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## Reducing Accident Liability Has a Lot to Do with Your Policies

By *Schaun D. Henry*

Despite all of your safety efforts, the sheer number of miles logged by your drivers means that they are likely to have an accident at some point. The savvy employer will want to have an eye on reducing the likelihood of liability in such cases. You will recall that, until 1997, The Safe Stat Accident Safety Evaluation Area ("Safe Stat") included preventability in assessing motor carrier accidents. Beginning in March 1997, changes in the compliance review methodology removed preventability from the factors to be considered by Safe Stat. As a result of these changes, the recordability/preventability accident indicator was replaced by the recordable accident indicator.

The recordable accident indicator makes all crashes that are recordable part of the safety analysis. The current safety fitness regulation states that the Federal Motor Carrier Safety Administration ("FMCSA") will look solely at the accident rate per million miles in assigning fitness ratings. Only when a carrier objects to a particular rating is there any consideration of preventability. In that instance the burden, which is quite high, is on the carrier to present compelling evidence to establish that the recordable accident rate is not a fair means of assessing preventability. FMCSA defines compelling evidence with specific examples, including police reports, other verifiable government reports, or law enforcement and witness statements. 73 Fed. Reg. 53384.

Under FMCSA's new safety analysis program, Comprehensive Safety Analysis ("CSA" or "CSA 2010"), FMCSA does not look at preventability of an accident in its evaluation. Rather, it looks to the frequency and severity of accidents. Under the

criteria established by CSA, crashes involving injuries, fatalities and hazardous waste spills are assigned a greater weight than those resulting in only a vehicle being towed away.

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While an internal investigation of the accident may ultimately answer the whys and wherefores of what happened, internal investigations can also set a company up to fail in accident litigation. Because courts have held that an internal investigation may be discoverable, there is always a danger that the information found during the internal investigation will have to be turned over to the opponent in litigation. As such, as is always the case in business, and the law, the balance of pros and cons must be weighed and considered before diving in.

Preventability determinations are not required to be made in an internal investigation. An effective safety program can be administered on the theory that "an accident is an accident." Every accident can be viewed as requiring further attention, but not necessarily an internal investigation in which a determination of preventability will be made. That further attention could be training, discipline, and other corrective action. Carriers may still have the

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need to categorize accidents. In such cases, carriers should consider alternative classifications such as:

- a. Non-reportable accidents;
- b. Reportable accidents – no citation; and
- c. Reportable accidents – citation.

Understanding this approach, you should consider that every accident is, in theory, preventable and it is the action taken after the fact that truly matters. This method of analysis is completely consistent with FMCSA's expectations. As a carrier, you should recognize that in a trial with a severely injured victim, your defense will be difficult enough. There is no reason to complicate your situation with an admission in internal documents that an accident was preventable.

Although we recommend that you not make a determination regarding preventability, it is nonetheless advisable to conduct

investigations of motor carrier accidents. Given that documents and communications made in the course of internal investigations may be discoverable should an accident proceed to litigation, we advise that you involve legal counsel, and request counsel to be present during all stages of the investigation. By following this advice, communications made regarding the accident will likely be protected from disclosure by the attorney-client privilege. McNees Wallace & Nurick LLC is experienced in assisting with investigations of motor carrier accidents. ■



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