

TRANSPORTATION matters

Summer 2020



Smith



Walsh

DOT/FMCSA - Noteworthy Updates

*Allen C. Smith, acsmith@hedrickgardner.com;
Austin R. Walsh, awalsh@hedrickgardner.com*

On 5/01/20, the Federal Motor Carrier Safety Administration (FMCSA) announced a change to the Crash Preventability Demonstration Program and Safety Measurement System

(SMS) that will permanently exclude no-fault crashes when calculating a carrier's safety score. Effective immediately, if the FMCSA determines that a crash was not preventable, it will no longer be included in the carrier's Crash Indicator Behavior Analysis and Safety Improvement Category score in SMS.

On 5/13/20, the FMCSA extended its 3/13/20 and 3/18/20 emergency declarations until revocation of the Presidential-declared national emergency. The extended declaration is found here: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-05/Extension%20of%20Emergency%20Declaration%202020-002-05132020.pdf>.

The FMCSA has further clarified how drivers may be exempt from certain regulations:

- Hours of Service (HOS) regulations do not apply while the driver is engaged with providing direct assistance under the emergency relief exemption.
- Hours worked in direct assistance do not count towards the 60/70-hour rule.
- The 34-hour restart is not required while engaged with direct assistance.
- Drivers must take 10 hours off duty after completing direct assistance.
- To account for the exemption on Electronic Logging Devices (ELDs), drivers may select "authorized personal use," annotate the log to indicate operation under the emergency relief exception, or turn off the ELD.
- No specific documentation is required to verify operation under the emergency relief exception; however, bills of lading may help with later enforcement actions.

The FMCSA defines "direct assistance" as carriers and drivers transporting the following:

- Supplies and equipment necessary for healthcare worker, patient and community safety, sanitation, and prevention of COVID-19 spread in communities, including masks, gloves, hand sanitizer, soap and disinfectants;
- Food for emergency restocking of stores;
- Equipment, supplies and persons necessary for establishment and management of temporary housing and quarantine facilities related to COVID-19;
- Persons designated by federal, state or local authorities for transport for medical, isolation or quarantine purposes;
- Personnel to provide medical or other emergency services.

On 5/14/20, the FMCSA published its final rule updating HOS regulations for normal, non-exempt operation. The key revisions include:

- Extend on-duty time by 2-hours for adverse weather;
- Extend the "short haul" exception from 100 air-mile radius to 150 miles and increase allowable drive time from 12 hours on-duty to 14 hours;

- Allow drivers to split the required off-duty time into two periods: one period of at least 7 consecutive hours in the sleeper berth and a second period of not less than 2 consecutive hours either off-duty or in the sleeper berth;
- Allow one off-duty break of between 30 minutes and 3 hours that would pause the 14-hour driving window as long as the driver takes 10 consecutive hours off-duty at the end of the shift.

The final rule may be found here: <https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2020-05/HOS%20Master%20050120%20clean.pdf>.

On 3/24/20, the Department of Transportation (DOT) issued guidance to clarify compliance with drug and alcohol testing given concerns with COVID-19.

- If compliance with DOT training and testing requirements is not possible due to COVID-19 closing of testing facilities, carriers must make a reasonable effort to locate necessary resources, such as mobile testing sites.
- If DOT testing is not possible, carriers must continue complying with DOT guidelines for documenting why a test was not completed.
- Even when testing is not possible, carriers must continue complying with DOT regulations. For example, without a “negative” pre-employment screen result, a carrier may not permit an employee from performing any DOT safety-sensitive functions.
- Employers may evaluate an employee’s refusal to test based on COVID-19 concerns and determine whether it should be considered a refusal under 49 CFR 40.355(i).

On 4/28/20, the California Air Resources Board (CARB) released a plan to require 5% of all Class 7 and 8 heavy trucks sold in 2024 to be electric vehicles, with a goal of 100% of trucks manufactured in California to be electric by 2045. The CARB is expected to vote on the new manufacturing standards at the end of June.



Attorney Spotlight: Elizabeth Bennett

An attorney in the Wilmington office, Beth focuses her practice on civil litigation, helping clients achieve their goals through her hard work and legal expertise. Her prior experience as a litigating plaintiff's attorney has given her the unique insight to understand how the other side views a case.

Q: What do you enjoy most about your practice?
EB: I enjoy learning new aspects of the law.

Q: What keeps you busy on the weekends?

EB: My children, I have two boys ages 7 & 9, and they keep me running. Well, the boys and laundry.

Q: What is your favorite vacation destination?

EB: Disney World! I am a Disney groupie and it still remains a magical place for my family.

Q: What is your favorite book?

EB: Any book by Johanna Lindsey, because I am a sucker for a happy ending.



Delfino



Glidewell

Handling COVID-19 Workers' Compensation Claims in North Carolina

*Joe Delfino, jdelfino@hedrickgardner.com;
Matthew Glidewell, mglidewell@hedrickgardner.com*

Proving a Compensable Occupational Disease in North Carolina

Under the North Carolina Workers' Compensation Act, generally speaking, there are two types of occupational diseases, each with their own standard of proof:

- (1) Those specifically enumerated in N.C.G.S. §97-53; and
- (2) Those covered by the statute's "catchall" provision in N.C.G.S. §97-53(13):

"Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment."

The catchall provision in 97-53(13) casts a broad net and may be familiar as the standard for occupational disease repetitive trauma claims, like carpal tunnel syndrome and lateral epicondylitis.

Employees will need to look to the latter "catchall" definition of a potential compensable occupational disease in bringing claims for alleged occupational COVID-19 exposure, as COVID-19 is not an enumerated disease or condition under the N.C.G.S. §97-53.

As such, an employee seeking to utilize the catchall provision will need to prove that their development of COVID-19 was due to causes/conditions peculiar to their particular job, that it was characteristic of and peculiar to their specific trade, occupation or employment, and that it is not an ordinary disease of life to which the public is equally exposed.

Filing a Formal Response to a Workers' Compensation Claim for COVID-19

When an employee formally files a workers' compensation claim, (presumably via the submission of a Form 18, *Notice of Accident (or Occupational Disease) to Employer of Employee*), for COVID-19, N.C.G.S. §97-18(j) and NC Industrial Commission Rule 601 allow 30 days "following notice from the Commission of the filing of the claim" to either accept or deny compensability (or give notice of payment of benefits without prejudice).

If the decision is made to deny the claim, a Form 61, *Denial of Workers' Compensation Claim*, should be filed, stating (under the "reasons" for denial section of the Form 61):

"Employee has not suffered a compensable injury by accident or developed a compensable occupational disease or condition as defined by the North Carolina Workers' Compensation Act."

The Benefits Forward Facing Video Camera Systems Have On Litigation Expenses



Britt

Williams B. Britt wbritt@hedrickgardner.com

"The eye sees all, but the mind shows us what we want to see."
— William Shakespeare

The rise of technology forces insurance companies, like other companies, to adapt. Upon first thought, advances in technology should streamline claim handling and the litigation process insurance companies endure.

From a 10,000-foot view, technology has already made it easier for claimants to file claims and for the insurance companies to investigate and respond. Nevertheless, technology, especially the use of cell phones, has also made life for motor carriers and insurance companies more difficult.

In 2014, the use of cell phones caused one out of every four motor vehicle accidents.¹ Further, a 2018 study by Motus, found that cell phone ownership increased by 22% from 2013 to 2017.² During that same time, the number of motor vehicle accidents increased 12.3%.³ The increase in motor vehicle accidents led to greater expenses for insurance companies. Unfortunately, the average costs of paid claims also grew. According to *Trends in Auto Injury Claims, 2019 Edition*, from 2008 through 2017 the average cost of paid claims grew for bodily injury and personal injury protection no-fault claims 34% and 24% respectively.⁴ These increases do not account for the litigation expenses insurance companies are often required to incur.

For commercial insurance companies and commercial truck drivers, these numbers are even more disturbing. Claimants may receive settlements and jury verdicts even though the claimant was at fault. A 2013 American Trucking Association report found that 70% to 75% of passenger motor vehicles were at fault for fatal crashes involving a commercial truck.⁵

So are there any solutions to alleviate the costs associated with the growing number of claims? One solution, especially for commercial insurance carriers and truck drivers, may be the use of forward facing video camera systems.

¹ Gabrielle Kratsas, *Cellphone use causes more than 1 in 4 crashes*, (March 28, 2014), <https://www.usatoday.com/story/money/cars/2014/03/28/cellphone-use-1-in-4-car-crashes/7018505/>.

² Katie Leonowitz, *Car Accidents Increase 12.3 Percent with the Rise of the Always-Connected Mobile Workforce, Finds New Motus Distracted Driving Report*, (September 20, 2018), <https://www.businesswire.com/news/home/20180920005122/en/Car-Accidents-Increase-12.3-Percent-Rise-Always-Connected>.

³ *Id.*

⁴ David Corum, *New Study Finds That Auto Injury Claim Severity Pushes Insurance Costs Higher*, The Institutes, (February 18, 2019), https://insurance-research.org/sites/default/files/downloads/Trends%20News%20Release%2002192019.docx_.pdf.

⁵ Hilary Daninhirsch, *Some Fleets Turn to Cameras to Help Mitigate Rising Insurance Costs*, Transport Topics, (May 5, 2020), https://www.ttnews.com/articles/some-fleets-turn-cameras-help-mitigate-rising-insurance-costs?utm_source=equipment&utm_medium=newsletter&utm_campaign=newsletter&mkt_tok=eyJpIjoiWWpOallUZ3pZakkzT1dNMilsInQiOijRsIRTV3I2MjRubmt5R1lVbHzhNm5hU1ItaDRSK3RUQXdaUDd6aWtZWjJQcEl3YXVcL1lhQmw0cG03RmVCTVdWVzdvRkk0aDIWKzI4XC9xeVdubFdCQ2FoQ1M2TlpQNVyZE9CVzJqTIVJVW9LeFlIVU5xSVEwQ05PYzJXMXJDUWgwIn0%3D.

A forward facing video camera mounts on the truck's dashboard with the lens facing forward, out of the truck, to replicate the driver's perspective.⁶ Generally, the video camera system is continuous or event-based.⁷ Continuous video camera systems, as the name suggests, record while the commercial vehicle is running.⁸ Conversely, a hard-brake, impact, or other specified event activate event-based systems.⁹ Regardless of the system, each have the potential to capture and record invaluable information that is useful in the claim and litigation process.

The video camera systems allow the trucking and insurance companies to have real time footage of how the accident occurred. It accurately displays the commercial vehicles position prior to and after an accident. It also displays the position of other vehicles and individuals involved in an accident. Most importantly, it eliminates what would otherwise be relied upon bias statements from the claimant and/or insured. A forward facing video camera system truly has the capability to see and replay "all" without inherent self-bias perspectives.

Consequentially, these systems have the potential to reduce the overall time and costs spent on claims. Potential claim and litigation expenses saved include, but are not limited to, the following:

- The time insurance companies investigate whether to accept or deny a claim.
- The need for insurance companies to conduct a recorded statement of the parties involved.
- The time attorneys spend gathering information to file an Answer to a Complaint.
- The time spent visiting the scene of the accident.
- Having to hire an accident reconstruction expert or other expert.
- Having to conduct lengthy written discovery.
- Having to conduct depositions of the parties and/or witnesses.
- Having to conduct mediation or arbitration.
- Having to go to trial.

Besides these immediate savings, a forward facing video camera system also serves additional purposes:

- It records how the claimant presented after the accident, e.g. whether the claimant exhibits any signs of injury.
- The footage allows claimant attorneys to know the viability of the claimants claim.
- Deters meritless claims.
- Allows for prompt settlement.
- Allows insurance companies to provide prompt feedback to insureds.

⁶ *Id.*

⁷ *New Trucking Tech: Forward-Facing Cameras* <https://supposeddrive.com/new-trucking-tech-forward-facing-cameras/>

⁸ *Id.*

⁹ *Id.*



Hedrick Gardner Trucking & Transportation Team

Allen C. Smith
Practice Group Leader
Civil Litigation
Charlotte
704.319.5449

Gerald A. Stein, II
Civil Litigation
Charlotte
704.319.5426

Jeffrey H. Blackwell
Civil Litigation
Wilmington
910.795.2208

Matthew D. Glidewell
Workers' Compensation
Charlotte
704.319.5432

David L. Levy
Civil Litigation
Charlotte
704.319.5426

Thomas W. Page
Workers' Compensation
Charlotte
704.319.5446

Kristie L. Hedrick
Civil Litigation
Asheville
828.575.1481

Joseph D. Delfino
Civil Litigation
Charlotte
704.602.8012

Austin R. Walsh
Civil Litigation
Charlotte
704.602.8010

Charlotte **704.366.1101**

Raleigh **919.832.9424**

Wilmington **910.509.9664**

Columbia **803.727.1200**

Asheville **828.575.1480**

www.hedrickgardner.com