Sleep Apnea: A Primer for Defense Lawyers in the Trucking Industry

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Introduction

In 2017, the Federal Motor Carrier Safety Administration (FMCSA) abandoned its pursuit of a regulation that would require trucking companies to test drivers and driver candidates for obstructive sleep apnea. This development was welcomed by many in the trucking industry. This article summarizes the history behind that decision, the current regulatory status regarding obstructive sleep apnea testing and the trucking industry's general approach to testing. It also discusses litigation tactics used by plaintiffs' lawyers against the trucking industry for failure to test for obstructive sleep apnea.

Sleep Apnea 101

Obstructive sleep apnea (OSA) is a respiratory disorder affecting a person's ability to breathe continuously during sleep. OSA causes intermittent interruption of air flow due to either a partial (hypopnea) or complete (apnea) obstruction of the upper airway. OSA has been found to impact the effectiveness of restorative sleep, potentially leading to excessive daytime sleepiness and fatigue.

The presence of OSA is most commonly diagnosed via "in-lab" sleep studies, which calculate an apnea/hypopnea index (AHI). In simple terms, the tests measure the number of times per hour that normal breathing is compromised. While most persons suffer from some degree of sleep apnea (a perfect score on apnea test is rare), it is has been argued in the medical community that an AHI score below 20 indicates that the test subject is at a low risk for excessive daytime sleepiness. The medical community generally characterizes individuals with an AHI score of 15 – 30 as suffering from "moderate" OSA, while an AHI score of 30 or higher is generally characterized as "severe" OSA.

Whether a driver experiences fatigue or excessive daytime sleepiness at or above any particular AHI score will vary from driver to driver depending upon their unique characteristics and circumstances. The research to date regarding the impact of OSA on commercial drivers and non-commercial drivers is, in the opinion of the authors, inconclusive regarding the magnitude of the potential increased safety risk associated with driving while suffering from OSA.

The factors that may contribute to the presence of OSA vary from person to person. The medical community generally considers poor diet, poor physical fitness, poor sleep habits, family history of OSA, old age and smoking to be factors that may contribute to the presence of OSA. Other conditions commonly associated with an increased risk for OSA include diabetes, hypertension and hypothyroidism. Treatment for OSA can include lifestyle changes, surgery, oral appliances and/or the use of Continuous Positive Airway Pressure devices (commonly referred to as CPAP) or Bi-level Positive Airway Pressure devices (commonly referred to as BiPAP or BPAP) to keep the airway open during sleep.

Although there is much debate regarding the physical characteristics that may put a driver at a higher risk for OSA, common physical characteristics associated with OSA include obesity, large neck circumference and an anatomically small throat. With regard to obesity, it has been argued that individuals who have a Body Mass Index (BMI) greater than 33-35 kg/m^2 may be at greater risk for OSA.[1] Some experts believe that individuals with BMIs between 30 and 33 kg/m^2 are also at increased risk for OSA.[2] Despite this concern, an expert panel that made recommendations to the FMCSA in January of 2008 concluded that a BMI of 33 is an appropriate cutoff level for identifying the vast majority of commercial drivers who may suffer from severe OSA.[3] With regard to neck circumference, some experts opine that a neck

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circumference greater than 17 inches in men and 16 inches in women put drivers at a higher risk for suffering from OSA.

History of Sleep Apnea in the Trucking Industry

The FMCSA has never issued a requirement that trucking companies test all drivers and driver candidates for OSA. Rather, the industry has historically relied on the certified medical examiner (ME) to determine whether a driver should be evaluated for OSA and whether the diagnosis should disqualify him or her from driving. In 2000, the FMCSA issued "advisory criteria" providing interpretive guidance to MEs concerning its physical qualifications standards. The advisory criteria were meant to assist MEs in applying the minimum physical qualification standards. They were published with the Federal Motor Carrier Safety Regulations as part of the medical examination report form in 49 CFR. 391.43.[4]

The October 2000 criteria gave the following guidance to MEs in making the determination of whether a driver satisfied the respiratory standard:

> [Because] a driver must be alert at all times, any change in his or her mental state is in direct conflict with highway safety. Even the slightest impairment in respiratory function under emergency conditions (when greater oxygen supply is necessary for performance) may be detrimental to safe driving.
>
> There are many conditions that interfere with oxygen exchange and may result in incapacitation, including emphysema, chronic asthma, carcinoma, tuberculosis, chronic bronchitis and *sleep apnea*. If the MEs detect a respiratory dysfunction that in any way is likely to interfere with the driver's ability to safely control and drive a commercial motor vehicle, the driver must be referred to a specialist for further evaluation and therapy. . . .[5]

Of course, this guidance was not helpful where the ME did not have reason (through lack of knowledge or information) to suspect the driver may have OSA, or where the driver did not self-report a prior diagnosis of OSA.[6]

In January 2015, the FMCSA issued its "Bulletin to Medical Examiners and Training Organizations Regarding Obstructive Sleep Apnea." The stated purpose of the bulletin was to "remind healthcare professionals on FMCSA's National Registry of Certified Medical Examiners (the National Registry) of the current physical qualifications standard and advisory criteria concerning the respiratory system, specifically how the requirements apply to drivers that may have obstructive sleep apnea (OSA)."[7]

The bulletin first restated the applicable FMCSA standard, as set forth in the October 2000 advisory criteria. It then emphasized that the current physical qualification standards and advisory criteria did not provide OSA screening, diagnosis or treatment guidelines for MEs to use in determining whether an individual should be issued a medical certificate. Rather, it was left to their clinical judgment either to withhold certification, or to certify a driver for less than two years due to the need to monitor any serious medical conditions more closely. However, for the first time the FMCSA went a step further and identified markers on which medical examiners could base their decisions.

Notwithstanding the additional information, the bulletin kept the onus on MEs to "identify drivers with moderate-to-severe OSA to ensure these drivers are managing their condition to reduce to the greatest extent practical the risk of drowsy driving."[8] Moderate-to-severe OSA was defined by an AHI of greater than or equal to 15.[9] While denying that it was offering screening guidelines, the bulletin stated that MEs should consider common OSA symptoms such as loud snoring, witnessed apneas or sleepiness during the major wake periods, as well as other risk factors such as BMI, neck size, involvement in a single-vehicle crash, etc.[10] Despite these markers, the medical examination report form was not changed and still only included generic questions about problems staying awake, loud snoring and whether the candidate had a previous "sleep test."[11] Even if these inquiries were answered "yes" by the driver, it was left to the discretion of the ME as to whether he or she would deny or limit certification.

FMCSA Rule Making Regarding Testing for Sleep Apnea

In August 2016, the FMCSA's Medical Review Board (MRB) outlined criteria to *require* truck drivers to be tested for sleep apnea. These recommendations were based on multiple public meetings held jointly by the FMCSA and the Federal Railroad Administration in which board members heard testimony from truckers and industry advocacy groups, along with expert testimony from doctors. This process, initiated on March 10, 2016, is known as an Advance Notice of Proposed Rulemaking (ANPRM), a/k/a a "pre-rule." During the pre-rule phase, these groups were tasked not only with outlining a sleep apnea rule, but also determining whether a rule was needed at all.[12]

The final recommendations for criteria that would require a trucker to be screened for sleep apnea, submitted by the MRB, were as follows:

- (1) has a body mass index greater than 40, OR
- (2) has a body mass index greater than 33 and meets three of the following:
    - age > 42,
    - is male,
    - is a postmenopausal female,
    - has diabetes,
    - has high blood pressure,
    - has neck size > 17in (males) or 15.5in (females),
    - has history of heart disease,
    - snores loudly,
    - has witnessed apneas,
    - has small airway,
    - has untreated hypothyroidism or has micrognathia or retrognathia.[13]

The FMCSA invited comments to the board's recommendations. One year later, in August 2017, upon review of all public comments, the FMCSA determined that current safety programs were the "appropriate avenue to address OSA" and the March 2016 ANPRM was withdrawn.[14] Since official rule making requires an open comment period and other requirements, the FMSCA will need to restart the rulemaking process in order to proceed with such a rule.

Industry Experience Regarding Testing for Sleep Apnea

In the absence of a regulatory requirement by the FMCSA, motor carriers are not currently required by law to test all driver candidates and/or current drivers for OSA. There is also no regulatory requirement that all driver recruits or current drivers who exhibit a single risk factor, such as elevated BMI or large neck circumference, be tested. Most motor carriers therefore continue to rely upon the certified ME to use his or her judgment to certify that a driver is medically qualified to drive. With regard to testing for OSA, it is up to the ME's judgment to determine whether the driver recruit/driver should undergo testing to rule out OSA or other sleep disorders.

Notwithstanding the lack of a regulation, some motor carriers require mandatory sleep testing for all driver recruits/drivers, while others require testing only if the driver recruit/driver exhibits specific risk factors. Examples of risk factors include a BMI higher than 35, and/or a neck circumference greater than 17. In April 2017, the United States Supreme Court declined to hear a case brought by a driver who claimed that his employer, a large motor carrier, violated the Americans with Disabilities Act (ADA) when it required him to be tested for OSA due to his BMI being above the 35 point threshold established by the motor carrier.[15] The lower court's decision that the motor carrier did not violate the ADA by requiring mandatory OSA testing for drivers above the 35 point BMI threshold indicates that motor carriers may implement mandatory testing under certain conditions without fear of violating the ADA.

Impact on Litigation

The fact that motor carriers are not prohibited by law from testing drivers for OSA (and the fact that some motor carriers test all drivers and/or set benchmark testing measurements for single risk factors for OSA) opens the door for plaintiffs' attorneys to assert that a motor carrier's decision not to require OSA testing constitutes negligent hiring, negligent retention and/or negligent supervision. If fatigue is arguably a contributing factor to an accident, experienced plaintiffs' attorneys will focus upon whether the driver exhibited any of the risk factors for OSA, and whether the driver has any history with any diagnosed sleep disorder. Plaintiffs' attorneys are increasing their efforts to hire medical experts to testify that the driver suffered from undiagnosed OSA at the time of the incident, and that this condition should have been recognized by either the employer or the examining physician. Some courts have even allowed medical experts to testify that a driver suffered from OSA based solely upon statistics (such as height, weight, neck thickness and medical history), notwithstanding the fact that the diagnosis was not supported by a sleep study to definitively diagnose OSA.[16]

Fortunately, many courts that have addressed this issue have concluded that motor carriers do not have a duty to test for sleep apnea in every driver candidate and, instead, can rely upon the ME's judgment. Many of these cases turned, however, on a lack of evidence that the driver: (1) was fatigued at the time of the accident; (2) had experienced sleep apnea symptoms prior to the incident; or, (3) was asleep at the time of the incident.[17] Plaintiffs have the burden of showing that the driver was impaired, or was likely to become impaired, due to fatigue caused by OSA. This is a difficult standard to meet in many instances. Plaintiffs must proffer a qualified medical expert to opine that the driver not only suffered from sleep apnea, but that he experienced drowsiness and fatigue at the time of the incident, his drowsiness and fatigue were caused specifically by the sleep apnea condition and that this drowsiness and fatigue caused the accident. Of course, drivers, and by extension motor carriers, may be at risk when a driver intentionally withholds information regarding his or her sleep disorder or if the motor carrier is aware of instances where the driver has experienced signs, symptoms or episodes of apnea and the motor carrier fails to address the known condition.

When defending companies faced with negligence or punitive damages claims based upon a failure to discover or test for sleep apnea, it is important to determine whether driver trainers or others within the safety department monitor driver candidates during the qualification and training phase. Some motor carriers instruct their driver trainers to look for signs of daytime excessive sleepiness, fatigue and other markers of OSA, and may require drivers exhibiting those traits to undergo sleep apnea testing before they will be approved for hire or allowed to return to the road.

It is also important to note that OSA, when successfully treated, is not a disqualifying medical condition for truck drivers under the FMCSRs.[18] Assuming that a driver suffering from treatable OSA undergoes the proper physical examinations with an independent ME at the appropriate intervals, and that the ME certifies that the driver is qualified to drive, the motor carrier should have a viable defense to a claim that it was negligent in failing to remove the driver from the road. When facing claims involving drivers with a known diagnosis of OSA, defense attorneys should focus on actions taken by the carrier to ensure that drivers suffering from moderate to severe OSA are either: (1) not approved as an initial hire; (2) are removed from the fleet if a current driver; or (3) are approved conditionally subject to their use of appropriate treatment (such as a CPAP device). Some carriers require drivers who suffer from treatable OSA to provide proof that they are using their CPAP machines on a regular basis (many CPAP devices contain a memory chip that can produce a report to be presented to the ME) or other proof that the condition is being successfully treated.

Additional actions taken by motor carriers to assist with drivers with OSA include, but are not limited to: (1) allowing longer idle times for their tractors to allow drivers with OSA to benefit from improved sleep conditions in the cab; (2) increasing the wattage of their inverters to assist with the powering of CPAP machines; and, (3) careful monitoring of hours of service compliance for drivers known to suffer from OSA. These measures are in addition to requiring all driver candidates and current drivers to be certified by a qualified ME. Defense lawyers should examine the practices of their motor carrier clients and

develop these facts, if present, to combat the claims of negligent hiring, supervision and retention based upon a motor carrier's failure to mandate screening for OSA.

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[1] Expert Panel Recommendations, *Obstructive Sleep Apnea and Commercial Vehicle Driver Safety*, Manilla Consulting Group, Inc./ESRI Institute, presented to the Federal Motor Carrier Safety Administration on January 14, 2008, p. 4.
[2] *Id.*
[3] *Id.*
[4] Physical Qualification of Drivers; Medical Examination; Certificate, 65 FR 59363 (October 5, 2000).
[5] *Id.* [Emphasis added].
[6] *Id*.
[7] FMCSA, "Bulletin to Medical Examiners and Training Organizations Regarding Obstructive Sleep Apnea."
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] Form MCSA-5875.
[12] "Evaluation of Safety Sensitive Personnel for Moderate-to-Severe Obstructive Sleep Apnea," RIN 2126-AB88, March 10, 2016, 81 FR 12642.
[13] MRB Task 16-01 Draft Letter Report (August 2016).
[14] Advance notice of proposed rulemaking; withdrawal, RIN 2126 –AB88, August 4, 2017.
[15] *Parker v. Crete Carrier Corporation*, 839 F.3d. 717 (8th Cir. 2016), *certiorari denied*, 137 S.Ct. 1445 (2017).
[16] *See, Royal & Son Appliance Insurance, PLC v. UPS Supply Chain Solutions, Inc.,* 2011 WL3874878, August 31, 2011, pp. 3-4.
[17] *See generally, Martinez v. CO2 Services, Inc.*, 12 Fed. Appx. 689 (2001); *Achey v. Crete Carrier Corp.*, 2009 WL 9083283 (2009); *Kyles v. Celadon Trucking Services, Inc.*, 2017 WL 4273622 (2017).
[18] *See Kyles v. Celadon Trucking Services, Inc.*, 2017 WL 4273622 (2017) at 4.