



THE EVOLVING USE OF CSA IN LITIGATION

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By now, everyone in the commercial motor carrier/transportation industry is familiar with the Compliance Safety Accountability Act of 2010 (CSA). Unfortunately, just as the industry was coming to grips with the practicalities of the program, many safety directors and industry officials likely feel as though they are being forced to shoot at a moving target, as the CSA unveiled substantial changes to the program in December 2012. This article addresses the recent CSA revisions and the ongoing evolution of CSA in transportation litigation.

On December 1, 2012, the following changes to the CSA regulations went into effect:

1 The FMCSA changed the Fatigued Driving BASIC to the Hours-of-Service (HOS) Compliance BASIC. This category will now focus more on HOS documentation requirements that, on their own, may not correlate with a fatigued driver or a driver who's exceeded their legal hours on

the road. The CSA will also now treat paper and e-driver logs equally.

2 The FMCSA changed the Cargo-Related BASIC to the Hazardous Materials (HM) Compliance BASIC. The Administration claims that the change will allow it to better identify hazardous materials safety and compliance problems. Under the new change, whether a carrier is considered an HM carrier is now a determination made by the FMCSA. The FMCSA acknowledged, at least to some extent, that the new rules could cause carriers' scores to spike, especially those who were not previously identified as HM carriers. Accordingly, the agency will keep the HM BASIC scores private for one year.

3 The FMCSA updated the Vehicle Maintenance BASIC. Load securement violations, which were once part of the Cargo-Related BASIC, will now be included in Vehicle Maintenance. Flatbed carriers complained that they had higher cargo-re-

lated BASIC percentile ratings, due to the visibility of their securement issues. The revision will address what was arguably an unfair comparison to closed-container carriers.

4 The FMCSA removed vehicle violations from driver-only inspections. Likewise, driver violations were removed from vehicle-only inspections. Carriers will no longer be penalized for violations that were outside the scope of an inspection. Any violations found outside the scope of a particular inspection (such as a driver violation found during the course of a vehicle inspection), will no longer be recorded in the SMS, though they will continue to appear on a carrier's inspection report.

5 Violations of Intermodal Equipment Provider regulations will now be recorded in the SMS, and will include violations that should be detected and corrected during a drivers' pre-trip inspection.

6 The Safety Measurement System (SMS) was modified to provide fact-based descriptions associated with crashes, rather than relying on coded terms such as “inconclusive” and “insufficient data.” The SMS will also separate crashes with injuries from crashes with fatalities, making it easier to decipher what types of accidents a carrier has been involved in.

7 Speeding violations between 1 and 5 MPH recorded within the previous 24 months have been removed from the SMS, and violations falling in that speed range will no longer be assessed from this point forward. The FMCSA also lowered the severity rating of general speeding violations to a score of 1.

8 The FMCSA updated the definition of passenger carrier within the SMS, so that those carriers can be more easily identified. The FMCSA intends to place a safety priority on passenger transportation companies, noting that “motor carriers subject to the passenger carrier threshold in the SMS are held to a significantly higher standard than non-passenger carriers.”

Assuming that motor carriers are able to bring themselves up to speed on these changes, and keep track of what oftentimes seems like a shifting regulatory landscape in the form of the CSA, what can carriers expect in terms of CSA metrics appearing in litigation? Perhaps the best predictor of what the future holds for the transportation industry takes the form of a lawsuit pending in the United States Court of Appeals for the District of Columbia Circuit, *Alliance for Safe, Efficient and Competitive Truck Transportation (ASECTT), et al. v. FMCSA*. In real terms, the ASECTT brief, filed in December of 2012, raises the following issues, which stem from an educational Power Point presentation released by the FMCSA:

1 Whether the CSA and the SMS are unlawful and/or constitute rules that were not issued in accordance with applicable law and procedure;

2 Whether the SMS uses flawed statistical methodology that misrepresents the safety performance of motor carriers;

3 Whether the implementation of the CSA represents a departure from an arguably established policy that SMS scores do not constitute safety ratings; and

4 Whether the FMCSA inappropriately allocated safety determination authority to state agencies.

According to ASECTT, its members “are con-

cerned that while CSA’s SMS methodology is a work in progress, portions of it have been released to the public without proper vetting, including but not limited to, the most basic scientific and statistical studies necessary to justify a nexus between the compliance violations measured in each of the so-called 7 BASICs and crash predictability.”

The FMCSA filed the Respondent’s Brief in January of this year. The Brief notes that after implementing the SMS in 2010, public communications staff at FMCSA began monitoring the public’s understanding of SMS data and concluded that additional educational materials would aid the industry in understanding the purposes of SMS. It consequently developed a set of Power Point slides further explaining the SMS, which were first posted to the Agency’s web site in May of 2012. The FMCSA argues that the Power Point presentation at issue is not a legislative rule that is subject to notice and comment rulemaking, does not establish standards or procedures for making an official safety fitness determination and does not constitute binding standards the Court can review. Further, the FMCSA claims that, to the extent the Power Point does provide a basis for judicial review, it falls within the Agency’s statutory duty to promote commercial vehicle safety and set minimum safety standards.

The ASECTT petitioners filed their Reply Brief on February 11, 2013. That Brief argues that, regardless of whether the information released by the FMCSA comes from a Power Point, it has real-world legal and practical consequences and, in effect, constitutes a legislative rule. Accordingly, the petitioners claim that the Agency cannot evade a review based on technical grounds.

The issues are now fully briefed and before the Court, although the Court has not scheduled oral argument. It appears that the best argument available to the FMCSA is based on procedural grounds, meaning that if the Agency wins, the issues will likely be litigated again. Ultimately, the Agency will have to address questions regarding whether its data can be used to accurately predict unsafe and/or high-risk carriers. In that regard, Wells Fargo Securities, LLC funded a study finding no statistical relationship between a carrier’s actual accident incident rate and the scores for Unsafe Driving, Fatigued Driving (the old version) or Driver Fitness BASICs. Additional studies resulted in similar conclusions and have suggested that there are problems with the way violations are weighted (an improper lane change is a 5 point violation, while a seatbelt violation is 7 points), the variance between inspection rates from state to state,

the quality of the data collected and the means available to change reported data (DataQs).

Given the problems inherent in the way the SMS collects and utilizes data, one has to believe that the CSA, as it’s currently structured, won’t remain in effect long-term. Given what’s at stake in terms of the arguable impact on the smaller carriers within the industry, and the expanding vicarious liability exposure associated with the program, the stakes are too high for the industry to cease legal challenges. Nonetheless, until the FMCSA lands on the final form of the program, the industry will continue seeing an increase in vicarious liability claims, or those claims where plaintiffs blame brokers, shippers or insurers for using and/or insuring “unfit” carriers. Courts are increasingly allowing plaintiffs to pursue vicarious liability claims under the theory that federally licensed independent motor carriers are the agents of a federally licensed broker. Thus, if a motor carrier causes an accident, the broker as well as the motor carrier are both sued for damages, even though the broker-motor carrier relationship is not one that was previously considered an employer-employee relationship. Brokers and carriers are both questioning the accuracy of the SMS and BASIC scores, yet are still being forced to weigh them prior to contracting a load. In addition, the CSA created an entirely new discovery toolbox available to the plaintiffs’ bar. The discovery that is tailored to CSA issues will continue to grow more sophisticated as the program matures and the FMCSA begins releasing more data to the public. Hopefully, the litigation environment will change with a favorable ruling in the ASECTT case. Until then, motor carriers cannot afford to let their CSA guard down.



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