



Recent Litigation Trends in Driver Fatigue: Analysis from Accident Litigation Involving Trucks, Heavy Vehicles

by David A. Brose

In any motor vehicle collision, there will be obvious signs that a given driver did or failed to do something that caused or contributed to cause the collision. One example is when there is an admission or eye witness testimony of failure to abide by a traffic signal. Another is where one vehicle crosses into the lane of traffic of an oncoming vehicle. Other causes of a collision may require a more detailed analysis, such as a vehicle driven at an excessive speed for the conditions. Other causes may not be readily apparent, such as the role that fatigue played in diminishing a driver's attention, performance or reaction.

Determining whether fatigue played a role in causing a collision is a multi-faceted investigation, requiring a familiarity with the causes and effects of fatigue, knowledge of the sources of evidence supporting fatigue, and use of the rules which serve to combat fatigue's role in causing accidents. Although laborious, this analysis can provide additional claims and sources of recovery beyond simple negligence of the driver and vicarious liability, including claims of negligent retention, supervision and training, as well as independent negligent claims against the trucking company.

I. Driver Fatigue as a Defense Tactic

Generally speaking, trucking companies try to avoid liability in cases where sleep deficit is in play, by creating distance between themselves and the driver, the vehicle, and the equipment. There are a number of ways they often attempt to do this:

One step is to obtain the necessary

permits to operate the truck. Usually the company does not own the tractor, trailer, or equipment used to haul the goods. Instead it leases or rents the equipment, tractors, and trailers from the "owner/operator." The trucking company also does not directly employ the drivers. Instead, in order to lessen liability it will hire them sometimes as independent contractors from the owner/operator.

The trucking company often will supply the owner/operator with a "placard," which essentially amounts to a logo that can be affixed to the side of the truck. This placard will include the name of the trucking company and its permit numbers. The placard is placed on the door of the tractor -- which makes it seem like the truck is owned by the named trucking company and the driver is an employee of the named trucking company.

Then, if the truck is in an accident, and the trucking company is sued, it tends to argue that:

- the driver was not the trucking company's employee, so the trucking company is not liable for driver error (falling asleep at the wheel), or
- the trucking company does not own the equipment, so it isn't responsible for the operation, maintenance, repair, and inspections of the equipment.

But some federal laws and regulations have been passed to address these tactics. For instance, a company owning a trucking permit is responsible for all accidents involving a truck that has its placard or name displayed on the vehicle. Whether the driver is an

employee or independent contractor is not grounds enough for dismissing a claim of liability.

II. The Causes of Driver Fatigue

As may be expected, the most common cause of fatigue is lack of sleep. There are also additional factors which can influence driver fatigue, including greater daytime sleepiness, difficult schedules, more hours of work, time of day, age, driving experience, cumulative sleep debt and the presence of a sleep disorder.¹ For example, according to one study, driving performance among truck drivers starts to decline after 5 hours of driving for those with irregular schedules, compared to 8 hours of driving on a regular schedule.²

A. Sleep Deprivation

The effect of sleep deprivation is cumulative, and losing as little as 1-2 hours of sleep per night can cause serious sleep deprivation over time.³ Each hour of sleep lost is an hour added to your sleep debt, and can only be reduced by getting extra sleep.⁴ Beyond getting less sleep, loss of sleep caused by sleep disruption or fragmented sleep also results in sleep deprivation.⁵ Drivers who average less than 5 hours of sleep per night are nearly 5 times more at risk to be involved in a fatigue-related crash.⁶

B. Circadian Rhythm

Fatigue related accidents are more likely to occur during the early morning hours from 2-6 a.m.⁷ The reason is the body's internal clock, known as a

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circadian clock, which regulates the timing of periods of sleepiness and wakefulness throughout the day.⁸ The body's circadian rhythm causes a person to feel more alert at certain points of the day, even if they have been awake for hours.⁹ The circadian clock is programmed for its lowest point around 3-5 a.m., with performance reductions from about 12-6 a.m.¹⁰ During these low points, a person will experience decreased performance, alertness and mood.¹¹

The reason people experience these lows during nighttime hours is that the circadian clock is synchronized to the external cycles of light and darkness.¹² Although circadian rhythms are produced by natural factors in the body, they are also affected by signals in the environment, with the light serving as the body's main cue for a time of alertness.¹³ The influence of the day-night cycle is never fully displaced, as the circadian rhythm can only be reset by 2 hours per day at best.¹⁴ This is especially concerning for people who work varying schedules or at times contrary to the body's biological clock, which is commonplace in the trucking industry.

C. Sleep Disorders

At least 40 million Americans suffer from chronic, long-term sleep disorders.¹⁵ Doctors have described more than 70 sleep disorders, most of which can be managed effectively once they are correctly diagnosed.¹⁶ One such sleep disorder that is prevalent among truck drivers is sleep apnea. Sleep apnea is a breathing-related sleep disorder that causes brief interruptions of breathing during sleep that can last at least 10 seconds or more, and can occur up to 400 times a night.¹⁷

One study has shown that as many as 28 percent of individuals holding a commercial driver's license suffer from sleep apnea.¹⁸ Risk signs for sleep apnea include being overweight (body mass index of 31 or more),

a neck size 17 inches or greater, daytime sleepiness, falling asleep at inappropriate times, loud snoring and lack of concentration.¹⁹ Sleep apnea is much more than an inconvenience to the individual affected. One study found that drivers with untreated sleep apnea did worse on performance tests than healthy, nonsleepy subjects whose blood alcohol concentration was above the federal limit for driving a commercial motor vehicle.²⁰ Another study found that individuals with moderate to severe sleep apnea had up to a 15-fold greater risk of motor vehicle accidents.²¹ Yet another study found that approximately 1,250 fatal truck crashes that occurred in 2005 could have been attributable to sleep apnea or other sleep disorders affecting commercial drivers.²²

III. FMCSA Efforts to Battle Fatigue-Related Accidents

A. Hours-of-Service Regulations

The Interstate Commerce Commission (ICC) promulgated the first federal hours-of-service regulations (HOS) in the late 1930s.²³ The HOS limit the amount of time that a truck driver can both work and drive in a given 24 hour period. The HOS require that truck drivers record their duty status for each 24 hour period of time, including days not spent driving.²⁴ The driver has only 4 choices in recording her duty status: off duty/OFF, sleeper berth/SB, driving/D, or on duty not driving.²⁵

"Off duty" is the time that a driver is not on duty, is not required to be in readiness to work, or is not under any responsibility for performing work.²⁶ "Sleeper berth" is time off duty resting in a sleeper berth.²⁷ "Driving" is time spent actually driving a commercial vehicle. "On duty, not driving" is the time from when a driver begins to work (or is required to be in readiness to work) until the time the driver is relieved from work and all responsibility for performing work, such as time spent loading/unloading freight, inspecting/

repairing/fueling the vehicle, meals and rest.²⁸

The HOS remained largely unchanged for a period of more than 60 years from 1940-2003. In April of 2003, the FMCSA enacted the first significant change to the HOS in more than a half a century. Under the HOS as amended, a driver could not operate a property-carrying commercial motor vehicle without first taking 10 consecutive hours off-duty.²⁹ A driver could then be on duty for up to 14 consecutive hours, driving consecutively for up to 11 consecutive hours during that time.³⁰

Beyond limiting the daily activity of a driver, the HOS also restrict total driving and on duty time, stating a driver may not drive after 60/70 hours on duty in 7/8 consecutive days.³¹ The application of a 7 or 8 day period depends on whether the motor carrier operates its vehicles every day of the week.³² A driver may only restart a 7/8 consecutive day period after taking 34 or more consecutive hours off duty.³³

The latest amendments to the HOS took effect on July 1, 2013, designed to improve safety of the motoring public by reducing truck driver fatigue.³⁴ It is estimated that these regulations will save 19 lives and prevent approximately 1,400 crashes and 560 injuries per year, resulting in \$280 million in savings in fewer crashes.³⁵ Although the new regulations retain the current 11-hour daily driving limit and 14-hour work day, they limit the average work week for truck drivers to 70 hours (reduced from 82 hours), further requiring truck drivers to take a 30 minute break during the first 8 hours of their shift.³⁶

B. Driver's Medical Qualification and Other Regulations Related to Fatigue

Another way in which the FMCSA has attempted to battle the risk of fatigue through the Federal Motor Carrier Safety Regulations ("FMCSR") is the medical qualifications of drivers. A driver is not allowed to operate a



commercial motor vehicle unless they are medically qualified.³⁷ A driver is only medically qualified if they can fulfill all of the physical qualification requirements set forth in the FMCSR. This restriction does not merely fall on the driver, but also the motor carrier, as a motor carrier may not require or permit a driver to operate a commercial motor vehicle if the driver is not medically qualified.³⁸

One such physical requirement is that the driver have no established history or clinical diagnosis of a respiratory dysfunction likely to interfere with their ability to control and drive a commercial motor vehicle safely.³⁹ Within the explanation of this regulation, sleep apnea is identified as such a respiratory dysfunction. The level of sleep apnea that serves to medically disqualify a driver (in the absence of treatment and ongoing compliance with treatment) is moderate to severe sleep apnea.⁴⁰

Beyond the issue of a driver's medical qualification, the FMCSR further expressly prohibit drivers

from operating commercial motor vehicles when fatigued. Specifically, the regulations provide that "[n]o driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness or other cause, as to make it unsafe for them to begin or continue to operate the commercial motor vehicle...."⁴¹ Thus, even absent a medical condition causing a driver to be fatigued, the mere existence of fatigue such that it interferes with safe operation serves a complete bar to that driver's operation of a commercial motor vehicle.

IV. The Problem of Identifying the Fatigued Truck Driver

When one considers what is known about restorative sleep and the causes of fatigue, it should be no surprise that truck drivers are at great risk of fatigued driving. In the National Sleep Foundation's 2012 Sleep in America

Poll, truck drivers were reported to work an average 10.1 hour shift, with the largest portion working shifts from 9 to less than 12 hours.⁴² Only 51 percent of truck drivers worked the same schedule each day, and only 27 percent worked the same number of hours each day.⁴³ Over half of the truck drivers reported only 8 – 12 hours off between shifts.⁴⁴ On average, truck drivers reported 51.3 hours spent working each week.⁴⁵ Almost 40 percent of truck drivers reported that they rarely had a good night's sleep.⁴⁶

Yet, 31 percent of the truck drivers responding reported that they only needed 6-7 hours of sleep per night to function at their best.⁴⁷ Further, 60 percent of truck drivers reported that they did not drive while drowsy, with only 22 percent admitting they had driven drowsy at least once per month.⁴⁸ Almost 70 percent of drivers reported that sleepiness had never impacted their job performance, with only 15 percent admitting it does impact their job performance at least

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once a week.⁴⁹ Only 16 percent of truck drivers reported experiencing any work incident because of sleepiness, with 2 percent reporting an accident and 14 percent reporting a “near miss.”⁵⁰

The statistics set forth above demonstrate a readily apparent disconnect between the objective data known about fatigue (i.e., accident data, medical literature, driving hours) and the general subjective belief of truck drivers that fatigue is not affecting their ability to safely do their jobs. Whether this is simply a matter of lack of self-awareness or an act of self-preservation in protecting their livelihood, what is clear is that a truck driver is not likely to admit that fatigue played any causative role in an accident. Further compounding the problem is the body’s natural response to an accident, a surge of adrenaline, which may mask any apparent symptoms of fatigue while the driver is at the scene. Moreover, a person’s level of fatigue is not subject to objective post-accident testing, such as toxicology screening used to evaluate impairment from the use of alcohol or drugs. This often results in a situation where it is left to the injured person’s attorneys and their experts to establish that fatigued played a role in causing the crash, often through the use of circumstantial evidence.

A. Step 1: Identifying Evidence of Fatigue

Efforts to evaluate whether a truck driver was fatigued at the time of an accident should start at the time of initial case investigation. The easiest place to start is the accident report, which provides the time of day when the accident occurred, allowing a comparison to what is known about circadian rhythms as discussed above. One should also consider the manner in which the accident happened, as the actions of the truck driver (such as a failure to make an avoidance maneuver in circumstance without visual restrictions) may be consistent with an

individual experiencing microsleep or impaired reaction not otherwise explained.

In most fatality accidents, and oftentimes in crashes resulting in serious injury, a commercial motor vehicle examination will also occur. As part of this examination, a driver’s record of duty status will be examined. If the driver has exceeded his hours of allowable driving or on duty time, they will be issued a citation which you can use as evidence of negligence.⁵¹ At the very least, you can begin to reconstruct the activities and work hours of the truck driver in the days leading up to the accident.

As soon as the decision is made to pursue the case, an evidence preservation letter should be sent. Time is truly of the essence, as motor carriers/drivers are only required by law to keep records for a finite period of time. For example the FMCSR impose an obligation on motor carriers to require every driver that it uses (regardless of the relationship) to maintain records of duty status. However, truck drivers are only required to maintain their record of duty status for 7 days, whereas motor carriers are required to retain their driver’s records of duty status for 6 months.⁵²

When a driver changes their duty status, they are also required to identify their location at that time, and if not in a municipality, identifying the highway and nearest mile marker, service post or intersecting street. The driver’s record of duty status is required to be kept current by the driver, further providing the number of total miles driven in the 24 hour period, the name of the carrier, and the name of the shipper, among other information.⁵³ The driver is required to submit the original of their record of duty status to their motor carrier, and if they haul for multiple carriers, they are required to submit copies to all motor carriers.⁵⁴ An example of a driver’s record of duty status is set forth below.

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As part of your evidence preservation letter, as well as your written discovery, it is important to request not only the driver’s record of duty status, but also other documents that can be used to evaluate the veracity of these records. The items that can be used to check a driver’s logs take multiple forms. The bill of lading is a document that the FMCSR require be prepared before freight is loaded, and must identify the motor carrier(s) involved, shipper and date of pick-up, among other items.⁵⁶ Other items such as gas, meal and toll receipts can be used to track the movement of the truck over the trip preceding the collision. With these materials in hand, you can reconstruct and time the trip using publicly available sources such as MapQuest or specialized transportation and logistics software.

When available, electronic information can be the ultimate check of a driver’s written logs, as it is less prone to alteration or destruction. For example, many motor carriers equip their trucks with Qualcomm communication devices. These devices allow drivers and motor carriers to communicate electronically, similar to e-mail or texting. If enabled, the Qualcomm system also serves to create an electronic version of a driver’s daily logs, often with geographical markers of



the location of the truck at the time the driver changes his duty status. Other electronic devices, such as GPS tracking, serve a similar function, as they record the location of the truck at specific points throughout the day.

While it is imperative to know what the driver was doing in the hours and days leading up to the collision, this only tells you part of the story. It is equally important to know who the driver was from a medical standpoint at the time of the collision, as the driver may be at a greater risk even if they operate within the allotted hours-of-service. Oftentimes, motor carriers and truckers will resist discovery of a driver's medical information, saying it is irrelevant because "the driver has a medical card."

One simply cannot accept the production of the medical card as conclusive of the driver's medical well-being sufficient to safely operate a commercial motor vehicle. The medical card does nothing more than stand for the proposition that on the day of the exam, which could be any

point in the preceding 2 years, the medical examiner determined the driver fit to drive. In the intermediate period of time, the driver could have developed a medical condition, such as sleep apnea, that should have served to medically disqualify them from driving. Moreover, you should not accept the ultimate determination of the medical examiner (often hired by the motor carrier to which it sends hundreds if not thousands of drivers) to be accurate.

To start your evaluation of a driver's medical health, you need to review the driver's long-form DOT Medical Examination Report. Although the FMCSR require that a driver's qualification file include a copy of this medical card, motor carriers are not required to include the completed DOT Medical Examination Report as part of the driver qualification file.⁵⁷ Further, to fully and independently evaluate a truck driver's health, you need all of the driver's medical records, including those following the accident. Thus, it is important to obtain a

medical authorization from the driver. In those states that do not generally allow discovery of the medical health of a defendant driver, you must focus on the medical aspects of driver qualification under the FMCSR to provide an exception.

Another place to develop evidence of fatigue is with the driver. This can be accomplished through deposition questioning that does not end simply with acceptance of the driver's statement that they were not fatigued at the time of the accident. Rather, through your questioning about the truck driver's activities in the week leading up to the accident, you can establish a timeline of activity and rest.

This inquiry serves two purposes. First, you can compare this testimony of activity/rest to what is established by the truck company's documents. You may very well find that they do not match up, providing a basis for impeachment at trial. Second, you can take this testimony and place it in the form of a demonstrative exhibit,

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allowing a jury to see a pattern which one would naturally expect to result in driver fatigue.

The truck driver's deposition is also a place to inquire about their medical background. This includes questions about information that may have been provided in connection with the required DOT medical examination. This should be compared to the long form report to find areas that are ripe for impeachment. This should also include questions that serve to open the door to the truck driver's general medical background. Oftentimes, an objection to written discovery about a defendant driver's medical background are more prevalent than an objection during oral examination. Once the door is opened to this area by answers to deposition questions, this will provide you with ammunition to press for the production of medical records and execution of a medical records authorization.

If all of these efforts fail to result in the production of the truck driver's medical records and receipt of an executed medical records authorization, a final step is to consider dismissing the truck driver in exchange for a release of their medical records while continuing the case against their employer. However, this is a step not taken lightly, as certain states require the driver to be a party if vicarious liability is to be found against the employer. Further, this type of exchange can only work if the driver is named as a party in the first place, and typically will only meet with success if the truck driver has independent counsel from the employer, either in the lawsuit or personally.

B. Step 2: Establishing Fatigue as a Cause

Simply discovering evidence that a truck driver was fatigued at the time of the accident does not end the analysis, as the mere existence of fatigue will be irrelevant if it played no role in the

accident. Rather, the key is to establish that said fatigue caused or contributed to cause the collision. To establish causative fatigue, you will likely need to employ experts in multiple fields. First, you will need an accident reconstruction expert whose opinions will serve to establish what the truck driver did or failed to do in the operation of their commercial motor vehicle that served to cause the collision.

Next, you will need an expert in the truck transportation field to establish the regulatory background in which the truck driver and their motor carrier operate. These opinions should include the existence and binding effect of the FMCSR, as well as the purpose behind the specific regulations at issue (such as to combat driver fatigue and reduce fatigue-related accidents). It is through this trucking expert that you will build a case of negligence per se, or at a minimum, establish the framework from which a jury can utilize a violation of the FMCSR as evidence of negligence. This trucking expert should also testify as to the industry knowledge of the risks presented by fatigued truck drivers and the response of other motor carriers to combat these issues.

In many cases, you will also need to retain a medical expert with specialized knowledge in the field of sleep/fatigue. The opinions of this medical expert may include identification of medical conditions which put the truck driver at greater risk for fatigue, such as sleep apnea. The opinions should also include a comparison of the driver's acts/omissions in comparison to the effects of fatigue as established in the medical literature.

V. Conclusion

Being able to prove fatigue in trucking cases is complex, but the more an attorney litigates these matters the more smoothly the effective strategies are able to be employed. In our practice, we have seen these arguments lead to additional claims in a truck accident, including claims of negligence

retention, supervision and training, as well as independent negligent claims against the trucking company.

Of course there can be signals to counsel that a driver did or failed to do something that caused or contributed to cause the collision. But these signals are not always immediately present when fatigue is the culprit, so it pays to be familiar with the science of sleep, the effect it has on operators, and the resources that are called into play in these types of cases. Though it is not an argument that is always easy to illustrate, the analysis of this potential cause of the accident can provide additional claims and sources of recovery beyond simple negligence of the driver and vicarious liability.

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