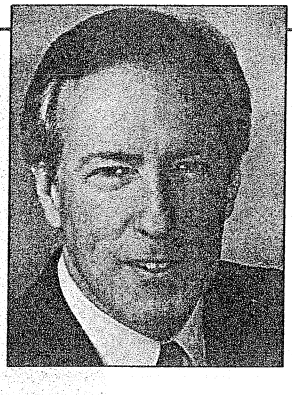
A Defense of Sleep Apnea AND FATIGUE CLAIMS



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Sleep apnea and fatigue loom as increasingly significant bases for plaintiffs' claims. With anticipated regulations as to driver sleep apnea qualifications and hours-of-service regulations, claims of liability on these theories will become far more frequent.

The authors were recently involved in defending a case where allegations of a commercial driver's sleep apnea and fatigue – and related claims of carrier negligent entrustment – were dismissed on motion for summary judgment: *Achey v. Gallman*, 2009 U.S. Dist. LEXIS 44353 (E.D. Penn. Mar. 30, 2009). This case enunciates a standard of proof required for actions based upon allegations of driver fatigue and sleep apnea.

The *Achey* ruling was recently followed in *Debaugh v. Greyhound Lines, Inc.*, 693 F. Supp. 2d 1253, 1258 (D. Or. 2010). In that case the court cited *Achey* in granting summary judgment as to plaintiff's claim for liability based upon driver fatigue.

A. FACTS

Achey arose from an accident in which a tractor trailer impacted a line of slowed vehicles in a construction zone. The police claimed that after the accident, the operator of the tractor trailer said he was tired, dozed for a few seconds and when he awoke, traffic in front of him had stopped.

Plaintiff alleged among other things, "wanton and gross negligence, outrageous conduct, and reckless indifference of [the carrier] in hiring, retention and negligent entrustment of a dangerous instrumentality to the [the driver]..."

B. PLAINTIFF'S EXPERT

In the course of the litigation, plaintiff produced one liability expert in support of these claims. The expert claimed expertise as a "transportation safety consultant." However, the expert's allegations against the carrier in his report were ultimately shown to have been extremely limited.

Nowhere did plaintiff's "transportation safety" expert opine the driver violated any of the federal hours of service regulations on the day of the accident. He claimed it was "possible" the driver had done so on a prior day. The defense argued that the "expert" did not render this opinion with the requisite level of professional certainty.

Similarly, the expert did not fault the carrier for hiring or retaining the driver based upon his driving record, qualifications, or professional competence.

The defense argued that the expert's limited contentions could be distilled to a criticism of the carrier for the driver's alleged fatigue on the day of the accident. Again, plaintiff's "transportation safety consultant" did not fault the carrier based upon any violation of the Federal hours of service regulations limiting the hours that a driver may operate.

Instead, plaintiff's transportation safety consultant opined that the driver suffered from sleep apnea which resulted in cumulative fatigue which in turn caused the accident and the carrier should have taken action to properly diagnose and prevent these conditions.

Plaintiff's expert opined that "[the driver's] fatigue, sleep difficulties, effects of cumulative fatigue, and sleep apnea caused him to be in a state of severely decreased alertness, and to doze off while behind the wheel of a commercial motor vehicle traveling at highway speeds."

The defense challenged this claim by asserting that plaintiff failed to present any competent evidence on the record that the driver was suffering from sleep apnea or cumulative fatigue at the time of the accident. Accordingly, it was asserted that the predicate proof required from this conclusion was absent, depriving his opinion of its needed foundation.

A motion was filed in limine and/or for a request for a Daubert hearing as to this expert ,concurrent with the defense filing of the motion for summary judgment. As noted in that motion, while the expert claimed expertise as a "transportation safety consultant," he did not claim, nor did he possess "knowledge, skill, experience, training, or education" in medicine or any related field.

In this vein the defense asserted that this "expert" was not qualified in pulmonary medicine, sleep science or any related field to make a diagnosis

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or render an opinion that the driver was suffering from sleep apnea or cumulative fatigue at the time of the accident. Absent his qualifications to render such an opinion, it was argued that his conclusions must have some other competent basis in the record as a foundation for his opinions.

C. SLEEP APNEA ALLEGATIONS

Plaintiff claimed punitive damages because the driver had been diagnosed at one time with sleep apnea. Plaintiff claimed that the carrier's knowledge of this diagnosis yet continuing employment of the driver subjected it to punitive damages.

As mentioned, the defense asserted that the record was devoid of competent, admissible evidence that the driver suffered from that diagnosis on the date of the accident. In fact, while the evidence of record was that driver had been diagnosed with sleep apnea, this was fifteen (15) years prior to the accident. He underwent surgery that resulted in the removal of his tonsils, adenoids, uvula, and part of the sinus bones in his nose.

The driver testified that before the surgery, he never experienced any nodding out from sleep apnea and he denied experiencing fatigue in the morning.

Plaintiff presented no competent medical evidence that the driver continued to suffer from sleep apnea at the time of the 2007 accident.

Similarly, the "expert" made the bald assertion that the driver was suffering from "cumulative fatigue," without any competent medical or scientific evidence of such. Absent such evidence, the defense likewise asserted that there was no basis for the transportation safety expert's opinions based upon sleep apnea.

The defense noted that the Court had previously recognized that sleep problems, to varying degree, are common within the population. *Bennett v. Unisys Corp.*, 2000 U.S. Dist. LEXIS 18143 (E.D. Pa. Dec. 8, 2000). "A 1994 survey of 1,000 American adults reports that 71% averaged five to eight hours of sleep a night on week nights and that 55% averaged five to eight hours a night on weekends. See The Cutting Edge: Vital Statistics – America's Sleep Habits, Washington Post, May 24, 1994." *Id.*, p. 21, n. 8.

In light of such statistics, the defense argued that qualified expert testimony as to the specific nature and severity of the condition at the time of the accident was required. The defense asserted that the bare facts of a diagnosis fifteen (15) years prior that was subsequently addressed by surgery was not in and of itself sufficient.

In contrast, in *Martinez v. CO2 Services*, 12 Fed. Appx. 689, 2001 U.S. App. LEXIS 6195 (10th Cir. 2001)(unpublished opinion), plaintiff sought to allege that the accident was due to the driver's sleep apnea. Plaintiff further alleged direct liability of the employer, claiming it "knew or should have known that [the driver] suffered from fatigue as a result of sleep apnea." *Id.* at p. 8.

In that case, the plaintiff supported its claim with affidavits from a physician who was "board certified in internal medicine, pulmonary medicine, critical care medicine, and sleep disorders with training in hyperabaric medicine." *Id.* at pp. 9-10. He opined that the driver's sleep study and his documented dramatic and profound hypoxemia or desaturation during untreated sleep suggested that the driver may have fallen asleep at the wheel. *Id.* at p. 10.

The trial court in *Martinez* granted summary judgment, finding that the experts were speculative and there was insufficient evidence of record to support plaintiff's claim that the proximate cause of the accident was the driver's falling asleep at the wheel as a result of fatigue related to sleep apnea.

The Tenth Circuit affirmed. It noted that when dealing with an issue of medical causation, a considered medical judgment is necessary, expressed in terms of probability rather than possibility. *Id.* at pp. 18-19, n. 11). The Court then held that absent adequate proof of causation based upon sleep apnea, plaintiff's claims of negligent hiring and entrustment must also fail. *Id.* at p. 21.

In *Achey*, there was no medical evidence, let alone any competent medical evidence. Accordingly, the defence asserted that summary judgment should be entered as to Plaintiff's claims based upon sleep apnea and/or cumulative fatigue.

The defense also asserted that plaintiff failed to present competent evidence of record that *treated* sleep apnea disqualifies a driver from operating a commercial motor vehicle.

Plaintiff's transportation safety "expert" had also opined that the driver was "suffering from a potentially disqualifying disease under the FMCSR (Sections 391.41(b)(5) and 391.41(b)(8)." The defense asserted that this opinion should have been rejected for several reasons.

As mentioned, this opinion failed to be stated with the requisite certainty as required of an expert and there was no competent evidence that the driver had sleep apnea at the time of the accident.

Third, while the transportation safety expert carefully hedged his opinion by claiming sleep apnea is a "potentially disqualifying disease," he provided no authority for such except two subsections of the FMCSR. These subsections are inapplicable:

Subsection 391.41(b)(8) prohibits the operation of a commercial vehicle by individuals with epilepsy. There was no allegation the driver ever suffered from epilepsy.

Subsection 391.41(b)(5) prohibits operation of a commercial vehicle by individuals with "an established