

Keep Your Eyes on the Road – Distracted Driving and Workers’ Compensation Claims

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The Legal Intelligencer

October 13, 2020

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For the past 10 years, April has been designated as “Distracted Driving Awareness Month” by the Department of Motor Vehicles. Due to the COVID-19 pandemic, the month of October has replaced April for this year. The coordinated program was originally started by Shelley Forney, a mother and safety advocate whose 9-year-old daughter was struck and killed while riding her bicycle by a driver who was looking down at their cell phone. As Ms. Forney emphatically stated in numerous news reports, “she was only 15 pedals from home.”

Driving is an act most of us do every day without much thought or concern. We are all cognizant of the inherent risks associated with driving but often fail to realize that simple actions or inactions can greatly reduce or increase that risk. As drivers, it is our responsibility to understand how we can make the roads safer.

Incidences of distracted driving have dramatically increased over the last decade, rising to the level of a national epidemic. In fact, distracted driving is the leading cause of all crashes, according to the National Safety Council. The Centers for Disease Control and Prevention reports that each

day in the United States, nine people are killed and more than 1,000 are injured in motor vehicle accidents.

The sources of distracted driving have been classified by The National Highway Traffic Safety Administration (NHTSA) into three types: 1) visual task - an activity that causes a driver to divert his/her attention from the road; 2) manual task - an activity that causes a driver to remove one or both hands from the steering wheel; and 3) cognitive task - an activity that causes a driver to wander beyond the task of driving.

Making calls and texting from smartphones are major factors, as are eating, drinking, adjusting climate or audio controls, grooming, daydreaming, rubbernecking, and assessing or following directions on a navigation system.

Workers’ Compensation Claims

From a workers’ compensation perspective, one of the most dangerous places for an employee to be is driving in a vehicle. Today, almost every industry, from small mom and pop operations to large trucking companies, conduct some aspect of business through motorized vehicles and smartphones. Since

our workforce is very mobile, it is not surprising that a significant number of workers' compensation claims are related to motor vehicle accidents. In fact, statistics have revealed an increase in work-related motor vehicle accidents over the last several years.

In Pennsylvania, employees can typically receive workers' compensation benefits for injuries arising out of and in the course and scope of employment. An employee injured in a motor vehicle accident while performing work duties would likely be eligible for workers' compensation benefits. However, determining whether that incident arises out of the course and scope of employment is fact specific and is the exclusive remedy precluding an employee from filing other actions against the employer. With the significant rise in the use of personal vehicles for business activities, the line has been blurred as to the compensability of the claim under the workers' compensation laws.

An interesting question arises of whether a "violation of a positive work order" will provide an employer an affirmative defense to a workers' compensation claim involving a motor vehicle accident. It will depend on the circumstances and whether the following three criteria are met: (1) The injury must be, in fact, caused by the violation of the order or rule; (2) the employee must actually be aware of the order or rule prior to the injury; and (3) the order or rule must implicate an activity not connected with the employee's work duties. If these three elements are established, there is a reasonable probability that the "violation of a positive work order" will be applicable.

Employers are constantly faced with the dilemma of not being able to control their employees' actions or inactions while driving, particularly with the no-fault system in Pennsylvania workers' compensation. The response of most employers has been, "Are we always liable when an employee engages in actions or inactions resulting in injuries to themselves due to a motor vehicle accident?" The answer is "Not always."

Distracted Driving Risk Management

Employers who want to avoid workers' compensation claims due to distracted driving should take a proactive approach to control risks and associated exposures. This begins with best practices in hiring, educating employees, establishing zero-tolerance policies, and implementing a distracted-driving prevention program. When promoting distracted driving prevention, it is important to consider both the direct consequences (loss of life, serious injury and potential lawsuits) and indirect consequences (interrupted operations, loss of productivity, rehiring and retraining of employees, and loss of morale) of such programs.

The best practice is to create a vehicle safety plan that accounts for personal and company vehicle use. An effective distracted driving prevention program starts from the first day of work via training, orientation, and procedures, and reflects an organization's attitude toward building and promoting a culture of "keeping each other safe." Employers should have formal written policies for distracted driving and regularly communicate these policies in company-wide meetings, newsletters, and bulletins. A main message of the policy should require that employees pull over and park in legal parking spaces when using their mobile

devices. Employers will benefit by maintaining a solid commitment to the ongoing education of employees, monitoring compliance with the program, and enforcing policies by addressing any violations.

Liability Claims

From a liability perspective, employers must not only address the injuries sustained by their workers, but also injuries caused to third parties. It is likely that injured parties will look to a negligent driver for compensation for property damage and personal injury. Generally, liability against a driver is based upon common law and liability against the employer is based on the respondeat superior doctrine (in which a plaintiff will look to hold both the employee and the employer liable). Attorneys will also look at the possibility of improper training, and ineffective policies and procedures. For these reasons, claims professionals must investigate to ensure that the injured party's own negligence or distraction did not contribute to the loss, or that there was no intervening or superseding events or circumstances unrelated to either driver that were a contributing cause. Various defenses may be available that can either help mitigate or even eliminate the claim against the distracted driver.

A thorough investigation is critical to assess the cause of the injury and the accident. It is imperative to gather all cell phone and texting records; statements and photos from electronic devices; event data recorders; police reports; cell tower records; GPS/hard drive data; dash camera video; company policies/handbooks and witness reports. Determining whether the employee was at the place he or she might be reasonably expected to be while performing the job duties and whether he or she was

performing those duties in the furtherance of the interest of the employer's business when the incident occurred is a significant element. This will help to assess the compensability of the injury, the likelihood of third-party liability to others injured and defenses to the claims.

Emergency Claims Response Team

Another important factor to mitigate and eliminate exposure in both the workers' compensation and liability arena is to establish an emergency claims response management plan. A well-built plan beginning with an initial claim response guided by a triage team ensures that the claim proceeds on the right path and all investigation is captured and preserved.

Once the team is established, it is important that all contact information for team members is documented and distributed, and a 24/7 response line is created. Team members should include personnel with the expertise in all phases of a claim response, including insurance broker; defense counsel; independent adjuster; insurance carrier/TPA adjuster; employer; and forensic consultant/accident reconstructionist, when appropriate.

While we have all likely been guilty of distracted driving at some point, we must work together to control these preventable actions that have a significant rippling effect. Employers must be proactive in assembling key personnel to address distracted-driving incidences and maintain a company plan for maintaining safety. Developing a strategy for adequately addressing the applicability of workers' compensation and general liability laws is essential to reducing these claims.

Given this responsibility lies with all of us, please pause a moment to take the following pledge issued by the Department of Motor Vehicles. Then share it with your family and friends. We can all do our part to help reduce distracted driving incidents, and to help save lives.

PLEDGE TO END DISTRACTED DRIVING

*I pledge today, not only to myself but to those I care about, that I will:
Keep my eyes on the road.
Keep my mind on driving.*

*Keep my hands on the wheel.
One distraction can steal your reaction.*



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