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What's the Score?

The Rising Impact of Motor Carrier CSA Scores

By Nicole Koppitch and Jerry Craig

On December 13, 2010, the Federal Motor Carrier Safety Administration (FMCSA) launched its Compliance Safety Accountability (CSA) program. The centerpiece of CSA is the Safety Measurement System (SMS), which analyzes safety-based violations from inspections and crash data to determine a commercial motor carrier's on-road performance. The SMS uses seven safety improvement categories called BASICs to examine a carrier's on-road performance and potential crash risk and then assign a score to the carrier. The carrier is assigned a score from one to 10 in each category with ine

representing the lowest crash risk and 10 representing the highest.

By reviewing violations within each of the seven categories, the intention of the FMCSA is to identify high-risk behaviors with a specific carrier and apply early intervention to minimize those behaviors. However, the implications in doing so are heavy for carriers because CSA scores in all but two categories, Cargo-Related and Crash Indicator, are public. You can be sure that whenever a carrier is involved in a collision, a savvy plaintiff's attorney will get his or her hands on a carrier's CSA score as early as possible.

Wading Through

Though not made public, a carrier's

Cargo-Related and Crash Indicator scores are not necessarily off limits to a potential plaintiff or counsel. By virtue of simple written discovery, the opposing side may be able to obtain this information. This may include requests for the Carrier's Profile or any documentation related to any intervention assigned to that carrier. In some cases, a carrier may pose viable discovery objections to disclosing some or all information related to a specific accident where certain scores may not be relevant or the request is overly broad.

Once the score is made available, the question then becomes what can the other side do with it? Alternatively, when a compliant carrier has a low

score, the be the carrier c shield to liab

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score, the better question is, should the carrier offer its CSA score as a shield to liability?

Using CSA Scores

The Federal Motor Carrier Safety Act Part 385 does not address the admissibility (or non-admissibility) of CSA scores. In fact, to date, there are no specific regulations, rules or statutes addressing the use and admissibility of CSA scores in litigation. Limited case law is split as to whether the scores are admissible under evidence rules. Likely, the admissibility of these scores will continue to be a case-by-case determination based upon the nature of the accident, the nature of the claims and the nature of the request.

Certainly when a carrier has a low CSA score, that score can play to the carrier's advantage. Though a good score will not insulate a company from liability, compliance can be used to mitigate, or in some cases, absolve, negligent hiring, negligent entrustment, negligent retention, negligent training and negligent maintenance claims against the carrier.

Further, a strong CSA score can assist a complaint motor carrier in defending a claim for punitive damages, which requires a plaintiff to prove the carrier was reckless and/or wanton. Certainly a pattern of compliance within the BASIC categories supports the position that a carrier did not proceed with reckless disregard when it comes to hiring, retaining, supervising and training drivers.

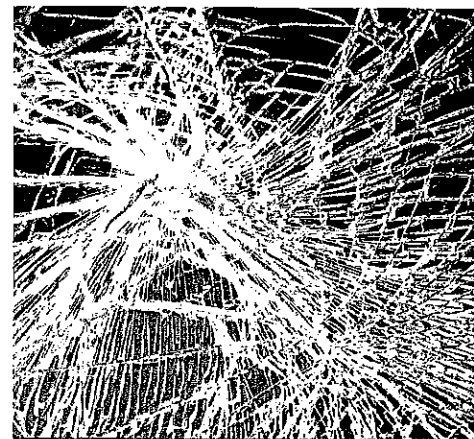
The Pitfalls

Of course, for every good score, there are those carriers with undesirable scores and plaintiffs looking to use those scores as a sword. In those cases, the best approach for a carrier is to dispute the reliability of the scores. Carriers should cite the FMCSA website, which includes a disclaimer in which it advises that a reader should not draw conclusions from the data displayed on the system. In fact, the FMCSA is clear that unless a carrier has been issued an unsatisfactory safety rating, it is authorized to lawfully operate motor vehicles.

The methodology for determining CSA scores is routinely evolving and, in fact, as late as December 2012, the FMCSA had yet again posted new updates to its methodology in determining scores. These revisions are based partly upon ongoing public comment and research. Probably the most problematic issue for carriers is that the CSA score does not consider fault when calculating the BASIC score for Crash Indicator. This means a carrier's score for Crash Indicator will increase as the result of a collision regardless of whether the collision was avoidable or unavoidable.

All of these factors support the position that CSA scores are simply unreliable. Under Federal Rule of Evidence 403, carriers should argue that any probative value of a CSA score is far outweighed by the prejudicial value. Further, to the extent a plaintiff is attempting to offer CSA scores through expert testimony, Federal Rule of Evidence 702, expert opinions must be the product

of reliable principles. As reflect in the FMCSA disclaimer, CSA scores are not the product of reliable methods and principles. Rather, these scores are simply intended to assist the FMCSA in the early identification and intervention of potential problematic behavior.



BACK TO BASICS

The Safety Measurement System seven safety improvement categories, the BASICs, are:

- Unsafe Driving
- Fatigued Driving (Hours-of-Service)
- Driver Fitness
- Controlled Substances/Alcohol
- Vehicle Maintenance
- Cargo-Related
- Crash Indicator

Both Ways?

The landscape right now is unclear. As the popularity of CSA scores continues to rise, ongoing litigation as to the discoverability and admissibility should be expected. However, in the absence of any strong case law, carriers are in the best position to pick and choose when they might utilize CSA scores. Of course, carriers should do so with caution, as decisions being made on these issues will undoubtedly play a significant role in the future of trucking litigation. **LM**

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