

About this Book

Do you know how to effectively litigate a trucking case? Does your firm have the resources it needs to handle these cases? Beasley Allen lawyer Chris Glover has written a primer for these types of cases, *An Introduction to Truck Accident Claims: A Guide to Getting Started*. This volume covers topics including the basics of trucking regulations and requirements, how to prepare for your case, how to identify potential Defendants including the carrier, the broker and the driver; and common issues that arise in commercial vehicle litigation, such as Hours of Service, fatigue, maintenance and products liability. Inside this book you'll find your road map to help you evaluate a potential heavy truck case and learn what it takes to get this complicated litigation on the path to a successful resolution.



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Chris has dedicated his law practice to protecting the rights of victims and survivors of catastrophic personal injury and wrongful death. An AV Preeminent Lawyer, he has represented injured individuals and their families in a wide range of serious injury and death claims, including those that were the result of defective products, automobiles, helicopters, commercial trucks, and workplace accidents. His experience in litigating cases involving 18-wheelers and other heavy trucks gives him an understanding of the special investment of time and resources needed to take on these types of cases, as well as a detailed knowledge of the many rules and regulations that govern the commercial trucking industry.

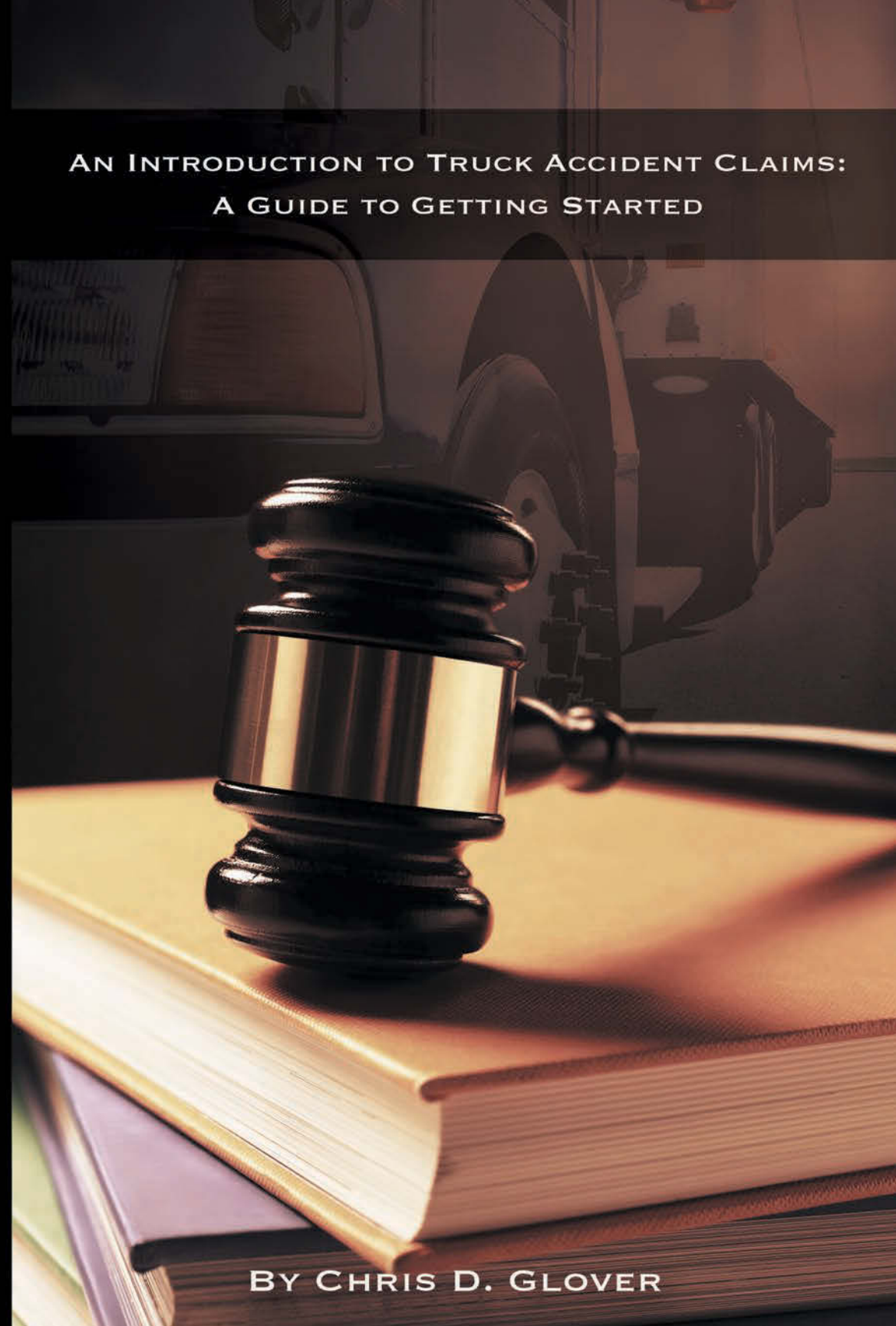
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BEASLEY, ALLEN, CROW, METHVIN, PORTIS & MILES, P.C.
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AN INTRODUCTION TO TRUCK ACCIDENT CLAIMS

CHRIS D. GLOVER

AN INTRODUCTION TO TRUCK ACCIDENT CLAIMS: A GUIDE TO GETTING STARTED



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An Introduction to Truck Accident Claims: A Guide to Getting Started

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Why write this book?

In my work, I see a lot of claims related to automobile accidents. More than twenty million automobile accidents occur each year in the United States.¹ Too many of these involve semi-trucks. It is true that the United States of America and various other countries around the world greatly benefit from the transportation of commercial goods carried by trucks. It is estimated that more than 70 percent of the goods in the United States today are transported by approximately 1.9 million semi-trucks.² The trucking industry produces provides more than 8.9 million jobs to people in the United States.³ The benefits of trucks are unquestionable, but the dangers of trucks can be unparalleled.

In 2009, there were approximately 3,380 fatalities as a result of large truck-related accidents and 74,000 injuries. The ratio of injuries to trucks on the road is extremely high, with approximately 90,000 accidents and injuries each year. Noncommercial drivers, especially those that commonly utilize the American interstates, share the roadways with commercial motor vehicles (CMVs), or trucks. The risk of fatalities is far greater when a truck is involved in a collision for obvious reasons: the truck is larger.

To put this in perspective, a Toyota Camry, one of the more common vehicles on the road, weighs approximately 3,400 pounds; a fully loaded semi-truck can weigh from 80,000 to 230,000 pounds and be more than 175 feet in length while hauling electric windmills.⁴ When a truck and car collide, the truck will win every time – often resulting in serious injury or death to the driver of the car. If a death occurs in an accident involving a truck, 98 percent of the time the deceased is the driver of the other vehicle.⁵ The chances are a lawyer in private practice will run across at least one truck wreck case during his or her career.

Cases involving 18-wheelers are complicated, with factors including the safety of big rig drivers, as well as the safety of automobile drivers that share the road with these heavy trucks.⁶ Cases involving big trucks are very different than a standard case involving a car crash.⁷ There are lots of rules and regulations surrounding commercial vehicles that a lawyer has to be familiar with in order to serve his or her client fully.⁸

Simply looking at the complexity of a trucking case, your head may begin to swim with the enormity of it all. It may seem like a daunting task to prepare for a trucking case, but with proper preservation, gathering and planning,

trucking cases do not have to be as formidable as they initially appear. Planning is the key to cutting down the behemoth early in the process. With a step-by-step plan and organization, trucking cases can be successfully prepared. Are trucks a necessary evil to those that share the roadways with them? The answer to this question is yes; without these mobile giants we would not have the many luxuries that are taken for granted on a day-to-day basis. Knowledge of safety regulations as outlined primarily by the Federal Motor Carrier Safety Administration (FMCSA) and adherence to the rules of the road can drastically decrease some of the dangers that trucks may present.

Ultimately, it is the responsibility of the commercial motor carrier to make sure the vehicles and drivers it employs meet all federal regulations to safeguard both its employees and the general driving public.⁹ It is also the responsibility of the commercial driver to make sure he or she is in compliance with the rules.¹⁰ In order to handle cases involving 18-wheelers and other heavy trucks, I have to be familiar with all those rules and regulations, as well as a lot of unique issues about technology, insurance, mechanics and other aspects that will affect the case.¹¹ This is something I am committed to doing.¹²

Thus, it is imperative for you also to have knowledge of the Federal Motor Carrier Safety Regulations, technology, business practices, insurance coverages, and to have the ability to discover written and electronic records.¹³ Expert testimony is of utmost importance.¹⁴ Accidents involving semi-trucks and passenger vehicles often result in serious injuries and death.¹⁵ Trucking companies and their insurance companies almost always quickly send accident investigators to the scene of a truck accident to begin working to limit their liability in these situations.¹⁶ Our lawyers, staff and in-house accident investigators immediately begin the important task of documenting and preserving the evidence – and so should you.¹⁷

In a recent case, the wife of a truck driver came to me after a lawsuit was filed against her husband's estate. He was a truck driver whose vehicle broke down in the roadway. Federal law requires a truck driver to put out three warning triangles. My client had only put out two of the required three triangles. Another tractor-trailer hit him from behind while his tractor-trailer was blocking the roadway. It looked bad for my client's case. We filed a counterclaim and ultimately reached a favorable settlement of the case. That case required litigation testing to prove that the driver who hit

my client's vehicle should have seen the stopped vehicle long before the wreck occurred and taken steps to avoid the collision.

One of my first trucking trials involved a tractor trailer driver faced with an emergency situation. A vehicle had stopped in his lane. The truck driver wasn't following too close or speeding. The truck driver locked down his brakes and directed his vehicle to the oncoming lane of traffic. This avoided the vehicle stopped in his own lane, but caused him to collide with the vehicle in the opposing lane of traffic. We successfully argued at trial that the emergency should have prompted the driver to steer his vehicle to the right, onto the shoulder of the road, in order to avoid both collisions. This case required our team to focus on the driver's failure to follow the training he had previously received in avoiding this exact emergency situation.

What drives me in pursuing cases like these is to make sure this horror doesn't happen to anyone else.¹⁸ We have the opportunity to help people when they need it the most; and that is the sole reason I do this.¹⁹ Every day I get to see people's lives changed for the better by our help.²⁰

As discussed further in the subsequent chapters, the Federal Motor Carrier Safety Administration (FMCSA), a division of the U.S. Department of Transportation, oversees the trucking industry. The primary mission of the FMCSA is to reduce crashes, injuries, and fatalities involving large trucks and buses on our Nation's highways. FMCSA has produced "A Motor Carrier's Guide to Improving Highway Safety." The guide discusses various countermeasures as examples of defensive driving strategies to reduce preventable accidents.

Below is an example of a carrier shut down by the FMCSA for having just about every violation in the book:

- ✓ "Failing to ensure that its drivers complied with hours-of-service regulations designed to prevent fatigue, including limitations on daily driving and maximum on-duty hours. During the investigation, investigators found that JDJD Transportation failed to maintain copies of drivers' records and had no safety management system to check and ensure driver compliance.
- ✓ Failing to ensure drivers possess a valid commercial driver's license (CDL) and that they were qualified to operate a commercial motor vehicle, using drivers that had not been tested for drug or alcohol use, and failing to implement a drug and alcohol testing program.

- ✓ Failing to systematically inspect, repair, and maintain its commercial vehicles. JDJD Transportation had no annual inspection records and did not require drivers to conduct pre- and post-trip inspections for its 15- to 30-year-old vehicles despite a pattern of roadside inspections finding serious maintenance problems.”²¹

The online notification of this shutdown included the below quotation, which is excellent in describing the point and purpose of this book, and trucking litigation as a whole:

“There is no higher priority than safety and we will not hesitate to order unsafe commercial drivers, vehicles, or entire companies off the road,’ said Transportation Secretary Anthony Foxx. ‘Our common sense safety regulations serve to protect the motoring public; everyone deserves to reach their destination safely.’”²²

CHAPTER ONE: HOW TO GET STARTED

You just received a call from a grieving client, whose wife and daughter were just recently killed in a semi-truck accident. During your preliminary investigation, you discover the truck driver was hired only twenty-five days ago. One of the driver's headlights burned out as he was transporting a tank of gasoline. A million questions run through your mind. Who in the government regulates these things? What laws did the driver or his employer maybe violate? When exactly did key events and factors occur – was it late at night or on a foggy morning? Where did it happen – on railroad tracks or up a mountain?

Really, you're asking "Where do I start?"

Start with Beasley Allen's *Introduction to Truck Accident Claims: A Guide to Getting Started*. At the beginning of each chapter you will find a list of frequently asked questions (FAQs) to help you identify key points of a prospective case, and maybe even point out something you had not yet thought to look for. At the end of the book, you'll find a sampling of regulations, charts and other data that you can sift through as needed. We reference this material throughout the chapters so you never have to feel lost.

You can also visit our firm website at www.beasleyallen.com or my personal website at www.chrisglover-law.com. These sites provide links to various online resources (such as regulations, etc.), so you can easily click to what you need and do a "Ctrl+F" search for key phrases and terms within the regulations.

Good luck, and just know – we are always only a phone call away.

Brief on the Basics

FAQs

- 1) What are the sources of regulations and requirements for the trucking industry?
- 2) What federal agency is the source of related regulations?
- 3) What are frequent violations that can be the key behind your cause of action?
- 4) What are some terms I should be familiar with?
- 5) What are key strategies and key people I should be pursuing?

What it's About

You share the road daily with these frighteningly massive trucks that transport goods across the country. How would you feel if the driver in control of the truck behind you was coming off of a methamphetamine high and dozing off at the wheel? Or, if the trucker passing you in the fast lane had received multiple tickets for speeding, was repeatedly found to have bad brakes, or had been arrested for DUI recently?

Driving is an inherently dangerous activity, in which most people actively participate daily, without considering the added risk of irresponsible drivers, especially ones in control of monstrous trucks. Between 2009 and 2012, the number of trucker fatalities were at a 35-year low — but since, the number has been rising.²³ The U.S. Centers for Disease Control and Prevention (CDC) reports that 700 truckers were killed and 26,000 were injured in 2012's approximately 317,000 truck accidents.²⁴ The price tag of these accidents for the U.S. economy was about \$99 billion.²⁵

Trucking began around 1910. It has been an efficient way to transport goods across the country since the development of gasoline and diesel engines. As of August 2010, the value of freight transported by trucks yearly in the United States is estimated to exceed \$670 billion dollars.

Trucking litigation is evolving around us every day. New theories are being developed and explored to help recover money for

people that are injured by enormous trucks on the road and their families, who are also impacted by the accidents. These new theories must be advanced, while weeding out the unsuccessful attempts in order to help people who are injured by careless truckers that are put on the roads by unscrupulous brokers and carriers. This book is designed to give you a basic understanding of all the moving parts in the evolving realm of trucking liability and what courts are saying about it.

Who regulates Who, What, When, & Where?

Federal

The federal government first promoted and regulated motor carrier safety in the 1930s, after Congress created the Interstate Commerce Commission. After a few transfers among agencies, interstate safety was placed in the hands of the Federal Motor Carrier Safety Administration (FMCSA) in 2000 and remains there today.

“In order that inspections are uniform, and everyone in the industry knows what to expect from the field investigators, the FMCSA puts forth Field Operators Training Manual. Any serious trucking lawyer should have a copy on file in his or her office. For example Chapter 1.4.7 deals with driving of commercial motor vehicles and 1.4.9.1 deals with Hours of Service violations [. . .].”²⁶

The agency also publishes regulations, or the Federal Motor Carrier Safety Regulations (FMCSR):

“The FMCSR applies to all vehicles with a Gross Vehicle Weight Rating (GVWR) in excess of 10,000 pounds and to vehicles pulling trailers with a combined GVWR in excess of 10,000 pounds. These include all ‘Medium Duty’ trucks and some ‘Light Duty’ trucks such as a one ton Ford F-350 or a GM 3500.”²⁷

Furthermore, to promote safety on the roads, the FMCSA monitors commercial motor vehicle drivers’ licenses and the safety of the drivers’ practices and offers the Motor Carrier Safety Assistance Program (MCSAP). In an effort to decrease the number of accidents and reduce their severity, the MCSAP incentivizes states with federal grants to adopt and enforce rules, regulations, and standards compatible with the FMCSA’s.

Who oversees trucking depends on the type of truck and what the trucks are transporting. Interstate trucking on public roads is overseen by the Department of Transportation (DOT), while most trucking on workplace property is overseen by the Occupational

Health and Safety Administration (OSHA). Violations or litigation involving OSHA will be rare. “The term ‘interstate commerce’ within the meaning of the FMCSRs and underlying statutes is not synonymous with transport across state lines, and can include operations conducted wholly within a single state.”²⁸ The FMCSA provides the following guidance regarding what qualifies as interstate versus intrastate commerce:

“Interstate commerce is determined by the essential character of the movement, manifested by the shipper’s fixed and persistent intent at the time of shipment, and is ascertained from all the facts and circumstances surrounding the transportation. When the intent of the transportation being performed is interstate in nature, even when the route is within the boundaries of a single state, the driver and commercial motor vehicle are subject to the Federal Motor Carrier Safety Regulations.”²⁹

Further, OSHA regulates loads of gravel, cement, logging, agricultural products, etc., while the DOT regulates all interstate and intrastate hazardous materials.

OSHA’s regulations and actions are preempted by those of other federal agencies, unless the situation is not covered by the other agencies’ regulations.³⁰ The following three main principles apply in determining OSHA’s jurisdiction and authority:

- 1) “OSHA cannot enforce its authority with respect to working conditions over which another federal agency has exercised its authority even if the other agency’s standards are not as stringent or as stringently enforced as OSHA’s.”
- 2) “If a federal agency fails to exercise its authority with respect to working conditions, OSHA has jurisdiction to inspect and to cite for violations of standards.”
- 3) “A negative exercise of authority can oust OSHA from jurisdiction. It must be noted, however, that 4(b)(1) situations must be considered on a case-by-case basis and deference given to a sister agency’s interpretation of authority.”³¹

The FMCSA has also published “A Motor Carrier’s Guide to Improving Highway Safety,” available online at

<http://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/ETA-Final-508c-s.pdf>. While not actual regulations, the guide is a useful resource and does discuss various countermeasures as examples of defensive driving strategies to reduce preventable accidents.

Federal regulations are merely the minimum. States may add further requirements, and the industry recognizes that companies are obligated to have set standards that “go the extra mile”—above and beyond the minimums set by the government.

State

State regulations govern purely intrastate activities. Pursuant to the above comparison of interstate and intrastate activities, an example of just intrastate activity may be a local store that operates a truck to make only instate deliveries.³² While state traffic laws often correlate with federal laws, any differences can be preempted by federal regulations.³³ Furthermore, federal regulations will sometimes preempt even a state’s common law.

The relationship of the state and federal governments in regulating trucks is best summarized by the following:

“Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.”³⁴

Industry Standards

The trucking industry has developed its own standards for truckers, carriers, and other key actors. These standards are generally higher than the minimums set by the government, and carriers’ policies and drivers’ practices should reflect an attitude of “going that extra mile.” While it is challenging to determine these standards if one is outside this industry, experts and the materials provided by certain organizations can help. J.J. Keller & Associates is one such example. Their website has countless free, online accessible

resources for truckers, carriers, and practitioners such as you. Below are other industry organizations:

- Other trucking companies
- American Trucking Associations
- American Association of Motor Vehicle Administrators
- Commercial Vehicle Training Association
- National Association of Publicly Funded Truck Driving Schools
- Truckload Carriers Association
- Women in Trucking³⁵
- States' Commercial Drivers License (CDL) manuals.

Industry standards push rogue trucking companies to increase their level of safety. These standards almost always require the use of a qualified trucking expert to get into evidence and serve as the “reasonable core” standard in a common law negligence claim.

Learning the Lingo

In order to have any understanding of the developing theories in trucking litigation, you need a basic understanding of common terms used in the trucking industry.

BASICS: CSA monitors seven safety improvement categories, called BASICS – Behavior Analysis Safety Improvement Categories. Carriers are assigned a score based on the criteria. Scores range from zero to 100. Zero is the best possible while 100 is the worst. The criteria that is used to assign scores includes Unsafe Driving, Hours of Service Compliance, Driver Fitness, Controlled Substances/Alcohol, Vehicle Maintenance, Hazardous Materials Compliance, and Crash Indicator.³⁶ There is more information about BASICS in Chapter Two, under the section about Carriers.

Broker: A federally regulated freight “broker” is defined as “a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent, sells, offers for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or assigning for, transportation by motor carrier for compensation.”³⁷ Or: a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.”³⁸ Brokers are also called “freight brokers” or “third party logistics” companies (3PL).

CSA: Compliance, Safety, Accountability is a Federal Motor Carrier Safety Administration initiative to improve large truck and bus safety and ultimately reduce crashes, injuries and fatalities that are related to commercial motor vehicles. It began in December 2010 to establish a new nationwide system for making the roads safer for motor carriers and the public alike.³⁹

FMCSA: The Federal Motor Carrier Safety Administration was established within the Department of Transportation on January 1, 2000. The FMCSA’s primary mission is to prevent commercial motor vehicle-related fatalities and injuries.⁴⁰

Motor Carrier: A person providing motor vehicle transportation for compensation.⁴¹

SafeStat: An outdated system that was used to measure a carrier's safety performance. This is no longer used since the creation of CSA.⁴²

SMS: The Safety Measurement System evaluates roadside performance data. This data is used to calculate the BASICs scores and crash involvement.⁴³

USDOT/DOT: The United States Department of Transportation.

Key “Whos” of Regs & Reqs

Who are key actors in the trucking industry? The list includes motor carriers, brokers, government agencies, truckers, mechanics, manufacturers, truck/trailer owners, etc. In Chapter Two, we examine drivers, carriers, and brokers — who they are and what responsibilities they have. In Chapter Three, we take a few of those critical and most often shirked responsibilities by drivers, carriers, and manufacturers and analyze them in detail to assist you as a practitioner in using those details to craft your claims of action.

Key “Whats”

What are the top ten key causes of action in trucking litigation? Here we give you a short list of the top ten causes of action in trucking litigation. (Subsequent chapters provide additional detail.)

1. **Fatigue** – While the federal government has established strict Hours-of-Service (HOS) regulations, drivers often disregard these or even falsify their records. Drivers are often generally uneducated about the dangers of fatigue. Carriers are responsible for ensuring drivers are aware of the dangers and for reviewing driver logs and watching driver behavior and performance.
2. **Maintenance problems** – Both carriers and drivers share the responsibility of ensuring the trucks are carefully maintained.
3. **Distractions** – Drivers must avoid distractions. This is thoroughly discussed in the Commercial Driver’s License (CDL) manual, which drivers have to study to receive their licenses. Texting is a growing, common distraction, but anything (including smoking, eating, etc.) can be a distraction. Drivers are responsible for avoiding these. In New York, one truck driver was caught on camera talking on two different phones (presumably having two different conversations).⁴⁴

“Drivers that did use their cell phones while driving did not look at the roadway an average of 4.6 seconds while the devices were in use. If the

driver was traveling at 55 mph, this would equate to driving ‘blind’ the approximate length of an entire football field, including the end zones.”⁴⁵

4. **Traffic flow interruption** – This is related to distractions. A distracted or fatigued driver can fail to notice a stall in traffic ahead, but a responsible driver will maintain proper attention at all times.
5. **Prescription drug use** – (see below)
6. **Over-the-counter drug use** – It is not just illegal drugs that can cause a driver’s downfall. Drivers cannot use any drugs without a physician’s assurance that their use will not adversely affect their driving abilities. (There is more in-depth information regarding substance abuse in Chapter Three.)
7. **Drunk driving** – The federal regulations strictly prescribe drivers’ use of alcohol and carriers’ responsibilities in testing drivers.
8. **Traveling too fast for conditions** – A rushed driver might be driving within the legal speed limit but may be “speeding” given the current road or weather conditions. Rain or fog or construction zones can require slower speeds than the limit prescribes. We describe industry and CDL manual expectations in Chapter Two.
9. **Unfamiliarity with roadway** – A responsible driver needs to do all he can to familiarize himself with his route. If he has never or rarely driven the route, he needs to remain particularly alert and cautious — especially when taking curves, etc. In one accident, the police said the driver’s unfamiliarity with the road may have caused him to go off the road on a curve, hit a road sign, snap a tree, and roll only a few feet away from a residence.⁴⁶
10. **Awareness** – A responsible driver follows the instructions in the CDL manual regarding awareness of her surroundings. We explain these concepts in Chapter Two’s section regarding drivers.

Left Turns and U-Turns

Patience and caution are critical when a trucker has to turn left across incoming traffic, so incoming traffic does not have to stop suddenly as the truck slowly completes the maneuver.⁴⁷ Rushed drivers are known to make such turns while knowing there is not enough time for them to do so unless the incoming traffic slows down to prevent a collision.⁴⁸ The fact that the driver is executing a maneuver indicates a lack of fatigue, though it may indicate a driver's distraction or inattentiveness.⁴⁹ Your approach should be to focus on the driver's disregard of safe maneuvers as described in detail in the CDL manual (discussed further in Chapter Two regarding the driver). You can also focus on the carrier's negligent hiring or retention – if you can prove the carrier knew this driver had previously acted in the same or a similarly dangerous manner (see Chapter Three regarding this theory of liability). U-turns are extremely dangerous for large trucks. Most safety-conscious trucking companies strictly prohibit them for their drivers. Many make a U-turn occurrence an automatic firing offense.

Underride

A car driver may not be able to stop in time if a truck blocks the road, such as while making a turn. In such a situation, the car will continue to move forward under the trailer, often resulting in decapitation and death of the car driver. If you have such a case, a key to winning is to prove with photos and an inspection the truck was not properly visible – such as because of dirty or damaged reflectors, retroreflective taping, etc.

Stopped Trucks

If he must stop his truck in or on the side of the road, a truck driver is required by federal regulations to warn oncoming traffic by placing markers at specified intervals behind the truck within specified times. (See Chapter Two on drivers for details regarding the placement of emergency markers.) To prove the driver waited too long to place the markers, you should to examine 911 call reports, cell phone records, etc. (Drivers will of course claim the accident happened before there was time to set out the markers).

Rear-End Collisions

When a truck driver rear-ends another vehicle (the most common type of truck collision), you need to consider whether the trucker

fell asleep or was fatigued (see Chapter Three regarding fatigue); whether the cargo was too heavy or not heavy enough; whether the brakes were malfunctioning (see Chapter Three regarding maintenance); and whether the driver was speeding. To do so, you will likely need the driver's logs, weight tickets, history of citations, maintenance and inspection records, and an accident reconstructionist.

A truck driver and his carrier can also be liable if they rear-end the tractor trailer. These cases can be difficult, but are fairly common. Truck drivers parked on the side of the road or re-entering traffic create a hazard. Slow moving or backing vehicles also are very dangerous, especially at night, to traffic approaching the truck from the rear. These case many times involve issues of conspicuity and as well as the question of whether your client responded appropriately. This question usually needs to be addressed by human factors an expert familiar with human reaction and responses to unfamiliar occurrences.

Backing Accidents

Backing is particularly dangerous for tractor trailer trucks. A truck driver doesn't have the ability to see behind him the way a passenger car can. That makes it all the more necessary to take additional precautions. Many trucking companies advocate truck drivers follow the steps outlined in the G.O.A.L. acronym. G.O.A.L. stands for Get Out And Look. This is obviously done to assure nothing is behind the truck prior to movement.

Improper Maneuvers

If the driver in your case swerved, changed lanes recklessly, etc., you will want to look at a driver's history (his past traffic citations, performance history, etc.) in consideration of pursuing a theory of negligent retention and hiring (see Chapter Three regarding carriers). Of course, fatigue and hours of service violations may be an issue as well (again, see Chapter Three regarding fatigue). Again, you should hire a reconstructionist who can prove the cause of the accident by preserving and interpreting the evidence.

Shifting Cargo or Unsecured Cargo

If the cargo was not properly loaded, the truck may jackknife or overturn from a shift in the cargo. Many times the truck driver will blame that movement of the load caused the vehicle to lose control

leading to the accident. The carrier and shipper should be your targets in a case like this, and – as always – photographs and other forms of evidence preservation are critical.

What were the driver and carrier doing (or not doing)?

Below we have a list of what the driver and carrier may have been doing (or not doing) that are violations and common causes of action. (We further analyze many of these in the subsequent chapters.)

DRIVERS:

- ✓ Distractions
 - Texting
 - Eating
 - Phone calls
 - Smoking
 - Unauthorized passengers
- ✓ Inspection Failures
 - Failure to Inspect at all
 - Failure to Inspect properly
- ✓ Fatigue
 - Violations of HOS regs
 - Undiagnosed sleep apnea
 - Falsified records
 - Economic pressures
- ✓ Substance Abuse
 - Alcohol
 - Over-the-counter drugs
 - Illegal drugs
- ✓ Aggressive driving
- ✓ Disregard of road conditions
- ✓ Traffic violations
 - Speeding
 - Running red lights
- ✓ Obesity
- ✓ Cargo
 - Proper Securement
 - Shifting from Careless Driving
 - Oversized load

CARRIERS:

- ✓ Hiring and retention
 - Background checks
 - Properly qualified or experienced
- ✓ Training
- ✓ Maintenance of Vehicles
 - Qualified inspectors
 - Manufacturers' prescribed schedules for parts
 - Tires, wheels, brakes, rearguards, windshield wipers, etc.
 - Truck visibility
- ✓ Substance abuse tests
- ✓ Compliance with HOS regs

One Last Key

This list was meant to help you identify common keys that will “turn on” your claim and get it going down the road. But keep in mind there are many other regulations and considerations — including ones you may find reading the subsequent chapters — that could bolster your claim.

Prep for your Case

FAQs

- 1) What should be my first steps?
- 2) What are key things to look for in discovery?
- 3) Should I hire experts? If so, what kind?
- 4) Is litigation testing worth it?
- 5) Could I argue there was more than one accident?
- 6) What are common theories of liability in trucking cases?

Pre-Suit Investigation

Remember, even if you get the case early on, your investigation is already behind. By the time you meet your client, several investigations have already been performed (law enforcement/DOIT, trucking company, and insurance company). So, after the initial client interview, send preservation letters to every potential defendant and nonparty in possession of evidence, informing him/her of his/her legal duty to preserve evidence in a potential civil trial.

For example, send a letter to the trucking company requesting preservation of driver logs, onboard computer data (i.e., electronic control module “ECM” data), and dispatch records. Otherwise, DOT regulations require that these records only be kept for six months. Preservation letters not only keep defendants from discarding evidence in the normal course of business, but also prove notice if spoliation becomes an issue at a later date. Further, to prevent spoliation and inadvertent loss of evidence, you should locate, inspect, and secure the accident vehicles as early as possible in your investigation.

Go to the scene of the accident with an investigator or accident reconstructionist and take your own photographs and video of the scene. Then, identify and contact all potential witnesses. Getting eyewitness information about speed, distance, and driver behavior is crucial to your case. Since memories tend to fade with time, the sooner you are able to contact and interview witnesses, the more details you will be able to obtain.

After identifying the truck driver, obtain a complete driving history from each state in which he was issued a Commercial Driver's License (CDL). Also request a copy of the Uniform Traffic Accident Report. If there was a motor carrier inspection performed on the date of the wreck, obtain that report as well by contacting the Motor Carrier Safety Division of the Department of Public Safety. Further, if fatalities occurred, a Traffic Homicide Report from the Department of Public Safety should also be requested. It is also imperative that you contact the appropriate state agencies and request copies of any other filings or certificates concerning the trucking company.

Discovery

Your discovery should focus on establishing liability while still considering factors that substantiate a claim for punitive damages. During discovery, below are some of the things you will want to request:

- ✓ Driver's qualification file and driver logs
- ✓ Daily inspection reports
- ✓ Annual inspection report
- ✓ Inspection, maintenance, and repair records
- ✓ OEM data and/or printout
- ✓ Any drug and/or alcohol tests taken after the accident
- ✓ Accident register
- ✓ Any bills of lading
- ✓ Weight tickets
- ✓ Hotel receipts for the week preceding the accident
- ✓ Any policy and procedure manuals or training documents
- ✓ Medical records of the defendant driver
- ✓ Medical records of your client
- ✓ The motor carrier profile from the DOT
- ✓ The DOT safety audit and rating of the trucking company
- ✓ All electronically recorded data relating to the truck, trip, and accident in question

Also, request the following:

- ✓ Any writing that relates to driving safety system in place at time of accident

- ✓ Any device or system used to record the speed of the truck before and during the collision (e.g., a GPS tracking system)
- ✓ Any writing in place at time of collision relating to safe operation (driving, loading, etc.)
- ✓ Any contracts or agreements between the truck driver and owner of tractor being driven
- ✓ Any contract or agreement between the truck driver and the people for whom he or she was driving⁵⁰

You should always use a rules approach because it is the best way to show the jury that the trucker or trucking company did wrong in the case. Have a list of rules prepared before sitting down to take the deposition and be sure that the list is thorough and efficient. Ultimately, the existence and violation of these rules will form the liability backbone of your client's case. After obtaining the responses to all written discovery, depose the following:

- ✓ Truck driver
- ✓ Trucking company corporative representative
- ✓ Safety director
- ✓ Trainer or instructor
- ✓ Lay witnesses

Be sure to question the safety director thoroughly regarding hiring criteria, safety policies, safety records and procedures as well as methods of driver monitoring. The FMCSA maintains company safety profiles on carriers, available at <http://www.fmcsa.dot.gov/>.

Early in the litigation, determine the existence and amount of insurance coverage available in your case. Beyond the obvious discovery requests, take a look at www.safersys.org to determine the amount of coverage the trucking company has obtained. Remember that FMCSR Part 387 sets out the minimum levels of financial responsibility for trucking companies. Also, it is important to note that one of the unique considerations of insurance coverage involving commercial carriers is the MCS-90 endorsement. This is a federally mandated endorsement for all commercial carriers in excess of 10,000 lbs., enacted to prevent parties involved in the shipping of freight from denying responsibility and pointing the finger at each other and in effect preventing and/or delaying recovery to an injured party.

Experts

Carefully consider the facts involved in your case and select appropriate experts. For example, if your case involves a serious and permanent injury, the use of an economist to prove loss of future earning and the use of a life care planner to prove future medical costs can greatly impact your case value.

It is a good idea to hire an accident reconstructionist early in the case, so he can be involved in the inspection of the accident scene and vehicles while the evidence is fresh. This expert is invaluable in your determination of liability and also in determining any aggravating circumstances such as speed or failure to take corrective action.

An expert knowledgeable in the FMCSR is also an important asset. Such experts can greatly assist you by determining if a safety or logbook violation exists as well as providing testimony regarding improper vehicle maintenance, inspection, and equipment. Also, an expert can assist you in preparing for the trucking company's depositions in your case.

Litigation Testing

I spend a great deal of my practice handling product liability claims against automobile manufacturers (see our Chapter Three section devoted to product liability claims). I have learned that litigation testing is a necessary fact of life for the product lawyer. A thorough understanding of how testing can be offered at trial is critical in these cases.

The car companies certify their vehicles to Federal Motor Vehicle Safety Standards through crash testing and heavily rely on that testing in litigation to defend the product. These well-funded defenses routinely run litigation testing to counter plaintiff's expert's positions and we do the same to attack the defense positions. Moreover, even when attacking the credibility of the other side isn't the purpose of the testing, *Daubert* concerns about the admissibility of expert opinions many times require the experts

on both sides of the case to support their positions at trial through litigation testing.

A few years ago, I found myself handling an increasing number of commercial vehicle cases, especially those involving tractor trailer trucking wrecks. Without fail, at some point in the case, the defendant tractor trailer driver comes up with some ridiculous excuse as to why the accident occurred. Sometimes the positions raise their ugly heads during interrogatory responses, but mostly, the truck driver offers them for the first time at deposition. I always wonder if these are planned out or off-the-cuff excuses for a horrible tragedy.

The first time I faced this was in a case where the defendant driver made a left hand turn from the center lane of travel and hit my client who was also to his left. He claimed my client was speeding in the lane to his left and that the lane would have been clear but for my allegedly speeding client. The logical question I asked at deposition was, "Why were you turning from the center lane?" The driver's response was unexpected.

This defendant truck driver explained that it was impossible to make the turn in his truck from the left lane. He further went on to lecture me that not only did he always make the turn from the center lane, but that every truck driver who took that route did the same thing. To finally drive the nail in my coffin, Mr. Driver then tells me that the police in this small town allow these turns from the center lane to assist the drivers in this impossible task of making the left turn.

I left the deposition realizing that I had a serious issue that needed to be addressed. Even though this case was pending in Alabama, where such turns are statutorily prohibited, the driver's turn was not negligence *per se*. Even worse, I could see a conservative jury buying this argument. My instincts kicked in, and I immediately began devising ways to disprove this position. Surely it wasn't impossible, I thought.

I hired a commercial motor vehicle expert who had a commercial license and could operate a tractor trailer. We rented an exact truck, and by exact, I mean the same year, make, and model as the one involved in the case. I then took a video camera and set out to film my expert make the turn the defendant driver had said was

impossible. We discovered the “impossible turn” defense was a complete fabrication. We made the turn multiple times with no problem. The driver really did me a favor by throwing in that all the other drivers made that left turn the same way he did. While we were videoing our expert, we were fortunate enough to video several other drivers make the same turn from the left lane with no problem. Even though the other drivers were driving different trucks and carrying different loads, it was relevant to counter the defense’s assertion that everyone did the same thing.

Producing this video tape at my expert’s deposition was the end of the case. The defendant driver lost all credibility, and since I had also gotten the trucking company’s safety director to agree with the impossible left turn defense, the defense was left with zero credible witnesses and no solid theory to rebut our allegations. The litigation testing I conducted in that case disproved the defendant driver’s ridiculous excuse and resulted favorably for my client.

The success I had with litigation testing in that case led me to use litigation testing in almost all of the trucking cases I have handled since that time. The key to litigation testing is finding the issue. I recently heard that every case is about something. Our job as lawyers is to find out what that something is and then take hold of that issue for our clients. I have learned that litigation testing in a tractor trailer case can do just that under the right conditions.

It is often difficult to have litigation testing admitted into evidence. To comply with the evidentiary hurdles, a product lawyer must first decide what the litigation testing is trying to accomplish. Then, the lawyer must devise a plan for the litigation testing that anticipates any problems with admissibility. In my case above, it wasn’t enough to have a truck make the turn. I needed the same truck, with the same load, traveling at the same speed, and under the same driving conditions. Obtaining that information takes planning through discovery.

A product lawyer can offer litigation tests for multiple purposes. A lawyer can use litigation testing to recreate the event or to illustrate physical principles in play. The evidentiary standards are different. This is an oversimplification, but a recreation usually is attempting to show the full event of what happened. An illustration is a small piece of the puzzle.

Recreation Testing

The evidentiary burden is raised if the purpose of the test is to recreate the accident or some aspect of the accident. The most important hurdle when doing this type of litigation testing is making sure what you are showing in your test is substantially similar to the actual events. It is well established that “[a] test is not admissible unless the test conditions are so nearly the same in substantial particulars (as those involved in the episode in litigation) as to afford a fair comparison in respect to the particular issue to which the test is directed.”⁵¹

Making sure that what your test depicts is substantially similar to the actual event is of critical importance. That is not to say that the testing must be exactly similar; substantial similarity by definition is not exactly the same. The jury must be able to compare what is shown in the test and then make a fair judgment as to the actual incident.

We recently handled a case where our client was a truck driver who started out as a defendant. Another trucker had hit him from behind while our client’s tractor trailer was stopped in the roadway. The impact killed our client so we were never able to ask him what had happened. Our client had put out two of the required warning triangles prior to his death. We initially believed our client’s vehicle was disabled since his vehicle was stopped in the middle of the roadway, but mechanical inspections failed to reveal anything wrong with the tractor trailer. This case posed a serious problem. Our client was in violation of the law in several aspects, including blocking the roadway and failing to appropriately warn oncoming traffic.

We decided to conduct litigation testing to show that the tractor trailer that hit our client from behind should have been able to see his disabled vehicle and avoid the crash. The collision occurred on the interstate so getting access to the interstate was a problem. This was necessary to satisfy the substantial similarity doctrine. Fortunately, the state highway patrol agreed to shut down the roadway so that we could conduct our litigation testing.

We then rented two exact tractor trailers and hired two truck drivers. We placed our client’s tractor trailer in the roadway with two emergency triangles. We then took the second tractor trailer and made the approach. We made sure the lighting conditions were

the same with regard to known surrounding traffic as well as natural lighting from the moon and stars. We approached the parked tractor trailer at the same speed that was shown on the electronic control module. Our testing revealed that an alert truck driver would have seen and avoided the stopped tractor trailer in the roadway. That testing turned the outcome of that case.

Underlying Principles of an Expert's Opinion

It isn't always necessary to show substantial similarity. Litigation testing is often used to support or discredit an expert's opinion. Usually, this happens when experts disagree on an issue. For example, one expert might say the brakes react in a certain way and the other expert disagrees. One expert might say the driver had time to avoid the crash and the other disagrees. Testing to prove or disprove principles underlying an expert's opinion need not meet the substantial similarity test.⁵² However, when this type of testing is admitted into evidence, it should "be made clear to the jury that even though there is not similarity to the events of the accident that the information is received on a theoretical basis for the limited purpose for which it is offered."⁵³ *Hankins v. Ford Motor Co.*, 437 F.2d 276 (3rd Cir. 1970); *Miller's National Insurance Co. v. Wichita Flour Mills Co.*, 257 F.2d 93 (10th Cir. 1958). Even though illustrative testing is not held to the substantial similarity standard, it is scrutinized beyond a mere relevance standard due to the highly persuasive nature of films.⁵⁴

We have run tests to show the time, distance, and space needed to change lanes in a particular truck. We didn't feel we needed to do it on the same road, but a similar road sufficed. We did use the same vehicle. We have run tests to determine the stopping distance of a particular vehicle. In those cases, the vehicle and roadway should be similar. It probably isn't as important that the lighting or traffic conditions be the same.

I once had an expert who opined that a truck could come to stop in a certain – but relatively short – distance. The defense expert disputed our opinions on the distance it required for this truck to stop and we ran a rebuttal test to counter his opinions. In that case, there were some similarities we needed to the actual incident but others were less important. It was important that the truck was the same and that the load was the same. The type and grade of the roadway needed to be the same. Things like lighting and traffic

conditions were not as important simply to determine what certain types of brake marks looked like on the road.

I've found that credibility is critical in every trial. The role of the impartial jury is to listen to both sides, apply the law, and determine which side should win. I've seen testing in commercial vehicle cases prove the other side wrong and, sometimes, reveal the other side's untruthfulness. When testing is done correctly, it can make or break your case by building the credibility of one witness and tearing apart the credibility of the other witness.

Multiple Occurrences

The below article, co-authored with me by Randall S. Haynes, applies to automobile and truck accidents alike.

It is possible...the law is there. When multiple losses attributable to the same covered cause occur, a problem exists in determining the scope of a liability policy's coverage. In such a situation, it is sometimes difficult to determine whether there has been one occurrence or multiple occurrences. The difference can mean a full recovery for your client or a split of policy limits between multiple parties.

Liability insurance provides coverage for legal liability imposed upon the insured as a result of unintentional and unexpected personal injury or property damage. Until 1966, coverage was keyed to the word "accident," which was defined as "a sudden and unforeseeable event." Courts have always struggled with the term accident, and have defined accident in different ways. However, there is a common theme in these definitions, which is that an accident is an unforeseen, unexpected, and unintended event that results from some cause, either known or unknown, whether it arises in property, personal, or liability insurance.

In 1966, the standard liability policy was revised to key the coverage to the word "occurrence." As of 1973, the standard CGL policy defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Under the plain language of the clause, a repeated exposure to conditions was on accident, meaning that the policy limits apply once, regardless of the number of losses.

“Cause Analysis” Doctrine

Suppose a driver loses control of an automobile, strikes one car, bounces off this car, and strikes another car. Now suppose a driver loses control of an automobile, strikes one car, bounces off this car, but then either regains control or had an opportunity to regain control prior to striking another car, albeit only feet or seconds away. Have there been one or multiple occurrences? The difference depends on the facts of each case, but under the second scenario a court could likely find two occurrences.

The majority of states have adopted “cause analysis” rule in determining the number of occurrences. The “cause analysis” rule depends upon the number of “proximate causes” for the accident. Under this rule, there is only one cause if there “was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.”⁵⁵ Likewise, the “cause analysis” rule will permit a finding that multiple collisions constitute multiple “occurrences” if multiple “proximate causes” lead to the loss.⁵⁶ If a time interval separates two events, a court might conclude multiple causes existed, meaning that multiple occurrences resulted. Other factors are important as well in motor vehicle accidents.

This “cause analysis” was adopted in an early Washington state case addressing the application of a liability insurance clause limiting liability to “one occurrence.”⁵⁷ In *Truck Ins. Exchange v. Rohde*, the Washington Supreme Court asked if “[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damages.” Since the *Rohde* decision, the majority of courts across the nation have adopted the “cause” theory of analysis.⁵⁸ One state court explained further that if the cause is interrupted or replaced with another cause, the chain of causation is broken and more and one accident or occurrence has taken place.⁵⁹

Time, Distance and Control

Other jurisdictions have examined this issue using the “cause” analysis. A Florida case, *Liberty Mutual Ins. Co. v. Rawls*, applying the “cause analysis” provides specific application of this doctrine provides specific application of this doctrine to an automobile collision.⁶⁰ In *Rawls*, the court was asked to determine whether there were one or two occurrences arising out of impacts occurring “2 to 5 seconds apart and 30 to 300 feet apart.”⁶¹ The court noted,

“[t]here is no evidence that the Bess automobile went out of control after striking the rear end of appellees’ automobile.”⁶² The court held that these were two occurrences providing full policy limits coverage for each one.⁶³ The three determinative factors in *Ramls*, time, distance and control, are all factors in determining if your multiple collision accident merits policy limits from multiple occurrences.

In a Delaware case, *Ennis v. Reed*, a negligent driver struck the first car from the rear, and then struck the second car.⁶⁴ There was a 15- to 20-foot distance between impacts, and several seconds passed between the impacts. From the evidence presented, the court concluded the negligent driver stopped after he hit the first car and then attempted to drive away from the scene and in doing so, struck the second car. The court applied the “cause” analysis and held two occurrences took place.

Another case addressing this topic under the cause analysis is *Illinois Nat. Ins. Co. v. Szczypekowicz*.⁶⁵ In that case, the negligent driver stopped his tractor trailer with his rear portion effectively blocking both northbound lanes of traffic.⁶⁶ The first car hit the tractor trailer.⁶⁷ The tractor trailer then moved forward approximately 12 feet “almost immediately” after the collision leaving his vehicle in one lane without losing control of the vehicle.⁶⁸ The court held there was no single force, or an unbroken or uninterrupted continuance, existed, once set in motion, that caused multiple injuries.⁶⁹

One court analyzing these cases and others stated:

*The common element of those cases finding that one accident or occurrence took place is that the time span was two seconds or less. Additionally, in most of the cases, the fact the negligent driver never regained control over the car was an instrumental factor.*⁷⁰

The attorney seeking a finding of multiple occurrences must begin building the case from the initial client interview. Fact witness depositions should be focused on the time, distance, and control factors. Vehicle black boxes can be downloaded in order to determine the total time of the collision sequence. More importantly, the black box in many vehicles can create a timeline showing what actions or omissions the defendant driver was taking during each phase of the collision. For instance, braking, clutching,

and accelerating all are actions that are recorded by many black boxes and can be key evidence in determining whether the driving remained in control of the vehicle.

It is possible to interpret a liability policy to provide multiple occurrences in an automobile case. The facts of each collision sequence control. Was there adequate space between each vehicle to avoid the next vehicle? Did the defendant have time to avoid the next collision? Did the defendant regain control or have the opportunity to regain control prior to the second collision?

Theories of Liability

Determining fault in a trucking accident when the truck driver runs a red light or rear-ends a vehicle legally stopped is not all that difficult. There are certainly difficult issues in those cases, like why the driver was not operating the vehicle responsibly as well as why the trucking company was overseeing a tractor trailer on the road that operated dangerously. Despite the expertise it takes to dig into the causes of those problems, it can be at times fairly obvious who was at fault in crashes. In those cases, obtaining maximum value for my clients requires digging into the deeper issues and not stopping with the obvious.

There are cases, however, when the underlying cause of the accident is a challenge to prove. Those cases require a great deal of work to prove not only the events leading up to the wreck in the weeks and months prior, but on the day of the wreck itself. A great number of my cases come to me after other lawyers have declined to represent the client.

To help you avoid declining potential clients, I advise you to thoroughly research the facts of your case to ensure that you include all applicable theories of liability in your complaint. Some commonly used theories in truck cases include:

- ✓ Negligence *per se* (applicable to all potential defendants)
- ✓ Common law negligence and wantonness (applicable to all potential defendants)
- ✓ Negligent/wanton entrustment, hiring, retention, training, and supervision (applicable to the carrier and/or broker)
- ✓ Negligent maintenance of the vehicle and equipment (applicable to both the driver and carrier)

- ✓ Product liability (applicable to the manufacturers)

Below, we provide a brief overview of a couple general concepts of law that could be theories of liability for multiple defendants, such as the ones discussed in Chapter Two. As mentioned before, in Chapter Two we take a quick look at the theories unique to carriers, drivers, etc. Then in Chapter Three, we more thoroughly analyze a few theories uniquely applicable to the trucking industry. For example, as discussed in Chapter Three, product liability cases are often overlooked especially in a single vehicle accident involving a large truck. However, theories of defective roofs, seatbelts, cab guards and the like apply equally to 18-wheeler trucks as they do to a car.

Common Law Negligence, Wantonness, and Negligence Per Se

“In 2012, 3,802 large trucks were involved in fatal crashes, 77,000 were involved in injury crashes, and 253,000 were involved in property-damage-only crashes.”⁷¹ This means that large trucks contributed to **more than** ten percent of all fatal crashes in the U.S. in 2012 (there was a total of 30,800 fatal crashes in 2012).⁷²

Needless to say, carriers must comply with regulations as well as industry standards. Similarly, drivers must use a reasonable truck driver’s standard of care while on our roads. Truck drivers must follow the “Rules of the Road” while driving a commercial vehicle. If a driver does not and his actions are the cause of an accident that results in another’s injury, then the driver is guilty of negligence — whether or not he violated any specific regulations or industry standards. There are many sources for these rules, which are easy to find if you work in the industry, but harder to find if you are on the outside and unfamiliar with the trucking industry.

On the other hand, many regulations and industry standards do in fact codify or specify what is and should be considered expectations of ordinary care (from both drivers and carriers), such as obeying traffic laws, complying with maintenance or hiring regulations, or driving safely and without aggression. Some sources for these rules include the FMCSR, your state’s Code and CDL Manual and a federal government publication entitled, “Accident Prevention Manual” (note this list includes both industry standards

and formal regulations). The manual covers the basic types of wrecks and the federal motor carrier safety regulations (FMCSR) that were violated in causing the wreck. A thorough review of these rules of the road will help identify the potential claims in a trucking case.

All trucking cases start with a violation of the rules of the road, whether codified by the government or standardized by the industry. These violations translate into common law negligence or possibly a wantonness claim. But it can also translate into a negligence *per se* claim.

For example, you will almost always find after an accident that there has been a violation of the regulations (such as regarding hours of service, maintenance, training, driver qualifications, etc.).⁷³ Almost ten out of ten drivers involved in wrecks have violated regulations.⁷⁴ While you should always see if a driver or company's violations meet the elements of common law negligence, you should also look to see if their violations would qualify as negligence *per se*, or "as a matter of law," under the FMCSR. Below are the elements of negligence *per se* per the FMCSR.

Three Elements of Negligence *Per Se* under the FMCSR:

- (1) "The regulation proscribes specific conduct."
- (2) "The injured party belongs to the class of persons the regulation was designed to protect."
- (3) "The injuries suffered are of the kind the regulation was enacted to prevent."⁷⁵

CHAPTER TWO: WHO TO SUE

The Carrier

FAQs

- 1) Can just anyone start a trucking company/carrier without permission from the government?
- 2) Are carriers held accountable for their safety practices (or lack thereof)?
- 3) Do carriers have to retain their documents for specified periods of time?
- 4) Do the regulations stipulate how carriers must train their drivers in truck operations?
- 5) If a mechanical failure caused the accident, can the carrier be sued?

Who is the Carrier?

A carrier is the company behind the trucks and their operators. The federal regs define a motor carrier as the following:

“A for-hire motor carrier or a private motor carrier. The term includes a motor carrier’s agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories.”⁷⁶

Just as a driver has to meet certain federally required qualifications, a carrier must meet specific qualifications as well. The company must agree to adhere to the FMCSR before it can put a single truck on the road. The importance of these safety laws is so critical that the driver, the lowest level employee, must also become signatory to the contract between the government and the trucking company. The trucking company must ensure the driver is familiar with the FMCSR before he takes his first truck on the road. Failure by either the driver or the company to adhere to the safety contract — the FMCSR — eventually results in needless death on our roads.⁷⁷

“Even though the FMCSA is charged with regulating approximately 725,000 interstate and foreign-based truck

companies, it is estimated that the FMCSA is able to only audit less than two percent, or less than 12,000, of the total carrier population annually. This means thousands of unsafe vehicles and drivers may fall through the cracks.”⁷⁸ The American Association for Justice recently released the findings of a study of safety performance that reveals more than 28,000 motor carrier companies have violated federal safety regulations, putting U.S. motorists on the roads with trucks that have such violations as defective brakes, bald tires, loads that dangerously exceed weight limits and drivers with little or no training, or drug and alcohol dependencies.⁷⁹

Who the carrier is can be indicated by not only the basic start-up company information on government-required forms, but also the “character” of the company (as demonstrated by its safety ratings).

Starting Up

To get started, only interstate motor carriers are required to register with the USDOT and to comply with the following:

- ✓ “Regulations of the Secretary of Transportation and the Surface Transportation Board,
- ✓ Any safety regulations, duties of carriers and employees, and safety fitness requirements imposed by the Secretary, and
- ✓ The minimum financial responsibility requirements.”⁸⁰

On the other hand, purely intrastate carriers (that stay within states borders) have to comply with state regulations, which are often very similar to federal regulations.⁸¹ (Intrastate carriers have to register for a USDOT number too, if they haul quantities of hazardous materials requiring a permit.⁸²) (Please note: for our purposes, unless stated otherwise, we will be discussing *interstate* carriers.)

A carrier has to register with the FMCSA (which must grant operating authority to the carrier, as discussed below) and receive a USDOT number that must be displayed properly on each CMV (along with the carrier’s name).⁸³ The USDOT number identifies who the owner of the vehicle is and assists with monitoring the carrier’s safety data from crash investigations, inspections, audits, and compliance reviews (CRs).⁸⁴

A carrier is required to obtain a USDOT number if it has even one vehicle with the following specifications:

- ✓ “Has a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater; or
- ✓ Is designed or used to transport more than eight passengers (including the driver) for compensation; or
- ✓ Is designed or used to transport more than fifteen passengers, including the driver, and is not used to transport passengers for compensation; or
- ✓ Is used in transporting material found by the Secretary of Transportation to be hazardous and transported in a quantity requiring placarding.

AND [if the carrier] is involved in Interstate commerce:

- ✓ Trade, traffic, or transportation in the United States;
- ✓ Between a place in a State and a place outside of such State (including a place outside of the United States);
- ✓ Between two places in a State through another State or a place outside of the United States; or
- ✓ Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.”⁸⁵

A number of states – including the following – also have regulations, requiring CMV “registrants to obtain a USDOT number”:

- ✓ Alabama
- ✓ Alaska
- ✓ Arizona
- ✓ Colorado
- ✓ Connecticut
- ✓ Florida
- ✓ Georgia
- ✓ Indiana
- ✓ Iowa
- ✓ Kansas
- ✓ Kentucky

- ✓ Maine
- ✓ Maryland
- ✓ Michigan
- ✓ Minnesota
- ✓ Missouri
- ✓ Montana
- ✓ New Jersey
- ✓ New York
- ✓ Nebraska
- ✓ North Carolina
- ✓ Ohio
- ✓ Oklahoma
- ✓ Oregon
- ✓ Pennsylvania
- ✓ South Carolina
- ✓ Tennessee
- ✓ Texas
- ✓ Utah
- ✓ Washington
- ✓ West Virginia
- ✓ Wisconsin
- ✓ Wyoming”⁸⁶

Generally, in addition to a USDOT number, carriers must have interstate Operating Authority, if they do the following:

- ✓ “Operate as for-hire carriers (for a fee or other compensation);
- ✓ Transport passengers in interstate commerce;
- ✓ Transport federally-regulated commodities or arranging for their transport, in interstate commerce.”⁸⁷
- ✓ (Thus, only private carriers [“carriers that transport their own cargo”] and “for-hire” carriers that only transport cargo not federally regulated do not have to obtain operating authority from the FMSCA.⁸⁸)

Operating authority controls a carrier’s permitted types of cargo and operations (thus, a carrier may need more than one type of operating authority, as identified by “MC,” “FF,” or “MX” numbers).⁸⁹ Furthermore, operating authority also determines a carrier’s required level of insurance/financial responsibility.⁹⁰

To be certain the carrier in your case had filed the proper forms (such as from the OP-1 series), take a look at the FMCSA's online "Matrix of Required Forms" for carriers.⁹¹ "Carriers seeking to operate in interstate commerce must complete form MCS-150 'Combined Motor Carrier Identification Report.' To apply for Interstate Operating Authority, a carrier must complete the appropriate form in the OP-1 series."⁹² In addition to filing these forms, all applying carriers are required to file insurance and legal process agent documentation.⁹³ Carriers are also required to update their registration information every two years, regardless of any changes or lack of changes in their information, operations, etc.⁹⁴

Furthermore, the carrier must designate the state of its principle place of business, under the Uniform Carrier Registration System (UCRS); it must also designate (on a form filed with the FMCSA) a registered agent for service of process in each state where the carrier has operations.⁹⁵ (Both inter- and intrastate carriers of hazardous materials must obtain a safety permit from the FMCSA, which "will not issue a safety permit to any carrier that is in the top 30 percent of the national crash average as indicated in the Motor Carrier Management Information System [MCMIS].") Intrastate hazmat carriers will be treated as interstate carriers in other ways as well.⁹⁶ Similarly, special requirements regarding household goods and the Americans with Disabilities Act are sometimes investigated by other federal and state agencies.⁹⁷

Also, there are "New Entrant Safety Assurance Programs."⁹⁸ According to the FMCSA, a "New Entrant is a motor carrier not domiciled in Mexico that applies for a U.S. Department of Transportation (DOT) identification number, in order to initiate operations in interstate commerce."⁹⁹

During the first eighteen months, the new entrant will be monitored and is required to do the following:

- ✓ "Operate Safely
- ✓ Maintain up-to-date records
- ✓ Conduct periodic inspections and perform maintenance on CMVs.
- ✓ Pass the Safety Audit"¹⁰⁰

Correspondingly, during that time, the FMCSA will "conduct a Safety Audit on the New Entrant; monitor safety performance

through roadside inspections; grant permanent authority, if safe; [and conduct] the Safety Audits and Compliance Reviews.”¹⁰¹ These steps will involve “a certified U.S. federal safety investigator, state or provincial enforcement officer” and the motor carrier (and/or employees).¹⁰² Safety audits and compliance reviews/interventions will be conducted typically at the principal place of business and “at any time FMCSA safety data indicates problems.”¹⁰³

The below is a checklist of causes for a new entrant to automatically fail a Safety Audit:

- ✓ “A New Entrant fails the Safety Audit for Alcohol and Drug Violations:
 - No alcohol and/or drug testing program.
 - No RANDOM alcohol and/or drug testing program.
 - Using a driver who refused a required alcohol or drug test.
 - Using a driver the company knows had a blood alcohol content of 0.04 or greater.
 - Using a driver who failed to complete required follow-up procedures after testing positive for drugs.
 - Driver Violations

- ✓ A New Entrant fails the Safety Audit for knowingly:
 - Using a driver without a valid CDL.
 - Using a disqualified driver.
 - Using a driver with a revoked, suspended, or cancelled CDL.
 - Using a medically unqualified driver.
 - Operations Violations
 - Operating a motor vehicle without having in effect the required level of insurance.
 - Failing to require drivers to make hours-of-service records.
 - Repairs and Inspections Violations
 - Operating a vehicle declared Out-of-Service [OOS] for safety deficiencies before repairs are made.

- Not performing OOS repairs reported in driver-vehicle inspection reports (DVIRs).
- Operating a CMV not periodically inspected.”¹⁰⁴

The FMCSA continues to monitor new entrants, even if they pass the safety audit. But if they fail, they have to take adequate action to correct their problems; if they do not do so, their USDOT registration will be immediately revoked.¹⁰⁵

You should also look into carriers’ history, including the possibility of the executives having previously owned/managed another carrier company elsewhere. Carriers, known as chameleon carriers, that have been assessed civil penalties or given OOS orders sometimes register for a new USDOT number to avoid these. If they do so and falsify or hide information they may be issued an OOS order and/or be assessed a fine.¹⁰⁶ At the very least, by looking at the history, you can establish the carrier management disregard for safety.

Once Rolling

EXPERT DOC:

Responsible and competent motor carriers routinely adapt to the ever-changing landscape of the trucking industry by taking on and implementing the regulatory and industry standards, which collectively serve to ensure compliance with appropriate standards, as well as ensuring the safety of all concerned. (6-7)

Safety Ratings¹⁰⁷

One of the first things you want to do is investigate the carrier’s available safety information, which will tell you much of what you need to know about who the carrier defendant really is. (Piece of advice: visit www.ai.fmcsa.dot.gov to learn more about a carrier’s safety data.) After conducting a Compliance Review (CR), the FMCSA publishes a “safety rating” and assigns the safety score, also referred to as BASICS. We take a look at both below.

First, the below are the FMCSA’s safety fitness procedures for determining the safety rating:

§ 385.7: Factors to be considered in determining a safety rating.

“The factors to be considered in determining the safety fitness and assigning a safety rating include information from safety reviews, compliance reviews and any other data. The factors may include all or some of the following:

- (a) Adequacy of safety management controls. The adequacy of controls may be questioned if their degree of formalization, automation, etc., is found to be substantially below the norm for similar carriers. Violations, accidents or incidents substantially above the norm for similar carriers will be strong evidence that management controls are either inadequate or not functioning properly.
- (b) Frequency and severity of regulatory violations.
- (c) Frequency and severity of driver/vehicle regulatory violations identified during roadside inspections of motor carrier operations in commerce and, if the motor carrier operates in the United States, of operations in Canada and Mexico.
- (d) Number and frequency of out-of-service driver/vehicle violations of motor carrier operations in commerce and, if the motor carrier operates in the United States, of operations in Canada and Mexico.
- (e) Increase or decrease in similar types of regulatory violations discovered during safety or compliance reviews.
- (f) For motor carrier operations in commerce and (if the motor carrier operates in the United States) in Canada and Mexico: Frequency of accidents; hazardous materials incidents; accident rate per million miles; indicators of preventable accidents; and

whether such accidents, hazardous materials incidents, and preventable accident indicators have increased or declined over time.

- (g) Number and severity of violations of CMV and motor carrier safety rules, regulations, standards, and orders that are both issued by a State, Canada, or Mexico and compatible with Federal rules, regulations, standards, and orders.”¹⁰⁸

The below is a more convenient checklist of the factors considered in determining a carrier’s safety rating:

- ✓ “Factor 1 (General Compliance): Parts 387 and 390;
- ✓ Factor 2 (Driver): Parts 382, 383, and 391;
- ✓ Factor 3 (Operational/Hours of Service): Parts 392 and 395;
- ✓ Factor 4 (Vehicle): Parts 393 and 396;
- ✓ Factor 5 (Hazmat): Parts 397, 171, 177, and 180; and
- ✓ Factor 6 (Accident Rate Factor): Recordable DOT Accident Rate.”¹⁰⁹

The result of a CR is one of the following ratings:

- ✓ Satisfactory
- ✓ Conditional
- ✓ Unsatisfactory

If a carrier is rated “unsatisfactory” and does not within sixty days (or forty-five days for most hazmat carriers) correct its issues to boost its rating to conditional or satisfactory, the FMCSA will automatically issue an operational out-of-service order.¹¹⁰ (Per 49 CFR §385.17, a carrier can request that its safety rating be amended based on proof of its efforts to correct cited violations and its compliance with Part 385’s safety standards and factors.¹¹¹)

The monumental problem with the safety rating is that the score essentially becomes outdated as soon as it is configured. According to a statement made by an FMCSA’s administrator before the House Committee on Transportation and Infrastructure Subcommittee on Highways and Transit on September 13, 2012:

The CR is very effective in changing unsafe behavior; however, it can also be very time consuming and labor intensive for both the motor carrier and safety investigators. It limits the Agency and its State partners to evaluate the safety performance of less than 3 percent of the approximately 525,000 active carriers each year. Moreover, our current regulations for issuing statutorily required safety fitness determinations for motor carriers is tied to the CR, meaning the Agency cannot incorporate on-road performance to issue a safety fitness determination on a carrier, no matter how far a motor carrier's on-road performance may have slipped or improved.¹¹²

A CR could take place on a Monday, and the entire environment of a motor carrier business could change for the worse the next day. However, the safety rating of the carrier would not change until the next CR is conducted. It is possible the carrier will not undergo another CR for the next decade. Here is where a serious danger lies: brokers are relying solely on the safety rating provided by the FMCSA instead of investigating further and looking up the BASICS score, discussed below.

Next, the BASIC score is calculated when the Safety Measurement System (SMS) combines all data collected during investigations, roadside inspections, and reported crashes to determine the motor carrier's BASIC score. The BASIC score includes evaluations of the following:

- ✓ Unsafe Driving
- ✓ Fatigued Driving, which is also called Hours-of-Service
- ✓ Driver Fitness
- ✓ Controlled Substances/Alcohol
- ✓ Vehicle Maintenance
- ✓ Cargo-Related
- ✓ Crash Indicator¹¹³

These scores are calculated on a scale of zero to 100; zero is the best, lowest risk, and 100 is the worst, highest risk. The threshold for this scale is seventy-five. Once a trucker has scored seventy-five

or above, he is considered to be unsatisfactory and should not be hired by a broker.¹¹⁴

The Unsafe Driving BASIC score is based on the operation of the commercial motor vehicle. It would reflect traffic violations from roadside interactions such as speeding, reckless driving, inattention, and improper lane change.

The Fatigued Driving BASIC score concerns the operation of commercial motor vehicles for extended hours of operation that do not comply with the Hours-of-Service regulations. It would also include instances where drivers fail to keep their logbooks updated with correct information.

The Driver Fitness BASIC score evaluates drivers and whether or not they have been adequately trained, how much experience they have, and a variety of medical qualifications.

The Controlled Substances/Alcohol BASIC score addresses drivers with any type of substances abuse issues; for example, excessive alcohol consumption, prescription medication abuse and consuming illegal drugs.

The Vehicle Maintenance BASIC score addresses whether or not drivers and carriers properly maintain their vehicles and take precautionary measures to prevent shifting, spilled, or dropped cargo. It also takes into account whether or not drivers overload their trucks. Drivers need to maintain their trucks to ensure they are mechanically sound, especially safety features, lights, signals, and tires.

The Hazardous Materials (HM) Compliance BASIC score is evaluated based on the handling of hazardous materials. Drivers are responsible for following all regulations by appropriately marking and labeling packages and shipments containing hazardous materials.

Finally, the Crash Indicator BASIC score takes into consideration the crash history of drivers. Drivers' scores in this category take into account how many crashes drivers have been involved in, when they occurred, and the severity of the accident.

One fact to keep in mind is that “it is in a company’s best interests to implement and enforce written procedures and policies beyond the minimum requirements of the FMCSR or state statutes.”¹¹⁵

What are the Carrier’s Responsibilities?

Carriers often boast of their team environment when recruiting drivers to hire.¹¹⁶ But there needs to be more truth in these claims than one might think (or than likely often actually is). It is the carrier’s responsibility to ensure every employee – from the president or chief operating officer to the driver or dispatcher – knows and understands the FMCSR.¹¹⁷ The carrier executives’ and supervisors’ attitudes regarding compliance with federal regulations and overall safety affects the entire company’s attitude.¹¹⁸ Even salespeople should be familiar with some regulations because these employees influence the reasonableness of customer’s expectations.¹¹⁹ The more knowledgeable all employees are regarding regulations and the more serious they know their supervisors are about compliance, the safer the roads will be.¹²⁰

“The Federal Motor Carrier Safety Regulations (FMCSR) make it very clear that the motor carrier has a clear, nondelegable duty to monitor, control, and supervise the conduct of every driver and employee, including independent contractors.”¹²¹ Thus, in depositions, be sure to question the safety director thoroughly regarding hiring criteria, safety policies, safety records and procedures, as well as methods of driver monitoring.¹²²

According to 49 CFR § 385.5,

“To meet the safety fitness standard, the motor carrier must demonstrate it has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

- (a) Commercial driver’s license standard violations (part 383 of this chapter),
- (b) Inadequate levels of financial responsibility (part 387 of this chapter),
- (c) The use of unqualified drivers (part 391 of this chapter),
- (d) Improper use and driving of motor vehicles (part 392 of this chapter),

- (e) Unsafe vehicles operating on the highways (part 393 of this chapter),
- (f) Failure to maintain accident registers and copies of accident reports (part 390 of this chapter),
- (g) The use of fatigued drivers (part 395 of this chapter),
- (h) Inadequate inspection, repair, and maintenance of vehicles (part 396 of this chapter),
- (i) Transportation of hazardous materials, driving and parking rule violations (part 397 of this chapter),
- (j) Violation of hazardous materials regulations (parts 170-177 of this title), and
- (k) Motor vehicle accidents and hazardous materials incidents.”

A. DOCUMENTATION & PRESERVATION OF RECORDS

One of the most critical and prevalent responsibilities a carrier has is to maintain proper documentation. Below is a brief checklist of a number of the required areas of documentation (some of which will be mentioned again or more thoroughly discussed later):

- ✓ Drivers’ records/logs of hours of service (must be kept for at least six months)
- ✓ Vehicle maintenance
 - Drivers’ daily vehicle inspection reports (must be kept at least 90 days)
 - Each vehicle’s complete maintenance record
- ✓ Driver qualifications file for each driver (must be kept for the length of the driver’s employment and the following three years [with exceptions])
- ✓ Business records
- ✓ Financial responsibility
- ✓ Drug use and alcohol misuse
- ✓ Accident information¹²³

Furthermore, per 49 §§ CFR 379.5 and 379.7, a carrier is required to preserve its records so as to prevent damage or modification due to natural disasters and deterioration, technological errors, etc.

B. HIRING

Hiring is the “frontline” of ensuring safe roads. Carriers must be vigilant in following federal regulations and industry standards

when making the important choices regarding who will drive their dangerous vehicles. For an in-depth analysis of this and related critical topics, see Chapter Three's section on negligent hiring, entrustment, and retention.

C. SUPERVISION & RETENTION

Supervision of drivers is one of the most key responsibilities a carrier has and one of the most key elements for your case. There are countless aspects of supervision, from basics applicable to every employee-employer relationship to details unique to the trucking industry. Below we provide a brief list of a few of these aspects involved in supervision, but see Chapter Three's discussion of negligent hiring, entrustment, and retention for a more in-depth analysis. Carriers must design systems and procedures to properly manage and control its drivers and ensure they are in compliance with regulations and industry standards.¹²⁴

- ✓ Drug & Alcohol Abuse Prevention
- ✓ Documentation
- ✓ Retention
- ✓ Cargo

Shifting or escaping cargo can endanger the lives of everyone on the road, including the driver. The regulations hold both the carrier and driver responsible for the safe transportation of cargo; drivers are required to inspect the cargo at stipulated times.¹²⁵ Per 49 CFR § 391.13,

“a motor carrier shall not require or permit a person to drive a commercial motor vehicle unless the person:

- (a) Can, by reason of experience, training, or both, determine whether the cargo he/she transports (including baggage in a passenger-carrying commercial motor vehicle) has been properly located, distributed, and secured in or on the commercial motor vehicle he/she drives;
- (b) Is familiar with methods and procedures for securing cargo in or on the commercial motor vehicle he/she drives.”

Thus, carriers must ensure both that the drivers are properly trained in cargo securement as well as that drivers are properly inspecting cargo as required.¹²⁶

D. TRAINING

The quality of training a carrier provides its drivers is of grave importance. A company is required to ensure each driver follows and is trained in the FMCSR. The driver even is required to sign a receipt for a copy of the FMCSR to keep in his truck so he can refer to them at need.¹²⁷ But what may surprise you is that federal regulations only specify the below topics as required to be covered in training for entry-level drivers:

- ✓ Driver Wellness
- ✓ Hours of Service
- ✓ Driver Qualification Requirements
- ✓ Whistleblower Protection.¹²⁸

The regulations do stipulate that a carrier must require an entry level driver to have a certificate of training, but the regs have no specifications regarding what types of operational training drivers must have received.¹²⁹ On the other hand, the regulations do provide standards for CDLs¹³⁰ and a more detailed list (with descriptions) of training topics required for drivers of longer combination vehicles (including doubles and triples).¹³¹

In 1985, the USDOT published a training proposal called the *Model Curriculum for Training Truck Drivers*, which most truck driving schools, including the Professional Truck Driving Institute (PTDI), have essentially adopted.¹³² (In 1997, the FMCSA noted that the knowledge and skills proven by earning a CDL [as stipulated in 49 CFR § 383] are not equivalent to adequate training.¹³³) “PTDI-certified courses ensure the motor carrier that the driver has received a particular set of skills and knowledge.”¹³⁴ The National Association of Publicly Funded Truck Driver Training Schools (NAPFTDS), the PTDI, and the Commercial Vehicle Training Association, Inc. are three entities providing various types of training and guidance, formulating industry standards.¹³⁵

Now, while still not official regulations, the FMCSA does devote an entire portion of its website to improving drivers’ safety practices, offering carriers materials, a “toolkit,” and a “Get Road Smart” Program.¹³⁶ But “until PTDI published its *Driver Finishing Standards*, industrywide guidelines didn’t exist. [. . .] Without mandatory requirements for formal training, the motor carrier must

decide what level of training, if any, is necessary beyond the minimum requirements set forth in the FMCSR.”¹³⁷

The regulatory standards require that a CMV operator be able to demonstrate specific knowledge and skills regarding the safe operation of CMVs. The industry standards of care, which incorporate the regulatory standards, require that CMV operators be instructed/trained, knowledgeable and become proficient with the requisite skills that include, but are not limited to, the regulatory and industry standards related to “Visual Search,” “Hazard Perceptions,” “Space Management,” “Night Operation,” and “Backing” as well as the recognized and well-established standards for defensive driving. (p 9-10, FMCSR §390.3(b), 383.111, 383.113)

Side note: the driver shares some responsibility regarding training. For example, as I mentioned in the book’s introduction, one of my first trucking trials involved a tractor trailer driver faced with an emergency situation. A vehicle had stopped in his lane. The truck driver wasn’t following too close or speeding. The truck driver locked down his brakes and directed his vehicle to the oncoming lane of traffic. This avoided the vehicle stopped in his own lane, but caused him to collide with the vehicle in the opposing lane of traffic. We successfully argued at trial that the emergency should have prompted the driver to steer his vehicle to the right onto the shoulder of the road in order to avoid both collisions. This case required our team to focus on the driver’s failure to follow the training he had previously received in avoiding this exact emergency situation.

E. MAINTENANCE

Many accidents are attributable to mechanical failures of parts or systems in a commercial vehicle. Federal regulations require motor carriers to systematically inspect, maintain, and repair all motor vehicles subject to their control. These regulations also require that the truck and its component parts must be in safe operating condition at all times. A motor carrier can be held responsible for any injury caused by its failure to properly inspect, maintain or repair any equipment in its control.¹³⁸

If in the driver’s daily inspection report a defect is noted, the carrier must ensure (and certify on the original report) “that the defect has

been repaired or that the repair is unnecessary before the vehicle can be operated.”¹³⁹ The maintenance record required to be kept for each vehicle is a strong indicator of the carrier’s attitude regarding the importance of maintenance and safety.¹⁴⁰ To ensure compliance with FMCSR § 396, carriers must have a schedule or system in place to ensure the vehicles’ operating conditions remain safe.¹⁴¹

In addition to driver’s inspections, carriers must ensure every vehicle is inspected at least annually (this requirement can be satisfied by a roadside or other periodic inspection performed by or with the authority of a state or federal government agency).¹⁴² The annual inspections must be completed by individuals with qualifications specified in 49 CFR §§ 396.19 and 396.25 [the latter pertaining to brake inspectors].

While regulations do not specify a detailed maintenance schedule due to the uniqueness of vehicles, carriers must maintain the parts and accessories per the guidance of the manufacturer.¹⁴³ (“Motor carriers who lease vehicles either must inspect, repair, maintain, and keep suitable records for all vehicles subject to their control for thirty consecutive days or more, or must have another party perform such activities.”¹⁴⁴) It is the sole responsibility of carriers to guarantee that its vehicles are in safe operating condition with any defects fixed.¹⁴⁵

Furthermore, carriers’ responsibility to maintain is heightened when they haul hazardous materials (and must obtain hazmat safety permits). Lastly, regulations provide specifics regarding the design of trucks and their cabs, such as requiring a certain amount of space for the drivers’ feet and including specifications for handholds, etc. Per 49 CFR 393 (“Parts and Accessories Necessary for Safe Operation”), carriers must ensure their vehicles comply with regulations regarding the following:

- ✓ Lamps
- ✓ Reflective devices
- ✓ Electrical wiring
- ✓ Brakes
- ✓ Glazing and window construction
- ✓ Fuel systems
- ✓ Coupling devices
- ✓ Towing methods

- ✓ Emergency equipment
- ✓ Frames
- ✓ Cab and body components
- ✓ Wheels
- ✓ Steering
- ✓ Suspension Systems

F. FINANCIAL RESPONSIBILITIES

Early in the litigation, determine the existence and amount of insurance coverage available in your case. Beyond the obvious discovery requests, take a look at www.safersys.org to determine the amount of coverage the trucking company has obtained. Remember that 49 CFR § 387 sets out the minimum levels of financial responsibility for trucking companies (see below for a chart from 49 CFR § 387.9). Also, it is important to note that one of the unique considerations of insurance coverage involving commercial carriers is the MCS-90 endorsement. This is a federally mandated endorsement for all commercial carriers over 10,000 lbs., enacted to prevent parties involved in the shipping of freight from denying responsibility and pointing the finger at each other and thereby preventing and/or delaying recovery to an injured party.¹⁴⁶

When trying to determine how much coverage the carrier involved your case has, keep in mind that sometimes a carrier has separate limits for the tractor and the trailer (such as \$1 million on each, totaling \$2 million). The carrier even sometimes includes coverage of a driver as “a permissive user.” In situations where the vehicle is leased out, the lessor may still have liability insurance on its leased vehicles.

Larger trucking companies self-insure up to a certain level, which I have seen as high as \$5 million. This can cause the carrier to feel pressure for fear of having any claims go to their carrier due to risk of being dropped or charged higher rates. (Insurance providers refer to a carrier’s safety ratings as an indicator of the likelihood for punitive damages, etc.; thus, carriers’ premiums are often affected by their publicized safety ratings.¹⁴⁷)

Schedule of Limits—Public Liability

Type of carriage	Commodity transported	January 1, 1985
(1) For-hire (In interstate or foreign commerce, with a gross vehicle weight rating of 10,001 or more pounds)	Property (nonhazardous)	\$750,000
(2) For-hire and Private (In interstate, foreign, or intrastate commerce, with a gross vehicle weight rating of 10,001 or more pounds)	Hazardous substances, as defined in <u>49 CFR 171.8</u> , transported in cargo tanks, portable tanks, or hopper-type vehicles with capacities in excess of 3,500 water gallons; or in bulk Division 1.1, 1.2 and 1.3 materials. Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; in bulk Division 2.1 or 2.2; or highway route controlled quantities of a Class 7 material, as defined in <u>49 CFR 173.403</u>	5,000,000
(3) For-hire and Private (In interstate or foreign commerce, in any quantity; or in intrastate commerce, in bulk only; with a gross vehicle weight rating of 10,001 or more pounds)	Oil listed in <u>49 CFR 172.101</u> ; hazardous waste, hazardous materials, and hazardous substances defined in <u>49 CFR 171.8</u> and listed in <u>49 CFR 172.101</u> , but not mentioned in (2) above or (4) below	1,000,000
(4) For-hire and Private (In interstate or foreign commerce, with a gross vehicle weight rating of less than 10,001 pounds)	Any quantity of Division 1.1, 1.2, or 1.3 material; any quantity of a Division 2.3, Hazard Zone A, or Division 6.1, Packing Group I, Hazard Zone A material; or highway route controlled quantities of a Class 7 material as defined in <u>49 CFR 173.403</u>	5,000,000

The Broker

FAQs

- 1) Who exactly is a broker?
- 2) Does a broker have to have authority from the federal government?
- 3) Can a broker be held responsible for a driver's negligence?
- 4) Are a broker's activities governed by federal regulations?

Who is the Broker?

To recover more money for those either injured or affected by trucking accidents, you may have to do more than sue the carrier or driver. In cases where you have a commercial carrier or driver responsible for a crash that injures or kills other drivers, do not overlook the area of broker liability. Broker liability provides an additional source of revenue in a lawsuit, as well as broker's insurance. By examining this aspect of a case, you can help your client receive the maximum recovery for his or her injuries and losses.¹⁴⁸ As discussed previously, most insurance policies for motor carriers max out at about \$1,000,000, which does not adequately compensate injured people or their family members. Thus, brokers present another potential avenue for recovering money damages.

Freight brokers have been around since trucking began, and about forty percent of truck accidents involve a broker of the cargo. A broker is an entity that does not transport the load but deals with the shipper and motor carrier in arranging the transportation. These brokers act as the middlemen to organize and plan the transportation of goods by motor carriers. The broker earns the difference between the amount allotted for transportation by the goods rightful owner and the money the broker pays to the motor carrier. This type of payment system incentivizes the broker to find the lowest bidder, therefore maximizing the broker's profit. Unfortunately, this system has spiraled into a never-ending search for the lowest bidder, regardless of "value."

A federally regulated freight "broker" is defined as the following:

- "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent, sells, offers for sale, negotiates for, or holds itself out by

solicitation, advertisement, or otherwise as selling, providing, or assigning for, transportation by motor carrier for compensation.”¹⁴⁹

- Or: “a person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.”¹⁵⁰

Brokers are also called “freight brokers” or “third party logistics” companies (3PL).

Most brokers believe they cannot be considered a carrier because they do not own or lease trucks. That belief is simply wrong. The Federal Motor Carrier Safety Act at 49 U.S.C.A § 301 et seq., makes no such requirement. Likewise, a broker, who also has motor carrier authority, cannot guarantee delivery of a load and still maintain its status as a broker. A broker who is also authorized as a motor carrier runs a significant risk when it guarantees the load under 49 C.F.R. § 371.2.

What are the Broker’s Responsibilities?

Hiring

Brokers have one particularly key, essential responsibility: to ensure they hire safe motor carriers. The general rule is that a party is not liable for the negligence of its independent contractors because they are not deemed agents. Thus, by claiming the carriers they hired were merely independent contractors, brokers have in the past escaped being held liable for accidents caused by drivers.

But if brokers did not properly investigate the motor carriers they hire, they can be held liable under a theory of negligent hiring.¹⁵¹ A broker’s liability under a theory of negligent hiring primarily depends on the state’s common law.¹⁵² Furthermore, Restatement Second of Torts § 411 provides that shippers and brokers are liable for “physical harm to third persons caused by failure to exercise reasonable care employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the party owes to third persons.” (See below for a more complete discussion of available theories of liability against brokers.)

Brokers should check a carrier's BASIC score prior to selecting that carrier (see Carrier section for detailed discussion of the BASIC scores).¹⁵³ But, currently, many brokers are relying solely on the "safety rating" provided by the FMCSA instead of investigating further and looking up the BASICs score. There is a "safety rating" made available by FMCSA after it conducts a Compliance Review (CR) and there is the safety score, also referred to as BASICs.) Looking up all safety scores for trucking companies available is not a difficult or lengthy task. It is simple to use online resources to gather information about trucking companies and see if they have tons of problems that should keep them from being on the road. Brokers have a duty to use reasonable care when deciding who they want to offer loads to so that other people on the road are not endangered with unnecessary risks.¹⁵⁴

If you sue a broker, the broker will likely make an argument based on the idea that it does not have to look up the BASIC scores that are calculated through the FMCSA, since there is a disclaimer on its website indicating that the information is used by the "Agency and Enforcement Community." Brokers will also allege that the BASIC scores are irrelevant. There are studies that will support their arguments. A commonly used study is one by Wells Fargo Equity Research. This research claimed "there was not meaningful statistical relationship between the results in the Unsafe Driving and Fatigued Driving (HOS) BASICs and crash frequency based on a sample of 200 of the largest motor carriers in the FMCSA census database of motor carriers."¹⁵⁵

You must be prepared to combat these arguments. Use these arguments and find ways to impeach the research that brokers are using in their defense. Determine who conducted the research and whether or not they are biased. By impeaching any of the threatening research, you will have a better shot at presenting your client's side of the story to a jury not confused by misleading information.

Furthermore, there are studies by the American Transportation Research Institute supportive of the argument that the BASIC scores are helpful in determining carrier safety. Furthermore, in *Schramm v. Foster* (discussed in further detail below), the judge found that, after the broker Robinson had discovered that the trucking company Groff Brothers had a marginal score on the FMCSA website, Robinson had a duty of reasonable care, which

included further inquiry.¹⁵⁶ (See below for further discussion of theories of liability for pursuing brokers.)

Theories of Suing the Broker

Negligent Hiring

In *Schramm v. Foster*, Robinson was granted summary judgment on all claims except for negligent hiring. The court found that under Maryland law, Robinson had a duty to use reasonable care in selecting the truckers whom it maintains in its stable of carriers.¹⁵⁷

“This duty to use reasonable care in the selection of carriers includes, at least, the subsidiary duties (1) to check the safety statistics and evaluations of the carriers with whom it contracts available on the SafeStat database maintained by FMSCA, and (2) to maintain internal records of the person with whom it contracts to assure that they are not manipulating their business practices in order to avoid unsatisfactory SafeStat ratings.”¹⁵⁸

The judge found that despite Groff Brothers not having an unsatisfactory SafeStat score, it was still a marginal one and this implied a duty of further inquiry. The judge determined that Robinson should have been reasonably alerted to the fact that Groff Brother’s didn’t have a clean background. This case settled out of court after the judge had determined the plaintiffs may have a claim for negligent hiring.

In *Jones v C.H. Robinson Worldwide, Inc.*, under Virginia law the court only had to address the negligent hiring of an independent contractor since the court determined that the driver was a contractor, not an employee of Robinson. The court found that the plaintiff had a viable claim for negligent hiring of an independent contractor, allowing the claim to survive summary judgment. In the court’s reasoning for this negligent hiring claim to survive summary judgment, they discussed § 411 of the Restatement (Second) of Torts (noted above). This section of the restatement states the following:

“An employer is subject to liability for physical harm to third persons caused by his failure to

exercise reasonable care to employ a competent and careful contractor

- (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) to perform any duty which the employer owes to third persons.”

Restatement (Second) of Torts § 411 (1965). The court agreed with the plaintiff that operating tractor-trailers upon public highways involves a risk of physical harm.

In *Owens v. Anthony*, the plaintiffs’ claim for negligence of an employer in the selection and retention of employees and independent contractors against the broker survived the Defendant’s motion for summary judgment. Under Tennessee law, the court determined a reasonable person could find the Defendant was negligent in selecting a carrier and that Defendant’s negligence resulted in the hiring of an unsafe driver whose carelessness caused this collision.¹⁵⁹

In *McLaine v. McLeod*, a case filed in Georgia, a tractor-trailer struck a pickup truck and killed three people and critically injured two others in 2004.¹⁶⁰ The plaintiffs tried to sue the broker of the transportation transaction; however, the broker prevailed on a motion for summary judgment on claims of negligent hiring. The court found the plaintiffs did not cite any authority to support their argument that the broker should be liable for hiring the trucking company as an independent contractor because the act of driving a tractor-trailer is inherently dangerous. Plaintiffs tried to assert this negligent hiring claim against the broker for hiring the trucking company and against the broker for hiring the truck driver. The broker won summary judgment motions on both of the negligent hiring claims pled by the plaintiffs.

Respondeat Superior

Schramm v. Foster, 341 F. Supp. 2d 536 (D. Md. 2004), arose after an accident between a tractor-trailer and a minor, Tyler Schramm, who was driving a pick-up truck with a passenger. Foster, the tractor-trailer driver, failed to stop or yield the right of way to on-coming traffic and Schramm’s truck collided with the tractor-

trailer. Foster had violated the hours of service regulation by driving in excess of the maximum driving hours allowed.

Schramm brought forth many claims against Foster and the broker, C.H. Robinson Worldwide, Inc., including negligence under a *respondeat superior* theory claiming that Foster acted as an agent of Robinson in the transportation of the load.¹⁶¹ In this case, C. H. Robinson brokered the load for Jasper Products, LLC to have their shipment transported by Groff Brothers, who employs Foster.

Although the court found that Robinson stated in the contract that they controlled the transportation of freight on behalf of its customers, Robinson instructed Foster to call them directly to receive the dispatch information, and that Robinson provided driving directions and required Foster to inspect the load upon pickup, use load locks, and arrange for the shipment to be unloaded. The court stated that “unless Robinson had control over Foster’s driving time and the condition in which he drove, it will not be vicariously liable for Foster’s negligence.”¹⁶² Suing the broker under a theory of *respondeat superior* was unsuccessful in this case before the United State District Court of Maryland in 2003.

In *Jones v. C.H. Robinson Worldwide, Inc.*,¹⁶³ there was an accident between two tractor-trailers. The two tractor-trailers collided after the truck heading northbound drove across a median into oncoming lanes of traffic where it crashed into a tractor-trailer that was headed southbound. The driver that caused the wreck died at the scene while the other drive was seriously injured. The injured driver brought forth claims against many people, including the broker, C.H. Robinson Worldwide.

The court in *Jones v. C.H. Robinson* addressed the claim of negligence under a theory of *respondeat superior* by finding that the negligent driver was an independent contractor of Robinson and because of that, Robinson could not be held liable under a *respondeat superior* claim for the trucking company or the driver. The court considered Robinsons ability or lack thereof to terminate drivers, determine which routes drivers would take and the compensation plans for drivers. Robinson did arrange pickup dates and times for the drivers and relayed information on details concerning the cargo among other information, but these tasks were not indicative of Robinson having “control” over the driver or the driver’s employer.

Negligent Entrustment

The judge in *Schramm v. Foster* quickly shot down the plaintiff's attempt at asserting a claim under the theory of negligent entrustment. According to Maryland law, Robinson could not be considered a supplier of chattel since Robinson did not have the right to control the chattel, which is necessary under Maryland law to assert a claim of negligent entrustment. The truck that Foster was operating was owned by Groff Brothers, not Robinson.

In *Jones v. C.H. Robinson Worldwide, Inc.*, the court also shot down the plaintiff's attempt at a negligent entrustment claim by granting summary judgment to the defendants on the issue. The court rejected the argument from the plaintiff because under Virginia law, the plaintiff needed to plead that the subject load was inherently dangerous in and of itself, which they failed to do.

Agency Relationship

In *Sperl v. C.H. Robinson, Inc.*, the court determined an agency relationship existed between the broker, C.H. Robinson, and the driver, DeAn Henry.¹⁶⁴ Interestingly, the jury did not find an agency relationship between C.H. Robinson and Henry's employer. Henry was transporting a load of potatoes when she caused a multiple-car accident, killing two people and seriously injuring another. At trial, the plaintiffs presented extensive evidence of the control that C.H. Robinson had over Henry. C.H. Robinson controlled how Henry was paid and provided the potatoes for delivery. These two findings, among other supporting evidence, led the jury to enter a judgment in favor of plaintiffs for \$23,775,000.

The Driver

FAQs

- 1) Must the driver be able to speak and understand English?
- 2) Is it legal for a teenager be a CMV driver?
- 3) Is it legal for a diabetic be a CMV driver?
- 4) What kind of documents should the driver have?
- 5) Is the driver responsible for inspecting his truck?
- 6) For what all does a driver have to check his truck before starting out on a job?
- 7) What happens if a driver is cited for multiple traffic law violations?
- 8) Does the driver need to have mechanical knowledge about his truck?
- 9) Can the driver be held responsible for falling asleep on the road?
- 10) Is a driver responsible for cargo that escaped or spilled and hit another driver?

Introduction

The first “Who to Sue” to consider is the driver, or operator of the commercial motor vehicle (CMV). Tractor trailer drivers operate extremely large vehicles that have the capability to cause a great deal of harm. Drivers, as well as the companies that employ them, must follow regulations that other drivers don’t. Drivers receive training that the rest of the motoring public does not. Consequently, drivers have a greater obligation to safety than others on the road.

A primary focus of determining whether a truck driver could have prevented a crash is not on the potentially dangerous situation another has caused, but instead on the driver’s improper actions or failure to act in avoiding the danger presented. This approach should be evaluated in every trucking case. Many truck accidents could be avoided and consequently many lives saved if truck drivers will correctly respond to dangerous situations regardless of whether the driver created the danger.

It is critical to know who the driver is, or at least should be, including his professional and physical qualifications and required knowledge and skills. This section also addresses the driver's own responsibilities while on the road and before and after the transportation of each load. As previously noted, these are defined by federal, state, and local regulations as well as industry standards. A driver has many responsibilities, including seemingly minor ones, but a driver's violation of any of his responsibilities could be a key in your case.

Outlined in detail below, the driver's responsibilities are best summarized by 49 C.F.R. § 385, Appendix A, which states the following: "If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable."¹⁶⁵

Who is the Driver?

Truck drivers must meet certain basic qualifications to comply with federal regulations. Below are checklists of these basics.

Per 49 C.F.R. § 391.11, the driver must have the following qualifications:

- ✓ "Is at least 21 years old;
- ✓ Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records;
- ✓ Can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he/she drives;
- ✓ Is physically qualified to drive a commercial motor vehicle in accordance with subpart E – Physical Qualifications and Examinations of this part;
- ✓ Has a currently valid commercial motor vehicle operator's license issued only by one State or jurisdiction;

- ✓ Has prepared and furnished the motor carrier that employs him/her with the list of violations or the certificate as required by § 391.27;
- ✓ Is not disqualified to drive a commercial motor vehicle under the rules in § 391.15; and
- ✓ Has successfully completed a driver's road test and has been issued a certificate of driver's road test in accordance with § 391.31, or has presented an operator's license or a certificate of road test which the motor carrier that employs him/her has accepted as equivalent to a road test in accordance with § 391.33.”¹⁶⁶

Drivers must also have the following knowledge and skill set, per 49 C.F.R. § 383.111:

- ✓ Safe operations regulations
- ✓ Safe vehicle control systems
- ✓ CMV safety control systems
- ✓ Basic control
- ✓ Shifting
- ✓ Backing
- ✓ Visual search
- ✓ Communication
- ✓ Speed management
- ✓ Night operation
- ✓ Extreme driving conditions
- ✓ Hazard perceptions
- ✓ Emergency maneuvers
- ✓ Skid control and recovery
- ✓ Relationship of cargo to vehicle control
- ✓ Vehicle inspections
- ✓ Hazardous materials
- ✓ Mountain driving
- ✓ Fatigue and awareness
- ✓ Air brakes
- ✓ Combination vehicles

¹⁶⁷

The driver must also meet the below physical minimums. “A person is physically qualified to drive a commercial motor vehicle if that person:

- (1) Has no loss of a foot, a leg, a hand, or an arm, or has been granted a skill performance evaluation certificate pursuant to §391.49;
- (2) Has no impairment of:
 - (i) A hand or finger which interferes with prehension or power grasping; or
 - (ii) An arm, foot, or leg which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or any other significant limb defect or limitation which interferes with the ability to perform normal tasks associated with operating a commercial motor vehicle; or has been granted a skill performance evaluation certificate pursuant to §391.49.
- (3) Has no established medical history or clinical diagnosis of diabetes mellitus currently requiring insulin for control;
- (4) Has no current clinical diagnosis of myocardial infarction, angina pectoris, coronary insufficiency, thrombosis, or any other cardiovascular disease of a variety known to be accompanied by syncope, dyspnea, collapse, or congestive cardiac failure;
- (5) Has no established medical history or clinical diagnosis of a respiratory dysfunction likely to interfere with his/her ability to control and drive a commercial motor vehicle safely;
- (6) Has no current clinical diagnosis of high blood pressure likely to interfere with his/her ability to operate a commercial motor vehicle safely;
- (7) Has no established medical history or clinical diagnosis of rheumatic, arthritic, orthopedic, muscular, neuromuscular, or vascular disease which interferes with his/her ability to control and operate a commercial motor vehicle safely;
- (8) Has no established medical history or clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a commercial motor vehicle;

- (9) Has no mental, nervous, organic, or functional disease or psychiatric disorder likely to interfere with his/her ability to drive a commercial motor vehicle safely;
- (10) Has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal Meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber;
- (11) First perceives a forced whispered voice in the better ear at not less than 5 feet with or without the use of a hearing aid or, if tested by use of an audiometric device, does not have an average hearing loss in the better ear greater than 40 decibels at 500 Hz, 1,000 Hz, and 2,000 Hz with or without a hearing aid when the audiometric device is calibrated to American National Standard (formerly ASA Standard) Z24.5—1951.
- (12) Does not use any drug or substance identified in 21 CFR 1308.11 Schedule I, an amphetamine, a narcotic, or other habit-forming drug.
- (13) Does not use any non-Schedule I drug or substance that is identified in the other Schedules in 21 part 1308 except when the use is prescribed by a licensed medical practitioner, as defined in § 382.107, who is familiar with the driver's medical history and has advised the driver that the substance will not adversely affect the driver's ability to safely operate a commercial motor vehicle.
- (14) Has no current clinical diagnosis of alcoholism.”¹⁶⁸

While not directly discussed in the regulations, a 2014 study found that new and very obese drivers “have a much higher crash rate than their colleagues who are not considered obese.”¹⁶⁹ Furthermore,

“While the study didn’t specifically pinpoint the cause for the increased crash risk, Burks [the leader of the study] suggests the culprit is likely fatigue caused by obstructive sleep apnea (OSA). [. . .] Burks believes in addition to OSA, obese drivers may be affected with daytime

sleepiness not related to OSA and limited agility that may contribute to fatigue and increased crash risk.”¹⁷⁰

(See Chapter Three for more in-depth discussion of driver fatigue.)

CDL Reqs:

What if the driver who killed your client’s family was not a fully licensed driver? Was he driving with only a permit, and was his licensed “co-driver” asleep? Federal regulations have required drivers of commercial vehicles to obtain a commercial driver’s license (CDL) since 1992.¹⁷¹ Thus, the FMCSA has published a template CDL manual (CDLM), providing a minimum standard for states to require of its drivers.¹⁷² Each state’s CDLM may be unique since states may add to the federal regulations¹⁷³ (though Alabama’s seems to be essentially identical to the FMCSA’s template).

For a driver to obtain a Commercial Driver’s License (CDL), he must first obtain a learner’s permit. To do so, he must have his driving record checked in all states (as well as D.C.) and must bring proof that he is medically qualified with a DOT medical card and proof of a physical conducted by a certified medical examiner. Physicals must be completed at least every two years by a certified medical examiner.

(Federal Motor Carrier Safety Administration, U.S. Department of Transportation, “DOT Reminds Commercial Drivers that Physicals Must Now Be Performed by Certified Medical Examiners,” May 21, 2014, <http://www.fmcsa.dot.gov/newsroom/dot-reminds-commercial-drivers-physicals-must-now-be-performed-certified-medical-examiners>.)

“FMCSA establishes a National Registry of Certified Medical Examiners (National Registry) with requirements that all medical examiners who conduct physical examinations for interstate commercial motor vehicle (CMV) drivers meet the following criteria:

- ✓ Complete certain training concerning FMCSA’s physical qualification standards,

- ✓ pass a test to verify an understanding of those standards, and
- ✓ maintain and demonstrate competence through periodic training and testing.”¹⁷⁴

With a permit, a driver is only authorized to drive a commercial vehicle with a qualified license holder next to him. He can only obtain his license after having had the permit for fourteen days before taking the skills test. In some states, he would also have to complete a CDL training before taking the test. The test has three parts that must be passed – a vehicle inspection test, basic controls test, and road test.

What are the Driver's Responsibilities?

One of the most critical factors in a trucking case is of course whether the driver was driving responsibly. Did the driver inspect his truck as he is supposed to before starting out on his drive? Had he been documenting details accurately and thoroughly, so the carrier was able to properly maintain the vehicle or ensure he was driving safely? Is he a careless driver? Did he have one or two or several traffic violations? If he did, did he report them to his employer as he is required to?

As mentioned in Chapter One, the trucking industry has basic standards it expects drivers to meet. These standards are often above and beyond federal or state regulations and are published by entities such as J.J. Keller & Associates and the Smith System. In the below discussion of a driver's necessary precautions, we primarily used Alabama's CDL Manual but also incorporated guidance from J.J. Keller and the Smith System.

A. DOCUMENTATION

A driver's documents (or lack thereof) will be a treasure trove of information to you as a practitioner. For example, a driver is required to produce “Driver Vehicle Examination Reports” at the end of each work day (see below regarding what details inspections are to include).¹⁷⁵ Furthermore, on each inspection report, the driver must note (and sign) whether or not there were any deficiencies or defects.¹⁷⁶ To the practitioner trying to solidify his

strategy in a claim against the truck driver, these documents are a key source, especially if a mechanical failure contributed to the crash.

Additionally, a driver must also properly document his hours of service. A practitioner should note if the driver has recorded improbable or impossible hours for the transportation and delivery of a load. An error was clearly made if the driver records traveling 200 miles in only an hour or a similar impossible scenario. Such a record could indicate illegal driving speeds and/or some other unsafe behavior the driver wishes to hide. Falsified log books are sadly quite common. Below are key tips to identifying falsified logs:

- 1) “Excessive mileage for the time traveled”
- 2) “Truck driver’s current record of duty status”
- 3) “Identical runs”
- 4) “Only on-duty driving time”
- 5) “Team logs do not match”¹⁷⁷

B. INSPECTIONS

Before beginning a journey, the driver is required by federal regulations to be “satisfied” that basic but specific equipment and parts are “available” and “in good working order.”¹⁷⁸ The driver is also required to check that everything, including the cargo, is properly distributed and secured.¹⁷⁹ “Finally, the driver must review the last driver’s vehicle inspection report (DVIR) and sign it if defects or deficiencies were reported.”¹⁸⁰

Further, the CDLM provides detailed checklists of not only the major equipment or parts to inspect, but also the types of defects and wear and tear for which the driver should be looking. Per the CDLM, the driver must complete a pre-trip inspection to avoid an accident or breakdown.¹⁸¹ The CDLM advises approaching the vehicle observantly and using the following seven-step inspection method:

- | | |
|---------------------------------|--|
| (1) “Do a vehicle overview.” | (3) “Start engine and inspect inside the cab.” |
| (2) “Check engine compartment.” | (4) “Turn off engine and check lights.” |

- (5) “Do walk-around inspection.”
- (6) “Check signal lights.”
- (7) “Start the engine and check.”¹⁸²

The CDLM’s detailed “sub-steps” within these steps include such safety measures as testing the brakes, checking the cargo securements, making sure the license plate(s) is clean and secure, ensuring the reflectors are clean with the proper color, etc.¹⁸³ The CDLM also advises inspections during trips, including watching gauges and checking at stops the tires, wheels, rims, brakes, lights, reflectors, brakes, electrical connections, coupling devices, and cargo securement devices.¹⁸⁴

Lastly, at the “completion of each day’s work,” the driver must complete an inspection that must include *at least* the following:

- 1. Service brakes, including trailer brake connections
- 2. Parking brake
- 3. Steering mechanism
- 4. Lighting devices and reflectors
- 5. Tires
- 6. Horn
- 7. Windshield wipers
- 8. Rear vision mirrors
- 9. Coupling devices
- 10. Wheels and rims
- 11. Emergency equipment.¹⁸⁵

(The driver does not have to keep her report in the vehicle and can instead file it immediately.¹⁸⁶)

Ultimately, as described by J.J. Keller, “drivers are required to check their loads:

- ✓ Before the trip starts,
- ✓ Within the first fifty miles after beginning the trip, and
- ✓ Whenever the driver makes a change of duty status or after the vehicle has been driven for three hours or 150 miles, whichever occurs first.”¹⁸⁷

Locations such as weigh stations and portable scales (which use the Commercial Motor Vehicle Safety Alliance inspection standards and the FMCSR) conduct roadside inspections.¹⁸⁸ After such an inspection by a state or FMCSA official, the driver must “deliver the report to the motor carrier upon arrival at the next terminal or facility. If the driver is not scheduled to arrive at a terminal or facility within 24 hours, he/she must immediately mail the report to the carrier.”¹⁸⁹

C. BASIC OPERATION

1. *Traffic Violations*

With the exception of parking tickets, a driver must report to his employer any received traffic violation within thirty days of conviction. If a driver has become disqualified by suspension, revocation, or cancellation of his license, the driver is required to notify his employer by the end of the next business day. Perhaps the driver began driving before his disqualification time period expired; if so, he would be disqualified for the following full year.

Speeding:

If the driver was speeding at the time of the accident, this is clearly a critical factor in your case. “[. . .] A vehicle driving 55 mph will travel half the length of a football field in just two seconds.”¹⁹⁰ Therefore, a truck driving at 75 mph in a 65 mph zone is a disaster bound to happen. “The faster you drive, the greater the impact or striking power of your vehicle.”¹⁹¹ A driver’s braking distance is nine times greater at 60 mph than 20 mph and is longer than a football field.¹⁹² According to the FMCSA:

“Where the total trip is on highways with a speed limit of 65 mph, trips of 550-600 miles completed in 10 hours are considered questionable and the motor carrier may be asked to document that such trips can be made. Trips of 600 miles or more will be assumed to be incapable of being completed with out [sic] violations of the speed limits and may be required to be documented. In areas where a 55 mph speed limit is in effect, trips of 450-500 miles are open to question, and runs of 500 miles or more are considered incapable of being made in compliance with the speed limit and hours of service limitation.”¹⁹³

Texting:

You have seen it. You are driving down the road, notice a driver ahead swerving a little, and then observe as you pass the driver that she has her head down and her hand up...with a phone in her hand. The truck driver in your case might have also been texting. In one case, a women’s college softball team suffered the loss of four members due to an accident involving their bus and a truck; it was believed that the truck driver was distracted.¹⁹⁴ In 2013, almost 16,000 truckers were ticketed for texting while driving (but “only four individuals had their licenses suspended and were taken off the road”).¹⁹⁵ “According to the FMCSA, commercial vehicle drivers who actively text while driving are 23.2 times more likely to be [in] an accident than other CMV drivers.”¹⁹⁶

Alert drivers remember the following basic formula: “perception distance + reaction distance + braking distance = total stopping distance.”¹⁹⁷ “The average perception time for an alert driver is 1 ¾ seconds. At 55 mph, this accounts for 142 feet traveled.”¹⁹⁸ “If drivers react a half-second slower because of distractions, crashes double,” according to the CDLM.¹⁹⁹ In May 2012, the FMCSA published a “No Texting Rule Fact Sheet,” which summarized its rule by stating: “It’s very easy to comply with the new rules: no reaching, no holding, no dialing, no texting, no reading.”²⁰⁰

The FMCSA further defines “texting” with the following:

- ✓ “Texting means manually entering text into, or reading text from, an electronic device.”

- ✓ “Texting includes (but is not limited to), short message services, e-mailing, instant messaging, a command or request to access a Web page, pressing more than a single button to initiate or terminate a call using a mobile telephone, or engaging in any other form of electronic text retrieval or entry, for present or future communication.”²⁰¹

But texting does not include the below:

- ✓ “Inputting, selecting, or reading information on a global positioning system or navigation system; or
- ✓ Pressing a single button to initiate or terminate a voice communication using a mobile telephone; or
- ✓ Using a device capable of performing multiple functions (e.g., fleet management systems, dispatching devices, smart phones, citizens band radios, music players, etc.) for a purpose that is not otherwise prohibited in this part.”²⁰²

(Note that there is an exception in emergencies: drivers may use a handheld cell phone to contact law enforcement officials and other emergency services.²⁰³)

Other violations:

You should also confirm the driver’s license had not been revoked (or should not have been). A driver can be disqualified from using his CDL if he commits any of the following:

- ✓ major offenses;
- ✓ second offense serious traffic violations;
- ✓ railroad-highway grade crossing offenses;
- ✓ violations of out-of-service orders and implied consent laws;
- ✓ or operation of a vehicle with a CDL from a decertified state.²⁰⁴

Additional types of violations include the following:

- (1) “speeding in excess of 15 mph over the speed limit;
- (2) driving recklessly;
- (3) making improper or erratic lane changes;
- (4) following the vehicle ahead too closely;

- (5) violating any motor vehicle traffic control law arising in connection with a fatal accident; or
- (6) driving without a commercial driver's license."²⁰⁵

The driver could also have been running a red light, making a U-turn, making a right turn on red where prohibited, making a dangerous left turn, failing to use his turn signal, etc. In addition, drivers are prohibited from using or possessing radar detectors.²⁰⁶

Other regulations include extra care at railroad crossings, proper signals in an emergency, transportation of only authorized persons. A number of these additional requirements are examined more in the below section devoted to driving safely, which reflects both regulations and general expectations or industry standards.

2. *Safe Driving Practices and Requirements*

(Per Industry Standards and the CDLM)

Note: When a driver is transporting a combination or tank load, the below precautions are even more serious because the dangers are exaggerated by those types of loads. (AAMVA, *Commercial Driver License Manual/ 2005 Model Commercial Driver's License Manual* 6-3 (July 2010),

<http://dps.alabama.gov/Documents/Manuals/CDLManual.pdf>.) The CDLM has similar, special requirements for inspection and driving of these unique types of loads.

A driver, per the CDLM, is expected to know the basics of accelerating, steering, stopping, and backing safely.²⁰⁷ For example, a driver should know how to avoid rolling back when accelerating and how to smoothly accelerate to avoid damaging the vehicle or coupling.²⁰⁸ Likewise, a driver must "hold the steering wheel firmly with both hands [which] should be on opposite sides of the wheel."²⁰⁹ The CDLM warns that potholes can make a driver lose control of the wheel.²¹⁰ Stopping should also be gradual and smooth.²¹¹ Drivers must also know how to brake and steer properly to avoid a crash and what to do if the brakes or tires fail or the tires skid from over-braking, over-steering, over-acceleration, or too high a speed.²¹²

In addition, drivers are expected to avoid backing whenever possible, but if a driver does have to back, the CDLM gives the following simple key steps:

- ✓ “Start in the proper position.”
- ✓ “Look at your path.”
- ✓ “Use mirrors on both sides.”
- ✓ “Back slowly.”
- ✓ “Back and turn toward the driver’s side whenever possible.”
- ✓ “Use a helper whenever possible.”²¹³

Knowledge of how to properly shift gears is also a must. The truck driver involved in your client’s accident might not have properly communicated with other drivers by using his turn signals, brake lights (such as to flash warnings of slowed speed or an approaching stop), or emergency flashers.²¹⁴ Within ten minutes of having to stop alongside the road, drivers are instructed to set out their emergency warning devices according to the following specifications:

- ✓ “If you must stop on or by a one-way or divided highway, place warning devices 10 feet, 100 feet, and 200 feet toward the approaching traffic. [. . .]
- ✓ If you stop on a two-lane road carrying traffic in both directions or on an undivided highway, place warning devices within 10 feet of the front or rear corners to mark the location of the vehicle and 100 feet behind and ahead of the vehicle, on the shoulder or in the lane you stopped in. [. . .]
- ✓ Back beyond any hill, curve, or other obstruction that prevents other drivers from seeing the vehicle within 500 feet. If line of sight view is obstructed due to hill or curve, move the rear-most triangle to a point back down the road so warning is provided.”²¹⁵

CMV drivers must avoid as much as possible any distractions, including reading maps, loading music CDs or working with the radio, adjusting mirrors, smoking, or having an emotional conversation.²¹⁶ As noted above, “if drivers react a half-second slower because of distractions, crashes double,” according to the CDLM.²¹⁷ A distracted or careless driver might not have kept in

mind strong winds, slick surfaces, curves, traffic flow, construction zones, or downgrades.²¹⁸ A safe driver will be aware of his surroundings – both near him and farther ahead, at least twelve to fifteen seconds ahead (which is about a block at lower speeds and a quarter of a mile at higher speeds).²¹⁹

Drivers are also responsible for avoiding tailgating other drivers. When they study to obtain their CDLs, drivers are given careful instructions regarding how much space to leave between another driver ahead and their trucks. The CDLM explains the following:

“One good rule says you need at least one second for each 10 feet of vehicle length at speeds below 40 mph. At greater speeds, you must add 1 second for safety. For example, if you are driving a 40-foot vehicle, you should leave 4 seconds between you and the vehicle ahead. In a 60-foot rig, you’ll need 6 seconds. Over 40 mph, you’d need 5 seconds for a 40-foot vehicle and 7 seconds for a 60-foot vehicle. [. . .] To know how much space you have, wait until the vehicle ahead passes a shadow on the road, a pavement marking, or some other clear landmark. Then count off the seconds like this: ‘one thousand-and-one, one thousand-and-two’ and so on, until you reach the same spot. Compare your count with the rule of one second for every ten feet of length. Also a driver should remember that when the road is slippery, you need much more space to stop.”²²⁰

(To add perspective – according to the FMCSA, 27,242 truck crashes occurred when it was raining in 2012.²²¹)

Per the industry, one of the rules drivers have been taught to follow is the “six second rule.” Under good conditions it is recommended that a large truck is six seconds behind the lead vehicle because it requires more distance for a truck to stop not only because of the weight of the truck but also the time it takes for the air brakes to activate, which can be a 0.5 second lag. If a truck driver does not abide by the six second rule and must suddenly stop for any reason, the end result can be tragic for all involved.

In conjunction with the six second rule, truck drivers need to remain focused and in control of their trucks. A fully loaded truck can weigh more than 200,000 pounds. If the load being carried by the truck shifts due to a curve, turn, or sudden distraction, it may cause the truck to overturn. If the truck driver catches it in time he may keep the rig upright but may change lanes or even cross the median potentially causing a catastrophe. This may have been the case in a disastrous truck related accident in Kentucky on March 26, 2010. Preliminary reports suggest the truck driver, who was from Alabama, was talking on his cell phone when his truck suddenly crossed the median on the interstate and collided with a van, killing ten passengers that were on the way to a wedding. Only two small children survived. The truck driver died as well. It is critical for a truck driver to remain focused while operating such a large vehicle.

Conversely, a driver is still held responsible for maintaining safe practices, even when tailgated. The CDLM provides the following tips for tailgated drivers:

- ✓ “Avoid quick changes. If you have to slow down or turn, signal early, and reduce speed very gradually.”
- ✓ “Increase your following distance. Opening up room in front of you will help you to avoid having to make sudden speed or direction changes. It also makes it easier for the tailgater to get around you.”
- ✓ “Don’t speed up. It’s safer to be tailgated at a low speed than a high speed.”
- ✓ “Avoid tricks. Don’t turn on your taillights or flash your brake lights. Follow the suggestions above.”²²²

As indicated above, a truck driver has a duty to manage space on all sides of his truck. Where does the duty arise? The Commercial Driver’s License (CDL) Manual states that “[t]o be a safe driver you need to know what’s going on all around your vehicle.” All states identify the same general duty. The duty is broad and encompasses all sides of the truck.

These space management cases occur during lane changes, passing parked vehicles, highway merges, when the truck stops or slowed while in front of your client’s vehicle, or when they follow your

client's vehicle too close. To prove the case you must balance considerations of what the driver could or should have seen against proper handling under the circumstances.

Space encroachment accidents can be avoided. The driver has mirrors and must use them. A truck with properly placed convex side mirrors can see the entirety of the side of the truck. The truck driver also can obviously see in front of his truck. The blind spot arises behind the tractor trailer.

A truck driver must guard against his rear blind spot by signaling his intentions with his brake lights and four way safety flashers. He should also warn other drivers when slowing down. The CDL Manual states:

“Slowing Down. Warn drivers behind you when you see you'll need to slow down. A few light taps on the brake pedal – enough to flash the brake lights – should warn following drivers. Use the four-way emergency flashers for times when you are driving very slowly or are stopped.”

Drivers are also expected to drive without aggression. The CDLM includes the following tips to help drivers avoid aggressive driving:

- ✓ “Give the drive your full attention. Don't allow yourself to become distracted by talking on your cell phone, eating, etc.”
- ✓ “Be realistic about your travel time. Expect delays because of traffic, construction, or bad weather and make allowances.”
- ✓ “If you're going to be later than you expected – deal with it. Take a deep breath and accept the delay.”
- ✓ “Slow down and keep your following distance reasonable.”
- ✓ “Don't drive slowly in the left lane of traffic.”²²³

Drivers should strive to stay centered within their lane and watch for sudden lane changes when driving alongside another.²²⁴ Drivers must be aware that they need more room than an ordinary car to change lanes or enter traffic and must keep in mind that the size and weight of the load affects acceleration, etc.²²⁵ Drivers are urged to watch other drivers' body movements to signal the driver might

be about to change lanes.²²⁶ Ultimately, a driver is expected to always have a plan for watching and preparing for hazards.²²⁷

Turns are another key maneuver which drivers must know how to successfully execute. For example, drivers executing a left turn must be certain they have “reached the center of the intersection before [they] start the left turn. If [they] turn too soon, the left side of [the] vehicle may hit another vehicle because of offtracking.”²²⁸ Surprisingly, drivers often make the left turn even when they know they will only clear the intersection if the oncoming traffic slows down for them.

Perhaps instead your client’s family was involved in a five-car pile-up because the truck stalled on railroad tracks. A driver should be ready to stop when nearing a railroad because he might be unable to hear the whistle, or the crossing barriers (if there are any) could be malfunctioning. Especially when the driver has to cross two sets of tracks, he should make certain he can safely drive completely across before proceeding. A truck should be in the lowest gear available when crossing, but the driver should not change the gears on the tracks or else he might get stuck on the tracks.

The Smith System has provided for sixty years a training program called “TheSmith5Keys®,” based on the below excellent checklist for truckers as they are driving down the road:

- 1) “Aim high in steering.
Looking further ahead than other drivers
- 2) Get the big picture.
Seeing more around you than other drivers
- 3) Keep your eyes moving.
Being more aware than other drivers
- 4) Leave yourself an out
Positioning in traffic better than other drivers
- 5) Make sure they see you.
Making yourself more visible than other drivers”²²⁹

Conditions of Nature

Night

Approximately 25,000 of the 144,171 large truck crashes that occur each year do so at night. This means there is a pretty good chance that a lawyer handling such cases will handle a nighttime crash case. It is important to understand the issues related to night driving.

At night, drivers should not look directly at oncoming traffic's headlights because of concerns with glare.²³⁰ In addition, a truck driver has a duty to drive at a speed slow enough to be able to come to a stop should a hazard appear in the roadway while operating a commercial motor vehicle. During daylight hours, drivers at highway speeds are trained to look ahead about a quarter of a mile for potential hazards. At night, however, a trucker can only see as far as the illumination cast by the headlights.

As a result, a trucker driving at night must drive slowly enough to be able to stop within the distance of the headlights. Driving any faster is referred to as "over driving" the headlights. This is a particularly bad problem because the driver can't react in time to a hazardous situation. This is the same as driving too fast for conditions, which is prohibited by the Federal Motor Carrier Safety Administration at 49 C.F.R. § 392.14 (1995).

The first step is to inspect the vehicle to determine how far the headlights for the truck illuminate. If this can't be done, the general rule is that the beams will shine ahead about 250 feet on low beams and about 350 to 500 with high beams. It is necessary to determine whether low or high beams were being used by the driver during discovery.

Maintenance factors can affect the illumination distance of the headlights on a truck. It is important to verify the headlights were working properly, had been adjusted correctly, and were free from dirt and debris. This is best done with an early inspection, but if that is not possible then photographs may be helpful in this determination.

The single most important factor in determining stopping distance for a tractor-trailer is the traveling speed. The CDL Manual warns, "most people are less alert at night, especially after midnight. ...[and] may not see hazards as soon or react as quickly." Thus, the driver's reaction time may be longer than the typical 1.5 seconds, prolonging the total stopping time.

As noted above, a vehicle traveling at 55 miles per hour will travel approximately 120 feet in the one and half seconds it takes to react (“half the length of a football field in just two seconds”²³¹). This is almost half of the illumination distance of typical low beam lights. Because nighttime reduces visibility and increases reaction times, drivers in rural areas or on roads without oncoming traffic are required to use high beam lights that enable the drivers to see 350-500 feet (low beam lights provide visibility for only 250 feet).

An accident reconstructionist is likely needed to determine the braking distance since weight, weather, and vehicle factors can play a role. The total stopping distance dramatically increases as speed increases as a general rule. For instance, a vehicle traveling 30 mph only needs 181 feet to stop. The same vehicle going 55 mph would need 512 feet to stop. The speed is less than doubled, but the stopping distance has increased to two and a half times farther.

Heat

Did perhaps the driver lose control of the truck because his tire blew out or caught on fire? Hot weather creates exceptional dangers. As the temperature rises, so does the tire pressure. Every two hours or 100 miles, drivers are advised to check if their tires are too hot to touch. If the tires are, to avoid a chance of the tires catching fire, drivers should give the tires a chance to cool before resuming driving again. Drivers should also check the coolant, belts and hoses, and oil.

Fog

A driver can also encounter fog on the road. Drivers through fog are advised to pull off if at all possible, because it can be a challenge to be able to see other cars and trucks. If the driver cannot pull off, she should use low beams and be ready to make frequent stops.

Winter

During the winter, pre-trip inspections become especially important to ensure safety precautions such as that the truck can properly defrost, the antifreeze levels are appropriate, the tires have adequate tread, and that the chains (with extra links) are the correct size.²³² Drivers may need to stop often to clean off windows,

lights, and reflectors; they should also be ready to reduce speed and increase following distance.²³³

Mountain Roads

What if instead your client's family was driving down a mountain and the driver ran the car off the embankment? Truck drivers must follow specific procedures for driving upgrade and downgrade on a mountainous road. When driving upgrade, a driver should use low gears, which help pull the vehicle up the mountain. When driving downgrade, drivers should still use a low gear, which will resist the increase in speed from gravity's pull. Known as brake fade, brakes can fail from overheating if they are used too much. Which low gear to use depends on how long and sharp the downgrade is, but a good rule for drivers to follow is to use one gear lower than they used driving upgrade. Whatever gear the driver chooses, he should switch to it before beginning the drive downgrade. In a situation with a runaway vehicle, the driver should look for clearly marked escape ramps designed with long trenches and a several-foot layer of small gravel, which will absorb the vehicle's energy and stop it.

Driver Fatigue

According to the CDLM, being awake for eighteen hours causes a driver to be in a state similar to having a blood alcohol concentration of 0.08% (legally intoxicated).²³⁴ Later in this chapter we provide a detailed analysis of driver fatigue and federally regulated hours of service, but we will preview it here by briefly examining the driver's responsibility to ensure his own alertness – which is always critical, but especially when a driver is unfamiliar with his route.

“The federal hours-of-service (HOS) rules do not specifically limit the distance that can be driven in one day, but they do limit the number of hours that can be spent driving, as follows:

- Drivers of property-carrying commercial motor vehicles (CMVs) are limited to 11 hours of driving after having 10 consecutive hours off duty. However, this is not a ‘daily’ limit. Under this provision, a driver could hypothetically drive for 11 hours, take 10 hours off, and drive for another 3 hours before the end of the 24-hour day.

- Drivers of passenger-carrying CMVs are limited to 10 hours of driving after having 8 consecutive hours off duty. In one 24-hour period, these drivers could hypothetically drive for 10 hours, take 8 hours off, and drive for another 6 hours.”²³⁵

While much responsibility rests on carriers to ensure their drivers are not violating hours of service regulations or driving with too little sleep, the driver is responsible for taking steps to avoid drowsiness. Drivers are advised in the CDLM to keep the cab cool, take breaks, and recognize signals of drowsiness, such as yawning and drifting from one lane to another or off the shoulder.²³⁶ If drivers realize they have become drowsy, they are expected to stop and sleep or at least take a nap but are urged not to rely on open windows, radios, or some substance (drugs, coffee, or other caffeine source) to keep alert and awake.²³⁷ To ensure their own safety while on the road, drivers are expected to get enough sleep, schedule trips safely (to avoid sleep debt), exercise regularly, eat healthy, avoid medication, and regularly visit their doctors to watch for conditions contributing to fatigue and other dangers.²³⁸

Substance Abuse

Of course, driving under the influence of alcohol or any “controlled substance” that “can make the driver unsafe” is prohibited²³⁹ (see Chapter Three’s section on this topic). This also includes substances such as “pep pills” and can include even cold medicines (though prescription pills that will not make a driver unsafe are permitted).²⁴⁰ In 2011, truck drivers were found to be driving with meth labs in their trucks.²⁴¹ In 2012, a jury returned a \$9.25 million verdict against a drunk driver.²⁴² In another case, a truck driver was fired for having had unopened beer in his truck.²⁴³

If the driver’s BAC was 0.04 percent or higher, he could be charged with a DUI and could then lose not only his CDL but also his regular driver’s license. Regulations prohibit a driver from using alcohol within four hours before going on duty, having physical control of the commercial vehicle, or operating it.²⁴⁴ When on duty or operating the vehicle, the driver cannot possess an alcoholic beverage.²⁴⁵ It is the carrier’s responsibility to monitor its driver’s behavior; if it appears a driver has consumed alcohol within the four-hour window, the carrier must take the driver “out of service”

for twenty-four hours.²⁴⁶ Furthermore, the driver and trucking company must make sure he does not perform any safety-sensitive function within four hours of using alcohol or with a BAC of at least 0.04 percent.²⁴⁷

A specified percentage of carriers' drivers must have random alcohol and drug testing at unannounced times throughout the year.²⁴⁸ In addition, if someone requires immediate medical attention or dies after an accident or if an involved vehicle is disabled (and requires towing), the involved truck driver must be tested as soon as possible (preferably within two hours of the accident) for drug and alcohol abuse.²⁴⁹

In case of an accident:

The driver must "protect the area, notify authorities, [and] care for the injured."²⁵⁰ A driver must know how to properly firefight, or else she could make an already existing fire worse.²⁵¹

D. CARGO SECUREMENT

Another of the driver's responsibilities is to ensure he is not transporting an overload.²⁵² Dangers of overloading can include brake failure and inhibited speed control and steering.²⁵³ Drivers are also expected to keep in mind the effect of weather on their loads; thus, sometimes drivers should not drive with a legally permissible load or should lighten their load before proceeding in bad weather.²⁵⁴ Drivers must be certain their trucks are not top heavy and should properly balance the weight of their cargo.²⁵⁵ While sealed loads cannot be inspected, drivers are still expected to check their compliance with weight limits.²⁵⁶

Furthermore, drivers are expected to properly block, brace, and/or tie down their cargo.²⁵⁷ Covering cargo not only shields the cargo but also avoids spilling it and endangering other drivers.²⁵⁸ Drivers should use their mirrors to keep a watchful eye on their cargo's covering, because a loose covering can inhibit the truck driver's vision or other drivers'.²⁵⁹ Oversized loads or loads of livestock or hanging meat cause unique dangers that the driver must take into consideration.²⁶⁰

A Driver's Unique Responsibilities

A. Hazardous Materials

According to the CDLM, the driver has the below unique responsibilities when transporting a load of hazardous materials:

- ✓ “Makes sure the shipper has identified, marked, and labeled the hazardous materials properly.”
- ✓ “Refuses leaking packages and shipments.”
- ✓ “Placards vehicle when loading, if required.”
- ✓ “Safely transports the shipment without delay.”
- ✓ “Follows all special rules about transporting hazardous materials.”
- ✓ “Keeps hazardous materials shipping papers and emergency response information in the proper place.”²⁶¹

Drivers are required to know the types of hazardous products that can and cannot be loaded together and must know the placard rules (or must ask their employers if they do not know).²⁶² Driving a CMV that is legally required to have placards without the right placards can endanger the driver's life and as well as the lives of others.²⁶³ Drivers are required to attach the right placards before driving the CMV (“on both sides and both ends of the vehicle”) and can only move “an improperly placarded vehicle during an emergency, in order to protect life or property.”²⁶⁴ Furthermore, drivers of placarded CMVs must have a CDL with the hazardous materials endorsement, which is earned with a written test.²⁶⁵ Driving a CMV that is legally required to have placards without a CDL hazmat endorsement is a crime.²⁶⁶

In addition, drivers of hazardous materials must check their tires.²⁶⁷ They must properly secure containers and cannot open any packages or transfer hazardous materials from one package to another during the journey.²⁶⁸ The driver must also keep in mind they should not smoke near certain kinds of cargo (such as explosives)²⁶⁹ and must be sure to keep the shipping and emergency response information where the papers can be found quickly by others in an emergency.²⁷⁰

B. Passenger Buses

In addition to the above precautions such as pre- and post-inspections, drivers transporting passengers have additional precautions they must take to ensure their passengers' safety.²⁷¹ For example, drivers must ensure emergency exits and other doorways (such as to restrooms, etc.) are closed and must clear any aisles and stairwells before starting the journey.²⁷² Seats, handholds, railings, floors, signaling devices, and emergency exits handles must be in safe working condition.²⁷³ Drivers of course cannot simultaneously transport any hazardous materials, so they must watch for these items in cargo or baggage.²⁷⁴ In addition, drivers are required to stop at railroad crossings and drawbridges.²⁷⁵

Furthermore, drivers must announce upcoming stops or destinations, including the location, reason for the stop, the bus number, and the time the bus will be departing.²⁷⁶ Drivers are supposed to remind their passengers to bring their carry-on luggage, warn them of steps down, and take other obvious safety measures. Drivers must make riders stand behind the standee line.²⁷⁷ In addition, drivers should not re-fuel with passengers on board or talk with riders (or other do anything else distracting) while driving.²⁷⁸

School bus drivers have even more requirements, such as keeping in mind danger zones, properly using mirrors, managing and loading and unloading students, and other unique safety considerations.²⁷⁹

CHAPTER THREE: ISSUES THAT ARISE IN COMMERCIAL VEHICLE LITIGATION

Hours of Service / Fatigue

FAQs

- 1) Is there a summary of the Hours-of-Service (HOS) regulations?
- 2) Can I pursue both the carrier and driver in my lawsuit?
- 3) How detailed should the driver's log be?
- 4) Is fatigue just sleepiness?
- 5) What steps can/should the driver take when fatigued?

Introduction

“He was fatigued. He was over his hours. He had played around with his log book.”²⁸⁰ The result of this truck driver's violations? The death of a police officer who was on duty and responding to an emergency call.²⁸¹ These are the facts of one of the cases our firm is currently handling.²⁸² As described by our firm's founder Jere Beasley:

“His log books revealed that he was attempting to conceal his duty status and hours of service. The hours-of-service rules are in place to prevent fatigued driving. A fatigued truck driver is not as capable of reacting to the environment around him, especially emergency situations like the one we have in this case. Fatigued driving is a big problem and results in thousands of crashes each year. Mr. James was faced with a police officer who was responding to an emergency call. The accident could have been avoided with an alert and oriented truck driver appropriately responding to his environment. Unfortunately, he did not.”²⁸³

In another case, John and Renee Parault were joined in marriage and ministry through their work with Son Rise Ministries. The Paraults were traveling through Alabama with their adult daughter from their home in North Carolina to a revival in Louisiana when their world was turned upside down. The family had just eaten breakfast when a tractor trailer suddenly and without warning changed lanes right into the Paraults's vehicle.

The impact eventually caused the tractor trailer to run over the Parault's vehicle as the massive size of the tractor trailer was no match for the small car. Sadly, the carelessness of the truck driver caused Mr. Parault's death and seriously injured Renee as well as their daughter, Darlene Keller. The tractor trailer was owned and being operated by MSJ Trucking.

Our investigation revealed that MSJ Trucking had a history of serious violations of various motor vehicle regulations, including operating with fatigued drivers. The circumstances of this wreck strongly suggested that the driver of the tractor trailer was severely fatigued when he drove his truck into the lane of travel occupied by the Paraults.

We recreated much of what happened on that tragic day through litigation testing with well qualified trucking experts. Our testing proved that a conscientious, well-rested driver most certainly would have easily recognized the danger moving into an occupied lane of travel. Settlement was reached for a confidential amount during the pendency of the litigation.

As evidenced above, one of the most pressing dangers for everyone on the roadway today – truck driver fatigue – is also one of the most preventable. “‘Just-in-Time’ delivery and ‘rolling warehouse logistics’ have made trucking truly a round-the-clock endeavor.”²⁸⁴ “As early as 1935 the National Safety Council issued its report on the problem [of fatigued driving], *Too Long at the Wheel*.”²⁸⁵ As far back as 1995, it was found that driver fatigue was the number one safety issue in trucking.²⁸⁶ The problem continues to plague the industry, as indicated by a former NTSB chair in the below statement:

“Fatigue is just not as simple as revising hours of service regulations. It’s about compliance. It’s about enforcement. It’s about fatigue risk-management programs that encompass education and training... The Board sees a lack of compliance with the hours of service regulations in many of the investigations that we are involved in. And some of those are not just minor; some of them are fairly egregious.... What people in the trucking industry need to realize is they are professionals. They are professional drivers, and the standard of care and the level of

expectations for them and their performance are higher. When they make poor choices, it's not just a reflection on personal decision, but it impacts the entire industry because there's an expectation that there's robust training and education, oversight, and enforcement. And I think that, often times in our investigations, we find that there is a lack of all those – not just the personal discipline, but company and the carrier's oversight by the enforcement authority.”²⁸⁷

Because proving the fatigue case can be difficult, specific and carefully planned discovery will be necessary. Unlike alcohol-related crashes (as discussed in the next section), there is no test for sleepiness. The facts of the accident, the time of the day, the driver's time on the job, what the driver did the day before, and other factors can play into proving the fatigue case. These can be proven by finding the following:

- ✓ The circumstances are consistent with fatigue.
- ✓ The trucker's hours during the day or accident and preceding day exceed the federal hours of service regulations.
- ✓ Witnesses observed inattentive driving.
- ✓ Physical evidence of fatigue includes absence of skid marks or failure to avoid a collision.
- ✓ Road conditions would/should have alerted the driver to avoid the accident.

Classic “fall asleep” cases are usually characterized by a driver's minimal braking or failing to brake at all (without anything decreasing the driver's visibility).²⁸⁸ But not all crashes caused by fatigue have these types of facts.²⁸⁹ As noted previously, fatigue, which includes more than just falling asleep, can be as dangerous (or more) as alcohol intoxication.²⁹⁰

“Accordingly, an evaluation of a crash requires an understanding of the interplay among some or all of the following: the economics of the industry, how the crash occurred, the driver's sleep/wake pattern in the days preceding the crash, time on task, time of day, the driver's training, the driver's health, company policies, and the fundamentals of the science of sleep.”²⁹¹

What are the HOS regs?

Federal regulations prohibit a driver from operating a commercial motor vehicle when impaired or likely to become impaired through fatigue.²⁹² Those same regulations prohibit a motor carrier from allowing their driver from operating a vehicle under those same conditions.²⁹³ The federal government uses the Hours of Service (HOS) regulations to limit when and how long a commercial motor vehicle driver may operate a commercial vehicle.²⁹⁴ These regulations are based on exhaustive scientific review and are designed to ensure truck drivers have the necessary rest to perform safe operations.²⁹⁵

The majority of drivers who operate a CMV are required to follow the regulations.²⁹⁶ In general, a CMV is a vehicle that is used as part of a business and is involved in interstate commerce and fits any of these descriptions:

- Weighs 10,001 pounds or more;
- Has a gross vehicle weight rating or gross combination weight rating of 10,001 pounds or more;
- Is designed or used to transport sixteen or more passengers (including the driver) not for compensation;
- Is designed or used to transport nine or more passengers (including the driver) for compensation;
- Is transporting hazardous materials in a quantity requiring placards.

(Source: <http://www.fmcsa.dot.gov/regulations/hours-of-service#sthash.oDgmpYtO.dpuf>)

Lowering the hours a truck driver can drive will not alone solve the problem of driver fatigue. Commercial drivers must follow and motor carriers must enforce those rules...a job they are currently neglecting in large numbers.

Below is a chart from the FMCSA website summarizing the HOS rules:

HOURS-OF-SERVICE RULES	
PROPERTY-CARRYING DRIVERS	PASSENGER-CARRYING DRIVERS
<p>11-Hour Driving Limit May drive a maximum of 11 hours after 10 consecutive hours off duty.</p>	<p>10-Hour Driving Limit May drive a maximum of 10 hours after 8 consecutive hours off duty.</p>
<p>14-Hour Limit May not drive beyond the 14th consecutive hour after coming on duty, following 10 consecutive hours off duty. Off-duty time does not extend the 14-hour period.</p>	<p>15-Hour Limit May not drive after having been on duty for 15 hours, following 8 consecutive hours off duty. Off-duty time is not included in the 15-hour period.</p>
<p>Rest Breaks 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. Does not apply to drivers using either of the short-haul exceptions in 395.1(e). [49 CFR 397.5 mandatory "in attendance" time may be included in break if no other duties performed]</p>	<p>60/70-Hour Limit May not drive after 60/70 hours on duty in 7/8 consecutive days.</p>
<p>60/70-Hour Limit May not drive after 60/70 hours on duty in 7/8 consecutive days. A driver may restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty. Must include two periods from 1 a.m. to 5 a.m. home terminal time, and may not be used once per week, or 168 hours, measured from the beginning of the previous restart.</p>	<p>Sleeper Berth Provision Drivers using a sleeper berth must take at least 8 hours in the sleeper berth, and may split the sleeper berth time into two periods provided neither is less than 2 hours.</p>

HOURS-OF-SERVICE RULES

NOTICE: The Consolidated and Further Continuing Appropriations Act of 2015 was enacted on December 16, 2014, suspending enforcement of requirements for use of the 34-hour restart. For more information see FMCSA's Federal Register notice: www.fmcsa.dot.gov/regulations/hours-service/hours-service-drivers

Sleeper Berth Provision

Drivers using the sleeper berth provision must take at least 8 consecutive hours in the sleeper berth, plus a separate 2 consecutive hours either in the sleeper berth, off duty, or any combination of the two.

Unless specified otherwise, “driver(s)” in this section refers to property-carrying drivers. Passenger-carrying drivers have slightly different requirements.

According to J.J. Keller, a driver can be on duty for more than fourteen hours, as long as he is not driving a CMV (excluding exceptions).²⁹⁷

But the extra hours worked will decrease the time he can work per the 60/70-hour time limit.²⁹⁸ The HOS regs apply to “anyone who gets behind the wheel” of a CMV and can include mechanics (again, unless an exemption/exception applies).²⁹⁹ The HOS regs apply to all hours worked, regardless of whether the driver is working for one or multiple carriers.³⁰⁰

To be considered “off duty,” the below conditions must be met:

- “The driver must be relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.”³⁰¹

- “During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.”³⁰²

Thus, other stops – including waiting times and meals – can also count as off-duty time.³⁰³ While federal regs require that every change in duty status be recorded (such as fuel stops, inspections, etc.), the regs do not require drivers to document exactly what they were doing (as long as they note the time stopped and location), but many carriers do require the inclusion of those details.³⁰⁴ Drivers can divide their consecutive “off duty” hours into two periods as long as:

- One period “is at least eight consecutive hours in a sleeper berth” and the other two hours are off-duty or in the sleeper berth (or both); and
- The time driving between the rest periods does not sum over eleven hours.³⁰⁵

A driver who is driving an unloaded CMV and is no longer working can consider time spent commuting or traveling from her hotel or other lodging to a nearby restaurant as off-duty (an OOS driver, though, cannot use a CMV to drive anywhere).³⁰⁶ Drivers must stop for thirty-minute breaks after driving for eight consecutive hours and must log these breaks as off duty or sleeper berth, but these breaks do reduce the driver’s available fourteen hours.³⁰⁷

What are the requirements for driver’s logs?

A driver’s log must include information such as the below:

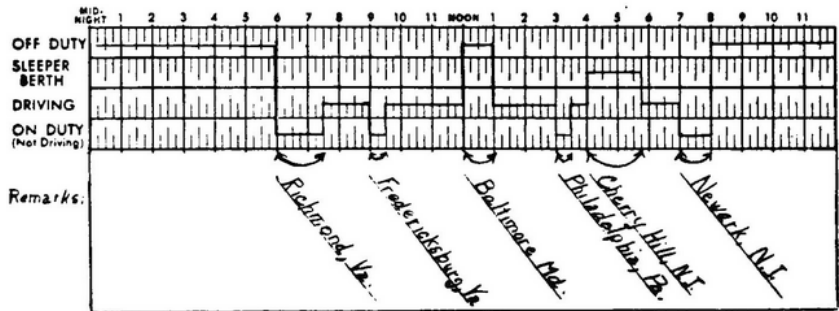
- ✓ Changes in duty status (off duty, sleeper berth, driving, or on-duty not driving)
- ✓ Locations of changes in duty status
- ✓ Dates
- ✓ Total miles driving today
- ✓ Truck or tractor and trailer number
- ✓ Name of Carrier

- ✓ Driver's signature / certification
- ✓ 24-hour period starting time
- ✓ Main office address
- ✓ Remarks
- ✓ Name of co-driver
- ✓ Total hours
- ✓ Shipping document number(s) or name of shipper and commodity
- ✓ Total miles driving today
- ✓ Commercial motor vehicle identification
- ✓ Recording days off duty
- ✓ Graph grid (to be recorded as specified in 49 CFR 395.8)

The regulations require drivers to keep their logs up-to-date during the day and make/retain duplicates (submitting the originals to the carrier within thirteen days after completion and keeping them for seven days and in a location where the logs can be readily inspected). Furthermore, any logs are required to be written by the driver legibly (unless automatic onboarding equipment is used, which is regulated by 49 CFR 395.15).

Carriers are required to monitor these logs and, if using the driver for the first time or only occasionally, "obtain from the driver a signed statement giving the total time on duty during the immediately preceding seven days and the time at which the driver was last relieved from duty prior to beginning work for the motor carriers."³⁰⁸ Carriers must retain all "supporting" documents regarding their drivers' logs.³⁰⁹ Supporting documents have never been specifically defined by the FMCSA, but the FMCSA has indicated that a supporting document is "any document that is maintained in the ordinary course of business and used by the motor carrier to verify the information recorded on the driver's record-of-duty status [log]."³¹⁰ Examples could include fuel receipts, traffic citations, bills of lading, dispatch records, etc.³¹¹

The following executed specimen grid illustrates how a driver’s duty status should be recorded for a trip from Richmond, Virginia, to Newark, New Jersey. The grid reflects the midnight to midnight twenty-four hour period.



Graph Grid (Midnight to Midnight Operation)

The driver in this instance reported for duty at the motor carrier’s terminal. The driver reported for work at 6 a.m., helped load, checked with dispatch, made a pre-trip inspection, and performed other duties until 7:30 a.m. when the driver began driving. At 9 a.m. the driver had a minor accident in Fredericksburg, Virginia, and spent one half hour handling details with the local police. The driver arrived at the company’s Baltimore, Maryland, terminal at noon and went to lunch while minor repairs were made to the tractor. At 1 p.m. the driver resumed the trip and made a delivery in Philadelphia, Pennsylvania, between 3 p.m. and 3:30 p.m. at which time the driver started driving again. Upon arrival at Cherry Hill, New Jersey, at 4 p.m., the driver entered the sleeper berth for a rest break until 5:45 p.m. at which time the driver resumed driving again. At 7 p.m. the driver arrived at the company’s terminal in Newark, New Jersey. Between 7 p.m. and 8 p.m. the driver prepared the required paperwork including completing the driver’s record of duty status, driver vehicle inspection report, insurance report for the Fredericksburg, Virginia, accident, checked for the next day’s dispatch, etc. At 8 p.m., the driver went off duty.”³¹²

There are also automatic on-board recording devices that “automatically record, at a minimum, engine use, road speed, miles driven, the date, and time of day. Drivers enter other information

required to complete the hours-of-service records.”³¹³ Electronic Logging Devices are also permitted by the FMCSA and require more manual entry from the driver than an automatic on-board recording device.³¹⁴

You should always keep in mind that it is common for truckers to falsify their logbooks, so you should verify their accuracy by comparing them (at least the prior thirty days’ logs) to other documents (such as cell phone records) or any on-boarding device or satellite communication system.³¹⁵ As noted previously, below are key tips to identifying falsified logs:

- “Excessive mileage for the time traveled”
- “Truck driver’s current record of duty status”
- “Identical runs”
- “Only on-duty driving time”
- “Team logs do not match”³¹⁶

“Even when the driver had been driving only three hours before the crash, there is a good chance you can show that the driver was actually out of service.”³¹⁷ Inaccuracies in the logbooks are most common regarding “on-duty-not-driving” and sleeper berth times.³¹⁸ Why? Largely due to the following:

“A study by an industry group, the Truckload Carriers Association, shows that drivers spend as much as 33 to 44 hours a week waiting to load or unload their cargo. Under 49 CFR § 395.3(b), drivers are allowed to drive only 30 or 40 hours in a week in which they accumulate that much on-duty-not-driving time. However, drivers are forced by economic necessity to drive more than 40 hours, meaning that the chances are very high that they are routinely in violation of the regulations governing maximum work time.”³¹⁹

Is the carrier also responsible?

Carriers do have a duty to have a procedural system in place for verifying drivers’ logs and ensuring compliance with the HOS regulations.³²⁰ If you as a practitioner find even one violation of the HOS regulations, you can use that violation as proof of the

carrier's negligence in a later accident.³²¹ (You are unlikely to be able to advance an argument of HOS violations unless you have proof that the driver's distracted or fatigued conduct at least contributed to the accident.³²² Therefore, it is advisable to hire an expert to analyze the carrier's HOS compliance procedures.³²³)

Beyond compliance with the specific HOS regulation, carriers need to be alert to their drivers' fatigue. Federal regulations prohibit a carrier from allowing a fatigued, unsafe driver to continue driving.³²⁴ If carriers do not provide drivers with a traveling companion to warn them when they are too tired to keep driving, carriers must have other methods in place to ensure they are preventing unsafely fatigued drivers from driving.³²⁵

Many carriers have departments devoted to safety or safety and compliance.³²⁶ But the problem is often that these departments concentrate too much on compliance with the federal government's minimum standards, when safety calls for more than compliance with minimum standards.³²⁷ "‘Compliance’ seeks to avoid a literal violation of a regulation. ‘Safety’ seeks to prevent crashes, serious injuries, and deaths. Compliance is simply not sufficient."³²⁸

Furthermore, the majority of carriers does not screen for sleep disorders when hiring drivers and do not even train their drivers regarding fatigue and its dangers. Yet the industry has made training materials easily accessible to carriers and, thus, drivers.³²⁹ This failure of carriers to properly warn drivers and prevent them from driving when fatigued is evidence of the carriers' "indifference to and conscious disregard for the safety of others and should be dealt with accordingly."³³⁰

Why are the HOS regs important?

Government studies suggest that fatigue may contribute to twenty to forty percent of commercial transportation accidents. Abiding by the regulations set forth by the FMCSA (especially the HOS regs) can save lives. Countless studies and statistics show that a strict enforcement of the HOS is necessary to save lives and increase efficiency of the commercial trucking industry. Accidents involving large trucks will happen, but many- especially those

related to fatigue – can be avoided by following the FMCSA’s regulations.

When looking at accident statistics, the numbers for truck drivers and fatigue are quite grim.³³¹ Of these grim statistics, it was found that a truck driver’s fatigue could be compared to the impairment caused by the consumption of alcohol. A truck driver remaining awake for seventeen hours had the same effect as the truck driver having a blood alcohol content (BAC) of .04 percent, the legal limit for a commercial truck driver.³³² This same seventeen-hour time period without sleep resulted in response times 50 percent slower than that of a well-rested driver.³³³

A study also showed that truck drivers with twenty-one hours of sleeplessness had the equivalent of 0.1 percent BAC, which may be considered drunk driving. Ultimately, truck drivers who fail to obtain adequate rest will likely have impaired motor skills beyond that required to operate a large commercial vehicle. These truck drivers are a danger not only to themselves but also to others who share the interstates and roadways with them.

One study found that fatigue leads to the following:

- ✓ Increased lapses of attention;
- ✓ Slower information-processing and decision making;
- ✓ Longer reaction time to critical events;
- ✓ More variable and less effective control responses;
- ✓ Decreased watchfulness;
- ✓ Decreased alertness to danger.³³⁴

Few dispute that these problems have the potential to become deadly behind the wheel of a tractor trailer truck. Thus, it was no surprise that researchers found that drowsy driving increased an individual’s crash risk by four to six times.³³⁵ The Large Truck Crash Causation Study (LTCCS) reported that 13 percent of commercial motor vehicle (CMV) drivers were considered to have been fatigued at the time of their crash. (For more information on this study, visit www.fmcsa.dot.gov.)

A number of years ago, I was involved in a wrongful death case in Auburn, Alabama, that highlighted the need for drivers to adhere to the regulations.³³⁶ The driver operated her truck from

approximately 6 a.m. until 3 a.m. the next day resulting in excess of twenty-one hours of on-duty time. Shockingly, she had only previously been off duty less than the required amount, only having had a window of six hours to sleep. This fatigued truck driver killed a stranded motorist who was standing beside his parked vehicle. The company was forced to ultimately admit that their driver had violated the HOS regulations that are intended to keep fatigued drivers off the road. The company even had internal documents stating that fatigue kills. Sadly, the document was proven true.

Unfortunately, many trucking companies do not have the procedural safeguards in place to reduce the likelihood of driver fatigue and prevent violations of the federal on duty hour regulations. The trucking company in the case mentioned above was found to have more than 100 fatigue-related violations of the federal regulations.³³⁷ Perhaps more egregious was that the trucking company took the truck from the driver and then gave it back within only six hours, grossly violating the ten-hour off-duty rule.³³⁸ Clearly, it was only a matter of time before this corporate culture of breaking the law would result in serious injury or a death.

As demonstrated above, fatalities can sadly be a very real result of fatigued truck drivers. In 2009, a horrific accident occurred in Miami, Oklahoma, when a truck driver began driving at 3 a.m. though in his tenth consecutive hour of driving. The truck driver failed to notice traffic had stopped on the interstate and, at 69 mph, slammed into the back of an SUV and continued to drive over three additional vehicles.³³⁹ The accident resulted in the death of ten people and injured five others.³⁴⁰ After an investigation, the NTSB found the cause of the accident was fatigue due to acute sleep loss, circadian disruption associated with his work schedule, and mild sleep apnea.³⁴¹ The truck driver had slept only five hours before beginning his drive.³⁴²

As stated in a study directed by a leading human factors/ergonomics scientist, the negative side effects of driver fatigue include the below:

- 1) Increased lapses of attention
- 2) Slower information processing and decision making
- 3) Longer reaction to critical events
- 4) More variable and less effective control responses.³⁴³

In another reported incident, a fatal collision in South Carolina involving a tractor trailer resulted from a truck driver who fell asleep at the wheel.³⁴⁴ The truck driver fell asleep, drifted off the road, and awoke jerking back onto the road.³⁴⁵ The driver was found to suffer from a sleep disorder. At least three people were killed.³⁴⁶ In another similar case, an expert witness suspected the driver had fallen asleep on the freeway at 2:30 p.m.³⁴⁷ The result? Twenty-five injured and twelve killed.³⁴⁸

Why are the HOS regulations important? The above examples are just a handful out of many that prove just how critically necessary it is for drivers' hours on the road to be regulated and monitored closely.

What is or causes fatigue?

Anytime a person is awake they are in the process of becoming fatigued due to sleep deprivation. Fatigue can induce sleepiness and decrease the ability to operate the vehicle safely. One sleep expert has demonstrated fatigue with the following table:

TABLE: SUMMARY OF LEVELS

- LEVEL 1 – WIDE AWAKE, ABSOLUTELY FOR SURE AT PEAK ALERTNESS AND ENERGY.
- LEVEL 2 – MAY BE TIRED, SLIGHTLY TIRED, CANNOT SAY "I AM AT PEAK ALERTNESS."
- LEVEL 3 – UNAMBIGUOUSLY TIRED.
- LEVEL 4 – VERY TIRED, EXTREMELY TIRED, BUT ABSOLUTELY NOT SLEEPY/DROWSY.
- LEVEL 5 – UNAMBIGUOUSLY SLEEPY/DROWSY.³⁴⁹

Drivers' inconsistent schedules result in inconsistent sleep patterns and increased risk of fatigue.³⁵⁰ "Altered circadian rhythms (such as those caused by shift work or time zone crossings) and other factors could further exacerbate the preexisting sleepiness."³⁵¹ Fatigue can also be caused by sleep orders.

"Almost ninety different sleep disorders exist. [. . .] One example is sleep apnea, a condition in which an individual has breathing pauses throughout sleep. This causes waking

sleepiness and performances decrements, as well as other related health problems. Studies of individuals with sleep apnea have shown up to seven times increased risk for car accidents. Sleep disorders, such as sleep apnea, put individuals at increased risk for sleepiness and potential performance reductions.”³⁵²

Obstructive sleep apnea is prevalent in as many as 18 million Americans and a large number of individuals with the health problem are undiagnosed. Drivers with obstructive sleep apnea have 2.5 times greater risk of having a highway accident than those without. The American Trucking Association states that at least 29 percent of its drivers have problems with sleep apnea compared with 4 percent of the general population.

As indicated above, sleep apnea is a disorder that disrupts the sleep process, making the affected individual feel very tired the next day. Sleep apnea is so dangerous that the Federal Motor Carrier Safety Regulations forbid drivers diagnosed with sleep apnea from driving until the sleep apnea has been treated. See Federal Motor Carrier Safety Regulations, 49 C.F.R. § 392.3

Sleep loss of even one or two hours can significantly degrade alertness and performance. Lost sleep over successive days can compound the problem and has a cumulative effect on alertness and performance. Sleep deprivation can only be restored by getting sleep. Sleep debt can cause a driver to suffer from having microsleeps.

“Microsleeps are brief, unintended episodes of loss of attention associated with events such as blank stare, head snapping, prolonged eye closure, and so on, which may occur when a person is fatigued and trying to stay awake to perform a monotonous task like driving or watching a computer screen. [. . .] ‘While in a microsleep, a person fails to respond to outside information. A person will not see a road signal light or notice that the road has taken a curve.’ The dangers of microsleeps are readily apparent.”³⁵³

What can the driver do to battle fatigue?

The FMCSA provides a number of tips on its website to help drivers in battling fatigue. We provide these tips in this chapter because they can help you as a practitioner in establishing a driver's negligence in failing to take the industry-recognized necessary steps (exercise reasonable care).

The FMCSA's first and most obvious tip is that the driver has enough sleep before beginning the journey.³⁵⁴ The driver should avoid driving when it is natural to be sleepy (12 a.m. to 6 a.m. and 2 p.m. to 4 p.m.) because the agency conducted a study that found a driver's attentiveness is "related to 'time-of-day' more so than 'time-on-task.'"³⁵⁵ The agency explains that our body has circadian rhythms (involving an internal clock) which affect people's natural patterns of alertness.³⁵⁶ As mentioned above, insufficient sleep only exacerbates these natural times of inattentiveness.³⁵⁷ The FMCSA also warns of "sleep inertia" during the first hour a driver has been awake and on the road.³⁵⁸

Second, a driver is advised to eat healthy to enhance sleep (sleeping on an empty or too full stomach can disturb one's sleep).³⁵⁹ Third, drivers are urged to take naps of at least ten minutes and preferably at most forty-five minutes; they should wait to resume driving until they have had fifteen minutes to fight off the sleep inertia.³⁶⁰

Fourth, drivers should not take medication that might make them sleepy (including allergy and cold medications).³⁶¹ The agency says suffering from cold symptoms is safer than risking the cold medicine's effects on one's driving.³⁶² In fact, one study found 17 percent of CMV drivers involved in accidents were using "over-the-counter" medications when the accident occurred.³⁶³

Fifth, drivers must learn to notice "the signals and dangers of drowsiness," including "frequent yawning, heavy eyes, and blurred vision."³⁶⁴ In 2005, a study found three out of four CMV drivers know they made at least one driving error because they were drowsy.³⁶⁵ To help drivers recognize the importance of noticing their sleepiness, the FMCSA recounts the below horrific crash:

"On October 16, 2005, at 2 a.m., a 23-year-old CMV driver fell asleep behind the wheel, causing him to enter a ditch and

eventually roll his truck over on both west-bound lanes of Interstate 94. Minutes later, a charter bus carrying a school band crashed into the truck, killing five and injuring twenty-nine others. As a result of the crash, the CMV driver was charged with five counts of homicide by negligent operation of a vehicle and twenty-nine counts of reckless driving that caused great bodily harm. If convicted he could have faced nearly ninety years in prison.”³⁶⁶

Sixth, the FMCSA warns drivers that smoking, listening to the radio, and other similar activities do not truly solve a driver’s drowsiness problem.³⁶⁷

In addition, technology and devices have been developed to help one in the battle against fatigue, including the below:

- ✓ “Actigraphy uses a wristwatch-like device (most have an actual watch built in) to measure physiological changes and assesses sleep, rest and activity patterns.”³⁶⁸
- ✓ “Another category of technology uses eye measurements to estimate fatigue. Some of these give an alert when there is impending fatigue or provide an alertness scale.”³⁶⁹
- ✓ “Another line of technology uses vehicle movement such as lane tracking and steering input to estimate fatigue.”³⁷⁰
- ✓ “Drivecams are probably getting the most attention in the industry. These cameras have the ability to record the roadway ahead and the driver in the cab. Some include GPS and speed capabilities.”³⁷¹
- ✓ “Psychomotor technologies measure inputs such as reaction time and hand-eye coordination to estimate fatigue.”³⁷²

Why is driver fatigue such an ongoing issue?

When fatigue is such a known, dangerous problem, and when such detailed regulations attempt to reduce the presence of fatigue on our roads, why then does fatigue continue to be the main cause of accidents?

One reason could be the explosion of authorized motor carriers, now nearing 1 million.³⁷³ This creates an environment of

unrestricted competition and, thus, lower driver pay.³⁷⁴ Because drivers are still primarily paid “by the mile,” they are motivated to drive as far and long as possible – even when they know they are too tired to continue.³⁷⁵ Further, drivers are not usually paid for the time spent unloading and loading, so drivers try to “make up for lost time” by driving when they should not.³⁷⁶

In one case, the driver drove more than twenty-one hours; the carrier had required him to make four stops in an impossibly short time. Why does the carrier do that? Time is money when behind the wheel. They move the material to the destination, get a new load, and make more; they are trying to keep that truck and system running. When the truck isn’t moving, it isn’t making money. Truck drivers are buying things like five-hour energy drinks because they are under such immense pressure to keep the trucks rolling.

Another reason could be that few people truly wish to work seventy to 100 hours a week away from their families, earning little or no more than someone working “a senior fast-food service job.”³⁷⁷ (The Fair Labor Standards Act does not cover truck drivers.³⁷⁸)

Maintenance

FAQs

- 1) What does the government require regarding maintenance?
- 2) Are both carriers and drivers responsible for maintenance?
- 3) What are parts that I as a practitioner should watch for being defective or negligently repaired/maintained?
- 4) What are common misconceptions about brakes?
- 5) What are common causes of tire failure?

Introduction

Paralyzed. An \$18.79 million verdict. The cause? Negligent repair of the truck involved in the crash.³⁷⁹

In a different, also horrific case currently handled by our firm, a police officer was responding to an emergency call when a truck driver struck and killed him. “The truck driver was cited for numerous violations of Federal Motor Carrier Safety Act regulations. Those violations included responsibilities he has as a driver on the road and those his trucking company has to maintain a safe vehicle,” Beasley Allen Principal & Founder Jere Beasley said.³⁸⁰

While drivers are usually at least partially at fault in trucking collisions, in the case mentioned above involving an \$18.79 million verdict, the plaintiff was actually the driver.³⁸¹ The day of the collision, the driver had even complained to the carrier that the vehicle suspension was vibrating.³⁸² The truck had just recently been serviced, but the servicer had left the lateral control rod detached.³⁸³ The driver’s spine was severed when the truck crashed; he spent two months in the hospital and his house had to be refitted to be wheelchair accessible.³⁸⁴

Many accidents are attributable to mechanical failures in a commercial vehicle. Federal regulations require motor carriers to systematically inspect, maintain, and repair all motor vehicles subject to their control. These regulations also require that the truck and its component parts must be in safe operating condition

at all times. A motor carrier can be held responsible for any injury caused by its failure to properly inspect, maintain or repair any equipment in its control. For example, one of the factors of the BASIC score is “vehicle maintenance.” See Chapter Two for a detailed discussion of the BASIC score.

In 2010, 13.5 percent of the vehicles inspected were placed out of service because of bad brakes. It should not be assumed that the truck is well maintained because there is a good chance that it is not. Our firm recently obtained a verdict of \$3.5 million against a trucking company in part due to poor maintenance of the truck’s brakes.

One fact you as the practitioner need to keep in mind is that trucks involved in accidents are many times repaired and back on the road before hired experts have a chance to examine the vehicles.³⁸⁵ In a more grave crash, sometimes “a special commercial vehicle enforcement officer” inspects the driver and vehicle (prior to their being placed back in service) and reports his findings in a “Commercial Vehicle Inspection Report.”³⁸⁶ You need to locate a copy of this report right away, since your expert will need to use it in his investigation.³⁸⁷ The report will contain a variety of details including the following:

- ✓ Driver logs
- ✓ Motor carrier information
- ✓ Exact brake adjustment measurements
- ✓ Tire condition
- ✓ Any mechanical violations discovered following the accident³⁸⁸

What people often do not realize is that trucks’ many parts are usually manufactured and assembled by multiple companies.³⁸⁹ “An example would be a Peterbilt truck with a Cummins engine, an Allison transmission, Eaton differentials, and a Bendix brake system. A different company manufactures each of these major components.”³⁹⁰ Every manufacturer prescribes different maintenance requirements and schedules for its parts.³⁹¹ Too, trucks are used for such a wide variety of reasons and in a wide variety of conditions.³⁹² Both of these factors inhibit legislating maintenance schedules.³⁹³ Therefore, carriers should establish maintenance systems and procedures based on careful

understanding of the federal and state regulations that do exist as well as industry expectations.³⁹⁴

What does the government require?

Despite the difficulty in legislating maintenance (explained above), the federal government has set out a number of guidelines for carriers and drivers regarding the maintenance of their vehicles. Each carrier is required to routinely “inspect, repair, and maintain” all vehicles that it controls for at least thirty consecutive days.³⁹⁵ “Parts and accessories shall be in safe and proper operating condition at all times.”³⁹⁶ The regulations further specify these parts and accessories in § 393, noting that section is not a comprehensive list (all parts and accessories affecting a vehicle’s safety should be maintained, including frames, suspensions, etc.).³⁹⁷

Carriers are required to keep records on each vehicle for one year in the place where the vehicle is “housed or maintained” and for six months after the carrier no longer controls the vehicle.³⁹⁸ Records are to contain the below information:

- ✓ “An identification of the vehicle including company number, if so marked; make, serial number, year, and tire size. In addition, if the motor vehicle is not owned by the motor carrier, the record shall identify the name of the person furnishing the vehicle;
- ✓ A means to indicate the nature and due date of the various inspection and maintenance operations to be performed;
- ✓ A record of inspection, repairs, and maintenance indicating their date and nature; and
- ✓ A record of tests conducted on pushout windows, emergency doors, and emergency door marking lights on buses.”³⁹⁹

Carriers are required to ensure proper lubrication of each vehicle and, further, ensure the vehicles have no oil or grease leaks.⁴⁰⁰

Given the above requirements, a carrier cannot allow a vehicle to be driven if the vehicle’s condition is likely to result in an accident or breakdown.⁴⁰¹ If the vehicle’s condition is found to be unsafe while on the road (unsafe enough that to remain on the road would

endanger the public), the driver must drive it only far enough to find a location to safely repair the vehicle.⁴⁰²

FMCSA special agents have the authority to enter and perform inspections of a carrier's operating vehicles.⁴⁰³ The driver's inspection reports (Driver Vehicle Examination Report) should include the outcomes of any inspections completed by FMCSA officials.⁴⁰⁴ If a vehicle's mechanical condition is likely to cause an accident or breakdown, "authorized personnel" must declare it OOS and use a sticker to mark the vehicles as such.⁴⁰⁵

In its appendix, the regulations provide a highly detailed list of the parts and accessories that must be inspected; this list though is only the minimum.⁴⁰⁶ "For example, for a tractor semitrailer, full trailer combination, the tractor, semitrailer, and the full trailer (including the converter dolly if so equipped) must each be inspected."⁴⁰⁷ It is the carrier's responsibility to ensure its vehicles are maintained at least at this minimum standard.⁴⁰⁸ Furthermore, if a vehicle has not been inspected according to at least the minimum specifications at least once within the previous twelve months and if documentation of such inspection is not actually in or on the vehicle, then the carrier cannot permit the vehicle to be driven.⁴⁰⁹ The documentation must include the following:

- ✓ "The date of inspection;
- ✓ Name and address of the motor carrier, intermodal equipment provider, or other entity where the inspection report is maintained;
- ✓ Information uniquely identifying the vehicle inspected if not clearly marked on the motor vehicle; and
- ✓ A certification that the vehicle has passed an inspection in accordance with §396.17."⁴¹⁰

Carriers can perform the inspections or hire others (such as a truck stop, commercial garage, etc.), as long as the inspections are performed by inspectors that meet the qualifications specified in 49 CFR § 396.19. A vehicle can be considered to have had its annually required inspection if it undergoes a roadside inspection or periodic inspection under the control of or by a state or federal government official and that inspection meets the minimum specifications.⁴¹¹

The below are the required qualifications for inspectors:

- (1) “Understand the inspection criteria set forth in part 393 and appendix G of this subchapter and can identify defective components;
- (2) Are knowledgeable of and have mastered the methods, procedures, tools, and equipment used when performing an inspection; and
- (3) Are capable of performing an inspection by reason of experience, training, or both as follows:
 - (i) Successfully completed a Federal- or State-sponsored training program or have a certificate from a State or Canadian Province that qualifies the individuals to perform commercial motor vehicle safety inspections, or
 - (ii) Have a combination of training or experience totaling at least one year. Such training or experience may consist of:
 - (A) Participation in a commercial motor vehicle manufacturer-sponsored training program or similar commercial training program designed to train students in commercial motor vehicle operation and maintenance;
 - (B) Experience as a mechanic or inspector in a motor carrier or intermodal equipment maintenance program;
 - (C) Experience as a mechanic or inspector in commercial motor vehicle maintenance at a commercial garage, fleet leasing company, or similar facility; or
 - (D) Experience as a commercial motor vehicle inspector for a State, Provincial or Federal government.”⁴¹²

Further, qualified inspectors must prepare a report that:

- (1) “Identifies the individual performing the inspection;

- (2) Identifies the motor carrier operating the vehicle or intermodal equipment provider intending to interchange the vehicle to a motor carrier;
- (3) Identifies the date of the inspection;
- (4) Identifies the vehicle inspected;
- (5) Identifies the vehicle components inspected and describes the results of the inspection, including the identification of those components not meeting the minimum standards set forth in appendix G to this subchapter; and
- (6) Certifies the accuracy and completeness of the inspection as complying with all the requirements of this section.”⁴¹³

The inspector’s report is required to be kept at the location where “the vehicle is either housed or maintained” for fourteen months and has to be available “upon demand” by any government official.⁴¹⁴

Furthermore, the regulations define brake inspectors as the following:

“any employee of a motor carrier or intermodal equipment provider who is responsible for ensuring that all brake inspections, maintenance, service, or repairs to any commercial motor vehicle, subject to the motor carrier’s or intermodal equipment provider’s control, meet the applicable Federal standards.”⁴¹⁵

The regulations further specify that these brake inspectors must meet the following qualifications:

- (1) “Understands the brake service or inspection task to be accomplished and can perform that task; and
- (2) Is knowledgeable of and has mastered the methods, procedures, tools and equipment used when performing an assigned brake service or inspection task; and
- (3) Is capable of performing the assigned brake service or inspection by reason of experience, training, or both as follows:
 - (i) Has successfully completed an apprenticeship program sponsored by a State, a Canadian Province, a Federal agency or a labor union, or a training program approved by a State,

- Provincial or Federal agency, or has a certificate from a State or Canadian Province that qualifies the person to perform the assigned brake service or inspection task (including passage of Commercial Driver's License air brake tests in the case of a brake inspection); or
- (ii) Has brake-related training or experience or a combination thereof totaling at least one year. Such training or experience may consist of:
- (A) Participation in a training program sponsored by a brake or vehicle manufacturer or similar commercial training program designed to train students in brake maintenance or inspection similar to the assigned brake service or inspection tasks; or
 - (B) Experience performing brake maintenance or inspection similar to the assigned brake service or inspection task in a motor carrier or intermodal equipment provider maintenance program; or
 - (C) Experience performing brake maintenance or inspection similar to the assigned brake service or inspection task at a commercial garage, fleet leasing company, or similar facility.⁴¹⁶

Documentation of a brake inspector's qualifications must be kept where and while the inspector is employed and for one year following.⁴¹⁷ (Such documentation is not required for anyone who has passed the CDL test, since the test includes a portion focused on air brake knowledge and skills.⁴¹⁸)

"Qualified, trained technicians are the heart" of a carrier's maintenance program, whether the carrier has a few or many trucks.⁴¹⁹ Without qualified inspectors, carriers and drivers cannot be certain of their safety on the road.⁴²⁰ The industry provides many certifications, including for medium- and heavy-duty trucks, fire apparatus, and other specific products and components used in trucks.⁴²¹

In addition, drivers have a role in ensuring the proper maintenance/repair of the trucks they drive. As discussed in our chapter regarding drivers, drivers must make pre-trip and post-trip inspections. Before beginning a journey, the driver is required by federal regulations to be “satisfied” that basic but specific equipment and parts are “available” and “in good working order.”⁴²² The driver is also required to check that everything, including the cargo, is properly distributed and secured.⁴²³ “Finally, the driver must review the last driver’s vehicle inspection report (DVIR) and sign it if defects or deficiencies were reported.”⁴²⁴

Further, the CDLM provides detailed checklists of not only the major equipment or parts to inspect, but also the types of defects and wear and tear for which the driver should be looking. Per the CDLM, the driver must complete a pre-trip inspection to avoid an accident or breakdown.⁴²⁵ The CDLM advises approaching the vehicle observantly and using the following seven-step inspection method:

1. “Do a vehicle overview.”
2. “Check engine compartment.”
3. “Start engine and inspect inside the cab.”
4. “Turn off engine and check lights.”
5. “Do walk-around inspection.”
6. “Check signal lights.”
7. “Start the engine and check.

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The CDLM’s detailed “sub-steps” within these steps include such safety measures as testing the brakes, checking the cargo securements, making sure the license plate(s) is clean and secure, ensuring the reflectors are clean with the proper color, etc.⁴²⁷ The CDLM also advises inspections during trips, including watching gauges and checking at stops the tires, wheels, rims, brakes, lights, reflectors, brakes, electrical connections, coupling devices, and cargo securement devices.⁴²⁸

Lastly, at the “completion of each day’s work,” the driver must complete an inspection that must include *at least* the following:

- Service brakes, including trailer brake connections
- Parking brake
- Steering mechanism
- Lighting devices and reflectors
- Tires
- Horn
- Windshield wipers
- Rear vision mirrors
- Coupling devices
- Wheels and rims
- Emergency equipment.⁴²⁹

The driver does not have to keep her report in the vehicle and can instead file it immediately.⁴³⁰

Ultimately, as described by J.J. Keller, “drivers are required to check their loads:

- ✓ Before the trip starts,
- ✓ Within the first fifty miles after beginning the trip, and
- ✓ Whenever the driver makes a change of duty status or after the vehicle has been driven for three hours or 150 miles, whichever occurs first.”⁴³¹

Locations such as weigh stations and portable scales (which use the Commercial Motor Vehicle Safety Alliance inspection standards and the FMCSR) conduct roadside inspections.⁴³² After such an inspection by a state or FMCSA official, the driver must “deliver the report to the motor carrier upon arrival at the next terminal or facility. If the driver is not scheduled to arrive at a terminal or facility within twenty-four hours, he/she must immediately mail the report to the carrier.”⁴³³

PRACTICAL EXAMPLES

The functionality of every part and accessory in a truck is critical. For example, maintenance factors can affect the illumination distance of the headlights on a truck. It is important to verify the headlights were working properly, adjusted correctly, and free from dirt and debris (this is best done with an early inspection; but if that

is not possible, you may be able to use any photographs taken at the accident for your verification).

In March 2015, the FMCSA shut down a Mortise Trucking carrier “following roadside safety inspections for mechanical defects including inadequate brakes, brake system pressure loss, oil-contaminated brake and steering components, and worn tires.”⁴³⁴ We will focus the remainder of the chapter on the two key practical examples mentioned in the Mortise Trucking case: brakes and tires. Brakes and tires are two of a truck’s parts most likely to malfunction and cause serious accidents and are thus two critical parts you as a practitioner should check to see if they were negligently repaired or maintained. Lastly, we include an article our firm previously published regarding the dangers of improper maintenance of wires...potentially causing truck fires.

Brakes

In Pennsylvania, eight vehicles were struck by a truck speeding down a steep mountain highway. Initial investigations indicated brake failure.⁴³⁵ Worse was a case where a man was crushed to death in his van that was caught between two log trucks in 2009.⁴³⁶ We represented his family, who was awarded a verdict of \$3.5 million.⁴³⁷ The cause of this horrific accident? The truck had “inoperable and defective brakes.”⁴³⁸ “I am grateful to see that folks in Chilton County value human life and will not accept unsafe trucks traveling on Alabama highways harming its citizens,” said Beasley Allen attorney J. Cole Portis. “I know that this jury’s verdict will make a difference in the log truck industry.”⁴³⁹

A thorough investigation is necessary when dealing with a case related to defective brakes.⁴⁴⁰ Determining the following issues are critical for a comprehensive understanding of the situation:

- “The owner’s responsibility”
- “The involvement of the maintenance provider”
- “Whether or not inspections were performed”
- “What repairs were made”
- “Whether compatible parts were utilized or not”⁴⁴¹

“When these elements are inspected and analyzed by experienced and trained personnel, the true story rarely evades coming to light.”⁴⁴²

Tires

A truck’s load of logs shifted and spilled onto a bridge with forty construction workers.⁴⁴³ Almost half of them were injured.⁴⁴⁴ Two lost their lives.⁴⁴⁵ Why? Because the truck’s left rear tire blew out.⁴⁴⁶

You will find it complicated to identify why a truck’s tires failed in an accident. The tire must be analyzed, while considering the road conditions, wheels, and remainder of the vehicle. Of course, consideration of the installation, repair, and maintenance of the tires is necessary too. Because of these various factors, you must hire an expert with thorough knowledge and experience when determining how the tire factored into the accident.

Underinflation increases the surface of the tire touching the roadway and thus heat. The heat is also increased by the tire’s speed. The heat then deteriorates the inside and outside of the tire, weakening the tire – ultimately to the point of failure. This failure can come in the form of a blowout but principally results in tire detread. There are many potential causes for a tire to be operated underinflated. A driver and carrier have a responsibility to operate the vehicle with properly inflated tires. The tire tread wear pattern is a good forensic indicator of a tire being operated while underinflated. Furthermore, inflating an previously underinflated tire does nothing more than delay the inevitable because the tire has already been weakened by the heat and will fail.

Another potential cause of tire failure is retreading. Retreading is done to prolong the tire’s life and is often done to trucks’ tires. Yet, improper retreading can cause the tires to fail. For example, a damaged tire should never be retreaded. Improper retreading could be the result of the contamination between the tire and the new tread, curing failures, or section repairs.⁴⁴⁷ Treads can also become a problem if they are not used by the carrier in the proper application. A log or quarry truck needs different treading than a interstate carrier.

Another danger is tire age.⁴⁴⁸ If tires are more than six years old, they can look brand new (and have never actually been used) but be deadly dangerous.⁴⁴⁹ Our firm partnered with the Prattville, Alabama, police to sponsor free tire safety inspections; trained officers explained to drivers how to use the tire manufacturers' codes to determine the tires' ages.⁴⁵⁰ In one case handled by our firm, a driver was paralyzed in an accident caused by using her ten-year-old spare tire that had never previously been used.⁴⁵¹

Hiring, Supervision & Retention

FAQs

- 1) What do the federal regulations require regarding hiring a new driver?
- 2) Do federal regulations affect how a carrier supervises and retains employees?
- 3) How can a carrier be held liable for its driver's negligence?

What must a carrier do to hire, supervise, and retain properly?

HIRING

In one case, a truck struck two men's car, which rolled multiple times resulting in injuries such as a fractured vertebra, brain trauma, and damaged collarbone.⁴⁵² One claim was that the carrier had been negligent in hiring the truck driver at fault.⁴⁵³ Drivers unknowledgeable in the proper securement of a load of hay or hazardous materials can and have caused devastating accidents.⁴⁵⁴

When you are looking to find out if the driver was hired properly, you need to start by looking at 49 C.F.R. § 391.23, which requires the prospective carrier to complete background investigation on each driver it hires. It states: "While a trucking company clearly has a duty to investigate the driving experience and qualifications of a driver, most jurisdictions have held that the company does not have a duty to investigate the driver's non-vehicular criminal background. [. . .] Accordingly, a trucking company cannot usually be held responsible under a negligent hiring or retention theory for an intentional assault inflicted by a driver."

You can begin by asking if the carrier followed two basic, key requirements from the C.F.R. First, a carrier must request the driver's three-year driving record from each state in which the driver had a motor vehicle operator's license. Second, the carrier must investigate the driver's safety performance history. Further, all drivers are required to present to their carriers their ten-year employment history.⁴⁵⁵ (See below for further discussion of hiring as a liability strategy aspect.)

Ask if these records were included, as required, in the driver's qualification file (specifically, his "driver history investigation file") within thirty days of his start date (§ 391.51). The carrier may claim it was unable to locate such historical information regarding its drivers. Even if that claim were actually be true, the carrier must have documented its "good faith effort" in obtaining the information and certify the driver had no record. (Similarly, if the driver had never worked as a driver before, the carrier must have documented this fact in his file.) The carrier's investigations can be via the phone or correspondence or even in person; the C.F.R. permits whatever method the carrier deemed "appropriate."

If the driver's previous carrier refused to respond to the investigation, the current/prospective carrier should report that lack of cooperativeness to the FMCSA. Previous carriers are required to respond to these DOT specified investigations within thirty days of requests (by either providing the information or confirming the lack of such data); they are also required to "take all precautions reasonably necessary to ensure the accuracy of the records." Previous carriers must provide their contact information, so the driver can contact them to correct or rebut any information from the investigation. Lastly, previous carriers must keep for one year records of every request for information on former drivers.

The current/prospective carrier's investigation needs to have included the following:

- ✓ "general driver identification,"
- ✓ "employment verification,"
- ✓ "data elements for accidents involving the driver,"
- ✓ "accidents as defined in §390.5 or accidents the previous carrier includes from § 390.15(b)(2)."

Additionally, the investigation must include (with the driver's written consent) the driver's three-year history regarding the following:

- ✓ "whether the driver violated the alcohol or controlled substance prohibitions;"
- ✓ "whether the driver failed to undertake or complete a rehabilitation program prescribed by a substance abuse professional;"

- ✓ “whether a driver who had successfully completed a SAP’s rehabilitation referral had testing violations of a 0.04 or higher on an alcohol test or verified positive drug tests or whether he refused to be tested.”

The carrier must also “obtain an original or copy of the medical examiner’s certificate issued in accordance with §391.43 and any medical variance on which the certification is based.” (See Chapter Two section re: drivers for more details on certified medical examiners.)

The FMCSA has created an online database called Pre-Employment Screening (PSP) to assist carriers in their hiring process (though it is not required that carriers use PSP, it could be argued that they are negligent if they fail to do so). The FMCSA creates driver profiles, known as the Driver Information Resource (DIR) and updates it monthly.

Industry standards demand that carriers be careful when hiring and sorting through applications, noting “caution lights” such as the applicants’ gaps in employment, driving records, years of experience, accident history, experience with types of vehicles and cargos, etc.⁴⁵⁶ Carriers should also ask “probing questions” during interviews.⁴⁵⁷ Thorough road tests and written tests are helpful in determining a driver’s skills and knowledge, including reading and comprehension skills.⁴⁵⁸ As noted above, carriers must take note of the applicant’s medical background and physical qualifications (including examining the documentation, to ensure everything is in order). (See the chapters regarding drivers and carriers for more details.)

“Ultimately the company is responsible for the driver’s actions. Great care and consideration should be given to all aspects of the hiring and qualification process to ensure compliance with all applicable laws, rules, and regulations, and to ensure that only qualified drivers are operating commercial motor vehicles. These are only some examples of what the qualification process entails. A prospective carrier may elect to implement other criteria independently or may be required to do so, depending on the circumstances.”⁴⁵⁹

SUPERVISION & RETENTION

As noted previously, supervision of drivers is a key responsibility that a carrier has and is critical to your case. Supervision ranges from basics applicable to every employee-employer relationship to details unique to the trucking industry. Below we provide brief discussions of a few of these aspects involved in supervision. Carriers must properly manage and control their drivers and ensure they are in compliance with regulations and industry standards.⁴⁶⁰

✓ *Drug & Alcohol Abuse Prevention*

Per 49 CFR § 382.301, and as discussed in further detail in Chapter Three, carriers must conduct the following types of testing to ensure compliance with alcohol and drug prohibitions:

- ✓ Pre-employment testing (under certain circumstances)
- ✓ Post-accident testing
- ✓ Random testing
- ✓ Reasonable suspicion testing
- ✓ Return-to-duty testing
- ✓ Follow-up testing

The regulations provide specific guidelines regarding how the tests are to be conducted, who conducts them, and what the tests must include; the regs also specify how the carrier must handle the results and records of the tests.

Further, per 49 CFR § 382.601, carriers are required to create and enforce a drug and alcohol testing policy.⁴⁶¹ In trucking lawsuits, it can be proven – with few exceptions – that carriers’ policies are deficient and thus create liabilities for the carriers.⁴⁶² While a carrier is unlikely to be fined for an inadequate policy, a driver might testify that he would have ceased his substance abuse had he known it was illegal or prohibited by the carrier; this would make the carrier liable for failing to establish a “program of deterrence.”⁴⁶³

For you as a practitioner, it is key to determine if the driver underwent the required post-accident testing and whether the driver tested “positive” for an illegal substance/at an illegal level.⁴⁶⁴ You should also determine if the carrier properly trained its drivers

about the proper procedures for post-accident testing (49 CFR §382.303).⁴⁶⁵ Carriers rarely do so.⁴⁶⁶ Carriers also usually misinterpret “as soon as practicable” for post-accident testing, which actually has no time allowance.⁴⁶⁷ In addition, carriers often use third-party service providers for their testing, which can lead to inadequate testing.⁴⁶⁸

✓ *Documentation*

As already indicated above, a responsible carrier will properly maintain and thoroughly review any documentation that will assist it in determining a driver or other employee’s performance. For example, in a case mentioned previously, the carrier failed to take note of a driver’s log that recorded a distance traveled in an impossible length of time.⁴⁶⁹ Furthermore, a carrier must maintain thorough personnel files, tracking a driver’s performance (including citations/violations of traffic laws, accident history, alcohol and drug test results, etc.). This kind of documentation is critical in properly supervising (including disciplining) its drivers.

✓ *Retention*

Related is retention (see below for further discussion of retention as a liability strategy aspect). “Retention is an ongoing process that includes, but is not limited to, continually implementing and updating procedures and policies, having an accountability system in place, and having a plan that defines the company’s disciplinary action policies.”⁴⁷⁰ It is critical that a carrier routinely not only hire and retain good drivers, but also discipline and even fire drivers when necessary. Many of the same considerations a carrier should have when hiring must factor into a carrier’s retention policies. If a driver’s performance proves unsatisfactory (such as with his recklessness, multiple accidents or traffic citations, etc.), a carrier must be prepared to promptly discipline or fire the driver.

Based on the above, what are key related theories of liability?

Employer Liability in General⁴⁷¹

When the driver is an actual employee of the trucking company or under the control of the trucking company, the company’s liability is governed by state common law theories of agency. In such

situations, the motor carrier, as the employer of the driver, is only responsible for the driver's actions while he is acting within the scope of his employment. A driver acts within the scope of his employment when his actions further the carrier's business in any matter even if it benefits himself.

Overview of Negligent Hiring, Entrustment, Training, or Retention⁴⁷²

Negligent hiring, entrustment training and retention each has at its heart the incompetence of the truck driver. The variations between these claims each deal with when and how the trucking company should deal with that incompetence. A trucking company has a duty to keep incompetent drivers off the road. A failure to do so will certainly be a strong basis for liability in litigation.

A closer look at Respondeat Superior

The most commonly used theory of liability – and the most direct – is *respondeat superior*, which assigns the responsibility for an employee's actions during the “course and scope of employment” to his employer.⁴⁷³ Most states require satisfaction of the following (the Restatement (Second) of Agency § 228):

- 1) “Conduct of a servant *is* within the scope of employment if, but only if:
 - a. It is of the kind he is employed to perform;
 - b. It occurs substantially within the authorized time and space limit;
 - c. It is actuated, at least in part, by a purpose to serve the master, and
 - d. If force is intentionally used by the servant against another, the use of force is not unacceptable by the master.

Alternatively,

- 2) Conduct of a servant *is not* within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master.”⁴⁷⁴

If you cannot prove that the employee's actions occurred within the scope of employment and that the employer is thus liable, you will have more of a challenge in securing the damages because you will not be able to touch the employer's financial assets and insurance.⁴⁷⁵ Keep in mind though that the defense may see it strategically wise to admit the employer was acting within the scope of employment, in which case "courts in most states will preclude the plaintiff from bringing independent claims of negligence against the employer" (such as the ones below).⁴⁷⁶ Key to each of the below is the foreseeability of the driver's negligent or reckless conduct/performance.⁴⁷⁷

A closer look at Entrustment

The Restatement (Second) of Torts §390 defines negligent entrustment as the following:

"One who supplies directly or through a third person, a chattel for the use of another, whom the supplier knows or has reason to know to be likely, because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."⁴⁷⁸

Whether the driver's actions were in the scope of employment may not affect a negligent entrustment case.⁴⁷⁹ Negligent entrustment can always be brought against a carrier if the driver was "driving or had control over a vehicle entrusted to him by the company."⁴⁸⁰

Examples of facts key to proving negligent entrustment include the following:

- (a) "A truck was entrusted by its owner, employer, lessor, or contractor to a driver;
- (b) The driver was either unlicensed, incompetent, or reckless;
- (c) The owner, employer, lessor, or contractor either knew or, in the exercise of reasonable care, should have known, that said driver was unlicensed, incompetent, or reckless;
- (d) The driver was negligent at the time of the accident in question;

- (e) The driver's negligence proximately caused the accident; and
- (f) The driver's negligence proximately caused damages to property and injuries to a third party."⁴⁸¹

The above establish the foreseeability of the accident and its cause.⁴⁸² For example, an accident caused by a driver with a history of driving under the influence of drugs or alcohol is a situation ripe for imputing the carrier with liability for negligent entrustment.⁴⁸³

Real-life examples where the theory of negligent entrustment applies include the below:

- (a) "The employer failed to check the truck driver's employment record, failed to test his driving skills or train him to drive its truck, and continued to let him drive after the accident and after it learned of the five speeding tickets in the year and one-half prior to employing him.
- (b) The driver of the truck lacked judgment, suffered from visual and hearing deficiencies, could not handle stressful situations, was slow in learning how to drive a truck, and had his driver's license suspended.
- (c) An employer entrusted a truck to an 18-year-old laborer with a 'deplorable' driving record who had no previous experience in driving that truck or similar vehicles, had no chauffeur's license, was untrained, and unqualified. The truck provided to the employee was uncontrollable at speeds above fifty miles per hour, manifested fifteen violations of ICC safety regulations, was loaded overweight, had its rearview mirrors obstructed, and its hood held down by two strands of baling wire.
- (d) The truck driver who rear-ended a slow-moving pickup while intoxicated had been hired and rehired eleven times over twenty years by the same employer. During that time, he had two convictions for driving while under the influence of alcohol, three convictions for reckless driving, and six speeding convictions. According to the court, the driver was unsafe and his employer either knew or should have known of his danger to the rest of the driving public.
- (e) The trucking company should not have allowed an underage driver (who had six citations for speeding and two for accidents, including one in which he overturned a

logging truck causing \$80,000 damage) to drive logging trucks continuously over a three-year period in violation of federal regulations, prior to his negligent turning maneuver into the company parking lot, causing a collision with a motorcyclist that resulted in the motorcyclist's death and that of his passenger.

- (f) An officer of a company made the decision to entrust a vehicle to himself as an employee of that same company, knowing his own poor driving record and history of eight DUI charges, was liable for negligent entrustment, even though he was acting in dual capacity as officer and employee.⁷⁴⁸⁴

Below are examples where negligent entrustment failed as a theory of liability due to insufficient evidence:

- (a) "The defendant employer was shown a military driver's license, and was purported to be a [sic] Maryland driver's license, but did not know that the state license was a fabrication.
- (b) The employer had no previous problems with the employee and had no reason to believe that entrusting the truck to him over the weekend was foolish and negligent.
- (c) The defendant neither owned the truck, nor entrusted it to a temporary employee furnished to another company. Plaintiff's theory that negligent entrustment encompassed the entrusting of an employee rather than a vehicle was rejected by the court.
- (d) The employer had no actual knowledge of a pattern of reckless driving on the part of the driver and was nor required to discover the reputation of the driver to avoid being negligent.
- (e) The truck driver's medical records established that he had experienced blackouts, blindness in one eye, and high blood pressure, but he had been seen and passed for duty by a trucking company physician five weeks before the accident.
- (f) The truck driver had passed numerous DOT examinations, had never been cited for violating DOT regulations, had been thoroughly tested by the lessor of the truck before being allowed to operate it, and the lessor

had no knowledge, either actual or constructive, of any unreasonable risk propensities of the driver.

- (g) A criminal history unrelated to driving and driving records containing seatbelt citation and a license suspension for failure to pay child support was not related to the driver's fitness to drive, and it was unforeseeable based on his past records that he would be involved in an accident."⁴⁸⁵

In-Depth: Hiring and/or Retention

Most courts will find a carrier liable for negligent hiring and/or retention if the employer knew or should have known of the employee's lack of fitness to perform a specific job or the danger to others of the retention of the unfit employee.⁴⁸⁶ Furthermore, a carrier is liable for negligence in hiring if it hires a driver despite his having a higher number or greater severity of traffic violations than the carrier's established policy and procedures permit. The doctrine of imputed knowledge means that when a carrier neglects to follow regulations regarding investigations of a driver's qualifications and background, a carrier is held liable as if it had actual knowledge of a driver's performance history. If this doctrine did not exist, the net result would be that carriers were rewarded for failure to properly investigate when hiring.

Negligent hiring versus retention primarily focuses timing.⁴⁸⁷ Negligent hiring happens when the employer knew or should have known about the employee's lack of fitness before the employee was hired.⁴⁸⁸ This is best proven by an examination of the employer's investigation into the employee's history prior to hiring her.⁴⁸⁹ In comparison, the employer is liable for negligent retention if the employer neglects to fire or investigate or take some other action against an already hired employee whose unfitness becomes apparent.⁴⁹⁰ According to the Florida District Court of Appeals:

"In general, the test is whether the employer exercised the level of car which, under all the circumstances, a reasonably prudent man would exercise in choosing or retaining an employee for the particular duties to be performed."⁴⁹¹

As noted previously, foreseeability is key.⁴⁹²

As discussed in both the driver and carrier sections, carriers must follow detailed federal regulations regarding the hiring process, including the following: drug and alcohol testing, “the qualifications of drivers, criteria [. . .] for employment, investigation/inquiries that must be performed, required road tests or the equivalent, and required physical qualifications and examinations.”⁴⁹³

Below are real life examples of the results of carriers’ inadequate investigations:

- (a) “Where the employer (1) hired [the truck driver] at his first interview, a visit lasting fifteen to twenty minutes; (2) did not talk to anyone for whom [the truck driver] previously worked; (3) did not administer a written or other driving test to [the truck driver]; (4) did not wait for a report from [the State Department of Motor Vehicles] on [the truck driver’s] driving record; did not give a defensive driving test or a copy of the safety manual to [the truck driver]; and (6) would not have hired [the truck driver] if it had known the number of his traffic violations and the period of time. Based on this failure to investigate, which would have revealed the existence of past records of speeding violations, the court found that the employer was grossly negligent and held the employer liable for the death of a motorist whose automobile collided at approximately thirty-five miles per hour with the employer’s 78,000-pound gravel truck after the driver, whose vision was partially obstructed, went through a busy intersection controlled by a flashing yellow light.
- (b) Where an investigation by an employer would have uncovered a prior termination for amphetamine/methamphetamine use and nine traffic violations in nine years, eight of which were for speeding.”⁴⁹⁴

The employer’s knowledge of an employee’s lack of fitness determines whether or not the employer’s actions were reasonable, given that knowledge (and perhaps the expense and challenge of “obtaining information about a prospective employee”).⁴⁹⁵

Post-accident investigations, random drug testing, annual investigations (such as of driving records) affect a claim of negligent retention.⁴⁹⁶ For example, in one case, a carrier neglected to fire a driver, though it was aware that the driver had had his license suspended because of three speeding tickets.⁴⁹⁷ The carrier furthermore failed to investigate and thus discover three additional speeding tickets within nine months.⁴⁹⁸ Carriers must make sure their drivers do nothing that would disqualify them.⁴⁹⁹

Furthermore, the United States Supreme Court “upheld the dismissals of employees who were mistakenly granted DOT health certification, one who was later found unable to be certified, and one who was only able to be certified under an experimental DOT waiver program.”⁵⁰⁰

Below is a description regarding the discoverability of documents that would aid you in pursuing a negligent entrustment/hiring/retention claim against the carrier:

“Records regarding a driver’s qualifications and the equipment almost always are deemed discoverable, even if they are later determined not to be admissible. Accident reports and related investigations deemed to have been conducted ‘in the ordinary course of business’ (e.g. routine accident reports) are also likely to be considered discoverable. Some courts take that approach even further. For example, at least one has held that a recorded statement from one’s driver, taken shortly after the occurrence, is discoverable, as it is fresher in the driver’s mind, and thus the functional equivalent cannot be obtained by the plaintiff through the driver’s deposition.”⁵⁰¹

The above theories can assist you in pursuing punitive damages, such as in a state requiring “gross negligence” to obtain punitive damages.⁵⁰² If the carrier is found liable under one of the above theories, the carrier’s actions could satisfy that need for “gross negligence.”⁵⁰³ The above theories can also assist you in admissibility of evidence and, thus, further anger the jury against the carrier (even potentially increasing compensatory damages).⁵⁰⁴

“Tort law, of course, varies greatly from state to state. Moreover, the disposition of the issues herein often turns on the specific facts

related to the subject driver and/or occurrence. As a result, there are few, if any, ‘bright line’ rules to rely upon.”⁵⁰⁵

Products Liability

FAQs

- 1) What should I be looking for to determine if my case could be a products liability case?
- 2) What questions should I be asking?
- 3) What are examples of products in the trucking industry that have been defective?

Introduction

While most key claims in trucking litigation should focus on the role of at least one of the key players analyzed in Chapter Two – the driver, carrier, or broker – sometimes none of the three are at fault. Sometimes there are not even any witnesses because everyone involved was killed, and people tend to assume that the driver is at fault because he appears to be the cause of the accident.⁵⁰⁶ In some cases, it is found that it is actually the vehicle (or its parts manufacturer) that is at fault.⁵⁰⁷ In these cases your client will be the injured or deceased truck driver.

Following the paper, I provide a brief example of a various truck product liability case that has been the focus of key litigation handled by our firm.

How to Spot and Develop a Successful Product Liability Case⁵⁰⁸

I. Introduction

Products liability is one of the most dynamic fields of law in the United States. The cost and complexity in this field is evolving so rapidly that without thorough preparation the attorney will find the path to success strewn with many unforeseen and technical pitfalls. I have endeavored here to acquaint you as the practitioner with the information necessary to evaluate a client's claim competently in a products liability case. It is not meant to be a primer on product

liability law, but simply to help the practitioner identify potential product liability claims and preserve critical evidence.

The first point is that lawyers handling personal injury lawsuits may have legitimate product liability claims existing in their current caseloads. Obviously, if an attorney was hired to investigate potential sources of compensation for an injured client, and if it appears that a product defect may have contributed to the client's injuries, his duty should include inquiry into a potential products case. The evidence required to prove a product claim can be very different from the typical personal injury case.

It is my experience that product liability cases most commonly arrive disguised as ordinary road wreck cases, and it is up to the attorney to determine whether the case should also be a product liability case. The last section of this paper includes a listing of facts to look for involving different defects in trucking product liability cases, which is offered as sort of a checklist on those type cases.

Your evaluation of a product liability case should begin with the correct answer to the below questions. In my opinion, the case stops if the answer to any of these questions is no.

II. Key Initial Questions

1.) Has your client suffered catastrophic injuries?

The preparation of a products case is time-consuming and expensive. Few other cases demand such thorough preparation on as many different fronts, all of which require substantial financial expenditure. These costs can include expert witness fees, product testing, discovery, purchase of identical products, purchase of alternative designs, extensive travel, deposition costs, preparation of trial exhibits, jury consultants, and vehicle storage.

Another reason products liability actions are so expensive relates to the defense strategy. Many products manufacturers and sellers fight a "war of attrition." They are keenly aware that the resources of the plaintiffs' law firm(s) footing the bill is typically more limited than their own and that disparity will result in some claims never being filed.

All of these factors make it generally impracticable to pursue a product defect case in the absence of catastrophic injuries and significant economic losses to offset the costs. I have been involved in product defect cases where the expenses approached a million dollars. Admittedly, such cases are rare, but expenses always are high. These issues mandate that the injuries be life-altering so as to justify the added expenses.

2.) Do you have the product?

I have run across numerous cases that appeared to have merit and substantial damages, but the product was no longer around. A product case without the product is the equivalent of a car without an engine. It isn't going anywhere. In some exceptional circumstances, it may be possible to proceed without the product, but this is not advisable and is rare. One such situation may be when a design defect exists and all similar products are defective for the same reasons.

Proving defect in the manufacturing defect case would be next to impossible. This is because you are trying to prove the product did not perform as designed. To do so would require one to point to a specific failure and determine why it failed. You see the difficulty when the product is not available.

It is also important to check the jurisdiction's law on this issue. Many states, like Alabama, have a law that suggests that a product case cannot be sustained without the product. You can save yourself a lot of pain by knowing this before expending substantial sums of money and losing at summary judgment.

You have substantial burdens even if you have a design defect case and the state law allows you to proceed. Imagine the cross of your expert: "So, Sir, you're saying that my client's whole line of widgets is defective – and you haven't even seen the product at issue?"

3.) Are you still within the applicable statute of limitations or statute of repose?

Your state's statute of limitations for a personal injury case will likely be applicable to a product liability claim. Many states, like

Georgia, have an additional time limitation called a statute of repose. Statutes of repose provide that no action for a product defect can be fielded beyond a certain period of years, typically ten to twelve years, after the product entered commerce.

III. Additional Questions

1.) Drinking/drug use

Consider what effect drinking or drug use by a driver or by your client will have on the jury's view of the case. Was your client a driver or a passenger? This could make a big difference. While juries are not typically sympathetic to intoxicated drivers, you may have a better claim with a passenger. Many states, like Florida, also have good law on alcohol use. The determination on whether alcohol comes into evidence depends on your claim. For instance, in a seat belt case, you may have a better argument that alcohol is irrelevant than a stability claim. This is true because the issue is not the control of the vehicle but is rather that the seatbelt is designed to protect both intoxicated and non-intoxicated users. The belt does not know the difference.

2.) Excessive speed

Manufacturers will argue that speed kills. This is called the big wreck defense. They contend that there was nothing that could be done to protect the occupant in this unforeseeable collision. Additional problems proving this case will be testing. Plaintiff's experts routinely rely on defendant's internal crash and sled tests to prove liability. However, the defendants' team(s) rarely runs tests in cases involving speeds between 35 and 55 mph. Proving your defect when the impact speed was 85 mph will likely make the internal testing of very limited use. Furthermore, the jury will be impacted by the fact that your client has broken the law.

3.) Preemption

As noted above, when the federal government makes a law, states cannot undermine that law by passing their own, different laws. In essence, the federal law "trumps" the state law. Manufacturers usually argue that auto product liability suits should be dismissed because the state law is preempted by the federal regulations. While

these arguments usually lose, they do not in some limited areas of the country/jurisdictions.

IV. Product Liability Claims Involving Trucks

Products liability cases may often be hidden in a truck wreck accident. It is important to know what to look for in order to fully evaluate all aspects of your case. Any accident that results in catastrophic injury, such as death, paralysis, or brain damage should be reviewed in order to determine if a products liability claim is present.

Seat Belt Defects

When they work properly, restraint systems in tractor trailers and other trucks indisputably prevent or lessen injury in crashes. When they fail, seatbelts can allow or even cause serious injury and death. (See below for more discussion regarding seat belt defects focused specifically on heavy trucks.)

A typical auto crash can be viewed as having two collisions (as noted in Part I). As a recap, the first collision occurs when the vehicle impacts another vehicle or fixed object. The second collision occurs when a vehicle occupant impacts the interior or is ejected. The second collision immediately follows the first collision – often only by milliseconds. Seat belts and airbags are designed, in part, to prevent the second collision or minimize its injury causing effects.

A seat belt defect may apply if any of these factors are present:

- The occupant is believed to have been belted but found unbelted post-accident;
- The occupant is belted but contacts the vehicle interior, which results in injury;
- The seat belt buckle is latched after the accident but the occupant is ejected or outside the belt;
- The seat belt webbing is “spooled” out or loose after the accident;
- The belted occupant is injured but the passenger compartment is intact;

- The vehicle is equipped with a “passive” or automatic door mounted belt system.

An example of a seat belt defect is the IMMI seatbelt buckle. In January of 2007, before jury selection in a Montgomery County, Alabama, Circuit Court, our firm settled a defective seat belt case with Indiana Mills & Manufacturing, Inc. of Westfield, Indiana, (“IMMI”) for the family of Joe Freeman. Mr. Freeman, a truck driver, was involved in an offset frontal collision. Neither vehicle was going more than fifty miles per hour at impact. Mr. Freeman’s truck went off the right shoulder of the roadway and he lost control, rolling the tractor trailer over on its side. Freeman, who was wearing his seat belt, was ejected when the seat belt buckle failed. He was thrown through the windshield of his truck and killed when he struck the pavement. Had the seat belt worked, Mr. Freeman would have walked away from the collision with no injuries. Instead, because of the defective buckle, he was killed. The initial collision was one that wouldn’t have resulted in a fatality had the seat belt buckle not failed.

IMMI was the manufacturer of the seat belt buckle in the truck Mr. Freeman was driving. The seat belt buckle was defective in that it intermittently failed to latch and was prone to a false-latch condition in which it appeared to be latched when it was not. IMMI had known that their buckles were defective and dangerous long before the truck driven by Mr. Freeman was even manufactured. In fact, IMMI had known that the design of the buckle was bad from the very beginning. IMMI knew that the defect would create a highly hazardous and dangerous condition in the event a frontal collision occurred involving a truck equipped with that particular seat belt system.

Shockingly, IMMI had known about this possibility for at least three years. IMMI knows that there are now fifteen thousand trucks on the road that have the very same defective IMMI buckles. Yet, there has been no recall of the buckles. In fact, there has been no attempt to even notify the owners of the trucks which are still being used on the highway. Once this lawsuit was filed, however, IMMI did inspect and replace all of the Defective Seat Belts for the trucks owned by Mr. Freeman’s employer.

However, no other owners have been notified. There is in effect what is known as a silent recall for the defective seat belts, which means that the owner of a truck with a bad belt can bring their truck in and get a safe seat belt installed at no cost. This company's utter disdain for human life and vehicle safety resulted in the loss of one known life and has put thousands of other truck drivers at great risk. Because of IMMI, Mr. Freeman died a horribly tragic death. After the settlement, all documents and deposition testimony from the case against IMMI were released from a previously entered protective order and made public.

However, the amount of the settlement is confidential. The accidental deaths mentioned in these examples are unfortunately very common occurrences. Truck drivers make up one of the largest professions in the United States, spending countless hours on the road. They do this while driving vehicles that are less regulated than our own passenger cars and trucks. Without more regulation, these men and women will continue to risk their lives daily to keep America running – sometimes not even knowing how dangerous their jobs are.

Roof Crush

Many truck occupants, although belted, are severely injured in rollover accidents due to the failure of the passenger compartment to maintain its integrity. Characteristics of these cases are that the roof is crushed five or more inches or the roof is deformed sideways creating an opening over the occupant's head. Our firm has litigated numerous roof-crush cases involving tractor trailer trucks. These roofs should be able to protect the truck driver during foreseeable rollovers. Unfortunately, most do not.

*What is the danger with Roof Crush?*⁵⁰⁹

The roof is an important structural component of a vehicle and is critical in keeping the occupant safe in the event of a crash. To protect occupants in a rollover, maintaining survival space is very important. Survival space is the area around an occupant that remains free of intrusion in an accident. It is the area in which an occupant is able to “survive” the crash. The roof is part of the

structural support of a vehicle and is therefore a critical component in keeping the occupant safe.

If a roof crushes substantially during an accident, from a failure of the side rails, headers or support pillars, catastrophic injuries can occur. Often, this decreased survival space results in the occupant's head impacting some portion of the vehicle causing death, paralysis or brain damage. Sometimes, the occupant can even be partially ejected through an opening created during roof crush.

In the 1980s, the National Highway Traffic Safety Administration ("NHTSA") sponsored a number of research papers that evaluated statistical information related to heavy truck crashes in the United States. The reports consistently found that the primary contributing factor to heavy truck occupant fatalities were injuries caused by ejection and rollover which involved severe cab deformation and occupant entrapment. The same reports consistently found that the best way to reduce heavy truck occupant fatalities was to enhance the structural integrity of the cabs, and improve methods to reduce occupant impacts with the interior surfaces of the vehicles.

Despite this overwhelming evidence, heavy truck crashworthiness and cab roof strength is not regulated by the federal government. In contrast, passenger car manufacturers are required to pass minimum roof strength and crashworthiness standards found in the Federal Motor Vehicle Safety Standards. Although the crashworthiness of heavy truck cabs is not regulated in the United States, there have been foreign standards in place for years. Heavy trucks sold in foreign countries are required to meet a variety of crashworthiness and roof strength standards including the Swedish standard and the ECE Rule 29 standard. These foreign standards require cab strength testing by static and dynamic loads. These particular tests require impacts to the roof, rear of the cab, front of the cab and the A pillars of the cab.

Apparently, in response to the overwhelming research data, American heavy truck manufacturers undertook the "Heavy Truck Crashworthiness Study" in conjunction with the Society of Automotive Engineers ("SAE") during the late 1990s. This study culminated in an SAE recommended practice for testing the strength of heavy truck cabs. Unfortunately, the test does not simulate actual forces that would be imparted into a heavy truck

cab that rolled over while traveling down the highway. As a result, heavy trucks manufactured in the United States still provide unsafe cabs of thin aluminum with fiberglass roofs.

Therefore, truck occupant fatalities continue to occur in the event of rollovers. It is very difficult for a heavy truck driver to survive a wreck when the roof and cab structure disintegrate around him during a wreck and fail to maintain reasonable occupant survival space. With such bleak statistics and an almost nonexistent regulatory history, it's no wonder that heavy truck crashworthiness is an emerging area of product liability litigation.

Product liability cases are often overlooked in single vehicle accidents – especially in accidents involving large trucks. However, theories of defect apply equally to 18-wheelers as they do to passenger cars. So, it is important to keep your eyes open while investigating an 18-wheeler accident so that you don't miss important product liability issues.

Tire Failure

The Firestone tire tragedy resulting in the recall of that tire alerted the public to tire safety issues. Tire failure can and does cause truck accidents. When the tread separates from the tire, the vehicle can become very difficult to control resulting in an accident. You may have a tire case if a tire failure leads to loss of control and accident.

Aged Tires

An issue that is just now coming to the attention of consumer watchdog organizations and tire experts involves “field-aged tires.” Recently, NHTSA released the first series of data from its “Phoenix” Tire Dataset study comparing aged and new tires of the same make. The data shows a notable reduction in robustness, particularly for tires that were “in service.”

The agencies' purpose was to assure that tires meeting federal standards will wear out before they catastrophically fail in order to prevent another Firestone tire debacle. The Phoenix testing showed that aged tires (those older than four years) could not meet the minimum federal tire standards. Unfortunately, many tire

manufacturers, tire stores and service shops keep an inventory of tires long after the manufacture date. These tires, while looking new, can be dangerously prone to failure. There is presently a push by consumer organizations to require manufacture dates be placed on the tire. Tire manufacturers oppose this warning.

Our firm included the below article in our online publication *Righting Injustice*.

Speed Limits Too Fast For Truck Tire Endurance⁵¹⁰

On many U.S. interstate highways west of the Mississippi River, speed limits often exceed the limits that tires on commercial tractor-trailers are designed to handle, creating a higher risk of tire blowouts and crashes.

Compounding the problem is a lack of knowledge from state regulators and legislators who don't know anything about truck tire endurance speed ratings, and truck drivers themselves who have no idea how much speed their truck's tires can safely handle.

Truck tires are almost always built to handle a maximum speed of 75 mph. But since the mid-2000s states have been allowed to boost their speed limits from 65 or 70 mph to 75, 80, and 85 mph. Trucks that regularly travel at these higher speeds on tires designed to be driven at or slower than 75 mph put a lot of heat and stress on the tires that damages the rubber and creates a heightened risk of a catastrophic blowout.

Recently, the Associated Press uncovered government documents that underscored "the disconnect between highway speed limits and safety standards" when it comes to truck tire failures. National Highway Traffic Safety Administration (NHTSA) investigators probing a complaint about Michelin tire blowouts on commercial trucks concluded that the truck operators were to blame for the incidents, not the tires.

That conclusion mirrors a larger dispute over the problem, with state officials and trucking companies blaming each other for the problem. According to the AP, "Highway officials in three states that allow trucks to go 80 mph or more either disregarded tire

safety ratings, wouldn't answer questions about them or told the AP they were unaware of them."

In Wyoming, for instance, some rural highways saw their speed limits go up to 80 mph last summer, without consideration of truck tire speed ratings. But legislators there don't see that as a problem, noting that the law doesn't *require* trucks to drive that fast.

Meanwhile, many in the trucking industry say that states are to blame for any increase in tire-related truck crashes because they are raising speed limits without taking into account the effect these faster limits will have on commercial truck tires.

Legislation that would prevent trucks from legally driving faster than 65 mph is supported by the American Trucking Association, one of the largest trucking industry groups in the U.S. The group has pushed the federal government to mandate all trucks install speed governors that would automatically limit their speed.

Interstate speed limits fall under the jurisdiction of state governments. Texas, Utah, and Wyoming allow trucks to drive 80 mph or faster, with South Dakota set to follow. Missouri, Nevada and Washington may go up to 75 mph or higher. Altogether there are fourteen states that allow trucks to travel in excess of 70 mph.

Some tire manufacturers make truck tires that can handle maximum speeds of 81 mph, but they do not want to completely overhaul their manufacturing process, fearing giant expenses and limited sales.

According to NHTSA, more than fourteen thousand crashes involving tractor-trailers and buses occurred in the U.S. from 2009 through 2013, killing nearly sixteen thousand people. Tires played a role in 198 of those crashes and 223 deaths.

Fuel System Litigation

Vehicle manufacturers have a duty to the public to design vehicles that will not create a fire hazard in survivable collisions. Heavy truck manufacturers are no different. However, government safety

standards only reduce the chance of fire in some types of crashes and automotive manufacturers have failed to adopt their own standards to avoid such fires. Despite the fact that automotive manufacturers have long been aware of the risk of fires associated with defective fuel systems, the incidents of vehicle fires has continued to be a serious problem.

Any fuel leak creates a very high danger of fire in the event of a collision. Only three elements are required to create a post-collision fire: fuel, oxygen, and an ignition source. Oxygen is readily available and there are several common fuel system defects that can cause fuel leaks, which result in post-collision fires. Consider a fuel fed fire case if both of these factors apply:

- The occupant was killed or seriously injured by fire.
- The occupant suffered no skeletal or other life-threatening injuries.

Defective Cab Guards

Cab guards or headache racks are required as front-end structures on 18-wheelers that pull flatbed trailers and log trailers. The purpose of a cab guard is to prevent shifting cargo from contacting the cab of a heavy truck. Many cab guards are designed of welded heat treated aluminum which results in a weakening of the cab guard over time. The weakening of the cab guard due to fatigue stress is relatively unknown to drivers. Many welding requirements established by national organizations are not followed by cab guard manufacturers. The failure to follow such guidelines result in poor welds, poor quality control, and poorly designed cab guards for their intended purpose of protecting truck occupants.

A cab guard is installed on a truck to ensure that a truck driver's load does not intrude into the cab. Instead of designing and manufacturing a cab guard that works, the company mentioned in the example at the beginning of this article used poor design and fabrication and inferior welding procedures that resulted in a failure, causing Mike's death. The company did this to save money and therefore, put profits over the safety of its consumers. It even claimed and advertised that its cab guard met the minimum Federal standards and provided maximum protection, even though no such standard exists. Federal Motor Carrier Standards that apply to the

trucking company require the cab guard to be able to withstand one half of the load applied uniformly across the back of the guard. Cab guard manufacturers claim this is the standard they have to meet even though it does not apply to manufacturers. The company never tested the cab guard model on Tom's truck. An Alabama jury awarded a \$12 million verdict to Tom's mother in the product liability lawsuit against the manufacturer of the defective truck cab guard.

Another example occurred here in Lowndesboro, Alabama. Jerry Albritton was unfortunately killed when the log truck he was driving overturned in Lowndes County Monday afternoon. According to the Alabama Highway Patrol, Mr. Albritton was killed when the 1988 Mack log truck he was driving on Lowndes Road 7 left the roadway in a curve and overturned. Mr. Albritton's truck lacked a cab guard.

As the son of one of my colleagues said, "Duh; a cab guard is something that should guard the cab."⁵¹¹ A cab guard's purpose is to stop forward-shifting cargo.⁵¹² But, in one case, our firm discovered that a prominent manufacturer of cab guards had neglected to even test whether or not the cab guard would actually stop cargo.⁵¹³ An executive of this company had to admit they had never tested the cab guard in a real collision.⁵¹⁴ The judge in this case was so appalled that he declared the cab guard as a defective product as a matter of law.⁵¹⁵

Another driver, Mike Rice, came to his demise un-expectantly [sic] and suddenly when silver metallic looking aluminum cab guard placed behind him on the tractor to protect him from forward shifting logs failed. Mike was a log truck driver who was hauling a less than full load of tree tops when he approached the crest of a hill and un-expectantly encountered a passenger car trying to limp its way to a service station at the bottom of the hill. The disabled vehicle had been left on the side of the road by the owner because he could not make it safely down to the service station the day before.

However, the next day he came back with his sister who was going to trail him down to the service station to have the car repaired. It is without dispute that this vehicle should not have entered the highway on the back side of a crest of a hill in an area with the

speed limit of 55 mph that log trucks travel frequently without a flag man at the top of the hill to warn oncoming drivers.

As a result of this decision, Mike's life turned for the worse when he slammed his brakes trying to avoid killing the occupant of the disabled vehicle. Mike struck a grove of trees head on traveling only 17 mph. This was a wreck that should have been easily survivable, but the "Cab Guard" failed and allowed the logs to slide forward, crushing the cab and killing Mike. Even though it was designed and sold as a safety device to protect the truck driver from logs shifting forward, the aluminum cab guard was not able to withstand the forces in this relative low speed wreck. When it failed, there was nearly three feet of intrusion into the occupant compartment and Mike was killed as a result. The "Cab Guard" was manufactured, designed and sold to log truck operators as a safety device to guard the cab.

However, the manufacturer's own internal testing is adequate and proves it will not protect truck drivers in many foreseeable collisions. One manufacturer's corporate representative testified that he now realizes a "Cab Guard" should not be used on log trailers. Nevertheless, they are still out on the road being used on log trucks.

Unfortunately, the crashworthiness of heavy trucks has been historically over-looked and poor designs are all too common an occurrence in the heavy trucks industry. My work in the heavy truck industry reveals "Cab Guards" are only the tip of the iceberg.

Substance Abuse

FAQs

- 1) Are drivers prohibited from drinking alcohol altogether?
- 2) What regulations govern how carriers handle drug and alcohol use?
- 3) What testing is required?
- 4) Can a driver who has violated the drug and alcohol regulations/carrier policies ever return to work?
- 5) Could carriers be doing more with technology to increase successful prevention of drivers under the influence?

Introduction

“He was crawling around on all fours...that’s how high was on his cocaine,”⁵¹⁶ recounted the victim of a truck driver, who was ultimately imprisoned for manslaughter.⁵¹⁷ This driver – responsible for the death of a teenager and injuries to others – was unable to account for a twelve-hour period, during which he had smoked cocaine.⁵¹⁸

Twelve crashes in two years, including an accident that took the lives of three people.⁵¹⁹ That was the price paid by the public for a trucking company in Texas with many violations, including violations of substance abuse regulations.⁵²⁰ In New York, liquor bottles were found at the scene of one crash; the student whose car was struck by the truck later died.⁵²¹

It is obvious why substance abuse is important to the government and is addressed in high detail in the regulations. Drivers and carriers both share the responsibility of ensuring the drivers on the road are not drunk or high on drugs. If a carrier or driver violates the regulations, they are subject to civil and/or criminal penalties.⁵²² Drivers are the frontline defense against driving under the influence; they are the ones who choose to drink or smoke illegal drugs before getting on the road. But “the buck stops” with the carrier. Carriers are required to ensure that their drivers are sober

and that their drivers know both the regulations and the carriers' policies regarding substance abuse. This is one of the many regulation violations that result in the FMCSA's routine decisions to declare carriers and/or their drivers out-of-service.

The regulations that we discuss in some detail below often reference 49 CFR § 40, known as "Part 40."⁵²³ Part 40 applies to all agencies within the DOT and guides employers in the process of returning positive-testing employees back to duties; it also gives detailed instructions for how to collect, test, and report test specimens.⁵²⁴

What are the regulations regarding drivers' use?

Federal regulations prohibit drivers with an alcohol concentration of 0.04 percent or higher from even showing up for work or continuing to work, if the work involves safety-sensitive functions.⁵²⁵ Similarly, drivers cannot work while using "any drug or substance identified in 21 CFR 1308.11 Schedule I or in other schedules, unless prescribed by a licensed medical practitioner who assures the driver that the drug will not inhibit his ability to drive safely."⁵²⁶ The carriers are strictly warned not to allow drivers to work if they have "actual knowledge" that the drivers are drunk or using a controlled substance.⁵²⁷ Drivers are further forbidden from using alcohol within four hours of beginning safety-sensitive functions (carriers are again required to ensure compliance).⁵²⁸ Drivers also cannot have any alcohol or drugs in the vehicle, even if the products are unopened.⁵²⁹ If a driver is involved in an accident that qualifies for a post-accident alcohol test, the driver may not use alcohol for eight hours after the accident or until he/she has the test (whichever happens first).⁵³⁰

A carrier may not allow a driver with a blood alcohol content (BAC) of even between 0.02 and 0.04 to work and cannot permit him to resume work "until the start of the driver's next regularly scheduled duty period, but not less than twenty-four hours following administration of the test."⁵³¹ The employer does not have the authority under the federal regulations to take any BAC-based action against a driver if his BAC is less than 0.04, but may do so "with authority independent of" the regulations.⁵³²

As discussed in a previous chapter, driving under the influence of alcohol or any “controlled substance” that “can make the driver unsafe” is of course prohibited.⁵³³ This also includes substances such as “pep pills” and can include even cold medicines (though prescription pills that will not make a driver unsafe are permitted).⁵³⁴ In 2011, truck drivers were found to be driving with meth labs in their trucks.⁵³⁵ In 2012, a jury returned a \$9.25 million verdict against a drunk driver.⁵³⁶ In another case, a truck driver was fired for having had unopened beer in his truck.⁵³⁷

Regulations prohibit a driver from using alcohol within four hours before going on duty, having physical control of the commercial vehicle, or operating it.⁵³⁸ When on duty or operating the vehicle, the driver cannot possess an alcoholic beverage.⁵³⁹ It is the carrier’s responsibility to monitor its driver’s behavior; if it appears a driver has consumed alcohol within the four-hour window, the carrier must take the driver “out of service” for twenty-four hours.⁵⁴⁰ Furthermore, the driver (and the carrier) must make sure the driver does not perform any safety-sensitive function within four hours of using alcohol or with a BAC of at least 0.04 percent.⁵⁴¹

What are the carrier’s responsibilities?

TRAINING & POLICIES

“ALCOHOL, CONTROLLED SUBSTANCE, AND DRUG OVERVIEW

Drunkenness, possession of or use of alcohol while on duty is strictly prohibited. Use of alcohol within eight hours of going on duty is also strictly prohibited. Alcoholic beverages are not to be kept in or on the equipment. The transport, possession or use of narcotics, illegal or controlled substances, and drugs is prohibited. (This does not apply to the possession or use of a substance administered to a driver by, or by prescription from, a licensed physician, who has advised the driver that the substance WILL NOT affect your ability to operate a motor vehicle safely). You must notify the Occupational Health Team within our Regulatory Department when you begin using either prescription or over-the-counter sleep

aids, seizure medicine, muscle relaxers, allergy treatments, antihistamines, or narcotics – as you may not be allowed by DOT to drive while taking these types of medications – (You will receive a complete copy of the Drug and Alcohol Policy during your on-boarding course).”⁵⁴²

The above is an example of part of a major carrier’s documentation regarding alcohol and controlled substances. Carriers are required to craft clear substance abuse policies; they must distribute these and educational materials to their employees and provide written notice of the availability of these documents. The content of the documents must comply with the following strict guidelines:

- (1) “The identity of the person designated by the employer to answer driver questions about the materials;
- (2) The categories of drivers who are subject to the provisions of this part;
- (3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;
- (4) Specific information concerning driver conduct that is prohibited by this part;
- (5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part, including post-accident testing under §382.303(d);
- (6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver, including post-accident information, procedures and instructions required by §382.303(d);
- (7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;
- (8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;
- (9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive

functions, and the procedures under part 40, subpart O, of this title;

- (10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;
- (11) Information concerning the effects of alcohol and controlled substances use on an individual's health, work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver's or a co-worker's); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and/or referral to management.”⁵⁴³

As noted previously, it can almost always be proven that carriers' policies are deficient and thus create liabilities for the carriers.⁵⁴⁴ While a carrier is unlikely to be fined for an inadequate policy, a driver might testify that he would have ceased his substance abuse had he known it was illegal or prohibited by the carrier; this would make the carrier liable for failing to establish a “program of deterrence.”⁵⁴⁵

Employers – based on “authority independent” of the federal regulations – may also stipulate additional elements of their policies, if they clarify that these additional elements are not federally required.⁵⁴⁶ Drivers must sign certifications that they received the materials; the employer must keep the original signed certifications and can offer copies to their drivers.⁵⁴⁷

Carriers also are required to provide all supervisors of drivers a minimum of an hour of training on alcohol abuse and an hour on controlled substances abuse.⁵⁴⁸ Training will enable supervisors to know when to test drivers based on reasonable suspicions and will teach drivers what to watch for in drivers' conduct and work.⁵⁴⁹

TESTING

“Under federal regulations, the main requirement for employers is to immediately remove employees from performing DOT safety-sensitive jobs” if the employees are found to violate drug and alcohol regulations.⁵⁵⁰ Therefore, one of the carrier's key responsibilities is testing. The regulations call for various types of testing, specifying details regarding the methods, etc. Carriers also

have to have methods in place to ensure the drivers who are being tested are not bringing in products to dilute or adulterate their specimens.⁵⁵¹

Carriers often hire third parties to handle their testing but do not realize that the program they purchase from the third parties do not fully meet the federal requirements.⁵⁵² Carriers regardless remain responsible for compliance.⁵⁵³ Carriers also will sometimes do testing not specifically required or specified by the DOT, but they need to check with both state and federal regulations to ensure what they are doing is permissible⁵⁵⁴ (for example, the federal regulations prohibit testing blood for alcohol levels⁵⁵⁵).

Drivers cannot refuse to take controlled substance tests, including the tests required before employment, after an accident, at random times, when the employer has a reasonable suspicion, when they return to duty, or when they must have a follow-up test, per the regulations.⁵⁵⁶ If a driver does refuse or does not refuse but tests positive for drug or alcohol use, the carrier cannot allow the driver to work.⁵⁵⁷ (But it remains within the carrier's discretion whether or not to fire the driver.⁵⁵⁸)

In the following pages, we provide the regulations' detailed requirements regarding the methods and procedures for the various types of testing. Below is an image published by the Department of Transportation to give a quick indication of what general testing procedures should entail:



PRE-EMPLOYMENT TESTING

“A new driver must be drug tested with a negative result before an employer can permit him to operate a CMV on a public road.”⁵⁵⁹ Carriers are given the option of choosing not to conduct pre-employment testing if:

- (1) “The driver has participated in a controlled substances testing program that meets the requirements of this part within the previous thirty days; and

- (2) While participating in that program, either:
 - (i) Was tested for controlled substances within the past six months (from the date of application with the employer), or
 - (ii) Participated in the random controlled substances testing program for the previous twelve months (from the date of application with the employer); and
- (3) The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months.”⁵⁶⁰

Otherwise, though, the carrier is required to conduct pre-employment testing. If, however, the carrier has the choice and chooses to conduct this type of testing, it must meet the following:

- (1) “It must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).
- (2) It must treat all safety-sensitive employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., it must not test some covered employees and not others).
- (3) It must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.
- (4) It must conduct all pre-employment alcohol tests using the alcohol testing procedures of 49 CFR part 40 of this title.
- (5) It must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee’s test indicates an alcohol concentration of less than 0.04.”⁵⁶¹

But the regulations give specific instructions regarding what to document if the carrier has the option and chooses not to conduct the pre-employment testing.⁵⁶²

POST-ACCIDENT TESTING

In short, “CDL drivers must be drug and alcohol tested whenever they are involved in a fatal accident, or receive a traffic citation resulting from an injury or vehicle-disabling accident. The alcohol test must occur within eight hours, and the drug test must occur within thirty-two hours.”⁵⁶³ Contrary to common misunderstandings regarding the phrase “as soon as practicable,” “there is no time allowance for conducting post-accident testing.”⁵⁶⁴

Per 49 C.F.R. § 382.303:

(a) “As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life;
or

(2) Who receives a citation within eight hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life;
or

(2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

- (i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or
- (ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(c) The following table notes when a post-accident test is required to be conducted by paragraphs (a)(1), (a)(2), (b)(1), and (b)(2) of this section:

Table for §382.303(a) and (b)

Type of accident involved	Citation issued to the CMV driver	Test must be performed by employer
i. Human fatality	YES NO	YES YES
ii. Bodily injury with immediate medical treatment away from the scene	YES NO	YES NO
iii. Disabling damage to any motor vehicle requiring tow away	YES NO	YES NO

- (d)
- (1) Alcohol tests. — If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the

same record. Records shall be submitted to the FMCSA upon request.

(2) Controlled substance tests. — If a test required by this section is not administered within thirty-two hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FMCSA upon request.

(e) A driver who is subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people following an accident or to prohibit a driver from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident, or to obtain necessary emergency medical care.

(f) An employer shall provide drivers with necessary post-accident information, procedures and instructions, prior to the driver operating a commercial motor vehicle, so that drivers will be able to comply with the requirements of this section.

(g)

(1) The results of a breath or blood test for the use of alcohol, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local alcohol testing requirements, and that the results of the tests are obtained by the employer.

(2) The results of a urine test for the use of controlled substances, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section, provided such tests conform to the applicable Federal, State or local controlled substances testing requirements, and that the results of the tests are obtained by the employer.”

J.J. Keller provides an excellent online flowchart interpreting the federal regulations regarding post-accident testing. You can find it at www.jjkeller.com.⁵⁶⁵

RANDOM TESTING

Each driver is required to submit to random testing for substance abuse.⁵⁶⁶ With only a few exceptions, carriers are required to randomly test for alcohol abuse a minimum of ten percent of their average number of drivers each year and for controlled substances abuse a minimum of fifty percent of their average number of drivers each year.⁵⁶⁷ (The FMCSA bases its determination of the minimum annual percentage rate “on the reported violation rate for the entire industry.”⁵⁶⁸)

“CDL drivers are subject to unannounced random testing. A driver may be directed to take a drug test even when at home in an off-duty status. Random alcohol testing may only occur when the driver is on duty or immediately before or after. Once notified to report for random testing, drivers must immediately report to the testing location. Delaying [. . .] arrival may be considered a refusal (see 49 CFR 40.191), which is equivalent to testing positive.”⁵⁶⁹

The below is an excellent document prepared by J.J. Keller to summarize the requirements for random testing:

Random Testing Requirements Selection and Notification

“Itemized below are the major requirements concerning the selection and notification of drivers for random testing.

1. Selection of drivers shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

2. The employer shall ensure that random tests are unannounced and spread reasonably throughout the year. Employers need to establish a program that will ensure that there is no period of time during which employees know testing 'is done for the year.' For example, if an employer is required to conduct only two tests and that number of tests is completed by mid-summer, the employer's program must ensure that more tests could be conducted before the end of the calendar year. Another alternative is for employers to join a consortium with testing pools large enough so that their drivers are always subject to random testing.

3. The employer shall ensure that drivers selected for random tests proceed immediately to the testing site upon notification of being selected. Employers are expected to notify and conduct tests on drivers as soon as possible after a selection of drivers is made. This means that when a selection of drivers has been made, the employer shall require all drivers selected to submit to testing at their first available time in the terminal or other appropriate location. Employers shall not delay testing for drivers until just before the next selection of drivers' names. Although the FMCSA has allowed this practice in the past, the FMCSA believes that some employers may use such an interpretation to perform quasi-reasonable suspicion tests of drivers by manipulating the timing of such tests, rather than conducting random testing that is not based on individualized suspicion. In addition, employers may have been delaying testing to move freight or allow a driver with a problem to 'clean up' prior to taking the test.

4. Employers may pool interstate and intrastate drivers together for random testing. Since the rule applies to all drivers with CDLs, there will be no need for the separation. However, the FMCSA will prohibit the inclusion in the random selection pools of any employees not subject to any of the DOT agency testing rules. If a driver works for two or more employers subject to FMCSA or DOT agency regulations, the driver must be in all of the employers' random testing programs.

5. Drug and alcohol testing is allowed from a single pool. For example, an employer needs to randomly choose eight names for a drug test and four names for an alcohol test. The employer could establish a procedure to accomplish this in a way such as the following:

- the first four names drawn would be tested for drugs and alcohol and the last four names drawn would only be tested for drugs, or
- twelve names could be drawn, the first eight names would be tested for drugs and the last four names would be tested for alcohol.

6. If a driver who is selected for a random test is on vacation, is laid off, or is on an extended medical absence, the employer can keep the selection confidential until the driver returns, provided the driver is notified and gets tested before the end of the cycle. If the driver will not be available for testing during the selection period, an alternate may be selected. The selection of alternates is only permissible if the primary driver selected will not be available for testing during the selection period because of long-term absence due to layoff, illness, injury, vacation, or other circumstances. If an alternate will be selected, the employer and/or C/TPA must document the reason why an alternate driver was tested, and the documentation must be maintained and available for DOT inspection. If a driver's name is skipped entirely, the employer must keep documentation that the driver was ill, injured, laid off, or on vacation and that the driver was in the random selection pool for that cycle. An additional driver should be selected during the next testing cycle to achieve the annual testing rate. Employers are not allowed to notify any drivers to submit to a test while the driver is off work due to these circumstances. An individual's name should not be removed from the random pool as long as there is a reasonable expectation of the employee's return. In the event a driver's name is out of the random testing program for more than thirty days, the pre-employment drug testing provisions of the regulations would apply when the driver returns. If an employer notifies its C/TPA that a selected employee is not available for testing and will not be

available before the end of the testing cycle, the C/TPA may select another random employee from that employer, instead of selecting the next name on the random selection list. The DOT has deemed this a scientifically valid method for selecting driver names.

7. If an employer is required to conduct random testing under the rules of more than one DOT agency, the employer may either:

- establish separate pools for random selection, with each pool containing the DOT-covered employees who are subject to testing at the same required minimum annual percentage rate, or
- randomly select such employees for testing at the highest minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject. Although multi-modal pools will be permitted, other specific DOT agency requirements will have to be met, such as the FAA requirement for prior approval of consortium-operated random testing pools.

Random Testing Requirements Consortia

If the employer conducts random alcohol testing through a consortium, the number of drivers to be tested may be calculated for each individual employer, or may be based on the total number of subject drivers covered by the consortium. This will mean that a consortium member could have less than its required number of random tests conducted if the overall consortium rate equals the required rate. Thus, if Employer A has ten drivers and the consortium has 500 drivers in the pool covering Employer A, and a 50 percent rate applies, if Employer A chooses to have the rate based on the consortium, the consortium must conduct at least 250 tests even if only four or fewer drivers of Employer A are tested. A consortium that performs selection and/or testing services as agents for the employer must prepare and provide to the employer complete and comprehensive descriptions of the procedures used by the consortium. An employer must have this information readily available for inspection. The

consortium, and an employer who does not use a consortium, must include in these descriptions: how the random selection pool is assembled; the method of selection and notification of drivers; the location of collection sites (at terminals, clinics, 'on the road,' etc.); methods of reporting the test results on each driver; and summary reports of the consortium's program. Also, documentation must be provided that the consortium is testing at the prescribed minimum annual percentage rate for alcohol and/or controlled substances. Each employer is at no time relieved of the duty to comply with each requirement of this rule.

Owner-Operators

An employer who employs only himself/herself as a driver must implement an alcohol and controlled substances testing program that includes more persons than himself/herself as covered employees in the random testing pool. Thus an owner-operator essentially must join a consortium."⁵⁷⁰

REASONABLE SUSPICION TESTING

One of the well-known, large carriers avoids reasonable-suspicion testing at almost all costs; one of its drivers would have to be drunk or high to the point of near incapacitation before the carrier would conduct the required reasonable-suspicion testing.⁵⁷¹ Neglecting to properly do reasonable-suspicion testing clearly endangers the public.⁵⁷² "DOT-trained supervisors can direct [a driver] to be drug or alcohol tested whenever [the driver] exhibit[s] signs of drug or alcohol abuse. The decision must be based on observations concerning the appearance, behavior, speech, or body odors of the driver."⁵⁷³ One video describes reasonable suspicion as "just what it sounds like."⁵⁷⁴ A carrier has a duty to act if a driver exhibits suspicious behavior.⁵⁷⁵ While wrongly accusing a driver could cause tension and disrupt working relationships, neglecting to detect and test a driver could cause loss of life.⁵⁷⁶

IF A DRIVER TESTS POSITIVE ...

If a driver tests positive, the following must occur before she can return to work (perform safety-sensitive jobs):

1. "The driver must seek a face-to-face evaluation from a substance abuse professional (SAP). (Payment of the evaluation is based on management-labor agreements and health care benefits and is not required of the employer under the FMCSRs.)
2. The SAP will refer the driver to an appropriate treatment and education program.
3. The driver must complete the required treatment and education and return to the SAP for another face-to-face evaluation.
4. If the SAP is satisfied that the driver is able to return to driving, he/she will issue a report on his/her findings to the Designated Employer Representative.
5. This report will list any continuing treatment and education, if required, and the number of DOT follow-up drug and/or alcohol tests required in a given time frame. The driver will be required to have a minimum of six unannounced follow-up tests in the first twelve months following the employee's return to a safety-sensitive function. The SAP may require follow-up testing for up to five years.
6. The driver now can go, and not prior to this point, for a return-to-duty drug and/or alcohol test. The employer must wait for the go ahead from the SAP before sending the driver in for the return-to-duty test. A negative result must be received before the driver can return to a safety-sensitive function."⁵⁷⁷

RETURN TO DUTY TESTING

"Return-to-duty tests require 'direct observation' as prescribed in 49 CFR 40.67. They are only required after an employee has completed the 'return-to-duty' process, and wants to return to work in a safety sensitive function (i.e., driving CMVs). They replace the pre-employment test for 'positive' tested and 'refusal' drivers."⁵⁷⁸

FOLLOW-UP TESTING

“Follow-up drug and alcohol tests are required as prescribed by the substance abuse professional (SAP) who signs the return-to-duty report. They consist of a minimum of at least six unannounced directly observed tests conducted during the first twelve months following the return-to-duty test. The SAP can prescribe follow-up testing of a maximum of five years for drivers who have tested ‘positive’ or ‘refused to test.’ Follow-up testing is in addition to any selections for random testing.”⁵⁷⁹

SUMMARY OF TESTING PROCEDURES REQs⁵⁸⁰

- Once notified to report for testing, a CDL driver must report to the collection site immediately (To familiarize yourself with the collection process and any of the other aspects of the DOT drug and alcohol testing program, please refer to: www.dot.gov/ost/dapc).
- DOT drug testing only recognizes urinalysis as a valid means for drug testing. If problems are identified, [a driver] may be required to retest under direct observation. A driver is only permitted three hours to produce a urine specimen. Leaving the collection site before the process has been completed may be declared a “refusal.”
- Once tested, the laboratory will report the analysis to a medical review officer (MRO). If the analysis indicates a positive result, the MRO will contact the driver to determine whether there are circumstances that would explain the positive result. If there are none, the MRO will report a positive result to the employer.

RETENTION OF RECORDS

Carriers must retain records per 49 CFR § 382.401 but are required to maintain the confidentiality of those records, unless otherwise required by law (in which case the carrier must inform the driver in writing) or unless the driver provides a written consent to a release of the documents.⁵⁸¹ (These documents follow a driver, wherever he goes – as long as he works for a company regulated by the

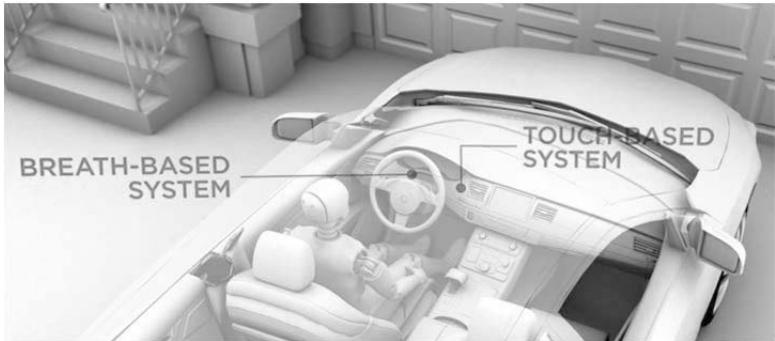
DOT.⁵⁸² These documents are obviously critical to the practitioner's case.

How might technology affect carriers' responsibilities?

How the government and carriers regulate drug and alcohol usage of truck drivers may become more convenient and safe in the coming years. Carriers could then be seen as having a duty to implement these potentially more effective technologies.

The federal government (Substance Abuse and Mental Health Services Administration) is currently considering approval of a drug testing system that would use a person's hair; if approved, this method would then be suggested to the U.S. Department of Health and Human Services (which tends to influence the DOT's procedures).⁵⁸³ This would clearly be a simpler and potentially more accurate method of testing, which would hopefully have a preventative effect on high drivers on the road.⁵⁸⁴

In addition, the National Highway Traffic Safety Administration (NHTSA) has developed the technology for a driver alcohol detection system and even has a prototype.⁵⁸⁵ Production is anticipated within the next few years.⁵⁸⁶ This system would prevent a drunk driver from ever reaching the road.⁵⁸⁷ The system would have both a touch- and breath-based system in the dashboard of the vehicle; if the driver met the legal blood alcohol limit, the vehicle would not even start.⁵⁸⁸



“The Driver Alcohol Detection System for Safety (DADSS) program slightly shares a similar concept with the interlock driving system, except with DADSS, it would be smart technology installed in the vehicle that features a steering wheel-mounted breathalyzer and an ignition-start button that uses an infrared light to scan the driver’s finger to determine their BAC.”⁵⁸⁹

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