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DOT/FMCSA - Noteworthy Updates

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On 1/21/15, the Federal Motor Carrier Safety Administration's (FMCSA) announced that a study of nearly 11,000 accident reports determined that the reports' fault assessments do not accurately predict future crashes. The study investigated whether fault, as determined on local police reports, provided a superior correlation to future crashes than the Compliance, Safety, Accountability (CSA) program's current method of simple accident involvement. The FMCSA identified a lack of uniformity in crash reporting nationwide as preventing a strong correlation between fault and future crash risk. The FMCSA estimates that implementing a uniform reporting system would cost between $3.9 million and $11.2 million. The FMCSA's period for public comment on the study and its findings has been extended from 2/23/15 to 3/25/15.

A Final Rule from the Food and Drug Administration (FDA) regarding the sanitary transportation of food is expected in March 2016. The mandate from the Sanitary Transportation of Human and Animal Food Act (FSMA), signed into law on 1/4/11, requires regulations to ensure that food "is not transported under conditions that may render the food adulterated." Critics of the rules believe the phrase, "may render the food adulterated," will unnecessarily lead to increased rejections of entire loads when only a portion of the shipment is damaged.

On 1/31/14, the FMCSA announced that trucking companies must continue random drug testing for at least 50% of drivers and other safety-sensitive employees through 2015. Federal safety agencies for railroad, airline, marine, and passenger transit were allowed a 25% testing rate once random drug-tests positive results fell below 1%. For the years 2011 and 2012, the positive random-test results for truck drivers were, .9% and, .6%, respectively. However, tests for drivers under reasonable suspicion or those with prior positive results increased from 2011 to 2012, which has provided the FMCSA with fodder to keep the testing rates at 50%.

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Wrongful Death Damages


Russell

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In the previous newsletter, we discussed the types of damages that can be awarded in a typical personal injury lawsuit. We will now address what damages are available to a plaintiff suing on behalf of the estate of a person who has died. Such a lawsuit is commonly referred to as a wrongful death suit.

In North Carolina, the types of damages that can be recovered in a wrongful death suit are governed strictly by statute. Other states have different ideas about what a plaintiff in a wrongful death suit should be entitled to recover and, therefore, the types of damages which can be recovered in a wrongful death suit will vary from state to state. In North Carolina, N.C. Gen. Stat. § 28A-18-2 sets out five types of damages that potentially may be recovered in a wrongful death suit. Depending on the facts of a particular case, some of these types of damages may not be available in certain cases.

First, the administrator or executor of the estate of the decedent is entitled to recover the expenses for care, treatment, and hospitalization incurred due to the injury which ultimately resulted in death. Sometimes people are killed instantly as a result of an accident and, therefore, the decedent

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DOT/FMCA cont.

On 12/16/14, President Obama signed the Consolidated and Further Continuing Appropriations Act, 2015, a spending bill that included an amendment by Senator Susan Collins (R-Me.) suspending enforcement of two HOS restart provisions through 9/30/15. Specifically, the law suspends regulations requiring the 34-hour restart to include two periods from 1:00 a.m. – 5:00 a.m. and suspends limiting use of the restart provision to once per week. The pre-July 2013 HOS regulations are in effect through September and still require a 34-hour restart but permit drivers a more flexible schedule. An unintended consequence of the delay will affect carriers with Electronic Logging Devices (ELDs) programmed for the new regulations. Many ELD suppliers already have updates in place or will be rolling them out soon. A long-term suspension of the HOS restart provisions is expected from House Republicans with the 2016 fiscal spending bill.

In response to HOS restart suspension, Martin Walker with the FMCSA's research division announced a year-long, Congressionally mandated study comparing fatigue and performance levels of drivers under the pre- and post-July 2013 HOS restart schemes. The study will help determine the efficacy of the FMCSA's proposed hours of service (HOS) regulations and the safety management system (SMS) methodology of identifying unfit drivers. Drivers who wish to participate may inquire on the FMCA's website at http://www.fmcsa.dot.gov/safety/research-and-analysis/get-involved-hours-service-driver-restart-study.

On 1/9/15, the DOT announced a policy shift to permanently allow Mexican trucking companies to operate in the US. This announcement comes after a three-year pilot program studied safety data on Mexican carriers operating long haul in the US. Only 15 Mexican carriers participated in the study, which prompted the DOT Inspector General to declare that the study cannot predict whether the general population of Mexican carriers will satisfy the DOT's high safety standards. An FMCSA report on the matter reached a conflicting result, finding that Mexican carriers could operate at safety levels equivalent to US and Canadian carriers. By opening the borders, the DOT seeks to avoid $2 billion in annual Mexican tariffs on US exports adopted by Mexico when Congress rejected a similar proposal in 2009.

On 12/29/15, House Transportation Committee Chairman Bill Shuster (R-Pa.) announced that federal gas and mileage taxes are off-the-table as sources of revenue for a new road funding bill expected in 2015. The bill is expected to extend funding for the Moving Ahead for Progress in the 21st Century Act (MAP-21), which expired in September 2014.

On 2/10/15, the FMCSA announced the formation of a 26-member advisory committee charged with updating new driver training programs, as mandated by MAP-21. This Entry-Level Driver Training Advisory Committee will produce recommendations for the FMCSA's proposed training rule, which is expected in fall of 2015, with a final rule expected in 2016. The new entry-level training regulations were first demanded by Congress 20 years ago and recently returned to the spotlight after the International Brotherhood of Teamsters, and the Citizens for Reliable and Safe Highways, filed suit against the FMCSA in the U.S. Court of Appeals for the District of Columbia on 9/18/2014 demanding action on the new regulations.

does not incur any medical expenses. At other times, a person can be hospitalized for weeks, months, or even years due to injuries sustained in an accident before eventually dying. The estate of the decedent will be entitled to recover these medical expenses which were brought about by the accident or event which was the cause of the death.

Secondly, the estate is entitled to recover compensation for any pain and suffering of the decedent during the interval between injury and death. The North Carolina appellate courts have ruled that there may be compensation only for conscious pain and suffering. In other words, a claimant will not be able to present evidence or contend that a person experienced pain and suffering while in a coma or other unconscious state. Such a claim is viewed as too speculative.

Third, the estate may recover the reasonable funeral expenses of the decedent. Note that the funeral expenses must be "reasonable," although it would be an unusual case if a defendant was brave enough to argue that they were unreasonable.

Fourth, the estate is entitled to recover the present monetary value of the decedent to the persons entitled to receive the damages recovered. This is the most complicated, and usually the most lucrative, of the types of damages that may be awarded in a wrongful death suit. It is first necessary to determine who is entitled to receive the damages recovered. In North Carolina, the beneficiaries of a wrongful death suit will be determined by the statutes which govern which persons will be heirs of a person who dies without a will. Whether a person actually has a will or not plays no role in determining who the beneficiaries are of a wrongful death suit.

In determining the present monetary value of the decedent to his or her beneficiaries, a judge or jury may attempt to estimate the amount of money which the decedent could have expected to earn during the remainder of his or her life, and subtract from that sum the amount he or she would have spent on himself or herself, or for other purposes which would not have benefited the decedent's beneficiaries. Most claimants' attorneys will employ an economist for this purpose. A key factor in such a determination is the life expectancy of the decedent prior to the injury which resulted in his or her death. The North Carolina statutory mortality tables allow a claimant to introduce into evidence a particular life expectancy based on the decedent's age at death, but the statutory life expectancy may be rebutted by competent evidence of the decedent's ill health or risky life style.

A judge or jury also may consider the services provided by the decedent to his or her beneficiaries in making a damages award. Examples of such services are the many things a parent does for a child, or the assistance provided to an infirm beneficiary by the decedent. Once again, compensation for these lost services should be awarded only for the life expectancy of the decedent or, if the life expectancy of the beneficiary was shorter than the life expectancy of the decedent, for the life expectancy of the beneficiary.

A judge or a jury may further consider the family and personal relations between the decedent and his or her beneficiaries. Obviously, it is difficult to put a precise price tag on the value of such things, but most people ascribe a large value to intrafamily relationships. Frequently this component of damages is a healthy percentage of any wrongful death damages award. Of course, occasionally a defendant discovers that the relationship between the decedent and one or more relatives was not as good as one might usually expect. There even have been instances where the decedent and one or more beneficiaries were estranged from each other.

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Glidewell

North Carolina Employees' Intentional Failure to Disclose Prior Injuries Fatal To Workers' Compensation Claims

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Many North Carolina employers have faced the issue of being held responsible under the Workers' Compensation Act for a re-injury or aggravation of a new employee's pre-existing injury or condition. Prior to the 2011 legislative Workers' Compensation Act reform, employees were sometimes awarded workers' compensation benefits for such re-injuries or aggravations even though they misrepresented or failed to disclose hindrances to their physical capabilities in the hiring process. The enactment of N.C. Gen. Stat. § 97-12.1 and its recent application by the state's courts are intended to eradicate this issue for diligent employers.

N.C. Gen. Stat. § 97-12.1 states that an employee will not be entitled to workers' compensation benefits if the employer proves (i) at the time of hire or in the course of entering into employment, (ii) at the time of receiving notice of the removal of conditions from a conditional offer of employment, or (iii) during the course of a post-offer medical examination:

> (1) The employee knowingly and willfully made a false representation as to the employee's physical condition;
>
> (2) The employer relied upon one or more false representations by the employee, and the reliance was a substantial factor in the employer's decision to hire the employee; and
>
> (3) There was a causal connection between false representation by the employee and the injury or occupational disease.

For the first time since its enactment, the NC Court of Appeals was called upon to interpret and apply the provisions of N.C. Gen. Stat. § 97-12.1 in the 2014 case of Purcell v. Friday Staffing, and the result was favorable to employers. In Purcell, the employee was assigned permanent work restrictions against lifting more than 20 pounds due to a work-related back injury she sustained in 1999. Thereafter, the employee applied for employment with Friday Staffing and, as part of the job application process, completed two pre-employment questionnaires. On the questionnaires, the employee indicated that she could engage in work requiring lifting greater than 50 pounds and, among other things, that she had never sustained an injury to her back or received treatment for back injury or pain, all of which was untrue. Relying on her representations as to her physical capabilities, Friday Staffing hired the employee and assigned her to a job that required constant lifting of between 20 and 25 pounds. Unsurprisingly, the employee sustained another work-related injury to her lumbar spine at the same disc space that had been injured in the 1999 incident and filed a workers' compensation claim. The employee conceded that she knowingly and willfully made a false representation upon which the employer had relied in hiring her but argued that there was not a causal connection between her misrepresentation and her subsequent back injury. The NC Court of Appeals explained that the "causal connection" required by N.C. Gen. Stat. § 97-12.1(3) exists if the employee's undisclosed or misrepresented injury, condition, or occupational disease increases the risk of the subsequent injury or disease. The court denied the employee's claim because she was exceeding her work restrictions when she injured her back and her physician testified that violation of her restrictions placed her at an increased risk of sustaining that injury.

N.C. Gen. Stat. § 97-12.1 is beneficial to employers, particularly as applied by the Court in Purcell. Thus it is important for the employer to take the necessary steps **during the hiring process** to

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Levy

DOT Physicals Part I: The Requirements

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Over the years, the Federal Motor Carrier Safety Administration ("FMCSA") has implemented rules and regulations to promote commercial motor vehicle safety. The FMCSA generally requires states to adopt the federal regulations or impose more stringent rules[1]. One pertinent regulation which has widespread industry effect is the requirement under the Federal Motor Carrier Safety Regulations ("FMCSR") for commercial drivers to undergo physicals to obtain a valid medical certificate. A medical certificate essentially declares a person physically qualified to drive a commercial vehicle and is a requisite requirement for obtaining a commercial driver's license. Regardless of the type of documentation drivers are required to carry in each state, under the FMCSR they must carry proof of medical certification while on duty to operate a commercial motor vehicle[2]. The purpose of requiring these medical exams, which are often referred to as "DOT physicals," is clear: to create minimum health requirements for commercial drivers thereby promoting safety on public highways.

Section 391.43 of the FMSCR contains the requirements for DOT physicals, including instructions for performing and recording the medical examination, as well as the report to be used in connection with the same. Under 391.43, the medical examiner address the following five areas as part of the exam: (1) vision; (2) hearing; (3) blood pressure/pulse rate; (4) laboratory/other test findings; and (5) physical exam. Further §391.43 identifies certain medical conditions which may disqualify an individual from receiving medical certification, such as significant vision or hearing issues, hypertension, and/or diabetes. The medical examiner may certify the driver following the physical for the statutory period of two (2) years, or a shorter period of time as warranted by observed health conditions.

The FMCSR identifies certain exceptions to the requirement for DOT physicals. For instance, persons engaged in custom-harvesting operations that transport farm equipment or crops to markets are not required to be medically certified in accordance with the FMCSA[3]. Another common exception applies to military personnel on active duty[4]. Notwithstanding these exceptions, the overwhelming majority of operators in the transportation industry must comply with federal regulations and obtain a valid medical certificate. Thus, DOT physicals are an issue of importance for both motor carriers and drivers.

Due to the numerous physical qualifications under the FMCSR for driving a commercial motor vehicle, the accountability and consistency of medical examiners pose a significant issue. Some medical examiners may have more stringent requirements to pass a physical, while others may be more lax. To cultivate uniformity, the FMCSR requires any medical examiner certifying commercial motor vehicle drivers to be listed on the National Registry of Certified Medical Examiners. Medical examiners must undergo a training program to familiarize themselves with the FMCSA regulations and the physical demands of operating a commercial motor vehicle. In addition, medical examiners could lose their status under the National Registry if they provide a driver with a medical certificate who was not physically qualified. With approximately 22,000 medical providers listed on the National Registry, and about 27,000 that are in the process of completing the training program, oversight of individual medical examiners is strenuous and difficult.

The FMCSR requirements for DOT physicals raise a number of issues for the trucking industry on

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[1] 49 C.F.R. § 355
[2] 49 C.F.R. § 391.41 (a)(1)(i)
[3] 49 C.F.R. § 391.2 (a)
[4] 49 C.F.R. § 383.3 (c)
[5] 49 C.F.R. § 390.113

DOT Physicals cont.

both the motor carrier and driver sides. Do motor carriers strictly adhere to the FMCSR requirements regarding DOT physicals? Are DOT physicals effective in terms of maintaining minimum health standards for commercial truck drivers? Perhaps most importantly, do DOT physicals actually result in safer operation of commercial motor vehicles? These questions, and other related issues will be addressed in an upcoming editions of this newsletter under DOT Physicals Part II: The Practical Side.

[6] FMCSA, National Registry Will Improve Safety for Travelers, Health of Commercial Drivers (last updated Dec. 19, 2014), http://www.fmcsa.dot.gov/newsroom/dot-reminds-commercial-drivers-physicals-must-now-be-performed-certified-medical-examiners

Technology — Electronic Logs: The New Standard

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FMCSA Delays Plans to Publish Final Rules to September 30, 2015

According to the March 2015 monthly legislative update released by the Department of Transportation (DOT), the Federal Motor Carrier Safety Administration (FMCSA) plans to publish its final electronic logging device (ELD) rule in September of 2015. This rule has been delayed since the 7th Circuit Court of Appeals vacated the agency's 2010 rule due in some part to concerns by the court that the agency failed to consider whether ELDs would be used by carriers to harass drivers.

In a study commissioned by the FMSCA and released November of 2014, research found that ELDs were very rarely used by carriers to harass drivers or monitor production.

The study also looked at the cost of implementing ELDs for motor carriers. According to the study, the median per unit cost per unit was $1,000, the median cost of EL unit installation was $150, and the median annual operational cost per unit of ELDs was $480. One interesting component of the study was drivers' attitudes towards ELDs. Over 70% of drivers agreed that ELDs resulted in less paperwork, easier compliance with hours of service (HOS) rules, and better interactions with fleet management. On the other hand, over 46% of drivers felt that ELDs gave management too much insight into their day, prevented them from doing the job the way they wanted, and reduced their independence as drivers.

The goal of the proposal is to improve overall commercial motor vehicle safety and reduce the burden for both motor carriers and drivers by increasing the use of ELDs within the motor carrier industry, which would in turn improve compliance with applicable HOS rules. The proposal will require all drivers that presently complete paper logs to switch over to ELDs within two years of the rule publication. With the projected publication of the final rule in November of 2015, this will mean all drivers should be switched over to ELDs by November of 2017.

The proposed rule will also amend the FMCSRs to establish: 1) minimum performance and design standards for HOS electronic logging devices; 2) requirements for the mandatory use of these devices by drivers required to maintain HOS records; 3) requirements concerning HOS supporting documents; and 4) measures to address concerns that ELDs are not used to harass drivers.

Additionally, the rules are expected to require manufacturers to update software to comply with changes to HOS provisions and to include download mechanism to law enforcement either through wireless Bluetooth, USB, printout, and others. The manufacturers are also expected to be required to include protections on the devices that will prevent tampering.

As we have discussed in prior articles in this technology series, any on-board data collection device, such as an ELD, will likely contain information that is discoverable during the course of a lawsuit arising from an accident. ELDs will take the guesswork out of a driver's HOS compliance and, therefore, provide protection for a carrier from a driver operating outside of the HOS rules unbeknownst to the carrier.

Any damages awarded for what the beneficiaries might have expected to receive from the decedent in the future should be reduced to their present value. Once again, claimants usually employ an economist to make this calculation.

The final type of damages which may be awarded for a wrongful death claim are punitive damages, if punitive damages are warranted. We discussed when a party might be entitled to recover punitive damages in the previous newsletter, but, generally speaking, a claimant may recover punitive damages if he or she can prove by clear and convincing evidence that the defendant was guilty of (1) fraud, (2) malice, or (3) willful or wanton conduct. Punitive damages awarded against a Defendant shall not exceed three times the amount of compensatory damages, or $250,000.00, whichever is greater. This cap on punitive damages does not apply if the driver of the truck was operating his vehicle while impaired.

Obviously, there is potential for a significant recovery in any wrongful death case. That being said, many of these cases have surprising twists and turns, and each case must be evaluated on its own merits.

NC Employees cont.

potentially avail itself of the defense since the employer has the burden of satisfying each element of the statute in litigation over its applicability to any given claim. An employer can, and should, require a potential employee to sign and date an attestation of ability to perform the essential functions of the job as detailed within the same document during the hiring process. And the employer should keep this information on file and provide it to its insurance carrier and/or defense attorney whenever an accident occurs that results in a North Carolina workers' compensation claim.

N.C. Gen. Stat. § 97-12.1 does not supersede the prohibitions and limitations the Americans with Disabilities Act of 1990 (ADA) places on employers in requesting and obtaining information on an applicant's medical conditions, treatment, and history. The primary point for employers to remember while attempting to gather information for potential use in a 97-12.1 defense is that (1) during the hiring process all questions must focus on the applicant's ability to perform the essential functions of a job rather than specific disabilities or medical history and (2) after the employer makes a bona fide offer of employment, it can then request and obtain medical information as long as the employer follows the ADA's requirements.

Hedrick Gardner's lawyers are well-equipped to advise employers on the use of N.C. Gen. Stat. § 97-12.1 in the hiring process and the potential application of this section in defense against workers' compensation claims, as well as employers' responsibilities in the hiring process under the ADA.

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