

Behind many truck crashes is a story of driver fatigue and logbook fraud encouraged by the trucking industry.

Asleep at the wheel?

Jeffrey A. Burns

To win a catastrophic truck crash case, the plaintiff lawyer representing an injured motorist must understand the competitive forces at work within the trucking industry. Before the Motor Carrier Act of 1980 brought about deregulation,¹ there were fewer than 20,000 interstate motor carriers operating in the United States. Within 20 years, there were more than 500,000.²

The rise in competition has been dramatic, and well-run, safe companies have been challenged by companies willing to cut corners to obtain or keep business. As carriers compete for the shrinking profit margin, working conditions for many drivers have worsened, leading to high attrition rates and attracting more poorly qualified drivers into the industry.

At the same time, public awareness of truck crash litigation has increased, and trucking companies have changed their

Jeffrey A. Burns is a legal adviser for Parents Against Tired Truckers. He represents plaintiffs in trucking cases for Shook, Hardy & Bacon in Kansas City, Missouri. © 2002, Jeffrey A. Burns.

procedures in an attempt to reduce their liability exposure. The result is that counsel must frequently look a little closer to find the safety violations that used to be more blatant. They are definitely still there.

Many truck crashes are the result of driver fatigue, and the lawsuits that arise from them focus on whether the driver—and the carrier—complied with regulations limiting the hours a driver can work, or otherwise took reasonable steps to minimize this ever-present danger. The dangers of driver fatigue have been known for decades.³ Nonetheless, the industry continues to minimize its role in crashes.

For years, the industry's position was that driver fatigue is a factor in only a small percentage of fatal crashes. And there was little emphasis on training drivers, dispatchers, and managers about fatigue and how to avoid its associated dangers. That changed forever in March 1995, when then-Secretary of Transportation Federico Peña convened the first National Truck and Bus Safety Summit. The Kansas City, Missouri, meeting included hundreds of industry representatives and safety experts, whose charge was to create a list of the

principal safety issues facing the trucking business. By the end, the participants had produced a list of 17 issues. "Driver fatigue" was number one.⁴

Since then, driver fatigue has been a principal subject of truck safety functions, videos, and training aids, and the industry press has treated the issue extensively.⁵ There is now no excuse for any safety director or terminal manager to fail to implement policies and procedures that encompass the basic principles of "sleep science."⁶

Several studies have shown that most long-haul drivers are frequently sleep-deprived.⁷ Researchers know that sleep disorders can impair alertness as much as or more than being legally drunk.⁸ Truck drivers are particularly susceptible to these disorders. The medical examination requirements of 49 C.F.R. §391.41 (b)(8), which pertain to any "condition likely to cause loss of consciousness or any loss of ability to control and operate a commercial motor vehicle," appear to include screening for sleep disorders such as obstructive sleep apnea. But most trucking companies have no procedure for doing so.

Even if this screening is not required, the regulations are clearly minimum standards, and a state is not precluded from establishing stricter requirements, so long as they don't interfere with the federal regulations.⁹ In other words, federal law should not preempt a negligence claim for a failure to screen for sleep disorders.

Wrongful conduct

Line 4 falsification. Inaccurate entries in driver logbooks are common in tired-trucker cases. In 1999, and again in 2000, 8 percent of truck drivers who were stopped for roadside inspections were caught with logbooks showing they were over their allowable driving hours.¹⁰

Keep in mind that this is an average, and that it reflects only those drivers who were caught. Unfortunately, the economics of the trucking industry encourage many long-haul drivers to falsify their logbooks merely to make a living. Most drivers are paid by the mile, so the time they spend waiting to load and unload their vehicles is unpaid.

In 1997 and 1998, the Truckload Carriers Association, a national association for the

truckload segment of the motor carrier industry, surveyed its drivers and found that on average, "reefer" drivers (those who drive trucks with refrigerated trailers) spend 44 hours a week waiting to load or unload. "Dry van" drivers (those who drive trucks with standard trailers that are not refrigerated and do not hold bulk liquids) spend 33 hours a week waiting.¹¹

This waiting time—with some specific, limited exceptions—is "on duty" time and should be logged as such.¹² Since the maximum time a driver can be "on duty" in an 8-day period is 70 hours,¹³ those drivers may *legally* drive only 26 to 37 hours in 8 days. Accordingly, many drivers don't record their "on duty, not driving" (or "line 4") time. They spend 33 to 44 hours a week waiting to load and unload, and then drive 65 to 70 hours on top of that, just to make a living.

This type of cheating can be easily hidden, even when satellite location data for the truck are available. By not recording the hours of "on duty, not driving" time spent waiting to load or unload, a driver can accurately log the time the truck is moving (exactly matching satellite data) and still exceed the allowable hours of ser-

vice by as much as 50 percent. If the only times logged consistently on line 4 are vehicle inspections before trips and occasional fueling stops, the driver has almost certainly falsified the log.

Lawyers need to be alert to the waiting-time issue and obtain dock facilities' security-gate logs showing truckers' "in" and "out" times. They should also find out what method of loading was used and whether the driver was responsible for the "count," or contents, of the load or whether it was a "drop and hook" operation, in which a driver simply drops off a trailer and picks up another. If the load is not drop-and-hook, the driver should usually record significant line 4 time whenever a trailer is loaded or unloaded.

The definition of "on duty" time is critical to this investigation. Under the regulations, "on duty" time includes "all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and *all responsibility* for performing work."¹⁴ This includes waiting to load or unload—unless the driver has been relieved from duty.

To be considered relieved from duty, the driver must "be at liberty to pursue activities of his own choosing and to leave the premises where the vehicle is situated."¹⁵ Therefore, whenever a driver is waiting for a trailer to be loaded or unloaded and is responsible for the count of the load, or is waiting to move the vehicle, such time should be logged on line 4.

Instructions in "code." A trucking company knows that its driver's manual may become an exhibit if one of its drivers is involved in a catastrophic crash. These manuals are often peppered with slogans such as "Safety is our number-one priority" and "Drivers must comply with *all* applicable safety regulations." When a driver is caught falsifying logs, the company can use materials such as these manuals as evidence that it did its part to instruct the driver not to cheat.

But a careful reading of the manual may reveal a different message: "Don't get caught." For example, manuals may include a list of the states in which the company operates, along with the maximum applicable speed limits and the admonition that drivers must not log

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speeds greater than those indicated. (Sometimes, they require logging at 5 mph under the speed limit.) Some include a written requirement not to log over a particular speed, such as 60 or 65 mph.

Such instructions might seem to indicate a safety-conscious company. However, the lawyer can make a compelling argument that if drivers were expected not to speed and to keep accurate logs, there would be no reason for these instructions.

There are four lines on a driver's log: off duty; sleeper berth; driving; and on duty, not driving. Regulations require drivers to "keep their record of duty status current to the time shown for the last change of duty status."¹⁶ For example, if a driver stops to fuel the rig, he or she should change the duty status from line 3 (driving) to line 4 (on duty, not driving). Logbooks do not require drivers to record the speed at which they were driving. Such calculations are necessary only when the driver is not keeping a simultaneous log and needs to go back and invent log entries.

Trucking company managers know that Department of Transportation (DOT) compliance auditors often check for falsification by looking at speeds between two points. In such cases, underreporting shows up on the log when a driver indicates traveling long distances in impossibly short lengths of time. For example, if a driver shows only two hours of driving time between Kansas City and St. Louis (roughly 250 miles), an auditor should catch that because it means the driver had traveled at 125 miles per hour—or falsified the log. However, if a driver calculates speed in order to pass such a simple "smell test" and matches documents kept by the carrier, chances are good he or she will pass an audit.

Some company manuals also instruct drivers to log certain minimum amounts of line 4 time for particular activities, such as vehicle inspections, fueling, and trailer

hookups. DOT auditors often check the logs for these minimums. If that type of instruction is given, and if the line 4 times logged are consistently very close to the minimums required, the attorney should suspect falsification.

A company may also include a section in the manual stating that it takes logging seriously and will check logs against other available documents. Frequently, however, the manual provides a precise list of the documents the company will check. The message is clear: "Make sure your logs match these documents." If drivers were trained and expected to log their work accurately, such a list would not be necessary. Accurate logs would match those documents automatically.

Spoliation. A trucking company is required to retain a driver's log six months from the date it receives the log from the driver.¹⁷ Other records, including those related to personal-injury claims, must be kept longer.¹⁸ Although companies are commonly advised not to destroy documents that may be relevant to a crash-related claim,¹⁹ some destroy logs after six months because the regulations don't require that they be retained longer.

The destruction of relevant documents, even when it occurs under an otherwise reasonable document-retention policy, may give rise to a spoliation claim. As the Eighth Circuit has noted, "[A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document-retention policy."²⁰ Also, although the regulations may allow motor carriers to dispense with logs after six months, trucking companies are subject to the minimum-wage requirements of the Fair Labor Standards Act and should be required to keep evidence of drivers' work for a minimum of two years.²¹

Uninformed drivers. Section 405 of the Surface Transportation Assistance Act²² has

provided whistleblower protection for commercial drivers for almost 20 years, but few drivers are aware of it. Under this section, a driver who refuses to violate a federal safety regulation cannot be disciplined or discriminated against. This means that it is illegal for a company to penalize drivers who

- are late for a delivery because they took a nap when they were too tired to continue driving safely²³
- refuse to take a load when the trip cannot be made within their remaining legal on-duty hours
- report violations of DOT regulations to the company or an enforcement agency
- refuse to operate a commercial motor vehicle that fails to meet all safety requirements
- refuse to drive under conditions they believe might cause serious injury.

The Occupational Safety and Health Administration, which is charged with enforcing this provision, provides trucking companies with free posters that inform drivers of these rights,²⁴ but I have never heard of a company that displayed them.

Skewing statistics

Many industry "experts" have a penchant for misquoting statistics and taking them out of context. The worst, and most prevalent, abuse in the trucking industry involves a statistic that has been used to create the false impression that passenger car drivers are to blame for 71 percent of fatal truck crashes.

This statistic appeared in a 1998 study²⁵ of data from the DOT's Fatal Accident Reporting System (FARS). The researchers essentially counted how often a police officer who filled out an accident report identified an action of either driver as a contributing factor in a fatal truck-auto crash.

The study, however, can be discredited. First, the FARS data that the study cites are

inherently biased: In most of these crashes, the occupant of the car was killed and the truck driver survived.²⁶ In only 2 percent did the car driver survive when the truck driver was killed. So in many instances, the police got only the truck driver's account.

Second, the study examined data only from fatal two-vehicle, truck-auto crashes. By not counting single-vehicle and multiple-vehicle (and two-truck) fatal crashes, the study excluded most fatal crashes in which the truck driver is most likely to have been "at fault." For example, the study excluded all crashes in which a semi crashed into stopped or slowed traffic (crashes that almost always involve more than two vehicles). Had these been included, the percentage of crashes blamed on the car driver would have been much lower.

A second misleading statistic often cited by industry experts is that only 1.9 percent of truck crashes are caused by driver fatigue. This figure is based on studies that count how often the police officer filling out the accident report checks "fatigue" as a "driver-related factor" in the crash.²⁷

This statistic can also be shown to be unreliable. Officers are often inadequately trained to recognize evidence of fatigue, and some jurisdictions do not even list "driver fatigue" on their accident report forms. To his credit, the author of the latest study on fatigue risk acknowledged that it clearly underestimated the percentage of fatigue-related crashes—and projected that as many as 20 to 40 percent of certain types of crashes, such as those fatal to the truck driver, can be attributed to fatigue.²⁸

Other potential defendants

Falsification and cheating are so pervasive in the trucking business that some companies serving the industry have created procedures that appear to accommodate the ongoing fraud. Documents that can prove what time a truck was at a particular place are anathema.

This attitude dictates how the industry does business with suppliers. For example, any time a private individual pays for fuel at a gas station with a charge card, the receipt shows the date, time, and place of purchase. The receipt for fuel purchased

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with a trucker's fuel card, however, may not include the time of the purchase. This information is almost certainly available from the credit company and can be used to prove falsification. In an appropriate case, counsel could argue that the absence of time information is evidence that a particular gas station and/or credit company is willing to cooperate with trucking companies to keep them as customers.

The fear of generating verifiable time and location information is so strong that an industry safety consultant recently advised truckers not to involve themselves in the Bush administration's "terrorist tipster" program because "each time a driver contacted the federal government with a tip, a time and location document would be created." He went on to admonish drivers to "not allow patriotism and emotion to overrule our logic."²⁹

Transponder companies are among the businesses that agree not to provide or maintain certain information. These companies market devices that allow trucks to rapidly pass through toll plazas and avoid certain weigh stations. Because these devices are computerized, they could be used to prove falsification if times were provided on billing statements.

Nonetheless, in their marketing materials and on their Web sites, some transponder companies make statements such as, "The invoice that is sent to the carrier does NOT list the times that drivers bypassed the weigh station" or "Such data is not publicly

disclosed and is not permanently retained after payment of the relevant transaction fees."³⁰ These statements, presumably made to assure drivers that their privacy will be protected, might also indicate that the transponder companies are willing to look the other way in the face of trucking industry fraud.

Federal regulations provide that "no person shall aid, abet, encourage, or require a motor carrier or its employees to violate the rules. . . ." ³¹ Yet the culture of the industry helps to promote and hide falsification. Although I am not aware of any case that has made this claim, it is only a matter of time before the right case comes along to establish aiding-and-abetting liability under this regulation.

Attorneys investigating a truck crash case must do more than study the regulations and driver's logs. They must understand trends in the trucking industry and look for what *isn't* in the logs. A solid understanding of the economic forces at work in the industry will lead to a more thorough investigation. □

Notes

1. Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980).
2. ECONOMICS & STATISTICS GROUP, AM. TRUCKING ASS'NS, AMERICAN TRUCKING TRENDS (2002).
3. See, e.g., NAT'L SAFETY COUNCIL, INC., TOO LONG AT THE WHEEL—A STUDY OF EXHAUSTION AND DROWSINESS AS THEY AFFECT TRAFFIC ACCIDENTS (1935).
4. Memorandum, National Truck and Bus Safety Summit, Top Truck and Bus Safety Issues Identified by Summit Participants (Mar. 12-15, 1995).
5. See Videotape: The Alert Driver: A Trucker's Guide to Sleep, Fatigue, and Rest in Our 24-Hour Society (Am. Trucking Ass'n's Found. & Safety Mgmt. Council, 1996); Jim McNamara, *Fatigue: The New Imperative*, TRANSPORT TOPICS, Nov. 13, 1995, at 1; Jim McNamara, *Study Sheds New Light on Driver Fatigue*, TRANSPORT TOPICS, Jan. 13, 1997, at 1.
6. Good beginning points for obtaining information include www.sleepfoundation.org; www.trucksafety.org; www.patt.org; www.truckdriverfatigue.com; www.fmcsa.dot.gov/safetyprogs/fatigue/fatigue.htm.
7. See OFFICE OF MOTOR CARRIER & HIGHWAY SAFETY, U.S. DEPT. OF TRANSP., COMMERCIAL MOTOR VEHICLE/DRIVER FATIGUE AND ALERTNESS STUDY (1996) (drivers obtained an average of two hours less sleep than the daily "ideal" requirements); OFFICE OF MOTOR CARRIER &

HIGHWAY SAFETY, U.S. DEP'T. OF TRANSP., COMMERCIAL TRUCK DRIVER FATIGUE, ALERTNESS, AND COUNTERMEASURES (1999) (28 percent of drivers reported that they had fallen asleep at the wheel within the past month).

8. N. Powell et al., *A Comparative Model: Reaction Time Performance in Sleep-Disordered Breathing Versus Alcohol-Impaired Controls*, 109 LARYNGOSCOPE 1648 (1999).

9. 49 C.F.R. §390.9 (2001); see also *Interstate Towing Ass'n, Inc. v. City of Cincinnati*, 6 F.3d 1154, 1162 (6th Cir. 1993) ("Congress intended . . . no implied preemption of state motor carrier regulation on a wholesale basis.")

10. Judy L. Thomas, *Dead Tired: Desperate Drivers Defy Limits as Safety Net Falters*, KANSAS CITY STAR, Dec. 16, 2001, at A1, available at www.kcstar.com/projects/deadtired/; see also www.safersys.org.

11. TRUCKLOAD CARRIERS ASS'N, MARTIN LABBE ASSOCS., NATIONAL REFRIGERATED DRIVER SURVEY(1998); TRUCKLOAD CARRIERS ASS'N, MARTIN LABBE ASSOCS., 1999 DRY VAN DRIVERS SURVEY(1999).

12. 49 C.F.R. §395.2.

13. *Id.* §395.3.

14. *Id.* §395.2 (emphasis added).

15. See U.S. DEP'T OF TRANSP., U.S. D.O.T. INTERPRETATIONS (1997).

16. 49 C.F.R. §395.8(f)(1).

17. *Id.* §395.8(k).

18. *Id.* §379.13.

19. See, e.g., DENNIS, CORRY & PORTER, MOTOR CARRIER LIABILITY, ¶381 (2002) (motor carriers should keep materials related to the eight-day period before the crash). Because fatigue is cumulative, counsel should request documents concerning at least the 30 days before.

20. *Levy v. Remington Arms Co.*, 836 F.2d 1101, 1112 (8th Cir. 1988).

21. 29 C.F.R. §516.6. (Interstate motor carriers are not subject to the overtime requirements of the act.)

22. 49 U.S.C. §31105 (2002).

23. 49 C.F.R. §392.3.

24. Poster, Occupational Health & Safety Admin., 3113, Attention Drivers . . . (1994).

25. DANIEL BLOWER, TRANSP. RESEARCH INST., UNIV. OF MICH., THE RELATIVE CONTRIBUTION OF TRUCK AND PASSENGER VEHICLE DRIVERS TO TRUCK-PASSENGER VEHICLE CRASHES (1998).

26. OFFICE OF MOTOR CARRIER & HIGHWAY SAFETY, DEP'T. OF TRANSP., DRIVER RELATED FACTORS IN CRASHES BETWEEN LARGE TRUCKS AND PASSENGERS VEHICLES (1999).

27. KENNETH CAMPBELL, TRANSP. RESEARCH INST., UNIV. OF MICH., ESTIMATES OF THE PREVALENCE AND RISK OF FATIGUE IN FATAL ACCIDENTS INVOLVING MEDIUM AND HEAVY TRUCKS (2002).

28. *Id.* at 82.

29. J.T. Messenger, *Letters and Comments*, TRANSPORT TOPICS, Aug. 12, 2002, at 10.

30. See, for example, answers to frequently asked questions at www.prepass.com.

31. 49 C.F.R. §390.13.



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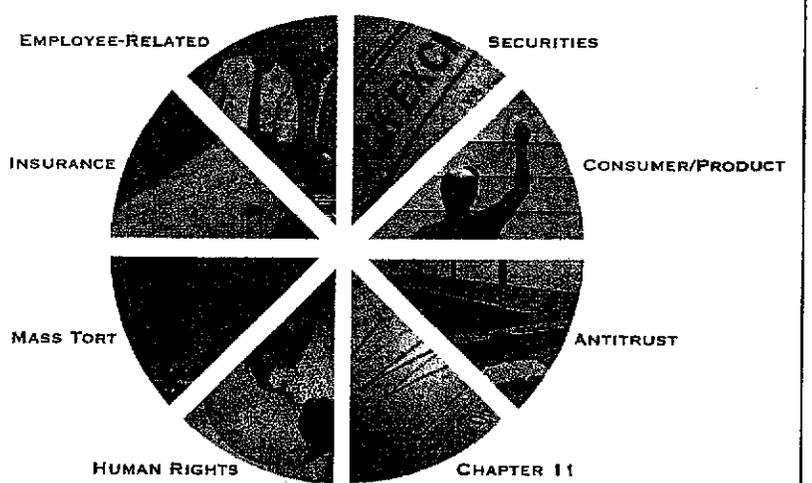
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