TRANSPORTATION matters
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DOT/FMCSA - Noteworthy Updates

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On 9/23/16, the Federal Motor Carrier Safety Administration (FMCSA) issued a final rule allowing voluntary mounting of certain "vehicle safety technology" devices on the interior of commercial motor vehicles within the area swept by windshield wipers. These devices include video event recorders, lane departure warning systems, collision mitigation or warning systems, transponders, and hands-free-driver equipment sensors. Because use of these technologies is voluntary, this rule was allowed to bypass usual notice and comment period and will become effective 10/24/16.

On 8/26/16, the National Highway Traffic Safety Administration (NHTSA) and the FMCSA jointly issued a Notice of Proposed Rule Making requiring new heavy-duty vehicles (those with gross weight greater than 26,000 pounds) to be equipped with speed limiters. Many carriers have voluntarily implemented speed limiters since the 1990s to maximize fuel economy and driver performance. The proposed rule estimates that limiting truck speed to 65 mph will save 63 to 214 lives each year. The FMCSA estimates fuel savings totaling $1.1 billion per year. The period for public comment on the proposed rule ends 11/7/16.

On 8/29/16, the FMCSA submitted its final rule on entry-level driver training to the Office of Management and Budget (OMB) for review. The Department of Transportation (DOT) has worked on creating the entry-level driver standards since 1985. The proposed rule requires a driver seeking a Class A commercial driver license (CDL) to have a minimum of 30 hours of road training with at least 10 hours on a driving range. The remaining 20 hours will be split between a public road or public road trip of at least 50 minutes each.

In an effort to recruit younger drivers, on 8/19/16, the FMCSA announced a 3-year pilot project to allow truck drivers between 18 and 21 with military heavy truck driving experience to operate in interstate commerce. The project will compare the safety record of approximately 200 drivers aged 18 to 21 with those 21 and older. Participants in the pilot program must be a current or former member of the armed forces, reserves, or National Guard and is not permitted to transport passengers, hazardous cargo, or operate "special configuration" vehicles.

On 8/22-23/16, the FMCSA Medical Review Board (MRB) met in Arlington, VA to update its 2012 guidelines related to standards and practices for medical examiners in diagnosing and treating drivers with obstructive sleep apnea (OSA). The respiratory disorder is characterized by a reduction or cessation of breathing while sleeping, which can lead to deficits in attention, memory, and situational awareness during waking hours. The MRB estimated that 22 million American men and women suffer from undiagnosed OSA. The preferred treatment is a Positive Airway Pressure (PAP) machine worn while sleeping.

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Plaintiff May Sue an Employer Without Naming the Employee-Driver

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Your driver is operating a company-owned vehicle and is involved in an accident while working. You investigate and take corrective action but no claim is made. Nearly three years go by without a word, and then out of the blue, you are served with a lawsuit. Your company has been sued.

Rather than suing your employee-driver, only your company is named as a defendant. The complaint clearly states that the employee-driver was negligent. But, rather than alleging negligent hiring or supervision against your company, the complaint simply states that because the employee-driver was in the course and scope of his employment at the time of the accident, the employee-driver's negligence is imputed to your company. Can your company be liable when the employee-driver isn't even on trial?

The answer, unfortunately, is yes. As long as there is a viable claim against the employee-driver, a plaintiff may sue the employer-vehicle-owner alone under the theory of *respondeat superior*. That phrase is a legal term meaning "let the master answer." It allows the employer to be held responsible for the negligent actions of its employee performed while in the course and scope of employment. Further, North Carolina General Statute Section 20-71.1 states that a plaintiff only needs to show proof that your company owned the vehicle to create a presumption that the employee was working at the time of the accident. Where an employer may be held responsible under the theory of *respondeat superior*, a plaintiff may sue the employee-owner or the employee-driver alone or together. *See Bullock v. Crouch*, 243 N.C. 40, 42, 89 S.E.2d 749, 751 (1955). This means that even if your employee-driver is long gone, your company may be left defending the suit without any sympathetic witnesses.

This does not necessarily mean, however, that a plaintiff can sue your employee alone and, if that does not work, take another bite at the apple against your company. Where there is a decision on the merits (by a judge or jury) that the employee is not liable, a plaintiff may not bring a second claim against the employer. *See id*.

Cell Phone Litigation

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Over the last ten years or so it has become self-evident that distractions related to cell phone use while driving present grave hazards. As a result, individual drivers and commercial carriers have begun to rely on blue-tooth or other hands-free technologies to communicate while driving. The issue for litigation which arises is whether hands-free communication is any safer than distractions from other means of cell phone usage?

Sections 392.80 and 392.82 of the FMCSA prohibit texting and the use of a hand-held mobile telephone while driving a commercial motor vehicle. A "hand held mobile telephone" refers to the use of at least one hand to hold, dial, or answer a telephone in order to conduct voice communication. However there are no similar regulations to prohibit using a hands-free device, and "texting" is distinguished from using other devices such as fleet management systems, dispatching devices, and CB radios. 49 CFR 390.5.

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What to Do When Employees Don't Follow Rules? - Taking Advantage of N.C.G.S. § 97-12

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In handling workers' compensation claims, it is common to hear the following question from a client: "Why is this employee receiving benefits when they disregarded a directive from management or company rule or directive resulting in an injury?" Unfortunately, an act of negligence on the part of an employee while in the performance of his work duties will not bar that employee's right to compensation for the accident resulting from the negligence. *Stubblefield v. Watson Elec. Constr. Co.*, 277 N.C. 444, 177 S.E.2d 882 (1970).

There is a line of cases holding that an employee can be barred from receiving workers' compensation benefits if that employee disregards a direct order from a then-present supervisor. Courts have made a distinction between a situation in which an employee disregards a direct order from a then-present supervisor and a situation in which an employee is injured while disregarding a general company rule or prohibition not to perform a certain activity. In *Hoyle v. Isenhour Brick & Tile Company*, 306 N.C. 248, 293 S.E.2d 196 (1982), the Supreme Court of North Carolina explained this reasoning as follows: "When there is a rule or a prior order and the employee is faced with the choice of remaining idle in compliance with the rule or order or continuing to further his employer's business, no supervisor being present, the employer who would reap the benefits of the employee's act if successfully completed should bear the burden of injury resulting from such acts."

Though not a complete bar to recovery, N.C.G.S. § 97-12 provides employers some form of redress when an employee is injured while disregarding a general Company rule or prohibition not to perform a certain activity. N.C.G.S. § 97-12 states, in pertinent part:

> When the injury or death is caused by the willful failure of the employee to use a safety appliance or perform a statutory duty or by the willful breach of any rule or regulation adopted by the employer and approved by the Commission and brought to the knowledge of the employee prior to the injury compensation shall be reduced ten percent (10%). The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

For years, defendants in workers' compensation claims were asking what exactly the term "approved by the Commission" meant. Defendants would often seek a 10% reduction in benefits as a result of a breach of a rule or regulation and have that request denied by the Commission based on the theory that the rule or regulation had not been "approved by the Commission." In denying the request for the 10% reduction, the Commission would never actually explain how, in practice, an employer would get a rule or regulation approved by the Commission.

Finally, in November, 2014, in response to repeated requests by the defense bar, the Commission supplemented its Rules by adding 04 NCAC 10A.0411, which states:

The process for the Commission to approve safety rules or regulations adopted by an employer as set forth in G.S. 97-12 is as follows:

(1) The rules shall comply with the general provisions of the safety rules outlined by the American National Standards Institute and the Occupational Safety and Health Act. These standards can be purchased at http://ansi.org/ and accessed free of charge at https://www.osha.gov/law-regs.html, respectively.

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The MRB has recommended that drivers with body mass index (BMI) of 33 to 40 should be required to take sleep studies if three of 11 risk factors are present, including:

- Hypertension (treated or untreated)
- Type 2 diabetes (treated or untreated)
- A male neck greater than 17 inches or a female neck size greater than 15.5 inches
- A history of stroke, coronary artery disease or arrhythmias
- Loud snoring
- Micrognathia or retrognathia
- Witnessed apnea symptoms
- Hypothyroidism
- Age 42 or older
- Male or post-menopausal female
- Mallampati Scale score of class 3 or 4 (small airway).

Beginning 8/8/16, all passengers in property-carrying commercial vehicles must wear seat belts. Seat belts will continue to be optional for passenger-carrying commercial vehicles.

On 6/14/16, an FMCSA advisory committee began reviewing the FMCSA's plain language guidance documents, which assist carriers, drivers, and inspectors interpret nearly 700 regulations. A final report from the advisory committee is expected in October 2016. Guidance documents were last reviewed in 1997.

On 7/7/16, the FMCSA announced plans for a two-year program for contesting and removing non-preventable crashes from carriers' crash indicator safety score. The program is a reaction to calls for more accurate Compliance, Safety, Accountability (CSA) scores and will give carriers the ability to dispute and remove crashes that were not the fault of the driver. In its determination of preventability, the FMCSA has rejected requests to use determinations of fault found in police reports. Instead, the FMCSA has proposed 4 scenarios where a collision could be classified as non-preventable: when the other driver is convicted of (1) driving under the influence; (2) driving in the wrong direction; (3) rear-ending the commercial motor vehicle; and (4) striking the commercial vehicle while it is legally stopped.

On 6/8/16, Transportation Secretary Anthony Foxx advised senators that the CSA percentile scores for carriers will remain unavailable to the public until the DOT completes a study to determine the accuracy of the CSA's Safety Management System (SMS) in predicting future crash risk and severity. Secretary Foxx expects the study and subsequent reforms to take up to two years.

On 6/15/16, the FMCSA filed its brief in response to the Owner-Operator Independent Drivers Association (OOIDA) legal challenge to the FMCSA's electronic logging device (ELD) rule. The OOIDA claim filed with the 7th Circuit Court of Appeals argues that the ELD rule does not advance safety and violates the 4th Amendment's protection against unreasonable searches and seizures. The FMCSA defends the ELD rule, calling it "common sense" regulation to prevent concealed or fraudulent status information and result in fewer crashes. Currently, all interstate carriers are required to comply with the ELD rule by 12/18/17.

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What to Do When Employees Don't Follow Rules? *cont. from page 3*

(2) The rules shall be filed by the employer in writing with the Commission's Safety Education Director by mailing them to 4339 Mail Service Center, Raleigh, NC 27699-4339 or e-mailing them to safety@ic.nc.gov.

(3) The rules shall be reviewed by the Safety Education Director of the Commission and approved if they are found to be in compliance with Item (1) of this Rule. The Commission shall return to the employer a copy of the rules bearing a certificate of approval from the Commission indicating that the rules have been approved by the Commission pursuant to G.S. 97-12. An employer may revise and resubmit the rules if not approved by the Safety Education Director of the Commission.

It is recommended that all employers take advantage of this new provision and submit their safety rules and regulations to the Commission for approval. As detailed above, while it is still not a basis for a complete denial of benefits, this clarification should make it easier for employers seeking a 10% reduction in benefits.

Even if a rule or regulation is approved by the Commission and an employee fails to follow said rule or regulation, an employer will still need to submit sufficient evidence of the following to be entitled to the reduction in benefits: that the failure was willful, that the injury or death was caused by the failure, and that the employee was made aware of the rule or regulation prior to the injury.

Cell Phone Litigation *cont. from page 2*

Research is split on this issue of whether using hands-free devices for communication while driving is safe. According to a study commissioned by the U.S. Department of Transportation, stimuli that draw drivers' visual attention away from the forward roadway are significant causes of severe accidents. This sounds like common sense, but this distraction time is amplified tenfold when driving a 20 ton vehicle at 70 miles per hour. However, the study also suggested that the use of voice activated, hands-free devices did not have a significant impact of visual attention. Based on the analysis of safety-critical events, driving, talking or listening were not significant risk factors in causing accidents. Driver Distraction in Commercial Vehicle Operations, September, 2009.

On the other hand, additional studies have shown that using hands-free devices also leads to a distraction in cognitive attention. The research cited indicated that the brain cannot truly multi-task. www.insurancejournal.com, April 15, 2014. Evidence showed that using a hands free phone while driving impairs your reaction time to critical events and increases your crash risk about the same as if you were using a hand-held phone.

Because the use of smart phone devices and other electronic equipment has become pervasive in our everyday lives, commercial carriers will always be faced with safety concerns relating to the use of these technologies. As in most situations, an ounce of prevention is worth a pound of cure. The best ways to prevent accidents and the high cost of litigation is to promote safety and vigilance in all respects while driving.

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