

Distracted Driver Collects Workers' Compensation Benefits

RELATED PRACTICE AREAS

Employment

RELATED INDUSTRIES

Professional & Licensed Occupations

Small, Emerging & Growing Businesses

Lauren Keenan

BKK Employment Law Newsletter

May 2011

A distracted driver was awarded workers' compensation benefits by the Virginia Workers' Compensation Commission for an accident that the claimant says was caused by her work-related cell phone.

In Dec. 2010, Donna Turpin, a hospice nurse, was on call. As most on-call employees, Ms. Turpin was required to be reachable by pager or phone while on-call. In this particular case, the procedure for contacting the employee was as follows: 1) the employee was contacted through a pager and if she failed to respond within 15 minutes, she was paged a second time; 2) she would then be called on her personal cell phone, and 3) if she still didn't respond, she would be called on her home phone.

In order to be available while on-call, Ms. Turpin always kept her beeper and cell phone with the ringer on in her front pocket. According to the facts of this case, at the time of the accident, Ms. Turpin was driving home from work when her cell phone light caught her attention and caused her to "glance down" [taking her eyes off of the road]. Subsequently she drove her car off the road onto gravel, which resulted in Ms. Turpin wrecking her vehicle and injuring herself.

Ms. Turpin sought medical payment from her employer for the whiplash she suffered during her accident. She argued that if she hadn't glanced down at her ringing cell phone she wouldn't have gotten into the accident and wouldn't have sustained her injuries. The employer defended the claim arguing that Ms. Turpin's accident did not arise out of her employment.

In Virginia, an accident arises out of employment "if there is a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed." *Grove v. Allied Signal*, 15 Va. App. 17, 19, (1992). The injury must be able to be fairly traced to the employment as a contributing proximate cause, and does not originate from a hazard to which the claimant would have been equally exposed apart from her employment. *R&T Investments, LTD. v. Johns*, 228 Va. 249, 253, (1984).

Ms. Turpin used her cell phone for both personal and business-related calls. Ms. Turpin, and not her employer, paid the bill for her phone and it was unclear if the call that distracted her was business-related or personal. Based on these facts, Ms. Turpin's employer initially urged the commissioner hearing the matter to distinguish this case from *Floyd v. EMC Corp.*, a case where the claimant was engaged in a work-required telephone conference on an employer-provided cell phone while driving. Ms. Turpin's employer instead encouraged the commissioner to follow the *Rubenstein v.*

LeClair Ryan case and find that Ms. Turpin was not performing a required act, one that would distract her from the safe operation of her vehicle.

Commissioner Roger L. Williams issued the opinion, ultimately deciding that the employer was liable for workers' compensation and stated that it didn't matter who footed the bill for the cell phone, what mattered in this case was Ms. Turpin's duty to be attentive to the cell phone while on-call and that her attentiveness to the ringing cell phone and potential work-contact was enough to cause her to be inattentive to her driving. "There was no way the claimant would know, in advance, whether a particular call was employment related. She was required to answer her cell phone, and be attentive to it, because it could have been an employment-related call." *Turpin v. Wythe County Community Hospital*, VWC File No. 0000018-30-28, 5 (December 29, 2010).

So what does this mean for employers?

With the statistics mounting about the negative impact that using your cell phone while driving has on a driver's ability to safely operate their vehicle, it's no surprise that this is a hotly debated issue. Many states across the country have completely banned the use of cell phones while driving, and others are limiting their use to drivers with "hands-free devices" only. As an employer, it's important to pay attention to the changing legal landscape in jurisdictions where you have employees and to issue cell phone use policies that comply with those laws.

The best way an employer can avoid liability is to draft a cell phone use policy for employees to follow. In addition to creating such a policy, employers should require each and every employee to read the policy and sign a contract stating that they will comply with it any time they are driving a company vehicle or while they are on company time. The policy should advise employees to stop their vehicle before taking a call, and if they expect a work-related phone call while driving, to plan in advance to be parked at a safe location before taking any calls.

In addition to a cell phone use policy, it is also wise to adjust other company policies to reflect current laws and encourage safe cell phone use. For example, an employer should not only create a cell phone use policy, but should also amend its on-call policy to provide ample response time for employees to pull over and stop their vehicle safely before responding to a work-related call or page and to encourage employees to set their ringer to an audible tone only and not one that will flash or distract them while driving.

Just how far an employer needs to go with their cell phone use policy is up for debate. However, the US Department of Transportation (USDOT) is leaning toward an all-out ban of cell phone use while driving. At its recent 2010 Distracted Driving Summit, USDOT urged employers to prohibit the use of cell phones at work, especially while driving.