

Wrecker Service Accident Clean Up: What is Reasonable?

BY TOM CHASE

Towing and related work by wrecker service companies for accidents involving commercial motor vehicles can be a complex and expensive endeavor, creating potential questions about what may be charged, when cargo may be retained, and how disputes regarding such issues can be resolved. In *Wayne's Automotive Center, Inc. v. South Carolina Department of Public Safety*, Opn. #5756 (Ct. App. August 12, 2020), the South Carolina Court of Appeals evaluated a finding of the Administrative Law Court ("ALC") reducing a sanction issued by the South Carolina Department of Public Safety ("SCDPS") against a wrecker service company for billing and retention of cargo for work stemming from the SCDPS wrecker rotation list. The case provides insight not only into the regulatory authority held by the SCDPS associated with wrecker service companies on the list, but also the means by which disputes on billing and cargo retention for the work may be evaluated under South Carolina law.

The sanction at issue arose from cargo retention and billing by Wayne's Automotive Center, Inc. ("Wayne's"), a wrecker service company on the approved rotation list with the SCDPS. Wayne's was called on February 9, 2016 to perform wrecker service operations for an accident involving an overturned tractor-trailer owned by J.H.O.C., Inc. d/b/a Premier Transportation ("Premier") on the I-20 bridge over the Savannah River near the South Carolina/Georgia border. The tractor-trailer was hauling a large load of dog food for a customer at the time of the accident. Wayne's performed towing and related operations, including uprighting of the overturned vehicle, clean-up work and cargo preservation, that required the use of multiple vehicles, laborers, operators and other equipment. Pursuant to request by Premier, Wayne's prepared an invoice on February 11, 2016, but then issued a supplemental invoice on February 15, 2016, while Wayne's retained possession of the cargo and the commercial vehicle. Premier, by and

through their insurance representative, contested numerous charges on the invoice and demanded that the cargo be released. After an agreement could not be reached, Premier contacted the SCDPS regarding the billing and cargo issues. The SCDPS then contacted Wayne's and provided recommendations for billing revisions and the release of the cargo. After some disagreement with the recommendations, Wayne's ultimately reduced the bill and agreed to release the cargo. A revised, lowered bill was issued on February 26th and Premier paid the final invoice on March 4th. The cargo was released and picked upon March 7, 2016.

Although the billing and cargo release was resolved, the SCDPS took further action because its representative felt that certain actions by Wayne's were unreasonable, including allegations of overcharging for certain labor, double billing and delayed release of the cargo. A recommendation was made within the SCDPS to remove Wayne's from the approved wrecker rotation list, but ultimately the SCDPS issued a sanction suspending Wayne's from the wrecker rotation list for 120 days. Wayne's initially appealed the sanction within the SCDPS, but the sanction was upheld. Wayne's then appealed the sanction to the ALC, which reduced the suspension to 60 days after a hearing, finding in favor of Wayne's on certain issues but also finding some double-billing and that Wayne's failed to provide supporting documentation of subcontracted labor. Wayne's appealed the decision of the ALC to the South Carolina Court of Appeals claiming the ALC erred in not vacating the suspension entirely. The SCDPS cross-appealed claiming the ALC erred in not upholding the original suspension. The Court of Appeals ultimately upheld the decision of the ALC, finding substantial evidence supported the reduction of the suspension, but not its elimination.

The opinion provides a good explanation of the regulatory law and other standards that apply to wrecker service work performed pursuant to the SCDPS approved rotation list. The following outlines some of the framework that may be useful in evaluating wrecker service work from both the perspective of commercial motor carriers and wrecker service companies.

1. The regulation and associated fee schedules for wrecker services performed pursuant to the SCDPS rotation list provide instruction on fees for services and methods of operations.

Towing companies may voluntarily request, by application, to be placed on a list of approved towing service providers with the SCDPS. S.C. Code Ann Reg 38-600 (2011) provides the general regulatory framework for the operation of wrecker companies in providing wrecker services pursuant to this rotation list. The regulation includes governance on (1) qualification criteria; (2) wrecker service rotation list/responsibilities; (3) complaints/disciplinary procedures; (4) wrecker classification; and (5) rates. The regulation includes governance of fees that may be charged for wrecker services. However, the regulations on fees only apply to wrecker services provided pursuant to the SCDPS rotation list.

The fees that may be charged by a wrecker service company on the SCDPS list are generally categorized by (1) class of wrecker, and (2) for each class of wrecker, the type of operations involved, to include standard towing, heavy-duty towing, storage and special operations. Each wrecker service company is required to submit proposed fees with its annual application, meaning a fee schedule is created and approved for each year. The approved fee schedule must be kept in the wrecker at all times and is required to be presented upon request at the scene to the person for whom the tow services are provided or their agent. Certain types of standard tows have a fee rate associated with the work. However, "special operations" fees often are dependent on the actual services provided, considering they may involve complex operations. "Special Operations" are defined to



include work associated with the uprighting of overturned vehicles or returning vehicles to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle or the recovery of a spilled load or off-loading and reloading of a load from an overturned vehicle. See, S.C. Code Ann Reg. 38-600 (F)(2)(a)(2)(2011)(Defining "Special operations").

In this case, the fee schedule provided that the wrecker service could recover "the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job" by submission of an itemized invoice or receipt from the provider. Therefore, while certain fees may be readily ascertainable at the scene of the work, other fees will necessarily have to be clarified by means of an itemized bill upon completion of the work. However, the wrecker service should provide only one bill to the owner or operator, including evidence of any fees included for subcontractor costs. S.C. Code Ann. Reg. 38-600(C)(15)(2011). In this case, Wayne's was found to have failed to provide one invoice that accounted for all work, including subcontractors. Additionally, the itemization created questions about double-billing for certain services, as noted.

2. The SCDPS has substantial authority related to wrecker service work performed by companies on the approved wrecker rotation list, including the fees charged.

Although this appeal did not involve the commercial motor carrier, the opinion identifies certain procedures that may be followed by commercial motor carriers to contest billing or cargo retention by wrecker service companies for work performed pursuant to the wrecker rotation list with the SCDPS. Pursuant to the regulation, the SCDPS has substantive discretion to review billing by wrecker companies on the list, including, but not limited to, consideration of the

applicable fee schedule, the reasonableness of the charges based on industry standards and comparison to rates charged for similar services. Therefore, a commercial carrier with issues regarding billing practices or cargo retention of a wrecker service provider can present the issues directly to the SCDPS, who will then have the discretion to review the specific circumstances associated with the wrecker service company. The SCDPS has the authority to get directly involved in the dispute and even issue recommendations related to the billing or cargo issues. While the towing company does not have to follow the recommendations of the SCDPS, the SCDPS retains the right to sanction the wrecker service company for unreasonable practices, including related to billing and cargo retention. The Court of Appeals noted that the SCDPS has discretion to sanction with oral reprimand, written reprimand, immediate suspension from the approved list, suspension for cause from the approved list or even removal from the approved list.

The Court of Appeals noted that the applicable regulation provides for an advisory committee to be created to review, upon request of the SCDPS, complaints related to the regulation. S.C. Code Ann 38-600(D)(5)(2011). This advisory committee is made up of experts in the towing industry and may provide opinions on "fair and reasonable resolution" of disputes under the regulation. However, per the Court of Appeals, the committee is merely advisory, meaning the SCDPS may choose whether or not to follow any recommendations from the advisory committee. Therefore, the potential use by the SCDPS does not create a substantial right for any party to the dispute.

Of further note, the payment of the final invoice by the party for whom the services were provided does not render the SCDPS investigation and sanctioning for wrecker service work moot. Therefore, whether or not a sanction by the SCDPS will be upheld is not resolved either way upon payment of the

wrecker service bill by the party for whom the service was provided.

3. A wrecker service company that disputes a sanction by the SCDPS has the ability to appeal the decision.

Where sanctions are imposed, a wrecker service company has the ability to appeal any sanction first within the SCDPS and then to the ALC. Upon appeal to the ALC, the SCDPS has the burden to prove by a preponderance of the evidence that the sanction was warranted under the circumstances. This is a de novo review of the sanction and evidence and witnesses, including experts, may be presented.

Where billing practices and cargo retention are involved, the Court of Appeals noted numerous considerations that provided substantial evidence supporting the ALC's decision in this case, to include the following:

- a. Time to complete the work;
- b. The rate charged for equipment;
- c. Whether a single itemized bill was provided to include subcontractor work;
- d. The labor required to perform the work;
- e. Certain "mark-ups" for liability, taxes and insurance expenses;
- f. Operator costs for equipment;
- g. Equipment utilized for the work;
- h. The complexity of the work, including for the cargo at issue (recovery, repacking, transportation and storage);
- i. Billing for similar work by other companies in the area;
- j. Evidence of double-billing; and
- k. Reason for retention of the cargo.

4. Whether cargo owned by a third party is considered "personal property" may affect the release of cargo removed from an accident by a company performing wrecker services.

S.C. Code Ann. 56-5-5635(F)(2018) provides the statutory requirements for the release of personal property from a vehicle in the possession of a towing company. Personal property that is in the towed vehicle that does not belong to the owner of the vehicle must be released to the owner of the personal property. However, evidence of ownership of the property is required prior to the release. In this case, Premier was carrying dog food for a third party customer. The ALC determined that the dog food constituted "personal property," as did the SCDPS in its initial evaluation of the circumstances. However, the Court of Appeals did not express an opinion specifically whether the cargo would be considered personal property subject to release under the statute. Rather, the Court of Appeals stated that the statute was open to different interpretations on this issue, meaning that the respective parties to a dispute on the release of cargo should be prepared to provide not only clear evidence of ownership, but also whether the cargo is considered personal property of such owner pursuant to the statute where a cargo retention issue arises.

5. A decision by the ALC will be affirmed by the Court of Appeals where there is substantial evidence in the record to support its decision.

Although an appeal from the finding of the ALC is available to both the wrecker service company and the SCDPS associated with a sanction issued by the SCDPS, the Court of Appeals will not substitute its judgment for the ALC's decision where there is "substantial evidence" in the record to support the decision. S.C. Code Ann. §1-23-610(B)(2018). Per the Court of Appeals, "[s]ubstantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Holmes v Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 717 S.C. 2d 751, 752 (2011)(quoting *Pierre v Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)). In other words, the

fact that reasonable minds may differ as to the judgment will not allow for the judgment to be set aside, given guidance regarding whether an appeal to this level of court will be successful on other cases.

Overall, the decision is limited in application to wrecker service work performed pursuant to the SCDPS wrecker rotation list. However, as to that work, the decision provides guidance on the means to deal with disputes between commercial motor carriers and wrecker service providers regarding wrecker service work. Additionally, the opinion clarifies the SCDPS's authority over wrecker service companies for wrecker rotation list work and also provides guidance on the types of evidence may be considered in evaluating the reasonableness of billing or cargo-retention actions in work by wrecker service providers.

