"SOME TRUCKERS SAY THE DARNDEST THINGS"

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In a time where companies are getting better at documenting and keeping track of incidents, we are faced with a dilemma in the trucking field with these incident reports pinning the driver, and ultimately the company, to often incorrect facts and words that are fueled by emotions.

Picture this: It's 3:00 in the morning. You are the safety director of a medium-sized trucking company. You get a call from dispatch reporting that a driver was involved in a serious accident involving a fatality. Depending on the company's policies and procedures, you most likely call an independent adjuster to head to the scene and/or head to the scene yourself. After the police release your driver from the scene and you have them undergo the required DOT post-accident

drug screen, you ask your driver to complete an incident report. Your company's policy, like many others in the industry, is to have its drivers fill out an incident report after they are involved in an accident with injuries while on the job. By now, it is close to 9:00 in the morning and your driver has been awake for over 20 hours. The last six hours were spent talking to police officers and watching emergency responders use the jaws of life to pry open what remains of the other cars involved in the accident. Your driver fills out a statement that reads as follows: "I was driving about 73 mph on the highway when traffic stopped in front of me – I tried to stop as fast as I could – I slammed on my brakes and skidded – but I could not stop in time and hit the vehicle in front of me. I can't believe I killed them. I am tired and do not feel like writing this right now."

A year and 364 days may pass without incident, but as we see all too often, on the final day before the statute of limitations runs, a lawsuit is filed against the driver and the company.

Unfortunately, this is often when outside counsel is first hired. As we begin to review the file, all may look great until we come across the incident report taken the early morning of the accident. We read the driver's words and we cringe inside.

We cringe because many states require that written and recorded statements provided by witnesses to an accident be disclosed during discovery. That means that we are stuck with the driver's words on the incident report. They are memorialized in the handwriting of our driver. There is no way around them. No amount of deposition preparation will take away the sting of those words. Unfortunately, the driver's words may lead the jury to assume that the driver was the cause of the accident and that his actions led to any injuries or death. Additionally, they might lead the jury to believe that the tractor or trailer's brakes weren't properly maintained because it was unable to stop in time despite heavy braking efforts by the driver. There is also an implication that the driver may have been tired or fatigued at the time of the crash.

Of course, what the driver was unaware of at the time that the incident report was written, is that he had slowed to 65 mph a few miles earlier when the speed limit changed and that the reason traffic ahead of him came to such an abrupt stop was because a car had drifted across the center median and caused a head-on collision ahead of him. Unfortunately, the driver's written incident report turns what would have been a highly defensible case into a defense attorney's nightmare based on a speeding driver that was inattentive. A good plaintiff's attorney will spend the deposition of the driver laboring over the words used in the handwritten statement. This is where the plaintiff's attorney makes their case against the driver and company. They will twist and turn the drivers' written words into either an admission on the part of the driver or, at the very least, something that undermines the driver's credibility (based on changing the story from the written account) in the eyes of the jury.

By requiring the driver to write a statement, particularly right after the accident, the company is essentially forcing the driver to give testimony without the advice of counsel and without any additional information about the nature of the accident (or the benefit of the data regarding the driver's speed or braking that is likely contained in the ECM unit). Doing so can have a disastrous impact on the company's defense position and can call the driver's credibility into question long before suit has been filed. Of course, we aren't implying that having defense counsel would somehow alter the truth of the statement or the driver's memories or recollection; however, the presence of defense counsel may lead to a better choice of descriptive words and a far less hazardous account of what happened from the driver. Additionally, allowing time to pass prior to a driver having to give a statement about an accident, allows the driver's emotions to settle and may allow for a more accurate recollection of the accident and the events that led up to it. We have all gotten into trouble at some point in our lives by blurting out words that were based on emotion. Demanding that truck drivers prepare incident reports shortly after the accident, particularly while emotions are running high, can lead to troublesome results for both the driver and the company and can be a heavy anchor that sinks our defense.

Many companies have written policies and procedures that require the driver to complete a written report after the accident – that seems to be a norm in the industry. We aren't suggesting you violate company policy. That leads to an entirely different set of problems. Rather, we recommend you continue to comply with the company's rules, but if the policies and procedures do not call for your driver to complete an incident report, requiring one should be avoided. Additionally, if the current policies and procedures require the driver complete an incident report, we suggest that you allow time, and if warranted by the nature of the accident, possible attorney involvement and driver preparation, before the driver puts pen to paper. Finally, companies should give serious consideration to ultimately changing their policies and procedures regarding incident reports to, at a minimum, allow the driver time to settle down and better understand the accident before requiring a full written account. The written statements do nothing to help defend an eventual lawsuit, but they can cause serious damage to the driver's credibility and, ultimately, a less favorable outcome for the company.

A smart alternative would be to have an attorney with experience handling rapid response investigations lead the accident investigation and interview the driver. The attorney can then provide a summary of the driver's recollection to the company. This affords attorney-client privilege to the investigation and will prevent discovery of a potentially hazardous written account from the driver. This also rings true for recorded statements, which many times can be even more damaging than written statements. The moral of the story is to think twice before requiring your driver to solidify their account of the accident while under great stress, likely while very tired, without the benefit of ECM information pertaining to speed and braking, and without any input from an attorney. Doing so may just provide the plaintiff with Exhibit A for their next trial against your company.

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