

NO DATE FOR ORAL ARGUMENT HAS BEEN SET

No. 06-1078
(Consolidated with No. 06-1035)

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, *et al.*,
Petitioners,

v.

FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION
and THE UNITED STATES.
Respondents.

On Petition for Review of a Final Rule Issued by the
Federal Motor Carrier Safety Administration

***AMICUS CURIAE* BRIEF OF THE
INSURANCE INSTITUTE FOR HIGHWAY SAFETY
IN SUPPORT OF PETITIONERS AND SEEKING
REVERSAL OF THE FEDERAL MOTOR CARRIER SAFETY
ADMINISTRATION'S ORDER**

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July 3, 2006

Counsel for Amicus Curiae

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amicus*

All parties and intervenors appearing in this Court are listed in the Brief for Petitioners.

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* states as follows:

Amicus Insurance Institute for Highway Safety, Inc., states that it is a non-profit organization incorporated under the laws of the District of Columbia.

Amicus Curiae has not issued shares to the public nor does it have any parent corporation, subsidiaries or affiliates that have issued shares to the public.

Rulings Under Review

The ruling under review is a final rule of the Federal Motor Carrier Safety Administration, 49 CFR Parts 385, 390, and 395, Hours of Service of Drivers, issued August 16, 2005, 70 *Fed. Reg.* 49978, August 25, 2005.

Related Cases

This case has been consolidated with *Owner-Operator Independent Drivers Ass'n. v. FMCSA*, No. 06-1035. That case challenges the final hours of service rule on separate grounds.

Two years ago, this court vacated and remanded a rule similar to the one under review. *Public Citizen, et al. v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004).

July 3, 2006

Respectfully submitted,

A handwritten signature in black ink that reads "Michele Fields". The signature is written in a cursive, flowing style.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Insurance Institute for Highway Safety (the Institute) is a nonprofit research and communication organization, supported by U.S. motor vehicle insurers, that identifies ways to reduce motor vehicle crashes and crash losses. Hours of Service (HOS) rules for interstate commercial vehicle drivers and the part the rules play in reducing highway losses are the subject of Institute research. The findings from this research have been submitted in comments to federal rulemakings conducted by the Federal Motor Carrier Safety Administration (FMCSA) and its predecessors. Most recently, FMCSA denied the Institute's petition to reconsider the HOS rule issued on August 25, 2005.¹

The Institute's supporters have a humanitarian and financial interest in reducing the deaths and injuries from motor vehicle crashes. The Institute has gathered evidence that the new HOS rule has resulted in a substantial increase in both daily and weekly work hours and that driver reports of falling asleep at the wheel have increased significantly under the new rule. Therefore, the Institute supports the Petitioners in this case.

On May 17, 2006, this Court granted leave to the Institute to participate in this case as *Amicus Curiae*.

¹ Hours of Service of Drivers; Response to Petition from Insurance Institute for Highway Safety, FMCSA Docket 2004-19608-2460 (February 27, 2006).

SUMMARY OF ARGUMENT

The United States Department of Transportation limits the on-duty hours of some workers (e.g., pilots, train engineers, and commercial vehicle drivers) in order to reduce fatigue-related crash risks for the traveling public. The HOS rules for commercial vehicle drivers, until recently, have remained unchanged since 1962. In 1995, Congress directed the U.S. Department of Transportation to open rulemaking on the HOS rule to reduce truck driver fatigue and fatigue-related crashes.² FMCSA did not issue a new rule until April 28, 2003.³ Subsequent to this Court's 2004 remand, FMCSA made minimal revisions to the 2003 rule which were published on August 25, 2005.⁴ Notwithstanding Congress' concern about the hazard of driving a truck while fatigued, and FMCSA's own estimate that truck driver fatigue is a factor in 15 percent of fatal and injury-producing truck crashes, FMCSA's 2003 rule and its 2005 version actually *increase* the HOS daily and weekly driving limits.

More deaths occur in crashes involving commercial motor vehicles than in commercial plane and train crashes, yet the federal limits on interstate commercial vehicle drivers remain the least restrictive of all of the

² 49 U.S.C § 31136.

³ 68 *Fed. Reg.* 22456 (April 28, 2003); 49 C.F.R. § 395.3 (2004).

⁴ *Public Citizen, et al. v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004); 70 *Fed. Reg.* 49979 (August 25, 2005).

Department's work restrictions.⁵ The current rule for drivers of large trucks substantially increased the limit on driving from 10 to 11 hours within a single shift, and mandates only 10 hours of off-duty time each day. As a result, it is now legal for a driver to drive as much as 11 hours consecutively. It also introduced a "restart" provision, allowing a trucker to start over on a new work week anytime after taking 34 hours off. This provision effectively increased allowable driving hours in any 7- or 8-day period by up to 28 percent.

Research shows the following unequivocally. Crash risk increases with driving time. The increased risk is modest in the first seven hours and rises dramatically in the eighth and subsequent hours. Drivers are pressed to meet tight delivery schedules; pay and other incentives, coupled with lax enforcement, encourage drivers to exceed the daily and weekly driving limits established by the HOS rules. Drivers regularly exceed those limits and fail to enter excess hours in their logbooks. These factors result in too many drivers operating long hours and driving while significantly impaired by fatigue.

FMCSA has breached its duty to the public by issuing a rule that, on examination, would be expected to increase driver fatigue. It has ignored competent research and relied on its own unsound analysis.

⁵ U.S. Department of Transportation, Bureau of Transportation Statistics, *Transportation Statistics Annual Report*, Nov. 2005 at 57 (fatality data); 49 C.F.R. 228.(railroad employees); 49 C.F.R. 121.471 (flight crewmembers); 49 CFR 395.3(a) (commercial drivers).

Institute research reveals that the increase in daily driving hours and the restart provision of the rule has, indeed, permitted a substantial number of drivers to drive more hours, and failed to reduce the incidence of HOS driving and logbook violations. Unsurprisingly, drivers report that they are still fatigued, are sleepy at the wheel, and are even dozing at the wheel.

ARGUMENT

I. Driving up to 77 Hours in 7 Days, Coupled with a Restart Provision Permits Substantial Increases in Weekly Driving Time.

Recognizing that commercial driver fatigue is a significant contributor to highway crashes and deaths, in 2000 FMCSA proposed a series of changes to the hours-of-service rules that were intended to reduce fatigued driving among drivers of large trucks.⁶ The final rule that emerged from this effort *increased* the maximum consecutive hours of driving from 10 to 11. In addition, through the inclusion of a new provision that allows a driver to “restart” the weekly clock after taking 34 consecutive hours off, the maximum driving hours in a 7-day was increased from 60 to 77 hours (28 percent) and the maximum driving hours in an 8-day period was increased from 70 to 88 (26 percent).⁷

⁶ 65 *Fed. Reg.* 25540 (May 2, 2000).

⁷ For, example, assume a 7-day work week with continuous shifts of 11 hours of driving followed by 10 hours off duty, a schedule allowed under the final rule. A driver would be close to the 60-hour limit in fewer than five days. However, the same driver could drive 55 hours, and then take 34 hours off. Then, using the restart provision, the driver could resume driving by the sixth day and drive another 22 hours that week. Without this provision, the driver could not resume driving until

FMCSA’s rationale for this increase in weekly driving hours is that “the theoretical maximum hours are based on a single week, with one restart. When the calculations are extended over multiple weeks, the average for each week necessarily falls because drivers begin subsequent weeks with at least some of their available hours already used; mathematically, the theoretical maximum-hours weeks simply cannot be maintained over longer periods.”⁸

The Institute has constructed a model to calculate how the restart rule affects the schedule over the longer term and to compare the restart rule with the prior rule. The model assumes the driver begins to drive at midnight (12 a.m.) on the first day and complies with HOS rules. Under the rules, drivers may work a 7-day work week or an 8-day work week; without using the restart rule, drivers are limited to driving 60 hours in a 7-day period or 70 hours in an 8-day period. Because over 90 percent of drivers responding to Institute surveys reported that they use an 8-day schedule, the model assumes an 8-day work week and defines a “work month” as four 8-day work weeks (32 days).

The model maximizes daily driving continuously (11 hours of driving followed by 10 hours of rest) until 66 hours of driving is reached. A restart (34

the eighth day. The new rules will encourage drivers to live according to a 21-hour schedule so as to maximize driving time, rather than the preferred 24-hour daily schedule the agency proposed in the NPRM.

⁸ Hours of Service of Drivers; Response to Petition from Insurance Institute for Highway Safety, FMCSA Docket 2004-19608-2460 (February 27, 2006).

hours of rest) occurs at this point, and the cycle begins again (i.e., 11 hours of driving, 10 hours of rest, etc.). This pattern is repeated for 4 work months. The total number of hours driven in each work month is constant at 341. The total number of hours driven in a work week varies depending on how many restart periods fall in the 8-day period; the weekly hours of driving range from 77 to 88.

The following table shows how use of the restart can maximize driving hours over a four-week period compared to the prior rule that permitted a 70 hour, 8-day work week without a restart provision.

Work Week (8 days)	70 Hour Week with Restart		70 Hour Week Without Restart
	Number of Restarts	Total Hours Driving	Total Hours Driving
1	1	88	70
2	1	88	70
3	1	88	70
4	2	77	70
	Total	341	280

The restart increases maximum driving hours by as much as 61 hours in a work month (from 280 hours to 341 hours). The percentage increase in driving time per work week ranges from 10 percent (77 vs. 70 hours) to 26 percent (88 vs. 70 hours). The increase is 26 percent in *three of every four* weeks.

The model maximizes driving time but does not consider additional non-driving work time. It is important to note that a driver may drive 11 hours at a

stretch but can work an additional 3 non-driving hours for a total of 14 hours on duty before taking 10 hours off duty.

Theoretical calculations do not consider the reality that many drivers do not comply with the daily work rules and drive more than the daily limit and/or rest fewer than the required 10 hours each day. An Institute survey of drivers found that some drivers using the restart take fewer than the minimum 34 hours off.⁹ In reality, some drivers are likely on the road longer than the theoretical weekly maximum.

In summary, although the maximum hours of driving allowed under the restart provision cannot be maintained every week, for the 8-day work week, the increase in weekly maximum driving time ranges between 10 percent and 26 percent. The increase in driving in a 32-day work month is steady at 22 percent.

FMCSA's inclusion of the restart provision ignores studies showing that drivers who reported working longer than 60-70 hours per week or other hours-of-service violations were about 80 percent more likely to report falling asleep while driving than drivers reporting fewer work hours.¹⁰ Further, FMCSA did not provide

⁹ Insurance Institute for Highway Safety, Comments on the Federal Motor Carrier Safety Administration, Docket No. 2004-19608-1800, Appendix A, (March 10, 2005).

¹⁰ Insurance Institute for Highway Safety, Comments on the Federal Highway Administration, Docket No. MC-92-30 (November 4, 1992). See also, Anne T. McCartt et

adequate scientific evidence that taking 34 hours off would provide sufficient recovery time to enable drivers to drive safely for 77 hours over 7 days or 88 hours over 8 days. In the absence of such evidence, the only conclusion justified by the prior scientific record is that the increased driving hours will result in additional fatigue-related crashes.

II. Commercial Drivers Need More Than 10 Hours of Time Off-Duty in 24-Hours.

FMCSA has increased the total off-duty time after work shifts from 8 to 10 hours. Yet 10 hours off is insufficient to ensure adequate sleep among commercial drivers. Scientific literature consistently indicates that sleep deprivation adversely affects task performance, including driving performance.¹¹ The proposed rule FMCSA published in 2000 heeded scientific advice regarding the need for sufficient off-duty periods by including a minimum of 12 hours off duty, 10 of which had to be consecutive. Neither the final rule published in 2003 nor the rule under review provide any sound scientific justification for reducing the total off-duty requirement from the proposed 12 to 10 hours.

al., Factors Associated with Falling Asleep at the Wheel Among Long-Distance Truck Drivers, 32 *Accident Analysis & Prevention* 493 (2000).

¹¹ National Sleep Foundation, Comment regarding Hours-of-Service Rules for Commercial Drivers and Fatigue Interventions/Countermeasures, FMCSA Docket No. 97-2350-932 (Feb. 24, 2000). See also, Transportation Research Institute, Report on Potential Hours-of-Service Regulations for Commercial Drivers, FMCSA Docket No. 97-2350-618 (Sept. 10, 1998).

The National Sleep Foundation, the National Institute for Occupational Safety and Health, and the expert panel convened by the Federal Highway Administration in 1998 recommended 12 hours of off-duty time.¹² Optimally drivers should sleep 8 hours.¹³ Ten hours is not long enough for a driver to eat, shower, complete daily errands or tasks, and still sleep as much as a person needs.

III. Driving More than 10 Hours within 24 Hours Increases Crash Risk.

Driving should be recognized for what it is: a sedentary and often monotonous task requiring constant vigilance. Momentary lapses of attention can have devastating consequences. Although the Institute supported the 2000 NPRM, which included 12 hours of driving time, that support was based on the net safety benefits that would have accrued from the rule as a *whole*.¹⁴ A critical element of the NPRM was enforcement of the HOS regulations using electronic on board recorders (EOBRs). The current rule, like the 2003 final rule, dropped the EOBR requirement, retained the woefully inadequate logbook system, and still increased permissible driving time from 10 to 11 consecutive hours.

¹² Id., National Sleep Foundation.

¹³ Id.

¹⁴ Insurance Institute for Highway Safety, Comments on the Federal Motor Carrier Safety Administration, Docket No. FMCSA 97-2350-20062 (August 4, 2000); Insurance Institute for Highway Safety, 35 *Status Report* 9:2 (October 31, 2000).

Multiple studies show increased crash risk among drivers operating large trucks for more than 8-10 hours at a stretch.¹⁵ These studies are indicative of what happens after driving for an extended period of time because they are based on real-world crashes, not driving simulator data, and do not rely on subjective assessments by investigating enforcement officers of whether a crash was related to fatigue. Another strength is the use of comparison groups, enabling control of confounding effects from time of day, travel patterns, and other factors affecting crash risks. Increased crash risks associated with long hours of driving have been reported as twofold or higher.¹⁶ Several studies reported a significant correlation between driving long hours, including more than 8-10 hours, and having dozed while driving.¹⁷ By allowing commercial drivers to drive continuously for 11 hours, FMCSA has ignored this critical research.

¹⁵ Kenneth L. Campbell, Evidence of Fatigue and the Circadian Rhythm in the Accident Experience, Proceedings of Federal Highway Administration Symposium on Truck and Bus Driver Fatigue 20-38 (1988). See also, Kenneth L. Campbell & Michael H. Belzer, Hours of Service Regulatory Evaluation Analytical Support UMTRI-2000-11, U. Michigan (2000); William J. Frith, A Case-Control Study of Heavy Vehicle Drivers' Working Time and Safety, Proceedings of the 17th Australian Road Research Board Conference 17-30 (1994); Ian S. Jones & Howard S. Stein, Defective Equipment and Tractor-Trailer Crash Involvement, 21 Accident Analysis & Prevention 469 (1989); Tzuoo-Ding Lin et al., Time of Day Models of Motor Carrier Accident Risk, 1467 Transp. Research Record 1 (1994); Frank F. Saccomanno et al., Effect of Driver Fatigue on Commercial Vehicle Accidents, Truck Safety: Perceptions and Reality 157, Waterloo, Canada (1996); and Heikki Summala and Timo Mikkola, Fatal Accidents among Car and Truck Drivers: Effects of Fatigue, Age, and Alcohol Consumption, 36(2) Human Factors 315 (1994).

¹⁶ Id., Frith, Jones, Lin, and Saccomanno.

¹⁷ McCartt, *supra* note 10. See also, Campbell (2000), *supra* note 15.

The agency's own analysis shows a significant increase in fatigue-related crashes as the number of driving hours increase. FMCSA reports that the relative risk of fatigue-related crashes increases 60 percent after driving 8 hours, 90 percent after driving 9 hours, and 240 percent after driving 10 hours. The relative risks are even higher after driving more than 10 hours.¹⁸ Given the agency's analysis, together with other research, FMCSA's decision to allow drivers to operate trucks for 11 hours at a stretch is contrary to the scientific evidence and without merit.

FMCSA's decision to increase allowable driving time to 11 hours is due in part to the relatively small increase in risk that it assigned to the extra 11th hour of driving. Institute statisticians found that the FMCSA's analysis systematically discounted the risk associated with the 11th hour. Specifically, the agency used data from Campbell that establishes a relationship between the number of hours of consecutive driving and the risk that a fatal crash is fatigue-related. The Campbell data stated the risk in terms relative to the average risk that any crash was fatigue-related during each hour of driving – thus, for example, the risk of a crash being fatigue-related in the first hour of driving was about half the average, while the risk in the 10th hour was about 2.5 times the average (or 4.5 times the risk in the first hour). Campbell's data estimated the

¹⁸ Campbell (2000), *supra* note 15.

risk at the 11th hour, the 12th hour, and aggregated all the data for 13 or more hours. Based on Campbell's initial data, the increase in risk from the 10th to the 11th hours of driving was 115 percent.

However, rather than use this direct estimate of the increased risk, FMCSA developed a new, continuous curve for the Campbell data that it claimed provided a best fit to the discrete hourly data. The problem lies not in the decision to use a continuous curve, but in FMCSA's choice to plot the aggregated data for 13+ hours at 17 hours. To fit a continuous curve, FMCSA analysts had to decide where to plot the data for 13+ hours. Although their own data raise questions about the number of drivers who actually achieve such long hours without rest, they chose to plot it at 17 hours. (It is likely that the average number of hours for these drivers is something closer to 13 than to 17 (perhaps, 14 or 15). The curve fit depends greatly on the choice of this plot point, and the effect of choosing 17 hours reduces the risk of the 11th hour of driving by 25 percent, relative to the direct estimate provided by the Campbell data. That reduces the estimated risk increase from the 10th to the 11th from 115 percent to 30 percent. This underestimate is important, especially when considered in the context that Campbell's own estimate is probably biased low.

The contribution of fatigue to crashes is almost certainly underestimated as driver fatigue cannot be verified post-crash and drivers have little incentive

to acknowledge their fatigue. Little if any evidence of fatigue remains after a crash, and fatigue can be present along with other factors, such as speeding or inclement weather, which may receive greater weight by investigating officers. In all likelihood, the risks associated with 9 and 10 hours of driving are already increased because some of these drivers do not admit that they are actually driving 11, 12, or more hours. Thus, the increased risk of the 11th hour is being compared with the risk in the 10th hour that is itself elevated because it contains data for drivers who drove more than 10 hours.

In sum, the FMCSA's estimate of the increased risk associated with driving in the 11th hour is underestimated by at least 25 percent and, in all likelihood, even more when reporting error is considered. FMCSA used this flawed estimate in its subsequent analyses of the effects of the rule.

Furthermore, the issue is not only whether the risk of the 11th hour is greater than the risk for the 10th. In the face of overwhelming evidence that crash risk begins to rise dramatically at 8 hours, when directed by Congress to reduce the risk posed by fatigued drivers, FMCSA chose to increase driving time to 11 hours. It attempts to justify this decision by underestimating the risk in the 11th hour.

IV. Drivers Report Dozing at the Wheel.

To assess the effects of the 11 hour driving limit, the restart provision, and other rule changes, the Institute conducted a survey of long-distance truck drivers in 2003, before implementation of the rule change and, in 2004, after its implementation.¹⁹ Researchers interviewed a representative sample of drivers of large trucks at weigh stations in western Pennsylvania (eastbound Route I-80) and northwestern Oregon (eastbound Route I-84). The Pennsylvania surveys were conducted in November 2003 and November 2004 and in Oregon in early December 2003 and 2004. Approximately 350 drivers were interviewed in each state in each year. Overall participation was 96 percent in 2003 and 91 percent in 2004. Generally, those who declined to participate said they were hurrying to complete their trips.

Researchers compared driver responses before and after the rule change for questions about work schedules, rule violations, and fatigued driving. In the 2004 survey, researchers collected additional information on changes in work schedules by asking those drivers who had worked under both rules to compare their daily and weekly work schedules under the new and old rules. The results of these surveys were tested for statistical significance using widely accepted methods for data analysis.

¹⁹ *Supra*, note 9.

About a fifth of drivers reported driving more hours daily under the new rule (22 percent in Pennsylvania; 17 percent in Oregon). Although many reported they were getting more sleep daily under the new rule (35 percent in Pennsylvania; 21 percent in Oregon), overall forty percent of drivers (39 percent in Pennsylvania; 41 percent in Oregon) were not getting the minimum 8 hours of daily sleep the FMCSA deems necessary for the safe operation of a commercial vehicle.

More than 90 percent of drivers reported using the restart provision to increase their weekly driving hours and a large majority (85 percent in Pennsylvania; 75 percent in Oregon) reported *regularly* using the restart provision. Nine percent of the drivers in Pennsylvania and 16 percent of those in Oregon said they took less than the mandatory 34 hours off before starting a new work week, while about 20 percent in each state said they took 34 hours off before restarting. That means a quarter to a third of the drivers responding (28-37 percent) were taking off the minimum 34 hours or less before restarting their work week.

About a third of drivers in both 2003 and 2004 reported that they often or sometimes omitted hours worked from their logbooks. Twenty-eight percent of drivers in 2003 and 30 percent in 2004 reported working longer hours than the rules permitted. About two-thirds in both years said logbooks generally are not

accurate for most drivers. These findings are consistent with long-standing research showing widespread hours of service violations.²⁰

The response to one question puts these statistics in stark perspective. Drivers were asked about instances of dozing while driving on duty. In both states and in both years, under both rules, drivers admitted that they had actually dozed off at least once in the past month while driving on duty. More drivers reported dozing under the new rule than under the old rule, but the difference was not significant. However, preliminary results from a third round of surveys in the two states, which were conducted using the same protocol as the first two rounds, show statistically significant increases in dozing under the new rule. When surveyed in 2005, about two years after the new rule took effect, 19 percent of drivers in Pennsylvania and 21 percent of drivers in Oregon said that they had dozed at the wheel during the past month. Only 13

²⁰ Richard Beilock, Schedule-Induced Hours-of-Service and Speed Limit Violations Among Tractor-Trailer Drivers, 27 *Accident Analysis & Prevention* 33 (1995). See also, Elisa R. Braver et al., Long Hours and Fatigue: A Survey of Tractor-Trailer Drivers, 13 *J. of Pub. Health Policy* 341 (1992); Robin P. Hertz, Hours of Service Violations Among Tractor-Trailer Drivers, 23 *Accident Analysis & Prevention* 29 (1991); McCartt (2000), *supra* note 10; and David McKane, Three-State Effort Enforces Hours of Service Regulations, *The Guardian*, July/Aug. 1994, at 4; Kenneth L. Campbell & Michael H. Belzer, Hours of Service Regulatory Evaluation Analytical Support UMTRI-2000-11, U. Michigan (2000); and Lawrence J. Ouellet, Pedal to the Metal (Paula Rayman & Carmen Sirianni ed., Temple U. Press) (1994).

percent of drivers in Pennsylvania and 12 percent of drivers in Oregon reported dozing at the wheel when interviewed in 2003.

Other preliminary findings of the 2005 survey indicate little change from the 2004 findings. That is, drivers reported driving substantially more on a daily and weekly basis and violating the HOS rules at about the same rates as before the rule change. A notable exception was reported hours taken off-duty in a typical daily shift. The number of drivers reporting that they typically take less than the required 10 hours off duty declined from 2004 to 2005 in both Pennsylvania and Oregon. The Institute submitted findings from the 2003-2004 surveys to FMCSA in a preliminary report which included extensive detail on the methods used to conduct the survey and the analytical methods used to interpret the data. FMCSA's response to the Institute's findings that the new HOS rule had not improved driver fatigue reveals its disdain for the Congressional mandate to "reduc[e] fatigue-related incidents and increas[e] driver alertness." 49 U.S.C. § 31136.

IIHS' data regarding drivers dozing while driving is not supported by current crash data; the data suggest that the number of fatigue crashes have decreased in the first 9 months of 2004 (43 fatigue crashes) compared to the first 9 months of 2003 (54 fatigue crashes). Therefore, *even if the IIHS data is accurate and statistically significant, the dozing behavior does not appear to be related to an increase in fatigue-related crashes.* It is difficult to comment without knowing all of the details regarding the IIHS survey. However, based on the Agency's experience, one would expect that a two percentage point increase in reported dozing

could be a function of sampling error and statistically insignificant. (Emphasis added.)²¹

As noted above, the 2003-2004 IIHS data is important because it showed that the new rule has failed to *reduce* driver fatigue. Subsequent research shows a statistically significant increase in reported dozing in 2005 compared with 2003 (from 13 to 19 percent in Pennsylvania; 12 to 21 percent in Oregon).

FMCSA's indifference to reports of drivers actually dozing while at the wheel speaks for itself.

CONCLUSION

The Federal Motor Carrier Safety Administration should have strengthened existing hours-of-service rules. Instead, ignoring strong evidence of the correlation between maximum driving hours and crash risk, it promulgated a rule with a restart provision that allows an increase in permissible driving hours of as much as 28 percent. For these reasons the Institute supports the Petitioner in this case.

²¹ 70 *Fed. Reg.* 49978, 50003.

CERTIFICATE OF COMPLIANCE

I, Michele McDowell Fields, certify that the Brief of *Amicus Curiae* Insurance Institute for Highway Safety complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B), has a typeface of 14 points and contains 4,366 words, relying on the word count of the Microsoft Word 2000.

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 3rd day of July, 2006, she caused two copies each of the foregoing *Amicus Curiae* Brief to be served by first-class United States mail, postage pre-paid on the following:

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