TRANSPORTATION matters
Summer/Fall 2013

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

DOT/FMCSA - Noteworthy Updates

Allen C. Smith, acsmith@hedrickgardner.com


Smith

The first half of 2013 has produced a lot of activity, along with some uncertainty, on the regulatory front. The hottest topics are the new **hours of service (HOS) regulations** on the "34-hour restarts" and mandatory rest breaks. As of **July 1, 2013**, the following changes go into effect:

- A driver's 34-hour off-duty period (following 60 hours on duty during 7 consecutive days or 70 hours during 8 consecutive days) must include two periods from 1 a.m. to 5 a.m. *See* 49 C.F.R. § 395.3(c).

- This 34-hour restart may only be used once per week. *See* 49 C.F.R. § 395.3(d)

- Additionally, a driver may drive no longer than 8 consecutive hours without a rest break (either going off duty or into the sleeper berth) of 30 minutes. *See* 49 C.F.R. § 395.3(a)(3)(ii).

A summary of HOS regulations and changes can be found at http://www.fmcsa.dot.gov/rules-regulations/topics/hos/index.htm. FMCSA has published an informational visor card highlighting key changes: http://www.fmcsa.dot.gov/documents/hos/HOS-Regulations-7-1-2013.pdf. (See p. 3 of this newsletter.) In February, FMCSA published *Interstate Truck Driver's Guide to Hours of Service*: http://www.fmcsa.dot.gov/documents/hos/Interstate-Truck-Driver-Guide-to-HOS_508.pdf.

Cont. on Page 3

Motor Carriers: Vulnerable to Overpaying Workers' Compensation Benefits?

Thomas W. Page, tpage@hedrickgardner.com; Matthew D. Glidewell, mglidewell@hedrickgardner.com


Page


Glidewell

When an owner-operator sustains an injury while driving for a motor carrier, the contracting trucking company must be careful when selecting the method used to determine workers' compensation indemnity (lost time) benefits. These benefits are paid to injured workers based on their calculated compensation rate, which is equal to 66-2/3% of the worker's "average weekly wage" (AWW). In short, AWW is the amount of gross wages an employee has earned during the 52 weeks prior to the worker's injury divided by the number of weeks it actually took for the employee to earn those wages.

In calculating an owner-operator's AWW, this simple calculation may become difficult because of the owner-operator's irregular driving schedule, his work for other companies, and his earnings that include more than just wages. Where the usual calculations are inadequate, the trucking company and owner-operator are left to agree on a calculation method that produces an AWW that is "fair and just" to both the owner-operator and the trucking company. It is common in the trucking industry to calculate an owner-operator's average weekly wage based on the total amount paid to the owner-operator in the previous year, as shown by either the IRS Form 1099 or by a pay statement. However, this calculation method can significantly overestimate an owner-operator's AWW, resulting in an inflated compensation rate.

The term "wage," as used in workers' compensation, means only "payment for labor and services." According to the North Carolina Court of Appeals' decision in *Baldwin v. Piedmont Woodyards, Inc.*, 293 S.E.2d 814 (N.C. App. 1982), wages do not include "expenses incurred in producing revenue." In *Baldwin*, the NC Court of Appeals decided that an independent contractor selling pulpwood to a wood yard could not calculate his AWW based on the total amount of money he received from his sales to the wood yard. Instead, the Court held that the independent contractor had to deduct from that total amount his expenses such as the cost of the purchase price of his business equipment. Thus, an independent contractor's business expenses should not be included in his AWW. A rule similar to that enunciated by the

Cont. on Page 4

Employment Law: When the FMCSR Collides with the ADA

Joseph S. Murray, IV, jmurray@hedrickgardner.com

Murray

It is a scenario that is all too common: an interstate-driver employee comes into the office after failing his Federal Motor Carrier Safety Regulations (FMCSR) required medical exam. While you appreciate the work this employee has put in for your company, it is a quick decision to terminate since he can no longer perform his duties as an interstate driver. Or is it a quick decision? Should you consider your obligations under the Americans with Disabilities Act ("ADA") before you terminate the employee?

You do not have to violate the FMCSR.

The ADA makes it unlawful for an employer to discriminate against "a qualified individual with a disability" in regard to the terms of employment. 42 U.S.C. § 12112(a). A "qualified individual" has a disability and, with or without a reasonable accommodation, can perform the essential job functions of her position. 42 U.S.C. § 12111(8). Under the 2008 amendments to the ADA, almost all medical conditions will constitute a disability, including lack of a hand or foot, diabetes mellitus, heart disease, respiratory dysfunction, arthritis, and sensory deficits.

An employer can impose qualification standards that are job-related and consistent with business necessity. 42 U.S.C. § 12113(a). Qualification standards that are imposed by federal law and regulation are job-related and consistent with business necessity. See 29 C.F.R. § 1630.15(e).

Numerous courts have found that when an employee cannot meet the FMCSR's medical requirements, there are no reasonable accommodations that would allow the employee to perform the duties of an interstate driver. *See, e.g., Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). In many cases, even if the employee has a disability, termination would be warranted and not violate the ADA.

But there still may be reasonable accommodations that do not violate the FMCSR.

While many courts have found that there is not a reasonable accommodation for the FMCSR requirements, there may be other reasonable accommodations that allow the employee to remain employed. Potential accommodations include unpaid leave, waivers, and job transfers.

An employer must provide a reasonable accommodation to a qualified individual with a disability unless the accommodation would place an undue hardship on the business. While an employee must generally request an accommodation, the reasonable accommodation process may be triggered when the employer knows of the disability and that an accommodation is necessary.

Unpaid may be reasonable accommodation if it allows the employee to return to his position. The leave does not have to be likely to succeed in allowing the employee to return to work; it only has to plausibly enable to the employee to return to his position. Further, leave can be of an uncertain duration, as long as it is not indefinite. In our scenario, if the employee's medical condition could be brought under control such that the employee could pass a subsequent medical exam, then unpaid leave is a potential reasonable accommodation.

Similarly, the employer may provide unpaid leave while the employee attempts to obtain a waiver or exemption from the Federal Motor Carrier Safety Administration of the particular medical prohibition. *See* 49 C.F.R. § 381.300. For instance, in February of this year, FMCSA granted an exemption to 40 deaf truck drivers from the "forced whisper test" of the medical examination. These 40 drivers are now qualified under the FMCSR and terminating or refusing to hire them based on their hearing deficits will violate the ADA.

Finally, a potential accommodation is transferring the employee to an open position for which the employee is qualified. If an employee is not qualified for her current position due to the disability but is qualified for an open position, then it is a potential reasonable accommodation to place the employee into the open position. If your, now former, interstate driver is qualified for any other open position in your company, then transferring the driver to that open position will be a potential reasonable accommodation.

Conclusion

A driver's failure of the FMCSR medical exam should not always result in an automatic termination. Before terminating an employee for failing the medical exam, you must assess if the employee is disabled and, if so, engage in the reasonable accommodation process.

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

Smith cont.

The big question is whether these regulations will remain in effect. A three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit heard oral arguments on 3/19/2013 in a challenge to the new regulations by the American Trucking Associations (ATA), which argues that the new rules are too restrictive. As of the date of this newsletter, no decision has been reached. The Federal Motor Carrier Safety Administration (FMCSA) refused a request by the ATA to delay enforcement of the new regulations until 60 days after the D.C. Circuit issues its opinion. The US Congress has entered the picture on June 18, 2013, when the House Committee on Transportation and Infrastructure conducted a hearing on the impact of the HOS regulations.

Obtaining a **Medical Examiner's Certificate** will likely become more difficult for drivers. As of May 21, 2014, the medical examination "must be conducted by a medical examiner who is listed on the National Registry of Certified Medical Examiners." 49 C.F.R. § 391.41. As of April 2013, the registry had approximately 800 certified examiners. FMCSA estimates that 40,000 medical examiners are needed to provide the over 2 million physicals per year sought by drivers with commercial driver licenses. Additionally, FMCSA has made a proposal that medical examiners submit same-day reports of exam results to FMCSA, which would then transmit the information to the state where the driver is applying for or renewing his license.

FMCSA has also proposed easing some regulations. Later this year, FMCSA will propose a regulation that drivers no longer need to file **daily inspection reports** if they find no defects in their equipment. This will not, however, relieve drivers of the obligation to inspect the tractor and trailer at the end of each day. *See* 49 C.F.R. § 396.11.

On May 24, 2013, FMCSA proposed a new rule to relieve some interstate motor carriers of the quarterly financial data reporting requirements. Interestingly, a data collector has lodged an objection to this rule.

On March 14, 2013, FMCSA expanded the distance that drivers hauling farming goods may travel under the **HOS exemption for the agricultural industry** from 100 miles to 150 miles. *See* 49 C.F.R. § 395.1(k). The FMCSA also waived the HOS rules for Oklahoma tornado relief efforts (from 5/21 to 6/5/2013).

On March 11, 2013, FMCSA issued tips and warnings about the use of **GPS navigation systems**. Importantly, drivers need to use GPS systems designed for professional truck and bus drivers.

The Compliance, Safety, Accountability (CSA) program continues to gather headlines. FMCSA plans to propose changes later in 2013; it will allow motor carriers to see a preview and provide comments. During FMCSA Motor Carrier Safety Advisory Committee's (MCSAC) CSA subcommittee meeting on June 16 and 17, 2013, a majority recommended to the MCSAC removal of CSA scores from public view. Currently, FMCSA has sufficient data to score only 40% of carriers in some BASICs.

SUMMARY OF HOURS OF SERVICE (HOS) REGULATIONS AS OF JULY 2013

Changes Compared to Current Rule

PROVISION	CURRENT RULE	FINAL RULE - COMPLIANCE DATE JULY 1, 2013
Limitations on minimum "34-hour restarts"	None.	(1) Must include two periods from 1 a.m. to 5 a.m., home terminal time. (2) May only be used once per week, 168 hours, measured from the beginning of the previous restart.
Rest breaks	None except as limited by other rule provisions.	May drive only if 8 hours or less have passed since end of driver's last off-duty or sleeper berth period of at least 30 minutes. [49 CFR 397.5 mandatory "in attendance" time for hazardous materials may be included in break if no other duties performed]

PROVISION	CURRENT RULE	FINAL RULE - COMPLIANCE DATE FEBRUARY 27, 2012
On-duty time	Includes any time in CMV except sleeper berth.	Does not include any time resting in a parked vehicle (also applies to passenger-carrying drivers). In a moving property-carrying CMV, does not include up to 2 hours in passenger seat immediately before or after 8 consecutive hours in sleeper berth.
Penalties	"Egregious" hours-of-service violations not specifically defined.	Driving (or allowing a driver to drive) more than 3 hours beyond the driving-time limit may be considered an "egregious" violation and subject to the maximum civil penalties. Also applies to passenger-carrying drivers.
Oilfield exemption	"Waiting time" for certain drivers at oilfields (which is off-duty but does extend 14-hour duty period) must be recorded and available to FMCSA, but no method or details are specified for the recordkeeping.	"Waiting time" for certain drivers at oilfields must be shown on logbook or electronic equivalent as off duty and identified by annotations in "remarks" or a separate line added to "grid."

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

Civil Liability: Assessing the Applicability of OSHA Fall Protection and PPE Regulations to Commercial Trailers at Third-Party Receiving Facilities

David L. Levy, dlevy@hedrickgardner.com

Levy

An emerging issue in the trucking and transportation community is the applicability, if any, of OSHA regulations to day-to-day operations of trucking carriers when operators and equipment are at third-party locations. This article examines the narrow issue of the whether OSHA fall protection and personal protective equipment (PPE) regulations apply to a driver who falls off a trailer at a receiving facility.

Consider the following fact pattern: a driver works for a large motor carrier which specializes in delivery of food grade lubricants. On the day in question, the driver makes a delivery to an out-of-state receiving facility using a company-owned tractor and tanker trailer. Upon arrival at the destination, the driver completes the appropriate intake paperwork and then proceeds onto the yard at the receiving facility, unsupervised by any of that facility's employees. The receiving facility requires drivers to offload their own product. Consequently, the driver positions his tanker trailer in a bay adjacent to one of the buildings at the facility. He exits the truck, and begins to climb the ladder on the side of the trailer in order to access the well area to make certain hose connections. As the driver reaches the top of the ladder, roughly ten feet above the ground level, he loses his balance and falls to the ground sustaining serious injuries.

Needless to say, the driver will pursue a workers' compensation claim against his own employer. The driver may also consider pursuing a third-party liability claim against the facility where the delivery is taking place. In that context, we must consider whether or not the fall protection and PPE requirements under the general industry regulations promulgated by the Occupational Safety and Health Administration (OSHA) apply to the receiving facility.

Cont. on Page 5

Page/Glidewell cont.

North Carolina Court of Appeals in *Baldwin* has been applied by the South Carolina courts, as well. *See Stephen v. Avins Construction Company*, 478 S.E.2d 74 (S.C. App. 1996) (in calculating subcontractor's AWW, subcontractor had to deduct costs of materials, wages, and other expenses from total payments from general contractor).

What this means for motor carriers operating in North and South Carolina is that their calculation of AWW for owner-operators should not be based simply on the total amount paid to that owner-operator over a period of time. Instead, motor carriers should be calculating an owner-operator's AWW using only the portion of those total payments specific to the owner-operator's labor and services, *i.e.*, driving. Trucking companies should deduct from those total payments money that goes toward operating expenses such as depreciation, equipment costs, per diem expenses, and the like.

Motor carriers often do not have access to the accounting records of their owner-operators, and the motor carriers are unable to see what portion of an owner-operator's payments are being used to pay the owner-operator's business expenses. An accurate method for determining what portion of the total amount payments made to an owner-operator is by reference to the owner-operator's most recent federal tax returns, and such documents are obtainable through discovery. The federal tax returns for an owner-operator are generally straightforward, and they include obvious expense categories such as depreciation, insurance, legal expenses, repair, supplies, taxes, per diem expenses, and utility. The federal returns also have an "other expense" category in which an owner-operator is supposed to specifically describe expenses that usually include deadhead miles, fuel, lumper fees, truck washing, and truck interest. All of these business expenses can reasonably be deducted from an owner-operator's income for purposes of determining the applicable AWW and compensation rate.

By using an owner-operator's federal tax returns to calculate the applicable AWW, motor carriers can calculate an AWW and the benefits due in a way that is fair and just to both the trucking company and the owner-operator, avoid overpayment of workers' compensation benefits, and protect themselves from exposure for accrued, past-due benefits.

Hedrick Gardner's lawyers are frequently involved in wage disputes and are always glad to assist in the investigation and the actual calculation of applicable average weekly wages.

Levy cont.

Under 29 CFR 1910 Subpart D—*Walking Working Surfaces*, OSHA requires employers to provide guard rails, picket fences or other temporary or permanent barriers around the perimeter of a walking working surface at a height of four feet or higher. More generally, 29 CFR 1910 Subpart I—*Personal Protective Equipment*, requires employers to provide PPE to employees "whenever it is necessary by reason of hazards of processes or environment," among other circumstances. Notably, many jurisdictions recognize the multi-employer worksite doctrine, which permits application of OSHA regulations to non-employers under certain circumstances. There is also explicit reference to potential citation of employers at multi-employer worksites in the OSHA *Field Inspection Reference Manual*, which provides enforcement guidelines for state and federal OSHA field inspectors.

Returning the question at hand, namely, the applicability of OSHA fall protection and PPE requirements to receiving facilities, two divergent schools of thought have emerged in the last several years. Safety advocates, the plaintiffs' bar, and other similarly-minded groups contend that receiving facilities have an obligation to provide fall protection and/or PPE to a non-employee driver who is making a delivery on their premises under 29 CFR 1910, and the failure to do so constitutes an OSHA violation. These groups cite provisions in the OSHA *Field Inspection Reference Manual* and case authority applying the multi-employer worksite doctrine in an attempt to impose liability on the third party receiving facility under state and federal OSHA laws. In addition, they point to an October 1996 memorandum promulgated by the federal OSHA Directorate of Enforcement Programs entitled "Enforcement of Fall Protection on Moving Stock." The Memorandum suggests that falls from "rolling stock" should not be cited under Subpart D, and that the PPE standard under Subpart I should not be cited for fall hazard exposure in such cases "unless employees are working atop stock that is positioned inside of or contiguous to a building or other structure where the installation of fall protection is feasible."

The October 1996 Memorandum contained a disclaimer to the effect that it could not create an additional obligations on the part of employers, and the language of the Memorandum suggests that citation under Subpart D (fall protection) and Subpart I (PPE) would generally *not* be appropriate for employees working on the top of "rolling stock," absent certain specific circumstances. Nonetheless, advocacy groups argue that, under the facts as presented in this article, the receiving facility created the hazard by having the driver offload his own product, and the facility has general responsibility for operations taking place on its premises. Because the bay was adjacent to a building on the premises, those groups contend that the receiving facility has an obligation to provide PPE and/or fall protection to the driver, and the failure to do so constitutes one or more OSHA violations for which the receiving facility should have civil liability.

On the other side, motor carriers, manufacturing companies, and others with common interests assert that OSHA in its entirety does not apply to a receiving facility under the facts presented. These groups note that, within the statute itself, OSHA regulations apply to employers, not third-party locations where employees may be working. There are very few examples where the multi-employer worksite doctrine has been applied by the state or federal courts to any aspect of the trucking industry, including circumstances where an individual is working on the side or top of a tanker or flatbed trailer. More broadly, these groups point to a 1972 Memorandum of Understanding between the Department of Labor (DOL) and the Department of Transportation (DOT), which essentially provides that the two entities have discrete and non-overlapping regulatory authority. From the standpoint that DOT regulates occupational health and safety of truck drivers, the 1972 Memorandum of Understanding (and the provisions of Occupational Safety and Health Act on which it is based) provide a basis to argue that DOL/OSHA are without authority to govern anything related to workplace safety of commercial operators.

As applied to the facts set forth above, the trucking and manufacturing industries are of the mindset that OSHA fall protection and PPE regulations have no applicability to a driver making a delivery at a receiving facility, even if that driver is required to offload his own product. In addition, these groups note that accidents of this type are often caused in whole or in part by the acts or omissions of the driver, including fatigue, physical de-conditioning, and/or the failure to exercise ordinary care. Depending the laws of the state where the receiving facility is located, the driver's own fault may operate to reduce or eliminate his claim, even if the receiving facility has liability under the Occupational Safety and Health Act or otherwise.

At the current time, the question presented by this article lacks definitive resolution. Moving forward, that resolution may take place on a state-by-state basis through the courts, through additional rule-making by DOL/OSHA and/or by DOT, or through some other means. For the time being, companies involved in the trucking industry should be mindful of potential OSHA issues involving use of commercial trailers at third-party receiving facilities given the divergent positions of advocacy groups and those within the industry.

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

PO Box 30397
Charlotte, NC 28230

IN OTHER NEWS...SHOUT-OUT TO THE NC TRUCKING ASSOCIATION

The NCTA Foundation held a wonderful captain's choice golf tournament at Pinehurst Resort & Country Club on April 16, 2013. Rick Cates, NCTA Director of Safety & Security, provided first-rate hospitality. Three lawyers from Hedrick Gardner (Allen Smith, Matt Glidewell, and Zach Linsey) enjoyed playing with Guy Hunter of Pike Electric. While they did not place in the money, they saw a Zach Linsey drive clear a house and heard it land in a cul-de-sac on the other side.

Hedrick Gardner Trucking & Transportation Team

Allen C. Smith
Practice Group Leader
Civil Litigation
Charlotte
704.319.5449

R. Daniel Addison
Workers' Compensation
Columbia
803.727.1201

Jeffrey H. Blackwell
Civil Litigation
Wilmington
910.795.2208

Matthew D. Glidewell
Workers' Compensation
Charlotte
704.319.5432

Hather B. Kincheloe
Civil Litigation
Charlotte
704.319.5442

David L. Levy
Civil Litigation
Charlotte
704.319.5426

Thomas W. Page
Workers' Compensation
Charlotte
704.319.5446

Zachary V. Renegar
Civil Litigation &
Workers' Compensation
Charlotte
704.602.8031

S. Reid Russell
Civil Litigation
Raleigh
919.719.3720

Gerald A. Stein, II
Civil Litigation
Charlotte
704.319.5464

Martha W. Surles
Workers' Compensation
Charlotte
704.319.5438

Jerry L. Wilkins, Jr.
Workers' Compensation
Wilmington
910.795.2223