

# MONTHLY *Motorfleet*

North American Transportation Management Institute

November/December 2008

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## Did You Waive Your Workers' Compensation Defense?

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Litigious Mike files a claim for workers' compensation with Truck Owners, Inc. Litigious Mike also files a third-party tort action for damages in a state court against ABC Corporation based upon the negligent driving of Mr. Truckman. ABC Corporation calls their counsel wondering whether that suit can be dismissed on the basis that Litigious Mike's sole remedy against ABC Corporation is workers' compensation. Is it?

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## Top 10 Most Unsafe Winter Driving Habits

All professional drivers know that winter conditions bring a lot of special challenges and potential danger. Unfortunately, each winter many drivers find themselves involved in accidents that could have been prevented had safe habits been in place. The following are some of the most common bad habits I have noticed drivers falling into over the years, which often can lead to accidents.

1. **Failing to clear off windows, mirrors, clearance lights, tail lights often enough.** This should be done every time a driver stops, when traveling in snowy wintertime conditions. Poor driver visibility has contributed to many crashes.
2. **Failing to react soon enough to trouble ahead.** As soon as a problem is spotted ahead, a driver should immediately start to reduce speed and prepare to stop if necessary. Drivers often underestimate the time/distance they will need to stop.

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## Skill Vs. Will

Skill and will - the best safety directors have both. What's the difference? One can be taught; the other can't. Confusing the two can cause turnover and disengagement.

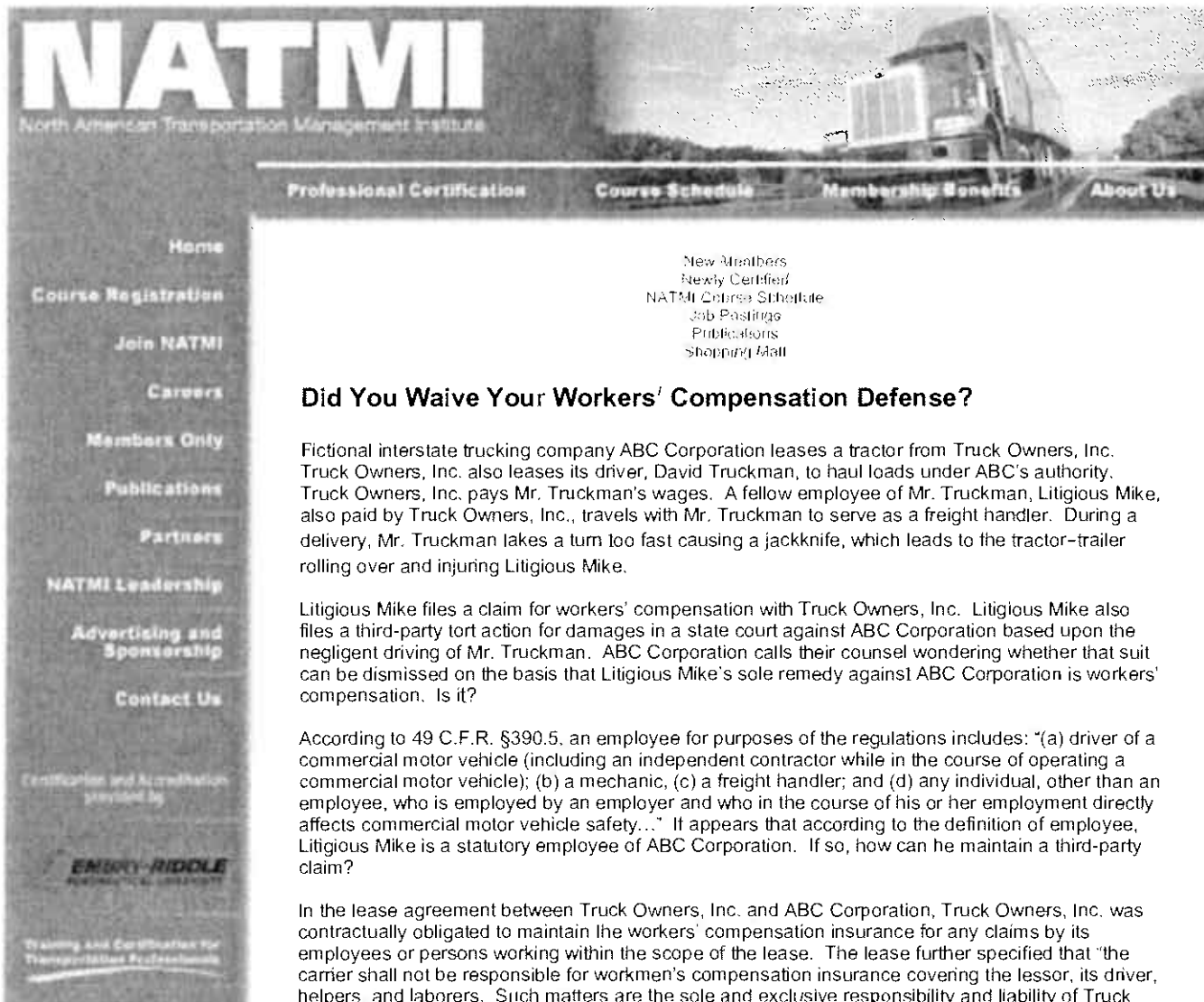
If you've been in this game for more years than you'd like to count, you'll agree that over time our 'will' becomes more of an issue than our 'skill.' With nearly twenty years in trucking, I find the hardest days to be those that require more of an emotional effort than a simple skill of knowing when to say yes or no to a driver file.

Think back, way back, to your earliest days as a safety manager or director. You were most likely gung-ho, ready to set the world on fire with your vast safety knowledge, and you were just itching for someone to ask or challenge you on something, right? The 'will' part had no problem in surfacing back then!

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NATMI  
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The image shows the top portion of the NATMI website. At the top left is the NATMI logo with the text 'North American Transportation Management Institute'. To the right is a photograph of a semi-truck. Below the logo and photo are navigation tabs: 'Professional Certification', 'Course Schedule', 'Membership Benefits', and 'About Us'. On the left side, there is a vertical navigation menu with links: 'Home', 'Course Registration', 'Join NATMI', 'Careers', 'Members Only', 'Publications', 'Partners', 'NATMI Leadership', 'Advertising and Sponsorship', and 'Contact Us'. Below the menu are logos for 'EMERY-RIDDLE' and 'Training and Certification for Transportation Professionals'. On the right side, there is a list of links: 'New Members', 'Newly Certified', 'NATMI Course Schedule', 'Job Postings', 'Publications', and 'Shopping Mall'.

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According to 49 C.F.R. §390.5, an employee for purposes of the regulations includes: "(a) driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle); (b) a mechanic, (c) a freight handler; and (d) any individual, other than an employee, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety..." It appears that according to the definition of employee, Litigious Mike is a statutory employee of ABC Corporation. If so, how can he maintain a third-party claim?

In the lease agreement between Truck Owners, Inc. and ABC Corporation, Truck Owners, Inc. was contractually obligated to maintain the workers' compensation insurance for any claims by its employees or persons working within the scope of the lease. The lease further specified that "the carrier shall not be responsible for workmen's compensation insurance covering the lessor, its driver, helpers, and laborers. Such matters are the sole and exclusive responsibility and liability of Truck Owners, Inc."

Does the fact that the carrier passed on to the lessor the responsibility for workers' compensation liability/coverage affect Litigious Mike's claim against his employer even though he was an apparent employee of the carrier? Maybe.

In *Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.M. 511, 602 P.2d 195 (CA 1979), the court addressed almost this precise set of circumstances. There, plaintiff's decedent and defendant driver Browning were employed as truck drivers for R&M Trucking Co. ("R&M"). R&M entered into a lease agreement with Zero Refrigerated Lines, Inc. ("Zero"), a licensed interstate common carrier whereby R&M agreed to furnish two drivers and a truck. *Matkins*, 93 N.M. at 513, 602 P.2d at 197. Per the terms of the written lease, R&M had the sole responsibility for hiring, firing, directing, and training drivers, paying wages, and providing unemployment and workers' compensation benefits. *Id.*

In *Matkins*, plaintiff's decedent was killed while riding as a passenger in the truck; it was not disputed that the decedent was killed in the course of employment. *Id.* There, the contract contained the same contractual obligation for workers' compensation insurance and liability. *Id.*, 93 N.M. at 514, 602 P.2d at 198. Though the court recognized that the decedent and the defendant driver were employees of the lessor with respect to rights and duties created by the Workers' Compensation Act, combined with the significant fact that Zero had contracted away its workers' compensation obligations, the decedent's estate was permitted to maintain a third-party action against the carrier despite the relative status of the parties to each other. The *Matkins'* court carefully noted that it was not addressing the status of a lessee/carrier and its ability to assert the workers' compensation defense when it had not contracted away such obligations to provide workers' compensation insurance and be responsible for liability under workers' compensation. *Id.*, 93 N.M. at 515-516, 602 P.2d at 199-200.

Twelve years later and, relying in part upon *Matkins*, an Ohio appellate court addressed a similar issue. In *Stonerock v. Miller Brothers Paving, Inc.*, driver Phillip Tong lost control of his vehicle and

collided with an unoccupied vehicle, resulting in the death of his passenger/fellow employee Kevin Stonerock. *Id.*, 72 Oh.App.3d 123, 126, 594 N.E.2d 94, 96 (CA Ohio 1991). Tong operated the tractor-trailer pursuant to a lease agreement between Trowbridge Storage Company ("Trowbridge") and Miller Brothers Paving, Inc. ("Miller Brothers"). *Id.* The decedent was employed as a helper, furnished by Trowbridge, and accompanied Tong to assist Mr. Tong loading and unloading the truck. *Id.*, 72 Oh.App.3d at 132, 594 N.E.2d at 100.

Miller Brothers argued that because the decedent and defendant driver were fellow employees, it could not be held vicariously liable where the agent was immune from liability and it was immune from suit as a principal. *Id.* In *Stonerock*, the lease between Trowbridge and Miller Brothers required Trowbridge to provide workers' compensation coverage and all attendant responsibilities. *Id.*, 72 Oh.App.3d at 133, 594 N.E.2d at 101. The court held that "the lease agreement demonstrates that [Miller Brothers], in exchange for not having to comply with [the workers' compensation laws], necessarily assumed the detriment of not being able to claim immunity under those statutes." *Id.*, 72 O.App.3d at 133, 594 N.E.2d at 101. Therefore, it held that Miller Brothers had relinquished to Trowbridge what it termed the "sole right" to invoke the provisions of Ohio Workers' Compensation Defense. *Id.*

The *Matkins*' decision has been limited in application. In *Vigil v. Digital Equipment Corp.*, 122 N.M. 417, 419-21, 925 P.2d 883, 886-887 (CA N.M. 1996), the Court held that the holding of *Matkins* was limited to its specific facts. *Id.*, 122 N.M. at 420, 925 P.2d at 886. The Court further held that not only was *Matkins* based in part on one party having contracted away any liability or obligations under the Workers' Compensation Act of New Mexico, in that case it was shown that the alleged employee was not an employee as a matter of law under tests used to determine that status in New Mexico. *Id.* In *Vigil*, the court recognized that both the special and lending employers could assert the workers' compensation defense. *Id.*, 122 N.M. at 420, 926 P.2d at 886. The court further held that in such a situation where the injured worker was working in the overall scheme of the borrowing or special employer, the special employer could assert the workers' compensation defense. *Id.*, 122 N.M. at 241, 925 P.2d at 887.

Other courts extend the protections of worker's compensation to both the lending and borrowing employer. For example, see *Lanphier v. Gilster-Mary Lee Corp.*, 327 Ill.App.3d 801, 802-03, 765 N.E.2d 493, 494 (3rd Dist. 2002); there, the court held that where an employer lends an employee to a second employer and the employee is injured while performing duties for the second employer, both employers are jointly and severally liable to the employee regardless of which party carried workers' compensation coverage. (Citing 820 ILCS 305/1(a)(4)(West)). Where there is a loaning employer and a borrowing employer, who under Illinois law are liable for workers' compensation benefits, the loaning and borrowing employers share immunity from tort liability under the Illinois Workers' Compensation Act. *Luna v. United States*, 454 F.3d 631, 634 (7th Cir. 2006), citing *Belluomini v. United States*, 64 F.3d 299 (7th Cir. 1995)

Whether the costs saved from potential workers' compensation claims outweigh the potential exposure assumed for liability matters requires an analysis by your company. Certainly, some of the considerations are the history of claims made and payouts made for any particular carrier or lessor; a comparison of monies paid out for workers' compensation compared to liability claims; an evaluation of potential exposure based upon what state(s) the carrier operates; and whether there are limits of recovery in those states for plaintiff bringing suit.

Regardless, carriers and businesses should keep in mind the potential risks assumed or, alternatively, defenses waived when contracting away or passing on workers' compensation obligations. While you may contract away one cost, you may be buying another.

Shimon B. Kahan  
Haynes, Studnicka, Kahan, O'Neill & Miller, LLC  
Chicago, IL  
skahan@hskolaw.com

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**NATMI**  
2460 W. 26th Ave., Suite 17-C  
Denver, CO 80211  
(303) 952-4013