

2012 TLA ANNUAL CONFERENCE AND CTLA MID-YEAR MEETING

GOT A TIP THEY'RE GONNA KICK THE DOOR IN AGAIN:
WHAT THE PLAINTIFFS' LAWYERS ARE TRYING THESE DAYS

FRIDAY, MAY 4, 2012

K. (Keri) DONALD SIMMS
WHITAKER, MUDD, SIMMS, LUKE & WELLS, LLC
2011 Fourth Avenue North
Birmingham, Alabama 35203
Phone: (205) 639-5300
Facsimile: (205) 639-5305
Email: Ksimms@wmslawfirm.com

No Representation is made that the Quality of Legal services to be performed is greater than the Quality of the Legal Services performed by other Lawyers.

TABLE OF CONTENTS

1. Trucking Problems which most often produce Litigation (Battling Bias)
2. Recent Plaintiff Lawyer Tactics: Crash to Closing Argument
 - A. Development of National Strategic Alliances
3. The Three (3) Primary Components Plaintiff Counsel look for in Trucking Cases (Implementing Bias against Truckers and Trucking Companies)
 - A. Truck Driver Conduct Before, During, and After Collision (Punitive Damages and Bias)
 1. Driver Fatigue: Asleep at the Wheel
 2. DOT Physicals and Medical Problems: Deception and Fatigue Issues
 3. Log Books and Modern Day Technology
 - B. Operation of Faulty or Defective Equipment
 - C. Trucking Company Organization, Structure, and Record Keeping
4. Conclusions

INTRODUCTION

Trucking Problems which result in Litigation

While there are various reasons for the development of problem areas in trucking cases, it seems that the more modern day problems tend to lend themselves to the aging population and, therefore, decline in the demographics related to the person operating the commercial motor vehicle involved in an accident-the truck drivers.

In 1964 (the year I was born) Bob Dylan released his third album, *The Times They Are A-Changin'* (Columbia Records). Today most Americans still base their opinions on their perceptions and their perceptions of the trucking industry are largely formed by news reports of horrendous and tragic truck crashes.¹

The truck transportation industry in the U.S. is experiencing a national shortage of truck drivers that has become a limiting factor in the operations of many trucking companies. This shortage manifest itself through driver retirements (aging driver workforce) and economic conditions. *The U.S. Truck Driver Shortage: Analysis and Forecast*, prepared by Global Insight, Inc. for the American Trucking Association, May 2005.

Global Insight determined that there were 1.3 million long-haul heavy-duty truck drivers in 2004 – the segment of the driver occupation most severely impacted by the driver shortage. All of Global's projections are for this driver group only. Global's principal findings of its analysis of the potential future supply of long-haul heavy duty truck drivers were:

* There have been some positive developments in demographic trends affecting the growth of the truck driver workforce over the past ten years. In particular, among males over 35 in the labor force, the share of truck drivers has trended upwards. The share of truck drivers in the rapidly growing Hispanic labor force has also risen.

Global determined that demographic trends will turn against the industry over the next 10 years. The size of the white male population of ages 35-54 – a demographic group that currently provides over half (50%) of all truck drivers – will decline by over 3 million

¹Global's overall analysis concluded that trucking companies are placing greater emphasis on factors affecting driver job satisfaction to counteract rising turnover rates, but the industry faces even greater pressures on the ability to hire and retain a qualified driver workforce in coming years, because a large fraction of the existing driver population is nearing retirement age. This also means that as the population ages, medical problems come to the forefront.

persons between 2004 and 2014. This trend is now occurring in the trucking industry and this trend is driving the focus of Plaintiff counsel in how they litigate trucking cases.

- * The trucking industry faces some adverse demographic trends, although the labor supply problem the industry confronts will also impact other industries in which the number of jobs available will grow at an above-average rate. A major problem for the trucking industry and the U.S. economy as a whole is that the annual rate of growth of the overall labor force will slow sharply, from 1.4% to only 0.5% by 2012.

Based on Global's detailed analysis of the labor market participation rates of truck drivers by age, sex, and race/ethnicity, and its forecasts of labor force growth, Global projected that the supply of new long-haul heavy-duty truck drivers will grow at an average annual rate of 1.6% if present trends in truck driver labor participation in different demographic groups continue. However, the number of new truck drivers needed will grow at a faster pace:

- * Economic growth will give rise to a need for a 2.2% average annual increase in the number of long-haul heavy-duty truck drivers, or an additional 320,000 jobs overall.

- * At least another 219,000 new truck drivers must be found to replace drivers currently of ages 55 and older who will retire over the next 10 years and to replace those in younger groups who will leave the occupation.

- * Combining these two figures gives total expansion and replacement hiring needs of 539,000, or an average of about 54,000 per year. However, this is a net figure. It reflects the hiring of new truck drivers to offset drivers exiting the occupation only on a net basis, and it does not include the substantial amount of hiring that trucking companies must do each year as a result of job switching ("churning") within the industry.

Global further determined that these separate projections of trend growth in the potential *supply* of and *demand* for long-haul heavy-duty truck drivers imply a widening imbalance:

- * There is already a shortage of long-haul heavy-duty truck drivers equal to perhaps 1.5% of the over-the-road driver workforce, or about 20,000 drivers.

- * In the absence of substantial market adjustments, this driver shortfall – projected demand less projected supply – would rise to 111,000 in 2014.

Closing this gap implies attracting a higher share of the labor force into the truck driving occupation. And the primary means by which more workers are drawn into long-distance trucking is higher wages. The labor market analysis presented in Global's report

showed graphically how the share of truck drivers in the labor force increases sharply with age from the early 20s through the early 30s. The trucking industry gets the long-haul drivers it needs by attracting workers in their late 20s and early 30s from other occupations where they have already reached their earnings potential.

A critical element in the current truck driver shortage is that *the competitiveness of wages in the truck transportation industry fell sharply with the onset of recession in 2000*, and driver wages have yet to regain their previous position. Average weekly earnings in long-distance trucking were 6-7% above average earnings in construction throughout the 1990s but fell to 9% below construction earnings by 2001 and were still 1% lower in 2004. Perhaps this accounts for the multitude of display cards at truck stops for trucking companies seeking drivers. This problem was further compounded by the financial crises which began in October 2008 and continues to the present.

Global determined that if the trucking industry is to attract the higher share of workers that it needs to achieve the growth projected over the next 10 years, earnings in the industry must, at a minimum, return to the relative position that prevailed during the 1990s. The current tight job market for drivers – the ready availability of job options for dissatisfied workers – has made it more essential to address non-monetary aspects of the job as well. Although competitive wages are a major factor in attracting workers to the trucking occupation, quality of life issues are more frequently cited as the primary consideration for worker retention in the industry.

The major irritants for drivers are extended periods on the road away from home and unpredictable schedules for getting home. Trucking companies impacted the most are those with less flexibility to address this major negative aspect of the long-haul truck driver's job. The marginal loss in productivity that may result from designing schedules to get drivers home more often must be weighed against the high cost of turnover. Numerical estimates of the driver shortage in terms of the size and projected growth of different demographic groups do not tell the whole story. Based on its findings, Global noted that the trucking industry faces a constant challenge of finding qualified drivers. It is these irritants that often find their focus by Plaintiff counsel in litigation.

Despite the severe shortage, many trucking firms continue to reject a very high percentage of driver applicants due to their lack of qualifications. And the challenge of finding qualified drivers has grown in recent years, as heightened concerns with security and safety have resulted in new regulatory requirements for the trucking industry. Nonetheless, driver qualifications and safety remain a dominant concern; the cost of lowering hiring standards can be significant in the long run when accounting for increased insurance premiums and accidents.

Given the current relative wage level, the size of the projected driver shortage and the added labor market pressures caused by regulatory requirements, we expect wage gains in long-haul trucking over the next three years to average 6-7% per year

-- ahead of the 5.1% increase recorded in 2004, and well ahead of the increase in wages economy-wide. This wage increase, in combination with continuing efforts on the part of trucking companies to address quality-of-life issues, should ease the severity of the driver shortage. But because the adverse demographic trends affecting the industry will intensify in the second half of the decade, trucking firms will face a continuing challenge to attract and retain a qualified driver workforce.

It is these challenges of finding qualified drivers coupled with a public perception of bias towards truck drivers and trucking companies which present the most challenging problems in trucking litigation and which has been and remains the focus of the Plaintiff bar today.

Litigation involving interstate motor carriers is a typical occurrence. While many factors can contribute to the cause of trucking accidents, driver conduct is usually the most common factor. A safety study published by the National Transportation Board concluded that approximately 33% of all drivers fatally injured in trucking accidents tested positive for drugs or alcohol. While these types cases are usually readily identifiable, the Plaintiff's bar in non drug or alcohol situations, tend to focus on driver qualifications and/or defective or poor equipment. It appears the recent economic developments in the U.S. have lessened the number of such mechanical cases, and therefore, the trend now appears to be more focused on qualifications. This trend is a natural progression due to the aging population of drivers and drivers which met Federally imposed standards.

Every serious trucking accident involves injury claims or deaths with the potential for litigation. The three (3) most common themes focused on by Plaintiff counsel are (1) low quality, poor appearing truck drivers with qualification issues particularly health issues, especially sleep disorders; (2) poor or defective equipment, and (3) inaccurate record keeping by the motor carrier. All three of these factors alone or in combination are used to show that the motor carrier cares more about its bottom line than the safety of the motoring public and which can enhance damages. These concepts mixed in with a pre-existing bias against trucking companies presents challenges in handling trucking cases.

Recent Plaintiff Lawyer Tactics: Crash to Closing Argument

The Association of Plaintiff Interstate Trucking Lawyers of America (APITLA) is a prime example of the tactics now being employed in trucking cases by Plaintiff lawyers. The Fall 2011 agenda for the Association's Summit includes tips, tools and tactics related to trucking cases. In addition to focusing on early accident investigation and evidence gathering and use of technology, the Association focuses primarily on driver fatigue, Hours of Service (HOS) violations, and record keeping requirements of motor carriers.

A motor carrier may not permit drivers to drive its vehicles unless they meet certain minimum requirements. The qualifications are set forth in 49 CFR Section 391.11(b). Generally, a driver is qualified to operate a motor carrier vehicle on if the driver:

1. Is at least 21 years of age;
2. Reads and speaks English sufficiently well to allow him or her to communicate with the general public, understands traffic signals, make reports, and respond to official inquiries;
3. Can safely operate the commercial motor vehicle (by reason of training, experience, or both);
4. Is physically qualified to operate a commercial motor vehicle (49 CFR Section 391, subpart E);
5. Possess a currently valid CDL license issued by only one State or jurisdiction;
6. Supplied a list of violations and/or the required certificate (49 CFR Section 391.27);
7. Is not disqualified to operate a commercial motor vehicle under 49 CFR Section 391.15; and
8. Has completed a driver's road test and was issued a certificate in accordance with 49CFR Section 391.31 or provides evidence of an accepted equivalent.

Section 392.3 states that "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".

1. Driver Fatigue and Hours of Service Violations

As noted above the aging population of truck drivers means the presence of more health related issues. Plaintiff's counsel want the DOT physical records of drivers and they want the log books and GPS data to prove that the trucking company and its driver made conscious decisions to ignore the safety of the motoring public.

The driver's operation of his tractor trailer unit, his/her effort and ability to avoid a serious accident and behavior to the accident immediately afterwards are often facts which will give a jury, especially one conditioned with trucking company bias, an impression that the corporate

trucking company as well as the individuals employed by it do not care about the safety of the public. Frequently, the truck driver finds himself/herself in a frightening situation following a serious highway accident. In all likelihood, he/she is an out of state resident and at a location far from his/her terminal.

The truck driver may be faced with a hostile investigating officer and alleged eyewitnesses who come forward following a collision to paint a picture favorable to the injured victims and contrary to the truck driver's version of the accident events. In short, the truck driver automatically becomes the "bad guy" in this scenario and, unless he/she acts with unusual poise and restraint, his/her post-accident actions and statements may simply make a bad situation worse. This evidence when compared to the various documents leading up the collision often can be used by Plaintiff's counsel to paint a picture that the behavior is consistent with a lack of concern for the safety of the motoring public.

In a surprising number of instances, the truck driver will claim to be totally unaware of colliding with a passenger vehicle in connection with a lane change or other situation and will simply continue down the highway. Although such conduct may in certain situations be explainable due to blind spots etc., testimony that the truck driver had to be chased down by a good Samaritan eyewitness typically serves to arouse a jury in favor of the injured victims and against the driver and the trucking company who employed him/her. If the medical evidence or driving logs show that at the time of the accident the driver was approaching or near the end of available legal hours, the risk of the jury becoming inflamed grows even higher.

Over concern at an accident scene on the part of the truck driver for his/her rig and cargo, particularly where the driver is a leased owner-operator of his/her own equipment, is often a fact which juries do not take to kindly. Frequently, the testimony of witnesses will support a finding that the truck driver spent his/her time at the accident scene checking on their own equipment and evidenced little concern or care for the well-being of the other drivers and occupants involved in accident.

Frequently, the investigating officers are DOT trained and will seize all paperwork, including driver logs, relating to the load being transported. As such, these documents may become available to opposing lawyers very early in a case. If this occurs, then certainly trucking companies and their defense counsel need to make sure that they address these developments in preparation for litigation and early on in the case.

In numerous cases, and especially with the use of GPS technology to track tractors and trailers in today's environment, it is discovered that a truck driver involved in an accident has falsified his/her driving logs. Although under the Federal Motor Carrier Safety Regulations (FMCSR) driver's are required to prepare and maintain logs on a daily basis, many drivers prepare their logs well after the fact and based upon their memory. Often times the actual facts of driving do not agree or coincide with the logs. More over, if the trucking company generates computer audits of driving logs, both the computer audit, actual handwritten logs, and GPS data have to be

reconciled. Driver's logs may be completely fabricated in order to cover up for a driver operating in excess of the hours permitted by federal regulation. Such evidence can be absolutely devastating to the trucking company in subsequent litigation because it enhances the notation employed by Plaintiff counsel that trucking companies ignore the regulations to the danger of the motoring public.

On January 4, 2004, FMCSA promulgated new hours of service (HOS) regulations for motor carriers. Section 395 of 49 CFR allow truck drivers to drive 11 hours (instead of 10), but limit the drivers to a 14-hour on-duty period. 49 CFR Section 395.3(a). Each duty period must begin with at least 10 hours off duty (rather than 8). Drivers may still be on duty 60 hours in 7 consecutive days, and for 70 hours in 8 consecutive days. 40 CFR Section 395.3(b). However, to restart the 7 or 8 day period, they are required to take at least 34 consecutive off-duty hours. 49 CFR Section 395.39 (c). Drivers are required to record their duty status, in duplicate, for each 24-hour period using the approved format.

Evidence gather in litigation by Plaintiff's counsel often focuses on a comparison of fuel tickets, trip documents, GPS tracking data, computer audited logs, and the actual hand written driver logs to establish violations and then tie this adverse evidence into health issues particularly fatigue and diminished alertness.

Conclusions

All registered motor carriers must comply with the government's safety regulations set out at 40 CFR Sections 390-399. Generally, courts do not easily award punitive damages, but motor carriers have been held liable for such damages where they hired unqualified truck drivers, had faulty equipment, had serious log book errors, had no real meaningful safety programs in place (of there they are in place are not followed), and/or have poor accident statistics and/or safety audits. Plaintiff's counsel continued to focus on these issues to enhance their cases and damages.

In most states to support a jury award of punitive damages requires an act or omission by the defendant trucking company or its driver that objectively involves an extreme degree of risk, that the defendant has subjective knowledge of that risk, and act or omission in conscious disregard of that risk. Evidence of a want of care which raises a presumption or inference of conscious indifference to consequences will typically support an award of such damages.

Due the aging population of available qualified truck drivers, Plaintiff's counsel tend to focus their trucking cases on developing evidence of driver fatigue and alertness issues, particularly health problems such as sleep disorders (apnea) and then tie into these issues driving activities which "push the envelope" of safety. All of this evidence is then presented to decision makers who likely are already biased against truck drivers and the trucking company.

