

## **WINTER WEATHER TRUCK WRECK: WHERE DO I START?**

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Every year during the winter months, people are seriously injured or even killed by commercial motor vehicle drivers that make the decision to continue traveling the roadways during winter weather. Winter weather conditions as well as road conditions can change rapidly and with the rapid change in conditions, a commercial driver can find themselves in a situation where they are traveling far too fast for the conditions. These commercial drivers become a risk not only for themselves but also for the public at large. Many times this type of wreck could have been avoided had the commercial driver only followed the regulations and law they are required to be knowledgeable of prior to obtaining a commercial driver's license. While this case type comes in a variety of conditions from wet road, snow covered road, and black ice conditions, they all have a common start point and plan of attack.

The Federal Motor Carrier Safety Regulations are the primary cornerstone to any truck wreck case involving adverse weather. F.M.C.S.R. § 392.14 specifically provide plaintiffs with a sword against the commercial driver as follows:

**“Extreme caution** in the operation of a commercial motor vehicle **shall** be exercised when hazardous conditions, such as those caused by snow, ice, sleet, fog, mist, rain, dust, or smoke, adversely affect visibility or traction. **Speed shall be reduced** when such conditions exist. If conditions become sufficiently dangerous, the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial motor vehicle can be safely operated. Whenever compliance with the foregoing provisions of this rule increases hazard to passengers, the commercial motor vehicle may be operated to the nearest point at which the safety of passengers is assured.”

[33 FR 19732, Dec. 25, 1968, as amended at 60 FR 38747, July 28, 1995]

This section *mandates* that when a commercial motor vehicle is being operated in hazardous conditions such as snow, ice, or sleet, that the commercial driver operates the vehicle using *extreme caution*. The interpretation of the phrase “extreme caution” has been subject to much debate but mostly by our adversaries on the opposite side. There have been courts who have interpreted this phrase to create a heightened standard of care on the commercial driver that requires a level of caution, control, vigilance, and attentiveness on the commercial driver that is much greater than that of the ordinary reasonable person. F.M.C.S.R. § 392.14 demonstrates a significant contrast between the operation of a commercial vehicle versus the operation of a passenger vehicle.

In its report to Congress in 2005, the Federal Motor Carrier Safety Administration concluded that of the 141,000 commercial motor vehicle crashes, 13% of those were attributed to adverse weather. Rain, fog, snow and ice were the most frequent of these cases. A key factor to F.M.C.S.R. § 392.14 is that its list of adverse weather conditions is a non-exclusive list.

Even though the list of adverse weather conditions is a non-exclusive list, the regulation is not triggered until there is a condition which “*affects visibility and traction.*” The visibility or traction triggering event allows the savvy defense attorney to argue that F.M.C.S.R. § 392.14 does not apply, especially if a defendant commercial driver provides testimony that his visibility or traction was never affected by the condition until the moment of the wreck.

As a practical matter, a defendant commercial driver’s testimony that a weather condition did not affect his visibility or traction may be properly challenged by witnesses who provide testimony to the contrary. Weather reports are also be useful in showing that there was a weather advisory (warning) for a particular area that the defendant driver knew they be traveling through. Such reports sufficiently place the driver on notice of the potential of hazardous road conditions which can trigger the mandate for extreme caution.

Not only is there the mandate that the commercial driver use extreme caution but the F.M.C.S.R. § 392.14 further require two separate duties for a commercial driver. The second two sentences of F.M.C.S.R. § 392.14 place the following duties on the commercial driver:

“**Speed shall be reduced** when such conditions exist. If conditions become sufficiently dangerous, the **operation of the commercial motor vehicle shall be discontinued** and shall not be resumed until the commercial motor vehicle can be safely operated.”

The regulation requires a commercial driver to slow down in some circumstances but in more severe weather requires that the commercial driver stop all operations of his vehicle until the operation can be safely resumed. This seems to leave some discretion to the commercial driver with regards to when they must cease operation of the commercial vehicle but is conclusive that at a minimum, a commercial driver’s speed must be reduced.

F.M.C.S.R. § 392.14 triggers other reasonable measures that a commercial driver should take when faced with hazardous road conditions. These can include a commercial driver’s duty to know the forecast, communication with dispatch regarding weather on a particular route, researching weather prior to travel, calling ahead to destinations before and during a route, and the use of four-lane highways instead of less traveled two-lane roadways.

Some courts have interpreted the phrase “extreme caution” to create a heightened standard of care for commercial drivers. Particularly since this is the only Federal Motor Carrier Regulation that requires such caution when operating a commercial vehicle. Two California state courts have found that “extreme Caution” creates such a heightened standard of care for the commercial driver. For example, in *Crooks v. Sammons Trucking, Inc.*, the

California Court of Appeals held it was error for the lower court to simply instruct the jury on a reasonableness standard and not the higher standard of extreme caution.

Following the same reasoning the California Appellate court in *Weaver v. Chavez* held that the trial court erred in instructing the jury only on the reasonableness standard of care because F.M.C.S.R. § 392.14's usage of the terms "extreme caution" sets a heightened standard of care. The court further explained that a "reasonable person standard is not consonant with a standard of extreme care." The court reasoned that the term "extreme" as defined by Black's Law Dictionary means the "greatest, highest, strongest, or the like."

Similarly, a Virginia state court reasoned that F.M.C.S.R. § 392.14 "imposes a duty on the operator of a commercial motor vehicle to exercise 'extreme caution' under such conditions." In the case of *Kimberlin v. PM Transport, Inc.*, the court defined the standard as "an expanded duty of care." The adoption of a heightened standard of care has not been applied in all jurisdictions any may defendants argue that the reasonableness standard was the intention of the writers of F.M.C.S.R. § 392.14. This is an important issue in that a jury who looks at the evidence of driving 40 in a 55 mph zone may find it reasonable under a that standard while the same jury may find it to unreasonable when examined under the commercial drivers duty to use "extreme caution."

When examining the winter weather wreck case, you must also look at F.M.C.S.R. § 392.2. The regulation directs the commercial driver back to the laws of the state where the wreck occurred. F.M.C.S.R. § 392.2 specifically state that:

"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."

All states are required to have some form of the Commercial Driver's License Manual. Prior to receiving their commercial driver's license and commercial driver must pass a knowledge test, in addition to the skills test and DOT physical requirement. Every state uses a similar form of the Commercial Driver's License Manual and they are pinned by the same company. While they may vary as to the depth of information and state specific information, the CDL manual provides the information necessary for a commercial driver to become licensed.

The CDL manual is a critical part of defining what reasonable steps a commercial driver took when traveling in adverse weather. Two of my favorite questions to defendant drivers and safety managers are "Is there anything unreasonable within the information provided in the CDL manual," and "Is there anything within the CDL manual that a commercial driver should not follow." This places a witness between a rock and a hard place because you really don't care what the witness says. Either they agree with the CDL manual and try to rationalize why the

commercial driver's actions are consistent with the manual or they disagree with the reasonable measures contained within and appear to be rogue commercial drivers.

Most states have identical sections to the CDL manual. Section 2.6.2 states:

#### 2.6.2 – **Matching Speed to the Road Surface**

You can't steer or brake a vehicle unless you have traction. Traction is friction between the tires and the road. There are some road conditions that reduce traction and call for lower speeds.

**Slippery Surfaces.** It will take longer to stop, and it will be harder to turn without skidding, when the road is slippery. Wet roads can double stopping distance. You must drive slower to be able to stop in the same distance as on a dry road. **Reduce speed by about one-third (e.g., slow from 55 to about 35 mph) on a wet road.** On packed snow, reduce speed by a half, or more. If the surface is icy, reduce speed to a crawl and stop driving as soon as you can safely do so.

Section 2.13.2 further provides that:

#### 2.13.2 – **Driving**

**Driving Slippery Surfaces.** Drive slowly and smoothly on slippery roads. If it is very slippery, you shouldn't drive at all. Stop at the first safe place.

**Check for Ice.** Check for ice on the road, especially bridges and overpasses. A lack of spray from other vehicles indicates ice has formed on the road. Also, check your mirrors and wiper blades for ice. If they have ice, the road most likely will be icy as well.

**Adjust Speed to Conditions.** Don't pass slower vehicles unless necessary. Go slowly and watch far enough ahead to keep a steady speed. Avoid having to slow down and speed up. Take curves at slower speeds and don't brake while in curves. **Be aware that as the temperature rises to the point where ice begins to melt, the road becomes even more slippery. Slow down more.**

**Adjust Space to Conditions. Don't drive alongside other vehicles. Keep a longer following distance.** When you see a traffic jam ahead, slow down or stop to wait for it to clear. Try hard to anticipate stops early and slow down gradually. Watch for snowplows, as well as salt and sand trucks, and give them plenty of room.

Of course the regulations and CDL manual information are useless without the information on what actually happened. Investigation can be difficult in adverse weather wreck cases but the earlier your involvement in the case, the better. One of the first steps that will aid in the recovery of as much scene information is early and consistent contact with the investigating officer. Determine what measurements were taken, whether any data was downloaded from the truck, if any photographs were taken, what witnesses were interviewed and the officer knowledge of the road conditions for the day of the wreck.

Your accident reconstructionist expert is also invaluable in the early gathering of information. Make sure that your expert is able to download any data that may be available from the at fault truck. You need to know whether any warnings were triggered by sudden braking or lane changes. Most importantly, what speed the at-fault commercial vehicle was traveling at prior to the collision.

I also like to use a weather expert for winter weather driving cases. This expert can be important in helping understand the weather conditions for the days leading up to the collision and on the date of the wreck itself. These experts can also pull the weather warnings for the different television stations within the areas viewing location. Often times, commercial drivers watch the news prior to a shift and made aware of the weather conditions for the areas they will be traveling.

The gathering of witness statements can swing the pendulum of your case. Quickly requesting the police report and the 911 tapes provides you with access to the witnesses who observed the wreck and the weather conditions at that time. Get statements from all the witness and know what each witness recalls about the wreck and the road conditions.

Discovery is key. Find out what policies, procedures, training materials the commercial carrier has that deals with winter weather and driving conditions. Often times there are training videos and safety meeting agendas that are used regularly each year. The training videos are a great source of information and an even greater tool in getting driving standards in against the commercial carrier and driver. Often times the driver handbook contains direct quotes from the CDL manual.

Find out what the commercial carriers responses are to drivers who travel in adverse weather. Are the drivers penalized for not completing a route? What does the individual carrier do to protect the driver and public at large when driving in adverse weather conditions? What role does the commercial carrier's dispatch center play in identifying and notifying drivers of adverse weather conditions?

Finally we all know what they say about assumptions! Do not assume anything about your case. If you are dealing with a case involving black ice, make sure that your potential jury will not have issues with finding the defendant at fault for an "accident." Find out what others think about the regulations and training for commercial drivers. Focus groups are a great way to identify weakness in your case and what a potential jury thinks about your arguments. This is a perfect time to tailor your word choice and find out what difference "extreme caution" makes.

Litigating a trucking case involving adverse weather conditions can be challenging but must be fully developed like any other trucking case. A commercial driver is not off the hook when they cause a collision under adverse weather conditions. The Federal motor Carrier Safety Regulations not only expects that the professional commercial driver will be a defensive driver but that the professional commercial driver will also use extreme caution when traveling in areas affected by adverse weather conditions.