



MARCELLO & KIVISTO

LLC

# TRANSPORT CENTER UPDATE

April 2014

Vol. 6, Issue 3

## OBAMACARE-A DEFENSE TO PA MV INJURY CLAIMS

National news has been full of Obamacare stories for the last several years. Cable talk shows consumed by it.

Beyond the debate of its merits, the enactment of the medical insurance law can be a benefit in the defense of Pennsylvania motor vehicle injury cases. We have filed motions in two cases, one in Lehigh County in November and another last month in Philadelphia, to preclude plaintiffs from presenting claims for past and future medical expenses. The motions played a key role in the favorable settlement of both actions for far less than plaintiffs' demands.

How does that work? Pennsylvania's Financial Responsibility Act, at 75 Pa. C.S. § 1722, provides that a party may not recover medical bills which are "paid or payable" by a first party insurer or other insurer.

Thus, if a plaintiff has first party (PIP) insurance to pay their medical bills (past and future), they cannot recover them in a lawsuit. Further, if they



### MK CONTACT INFORMATION

**Marcello & Kivisto, LLC**  
1200 Walnut Bottom Rd.  
Third Floor, Suite 331  
Carlisle, PA 17015

T: (717) 240-4686

F: (717) 258-4686

[www.cdl-law.com](http://www.cdl-law.com)

[Transportation Legal News  
Blog](#)

Douglas Marcello, Esq.  
[dmarcello@cdl-law.com](mailto:dmarcello@cdl-law.com)

Sonya Kivisto, Esq.  
[skivisto@cdl-law.com](mailto:skivisto@cdl-law.com)

Angela N. Rainey, Esq.  
[arainey@cdl-law.com](mailto:arainey@cdl-law.com)

Alyssa Adams, Esq.  
[aadams@cdl-law.com](mailto:aadams@cdl-law.com)

Jennifer Mulligan, Esq.  
[jmulligan@cdl-law.com](mailto:jmulligan@cdl-law.com)

### M&K Upcoming Events:

For more current  
updates on events,  
follow M&K on  
[Facebook](#) and [Twitter](#).

have any other insurance that would pay the past or future medical bills, they cannot recover those as well. The only exceptions are workers' compensation payments or payments made by health insurance coverage that are ERISA plans for which federal law provides for subrogation.

So where does Obamacare come in? The law mandates health insurance coverage. Thus, plaintiffs are required to have insurance to pay their medical bills. As medical bills in PA motor vehicle cases cannot be recovered if there is insurance, they are precluded by the required coverage of Obamacare.

The impact? Claims that are "driven" by large medical bills (often payable to chiropractors or therapists to whom they were directed by their attorney) are now stripped of their inflated value provided by the medical expenses. It prevents plaintiffs from claiming excessive damages by inflating their value with run-up medical bills.

For a more in depth analysis look for Doug Marcello's article that will be published in an upcoming PennTrux's issue.

## LIMITING LIABILITY EXPOSURE WITH WC DECISION

You're being sued for injuries. The plaintiff suing you was working at the time of the accident. He filed a compensation claim for his injuries, seeking lost wages and payment of medical bills. The claim was contested, went to a hearing, and

### Upcoming Events in the Industry:

**May 1st-4th - 2014  
PMTA Annual  
Management  
Conference** - Skytop, PA, for more info click [here](#).

**June 3rd-5th - CVSA  
Roadcheck** - Nationwide, for more info click [here](#).

**June 13th-14th - PA  
Truck Driving  
Championships** - HACC in Harrisburg, PA.

**Aug. 12th-16th -  
National Truck Driving  
Championships** - Pittsburgh, PA, for more info click [here](#).

## FMCSA Cab Card on New HOS

FMCSA has put out an updated cab card with information on the HOS rule changes that occurred in February and the ones that became effective July 1<sup>st</sup>. You can get a printable version of the cab card by clicking [here](#).

## Webinars On-Line

Several 20 minute webinars on key issues in the trucking industry have been posted to our webpage. These are

the workers' compensation judge ruled on the extent of the compensable injuries.

You can benefit from that decision. If the workers' compensation judge ruled that not all of his claimed injuries are due to the accident, you can keep him from recovering the non-compensable damages from you. You can cap his claim to the extent of the injuries permitted by the workers' compensation decision.

In a recent trial in Philadelphia, this very scenario was presented. The plaintiff claimed a myriad of maladies, including neck and low back disc herniations, strains, a torn rotator cuff, and a torn meniscus among others. He had sought to recover workers' compensation for the same injuries.

The compensation claim was contested, resulting in a decision by the compensation judge as to the extent of the compensable injuries suffered in our accident. The compensation judge ruled that the plaintiff only sustained neck and low back sprains and strains as a result of the accident. She rejected the herniations, torn rotator cuff, torn meniscus, and other claimed injuries as being causally related to our accident.

We filed a motion with the trial court asserting that the Plaintiff is bound by the workers' compensation judge's decision regarding plaintiff's injuries based upon the principle of collateral estoppel. The trial judge agreed, granted our motion, and limited the plaintiff's recoverable injuries to the sprains and strains of the comp award. Result-the case settled just before closings for a fraction of the \$750,000 pretrial demand.

audio/video presentations that explain the issues and the challenges they present to the trucking industry.

The topics are as follows:

Aggressive Defense  
of Trucking  
Accidents

New Hires and PSP

CSA

We also have two 5 minute PowerPoint presentations posted to our website regarding information concerning the HOS changes effective in July.

You can view the webinars by clicking [here](#).

#### **Documents and Resources Available From M&K**

If you are interested in obtaining copies of the following, please call or email.

- Hours-of-Service  
Rules Safety Impact  
2010 Analysis  
compiled by ARTI in  
May 2010

- Accident  
preparedness DVD  
and/or forms

- Powerpoint  
presentation regarding  
CSA 2010 presented  
by ATA

- Powerpoint  
presentation by Dr.  
Hickman regarding

How does collateral estoppel work? If an issue is decided in a prior proceeding, that decision binds the party involved in later proceedings arising from the same incident or facts. In this case, the plaintiff's prior comp decision bound him in our later case arising from the same accident.

The theory is that the plaintiff was involved in the prior litigation, had the opportunity to litigate the issue, and received a final decision. The principle provides that he should not be able to retry the same issue in a later time, burdening the courts with duplicative proceedings.

Conversely, we are not bound by the prior decision if, as in this case, we did not have the opportunity to present our defense to it. This gives us the benefits of both worlds-limiting the plaintiff to decisions that benefit us, but not being bound if the comp court had awarded the full boat.

The plaintiff tried to argue that he should be able to present the social security decision that found him totally disabled as of the date of the accident. However, this was rejected by the Court. We were not a party to the social security decision and did not present evidence to contest it.

Besides, social security does not make a determination as to what caused the injury. It was irrelevant to the social security judge whether the disability was caused by the accident or was the result of his preexisting conditions.

For more information, see the article Associate Jennifer Mulligan recently published in PennTrux

Distracted Driving  
Study presented at  
M&K Seminar

To see M&K's recent  
case results and  
articles click [here](#).

#### Other Resources

FMCSA Distracted  
Driving Instructional  
Videos click [here](#).

[PA Motor Trucking  
Association](#)

[American Trucking  
Association](#)

[Trucking Industry  
Defense Association  
\(TIDA\)](#)

[Federal Motor Carrier  
Safety Administration](#)

[PA Travel  
Information To-Go](#)

[National Traffic and  
Road Closure  
Information](#)

For more resources click  
[here](#)

## MARK YOUR CALENDARS: PA TDCs!!!

Come out to HACC on  
June 13<sup>th</sup> and 14<sup>th</sup> to  
support and watch PA's  
best truck drivers  
compete! The two day  
competition features  
drivers who have proven  
safety records as they

about collateral estoppel and how it can benefit your defense, by clicking [here](#).

## ARE YOU MONITORING YOUR CSA SCORE?

How proactive are you in monitoring and acting on your CSA score? I'm not just talking to companies, but drivers too. Do you check your score regularly? If so weekly, monthly, yearly?

Whatever we think of them, CSA scores and SMS are here to stay. It's crucial that you monitor your scores. Even if you aren't monitoring your score, someone else is--whether its FMCSA trying to target potential safety concerns; a plaintiff in a civil suit trying to create an image that you are unsafe; a potential customer or employer trying to make a safety judgment; or an insurance company trying to determine the amount of risk associated with a carrier or its drivers.

A violation on your CSA score will stay with a motor carrier for two (2) years and will stay with a driver for three (3) years. A violation is weighted more heavily during the first six (6) months for companies, one (1) year for drivers. During those respective periods the points are tripled. Bottom line-you need to monitor your score constantly and act immediately.

Companies can check their scores on SMS - <http://ai.fmcsa.dot.gov/sms/>. Drivers through PSP - <https://www.psp.fmcsa.dot.gov/psp/default.aspx>.

Think about it-the points come from roadside inspections and are data entries into a government computer system. Think that there is a potential

complete several events, including timed pre-trip inspections, a written exam as well as a timed obstacle course. Drivers compete in step vans, straight trucks, 3-axle semi-trailer, 4-axle semi-trailer and 5-axle semi-trailers as well as twins and sleeper berths. For more information click [here](#).

## M&K Truck News Blog

Truck News now includes a blog by Doug Marcello. You can find his blog by clicking [here](#). Truck News blog provides other writers with insight and perspective of the various challenges of our industry.

## Free Presentations for Your Driver Meetings

We provide FREE presentations at driver's meetings geared toward our client's topics of interests. Recently, we finished filming a mock trial cross-examination of

for errors? Wrong DOT number? Double entries? Not your points? We have seen them all.

Also, remember that just because you won at a hearing on the ticket does not remove the violation from your CSA score. You need to challenge it separately to remove it.

Get rid of errors and challenge improper assessments through DataQ - click [here](#). For more information on DataQ, check out the story we

published in PennTrux - click [here](#) or an abbreviated version of the article below.

How else can you control your scores? The two vehicle-oriented BASICS, vehicle maintenance and hazmat, rank you based upon your number of vehicles. Two other BASICS, unsafe driving and crash indicator, use a hybrid calculation that include your number of vehicles.

Key-make sure of the accuracy of your MCS-150 form that is used for the number of vehicles. Failure to do so could put you in a different grouping to the detriment of your score.

Make sure your drivers know how important CSA is to them and how it works. We posted to 5 minute narrated PowerPoints on our webpage that explain this. <http://www.cdl-law.com/video/>

## CHANGES FOR CSA IN PA AND BEYOND

Changes and/or Anticipated Changes to CSA:

1) Previously, in Pennsylvania a driver was required to submit a DataQs challenge within thirty (30) days of the violation and a motor

a driver as part of a new presentation. Please let us know if you are interested.

**STAY CONNECTED:**  
You can now follow, M&K, LLC on the web!



[Transportation Legal News Blog](#)

### Quote of the Month:

"Sweet April showers do spring May flowers."

~ Thomas Tusser



## About Our Firm

Founded in 2005, **M&K, LLC** is dedicated to and focused upon transportation law and the needs of their transportation clients. Since opening in 2005, **M&K, LLC** has expanded its office to provide clients with the attention and availability they deserve.

carrier was required to submit a DataQs challenge within one (1) year. As of April 1, 2014, Carrier and driver challenges will be accepted for up to three (3) years after the violation occurred.

2) It is anticipated that a future proposed change to CSA will allow carrier and drivers to file challenges on the basis that their citations have been discharged in court. Currently, a citation adjudicated in court is not connected. The Pennsylvania State Police have indicated that they will consider the discharge as a factor in determining whether or not the violation should be removed.

3) Currently, only on sight investigation data is used to make a safety fitness determination. It is anticipated that FMCSA will be publishing a notice of rulemaking for a rule that would incorporate roadside inspection data into a safety fitness determination.

For more information check out the CSA PowerPoints on our website at <http://www.cdl-law.com/video/>.

## M&K Rewind

We find that some issues we have covered in previous newsletters may come up again for our clients. Therefore, this section will provide information on topics we have previously covered but are still relevant today.

**Don't Forget About DataQ**

**DataQ provides motor carriers with an important mechanism for ensuring FMCSA's data is correct and accurate. As CSA is public, DataQ has become even more important to motor carriers to ensure that incorrect data is promptly removed from their scores. Here are some things you should know about DataQ:**

### **I. Roadside Inspection Violations v. Traffic Citation**

**You or your driver are cited as a result of a roadside violation. You successfully defend against the citation through the court system. As a result, the violation on the inspection report will not show up on your CSA BASICs score, right? Wrong. A successful challenge in court removes the citation from the MVR. However, the violation remains a part of a carrier's SMS score unless successfully challenged through DataQ.**

### **II. States May Treat DataQ Challenges Differently**

**Each state has an office that reviews DataQ challenges and each state may impose its own rules on how DataQ challenges are handled. For instance, some states may consider the outcome of the citation in the court system when determining whether to remove a violation challenged through DataQ. Also, some states may impose a time limit for challenging a violation through DataQ.**

### **III. Crash Data**

**For purposes of CSA, any reportable accident will be included in a carrier's SMS score. DataQ may be used to challenge crash data. Proper DataQ challenges may include; if your driver was improperly assessed a "crash", such as non-contact or noninvolvement or if the accident was "non-reportable."**

### **IV. Promptly Make DataQ Challenges**

**It is important to act timely when making a DataQ challenge. Your challenge must be**



**submitted within any applicable state imposed time limitation. Also, keep in mind that your SMS score will reflect the violation while your DataQ challenge is being considered and during the first 6 months the violation will be scored at triple the points.**

#### **V. Conclusion**

**CSA is open to the public. More importantly, it is open to shippers, brokers, and insurers. Be sure to review your scores for input errors often. Improper assessment at the roadside needs to be promptly challenged in order to avoid undue inflation of your SMS score due to double-recording, miss identification, etc. DataQ is the means of doing so. Your use and awareness of this system is vital to your success.**

**DISCLAIMER: The Information Contained in this Newsletter is NOT Legal Advice.**

