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TRANSPORTATION matters
Summer 2016

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DOT/FMCSA - Noteworthy Updates

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On December 18, 2015, President Obama signed the 2016 fiscal year appropriations bill. That law further suspended the 34-hour restart rule, which took effect in July 2013 and which requires drivers to take off two consecutive periods of 1 a.m. to 5 a.m. during a 34-hour restart.

As with the rule's previous suspensions, it was initially believed that if Congress fails to finally approve the 34-hour restart provision, the pre-July 2013 restart provision would take effect. Recently, Department of Transportation (DOT) Secretary Anthony Foxx stated that the DOT interprets the December 2015 appropriations bill to mean that if Congress fails to finally approve the 34-hour restart provision, then *all restart provisions* are vacated and carriers will return to the rolling recap under 49 CFR § 395.3(b). Those rules mandate weekly work week limits of 60 hours in 7 days and 70 hours in 8 days.

On 5/18/2016 and 5/19/2016, the House and Senate respectively passed versions of a 2017 fiscal year transportation bill meant to correct the error in the 2016 bill. The House bill denies funding for enforcement of the 1 a.m. to 5 a.m. restart rule while the Senate bill creates a cap of 73-hours of service per week.

The House version of the 2017 fiscal tear transportation bill also includes language that prevents states from requiring companies to schedule meal and rest breaks for drivers. This portion of the bill is intended to block a 2011 California law requiring employers to provide one off-duty, 30-minute meal break for employees working more than 5 hours and two breaks for employees working more than 10 hours per day. Similar language was included in a Federal Aviation Administration ("FAA") bill but was removed by House leadership after Senator Barbara Boxer (D-Ca.) voiced opposition to the bill's trucking language.

On 3/7/16, the FMCSA returned Compliance, Safety, Accountability (CSA) raw safety data to public view. The percentile scores for carriers will remain unavailable to the public in compliance with the Fixing America's Surface Transportation (FAST) Act, which President Obama signed on 12/4/2015. After the DOT completes a study to determine the accuracy of the CSA's Safety Management System (SMS) in predicting future crash risk and severity, the scores will return to public view.

On 1/15/2016, the FMCSA issued a proposed rule to modify its methodology for determining carriers' safety ratings. The proposed rule would replace the current three-tier system of satisfactory, conditional, or unsatisfactory, with a single determination of fit or unfit. The fitness determination will be based on performance under the FMCSA's Behavior Analysis and Safety Improvement Categories (BASICs), investigation results, and a combination of safety data and investigation results. To be labeled "unfit," carriers must have a minimum of 11 inspections yielding violations in a single BASIC within a consecutive 24-month period. The new pass/fail regime will allow the FMCSA to expand its review from 15,000 carriers to 75,000 carriers annually. The worst 1% of carriers, fewer than 300 carriers per year, are expected to be labeled 'unfit.' The period for public comment closed on 5/23/16.

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Glidewell


Jones

Reigning in the Parsons' Presumption

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In October of 2015, the North Carolina Court of Appeals issued an opinion in *Wilkes v. City of Greenville*, __ N.C. App. __, 777 S.E.2d 282 (2015), which created uncertainly for employers across the State – including, but certainly not limited to, motor carriers – regarding the application of the *Parsons* presumption by expanding the presumption to any and all symptoms an employee may allege are compensable.

The evidentiary presumption resulting from the Court's prior decision in *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 485 S.E.2d 867 (1997), was created to protect employees who met their initial burden of proving a causal relationship between medical treatment sought and the compensable injury from having to repeatedly re-prove medical causation with respect to additional treatment for the very injury already deemed compensable. Once the Industrial Commission has judicially determined that a particular injury is compensable, the burden shifts to the employer to show that any additional treatment involving that condition is unrelated to the compensable injury. However, the "*Parsons* presumption" was never intended to address an employee's entitlement to medical treatment for symptoms other than those for which treatment was previously awarded. Rather, when the Commission holds a specific condition is compensable, the employee is prospectively entitled to the presumption only for the "very injury" found compensable in the previous decision.

In *Perez v. Am. Airlines*, 174 N.C. App. 128, 620 S.E.2d 288 (2005), the Court of Appeals extended the Parsons' presumption to any injury accepted by an employer on a Form 60. Employers had some certainty, however, that the presumption would be limited to any injury specifically listed on the Form 60 as accepted, but no other symptoms.

In *Wilkes*, the employee sustained physical injuries from a work-related motor vehicle accident. The employer initiated payment of workers' compensation benefits by accepting the claim on a Form 60 that expressly limited the injuries accepted as those sustained to the employee's "ribs, neck, legs and entire left side." The Court held that, because the employer accepted the compensability of the injuries employee sustained directly in the motor vehicle accident on a Form 60, Plaintiff was entitled to the *Parsons* presumption that his subsequently-diagnosed anxiety and depression were also compensable. Thus, *Wilkes* arguably stands for the proposition that, when an employer accepts liability for injuries on a Form 60, that Form 60 presumes a causal relationship for any subsequent symptom the injured worker alleges is compensable, shifting the burden to the employer to disprove the causal relationship between the original injuries and any new symptoms or conditions.

Two subsequent NC Court of Appeals decisions have somewhat reigned in the expansiveness of *Wilkes*, albeit through unpublished opinions, which are not precedential. In *Edwards v. Reddy Ice*, COA15-308, 2016 WL 1565770 (N.C. Ct. App. Apr. 19, 2016) (unpublished), the Court of Appeals refused to extend the *Parsons* presumption to a claimant's lymphedema following an admittedly compensable knee injury. Also, in *Henderson v. Goodyear Tire & Rubber Co.*, COA15-985, 2016 WL 1745222 (N.C. Ct. App. May 3, 2016), the court refused to extend the presumption to the claimant's physical conditions that were distinct from the injuries previously accepted because the defendants never admitted liability for those specific physical injuries and the Commission never determined a causal relationship exists between the accident and those injuries.

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EPA Emission Standards

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In June 2015, the United States Environmental Protection Agency (EPA) and the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) jointly proposed a national program to establish the next phase of greenhouse gas (GHG) emissions and fuel efficiency standards for medium and heavy duty vehicles. The program's purpose is to continue significantly reducing carbon emissions and improve the fuel efficiency of heavy duty vehicles, helping to address the challenges of global climate change and energy security.

Specifically, EPA's proposed carbon dioxide emissions standards and NHTSA's proposed fuel consumption standards are tailored to each of four regulatory categories of heavy-duty vehicles: (1) Combination Tractors; (2) Trailers Pulled by Combination Tractors; (3) Heavy-duty Pickup Trucks and Vans; and (4) Vocational Vehicles, which include all other heavy-duty vehicles such as buses, refuse trucks, and concrete mixers. For example, proposed regulations for Class 7 and 8 combination tractors will reduce carbon dioxide emissions by up to 24 percent will begin to phase in 2021. To accomplish these goals the agencies are proposing standards for lower emission engine improvements to include combustion optimization, improved air handling and reduced engine friction. *Regulatory Announcement*, June 2015, www3.epa.gov.

Mack Trucks is one company leading the way in zero emission research and development. The trucking company has participated in and funded research on ultra-low emission nitrous oxide technologies. Other technologies Mack is exploring are parallel diesel and lithium ion electric battery powered engines. *Fleet Owner*, May 26, 2016.

Other small and midsized trucking companies are cautious about the regulations and fear that the EPA is pushing the industry too far too fast with new and costly regulations. The inverse effect of the new regulation is to drive up the cost of vehicle ownership with uncertainties about whether the regulations will bring any true societal benefit. *Transport Topics*, August 24, 2015. To date, there has been limited push back from the industry in the form of environmental litigation against the EPA. However, recent litigation as a result of the EPA's regulation of energy plants under the Clean Power Plan (CPP) may portend a similar response from the trucking industry.

The Clean Power Plan implemented by the EPA in the summer of 2015 required states to lower emissions from their energy producing plants. Opponents of the CPP argue that the increased regulation would have a detrimental and costly effect on power plants that are heavily reliant on coal. Consequently, twenty five states have sued the EPA alleging that it does not have the authority to regulate carbon emissions under the Federal Clean Air Act. *Climate Progress*, May 24, 2016, www.thinkprogress.org.

In February 2016, just days before Supreme Court Justice Antonin Scalia passed away, the United States Supreme Court issued a stay of implementing the regulations proposed by the CPP until all of the legal challenges are resolved. Litigation on this issue is progressing in the D.C. Court of Appeals, and is expected to last about a year and half. The final resolution of these issues should have a great impact on how the trucking industry will move forward by either finding new ways to reduce carbon emissions or to maintain the status quo.

Joseph D. Delfino

Joe is an attorney in the firm's Charlotte office. His practice focuses in the areas of civil litigation and workers' compensation. He is an active member of the North Carolina State Bar and New York State Bar.

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Why did you become a lawyer?

JDD: Ever since I can remember, which was well before I knew what the job actually required, I wanted to be a lawyer. My father worked as a Detective for the NYPD in the Kings County District Attorney's Office and he would always tell me that I should become a lawyer when I grew up. I also have a tendency to always argue the opposing point of any issue, which drives my parents, friends and now wife, crazy. However, it was not until I actually began working in the legal community that I truly discovered what it means to practice law and advocate for a client.

Q: What keeps you busy on the weekends?

JDD: My weekends are usually spent trying to keep my 6-year old, Devin, and my 2-year-old, Dylan, from seriously injuring themselves or destroying something in my home. In the fall and winter, I enjoy rooting for the Miami Hurricanes and New York Jets. I also enjoy playing basketball, football, soccer, baseball and lacrosse with my sons.

Q: What is your proudest moment?

JDD: Aside from my wedding day and the birth of my children, I would say the day I graduated from Columbia University. Neither of my parents graduated from College, so that was definitely something that I wanted to accomplish both for myself and my parents.

Q: What is your favorite vacation destination?

JDD: I would have to say South Florida, which is where my parents now live. In addition to getting to see my parents, the warm weather is always appreciated in the winter months.

Q: What motivates you?

JDD: I would have to say fear of failure, first and foremost, and also the realization that people are putting their faith in you to represent their interests in important matters.

Parsons Presumption *cont. from page 2*

While these unpublished opinions provide some optimism, the most promising news is that the North Carolina Supreme Court has granted the defendant's Petition for Discretionary Review in *Wilkes*, which means the Supreme Court will review the decision and, hopefully, issue a decision which clarifies the *Parsons* presumption to the limitations initially considered in *Parsons*. Several organizations have joined together on *amicus curiae* briefs to argue on behalf of insurers and employers doing business in North Carolina. These groups include North Carolina Chamber of Commerce, North Carolina Retail Merchants Association, North Carolina Home Builders Association, Employers Coalition of North Carolina, Property Casualty Insurers of America, American Insurance Association, North Carolina Association of County Commissioners, North Carolina League of Municipalities, and the North Carolina School Boards Association. Hedrick Gardner Kincheloe & Garofalo and the leader of its appellate advocacy practice group, M. Duane Jones, participated in authoring one of those *amicus curiae* briefs.

It is likely the Supreme Court will hear arguments in August or September of 2016. In the meantime, Hedrick Gardner continues to actively advocate for limiting the scope of the *Parsons* presumption and reversing the Court's expansive interpretation of *Wilkes*. If you or your company have questions about *Wilkes*, the "*Parsons* presumption" in general, or any other workers' compensation issues, we would be glad to answer them.

DOT/FMCSA *cont. from page 1*

On 3/28/16, the FMCSA denied the American Trucking Association's request for a two-year exemption to HOS rules requiring inclusion of waiting periods at oil and natural gas sites into the 14-hour per day on-duty time. The FMCSA determined that the ATA failed to show how the exemption would create the level of safety obtained without the exemption.

The FMCSA is working to implement a pilot program mandated by the FAST Act to determine whether military truck drivers between the ages of 18 and 21 are as safe as older drivers. Currently, drivers cannot operate in interstate commerce until they reach the age of 21. Under the FAST Act, current and former military drivers will be permitted to drive interstate routes pending the outcome of the pilot program.

On 3/16/2016, the FMCSA published a proposed rule extending the time period to apply for a skills test waiver from 90 days to 1 year for former military members, who operated large vehicles while in the armed services. The FMCSA estimates that more than 10,000 former military personnel have taken advantage of the skills test waiver and expects that the new rule will help ease the return to civil life and broaden the pool of eligible drivers.

On 3/4/2016, the FMCSA published its proposed entry-level driver training rule, which revises the standards for obtaining a commercial driver's license. The new rule requires a minimum of 30 hours behind the wheel, including minimums of 10 hours on a driving range and 10 hours on a public road or 10 public road trips of not less than 50 minutes for Class A licenses. For a Class B license, drivers must have 15 hours behind the wheel with 7 spent on a public road. There are no proposed minimum hours of classroom instruction. The rule, which was mandated by the MAP-21 Act, will be the first regulation of the driver training industry and will take effect three years after the final rule is published.

On 2/15/2016, the FMCSA and the National Highway Traffic Safety Administration (NHTSA) published a joint rule requiring the installation of 65 mph speed-limiters on trucks weighing over 27,000 pounds. The DOT expects the rule to result in minimal cost to the industry, as heavy trucks already come with the devises installed.

As of 4/20/2016, Medical Examiners are required to use the revised versions of the Medical Examination Report Form (MCSA-5875) and Medical Examiner's Certificate (MCSA-5876). The final rule implementing this change was published in April 2015 and was set to be enforced beginning on 12/22/2015. The FMCSA granted a 120-day grace period to implement the changes, which ended in April.

On 3/10/2016, the FMCSA and the Federal Rail Administration (FRA) jointly published an Advanced Notice of Proposed Rulemaking (ANPRM) seeking information regarding the effect of sleep apnea on commercial drivers through 6/8/2016. This first, exploratory step in the rulemaking process will be followed by a Notice of Proposed Rulemaking and public comment period. The process from ANPRM to final rule can take as long as 6 years.

On 5/20/2016, the FMCSA sent its final rule on a drug and alcohol clearinghouse to the White House Office of Management and Budget (OMB), which marks the final step in the approval process. The rule requires carriers and other medical personnel to report certain test results to the clearinghouse and for employers to search the clearing house on an annual basis and as a part of pre-employment screening.

On 5/11/2015, the Occupational Safety and Health Administration (OSHA) issued a rule requiring trucking and other high-risk industries with 20 to 249 employees to submit 2016 injury and illness information electronically by 7/1/2017. These employers are currently required to submit this same information by completing OSHA Form 300A. 7/1/2018, OSHA Forms 300A, 300, and 301 must be submitted electronically. Beginning in 2019, this information must be submitted by March 2.

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