

DISCOVERING A

The Case Against the Drug- Imp



I. Introduction

As trial lawyers who litigate trucking cases know (as well as lawyers who may handle the occasional motor vehicle collision case), collisions between tractor-trailers and ordinary passenger vehicles or between tractor-trailers are among the most dangerous and catastrophic accidents on our Nation's highways. These collisions often involve major injuries to life and limb, and untold losses to families, and companies which operate commercial motor vehicles. The trucking industry is essential to our very way of life in this country as commercial motor vehicles transport most of our food, products and equipment that sustains our very existence. Commercial trucking companies, however, are operated for profit. And regardless of whether it is a company-owned truck or is a leased vehicle by a driver who in essence is an owner/operator of his or

her own commercial vehicle, the incentive exists to cut costs, cut corners and hedge on safety to ensure that the wheels of profit keep turning. The goal of the commercial trucker and/or trucking company is to make the delivery on time and to get paid for their services. The time factor which requires the driver to get to his or her destination often results in violations of what is known as the hours-of-service regulations imposed by the Federal Motor Carrier Safety Regulations (FMCSRs). There are scores of articles on this subject and that topic and those regulations are not part of this article. Rather, this article is focused on the important, and perhaps related topic, of what drivers often do to keep the wheels of commerce rolling and which often results in drivers pushing themselves beyond the limits of the regulations—driving while drug-impaired and/or fatigued.

AND LITIGATING

Impaired Driver in Trucking Cases

BY FREDERICK "RICK" I. HALL, III

While it is clear that drivers are prohibited from driving while under the influence of alcohol, the FMCSRs permit drivers to take certain prescription drugs which are otherwise banned by the regulations- but only if the prescribing doctor has certified that he or she is familiar with the driver's medical history and assigned duties and advises the driver that the particular drug at issue will not adversely affect the driver's ability to safely operate a commercial motor vehicle (CMV). The Federal Motor Carrier Safety Administration (FMCSA) which is charged with interpreting and enforcing the FMCSRs, has interpreted the pertinent regulation to require the Commercial Motor Carrier to have a letter or evidence on file which ensures that only medically qualified drivers are allowed to operate a CMV in interstate commerce. The regulation that is of import here is Subpart E of Chapter 391 pertaining to Qualifications of Drivers, specifically- Physical Qualifications and Examinations. This article will examine and hopefully shed some light on discovering the drug-impaired driver, who is often a fatigued driver pushing the limits of what he or she is permitted to do under the FMCSRs.

II. Investigating the Case

Pre-suit investigation of any trucking case is of utmost importance. And depending on whether liability is contested, most seasoned trial lawyers handling trucking cases will hire qualified accident reconstruction experts and private investigators to go to the scene, interview witnesses, and take photographs and measurements. However, in many trucking cases, the issue of liability is reasonably clear. Nevertheless, you should go to the scene of the collision and investigate it. As soon as you can, obtain the traffic collision report. If there has been a death, you will normally have to wait in South Carolina, and many other states, as death cases require that an investigation and report

be filed by what is known in South Carolina as the Multi-disciplinary Accident Investigation Team (MAIT). It can take months to get the MAIT report in South Carolina.

Early Clues: When you get the collision report- in South Carolina known as the Uniform South Carolina Traffic Collision Report- examine the report for early clues as to what caused the collision, including a drug-impaired driver. The South Carolina Traffic Collision Report lists "Contributing Factors" to the collision, which are normally based on the law enforcement officer's interview of the driver and parties involved in the crash. **Of particular note is the category of "Distracted/Inattention."** This should draw to the attention of the experienced trial lawyer handling trucking cases the need to turn over every stone to discover what precipitated this finding by the investigating officer. There are many things which can distract a truck driver, including the often involved use of cell phones, which is a separate category of distracted driving on the S.C. Traffic Collision Report. The focus of this article is on another often-dismissed cause of distraction- drug-impaired drivers. While law enforcement officers are well-trained to notice and obtain evidence of alcohol related offenses, their training is not as sophisticated when it comes to drug-impaired drivers. Of course, when the pill bottles are lying in the seat this is not as much of an issue. But frequently truck drivers are taking prescription drugs which may impair their driving- legal under the FMCSRs if they have a certificate from a doctor which allows for the use of the medication and states that the physician is aware of the driver's duties and that such medication will not adversely affect the driver's ability to safely operate a CMV.

In a recent case which our firm handled, we received the mandatory post-accident drug

testing results from trucking company's file. We then subpoenaed the lab reports from the lab where the driver's post-accident urine drug screen was performed and discovered that although the driver had been tested and cleared as having a negative drug test, neither the trucking company nor the driver had the required certificate or statement from his doctor that the drugs he was taking would not adversely affect his ability to safely operate a CMV. The independent Medical Review Officer (MRO), which operates under the DOT's Office of Drug and Alcohol Compliance, indicated in our case that the driver's drug test was in fact positive for amphetamines, a drug which is specifically prohibited under 49 C.F.R. § 391.41(12)(i). The MRO nevertheless issued a negative test or clearance verification because the medication was prescribed by a doctor. However, he advised that the finding was a safety concern because amphetamines are a drug that is considered medically disqualifying. Under this guidance, the MRO advised that the driver should be temporarily disqualified from driving as this finding made the driver unqualified to perform DOT sensitive duties without a letter from the prescribing doctor.

The published guidance from FMCSA provides as follows:

A driver cannot take a controlled substance or prescription medication without a prescription from a licensed practitioner.

If a driver uses a drug identified in 21 C.F.R. 1308.11 (391.42(b)(12)) or any other substance such as amphetamine, a narcotic, or any other habit-forming drug, the driver is medically unqualified.

There is an exception: the prescribing doctor can write that the driver is safe to be a commercial driver while taking the medication. In this case, the Medical Examiner may, but does not have to certify the driver.

Any anti-seizure medication used for the prevention of seizures is disqualifying.

The Medical Examiner has 2 ways to determine if any medication a driver uses will adversely affect safe operation of a CMV:

1. Review each medication - prescription, non-prescription and supplement
2. Request a letter from the prescribing doctor

<https://www.fmcsa.dot.gov/faq/what-medications-disqualify-cmv-driver>

III. Focusing the Case on Violations of the Federal Motor Carrier Safety Regulations

Once you have proof or suspect there is a driver who may have been drug-impaired at the time of the collision, the trial lawyer should focus his or her case on showing that there has been a violation of the FMCSRs. In South Carolina, and many jurisdictions, the violation of a safety regulation will establish a negligence per se cause of action or claim against the driver, and potentially a direct or independent case against the trucking company for the negligent hiring, training, supervision, and retention of the truck driver. Answering a Certified Question from the U.S. District Court in South Carolina, the South Carolina Supreme Court held in the case of *James v. Kelly Trucking Co.* that:

Just as an employee can act to cause another's injury in a tortious manner, so can an employer be independently liable in tort. In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public. See RESTATEMENT (SECOND) OF TORTS § 317 (1965). (Cited with approval in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992)).

James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330–31 (2008).

In another case involving the sale of alcohol to minors in violation of South Carolina's Alcoholic Beverage Control scheme, the Court held:

Regulations authorized by the Legislature have the force of law. *Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986). Violation of a regulation may constitute negligence per se. See, e.g., *Id.* (violation of state and federal air pollution regulations supports action for

negligence); see also *Seals v. Winburn*, 314 S.C. 416, 445 S.E.2d 94 (Ct. App. 1994) (Davis Adv. Sh. No. 5 at 27) (employer's violation of state and federal regulations prohibiting the employment of children under the age of ten on a farm was negligence per se); *Ravan v. Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993) (approving jury instruction charging that violation of a regulation is negligence per se); *Coleman v. Shaw*, 281 S.C. 107, 314 S.E.2d 154 (Ct. App. 1984) (violation of agency regulation governing swimming pool safety was negligence per se).

Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994), *aff'd*, 319 S.C. 469, 462 S.E.2d 861 (1995).

In addition, such a claim raises the stakes of the litigation and may provide a very strong basis for a claim of punitive damages against the trucking company.

The regulation to focus on is 49 C.F.R. § 391.41 (a) which provides:

A person subject to this part must not operate a commercial motor vehicle unless he or she is medically certified as physically qualified to do so, and, except as provided in paragraph (a) (2) of this section, when on-duty has on his or her person the original, or a copy, of a current medical examiner's certificate that he or she is physically qualified to drive a commercial motor vehicle.

A drug-impaired driver is not physically qualified to drive a CMV. Other relevant subparts of this regulation should also be examined. For instance, any individual with significant medical problems is likely to be taking one or more medications to control or treat their conditions, including drivers with heart disease, diabetes, epilepsy or a mental, nervous, or psychiatric disorder. Any of these medical problems which are not controlled through medication and which are likely to interfere with a driver's ability to operate or control a commercial motor vehicle are disqualifying. See, e.g., 49 C.F.R. § 391.41(b) 1-13.

Thus, any medication used to treat any of these conditions which is a controlled substance identified in 21 C.F.R. 1308.11 Schedule 1, an amphetamine, narcotic, or any other habit-forming drug is prohibited, unless the prescribing doctor who is familiar with the driver's medical history and assigned duties, has advised the driver that the prescribed drug substance or drug will not adversely affect the driver's ability to safely operate a commercial motor vehicle. 49 C.F.R. 392.3 pertaining to the "Ill or fatigued operator," provides:

No 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 any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

Federal Department of Transportation (DOT) Interpretation:

Question 1: Who is responsible for ensuring that medical certifications meet the requirements?

Guidance:

Medical certification determinations are the responsibility of the medical examiner. The motor carrier has the responsibility to ensure that the medical examiner is informed of the minimum medical requirements and the characteristics of the work to be performed. The motor carrier is also responsible for ensuring that only medically qualified drivers are operating CMVs in interstate commerce.

<https://www.fmcsa.dot.gov/regulations/title49/section/391.41>

This DOT interpretation is very important as it puts the legal responsibility for ensuring that a driver is medically qualified on the trucking company, and therefore, the company must determine that the driver is not taking any prescription drug that would interfere with his or her ability to safely operate a CMV. In our case, we found that the trucking company had a list of medications but not the required certification from the prescribing doctor.

IV. Informal Discovery or You May Never Know What the Company Knows Unless You Find It Yourself.

Every good trial lawyer should be knowledgeable about the formal rules of discovery under both the federal and state rules peculiar to their jurisdiction. This subtopic deals with what most lawyers know as informal discovery. In the case which formed the basis for this article we were able to obtain invaluable information from speaking with the defendant's ex-wife (through our private investigator) who provided us a list of medications her husband was taking and who his doctor was before we obtained the driver's medical records under the subpoenas we issued to his doctors. We also found out that the defendant driver had divorced his wife and moved to the Philippines when service of the filed complaint was attempted by the local sheriff's office in the county where the defendant truck driver last resided. Trial lawyers handling trucking cases should therefore make every effort to speak to ex-wives, friends, neighbors, etc., to learn as much information as these individuals will provide concerning the habits and general health of the defendant truck driver if they suspect distracted driving. There are many other resources available to lawyers such as West Law Clear, Google, Facebook, and the like. Do not overlook the internet and social media.

V. Doing the Discovery- What to Ask For. (HR File, Driver's Qualification file, Driver Investigation History File, Medical Examination Report- All Required by FMCSRs)

The South Carolina Rules of Civil Procedure allow for the service of discovery with the complaint. Rules, 33(a) and 34 (a), SCRCP. Interrogatories and requests for production should be served with the complaint, if allowed by the rules of civil procedure in the trial lawyer's jurisdiction, in every trucking case. If liability is reasonably clear, requests for admissions directed toward establishing liability should also be considered.

Interrogatories: There are scores of articles dealing with discovery in trucking cases and this article is focused on discovering and litigating the case against the drug- impaired driver. Given the limitations on the number of interrogatories that can be sent or served without leave of court in many states, be sure to draft interrogatories directed toward the defendant driver and the trucking company designed to discover what medications the driver was taking at the time of the collision, and for what reasons. It is also important to inquire into what the driver's medical condition was at the time of the collision and prior thereto. Interrogatories should be drafted asking the defendant driver to identify his or her medications and the prescribing doctor. If any of the medications being taken by the driver at the time of the collision are prohibited by the FMCSRs and the driver does not have a medical clearance letter, the driver is not qualified to drive a commercial motor vehicle.

Requests for Production: Requests for production should ask for the driver's personnel or HR file, Driver Qualification file, and Driver Investigation History File. These records must be retained and kept on file under the FMCSRs for periods of time ranging from 1 to 3 years and for as long as the driver is employed by the trucking company. See 49 C.F.R. § 379 pertaining to Preservation of Records, Appendix A to Part 379, and 49 C.F.R. Subpart F- Files and Records, which include the Driver - Qualification file and the Driver Investigation History, 49 C.F.R. § 391.51 and 391.53.

Of particular importance for the purposes of this article is the medical examiner's certificate of the driver's qualification to drive a CMV. 49 C.F.R. § 391. 51 (b)(7). The Driver Qualification File must retain the medical examiner's certificate. The trial lawyer should send a subpoena to the physician who performed the medical exam and signed the medical certificate, which the DOT requires a driver to have, and require the production of the Medical Examination Report which must be kept on file. This report contains personal identifying information of the driver who was examined, including his or her name, address, driver's license number, contact information and certification status.

The DOT Medical Examination Report: Perhaps the most important section (Section 2) of the DOT Medical Examination Report is the medical history which is provided by the truck driver. The driver must certify that the information reported is complete and true, and by signing the form, the driver acknowledges that inaccurate or false information may invalidate the Medical Examiner's certificate.

In the case our firm litigated recently, we learned that the driver had reported falsely that he had no illness or injury within the last 5 years, when in fact he had been diagnosed with chronic fatigue syndrome, obstructive sleep apnea, and anxiety, which is a psychiatric disorder. The driver was taking several prohibited medications at the time of the collision, including amphetamines, and Klonopin which is a prohibited habit-forming drug that the truck driver in our case had omitted to disclose in his reported medical history. Klonopin has the side effect of being very sedating. He had also failed to report that he was taking amphetamines. These medications had been prescribed to treat the disorders which the driver failed to disclose and hence he signed a false Medical Examination Report.

The HR/Personnel File: The trial lawyer should ask for and examine the driver's personnel file closely for a history of prior disciplinary actions focused particularly on driving violations. In our case, in addition to finding the driver was taking prohibited prescription drugs without medical clearance, he had two recent previous collisions where he had rear-ended other vehicles. These incidents could not really be explained by anything other than distracted driving. He also had prior speeding incidents for which he had been counseled and disciplined by the trucking company. Of course, speeding occurs often without drugs and/or drug impairment, but as a former DUI defense attorney the author can attest that it is well known in law enforcement circles and DUI cases that speeding may be an indication of an impaired driver. In this case, the driver was on amphetamines, which are stimulants. The truck driver in our case had been disciplined for speeding prior to the collision in the case we handled and was speeding at the time of the collision with our client. Noticeably absent from the driver's HR file was any medical clearance letter authorizing the driver to operate a CMV

while on the prohibited medications or ensuring the driver could safely operate a CMV while taking these medications.

Medical Records: After you learn what medical conditions the driver had, and what medications he or she was taking at the time of the collision, subpoenas should be issued to the prescribing and treating doctors. These records will often reveal the extent of the driver's medical conditions and whether the doctor ever provided the required medical clearance letter if the driver is taking a prohibited drug.

VI. Taking Depositions

Once the trial lawyer is equipped with all the informal discovery and the documents obtained from the driver's qualification file, HR file and the company's safety programs, as well as medical records, he or she is ready to take depositions. Depositions have been described as the greatest sword ever developed for obtaining the truth. The driver should be deposed and questioned about the collision at hand, his or her medical conditions, and what drugs he or she was taking at the time. We deposed the truck driver in our case well before the advent of Covid- 19 on Zoom in the Philippines over the internet a couple of years ago. With the medical records from his doctor, the medications list from his wife, and the Medical Examination Report before him, the driver had to admit that he had not been truthful in providing his medical history to the DOT Medical Examiner and that he had not obtained medical clearance from his doctor to operate a commercial motor vehicle while taking amphetamines. All parties and witnesses involved in the collision, including the investigating officer, should be deposed. Any deposition worth taking should be videotaped to capture the nonverbal communication which witnesses invariably provide.

Depose the DOT Medical Examiner: Deposing the DOT Medical Examiner is important because he or she is the individual who issued the Medical Certificate which qualifies the driver to operate a CMV. In our case, deposing the physician who performed the DOT Medical Exam was extremely beneficial as we were able to obtain testimony from the doctor that the driver in our case had

not disclosed that he had been diagnosed with chronic fatigue, obstructive sleep apnea, anxiety and had been prescribed amphetamines, and Klonopin, a habit-forming anxiety medication. The DOT Medical Examiner testified had he known this information, he would not have issued the driver a Medical Certificate without a clearance letter from the prescribing doctor.

VII. Taking the Company Rule 30 (b)(6) Deposition- the Safety Director

The South Carolina Rules of Civil Procedure, as well as the as the Federal Rules of Civil Procedure, allow a party to take the deposition of a company, or organization, and requires the company or organization to designate one or more representatives to testify about knowledge or information relevant to the claims and defenses in the pending action. The rule provides:

(6) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

SCRCP, Rule 30(b)(6).

The particular matters which should be described in a trucking case 30 (b)(6) deposition notice include the company's safety program, its safety policies and procedures, the driver's qualifications and the information contained in

the Driver Qualification File, which can be kept in the driver's HR or personnel file, and the Driver Investigation History. The driver's performance reviews and prior accident history are also topics which should be explored, as well as compliance with the FMCSRs.

Most often the listing or description of these topics will result in the trucking company designating its safety director. If he or she is not designated, they should nevertheless be deposed.

Since this article is focused on the drug-impaired driver, who is often someone with fatigue issues, the company 30 (b)(6) deponent should be examined on his or her knowledge of the driver's medications list and be specifically asked whether the company has a medical clearance letter for any medications which are normally prohibited by the FMCSRs.

Motions to Compel Discovery: It is essential that the trial lawyer make sure they have the complete Driver Qualification File (DQ File) as it may contain very valuable information relating to liability, including any safety committee's findings related to the accident involved. Be prepared to file motions to compel discovery. At the 30 (b) (6) deposition of the safety director in the case our firm recently handled, we had a pending motion to compel production of the DQ File at the time. The trucking company produced the DQ File at the 30 (b)(6) deposition. It contained the evidence which settled the case. Located in the file was a fax predating the collision from the terminal manager at the location where the driver was employed. The fax, which was sent to the home office, revealed the driver had omitted that he was taking amphetamines from the Medical Examination Report and medical history section when he had his DOT physical exam. The company realized that it did not have the required medical clearance letter in the file. The trucking company got the doctor to write a letter stating the reasons the driver was taking the medication, but the letter did not comply with the FMCSRs as it did not address whether the doctor was aware of the driver's duties and did not state he could operate a truck safely. Thus, the driver was not qualified to be driving a commercial motor vehicle at the time of the collision in our case.

VIII. Hiring the Right Experts

The trial lawyer litigating trucking cases should hire competent experts to prove up the violations related to FMCSRs. In the case of the drug-impaired or fatigued driver, a physician who is familiar with DOT regulations, DOT Medical Exams, and the medications at issue is very important. Most general practitioners who do DOT Medical Exams should be aware of the medications mentioned in this article and regularly prescribe these drugs. But the author recommends that a specialist who is familiar with both the DOT regulations and the diseases in question be hired.

A trucking safety expert familiar with hiring, retention, and compliance with the FMCSRs should be retained. In our case, the DOT trained physician, who was also an expert in sleep apnea and chronic fatigue, was able to offer an opinion to a reasonable degree of medical certainty that the cause of the collision was a drug-impaired driver who likely fell asleep at the wheel of the CMV. The trucking safety expert opined that the driver was not qualified to be driving at the time of the collision.

IX. Preparing the Case for Mediation and Trial

Once discovery has been completed and it has been shown the driver in question was drug-impaired or fatigued, likely related to the drugs themselves, the case is ready for mediation and trial. Educate the mediator with a confidential memorandum outlining the evidence and let them know you will be making a substantial demand on the trucking company's insurance carrier. And send a demand well in advance of the mediation outlining the evidence and showing the carrier why your client is entitled to a significant sum to settle the case, with particular emphasis on violations of the FMCSRs and the likelihood of a punitive damages claim if your state allows such claims for statutory violations. In South Carolina, the violation of a statute is negligence per se and some evidence of willfulness and recklessness.

If the trial lawyer is armed with the type of evidence found in our case, your client is very likely to receive a substantial settlement or verdict depending on the available insurance coverage.



FREDERICK "RICK" I. HALL, III

Frederick "Rick" I. Hall, III has been a practicing trial lawyer since 1982. He is member of the South Carolina Association for Justice, the American Association for Justice and a Graduate of Gerry Spence Trial Lawyers College and member of The National Trial Lawyers Top 100. He practices law in Lexington, S.C. and in both Federal and State Courts.