



2021 CLM Focus:

Diversity, Equity & Inclusion, Management Liability, Medical Malpractice, Product Liability,  
Professional Liability, Transportation, Claims & Litigation Management

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### **SESSION 3**

#### **Managing the "Dirty Five" Aggravating Factors in Trucking Claims and Lawsuits**

##### **I. FATIGUE**

Plaintiff lawyers know that the issue which probably worries jurors the most is fatigue. The thought of a tired trucker driving 80,000 pounds on roads used by the motoring is terrifying. Thus, plaintiffs base their case upon fatigue, fatigue protocols and the failure to enforce them. Plaintiff will attempt to convince the jury that there was one and only one explanation for this accident (especially rear end collisions, lane changes and work zone incidents) – fatigue. Plaintiffs work backwards from the accident to come to the fatigue conclusion.

Often the logs or 150-mile driver time sheets do not match up with the onboard recorders (EOBR) or engine control module (ECM) readouts. As technology increases, we are seeing more side-by-side comparisons between the logging which is controlled by the driver and the ECM data which often do not match up. We see cases where the driver has logged sleeper berth or off duty time when the ECM analysis shows that the vehicle was moving. The driver may log on the wrong line even with electronic logging or a team driver logs on duty time to help the other driver while the offending driver logs sleeper berth or off duty time. These can lead to disaster in terms of a verdict in a catastrophic case.

Remember that FMCSR 392.3 prohibits a driver from driving while the driver's ability or alertness is impaired by fatigue, illness or any other cause so as to make it unsafe to begin or continue the trip and prohibits a Motor Carrier from permitting such conduct. This adds a layer of oversight on the part of the Motor Carrier.

A second aspect of fatigue is the focus on Obstructive Sleep Apnea (OSA). Plaintiffs ask the jury to conclude that sleep apnea was the cause of an accident.

It is interesting to note that sleep apnea is not called out as a condition in the main text of either FMCSR 391.41-Physical Qualifications for Drivers or 391.43 – Medical Examination:

Certificate of Physical Examination. The only mention of respiratory issues in these regulations comes in the physical examination section which talks about abnormal respiratory rate, abnormal breath sounds including wheezes...it does mention that "abnormal findings on physical examination may require further testing such as pulmonary tests and/or x-ray of chest."

The long form medical report driver questionnaire asks about chronic cough, shortness of breath or breathing problems as well as a relative new addition (Question number 25) which says "sleep disorders, pauses in breathing while asleep, daytime sleepiness or loud snoring." Question 26 asks if the driver has had a sleep test (e.g. sleep apnea). However, this is a driver self-report. The form states that the driver is to fill it out but the examiner is to make further inquiries where appropriate ("driver completes this section but medical examiner is encouraged to discuss with driver"); ("The medical examiner must review the responses and discuss them with the driver. This discussion must be documented below.") It's likely that most medical examiners do not extensively ask questions and most drivers are not especially forthcoming. This is a source of attack in depositions when Plaintiffs are not only raising the issue of the qualifications of the medical examiner but also the thoroughness of the medical exam.

Note that the medical examiner is required to refer the driver to a specialist for further evaluation (sleep study) if anything appears out of the ordinary. Given the relative lack of experience regarding OSA of most examiners it's likely few referrals are made. Medical examiners and safety directors who are cross examined on this subject can be made uncomfortable when asked about oversight of medical examiners.

Remember that no regulation requires a certain amount of sleep, just that 10 consecutive hours must be taken as a break. But sleep experts are prepared to analyze everything about a driver's activities, rest breaks and the route to conclude the driver was fatigued due to sleep deficit.

## **II. CELL PHONES AND DISTRACTED DRIVING**

The regulations permit cell phone usage under certain circumstances (cell phones must be hands free, within reach and must be able to receive or make a call with the press of only one button.) The regulations are generally found at Part 392.80 and Part 392.82. Of course, texting in any form is absolutely prohibited even if hands free.

Some motor carriers absolutely prohibit any usage of phones, hand-held or otherwise and some motor carriers incorporate the applicable regulations. Irrespective of which course a motor carrier should take, distracted driving is one of the "Dirty Five". If there is any hint that a driver is using their cell phone in any form, even if allowed by company regulation, that can be a major problem in a lawsuit. And if a driver is suspected of reading or sending texts, accessing websites, or watching videos then the exposure increases exponentially.

This topic raises issues of cell phone/device preservation, which can be tricky since most drivers are not issued company phones. Then there is the specter of more than one phone being possessed by the driver.

Forensic phone experts are ready to examine the device and find everything there is to find, times and locations of usage, specific websites and data which was accessed (this can be exceedingly embarrassing, for obvious reasons).

Human factor experts are ready to opine that phone and device usage is as distracting or more so than drunk driving.

Device usage can tie in with fatigue (Topic I above) if the driver is accessing data when he or she should be sleeping.

### **III. ALCOHOL AND CONTROLLED SUBSTANCES**

Jurors recoil at the idea that any driver could be under the influence of drugs or alcohol. This mainly comes up where there is not good compliance with FMCSR 382.303, Post Accident Testing. Additionally, the Part 382 and Part 40 Random Testing procedures of any motor carrier must be beyond reproach.

With regard to Post Accident Testing, we most often see a problem where the alcohol testing is not conducted within 2 hours (which is almost impossible because most drivers aren't released from the scene) or the outside time of 8 hours because a testing facility is not open or cannot be found. It is less of a problem with controlled substances, which is a 32 hour window.

However, care must be taken to assure that the testing facility knows it must test for DOT designated drugs (Amphetamines, Barbiturates, Cocaine, Opiates, and PCP) AND alcohol. If a driver asks for a post-accident DOT drug test some facilities will not test for alcohol. The driver or whoever is accompanying them must specify drug and alcohol tests.

The proper tests must be administered. For instance, urine is acceptable for drugs but usually not alcohol; a breath or blood test are the proper ones for alcohol.

Often drivers, driver managers, dispatchers or anyone up the line who is notified about an accident is unfamiliar with Part 382.303. Obviously, post-accident testing is a must where it is required: after any fatality or any time a driver is cited and where there is either disabling damage to any vehicle requiring a tow or immediate medical treatment away from the scene.

The Motor Carrier procedures for random and reasonable suspicion drug and alcohol testing (and pre-employment drug testing) must fully conform to the FMCSRs, and the proper personnel must be in place at the Motor Carrier. See generally FMCSR Part 382, Subparts C and D.

Plaintiff counsel will fly-speck alcohol and drug procedures to look for any hint of impairment. They will also carefully examine driver medication self-reports to look for drug interactions. And often the driver has a bag of medications in their truck which are discovered and inventoried post-accident by Law Enforcement.

#### **IV. MAINTENANCE**

The issue of maintenance, and keeping records of both scheduled and as required maintenance tends to show up in many accidents. Keeping documents for the required period of time and most importantly, being scrupulous with driver vehicle inspection reports both Pre and Post Trip goes without saying. While the regulation has now been eased so that DVIRs are only required where the driver finds a defect, we are seeing more cases where they're improperly filled out and most importantly repairs are not attended to within a reasonable time after the driver submits the DVIR. It is good practice to make sure that DVIR procedures are made clear to all drivers especially where the DVIRs are electronic.

And the retention period for DVIRs - - three months - - must be respected.

It is obvious that brakes, tires, stability and handling equipment and anything which the public sees as crucial to safety (tractor and trailer) must be carefully maintained. In an accident if law enforcement or the other side find non-conforming equipment, especially out of service items, then the Motor Carrier is vulnerable to attack. Quite often the maintenance deficiencies had nothing to do with the accident but the "poor safety culture" mantra will be used.

Plaintiff experts will try to use SMS and CSA maintenance BASIC statistics to demonstrate that the Motor Carrier has a long list of violations.

Then they quote from FMCSR 385.3 and 385.5- -Safety Management Controls - - to say that the Motor Carrier didn't have proper policies and procedures to ensure compliance with safety regulations.

See generally FMCSR Part 393- -Parts and Accessories Necessary For Safe Operation- -for areas of attack by plaintiff experts.

#### **V. TRAINING**

The initial and recurrent training of the driver is a hot button issue. What is the Motor Carrier's training program? If there is a training program, who designed it? Were safety consultants used? Is driver behavior monitored by in-cab cameras?

Was the driver counseled, disciplined, or given additional training after critical events, including accidents or incidents?

It is imperative for a Motor Carrier to not only properly train drivers upon hiring, but to have a careful recurrent training module and most importantly to counsel drivers when they are found to be deficient.

FMCSA has been engaged in proposed rulemaking for the training of drivers, qualification of driver trainers (similar to the National Registry of Medical Examiners) and a complete overhaul of federally mandated training. This effort has been going on for decades, but apparently the FMCSA, ATA, OOIDA and other stakeholders have agreed upon this training.

Safety directors and other Motor Carrier personnel can be made extremely uncomfortable when the issue of training arises after a catastrophic accident.

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