



**ALFA International**  
THE GLOBAL LEGAL NETWORK

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### PREVENTABILITY DETERMINATION AND INADMISSIBILITY

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# WHAT IS PREVENTABILITY?



# Where does preventability come from?

49 C.F.R. §385.7(f) states that factors to be considered in determining a safety rating include, "frequency of accidents; hazardous materials incidents; accident rate per million miles; indicators of preventable accidents; and whether such accidents, hazardous materials incidents, and preventable accident indicators have increased or declined over time." Unfortunately, there is no definition of "preventable accident indicators."

Neither 49 C.F.R. §390.15(b) nor §385.7(f) makes mention of recording of accidents as preventable or non-preventable.

- So why do companies make preventability determinations?



# Where does preventability come from?

Appendix A to 49 C.F.R. §385 Explanation of Safety Audit Evaluation Criteria states, "*Preventability will be determined according to the following standard: if a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable.*"

- This section deals with how the FMCSA will use a preventability determination in assessing a motor carrier's overall safety rating, not how a preventability determination will be used to prove negligence in a civil trial.

# What is preventability?

What is the “official” definition of “preventable?”

- The National Safety Council’s definition states, “a preventable collision is one in which the driver failed to do everything that reasonably could have been done to avoid the accident.”
- The American Trucking Association defines preventability as follows: “was the vehicle driven in such a way to make due allowance for the conditions of the road, weather, and traffic and also to assure that the mistakes of other drivers did not involve the driver in a collision.”
- The FMCSR states that a preventable accident on the part of a motor carrier means an accident (1) that involved a commercial motor vehicle, and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver. §385.3

# WHY IT MATTERS





# What harm can a preventability determination do?



# What harm can a preventability determination do?

When a motor carrier makes a preventability determination it is essentially undertaking a voluntary self-critical analysis that may become admissible in a civil proceeding and used to convince a jury that your driver could have avoided the accident.

- Where self-evaluation has been voluntarily undertaken, “[n]either that fairness rationale nor [an] effective enforcement rationale operates \* \* \* No unfairness exists, for no third party required [the defendant] to make a critical self-evaluation, or indeed, any evaluation at all.” *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 641 (S.D.N.Y. 1987).



# Why make a preventability determination?

Why make a preventability determination if there is no federal requirement that motor carriers engage in an analysis to determine whether an accident was preventable? Trucking companies use preventability determinations to:

- Identify potentially problematic driver behavior in the fleet
- Assess individual driver action/inaction
- Determine the need for remedial training individually or fleetwide
- Assess the need for additional safety tools (Bendix, Drivecam, etc.)
- Ensure FMCSR compliance and/or protect safety scores?
- Eligibility for awards, bonuses, perks?
- ***Assess potential liability?***

# Know Your Handbook

1. **Preventable Accident:** An accident in which there is damage to a Shaw vehicle or other party vehicle, and/or bodily injury or property damage to a third party as a result of poor judgment or conduct on the part of our driver.

## **PROCEDURE**

### **Data used to determine preventability**

Each driver's accident file will be reviewed using the following documents to determine preventability:

1. Form A (Accident Report)
2. Form B (Driver's Statement)
3. Police report, if applicable
4. On scene adjuster's report, if applicable
5. Witness Statements
6. Pictures of the accident





# HOW CAN THE FMCSA HELP?



# FMCSA Crash Preventability Demonstration Program

FMCSA will review Requests for Data Review for crashes submitted through DataQs:

- When the commercial motor vehicle (CMV) was struck by a motorist driving under the influence (or related offense);
- When the CMV was struck by a motorist driving the wrong direction;
- When the CMV was struck in the rear;
- When the CMV was struck while it was legally stopped or parked, including when the vehicle was unattended;
- When the CMV struck an individual committing, or attempting to commit, suicide by stepping or driving in front of the CMV;
- When the CMV sustained disabling damage after striking an animal in the roadway;
- When the crash was the result of an infrastructure failure, falling trees, rocks, or other debris; or
- When struck by cargo or equipment from another vehicle.

<https://www.fmcsa.dot.gov/safety/crash-preventability-demonstration-program>

# FMCSA Crash Preventability Demonstration Program

FMCSA's Safety Measurement System (SMS) will display the final determinations of reviewed crashes.

- Not Preventable: The crash will appear on the public display of SMS with a notation that reads “FMCSA reviewed this crash and determined that it was not preventable.”
  - The Crash Indicator BASIC on the motor carrier and enforcement views of SMS will display calculations with and without the not preventable crashes.
- Preventable: The crash will appear on the public display of SMS with a notation that reads “FMCSA reviewed this crash and determined that it was preventable.”
- Undecided: If the documentation provided with the RDR does not allow for a conclusive determination, the crash will appear on the public display of SMS with a notation that reads “FMCSA reviewed this crash and could not make a preventability determination based on the evidence provided.”




# FMCSA Crash Preventability Demonstration Program

  
COMPLETE  
SMS PROFILE

  
CONTACT US

  
DOWNLOADS

  
PRINT

10/24/2017	<a href="#">NC0105266781</a>	NC	P753453	IL	0	1	Yes	No	2	2	4
10/23/2017	<a href="#">TX51ADHQE17U</a>	TX	P879023	IL	0	2	Yes	No	2	2	4
10/22/2017	<a href="#">WI0000102674</a>	WI	P931422	IL	0	1	Yes	No	2	2	4
↳ Not Preventable: FMCSA reviewed this crash and determined that it was not preventable.											
10/15/2017	<a href="#">LA0170041524</a>	LA	P755841	IL	0	0	Yes	No	1	2	2
10/13/2017	<a href="#">TX5138HQE1S9</a>	TX	P828700	IL	0	0	Yes	No	1	2	2
10/11/2017	<a href="#">PA710567300X</a>	PA	P796758	IL	0	0	Yes	No	1	2	2
10/10/2017	<a href="#">WV201728523A</a>	WV	P791159	IL	0	1	Yes	No	2	2	4
10/10/2017	<a href="#">MD17A0390071</a>	MD	P899516	IL	0	0	Yes	No	1	2	2
10/9/2017	<a href="#">PA710486300X</a>	PA	P879027	IL	0	0	Yes	No	1	2	2
10/4/2017	<a href="#">PA710434800X</a>	PA	P921984	IL	0	0	Yes	No	1	2	2
↳ Undecided: FMCSA reviewed this crash and could not make a preventability determination based on the evidence provided.											
9/28/2017	<a href="#">PA710968200X</a>	PA	P921981	IL	0	0	Yes	No	1	2	2
9/25/2017	<a href="#">NC0105236922</a>	NC	P900732	IL	0	0	Yes	No	1	2	2
9/24/2017	<a href="#">TX50DAHQE1ZK</a>	TX	P696527	MO	0	1	No	No	2	2	4
9/21/2017	<a href="#">OK00E0075817</a>	OK	P868902	IL	0	1	Yes	Yes	3	2	6



# CAN WE MINIMIZE THE IMPACT?

# Is a preventability determination always admissible?

There are several arguments against the discoverability, and ultimately the admissibility, of a “preventable” designation.

- Self Critical Analysis—See *Harper v. Griggs*, 2006 U.S. Dist. LEXIS 64691 (W.D.Ky., 2006) “evidence of a conclusory nature is inadmissible as evidence in this case. Such evidence includes thoughts, analyses, inferences, or deductions based on the factual circumstances of the accident, and recommendations, changes in policy, or employment decisions in light of the accident;
- Irrelevant under 401—See *Akbar v. Khai*, No. 3:18-CV-339, 2021 WL 1206527, at \*2 (S.D. Ohio Mar. 31, 2021) When no clear evidence establishes what standard or definition has been used to define “preventability” or a “preventable accident,” courts may exclude evidence regarding whether an accident was considered “preventable”;
- Irrelevant/confusing under 403—See *Tyson v. Old Dominion Freight Line, Inc.*, 270 Ga. App. 897, 900–01, 608 S.E.2d 266, 270 (2004) “With regard to the finding that the collision was preventable, the evidence shows that Old Dominion's definition of preventable is different from the standard of liability. Accordingly, the trial court's ruling with regard to the finding itself was not an abuse of discretion.”
  - Be aware that attempting to place fault on a third-party may negate this argument. See *Haynes v. Lawrence Transportation Co.*, No. 1:13-CV-04292-LMM, 2016 WL 11745938, at \*4 (N.D. Ga. Aug. 15, 2016).



# Is a preventability determination always admissible?

There are several arguments against the discoverability, and ultimately the admissibility, of a “preventable” designation.

- Unfair prejudice and/or confusion of the issues under Fed. Evid. R. 403—*Swift Transportation Co. v. Amenounve*, No. 4:09-CV-4, 2011 WL 13349660, at \*1 (M.D. Pa. May 3, 2011) “The problem with that inference is that the standard for determining preventability and the standard for determining negligence under Illinois law are not necessarily the same ... Thus, the two standards may confuse and mislead the jury and result in a mini-trial regarding the different standards and the significance of the preventability finding, diverting attention away from the real issue of negligence”;
- Prepared in anticipation of litigation—See *Byrd v. Wal-Mart Transp., LLC*, No. CV609-014, 2009 WL 3055303, at \*2 (S.D. Ga. Sept. 23, 2009) “Any subjective evaluation by Wal-Mart of its legal responsibility for the accident (i.e., its failure to maintain some legally mandated standard of conduct) necessarily steps into mental impressions of the merits of the case.”
  - However, questions regarding the factual basis for making a preventability determination are still valid and potentially admissible. See *Cardinal Aluminum Co. v. Cont'l Cas. Co.*, No. 3:14-CV-857-TBR-LLK, 2015 WL 4068405, at \*3 (W.D. Ky. July 2, 2015).

# THE MAKEOVER





# Can you stop digging?



Ron Bair and Robert Fuentes published a paper titled PREVENT A LEGAL ACCIDENT; ELIMINATE THE "PREVENTABLE ACCIDENT" DETERMINATION way back in 2010 advocating for the industry to cease making preventability determinations. I think Ron and Robert were on the right track.



# Can you turn it into a positive?

when you use your demons  
to your advantage



Motor carriers should **consider assessing preventability for all drivers involved** in any given accident. If the motor carrier's review board is competent to determine whether an accident was preventable by its own driver, it is also competent to determine whether an accident was preventable by the plaintiff or other third-party.

# Determine if another driver were the cause

## Incident Investigation, Root Cause and Corrective Action Report

- 
- ☐ A policy violation. Which policy? \_\_\_\_\_
  - ☒ Unsafe condition or environmental factors?
  - ☐ The employee/contractor not receiving items required by policy, experience or training.
  - ☐ A lack of management or oversight.
  - ☐ Shipper/Consignee error.
  - ☒ Other motorist negligence.
  - ☐ Equipment failure.
  - ☐ None.

**Please outline your justification for this belief or add additional root cause.**

See above

**Determining Compliance**



# Prepare your corporate representative

2 Q Preventability is a term of art; correct?

3 A A term of?

4 Q It's a well-defined standard within the trucking

5 industry; correct?

6 A I would somewhat disagree with that.

7 Q Well, the National Safety Council has a definition  
8 of preventability?

9 A Think so does the Federal Motor Carrier Safety  
10 Administration.



# Prepare your corporate representative

12 A There is varying definitions, and I'm seeking yours  
13 to answer your question. What is your definition  
14 of preventability?

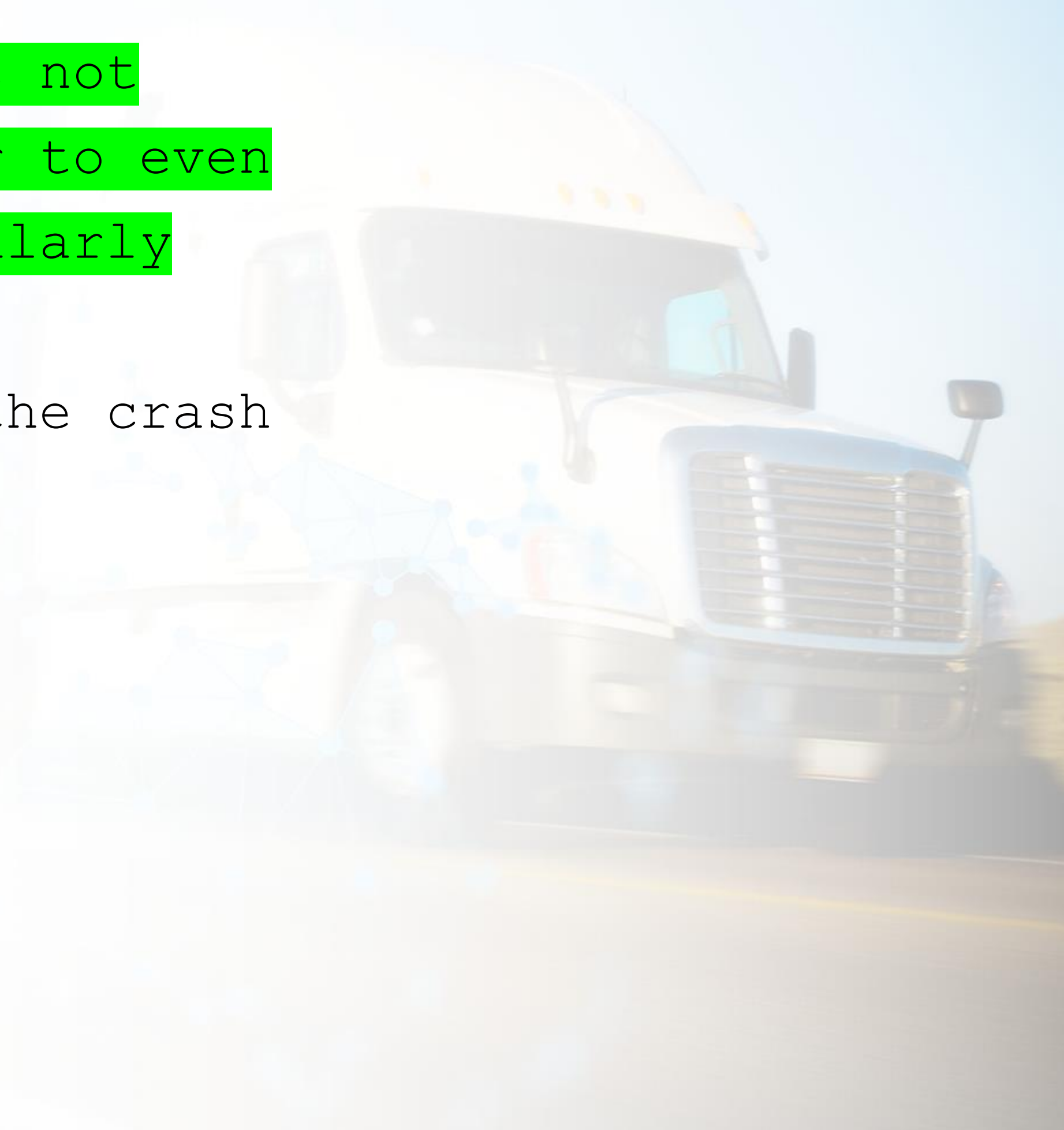
15 Q Let me do it this way. How did  
16 your company define preventable crash  
17 back in November of 2015?

18 A Okay. We would define preventable as a driver did  
19 everything possible to -- reasonably possible to  
20 prevent that crash.

# Prepare your corporate representative

10 A However, preventability for our purposes is not  
11 · · · necessarily to assign fault or liability or to even  
12 · · · state that that driver did anything particularly  
13 · · · wrong. · I want to make that clear.

24 Q Sir, did you make a determination whether the crash  
25 was preventable?



# Prepare your corporate representative

14 Q If you used all of the information that was  
15 available to you to assess the preventability or  
16 non-preventability of this accident with regard to  
17 your driver's conduct and assessed it -- or  
18 assessed the conduct of Plaintiff, would you  
19 have found this to be a preventable accident on his  
20 part as well?

21 MR. PLAINTIFF'S ATTORNEY: Objection. Foundation.  
22 Speculation.



# Prepare your corporate representative

3 A Based on the criteria of the section of roadway was  
4 unobstructed. **Any prudent driver, be him in a car**  
**5 or a truck, should have seen the truck in the**  
**6 roadway.**

12 MR. PLAINTIFF'S ATTORNEY: Move to strike. Lacks  
13 foundation. Speculation. Argumentative.