

TRUCKING CRASHES - NOT YOUR TYPICAL CAR CRASH

DENISE A. BRADSHAW, ESQ.
BRADSHAW LAW LLC
603 Pine Street
Elko, Nevada 89801
775.738.7444
denise@bradshawlawnv.com

You got a new case! Your client was catastrophically injured when his vehicle was rear-ended by a tractor/trailer on the interstate. Your initial instinct is to handle this case just like any typical car crash - request the crash report, take pictures of your client's vehicle, send letters of representation to the insurance carriers, request your client's medical records, and, when he is done treating, send a policy limit demand. Right? WRONG!

In order to protect your client, trucking cases must be handled from day one drastically different than your typical car crash. Why?

1. EVIDENCE

Trucking cases involve a wealth of data generally not available in a typical car crash. To ensure proper preservation of this essential evidence, most of which can be gathered before filing suit, you must move quickly!

a. Preservation Letter.

Upon retention, it is imperative that an evidence preservation letter is sent out immediately to the insurance carrier(s), driver and involved company(ies), if applicable. The letter must be specific as to all items of evidence that need to be preserved, such as:

1. Any and all EDR/ECM/"Black Box" data, including, but not limited to all sudden deceleration and/or hard stop and last stop data;
2. The driver's complete personnel file for the duration of his/her employment;
3. Driver's qualification file as mandated by 49 C.F.R. § 391.51;
4. Driver's log and/or record of duty status, either in paper or readable electronic format, for the last two (2) years, pursuant to 49 C.F.R. §§ 395.8 and 395.15, in its original condition with no modifications and/or alterations;
5. All statements from any and all investigation(s) of the crash, regardless of their source;

6. GPS and/or any other tracking data for the date of the crash;
7. Bill(s) of Lading and all shipping documents for any and all items/substances being transported at the time of the crash;
8. Any and all cellular device data for any and all cellular devices in the driver's possession at the time of the crash, including but not limited to billing information, data logs, text print-outs, GPS, application usage and/or internet usage data;
9. All operational documents associated with each trip by the Defendant driver in the two (2) years before the crash; and,
10. Maintenance and/or repair history for commercial vehicle.

This is essential as 49 C.F.R. § 395.8(k), which pertains to driver's logs/record of duty status, only requires motor carriers to retain the logs and any supporting documentation for six (6) months. Therefore, if you wait, the evidence will very likely be gone. Further, if a motion for spoliation becomes necessary, the defendants will have a hard time negating timely notice to preserve the evidence.

b. Tractor Inspection/Black Box.

Next, if possible, you must secure the truck and trailer(s) for a forensic inspection by your expert(s). Depending on the circumstances, you will want an accident reconstructionist who specializes in trucking crashes to perform the inspection, along with trucking standards expert.

If applicable, part of the inspection must include a download of the truck's Event Data Recorder (EDR) and/or Electronic Control Module (ECM), more commonly known as the "black box." In newer tractors, the black box is designed to record two (2) essential crash-related events: hard brake/sudden deceleration; and, last stop data. This evidence can make or break your case and assist in eliminating many defenses.

Depending on the model of truck and its engine, the hard brake event will show the last sudden deceleration of 7 or 9 miles per hour (unless reprogrammed, which will be revealed in the download), including the tractor's activity, i.e. speed, throttle percentage, brake application, cruise control status, diagnostic codes, etc., in the 60 seconds before the crash and the 15 seconds thereafter. The Cummins EDR retains the last three (3) sudden deceleration events, while the Volvo EDR only retains the last qualifying deceleration event. Knowledge of the engine type and the type of data it may retain is essential. These valuable data events are recorded on a loop and can be destroyed by driving the vehicle. Therefore, the data must be gathered immediately.

The last stop data records all of the data related to the tractor's last stop.

Depending on the model, this information can go back to more than a minute before the crash. This valuable data, however, is overridden with the next cycle of the key so it must be downloaded before the tractor is operated after the crash. Importantly, be aware that, even if the tractor is not started, this data can be lost if the key is in the “on” position while being towed.

Downloading the EDR will require an expert, along with written consent of tractor owner. Specialized equipment is required to plug into the access-port and download the data. If engine is manufactured by Volvo, there are only three (3) companies in the United States with the proprietary software to access the crash-related data. I prefer to bring my own expert to oversee the download and to ensure no data is destroyed and/or manipulated; doing our own download also provides immediate access to the data. However, due to time constraints, that is not always possible. If necessary, parties can agree to share the expense of an expert to do the download. Regardless of the arrangement, be absolutely certain your firm name is on the consent form signed by the driver - otherwise you risk not getting the data from the opposing side in a timely manner.

While preserving black box data, do not forget to check your client’s vehicle. Does it contain a black box? If so, that data must be preserved as well.

c. Satellite Tracking.

Many trucking companies utilize satellite tracking/GPS devices to track their drivers and equipment, a common version is Qualcomm. This data can provide the exact location to the tractor/driver at any given time. Immediate preservation and access to this data can be essential to proving your trucking case.

While the tractor/driver’s location at the time of the crash seems obvious, this data is invaluable in proving a larger system failure against the company. It can be used to verify the accuracy of the driver’s logs/record of duty status, along with determining a pattern of overdriving.

d. Collision Avoidance System.

These systems are designed to warn the commercial driver of objects in the roadway ahead of them, and are also known as VORAD (Vehicle Onboard Radar System). One such system is the Bendix Wingman Collision Avoidance System. Depending on the system, they can provide both audible and digital warnings to the commercial driver to help avoid a crash. Unless turned off, these systems record the warnings and can be downloaded in a usable format for the trucking attorney. This data can be invaluable to show your driver has history of following too closely.

e. FMCSA.

The Federal Motor Carrier Safety Administration (FMCSA) can also provide a wealth

of information about your defendant motor carrier and its driver(s).

Its safersys.org website provides immediate access to realtime data for the past twenty-four (24) months about the carrier's history of unsafe driving, hours of service compliance, vehicle maintenance, controlled substances/alcohol and driver fitness. It also provides safety ratings for the motor carrier based upon other carriers in the industry. This data is gathered through inspections and citations which are listed on the website. Immediately upon retention, you will want to gather the online data for your defendant, and continue watching the website during the pendency of your case for similar violations.

Additionally, the Defendant driver and/or company's applications and supporting documentation are maintained by the FMSCA and can be accessed through a FOIA request. Unfortunately, these requests are taking 9-12 months to process so you will want to submit the request right away.

2. INSURANCE COVERAGE

In direct contradiction to a typical car crash, due to the inherent danger of tractor/trailers, there is significantly more insurance coverage available to your catastrophically injured client.

The Federal Motor Carrier Safety Regulations set forth the minimum liability insurance coverage required for a motor carrier to operate interstate. A typical "for hire" motor carrier operating a vehicle with a gross vehicle weight exceeding 10,001 pounds transporting non-hazardous property must have a minimum of \$750,000.00. 49 C.F.R. § 387.9. In contrast, if the motor carrier is "for hire" or private and transports hazardous substances as defined in 49 C.F.R. § 172.101, intrastate or interstate, the minimum liability coverage increases to \$5,000,000.00. Knowledge of what the defendant was transporting, along with the required minimum coverages is critical.

While looking up the defendant and/or motor carrier on safersys.org, the insurance company and applicable coverage will be listed. I have had cases where the coverage amount is incorrect (it lists the minimum when motor carrier actually had more coverage), but it can provide you with immediate identification of the insurance carrier at the time of the crash.

Additionally, unlike typical car crash cases, the FMCSR prohibit insurance companies of "for hire carriers" from denying coverage due to breach of any policy provision by an insured, such as "failure to cooperate." This is done through an MCS-90 endorsement, and ensures that the public will be protected. See 49 C.F.R. § 387.15. Keep this in mind when the defense attorney is threatening that the carrier is going to pull coverage so you must accept their ridiculous offer right now.

There may be more insurance coverage available through additional parties.

3. PARTIES

In a typical car crash case, the tortfeasor is generally the only defendant. If the driver was working at the time of the crash, the employer would also be a party.

Trucking cases, however, do not stop there. More often than not, these cases involve a larger system failure - a failure larger than the commercial driver's negligence in rear-ending your client's vehicle. The goal in a trucking case is to determine how the overall system failed your client. Stepping back from the crash, itself, why did the crash occur? For example, when an employer/motor carrier is a defendant, a trucking lawyer must thoroughly examine its safety program, hiring qualifications, vehicle maintenance, document retention, root cause analyses and driver history. Was the crash actually caused by a failure to maintain the vehicle? Did the driver fail to do a pre-check as required by law? Was the driver not properly trained to keep a lookout? Was the driver fatigued due to overdriving?

You must dig deeper to see if there are additional parties who contributed to the overall system failure that caused injuries to your client. This approach is imperative as you will want the case to be bigger than the defendant driver. You must look at the driver, motor carrier/employer, shipper(s), and any other party(ies) in the chain that may have liability, including insurance carriers. Depending on the facts and circumstances of your case, other viable parties not listed may have contributed to your client's injuries and need to be fully investigated.

4. FEDERAL MOTOR CARRIER SAFETY REGULATIONS (FMCSR)

While all car crashes involve a violation of the rules of the road, trucking cases are much more complex and commercial drivers have many more regulations to which they **must** comply. The FMCSR provide a wealth of guidance and rules to the trucking lawyer.

The FMCSR apply to all aspects of operating a commercial vehicle, including driver fitness and licensing, driver medical examinations, vehicle size and weight, pre-trip inspections, operation, accident procedures, driver file maintenance, hours a driver is allowed to drive, driver's logs/record of duty status, and vehicle maintenance.

The regulations are very specific as to the qualifications of a commercial driver. In order to operate a commercial motor vehicle, a driver must be:

1. At least 21 years of age;
2. Read and speak the English language sufficiently to converse with the general public, read traffic signs, respond to official inquires and to make entries on reports and records;

3. Can safely operate the commercial vehicle, based on training and/or experience, or both;
4. Physically able to pass biannual medical examinations;
5. Has a valid commercial drivers license from only one state;
6. Provided a list of prior violations to employer and/or motor carrier that employs him/her;
7. Is not disqualified under any other Part; and,
8. Passed a driving test or its equivalent.

49 C.F.R. § 391.11. The FMCSR also set forth specific skills a commercial driver must possess in 49 C.F.R. § 383.113. Use these qualifications in your case - especially during the defendant driver's deposition.

When presented with the FMCSR, many defendant drivers and their employers will either attempt to claim ignorance of the regulations or that a particular regulation does not apply to them. These positions fail miserably.

The FMCSR require "knowledge and compliance with the regulations" by every driver, employee and employer. 49 C.F.R. § 390.3T(e). Further, in order to operate a "for hire" vehicle with a gross weight of more than 10,001 pounds in interstate commerce (note this is not limited to traditional commercial tractor/trailer configurations), the Federal Motor Carrier Safety Administration requires a driver/motor carrier to obtain a US DOT Number. The application for the number is a Form MCS-150 (after January 17, 2017, the form is called MCSA-1). Upon signing the form, the applicant certifies that they are "familiar with the Federal Motor Carrier Safety Regulations."

Additionally, before December 2015, in addition to the US DOT number, interstate carriers of property owned by another are also required to have an Authority to Operate, or MC Number. Until the new system was implemented, which combines the two numbers, the application for an MC Number was called an OP-1, and can be invaluable to your clients. The OP-1 is still required for existing companies to apply for additional authorities. Section IV of the form is entitled, Safety Certification and applies to applicants operating motor vehicles. The Safety Certification requires certification that:

- A. Applicant has access to and is familiar with all applicable USDOT regulations relating to the safe operation of commercial vehicles and the safe transportation of hazardous materials, and ***will comply with these regulations.***
- B. In so certifying, applicant is verifying that, at a minimum, it:

- (1) Has in place a system and an individual responsible for ensuring overall compliance with FMCSRs.
- (2) Can produce a copy of the FMCSRs and the Hazardous Materials Transportation Regulations.
- (3) Has in place a driver safety training/orientation program.
- (4) Has prepared and maintains an accident register (49 CFR 390.15).
- (5) Is familiar with DOT regulations governing driver qualifications and has in place a system for overseeing driver qualification requirements (49 C.F.R. § 391).
- (6) Has in place policies and procedures consistent with USDOT regulations governing driving and operational safety of motor vehicles, including drivers' hours of service and vehicle inspection, repair, and maintenance (49 C.F.R. §§ 392, 395, and 396).
- (7) Is familiar with, and will have in place on the appropriate effective date, a system for complying with USDOT regulations governing alcohol and controlled substances testing requirements (49 C.F.R. §§ 382 and 40).

FMSCA Form OP-1 (emphasis added). For domestic motor carriers, *only*, the new MCSA-1 form, like the MCS-150, only requires certification that the applicant will comply with the FMSCA.

These mandatory forms signed by the defendant, employer and/or motor carrier provide an excellent foundation for your rules, along with impeachment material. As discussed above, these documents for your defendant/motor carrier can be obtained from the Federal Motor Carrier Safety Administration through a FOIA request.

A thorough understanding of the FMCSR and their application to the evidence is essential in preparing and presenting your client's case and showing a larger system failure.

At first blush, trucking cases may seem daunting. However, once you are familiar with the industry, evidence gathering and federal and state regulations, they are extremely satisfying as, by proving a larger system failure, we are not only protecting our injured client and their family, but the traveling public as a whole.

Now...about your new case...

