

FMCSA's Formal Adoption of Crash Accountability Program Signals Shift for Non-Preventable Accidents

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On May 1, 2020, the FMCSA expanded its Crash Preventability Demonstration Program (CPDP) to remove accidents deemed "non-preventable" from its prioritization algorithm. If an accident is found to be non-preventable in the CPDP's review, the Safety Measurement System (SMS) will exclude the accident from a carrier's score and note the non-preventable determination in a driver's Pre-Employment Screening Program (PSP) report. Exactly how the CPDP will review accidents, what criteria it will use, and insight into the decision-making process warrants further examination.

This decision stems from the August 2019 CPDP asking motor carriers to submit information and documentation regarding eligible accidents that occurred on or after August 1, 2019. If a carrier is involved in one of the eligible types of accidents, the carrier can submit a request to the FMCSA along with the accident report and supporting documentation. The FMCSA will review the request and make a case-by-case decision of whether the accident is deemed "non-preventable" and therefore excluded from the carrier's SMS profile. The following types of accidents are eligible for review:

- Rear End: accidents where a commercial motor vehicle (CMV) is rear-ended
- Wrong Direction/Illegal Turns: accidents where the CMV was struck by a vehicle traveling in the wrong direction or making an illegal turn
- Parked/Legally Stopped: accidents where the CMV is parked or legally stopped
- Failure of Other Vehicle To Stop
- Under the Influence: accidents where the driver of the other vehicle is under the influence as judged by the legal standard of the jurisdiction where the accident occurred
- Medical Issues, Falling Asleep, or Distracted Driving: accidents where the other driver had medical issues, fell asleep, or was driving while distracted
- Cargo/Equipment/Debris or Infrastructure Failure
- Animal Strike
- Suicide: accidents where the CMV was struck by a person committing or attempting to commit suicide
- Rare or Unusual: examples include being struck by an airplane or skydiver

According to the FMCSA's press release, approximately 56% of the accidents submitted for review were eligible. Of those eligible accidents, the FMCSA found that 93% were non-preventable. Those accidents are still listed on the SMS profile, but not included in the carrier's Crash Indicator Behavior Analysis and Safety Improvement Category (BASIC) score in SMS. These accidents will appear as one of three categories: (1) Reviewed, Not Preventable; (2) Reviewed, Preventable; or (3) Reviewed, Undecided.

This change acknowledges certain shortcomings in the FMCSA's SMS scheme. First, a carrier's BASIC score originally included all accidents, regardless of fault, in determining the carrier's safety record. Many critics of the previous system argued that a motor carrier's safety should not be measured by accidents which could not have been avoided by the CMV driver. It is unfair to the driver and the motor carrier. If the goal of SMS and BASIC scores is to measure a carrier's safety record and evaluate whether the FMCSA needs to intervene, the focus should be on those accidents which could have been avoided by the motor carrier or CMV driver. The CPDP is trying to improve that focus.

Second, by excluding non-preventable accidents, the Federal Motor Carrier Safety Administration will be able to better prioritize motor carriers for safety interventions and audits. SMS data was never intended to be used to determine a motor carrier's overall safety fitness or rating. Even the FMCSA warned the public against



making judgments concerning the overall safety, fitness or status of motor carriers utilizing SMS data. With the exclusion of these accidents from a carrier's BASIC score, the SMS data will hopefully provide the FMCSA with a clearer picture as to which carriers might need intervention in the areas of driver fitness, equipment maintenance, and overall safety.

Third, a non-preventable accident will appear in a driver's PSP report with the appropriate annotation to notify a motor carrier of the accident. This additional notation in a driver's PSP report will aid motor carriers in vetting the backgrounds of driver applicants. If a driver is involved in a subsequent accident that leads to litigation and a negligent hiring claim, a carrier could be attacked for not investigating these accidents appearing on a PSP report, even though a driver had a valid defense to the accident.

If the motor carrier feels that an accident has appeared on the carrier's BASIC score in error, the carrier must follow certain steps in order to seek a Request for Data Review (RDR) with the FMCSA. In order for a motor carrier to seek review of any such accident, the carrier must check several boxes in order to be eligible:

- The carrier must submit a police accident report prepared by the appropriate jurisdiction's law enforcement agency. One important caveat is that if no police report has been prepared or a report is not attached to the carrier's RDR, the FMCSA will automatically close the request.
- The carrier must submit drug and alcohol tests for fatal crashes (or the required documentation under 49 C.F.R. § 382.303(d)(1)-(2)).
- The carrier has the burden of submitting "compelling evidence" that the accident is within an eligible category listed above and not

preventable.

- The carrier must submit evidence in support of the RDR which can include videos, pictures, and court documents.
- If requested by the FMCSA, the carrier must provide additional documentation within 14 days.

If an accident does not have an accident report, as might be the case with loading dock accidents, parking lot accidents, or accidents occurring on private property, the FMCSA will automatically close the request. The FMCSA's stance on the need for a police accident report underlines the importance of notifying authorities and requesting a formal police accident report, especially in instances where the CMV driver was not at fault. Although burdensome for a minor accident, requesting a police report should be something the carrier considers for many accidents.

Other issues with SMS data and BASIC scores still remain. It is unclear what transparency the CPDP's decision-making process will have for motor carriers and drivers. Will motor carriers have access to background information underlying the FMCSA's ruling? How readily will the FMCSA provide such information to inquiring drivers and motor carriers? Even though these questions will have to be answered, the FMCSA's shift in allowing an appeal of a mistaken preventability determination is a step in the right direction for carriers and CMV drivers involved in accidents through no fault of their own. We at Momar have regularly assisted carriers with filing RDR's in the DataQ system and have experienced how frustrating it is to reach the right result in that process. We are glad the FMCSA is at least starting to improve the process.