TRANSPORTATION matters
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DOT/FMCSA - Noteworthy Updates

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On 7/31/19, the Federal Motor Carrier Safety Administration (FMCSA) proposed to make its crash preventability determination program permanent. This program was announced in July 2017 and is intended to gather data on commercial motor vehicle (CMV) accidents to assess commercial motor carriers that pose safety risks. Since the FMCSA began reviewing crashes in 2017, 94% of the more than 5,600 crashes have been found to be preventable. As part of the plan to make the determination program permanent, the FMCSA has committed to removing non-preventable crashes from the Safety Management System (SMS) Crash Indicator Behavior Analysis Safety Improvement Category (BASIC) score. The FMCSA has opened up this change for comment for 60 days.

On 7/31/19, the FMCSA extended the comment period for its advance notice of proposed rulemaking (ANPRM) regarding regulatory changes necessary to facilitate safe introduction of automated driver systems. The original ANPRM published on 5/28/19 sought answers to questions including how to regulate hours of service, distracted driving, drug and alcohol screening, and roadside inspections. The comment period will now run through 8/28/19.

The past several months have seen the FMCSA seek to address the nation's driver shortage. On 7/29/19, the FMCSA published a proposed rule to decrease the burden on commercial driver's license (CDL) applicants by allowing a driver to take general and specialized knowledge tests in states other than an applicant's state of domicile. The ultimate decision on whether to allow out-of-state applicants to take tests will be left to the states.

On 6/27/19 the FMCSA published a proposed rule allowing more flexibility for CDL skills testing. Specifically, the rule would allow states to permit instructors to perform both the instruction and the testing. Current federal rules do not allow to do both. The FMCSA expects this rule to reduce testing delays and streamline the licensing procedure.

On 6/3/19, the FMCSA launched its pilot program to allow applicants between the ages of 18 and 20, who possess a military CDL equivalent, to apply for license to operate CMVs in interstate commerce. The FMCSA hopes that allowing veterans to apply for a CDL prior to reaching the age of 21 will make driving a more attractive carrier and improve the nation's driver shortage.

In March 2019, the FMCSA published a final rule that lowered costs to upgrade from a Class B to a Class A CDL that is expected to save trainees and carriers an estimated $18 million annually.

On 2/26/19, legislation was introduced in the House and Senate that would allow civilian 18 to 21 year-olds to drive interstate with proper training. The Developing Responsible Individuals for a Vibrant Economy or Drive-Safe Act would require 400 hours on-duty hours of which 240 hours are spent driving a CMV. The bills are currently in committee with no scheduled vote. Similar bills were introduced in 2018 but never made it out of committee.

The FMCSA's proposed policy changes to hours of service (HOS) regulations appear to be delayed further. The period for public comment ended 7/26/19 with a proposed rule expected by 7/31/19. This deadline has come and gone without a proposed rule. The FMCSA has not published a new deadline. One of the proposed changes is to divide the current 10-hour off-duty rest break for those drivers operating commercial motor vehicles (CMVs) with sleeper berths.

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The FMCSA requested comment on the following general areas:

- Should the FMCSA expand the 100 air-mile "shorthaul" exemption from 12 hours on duty to 14 hours on duty?
- Is there adequate flexibility in the adverse driving exception that currently expands driving time by up to two hours?
- If the 30-minute rest break after eight hours of driving did not exist, would drivers obtain adequate rest breaks throughout a daily driving period to relieve fatigue?

On 7/22/19, the FMCSA published an ANPRM requesting comment on proposed revisions to agriculture ("ag.") commodity and livestock definitions in HOS regulations. Currently, drivers transporting ag commodities, including livestock, during harvesting and planting seasons are exempt from HOS regulations up to a 150 air-mile radius. The list of proposed questions include:

- Would clarification or definition of terms such as "food, feed, or fiber" be helpful?
- Is the list of animals in the definition of livestock adequate?

Currently, the definition of livestock includes cattle, elk, reindeer, bison, horses, deer, sheep, goats, swine, poultry, fish, llamas, alpacas, crawfish, and other animals that are part of a foundation herd. The definition of "agriculture commodity" is, in part "any agriculture commodity," which is noted by the FMCSA as being ambiguous.

On 5/2/19, the U.S. District Court for the Central District of California dismissed a lawsuit filed by a California-based driver against his Tennessee-based employer/carrier claiming that the carrier did not provide the driver with adequate meal and rest breaks under the California law. The FMCSA had previously announced that federal regulations preempt California's meal and rest break requirements, which are incompatible with current federal rules, have no safety benefit beyond the current federal regulations, and result in an undue burden on interstate commerce.

California's rule required one, 30-minute rest break for employees working more than 5 hours per day and a second 30-minute rest break for drivers working more than 10 hours per day. The federal rule requires a 30 minutes rest break after an 8-hour on-duty period.

A lawsuit by California's Attorney General and Labor Commissioner and Teamsters FMCSA in the U.S. Court of Appeals for the Ninth Circuit to review the FMCSA's preemption decision is still awaiting ruling from that Court.

On 4/15/19, the FMCSA announced a five-year exemption for agriculture commodity haulers to allow alternative cargo securement techniques, including transportation in wood and plastic boxes, tubs, and bales. Testing performed by the John Volpe National Transportation Systems Center found that the best method for securing cargo in plastic bins included perimeter rope tie-downs, corner irons, and lateral securement devices.

Workers' Compensation: An Exclusive Remedy?

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For years, many employers have assumed that if an employee alleges that he or she was injured while working, recovery under the North Carolina Workers' Compensation Act was the Employee's only remedy. This belief is grounded in the language of § 97-10.1 of the North Carolina Workers' Compensation Act, which states:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

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However, a case was recently decided by the Court of Appeals of North Carolina that raises serious doubts as to whether recovery under the Workers' Compensation Act is an Employee's only remedy. In Jackson v. The Timken Company, decided on May 21, 2019, the Court of Appeals addressed a situation wherein an Employee asserted a claim for medical negligence against his Employer. In Jackson, Plaintiff was employed as a grinding machine operator and suffered a stroke while a work. He alleged that his stroke was misdiagnosed by a company nurse.

Plaintiff initially filed a workers' compensation claim against his employer. The workers' compensation claim was denied via an opinion and award by a deputy commissioner. The deputy commissioner found that Plaintiff did not sustain an injury by accident arising out of and in the course and scope of his employment.

Thereafter, Plaintiff filed an action in Gaston County Superior Court asserting a claim for medical negligence against his employer. Defendants moved to dismiss Plaintiff's action based on a lack of subject matter jurisdiction. Defendants argued that the Workers' Compensation Act provided Plaintiff an exclusive remedy under such circumstances. The Trial Court denied Plaintiff's motion to dismiss and Defendant appealed that decision to the Court of Appeals.

The Court of Appeals affirmed the decision of the trial court to deny Defendant's motion to dismiss. In deciding that Plaintiff could bring a claim outside of the Workers' Compensation Act, the Court of Appeals found that Plaintiff's injury was not caused by an accident and did not arise out of and in the course of his employment.

Perhaps most troubling is the specific language used by the Court in summarizing its findings. The Court stated,

> In sum, Plaintiff's claim does not fall under the exclusive jurisdiction of the Industrial Commission through The Act. Where an injury occurs in the course of one's employment but is not caused by an accident and does not arise out of that employment, the injury does not fall under The Act and the injured party may not be compensated thereunder. As both the Industrial Commission and trial court correctly concluded, Plaintiff's injuries are not compensable under the Act. Therefore, the Commission does not have exclusive jurisdiction over Plaintiff's claim, and the trial court did not err in denying Defendants' Motion to Dismiss for lack of subject matter jurisdiction.

While the facts of the Jackson claim are unusual, it is anticipated that plaintiff attorneys will attempt to utilize the language of the case to argue that workers' compensation benefits are not an exclusive remedy for their clients in certain situations involving injuries at work. This could lead to an influx of negligence claims brought against employers by their employees. We will continue to monitor how the courts interpret these types of issues and whether any future courts specifically address the findings in Jackson.

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