

DOT/FMCSA - Noteworthy Updates

Allen C. Smith, acsmith@hedrickgardner.com; Austin R. Walsh, awalsh@hedrickgardner.com



Smith



Walsh

On 12/4/2015, President Obama signed the Fixing America's Surface Transportation (FAST) Act, which requires the Federal Motor Carrier Safety Administration ("FMCSA") to remove Carrier Safety Administration (CSA) scores for property carriers from public view until a Department of Transportation (DOT) study is completed. The mandated study will determine the accuracy of the CSA's Safety Management System (SMS) in predicting future crash risk and severity. On 11/4/2015, the House voted down an amendment by Lois Frankel (D-Fla.) that would have kept CSA scores available to the public during a review of the scoring system. The CSA scores for passenger carriers will remain available.

On 12/16/2015, the FMCSA published its final rule requiring interstate drivers to use electronic logging devices (ELDs) to document hours of service (HOS) and drivers' locations at 60-minute intervals. The deadline for compliance with the rule is 12/18/2017. The rule exempts fleets and drivers using "ELD-like" on-board recording devices until 12/18/2019. Additional exemptions include model-year 2000 and older trucks without electronic control modules (ECMs), short-haul drivers under Section 395.1(e), towaway operations, and a short-term exception for drivers who may use paper logs for no more than 8 days during any 30-day period.

To replace the paper logs, the FMCSA has implemented a new document retention policy to verify on-duty time. Carriers will be required to retain up to 8 documents per driver for each 24-hour period. The documents must be retained for 6 months and include:

- Bills of lading, itineraries, schedules or equivalent documents showing the origin and destination of a trip;
- Dispatch records, trip records, or the equivalent;
- Expenses receipt for on-duty time;
- Text, email, instant messages or other communications transmitted through a fleet management system;
- Payroll records, settlement sheets, or other documents reflecting payments.

Supporting documents must include the following:

- Driver identification
- Date
- Vehicle location
- Time

Drivers are required to submit the necessary documentation within 13 days and produce the same to law enforcement upon request. The reduction in industry paperwork is expected to yield a net benefit of \$1 billion annually. The stricter oversight of HOS violations is expected to save 26 lives and prevent 562 injuries related to commercial motor vehicle accidents. A full copy of the final rule may be found here: www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/FMCSA-ELD-Final-Rule_12-10-2015.pdf

The Impact Of Controlled Substances On Driver Qualifications, Part II

Joe Delfino, jdelfino@hedrickgardner.com; Martha Surles, msurles@hedrickgardner.com



Delfino



Surles

In Part I of this series, we examined the impact of controlled substance use on driver qualifications, focusing generally on the difference between use of controlled substances classified as Schedule I and use of substances classified as Schedules II, III, IV and V. We also discussed in general testing procedures, including pre-employment testing, post-accident testing, random testing and reasonable suspicion testing. In Part II of this series, we will focus on how the use of controlled substances, and more specifically being “under the influence” as a result of the use of said controlled substances, can serve as the basis for the denial of an otherwise compensable workers’ compensation claim.

Many employers face situations involving drivers who test positive for controlled substances following a motor vehicle accident or other type of incident that would otherwise entitle the driver to workers’ compensation benefits. This situation is specifically addressed in § 97-12 of the North Carolina Workers’ Compensation Act, which states, in relevant part:

No compensation shall be payable if the injury or death to the employee was proximately caused by:

1. His intoxication, provided the intoxicant was not supplied by the employer or his agent in a supervisory capacity to the employee; or
2. His being under the influence of any controlled substance listed in the North Carolina Controlled Substances Act, G.S. §90-86, et seq., where such controlled substance was not by prescription by a practitioner; or
3. His willful intention to injure or kill himself or another.

...“Intoxication” and “under the influence” shall mean that the employee shall have consumed a sufficient quantity of intoxicating beverage or controlled substance to cause the employee to lose the normal control of his or her bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of these faculties at the time of the injury.

A result consistent with “intoxication” or being “under the influence” from a blood or other medical test conducted in a manner generally acceptable to the scientific community and consistent with applicable State and federal law, if any, shall create a rebuttable presumption of impairment from the use of alcohol or a controlled substance.”

The burden of proof shall be upon him who claims an exemption or forfeiture under this section.

In this series, we will specifically address item No. 2, dealing with a driver being under the influence of a controlled substance. This provision applies to a driver being under the influence of a controlled substance listed in the North Carolina Controlled Substance Act which is not prescribed by a practitioner. The North Carolina Controlled Substance Act details substances classified as Schedule I-VI in §90-89 through §90-94.

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DOT Physicals Part III: Industry Opinions



David L. Levy, dlevy@hedrickgardner.com

In Part 2 of this series, we discussed the requirements for physicals under Federal Motor Carrier Safety Regulations with an industry leader. We wanted to further expand upon the industry's perceptions and opinions on DOT physicals by discussing the regulations with an experienced commercial driver. Similar to the Part II of this series, our discussions with the commercial driver focused on the overall effect on the DOT physicals with regard to his employment as well as the efficiency and effectiveness of physicals in promoting safe operation of commercial motor vehicles on public roads.

The driver we spoke with has been working for a freight trucking company for over 15 years. This driver confirmed that he is very familiar with FMCSA rules and regulations regarding DOT physicals. It is his opinion that FMCSA regulations, and particularly, the DOT physicals have remained consistent over the past 8 to 10 years. He considered these regulations stringent, but also acknowledged that many drivers that do not appear to be healthy and are still able to obtain a commercial driver's license. This is a notable distinction from the industry leader's perspective, who affirmed that the DOT physicals are necessary and effective for obtaining minimum health standards. The driver's belief is that unhealthy drivers slip through the cracks due to mistakes by medical professional.

Similar to the opinions and perceptions of the industry-side representative, the driver also recognized a common trend for conditions that have caused drivers to fail the physicals. The interviewee said many older drivers cannot pass the DOT physicals or must renew their certificates more often based on high blood pressure and diabetes. With regard to the effect of DOT physicals on the trucking industry, it is his belief that the DOT physicals are not a contributing factor to the decline in the work force. Throughout his career, the medical screening has been consistent and has not had a personal impact on his employment. Simply put, he believes that the younger generation is not attracted to the commercial trucking profession, regardless of the DOT physicals.

Further, he added that oversight from his employers has not changed over the years. It is his opinion that drivers, not the employers, are responsible for keeping up with FMCSA regulations. Also, he added that it is the medical professional who is responsible for passing the drivers, and the employer simply relies on documentation provided by these doctors. Essentially, the interviewee stated that the extent of oversight by the employer is to ensure commercial drivers have their medical certificate up-to-date.

Overall, the driver and the industry leader have expressed many similar, positive effects of DOT physicals. He realizes that medical professional's make mistakes and unhealthy drivers slip through the cracks, but he believes the consistency of medical screening has improved. In summary, he believes that requiring commercial drivers to pass DOT physicals is a good start to making the roads safe a safer place.

Expert Witnesses - Bodily Injury & Wrongful Death Claims, Part II

Andy Stein, astein@hedrickgardner.com

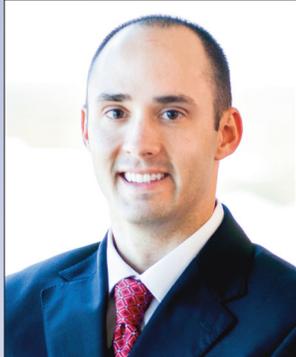


Stein

Part I of this series focused on the need for expert witnesses in litigation (personal injury and wrongful death) arising from truck accidents and the legal standards for admitting the expert investigation and testimony into evidence at trial. In review, the expert must demonstrate qualifications and experience that allow him to offer opinions in the field of his expertise, and the expert's opinions and investigation must be based on reliable scientific principles in order to be admissible at trial. This article will provide more practical information about the kinds of expert witnesses used in trucking litigation as well tips for selecting the right expert for your case.

An accident reconstruction expert (Professional Engineer) helps determine whether a party is legally responsible for an accident (i.e., who is at fault). The reconstruction experts helps solve questions about how and why an accident occurred. Reconstruction experts apply scientific and engineering principles to known data from the accident such as speed, impact zone, distance travelled after impact, final resting positions, and property damages in order to create models about how the accident occurred.

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Attorney Spotlight: Austin R. Walsh

Austin is an attorney in the firm's Charlotte office. His practice focuses in the area of civil litigation. He is an active member of the North Carolina State Bar, North Carolina Bar Association, and North Carolina Association of Defense Attorneys.

While in law school, Austin was a Moot Court Board Member and served as the Senior Notes and Comments Editor for the Journal of Business and Intellectual Property Law.

Q: Why did you become a lawyer?

ARW: When I was 12, my family took a summer road trip from our home in Houston, TX to the East Coast. The landmarks and historic sites we visited made a lasting impression on me, particularly Gettysburg, Arlington National Cemetery, and the halls of Congress. That trip and my passion for American history instilled a respect for the ideas of liberty and equality that are the foundation of our legal system.

Q: What keeps you busy on the weekends?

ARW: My weekends usually involve trips to the hardware store with my daughters, Charlotte (3) and Rose (10 months), and DIY home improvement projects with my wife, Laura. This fall we spent weekends building a play house in the backyard and cheering on the Auburn Tigers and Carolina Panthers.

Q: What is your proudest moment?

ARW: The births of my two daughters and nearly every day since.

Q: What's your most cherished family tradition?

ARW: We go to the Woolly Worm Festival in Banner Elk, NC every fall and take part in the festival's "worm races." We have yet to pick a winning worm, but this year my 3 year old came home with a pet worm named Julius.

Q: What motivates you?

ARW: The desire to provide high quality service to my clients and zealously advocate for them in the courtroom. I grew up working for my family's small business, which taught me the value of purpose-driven hard work and customer service. I try every day to emulate those values.

Impact Of Controlled Substances *cont. from page 3*

North Carolina courts have held, and as is specifically detailed in the statute, that the employer has the burden of proving that a driver was under the influence as an affirmative defense to a claim. A simple positive test does not establish, in and of itself, that a driver is under the influence. In *Moore v. Sullbark Builders, Inc.*, 198 N.C. App. 621, 680 S.E.2d 732 (2009), the NC Court of Appeals determined that a urine toxicology test that indicated the presence of cannabinoids, without providing a level or concentration. Could not be used to show that the Plaintiff was impaired at the time of the accident. Therefore, when obtaining testing results following an incident, it is imperative to request specific information regarding the levels of the controlled substances in the driver's system.

Even if you are able to obtain information with regard to the specific levels of the controlled substances, you will likely need to retain an expert to interpret those results and give an opinion that the driver was under the influence at the time of the incident. Depending on when the testing was performed in relation to the accident and depending on which controlled substance the driver tested positive for, this can be difficult. As such, testing performed as close in time to the actual accident is critical.

If an "under the influence" defense is going to be argued, it is also important to speak with individuals who were in communication with the driver on the date of the incident - both before and after. Evidence of a driver being under the influence, such as slurred speech and possible admissions by the driver that he was under the influence of a controlled substance will obviously be powerful evidence either before the Industrial Commission or a Court. It is also critical to perform as thorough an investigation as possible.

Another hurdle to overcome when claiming an "under the influence" defense is that the burden is on the employer to show that being under the influence was a proximate cause of the accident. Therefore, even if you can prove that a driver was under the influence of a controlled substance at the time of the accident, in order for the defense to be successful, you will need to show that being under the influence of a controlled substance was a proximate cause of the accident. The courts have, and will, determine that a driver is entitled to workers' compensation benefits, even when the drive is found to be under the influence of a controlled substance, when being under the influence of that controlled substance was not found to be a proximate cause of the accident.

Practically speaking, maintaining a defense based on the argument that a driver was under the influence at the time of the accident is difficult. However, it is certainly worth proceeding with such a defense as it is a complete bar to recovery.

One other issue that should at least be considered when discussing the use of controlled substance is N.C. Gen. Stat. § 97-12.1, which is the statutory provision stating that no compensation will be allowed when there is a willful misrepresentation at the time of hiring. My colleague, Matt Glidewell, wrote an excellent article discussing this provision in our quarterly letter from March 2015. Although Matt focused on an employee's failure to disclose prior injuries when discussing N.C. Gen. Stat. § 97-12.1, I believe a similar argument can be made when a driver willfully fails to disclose that he is taking a controlled substance at the time of hiring.

DOT/FMCSA *cont. from page 1*

On 12/16/2015, the National Highway Traffic Safety Administration (NHTSA) published a notice of proposed rule-making (NPRM) affecting the standard for underride guards, which absorb rear impacts on trailers. The NHTSA has proposed an upgrade in the ability to absorb an impact from compact and subcompact cars from 30 mph to 35 mph. The NHTSA anticipates that 1 life and 3 serious injuries will be saved annually with a net benefit to the industry between \$130,000 and \$590,000.

On 12/18/2015, Congress approved further delays in enforcement of the HOS restart provision until studies reveal that the rule results in significant improvements in driver fatigue, health, and work schedules. The HOS restart rules will likely remain unenforced until at least February 2016. The restart rule requires drivers to take off two consecutive periods of 1 a.m. to 5 a.m. during a 34-hour restart. The HOS regulations from prior to July 2013 will remain in effect.

Effective 1/1/2016, the percentage of random drug testing decreased from 50 percent to 25 percent of the average number of driver positions. If the rate of positive tests is equal to or greater than 1.0 percent for any calendar year, the testing rate will return to 50 percent. The change is expected to save motor carriers \$50 million in 2016. The rate of random alcohol testing will remain at 10 percent.

On 1/29/2016, the final rule prohibiting shippers, carriers, and brokers from coercing drivers to violate certain rules and regulations will take effect. Violators of the rule may be fined up to \$16,000 per violation. Under the rule, coercion includes threats of termination, withholding future work, and reduced payments for a driver's refusal to violate certain regulations, including HOS rules, drug and alcohol testing rules, and commercial driver's license (CDL) regulations. Drivers are required to report violations to the FMCSA within 90 days of an occurrence. Complaints must be supported by written communication showing coercion attempts and the driver's responses. Originally proposed in 2014, the rule was required by MAP-21 to prevent pressure on drivers to violate core safety rules by threat of economic damages or physical harm.

On 11/18/2015, the Senate passed an amendment to the 2016 Transportation, Housing and Urban Development (THUD) bill that delays approval of an increase from twin 28-foot to twin 33-foot trailers. Mississippi Senator Roger Wicker, who sponsored the amendment, cited the need for further study on the affect to public safety following 38 states voicing opposition to the 33-foot trailers. THUD has been passed by the House and was last considered by the Senate on 11/19/15 before it was withdrawn from the floor.

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Expert Witness *cont. from page 4*

When using an accident reconstruction expert it is important to preserve as much evidence as possible from the accident. This includes property damages to the vehicles and photographs of the scene. In significant cases, the motor carrier wants the engineer to arrive on the scene before it is cleared. If the motor carrier cannot retain the expert before the scene is cleared, do so as soon after the accident as possible to conduct a site investigation so that the evidence from the accident site is fresh (e.g., debris, tire impressions, etc.). This engineering information helps attorneys craft arguments to explain why their client may not be at fault and show that the driver was obeying the rules of the road. On the other hand, if the information demonstrates the client may have some legal responsibility for the accident, the attorneys can move for a fast resolution to the claim.

Another type of expert witness that will assist with questions of legal liability is a human factors expert. Human factors is the scientific study of how people interact with their environment, including roads, products, machines and heavy equipment. As applied to trucking matters, this means how truck drivers and others on the road perceive, interact with, and react to stimuli involving tractor-trailers and other commercial vehicles. For example, a human factors expert may provide analysis regarding driver fatigue and describe how driver's perception and reaction time is effected by the number of hours driven. A human factors expert may also studying the relationship of driver safety training with the degree of care and safety a driver uses on the road. Other issues which a human factors expert may be helpful are how drivers deal with distractions, peculiar weather or road conditions, and visibility.

While accident reconstruction engineers and human factors experts assist with issue of legal liability, another group of experts are necessary to prepare the attorney's case to address damages. In matters involving personal injury a plaintiff's treating doctors are always relevant expert witnesses. Occasionally, defense attorneys will retain independent medical doctors and nurses to review a plaintiff's injuries and opine about the severity of and recovery time for the injuries. Economists and accountants may testify about the future cost of lost wages and diminished earnings capacity of a plaintiff may experience from an accident. Similarly, a life care planner will examine the medical costs of future treatment a plaintiff may need and discount the cost estimate to a present day number. Damages can be essential to estimating a financial value to a case, and in some cases are worth their weight in gold in order to develop a risk management plan for the litigation. As a general rule, plaintiffs are more likely to retain economists than defendants. Frequently, the economist does nothing more than calculate present values based on information provided to him/her by other experts or the plaintiff's attorney.

In summary, litigated trucking matters present complex issues of fact and law. Generally speaking, they also involve more significant exposure to financial liability from property damages and personal injuries. It is essential to act quickly to preserve evidence and determine what experts may be necessary to represent your interests.



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

Hatcher 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

Kristie H. Farwell
Civil Litigation
Raleigh
919.719.3718

Gerald A. Stein, II
Civil Litigation
Charlotte
704.319.5464

Martha W. Surlis
Workers' Compensation
Charlotte
704.319.5438

Scott Lewis
Civil Litigation
Wilmington
910.6794803

Austin R. Walsh
Civil Litigation
Charlotte
704.602.8010

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

**Charlotte
Wilmington**

**704.366.1101
910.509.9664**

**Raleigh
Columbia**

**919.832.9424
803.727.1200**

www.hedrickgardner.com