

Defending Sleep Apnea Claims in Trucking Litigation



The Federal Motor Carrier Safety Administration has promulgated many rules with the intent to increase safety on our

roadways. For example, pre-employment drug testing is required before motor carriers can hire commercial motor vehicle drivers, as well as post-accident drug testing. Motor carriers are also required to administer a road test before hiring commercial motor vehicle drivers. *See* 49 CFR §382.301; 49 CFR §9 and 382.303; 49 CFR §391.31 While there are many other Federal Motor Carrier Safety Administration regulations, including limiting the number of hours drivers can operate commercial motor vehicles, there is also a regulation addressing driver's fatigue. *See* 49 CFR §395.3. The regulation 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 where alertness is 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. However, in a case of grave emergency where the hazard to occupants of the motor vehicle or other users of the highway would be increased by compliance with this section, the driver may continue to operate the commercial motor vehicle to the nearest place to which that hazard is removed.

49 CFR §392.3

Recent studies have demonstrated claims of fatigue driving and sleep apnea are on the rise.

While the medical examination report for commercial driver fitness determination requires the driver to state whether "he/



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she suffers from sleep disorders, pauses in breathing while asleep, daytime sleepiness and/or, loud snoring,” the medical examiner who issues the certificate of fitness for the commercial motor vehicle driver is not required to verify same. See 49 CFR §391.41 physical qualifications for drivers.

At least one well-known plaintiffs’ firm in Palm Beach County has advertised on its website that they are “Florida Commercial Truck Accident” lawyers and cite to recent studies that one in five semi truck drivers reported that they have fallen asleep behind the wheel at least once in the course of a month. See Law Office of Lytal, Reiter, Smith, Ivey & Fronrath at <http://www.foryourrights.com/index.htm>. In addition, the Penn Sleep Centers newsletter in 2006 noted that truck drivers routinely get too little sleep or suffer from sleep apnea and show signs of fatigue and impaired performance that can make them hazardous on the road. See “Impaired Performance in Commercial Drivers: A Role of Sleep Apnea and Short Sleep Duration,” published in August 15, 2006, issue of the American General Respiratory and Critical Care Medicine. The study was among the largest and most comprehensive studies of truck drivers and fatigue ever done. Researchers examined 406 truck drivers and found that those who routinely slept less than five hours a night were likely to fare poorly on tests designed to measure sleepiness, attention and reaction time, and steering ability. Drivers with severe sleep apnea, a medical condition that causes a poor quality of sleep, also were sleepy and had performance impairment. The person who headed the study found that tired truck drivers had impaired performance similar to that of drivers who are legally drunk. In addition, nearly five percent of the truck drivers studied had severe sleep apnea, and about 13 percent of the drivers got fewer than five hours of sleep a night on a regular basis.

With this backdrop, questions abound. How should defense counsel, risk managers, motor carriers, and insurers plan to defend fatigue and sleep apnea claims? Motor carriers should plan on being asked what they knew or should have known about their drivers’ undiagnosed sleep disorders? What unmonitored and undiagnosed

driver sleep disorders should realistically concern motor carriers, risk managers, and insurers? This article addresses these concerns, as well as the admissibility of experts on sleep apnea.

The Legal Landscape: Sleep Apnea and the Admissibility of Experts in the Field

Sleep apnea was defined by the Tenth Circuit, citing to the Merck Manual, in *Martinez v. CO2 Services, Inc.*, 12 Fed. Appx. 689, 2001 WL363282 (10th Cir 2001) as “a disorder in which breathing during sleep stops for ten seconds or longer, usually more than twenty times an hour, causing measurable blood deoxygenation.” *Id.* at 693. The court in *Martinez* noted that a sudden and unforeseeable loss of physical capacity or consciousness is a complete defense to a claim of negligence. *Id.* at 695. In that case, a semi tractor trailer operated by Donald D. Mullins was involved in an accident with Louis J. Martinez, an employee of the New Mexico State Highway and Transportation Department, resulting in both of their deaths. *Id.* at 691. The plaintiff, Mr. Martinez’s surviving spouse, did not dispute the findings in the autopsy report that the cause of Mullins’ death was ventricular fibrillation of the heart resulting in sudden cardiac arrest. Instead, the plaintiff disputed that it was the sudden cardiac arrest that caused Mullins to lose control of the truck. The plaintiff’s theory was that Mullins suffered from sleep apnea; and as a result of the fatigue associated with sleep apnea, Mullins fell asleep while driving a truck, lost control of the truck, which swerved to the left, killing Martinez. At some point, after Mullins fell asleep, the plaintiff theorized that he suffered from sleep apnea whereupon he stopped breathing and went into ventricular fibrillation. *Id.* at 692–93. The court rejected the affidavit of the plaintiff’s expert, Richard Seligman, M.D., a board certified internal medicine, pulmonary medicine, critical care medicine, and sleep disorder expert. This was due in part to the fact that Dr. Seligman’s opinions were speculative and insufficient. The Tenth Circuit affirmed the district court’s entry of summary judgment in favor of the defendant. Other courts have not necessarily followed suit.

One such example was in *Dunlap v. W.L. Logan Trucking Company*, 2003 WL 1904418 (Ohio Ct. Cl. 2003). In that case, the court did not excuse the truck driver’s negligence defense, in which he claimed that he had lapsed into an unconscious state and was unaware that he had suffered from a condition subsequently diagnosed as sleep apnea. *Id.* at 6–7. The court found that the driver failed to sustain his burden of proof that he was suddenly stricken by a period of unconsciousness, which rendered it impossible for him to control his vehicle. The court analyzed the factual evidence presented, claiming that the driver had no reason to anticipate his sudden loss of consciousness. The court remarked that the driver slept poorly, slept an average of three hours a night, and on at least one occasion had fallen asleep while driving. The court therefore found the truck driver equally negligent with the D.O.T. in causing the accident, and rejected his sudden and unforeseeable loss of consciousness defense.

Similarly, in *U.S. Express, Inc. v. American Field Service Corp.*, 2008 WL 2714635 (N.D. Miss. 2008), the district court determined that the deceased tractor trailer driver’s prior medical records warranted a medical expert’s opinions as to the general facts of the deceased’s medical condition, but not the cause of accident. The medical expert attempted to opine that the deceased driver suffered from obstructive sleep apnea, and that his symptoms of fatigue and sleepiness would have placed him at high risk for motor vehicle accidents due to the fact that his sleep apnea was untreated. *Id.* at 1. See also *Kentucky Retirement Systems v. Turner*, 2010 WL 135118 (Ky. App. 2010) (a sanitation truck driver’s diagnosed sleep apnea compelled a finding that he was permanently incapacitated from his employment) contra *Salisbury v. Astrue*, 2011 WL 861785 (M.D. Fla. 2011) (affirming an administrative judge’s denial of Social Security benefits to a truck driver claiming disability due to sleep apnea where the claimant had surgery to improve his sleep apnea). The fact that the deceased’s wife was in the cab during the accident and testified that the decedent was alert and talkative weighed heavily in the court’s exclusion of the medical expert’s

speculative opinion. Notwithstanding, the expert was permitted to give general opinions on effects of the deceased's medical condition, based on her knowledge and review of the decedent's medical records.

Obviously, this decision potentially presents problems for defense counsel in dealing with wrongful death suits. That is, in absence of an eyewitness riding in the cab with the truck driver at the time of a fatal collision, a sleep expert could opine that the cause of the accident was the truck driver's sleep apnea, fatigue, or other related pre-existing medical conditions. Thus, a conundrum arises on negligent hiring or negligent retention claims against the motor carriers on what they knew or should have known concerning their driver's medical condition.

Admission of post-accident sleep apnea diagnosis has been permitted. Recently, the court in *Royal & Sun Alliance Insurance PLC v. UPS Supply Chain Solutions, Inc.*, 2011 WL 38474878 (S.D.N.Y. 2011), ruled on the admissibility of expert witness testimony on sleep disorders. In *Royal & Sun Alliance Insurance PLC*, the issue was whether the accident was unavoidable or due to the driver's medical condition. The driver died two weeks after the crash and plaintiffs Royal & Sun Alliance claimed that he suffered from obstructive sleep apnea, a condition that might have affected his driving on the night of the accident.

Royal & Sun Alliance sought the admission of opinions from a physician and expert on sleep disorders. The expert wished to testify that the driver had obstructive sleep apnea, which was not recognized by either his employer or the examining physician who certified him as able to continue driving. According to the expert, the untreated sleep apnea would have placed the driver at a greater risk of dozing off or falling asleep at the wheel. Based upon the driver's physical characteristics, the certified physician should have suspected the driver might have sleep apnea and evaluated him more thoroughly before allowing him to drive. Therefore, the expert concluded that the certifying physician failed to exercise reasonable care in testing the driver to determine his safety. The court found that the expert's education, experience, and work history rendered him highly qualified to

render opinions about sleep disorders and that his opinions were plainly relevant to the cause of the accident. The court rejected the defendant's assertion that the expert's diagnosis was speculative and was based on statistics, rather than sleep study results or personal examination. *Id.* at 3. In rejecting the defense's attack, the court stated that the expert reviewed the driver's medical records, as well as numerous medical studies and articles, which provided the undisputed data that he used to evaluate the possibility that the driver had sleep apnea. *Id.* Even without more definitive sleep study results, the expert's diagnosis was found by the court to rest "on good grounds." *Id.* Given the court's holding in *Royal & Sun Alliance Insurance PLC*, motor carriers may face an attack that their driver has undiagnosed sleep apnea and the condition was the cause of the accident, even with the presence of a current and valid medical certificate.

Recommendations on Defending Potential Sleep Apnea Claims

It is important when defending motor carriers in trucking litigation to review and ensure that all applicable Federal Motor Carrier Safety Administration regulations have been complied with. It is basic that defense counsel and risk managers would check the driver's logs for hours of service compliance; that they would verify that the driver's medical examiner's certificate is current and valid; and that post-accident drug testing was administered and hopefully reported as negative. The motor carrier, counsel, and risk management would interview the driver as soon as possible to determine how the accident occurred.

When conducting interviews with drivers post-accident, it is recommended that standard questions concerning whether they had any sleep issues, such as difficulty sleeping, loss of sleep, snoring, or any diagnosed pre-existing sleep disorder be added to any existing accident/incident reports.

A skilled plaintiff's attorney, once being satisfied that all applicable Federal Motor Carrier Safety Administration rules have been complied with, can seek to develop a theory of driver fatigue and obtain the truck driver's medical records to determine whether or not a diagnosis of sleep

apnea has failed to have been made or could be made in the case. Plaintiff's counsel, in absence of discovering any other Federal Motor Carrier Safety Administration rules violations, will likely seek to obtain the driver's medical records to develop the theory that the driver was fatigued or suffered from sleep apnea, which caused or contributed to the subject accident.

Monitoring and Prevention

To be proactive, a motor carrier should have a pre-screening mechanism before drivers are hired. Current drivers should similarly be required to complete a detailed questionnaire to screen for potential sleep disorders, including sleep apnea. Assuming the questionnaire implicates a preliminary diagnosis of sleep apnea, medical authorizations from the current driver or the potential hire should be obtained for further investigation on whether additional testing is indicated in order to make a definitive diagnosis of sleep apnea. This may include sleep studies administered at sleep clinics by a sleep expert. If drivers are diagnosed with sleep apnea, there are recognized treatments to remedy same. Assuming a motor carrier fails to be proactive in this regard, the motor carrier, risk managers, and their liability insurers will be exposed to the admission of this evidence.

It is recommended that the detailed questionnaire be written after consulting with a sleep expert. Motor carriers and risk managers should consult with sleep experts to develop the comprehensive pre- and post-hiring screening questionnaire for all drivers to complete, in order to detect potential at-risk drivers with undiagnosed sleep disorders.

The sleep expert should also be consulted on any ongoing monitoring program that needs to be instituted for any at-risk drivers who may develop sleep disorders. The goal should be to identify impaired drivers through objective screening and, if needed, testing.

By instituting such policies, the motor carrier, risk manager, counsel, and the insurer will be in much better position to defend against sleep apnea claims and, most importantly, prevent catastrophic accidents.

