Trucking Litigation Tips During Regulatory Change

Hours of service changes tucked into spending bill

By David Brose

Commercial truck crashes resulted in nearly 4,000 deaths in 2012 and deaths from trucking accidents continue to increase each year.[1] Yet, in a rush to finalize a $1.1 trillion spending bill to keep the U.S. government funded into 2015, Congress approved a provision that rolled back the hours-of-service (HOS) requirements intended to improve truck driver and motorist safety. The provision allows truck drivers to work up to 82 hours per week, rather than 70 hours under previous rules. Unfortunately, these changes could put more tired truck drivers on the road.

History of FMCSA Efforts to Battle Fatigue-Related Accidents

Hours-of-Service Regulations

The Interstate Commerce Commission (ICC) promulgated the first federal HOS in the late 1930s.[2] The HOS limit the amount of time that a truck driver can both work and drive in a given 24-hour period. The HOS require that truck drivers record their duty status for each 24-hour period of time, including days not spent driving.[3] The driver has only four choices in recording her duty status: off duty/OFF, sleeper berth/SB, driving/D, or on duty not driving.[4]

The HOS remained largely unchanged for a period of more than 60 years from 1940-2003. In April of 2003, the FMCSA enacted the first significant change to the HOS in more than a half a century. Under the HOS as amended, a driver could not operate a property-carrying commercial motor vehicle without first taking 10 consecutive hours off duty.[5] A driver could then be on duty for up to 14 consecutive hours and drive for up to 11 consecutive hours during that time.[6]

Beyond limiting the daily activity of a driver, the HOS also restrict total driving and on-duty time, stating a driver may not drive after 60/70 hours on duty in seven to eight consecutive days.[7] The application of a seven- or eight-day period depends on whether the motor carrier operates its vehicles every day of the week.[8] A driver may only restart a seven or eight consecutive-day period after taking 34 or more consecutive hours off duty.[9]

Additional amendments to the HOS took effect on July 1, 2013, and were designed to improve safety of the motoring public by reducing truck driver fatigue.[10] It was estimated these regulations would save 19 lives and prevent approximately 1,400 crashes and 560 injuries per year, resulting in $280 million in savings in fewer crashes.[11] Although the amended regulations retained an 11-hour daily driving limit and 14-hour work day, they limited the average work week for truck drivers to 70 hours (reduced from 82 hours), further requiring truck drivers to take a 30-minute break during the first eight hours of their shift.[12]

The most recent provision, passed by Congress in December 2014, temporarily suspended the 2013 rules, again allowing truck drivers to work as many as 82 hours a week. It also eliminated the requirement that truck drivers must take breaks between 1 a.m. and 5 a.m. on consecutive nights before they can work again.[13]

The Causes of Driver Fatigue

Many factors influence driver fatigue, including greater daytime sleepiness; difficult schedules; more hours of work; time of day; age; driving experience; cumulative sleep debt; and the presence of a sleep disorder.[14] According to one study, driving performance among truck drivers starts to decline after five hours of driving for those with irregular schedules, compared to eight hours of driving on a regular schedule.[15]

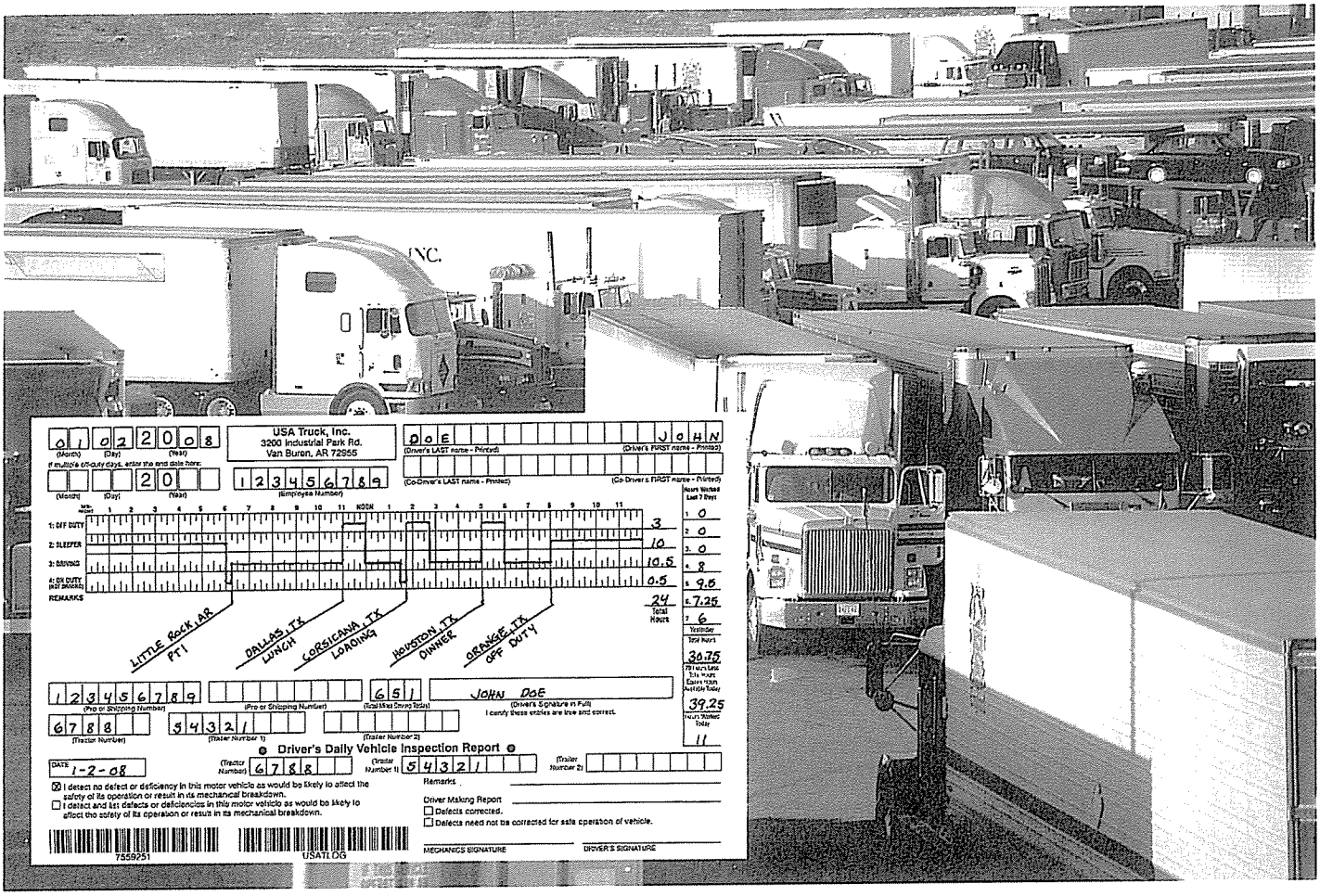
Sleep Deprivation

The effect of sleep deprivation is cumulative, and losing as little as one to two hours of sleep per night can cause serious sleep deprivation over time.[16] Each hour of sleep lost is an hour added to a person's sleep debt and can only be reduced by getting extra sleep.[17] Beyond getting less sleep, loss of sleep caused by sleep disruption or fragmented sleep also results in sleep deprivation.[18] Drivers who average less than five hours of sleep per night are nearly five times more at risk to be involved in a fatigue-related crash.[19]

Circadian Rhythm

Fatigue-related accidents are more likely to occur during the early morning hours from 2 to 6 a.m.[20] The body's internal clock, known as a circadian clock, regulates the timing of periods of sleepiness and wakefulness throughout the day.[21] People experience lows during nighttime hours because the circadian clock is synchronized to the external cycles of light and darkness.[22] The body's circadian rhythm causes people to feel more alert at certain points of the day, even if they have been awake for hours.[23] The circadian clock is programmed for its lowest point around 3 a.m. to

See TRUCKING Page 9



TRUCKING (con't from Page 8)

5 a.m., with performance reductions from about 12 a.m. to 6 a.m.[24] During these low points, a person will experience decreased performance, alertness and mood.[25]

Sleep Disorders

At least 40 million Americans suffer from chronic long-term sleep disorders.[26] One such sleep disorder that is prevalent among truck drivers is sleep apnea. Sleep apnea is a breathing-related sleep disorder that causes brief interruptions of breathing during sleep that can last at least 10 seconds or more and can occur up to 400 times a night.[27]

One study has shown that as many as 28 percent of individuals holding a commercial driver's license suffer from sleep apnea.[28] Risk signs for sleep apnea include being overweight (body mass index of 31 or more); a neck size 17 inches or greater; daytime sleepiness; falling asleep at inappropriate times; loud snoring; and lack of concentration.[29] Sleep apnea is much more than an inconvenience to the individual affected. One study found that drivers with untreated sleep apnea did worse on performance tests than healthy, nonsleepy subjects whose blood alcohol concentration was above the federal limit for driving a commercial motor vehicle.[30] Another study found that individuals with moderate to severe sleep apnea had up to a 15-fold greater risk of motor vehicle accidents.[31] Yet another study found that approximately 1,250 fatal truck crashes that occurred in 2005 could have been attributed to sleep apnea or other sleep disorders affecting commercial drivers.[32]

Driver's Medical Qualification and Other Regulations Related to Fatigue

Another way in which the FMCSA has attempted to battle the risk of fatigue through the Federal Motor Carrier Safety Regulations (FMCSR) is the medical qualifications of drivers. A driver is not allowed to operate a commercial motor vehicle unless she is medically qualified.[33] One physical requirement is that the driver have no established history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely.[34] Within the explanation of this regulation, sleep apnea is identified as such a respiratory dysfunction.

Beyond the issue of a driver's medical qualification, the FMCSR further expressly prohibit drivers from operating commercial motor vehicles when fatigued. Specifically, the regulations provide that "[n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or other cause, as to make it unsafe for him

See TRUCKING Page 32

her to begin or continue to operate the commercial motor vehicle...."[35]

The Problem of Identifying the Fatigued Driver

When you consider what is known about restorative sleep and the causes of fatigue, it should be no surprise that truck drivers are at great risk of fatigued driving. In the National Sleep Foundation's 2012 Sleep in America Poll, truck drivers were reported to work an average 10-hour shift, with the largest portion working shifts from nine to less than 12 hours.[36] Only 51 percent of truck drivers worked the same schedule each day, and only 27 percent worked the same number of hours each day.[37] Over half of the truck drivers reported only eight to 12 hours off between shifts.[38]On average, truck drivers reported 51hours spent working each week.[39] Almost 40 percent of truck drivers reported that they rarely had a good night's sleep.[40]

Yet, 31 percent of the truck drivers responding reported they only needed six to seven hours of sleep per night to function at their best.[41] Further, 60 percent of truck drivers reported they did not drive while drowsy and only 22 percent admitted they had driven drowsy at least once per month.[42] Almost 70 percent of drivers reported that sleepiness had never impacted their job performance and only 15 percent admitted it impacted their job performance at least once a week.[43] Only 16 percent of truck drivers reported experiencing any work incident because of sleepiness, with 2 percent reporting an accident and 14 percent reporting a "near miss."[44]

These statistics demonstrate a readily apparent disconnect between the objective data known about fatigue (e.g., accident data, medical literature, driving hours) and the general subjective belief of truck drivers that fatigue is not affecting their ability to safely do their jobs. Whether this is simply a matter of lack of self-awareness or an act of self-preservation in protecting their livelihood, what is clear is that a truck driver is not likely to admit that fatigue played any causative role in an accident.

Litigation Tips Related to Drive Fatigue

Identifying Evidence of Fatigue

The easiest place to start is the accident report, which provides the time of day when the accident occurred, allowing a comparison to what is known about circadian rhythms as discussed above. You should also consider the manner in which the accident happened, as the actions of the truck driver, such as a failure to make an avoidance maneuver in circumstance without visual restrictions, may be consistent with an individual experiencing microsleep or an impaired reaction not otherwise explained.

In most fatality accidents, and often in crashes resulting in serious injury, a commercial motor vehicle examination will also occur. As part of this examination, a driver's record of duty status will be reviewed. If the driver has exceeded the hours of allowable driving or on-duty time, she will be issued a citation that you can use as evidence of negligence.[45] At the very least, you can begin to reconstruct the activities and work hours of the truck driver in the days leading up to the accident.

When a driver changes her duty status, she is also required to identify her location at that time, and if not in a municipality, identify the highway and nearest mile marker, service post or intersecting street. The driver's record of duty status is required to be kept current by the driver, further providing the number of total miles driven in the 24-hour period, the name of the carrier and the name of the shipper, among other information.[46] An example of a driver's record of duty status is provided below.[47]

Other documents that can be used to evaluate the veracity of these records. The items that can be used to check a driver's logs take multiple forms. The bill of lading is a document that the FMCSR require be prepared before freight is loaded. It must identify the motor carrier(s) involved, shipper and date of pick-up, among other items.[48] Other items such as gas, meal and toll receipts can be used to track the movement of the truck over the trip preceding the collision. With these materials in hand, you can reconstruct and time the trip using publicly available sources such as MapQuest or specialized transportation and logistics software.

When available, electronic information can be the ultimate check of a driver's written logs because it is less prone to alteration or destruction; for example, many motor carriers equip their trucks with Qualcomm communication devices. These devices allow drivers and motor carriers to communicate electronically, similar to e-mail or texting. If enabled, the Qualcomm system also serves to create an electronic version of a driver's daily logs, often with geographical markers of the location of the truck at the time the driver changes his duty status. Other electronic devices, such as GPS tracking, serve a similar function, as they record the location of the truck at specific points throughout the day.

You simply cannot accept the production of the medical card as conclusive of the driver's medical well-being sufficient to safely operate a commercial motor vehicle. The medical card does nothing more than stand for the proposition that on the day of the exam, which could be any point in the preceding two years, the medical examiner determined the driver fit to drive. Moreover, you should not accept the ultimate determination of the medical examiner – often hired by the motor carrier to which it sends hundreds if not thousands of drivers – to be accurate.

To start your evaluation of a driver's medical health, you need to review the driver's long-form DOT Medical Examination Report. Although the FMCSR require that a driver's qualification file include a copy of this medical card, motor carriers are not required to include the completed DOT Medical Examination Report as part of the driver qualification file.[49] Further, to fully and independently evaluate a truck driver's health, you need all of the driver's medical records, including those following the accident. Thus, it is important to obtain a medical authorization from the driver. In those states that do not generally allow discovery of the medical health of a defendant driver, you must focus on the medical aspects of driver qualification under the FMCSR to provide an exception.

Another place to develop evidence of fatigue is with the driver. First, you can compare this testimony of activity/rest to what is established by the truck company's documents. You may very well find that they do not match up, providing a basis for impeachment at trial. Second, you can take this testimony and place it in the form of a demonstrative exhibit, allowing a jury to

See TRUCKING Page 33

see a pattern that you would naturally expect to result in driver fatigue.

The truck driver's deposition is also a place to inquire about his or her medical background. This includes questions about information that may have been provided in connection with the required DOT medical examination. This should be compared to the long form report to find areas that are ripe for impeachment. This should also include questions that serve to open the door to the truck driver's general medical background.

Conclusion

Excessive on-duty times create substantial safety problems. Too many hours behind the wheel can lead to dangerous fatigue in truck drivers. The U.S. DOT Driver Fatigue and Alertness Study found that driver fatigue is the leading factor in heavy truck accidents. Yet, regulations to address driver fatigue remain in flux.

Of course, there can be signals to counsel that a driver did or failed to do something that caused or contributed to cause the collision; however, these signals are not always immediately present when fatigue is the culprit, so it pays to be familiar with the science of sleep, the effect it has on operators and the resources that are called into play in these types of cases. Though it is not an argument that is always easy to illustrate, the analysis of this potential cause of the accident can provide additional claims and sources of recovery beyond simple negligence of the driver and vicarious liability.

Endnotes

1 U.S. Department of Transportation, National Highway Traffic Safety Administration/ "Traffic Safety Facts 2012 Data." Revised May 2014. Available online: http://www-nrd.nhtsa.dot.gov/Pubs/811868.pdf.
2 Federal Register: August 25, 2005, Volume 70, Number 164, Pages 49977-50073.
3 49 C.F.R. § 395.8(a).
4 49 C.F.R. § 395.8(b).
5 49 C.F.R. § 395.3(a)(1).
6 49 C.F.R. § 395.3(a)(2-3).
7 49 C.F.R. § 395.3(b).
8 *Id.*
9 49 C.F.R. § 395.3(c-d).
10 U.S. Department of Transportation, Office of Public Affairs, "New Hours-of-Service Safety Regulations to Reduce Truck Driver Fatigue Begin Today." News Release FMCSA 40-13 (July 1, 2013).
11 Levin, A. "Trucking Safety Should Be a Higher U.S. Priority, NTSB Says." Bloomberg. January 13, 2015. Available online. http://www.bloomberg.com/news/articles/2015-01-13/trucking-safety-should-be-made-a-higher-u-s-priority-ntsb-says. Accessed March 30, 2015.
12 *Id.*
13 Laing, K. Spending bill includes trucker changes. The Hill. December 10, 2014. Available online http://thehill.com/policy/transportation/226594-spending-bill-includes-trucker-changes. Accessed February 19, 2015.
14 Gander, P., and James, I. (1999) "Investigating Fatigue in Truck Crashes." Wellington School of Medicine and Commercial Vehicle Investigation, New Zealand; McCartt, A., Rohrbaugh, J., Hammer, M., and Fuller, S. (2000). "Factors Associated With Falling Asleep at the Wheel Among Long-Distance Truck Drivers." *Accident Analysis and Prevention*, 32, 493-504.
15 Mackie, R., and Miller, C. (1978). "Effects of Hours of Service, Regularity of Schedules and Cargo Loading on Truck and Bus Driving Fatigue." Coleta, C, Technical Report No. 1765-F.
16 Carskadon, M. and Dement, W. (1981). "Cumulative Effects of Sleep Restrictions on Daytime Sleepiness." *Psychology*, 18, 107-118.
17 National Sleep Foundation, Get on the Road to Better Health, Recognizing the Dangers of Sleep Apnea, USDOT, FMCSA
18 Dinges, D.F. (1995). "An Overviw of Sleepiness and Accidents." *Journal of Sleep Research*, 2 (supplement), 4-14.
19 Stutts, J., Wilkins, J., S., O., and Vaughn, B. (2003). "Driver Risk Factors for Sleep-Related Crashes." *Accident Analysis and Prevention*, 35, 321-331.
20 Mackie, R., and Miller, C. (1978). "Effects of Hours of Service, Regularity of Schedules and Cargo Loading on Truck and Bus Driving Fatigue." Coleta, C, Technical Report No. 1765-F; Harris, W., and *et al* (1972). "A Study of the Relationships Among Fatigue, Hours of Service, and Safety of Operations of Truck and Bus Drivers." U.S. Department of Transportation BMCS-RD-71-2, Washington, D.C.
21 National Sleep Foundation, Sleep Drive and Your Body Clock." http://www.sleepfoundation.org/article/sleep-topics/sleep-drive-and-your-body-clock.
22 Hedge, A., Biological Rhythms, Cornell University, August 2013.
23 *Id.*
24 Rosekind, M.R., *Examining Fatigue Factors in Accident Investigations: Analysis of Guantanamo Bay Aviation Accident*, pgs. 2-3.
25 Rosekind, M.R., *Examining Fatigue Factors in Accident Investigations: Analysis of Guantanamo Bay Aviation Accident*, pgs. 2-3.
26 National Institute of Neurological Disorders and Stroke, Brain Basics: Understanding Sleep, http://www.ninds.nih.gov/disorders/brain_basics/understanding_sleep.htm.
27 Sleep Apnea and Commercial Drivers, FMCSA, http://www.fmcsa.dot.gov/safety-security/sleep-apnea/industry/commercial-drivers.aspx.
28 Pack AI, Dinges DF, & Maislin G. (2002) A Study of Prevalence of Sleep Apnea among Commercial Truck Drivers (Report No. DOT-RT-02-030). Washington, DC: U.S. Department of Transportation, FMCSA.
29 Sleep Apnea and Commercial Drivers, FMCSA, http://www.fmcsa.dot.gov/safety-security/sleep-apnea/industry/commercial-drivers.aspx.
30 Powell NB et al. (1999). A comparative model: reaction time performance in sleep-disordered breathing versus alcohol-impaired controls. Laryngoscope, 109(10):1648-54.
31 Horstmann S., Hess C.W., Bassetti C., Gugger M., Mathis J., "Sleepiness-Related Accident in Sleep Apnea Patients," Sleep, May 1, 2000, 23(3).
32 Lazar, R., "An Emerging Standard of Care Requiring Commercial Driver Screening for Sleep Apnea? Practical Considerations and Risk Management Strategies for the Trucking Industry, White Paper, 2007.
33 49 C.F.R. § 391.41.
34 49 C.F.R. § 391.41(b)(5).
35 49 C.F.R. § 392.3
36 National Sleep Foundation. 2012 Sleep in America Poll: Planes, Trains, Automobiles and Sleep. Washington D.C.: The Foundation; 2012 Mar. Available from: http:www.sleepfoundation.org/2012poll, at pg. 11.
37 *Id.* at pg. 12
38 *Id.* at pg. 16
39 *Id.* at pg. 20
40 *Id.* at pg. 31
41 *Id.* at pg. 37
42 *Id.* at pg. 56.
43 *Id.* at pg. 57.
44 *Id.* at pg. 58.
45 *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, P50, 2013 Ill. App. LEXIS 457, 2013 WL 3296568 (Ill. App. Ct. 1st Dist. 2013)
46 49 C.F.R. § 395.8(d) and (f).
47 Image obtained at http://en.wikipedia.org/wiki/File:Truck_driver_log_book_(example).JPG.
48 49 C.F.R. § 375.503.
49 J.J. Keller & Associates, Inc., Driver Qualification FAQs, http://www.jjkeller.com/webapp/wcs/stores/servlet/content___bi-Driver-Qualification-Hiring-FAQ___.