



Smith



Walsh

## DOT/FMCSA Noteworthy Updates

*Allen C. Smith, [acsmith@hedrickgardner.com](mailto:acsmith@hedrickgardner.com);*

*Austin R. Walsh, [awalsh@hedrickgardner.com](mailto:awalsh@hedrickgardner.com)*

On 2/3/2021, Pete Buttigieg was sworn in as the 19th Secretary of Transportation.

On 1/20/2021, President Biden issued an executive order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. On 4/22/2021, in response to President Biden's executive Order, the National Highway Traffic Safety Administration (NHTSA) proposed withdrawing the SAFE I Rule, which prevented states from issuing state-specific greenhouse gas emissions standards. Secretary Buttigieg commented that "[t]he transportation sector is the biggest contributor to greenhouse gases in our economy – which means it can and must be a big part of the climate solution." If withdrawn, states will be free to set emissions standards for commercial motor vehicles operating within their borders. The public comment period ends 5/22/2021.

On 4/21/21, the DOT announced it was appointing Robert C. Hampshire, Ph.D. as Chief Science Officer in an effort to meet the Biden Administration's focus on climate change and "restore scientific integrity" to the DOT. Dr. Hampshire was previously associate professor at University of Michigan's Gerald R. Ford School of Public Policy. As Chief Science Officer, Dr. Hampshire will head the DOT's Climate Change Center to coordinate the DOT's efforts to create net-zero carbon emissions. The Climate Change Center was last active during the Obama Administration.

On 4/21/21, the Department of Transportation (DOT) announced \$10 million in grant funding available for transit planning that supports President Biden's 1/20/21 executive order on "environmental justice" and a second executive order entitled Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. Suggested planning topics include studies for new light-rail, heavy rail, commuter rail, or bus systems with designated right of ways. The application period for grant funding closes June 21, 2021.

On 4/13/2021, the DOT published a Notice of Funding Opportunity (NOFO) for \$1 billion in discretionary funds for 2021 under the Rebuilding American Infrastructure with Sustainability and Equity (RAISE) grant program. Similar funding opportunities were offered by the Trump Administration under the TIGER grant program. Secretary Buttigieg indicated that priority will be given to projects that can "demonstrate improvements to racial equity, reduce impacts of climate change and create good-paying jobs."

On 4/26/2021, in recognition of National Work Zone Awareness Week, the Federal Motor Carrier Safety Administration (FMCSA) challenged all commercial motor vehicle (CMV) drivers to "share work zones safely." According to a 2019 Federal Highway Administration study, 1/3 of all fatal accidents occurred in work zones.

On 1/21/2021, the FMCSA announced a new pilot program to evaluate two additional options for splitting sleeper birth periods. Participants will have the additional option of dividing 10 consecutive hours of off duty or sleeper birth time into 6 hours in the sleeper birth and 4 hours off duty or 5 hours in the sleeper birth and 5 hours off duty.



## Are employees entitled to more than 500 weeks of benefits?

Joe D. Delfino, [jdelfino@hedrickgardner.com](mailto:jdelfino@hedrickgardner.com)

Before June 24, 2011, injured employees were eligible for lifetime Temporary Total Disability (TTD) benefits for the duration of their disability. In 2011, the North Carolina legislature passed revisions to the Workers' Compensation Act. One of the revisions altered N.C. Gen. Stat. § 97-29(b), which now states:

“The employee shall not be entitled to compensation pursuant to this subsection greater than 500 weeks from the date of first disability unless the employee qualifies for extended compensation under subsection (c) of this section.”

In claims arising on or after June 24, 2011, employees are only entitled to 500-weeks of benefits unless they qualify for extended benefits under N.C. Gen. Stat. § 97-29(c) which states:

“An employee may qualify for extended compensation in excess of the 500-week limitation on temporary total disability as described in subsection (b) of this section only if (i) at the time the employee makes application to the Commission to exceed the 500-week limitation on temporary total disability as described in subsection (b) of this section, 425 weeks have passed since the date of first disability and (ii) pursuant to the provisions of G.S. §97-84, unless agreed to by the parties, the employee shall prove by a preponderance of the evidence that the employee has sustained a total loss of wage-earning capacity.”

If an employee had a workers' compensation claim on or after June 24, 2011, that employee could be entitled to more than 500-weeks of TTD benefits. However, the request for extended TTD benefits can only be made if the employee had already received 425-weeks of benefits and if the employee can show, by a preponderance of the evidence, a total loss of wage-earning capacity.

Since these revisions to the North Carolina Workers' Compensation Act, both employees and employers have speculated how the Commission and the Courts would define the phrase “total loss of wage-earning capacity.” Since an employee could not request extended TTD benefits until after receiving 425-weeks of benefits, we have not yet received a definitive answer from the Commission or the Courts. (Assuming an employee was injured on June 24, 2011, that employee would have received 425 weeks of TTD on August 16, 2019.)

A recent decision from a North Carolina Deputy Commissioner appears to reflect a belief that if an employee is simply able to prove that he/she is still disabled after 425 weeks, they are entitled to extended TTD benefits beyond 500-weeks. This decision has been appealed to the Full Commission.

In the next 12-months, courts in North Carolina will likely provide further clarity regarding the meaning of “total loss of wage-earning capacity” and what type of evidence is required for an employee to prove an entitlement to extended TTD benefits.

**Current and prior issues of this newsletter can be found at:**

[www.hedrickgardner.com/practices/trucking-and-transportation-law](http://www.hedrickgardner.com/practices/trucking-and-transportation-law)

## Attorney Spotlight: James Gallagher



*Jim provides a high level of service and responsiveness while working collaboratively towards the best possible outcome for his clients.*

*A civil litigator, he has a broad range of experience in state and federal court. Jim's practice involves general liability matters with a focus in the areas of premises liability, worksite accident liability, products liability, aviation law, property damage liability, professional liability, insurance law, and subrogation matters.*

### **Q: Why did you become a lawyer?**

**JG:** The straight answer is because of the admiration I had for my father as a man and lawyer. My father passed away a month after I moved from Long Island to Charlotte. He had been suffering for a few years with Alzheimer's disease. The most striking and hollowing aspect of that disease on my father (and I imagine all who suffer) was that his mind, once filled with intellect, drive, love, and hope, faded into the lost void of a bewildered stare. I learned the importance of family, friendship, loyalty, and love from my parents. While my mom taught me to "feel good" like that James Brown song, my father taught me to "shake down the thunder from the skies", a drive he was born with and mastered with a Notre Dame education. As a litigator, my father could make you laugh, think, and cower in the same conversation. He relished the opportunity to prove his case, more so when equipped with meager facts. His passion for truth and justice has always been a guiding light.

### **Q: What is your proudest moment?**

**JG:** I have many proud moments, I'm lucky that way. I was proud to declare my love for my wife on our wedding day. I was proud when my children were born. I am proud every day to see the achievements of my children when they tackle adversity. Professionally, my most proud moment was when I successfully appealed the denial of a prosthetic leg my friend was denied. It was at a time when giant leaps in prosthetic engineering were happening to aide soldiers coming back from service after the terrorist attacks on September 11th. The advance technology prosthetics were earmarked for the soldiers, rightfully so, but my friend was starting his family at the time and he would need all the mobility he could gather to chase after his newborn children. I wrote a heartwarming appeal with a persuasive fact-based needs argument and my friend, a prosthetic user since childhood, has never been more mobile.

### **Q: What is your favorite book and why?**

**JG:** The Alienist. I'm fascinated by detective stories and history, and this book combines those elements. Having worked in Manhattan for many years, I always wondered what the city looked like as it developed into today's metropolis. What establishments endured, how did the landscape of the city develop? Not to be lost in my fondness for the book, Teddy Roosevelt, the person in history I most admire, is a central character in this work of historic-fiction.

### **Q: What's your most cherished family tradition? Why is it important?**

**JG:** The reading of 'Twas The Night Before Christmas on Christmas Eve. I am one of six kids and each year we would gather on the couch next to my father as he read to us. I carry that tradition now with my children. That tradition always made me feel loved, happy, and safe.



## Increasing Minimum Limits Will Not Prevent Nuclear Verdicts, But You Can

*Williams B. Britt [wbritt@hedrickgardner.com](mailto:wbritt@hedrickgardner.com)*

In my previous article, I discussed whether the proposed tort reform for raising minimum liability insurance coverage is the answer for the increasing size of jury verdicts from 2010 to 2018. As a reminder, the average jury verdict against commercial motor carriers increased by approximately 1000% from 2010 to 2018. To combat this issue, proponents have proposed raising the current \$750,000 minimum limit to at least \$2,000,000.

How does raising the required minimum liability insurance coverage combat the increase in jury verdicts? It doesn't. Sure, it will provide additional coverage, and possibly lead to more settlements, but at what costs? Increasing the minimum limits will only have a trickledown effect that will drive up costs for everyone. Additionally, the term nuclear verdict generally means a verdict in excess of \$10,000,000. \$10,000,000 is a far cry from a new minimum limit of \$2,000,000.

As eluded to in my previous article, the best answer is you. Incorporating better safety standards, protocols, and training all reduce the likelihood of large jury verdicts. However, this cannot stop at implementation; these enhanced safety standards must be implemented and become common practice throughout the company.

The best place to begin implementing better safety standards is in the hiring process. It should be common practice to conduct criminal background checks, motor vehicle background checks, employment background checks, driving references, and drug screenings when considering candidates for hire. Not abiding by these simple directives can prove extremely costly in the event an accident does occur. For example, if a driver has a history of accidents or commercial DWIs, background checks would inform the company at the outset. Failing to know about an employee's history can prove costly if litigation results. It is easy for a Plaintiff's attorney to portray a company's weak hiring process as disregard for the safety of others.

As stated above, safety standards cannot begin and end with the hiring process. Strict hiring standards with lackadaisical training and/or record retention can be even more costly. In a recent article published by Today's Trucking, Lia Arseneau of Staebler Insurance said it best, "If you have a robust hiring process and weak follow-through, anything you are weak at is where [plaintiff's lawyers] are going to go." Any misstep allows an attorney to use the cliché, "profit over safety."

Therefore, after following all the required regulations for hiring a candidate, it is important to maintain a complete and organized driving file for each employee. A company should also implement continuing training exercises and programs to keep drivers knowledgeable on current safety protocols, techniques, and technology that could enhance the ability to operate a commercial motor vehicle safely. It is always better to be ahead of safety trends within the industry than behind.

Nothing in this article is to be confused with or to supplement the Federal Motor Carrier Safety Administration requirements. Companies must adhere to all the rules and regulations. However, it is best to think of the rules and regulations as the bare minimum. As General George S. Patton stated, "Always do more than is required of you." Doing more than required will demonstrate that safety is the company's number one priority, and should begin reversing the upward trend in nuclear verdicts.

If the implementation of enhanced safety standards cannot solve the increase in nuclear verdicts, is it time for the federal and state government to considering capping recovery in commercial motor vehicle litigation? I will address this issue in future articles.