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Docket Management Facility
U.S. Department of Transportation
Room PL-401
400 Seventh St., S.W.
Washington, D.C. 20590

Re: Docket No. FMCSA-2001-9800-⁴⁷ Comment

Dear U.S. Department of Transportation:

You will find enclosed a comment submitted on behalf of commercial motor vehicle driver Philip J. Hartline.

If you wish any further information, please do not hesitate to contact me.

Yours truly,

Judith G. Eagle

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Comment

I. Introduction

The purpose of this comment is to voice strong approval and support of the Federal Motor Carrier Safety Association's (FMCSA) proposal to issue regulations impacting insulin-dependent individuals who operate Commercial Motor Vehicles (CMVs). These proposed regulations would permit the issuance of exemptions from the diabetes mellitus prohibitions contained in the current Federal Motor Carrier Safety Regulations (FMCSRs). Approval of these FMCSRs would positively impact many diabetic individuals who depend on the operation of CMVs for their livelihood.

On or about October 21, 1999, the State of Maryland, Motor Vehicle Administration (MVA), issued to me a Commercial Driver's License (CDL) waiver for pre-existing medical conditions pursuant to COMAR 11.21.01.06E. The waiver was valid from October 21, 1999 until October 31, 2000.

The medical condition necessitating this waiver was for diabetes, and was for intrastate travel only. The foregoing waiver was necessary, as my occupation as a employee for Harford County, Maryland, and as an owner of a part-time excavating business required my operation of a variety of multi-axel vehicles. The waiver was valid from October 21, 1999 until October 31, 2000.

On or about October 31, 2000, the MVA extended the waiver through December 31, 2000. This waiver was again extended on December 27, 2000 through February 28, 2001. It was extended again from February 26, 2001 through March 30, 2001, and then from March 30, 2001 through October 31, 2001. However, on May 21, 2001, I received a notification from the MVA that the waiver program for insulin-dependent individuals would end in October 2001. The rationale for the discontinuation of the waiver program, stated by John D. Stafford, M.D., Associate Chief of the Medical Advisory Board for the MVA was that "[g]enerally speaking, the case could not be made that the CDL waiver for insulin-dependent diabetics was a medically safe and effective practice."

Eliminating this waiver would effectively end my employment with Harford County, and force me to close my excavating business. Documentation provided to the MVA from my physician conclusively showed that my diabetes is under control by use of an insulin pump, and that I have corrected 20/20 vision. Adoption of the FMCSRs would permit me to provide for my family, and to allow me to stay gainfully employed. For these reasons, among others, I strongly urge the FMCSA to adopt the regulation permitting the issuance of the aforementioned exemption.

II. Evidence Does Not Support Maryland's Modification of Its CDL Waiver Program

Maryland has taken the position that the safety of the driving public is paramount as the reason behind the modification of CDL waiver program to exclude individuals with diabetes. There can be no argument that the safe operation of CMVs is an important governmental interest, and one that the MVA should vigorously pursue. However, the evidence that the MVA presents in excluding diabetics from the waiver program is not compelling, and is, arguably, a minority view.

The MAB contends that "[g]enerally speaking, the case could not be made that the CDL waiver for insulin dependent diabetics was a medically safe and effective practice." The MAB further states that, "[t]oo many patients did not have good "control" of their diabetic disease, which was indicated by laboratory testing." However, these studies, are directly contradicted by those utilized by the FMCSA in their Notice to Intent to Issue Exemptions and Request for Comments, for the new regulations providing waivers to insulin dependent diabetics.

In a 1997 Federal Highway Administration (FHA) report entitled, "Qualifications of Drivers-Vision, Diabetes, Hearing and Epilepsy," showed that the accident rate of individuals with diabetes participating in waiver programs was lower than the accident rate of the general driving public. The FMCSA also assembled a panel of physicians who were expert in the field of diabetes treatment and research. These experts concluded that, with proper medical screening and disease management, that insulin dependent diabetics could be safely permitted to possess CDLs and to operate CMVs on the nation's highways.

Additionally, independent research confirms the studies conducted by the FMCSA finding that insulin dependent individuals have similar, if not lower, rates of highway accidents compared with that of the general driving public.¹ In a separate FHA study, analysis of data showed that insulin dependent drivers possessing CDLs had a lower accident rate per million vehicle miles traveled than did the individuals possessing CDLs who were not diabetic. Insulin dependent drivers had an accident rate of 1.706 accidents per million miles, while non-diabetic drivers who operated CMVs had an accident rate of 2.605 accidents per million miles traveled.² A Danish study pertaining to diabetes and accident insurance produced similar results.

In 1991, the Danish Diabetes Association, in collaboration with TRYG-Baltica Insurance conducted a three (3) year study to find the differences, if any, between

¹ It should be noted that in all instances, when the term "insulin dependent diabetic" is being used, that it is being used in conjunction with the requirement that the individual's diabetes is "controlled." This author in no way intends to contend that it is safe for any insulin dependent diabetic to operate any motor vehicle, let alone a commercial motor vehicle.

² At the time that the study was undertaken, there were 2,234 drivers participating in the Vision Waiver Program. The number of accidents reported for these drivers from 1992 through 1995 was 510. These drivers self-reported a total of 299 million vehicle miles traveled. The government estimates that during 1994 alone there non-insulin dependent CMV drivers were involved in 144,000 large truck accidents covering a total of 170,415 million vehicle miles traveled.

insureds with diabetes and those without diabetes. Individuals were required to self-disclose their diabetic condition, and their accident rates were compared with those of the general public. The study concluded that, while individuals with diabetes paid higher premiums than did the general population, that their rate of accident was significantly lower than that of those who did not have diabetes.³

Finally, many states are implementing laws that acknowledge insulin dependent diabetics are completely capable of operating CMVs in a safe manner. Utah and Rhode Island have enacted legislation requiring the licensing of medically screened and qualified diabetics to operate CMVs in intrastate comers. It is quite possible that more states may follow Utah and Rhode Island's lead if the federal government were to withhold highway funding if state statutes are at odds with federal regulations.

III. Maryland CDL Program

A. History

Maryland's CDI program was enacted and administered by the MVA in 1997 on a test basis. Individuals who did not qualify to operate CMVs in interstate commerce under federal regulations could apply for a waiver to operate such vehicles on an intrastate basis only. The application for a CDL waiver, and the granting of these waivers was to be considered on a case-by-case basis, with a heavy reliance being placed upon information provided by the individual's treating physician.

The rationale behind Maryland's CDL waiver program was that federal regulations left very little room for consideration of an individual's management of his/her diabetes.⁴ Thus, Maryland's CDL waiver program would provide an avenue for individuals to continue to be employed and to earn a living while safeguarding the public by considering the waivers on a case-by-case basis.

B. State rationale for changing CDL program.

On April 15, 2001, Maryland issued notice that their CDL program was to be modified. Under these changes, the MVA would only issue CDL waivers for three medical or physical conditions. These conditions were limited to vision (if not related to diabetes), amputation or loss of use of a limb, and loss of power grasping. No other physical conditions would be considered for waiver in the future.

³ The accident rate for diabetics was 0.71 accidents per 1,000 years compared to 5.50 per 1,000 years for the general population. An accident could be anything from a metal splinter in the eye, to an individual being hit by an automobile while in a wheelchair.

⁴ It is a widely accepted premise in the medical community that an individual who has diabetes can have an enormous impact on the course of the disease. Diabetes can be controlled, in most cases, by diet, medication, and exercise. Even insulin dependent diabetics can function the same as do non-diabetics.

The state emphasized a number of reasons for changing the CDL waiver program. First, great reliance was placed on the treating physician to certify that an individual would be safe to operate a commercial motor vehicle. Therefore, the state posits that, a physician's opinion is only as good as the information supplied by the patient. Maryland's assessment of patient reporting is that it is common for individuals to withhold information, or to minimize problems in controlling their diabetes so that they would not be denied a CDL waiver, without which, their livelihood would be threatened.

Second, the state Medical Advisory Board (MAB) was wary that physicians would, and did, disregard medical evidence of an individual's fragile control of their diabetes and certify a patient safe to operate a CMV. The MAB contends that this scenario arose out of patient advocacy that influenced a physician's certification that the patient was a safe and capable driver.

Finally, Maryland asserts that its interest in insuring the safety of all drivers outweighs the possible risks of continuing the CDL waiver program in its present form. Insofar as individual physicians were not going to provide reliable certifications, and that it was not financially feasible for the MAB to administer physical examinations to each individual requesting a waiver, Maryland concluded that the CDL waiver program would have to be modified to exclude individuals with diabetes.

IV. Impact

The change in Maryland's CDL waiver program has broad negative implications for individuals with diabetes who operate CMVs in intrastate commerce. In one broad stroke, Maryland will consign hundreds of individuals to the unemployment rolls. For many, operating a CMV is the only occupation for which they are trained. Without this waiver, these individuals have little hope for gainful employment.

Eliminating diabetics from the CDL waiver program has consequences beyond unemployment. Individuals who lose their jobs due because they no longer can get a waiver would, in all likelihood, lose health insurance. The cost of uninsured diabetics on the state's healthcare system would arguably be more costly than highway safety issues. And while individuals may no longer be able to acquire a CDL, they would still possess a general motor vehicle license. Without access to adequate health care, an individual with poorly controlled diabetes operating a car would be a higher risk than would a controlled diabetic operating a CMV. In effect, the state might put more of the general driving public at risk without the waiver program than if Maryland left the CDL waiver program in place.

V. Impact of the Americans With Disabilities Act

The Americans with Disabilities Act (ADA), was signed into law in 1991. The purpose of the ADA was, and still is, to provide equal access to employment, government programs, and to public accommodations. As it pertains to employment, an employer is prohibited from discriminating against an individual with a disability as long as, with or

without accommodation, they can perform the essential functions of the job. However, these protections are not absolute, and have serious implications for individuals with disabilities.

First, an individual must have a "disability" as defined by the ADA. An individual has a disability if he/she:

Has a physical or mental impairment that substantially limits one or more of his/her major life activities;

Has a record of such impairment; or

Is regarded as having such impairment.

There is little question that an individual with diabetes has a physical impairment that limits one or more of his/her major life activities. Diabetes impacts the ability to sight, the cardiovascular system, kidneys, and in some instances, the ability to walk.⁵ By the definitions of the ADA, it would seem clear that an individual with diabetes would be considered to have a disability. This is not the case.

In 1999, the United States Supreme Court issued two landmark rulings as to what constituted a disability. Sutton v. United Airlines, 527 U.S. 471 (1999), was a case brought by an individual who claimed that she was discriminated against by United Airlines in the hiring process because of her disability. Sutton was applying for a pilot's position, and had uncorrected vision of 20/200 in one eye, and 20/400 in the other. United's requirement was that a pilot have uncorrected vision of 20/100 or better in each eye. The Court did not agree with Sutton's contention that her impairment was substantial because her vision could be corrected to 20/20, even though the airline's requirement was for uncorrected vision.

The second case, Murphy v. United Parcel Service, 527 U.S. 516 (1999) involved a UPS mechanic and part-time driver who had high blood pressure. The Court ruled that Murphy did not have a disability under the ADA because Murphy's high blood pressure was effectively controlled by medication. However, Murphy was discharged even though his blood pressure was controlled, because his high blood pressure precluded him from acquiring a DOT health certificate, a requirement of the job.

Therefore, at least in the eyes of the U.S. Supreme Court, diabetes is not a covered condition under the ADA. The rationale for this is that because diabetes can be controlled through medication and/or diet, diabetes does not fall under the definition of a disability as required by the ADA.

Second, the ADA requires that the individual with a disability be able to perform the essential functions of a job, either with or without reasonable accommodations.

⁵ Individuals with uncontrolled diabetes are at an increased risk for blindness and amputation of limbs due to poor circulation.

Where a CDL is required, driving is obviously an essential function of the job. There is little that an employer can do in the form of an accommodation when the state requires a commercial drivers license for the operation of a commercial vehicle. One with diabetes is put in the impossible position of being considered disabled by the state even when the diabetes is controlled while also considered not to be disabled because the diabetes is controlled.

Finally, the ADA contains a "direct threat" provision. This provision basically states that an individual can have his/her disability considered if that disability would directly threaten the health and/or the safety of workers in the workplace. Maryland contends that the driving public would be put at risk should diabetics be allowed to operate CMVs. One can assume that the rationale is that Maryland considers the state's roadways to be the "workplace" of drivers who operate CMVs.

It is clear from relevant case law that the ADA provides little protection from discrimination for conditions that may be corrected or adequately controlled. While these cases have not addressed diabetes specifically, it is clear that diabetes would fall within the ambit of both Sutton and Murphy. Consequently, those individuals with controlled diabetes must look toward the FMCSRs to redress the inequity and inequality of Maryland's elimination of the CDL waiver for individuals with controlled diabetes.

VI. Conclusion

It is abundantly clear that insulin dependent individuals who have control of their disease can operate CMVs safely on the nation's highways. Studies have proven that diabetics have a similar, if not lower, rate of highway accidents as do non-diabetic drivers. Maryland's decision to discontinue their CDL waiver program is facially discriminatory, and diabetics have no way to redress this discrimination. Individuals with potentially more serious conditions are permitted to operate CMVs without the restrictions placed upon diabetics.⁶

Adoption of the FMCSRs will permit insulin dependent diabetics to continue their gainful employment and to provide for the support of their families. While this writer does not discount the concerns of the State of Maryland over the safety of the driving public, they are doing so at the expense of diabetics who have, and would continue to have safe driving records. Diabetics have an important interest in keeping their disease under control beyond just the safety of the public. Without such control, the diabetic would not be able to provide for the wellbeing of him/herself or that of their family. Therefore, it is of the utmost importance that careful screening be in place to insure that all who would be granted a waiver have control of their diabetes.

Without the adoption of the FMCSRs, I will no longer be able to continue my employment with Harford County. I will also be forced to close my part-time excavating

⁶ Report that the driver of a Greyhound bus that crashed on Mother's Day 1999 had been hospitalized 10 times in 20 months for heart and kidney disease was repeatedly cleared to renew his commercial license. The driver and 22 passengers perished in the crash.

business, which I have spent years of hard work developing. Without employment, my family will be in danger of losing everything that we have worked many years to build. I therefore urge that the regulations proposed by the Federal Motor Carrier Safety Administration to grant waivers to diabetics be enacted.