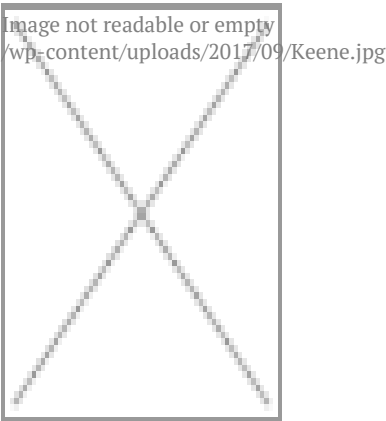


Transportation Officials Withdraw Proposal to Regulate Obstructive Sleep Apnea, Give Doctors Discretion



By Dennis Keene, Bouhan Falligant, LLP

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Transportation officials with the Federal Motor Carrier Safety Administration (FMCSA) and the Federal Railroad Administration (FRA) recently decided not to set specific criteria to test drivers and conductors for obstructive sleep apnea (OSA), an increasingly common respiratory disorder that has been blamed for several major accidents in the last few years. On August 4, 2017, these agencies withdrew their joint advance notice of proposed rulemaking relating to OSA.

OSA sufferers repeatedly stop and start breathing during sleep. This leads to attention problems and excessive daytime sleepiness posing a considerable risk to highway traffic.

The 2014 FMCSA National Survey of Long-Haul Truck Driver Health and Injury found that up to 59 percent of drivers may suffer from OSA. Obesity is one of the main causes of the condition. That survey found that 69 percent of commercial drivers are obese, 17 percent are morbidly obese and 51 percent smoke, a habit that triples the risk of developing OSA.

In 2016, a University of Minnesota Morris Research Study found that truckers with untreated sleep apnea are five times as likely to crash. In 2015, 745 heavy and tractor-trailer truck drivers died, more than any other occupation, according to the Bureau of Labor Statistics (BLS). Total truck- or bus-related fatalities in 2015 jumped to 4,337 from 4,168 the year prior, according to the FMCSA. These crashes led to 138,000 injuries in 2015 up from 132,000 in 2014.

In order to combat the effects of OSA on highways and railroads, the FMCSA and FRA proposed a regulation that would require all drivers with a morbidly obese Body Mass Index (BMI) of 40 or higher or drivers with an obese BMI of 33 or higher and one other contributing factor to be tested for sleep apnea.

By withdrawing the advance notice of proposed rulemaking, criteria to detect, monitor and treat OSA reverts back to doctor discretion. The FMCSA directed medical examiners in January 2015 to refer drivers for apnea testing if they the driver's respiratory condition is in any way likely to interfere with the driver's ability to safely control and drive a commercial motor vehicle."

The vagueness of this recommendation prompted some drivers and industry leaders to complain of unwarranted referrals. Drivers are concerned about this because often they have to pay for the testing and they lose time from work. An American Transportation Research Institute Study found that 53 percent of truck drivers had to pay for some or all of the OSA testing and monitoring which costs \$1,200 on average.

One driver appealed his case all the way to the U.S. Supreme Court after being fired for refusing an in-lab sleep apnea test. His former employer, Crete Carrier Corp., has required all drivers with a BMI of 35 or more to be tested for OSA since 2010. The 8th Circuit Court of Appeals ruled that the carrier can require sleep apnea testing and the U.S. Supreme Court recently solidified the decision by refusing to hear the case.

If a driver develops OSA, doctors generally recommend using a continuous positive air pressure (CPAP) machine. The CPAP is a pressurized breathing mask worn at night to promote restful sleep to help drivers stay alert. Trucking companies generally require proof of CPAP use before allowing drivers to get back behind the wheel. But the Owner-Operator Independent Drivers Association recently stated that CPAP monitoring violates federal medical record and personal health information privacy laws, opening up monitoring carriers to possible lawsuits.

Since regulators cracked down on drivers' medical qualifications in 2014, about 70,000 drivers have been disqualified from driving due to sleep apnea. Hiring and training new commercial drivers can cost as much as \$9,000 per driver so the impact on motor carriers can be significant.

But on the other hand, motor carriers have already lost lawsuits for not closely monitoring their drivers. For example, Greyhound recently paid \$6 million when a driver with untreated sleep apnea crashed a bus driving from Cincinnati to Detroit in 2013.

Since the FMCSA and FRA elected to forego its efforts to develop regulations pertaining to OSA, motor carriers should evaluate their practices and consider consulting with a qualified attorney who can help them weigh their options to ensure their drivers with OSA are safe stewards on the road.

Attorney Dennis Keene is a partner at Bouhan Falligant whose practice focuses on transportation and logistics, mediation, and product liability. He can be reached at 912-232-7000 or dkeene@bouhan.com.

Practice Areas

- Mediation & ADR
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Attorneys

- Dennis B. Keene