TRANSPORTATION matters
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DOT/FMCSA - Noteworthy Updates

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


Smith


Walsh

On 3/2/16, the Department of Transportation (DOT) Inspector General (IG) released preliminary results of the DOT study on the Federal Motor Carrier Safety Administration's (FMCSA) hours-of-service restart rule. In his statement, the DOT IG indicated that the study "did not explicitly identify a net benefit on driver operations, safety, fatigue and health."

The much-maligned provision required a 34-hour restart with two consecutive 1 a.m. to 5 a.m. rest periods. The rule went into effect in July 2013 but has been suspended since December 2014. On 12/9/16, Congress issued a clarification of the hours-of-service rule in a short-term continuing resolution funding bill signed by former President Obama. Specifically, the provision restored the restart rules to pre-July 2013 mandates pending the outcome of this DOT study.

The study used a significant sample of drivers from all fleet sizes and covering various industry sectors to assess drivers' fatigue, alertness, and health outcomes by using electronic and hard-copy duty records. The DOT IG stated that although the reliability of underlying records was not analyzed, the study plan provided sufficient reliability to validate the results.

On 1/30/17, President Trump signed Executive Order 13771 directing agencies to repeal two existing regulations for every new regulation in a way that does not increase the total cost of regulations. On 2/24/17, Executive Order 13777 directed heads of agencies to appoint Regulatory Reform Officers (RROs) to oversee implementation of the administration's regulatory reform. The RRO will be the head of a Regulatory Reform Task Force, which is responsible for reviewing regulations considered for repeal

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Industrial Commission Increases Efforts to Identify and Prosecute Uninsured Employers


Glidewell

Matt Glidewell, mglidewell@hedrickgardner.com

Recent developments in the North Carolina Industrial Commission's efforts to deter employers subject to the North Carolina Workers' Compensation Act from failing to carry workers' compensation insurance are worthy of attention by all North Carolina employers. The developments may be of specific interest to those in the Trucking and Transportation sector due to the varied contractual arrangements in the industry that could require compliance with the North Carolina Workers' Compensation Act and its requirements pertaining to workers' compensation insurance coverage. This is the first of a two-part article on this topic, and this installment will discuss: (1) the applicable law requiring some employers to carry workers compensation insurance or qualify as a duly self-insured employer and the ramifications for failure to do so; (2) how the Industrial Commission has historically addressed employers that fail to comply with these requirements;

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and (3) the recent catalyst that has caused the Industrial Commission's enforcement of these requirements and prosecution of non-compliant employers to become more active.

The North Carolina Workers' Compensation Act (hereafter "Act"), states that any employer with three or more employees is subject to the provisions of the Act. N.C.G.S. § 97-2(1). Additionally, the Act requires that employers subject to the Act carry workers' compensation insurance or apply to the Commissioner of Insurance for a license to be self-insured. N.C.G.S. § 97-93(a)(1)(3). And N.C.G.S. § 97-94 provides for the assessment of penalties against employers subject to the Act for failure to procure workers' compensation insurance or qualify as a duly self-insured employer; these penalties are both civil and criminal in nature, and can include fines of up to $100 per day for every day an employer fails to comply with the Act in these regards and criminal charges as serious as a felony. Notably, N.C.G.S. § 97-94 even allows an injured employee to sue a noncompliant employer outside the Workers' Compensation Act "at the election of the injured employee."

Motor carriers and others in the trucking industry are not exempt from these provisions, and one section of the Act specifically applies these requirements to certain members of the industry. N.C.G.S. § 97-19.1 states, in pertinent part, that any principal contractor, intermediate contractor, or subcontractor that contracts with a driver operating a truck, tractor, or truck tractor trailer licensed by the United States Department of Transportation shall be liable under the Act as the driver's employer unless the driver has workers' compensation insurance or is otherwise duly self-insured. As discussed in an article in a prior edition of this newsletter, the North Carolina Court of Appeals held in 2015 that a freight broker was liable under this section of the Act for injuries to a driver because the broker was a contractor for purposes of N.C.G.S. § 97-19.1. See Atiapo v. Goree Logistics, Inc., _ N.C. App. _, 770 S.E.2d 684, 2015 N.C. App. LEXIS 219 (2015). The Atiapo Court further held that the driver and its principal were subject to penalties pursuant to N.C.G.S. § 97-94.

The broker and contractor in Atiapo came under scrutiny by the North Carolina Industrial Commission and Courts because the injured driver instituted and litigated a workers' compensation claim against them. Prosecution of employers for violations of these provisions of the Act historically occurred under such circumstances – that is, relatively passively and only when brought to the attention of the Industrial Commission in the context of a specific claim against an employer by a specific employee for a specific injury. But the Commission has of late taken a more active role in enforcing these sections of the Act at the direction of the North Carolina Governor's Office.

On December 18, 2015, former Governor Pat McCrory handed down Executive Order No. 83, "Employee and Employer Fairness Initiative." Executive Order No. 83 (hereafter "Order"), was premised on the ideas that "certain business engage in 'employee misclassification' by improperly classifying their employees as independent contractors which enables these businesses to avoid the liabilities and obligations imposed by state and federal law" and this "misclassification: (1) deprives North Carolina employees of their lawful rights and protections; (2) affords unethical business owners with a competitive advantage at the expense of lawful businesses; and (3) divests the state and general public of significant tax revenues." The Order established "The Employee Classification Section" and specifically empowered the Chairman of the

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under Executive Order 13771. Due to the implementation of these two executive orders, DOT rulemakings are in the process of reevaluation. The DOT has yet to publish a monthly calendar of significant rulemakings for 2017 as many rulemakings, including those discussed in this Newsletter, are expected to be delayed.

On 2/1/17, the FMCSA responded to President Trump's 1/20/17 60-day regulatory freeze by announcing a postponement of the entry-level driver training final rule effective date. The final rule, which was published on 12/8/16, was slated to go into effect 2/6/17 with a compliance date of 2/7/2020. No new effective date has been announced. The long awaited rule does not have required minimum hours for classroom or road-training but CDL applicants must receive an overall score of 80% on the classroom or "theory" portions of driver training and show proficiency with road training.

On 1/12/17, the FMCSA announced that it would likely publish a Supplemental Notice of Proposed Rulemaking to address comments received related to the 1/21/16 Notice of Proposed Rulemaking (NPRM), which sought to revise current methodology for motor carrier safety fitness determination based on the agency's Behavior Analysis and Safety Improvement Categories (BASICs). The rulemaking schedule was expected in January 2017, but the proposal has not come out of the agency's Regulatory Reform Task Force process.

On 1/19/17, the DOT issued a notice of proposed rulemaking offering amendments to pre-employment drug screening to include heavily abused opioids – hydrocodone, hydromorphone, oxymorphone, and oxycodone. According to a 2014 survey, over 2 million Americans misused or were dependent on these prescription opioids. The proposal also removes the requirement for employers and consortium/third party administrators to submit blind specimens.

On 12/13/16, the FMCSA announced that it will maintain random drug testing rates at a minimum of 25% of drivers for 2017. Federal regulations mandate that if a Management Information System survey reveal positive test rates less than 1% for two consecutive calendar years, the FMCSA has discretion to lower mandatory minimum testing rates to 25%. If positive test results rise above the 1% threshold, the minimum testing rate automatically increases to 50%. The most recent survey, conducted in 2014, estimated positive drug usage rates at 0.9%. For 2012 and 2013, the positive usage rate for drugs was estimated to be 0.6% and 0.7%, respectively. Alcohol usage (BAC of .04 or higher) is significantly lower at .08% for 2014 and .03% and .09% for 2012 and 2013, respectively.

On 11/30/16, the FMCSA announced proposed changes to the qualification process for physicians employed with the Department of Veterans Affairs (VA) to be listed as a Certified Medical Examiner. The physicians must be employed by the VA, be familiar with the FMCSA standards for commercial motor vehicle (CMV) operators and physical requirements for drivers, and must never have acted fraudulently with regard to CMV certifications.

On 10/31/16, the 7th Circuit Court of Appeals denied the Owner-Operator Independent Drivers Association's (OOIDA) challenged the electronic logging device (ELD) mandate, which is scheduled to go into effect 12/17/17. Among other issues, the Court held that the FMCSA was not required to perform a cost-benefit analysis for the rule. Further, that the ELD rule did not violate any 4th Amendment privacy rights against unconstitutional search and seizure on drivers. The FMCSA estimates that improved hours-of-service (HOS) compliance will annually result in 1,844 fewer crashes, 26 lives saved, and 562 injuries avoided.

On 10/24/16, the Motor Carrier Safety Advisory Committee and Medical Review Board (MRB's) issued recommendations related to moderate-to-severe obstructive sleep apnea risk factors that the FMCSA is likely to use to enact a requirement for at-risk drivers to take diagnostic sleep studies. These recommendations closely follow the MRB's

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recommendations that we reported in in our last Newsletter. Among the recommendations, drivers with a body mass index (BMI) of 40 or higher would be given a 90-day window to complete a sleep study if diagnosed with sleep apnea. Drivers would also need to certify 30-days of treatment. Drivers who experience excessive fatigue or sleepiness while driving, have been in a sleep-related crash or have been observed drowsy behind the wheel will be disqualified. Additionally, the MRB has asked the FMSA to instruct medical examiners to consider the effect of opioid pain medication and certain benzodiazepines when certifying drivers.

After a contentious debate, the Advisory Committee and MRB has recommended that drivers with body mass index (BMI) of 33 to 40 should be required to take sleep studies if 4 of 11 risk factors are present. This is a change from the MRB's August recommendations, which only required the presence of 3 risk factors. The relevant risk factors include:

- Hypertension (treated or untreated),
- Type 2 diabetes (treated or untreated),
- A male neck greater than 17 inches or a female neck size greater than 15.5 inches,
- A history of stroke, coronary artery disease or arrhythmias,
- Loud snoring,
- Micrognathia or retrognathia,
- Witnessed apnea symptoms,
- Hypothyroidism,
- Age 42 or older,
- Male or post-menopausal female, and
- Mallampati Scale score of class 3 or 4 (small airway).

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Industrial Commission to appoint a Director of that "Section." The Order also charged the Section with duties including receiving complaints of employee misclassification; investigating complaints of employee misclassification; assessing back taxes, wages, benefits, penalties, etc. against businesses found to have misclassified employees; and educating "the public about proper classification of employees and the prevention of employee misclassification." Given the direct charge made to the Industrial Commission Chair and the requirements of the Industrial Commission annunciated by Executive Order No. 83, the Commission has a central role in enforcing the Order.

In the next installment of this series, we will explore how the Industrial Commission has assimilated these responsibilities into its broader operations, the effects on North Carolina business and industry generally, and the effects and potential effects on the trucking industry in particular. If you have questions prior to the next installment in the next edition of this newsletter, please do not hesitate to contact any of our firm's Trucking and Transportation Practice Group members.

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Changes to Medicaid's Right to Recovery from Injury Settlements is Drawing Near

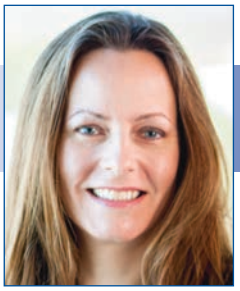
Shannon Metcalf, smetcalf@hedrickgardner.com

As a brief background, Medicaid's recovery rights from tortious settlements and judgments are set forth in federal and state statutes and, at times, have conflicted. In 2006, the United States Supreme Court issued a decision, Arkansas Department of Human Services v. Ahlborn, 547 U.S. 268 (2006), finding that only the portion of a settlement designated as payment for past medical expenses could be claimed by a state Medicaid program.

North Carolina's Medicaid subrogation statute, N.C.G.S. § 108A-57, requires up to one-third of damages recovered by a beneficiary to be paid to Medicaid, regardless of any allocation of damages. In 2013, a North Carolina medical malpractice case, Wos v. ex. rel. E.M.A., 568 U.S. 290 (2013), was heard by the United States Supreme Court on the issue of whether North Carolina's statute mandating automatic reimbursement of up to one-third was reasonable. The Supreme Court cited Ahlborn and noted federal Medicaid subrogation law preempted all states from taking any portion of a tortious judgment or settlement that is not specifically designated as payment for medical care, so North Carolina's statutory mandate that Medicaid recover up to one-third of a settlement is incompatible with federal anti-lien provisions. After the Ahlborn and Wos decisions, the government decided to make legislative changes to Medicaid recovery rights.

On December 6, 2013, President Obama signed the Bipartisan Budget Act of 2013. The intent of Section 202 of the Act, "Strengthening Medicaid Third-Party Liability," was to amend portions of the federal Medicaid Act that limited Medicaid recovery. The Act was initially supposed to take effect on October 1, 2014. That date has been pushed back several times and the Act will now take effect on October 1, 2017. The Act allows state Medicaid agencies to recover funds paid for medical treatment from any tortious settlement or judgment proceeds received by a Medicaid beneficiary. The states will be permitted to recover from the entire settlement proceeds, not just funds designated as payment for medical care.

Sound familiar? Sound a bit like Medicare's right to recover conditional payments made from the entire settlement amount? This change will certainly impact the ability to resolve claims on and after October 1, 2017. Until then, Ahlborn and Wos still control, so dig some of those cases with Medicaid beneficiaries out of your file drawers and settle!



Attorney Spotlight: Shannon P. Metcalf

Shannon is a partner in the firm's Charlotte office. Her practice focuses in the areas of workers' compensation and Medicare Secondary Payer Act compliance.

Q: Why did you become a lawyer?

SPM: Growing up, I witnessed the struggles of working class Americans and how hard work alone often did not result in financial success. I realized at a young age that a good education would be one of my greatest assets in my future career. This motivated me to fully devote myself to school, and in following my natural strengths, I decided to go to law school.

Q: What is your proudest moment?

SPM: I had many proud moments through school but early in my career I had two distinct situations that stand out. One was arguing a highly complicated medical causation issue in front of the North Carolina Supreme Court early in my career. To argue that case in such a beautiful and historic courtroom, against an attorney at least twenty years my senior, and win, gave me added confidence that I could handle anything thrown my way. The second was representing my mother in a case where she was owed a substantial amount of money. Even before a decision was reached on the issue in the case, I could see how proud my mother was about my performance and abilities in the courtroom. Winning that case for her made me feel like I had given a little something back to the woman that raised me to be who I am today.

Q: What is your favorite part about getting a new case?

SPM: Every new case involves a unique set of individuals and circumstances. I enjoy piecing together the facts of each case and working toward the most favorable outcome for each of my clients.

HEDRICK GARDNER
HEDRICK GARDNER KINCHELOE & GAROFALO LLP
ATTORNEYS AT LAW

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

Martha W. Surles
Workers' Compensation
Charlotte
704.319.5438

Gerald A. Stein, II
Civil Litigation
Charlotte
704.319.5464

Austin R. Walsh
Civil Litigation
Charlotte
704.602.8010