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UNINSURED/UNDERINSURED
WHEN ARE DELIVERY PERSONNEL OCCUPANTS OF A VEHICLE?

A recurring issue arising in Uninsured/Underinsured personal injury matters is whether the claimant that is demanding arbitration was an "occupant" of the vehicle which was insured by an insurance carrier that the demand has been made upon.

Pursuant to Regulation 35-D (11 NYCRR §60-2.3 *et seq*.), there is a standard, mandatory unified endorsement which affords both uninsured and underinsured motorist coverage under the label of supplementary uninsured motorist (SUM) insurance coverage to all policy holders in New York State. The SUM endorsement is a standard form in each and every insurance policy issued to policyholders in New York State.

McKinney's Insurance law § 3420(f)(3), defines occupancy and specifically states that: "The protection provided by this subsection shall not apply to any cause of action by an insured person arising out of a motor vehicle accident occurring in this State against a person whose identity is unascertainable, unless the bodily injury to the injured arose out of physical contact of the motor vehicle causing the injury with the insured person or with a motor vehicle which the insured person was occupying (meaning in or upon entering into or alighting from) at the time of the accident."

Case law has continued to define the status of "occupant". In connection therewith, the Court of Appeals in The Matter of Linda Rice v. Allstate Insurance Company, 32 N.Y.2d 6

(1973), was asked to address the issue of whether or not an individual was deemed a pedestrian or an occupant for the purposes of insurance coverage. The Court of Appeals concluded that, "where a departure from a vehicle is occasioned by or is incident to some temporary interruption in the journey, and the occupant remains in the immediate vicinity of the vehicle, and upon completion of the objective occasioned by the brief interruption, he intends to resume his place in the vehicle, he does not cease to be a passenger."

The status of "occupant" continued to evolve and in Coregis Ins. Co. v. Micelli, 744 N.Y.S.2d 677 (2d Dep't 2002), the Second Department held that a firefighter who was struck by a car while directing traffic as the fire truck was being garaged was not "occupying" the fire truck, and therefore he was not entitled to benefits pursuant to the fire truck's policy.

In re Martinez, 744 N.Y.S.2d 176 (1st Dep't 2002), the Court held that because a tow truck driver was no longer occupying the tow truck when he was struck by a hit-and-run vehicle he was not entitled to coverage pursuant to the uninsured motorist policy which covered the tow truck. While his absence from the truck was not intended to be brief his immediate purpose was to attend to the disabled vehicle that he was dispatched to assist as a necessary "incident to his employment", thereby distinguishing this case from those where "a mere temporary happenstance interrupted the operator's connection with the vehicle."

Delivery personnel who must make a number of deliveries throughout the course of their employment are continually "entering into or alighting from" their delivery vehicles. If they are injured during the course of their employment, when are they considered "occupants" of the delivery vehicle?

Two recent decisions involving delivery personnel have further defined who qualifies as an "occupant". In, In re Arbitration Between Travelers Ins. Co, 13 AD3d 1044 (3d

Dep't 2004), a delivery man was struck from behind as he was leaning into the rear of a delivery vehicle to unload supplies for delivery. He had just stopped the vehicle, exited, and walked to the rear of the vehicle to retrieve the supplies. He was crushed between the two vehicles causing personal injuries. The delivery man demanded SUM/UM arbitration through the insurance carrier that insured the delivery vehicle. The insurance carrier sought to stay the demanded arbitration concluding that the claimant was not an "occupant" of the delivery vehicle at the time of the accident. The Court held, a delivery person who had just exited the vehicle and was in the process of unloading, had not yet "severed" his connection with the vehicle and was still "vehicle oriented" at the time of the accident. The Court further opined that the delivery man's intent to return to the delivery vehicle after the delivery would not in itself be sufficient to render him an "occupant" of the delivery vehicle.

In Kemper v. Sykes, Supreme Court Queens County, Index No.: 18308/04 (2005), a delivery man arrived at his intended destination, double parked his delivery vehicle, exited and walked to the rear of his vehicle to retrieve supplies. He next took the supplies and walked onto the sidewalk where he set down the boxes. He returned to the delivery vehicle, closed the door, and on his way back to the sidewalk was hit by a car. The insurance carrier sought to stay the demanded arbitration on the basis that the claimant was not an "occupant" of the delivery vehicle at the time of the accident. The Court agreed and held, that the delivery man's purpose upon his arrival was to attend an activity "incident to his employment" that was not in the immediate vicinity of the delivery truck. As such, the delivery man had severed his connection with the vehicle, thereby changing his status as an "occupant" of the delivery vehicle.

These cases illustrate that although both delivery men where outside the delivery vehicle doing more than "entering into or alighting from" when the accidents occurred, it is the

activity “incident to their employment”coupled with the intent of the delivery person that ultimately determines one’s status as an “occupant”.