

**WALKING A THIN LINE: UNDERSTANDING DRUG TESTING
REQUIREMENTS UNDER THE FMCSR AND EVIDENTIARY
CONSIDERATIONS IN TRANSPORTATION LITIGATION**

Cooper & Scully Transportation Law Seminar
City Place Conference Center
Dallas, TX

June 20, 2008

Wesley G. Johnson
Cooper & Scully, P.C.
900 Jackson Street, Suite 100
Dallas, TX 75202
214/712-9500
214/712-9540 (Fax)

© 2008

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	TYPES OF DRUG TESTING MANDATED BY FMCSR.....	1
	A. History of Drug Testing in the Transportation Industry:.....	1
	B. Pre-Employment Drug Screening:	1
	C. Post-Accident Drug Testing:	2
	D. Other Mandated Drug Screenings:	3
III.	ADMISSIBILITY OF EVIDENCE REGARDING POSITIVE DRUG TESTS	4
	A. Standard in the Federal Courts	4
	B. Standard in Texas State Courts	4
	C. Venue Considerations:	5
IV.	CONCLUSION	6

**TABLE OF AUTHORITIES
CASES**

Ballou v. Henri Studios, Inc.,
656 F.2d 1147 (5th Cir.- 1981)4

Barron v. Ford Motor Co.,
965 F.2d 195 (7th Cir. 1992)6

Bedford v. Moore,
166 S.W.3d 454 (Tex. App. - Ft. Worth, no pet.)5

Bocanegra v. Vicmar Servs., Inc.,
320 F.3d 581 (5th Cir. 2003)4

Caparotta v. Entergy Corp.,
168 F.3d 754 (5th Cir. 1999)4

Dorman v. Langlinais,
592 S.W.2d 650 (Tex.Civ.App.—Beaumont 1979, no writ)4, 5

Javernick v. U.S. Xpress, Inc.,
2007 U.S. Dist. LEXIS 57082 (W.D. Tex. 2007)6

McInnes v. Yamaha Motor Corp.,
659 S.W.2d 704 (Tex. App.--Corpus Christi 1983), *aff'd*, 673 S.W.2d 185
(Tex. 1984).....5

Nichols v. Howard Trucking Co.,
839 S.W.2d 155 (Tex. App.--Beaumont 1992, no writ)5

Trans-State Pavers, Inc. v. Haynes,
808 S.W.2d 727 (Tex.App.—Beaumont 1991, writ denied)5

STATUTES

49 CFR 382.3053

49 CFR 382.302(a)2, 3

49 CFR § 382.3032

49 CFR 382.3074

Fed. R. Evid. 4014

Fed. R. Evid. 401, 402.....4

Fed. R. Evid. 402.....4

Fed. R. Evid. 403.....4

MISCELLANEOUS

FMCSR § 382.011

Drug Testing in the Trucking Industry, 46 J. Law & Econ. 131, 135 (April 2003).....1

I. INTRODUCTION

In the past year there has been significant media coverage given to major accidents involving motor carriers. Moreover, many media outlets, such as the Dallas Morning News have presented investigative reports and/or editorial pieces regarding hiring practices in the trucking industry, with an emphasis on the use of controlled substances and alcohol by truck drivers.

Clearly, this is an issue that has seized the public's interest. It is undeniable that commercial motor carriers are at a disadvantage from a public perception standpoint from the onset of civil litigation due to public concerns over sharing the road with large trucks, the relative financial worth of a motor carrier, etc.

However, nothing can be more detrimental or prejudicial to the defense of a trucking case than a positive drug screen. If such a positive test is the result of post-accident drug testing, then a presumption descends upon the jury that the intoxication or impairment of the truck driver is the sure cause of the accident, and the hill to climb for the defense becomes much more steep.

Likewise, if a positive drug screen comes during the pre-employment screening process, then it can give credence to a plaintiff's claims of negligent hiring – even if there is no dispute that the driver was not impaired at the time of the accident.

Consequently, it is of utmost importance to understand drug screening under the Federal Motor Carrier Safety Regulations (FMCSR). This paper will discuss the types of testing provided by the FMCSR and the evidentiary and venue considerations that can arise from a positive drug test.

II. TYPES OF DRUG TESTING MANDATED BY FMCSR

A. History of Drug Testing in the Transportation Industry:

During the 1980s, many states responded to the growing “war on drugs” by passing legislation through their respective state houses mandating certain workplace drug screenings and the American public became used to the idea of commonplace drug testing. See Drug Testing in the Trucking Industry, 46 J. Law & Econ. 131, 135 (April 2003).

Beginning in 1988, the U.S. Department of Transportation (DOT), became concerned by several highly publicized commercial truck, airplane, and train accidents, most notably the 1987 Conrail-Amtrak train crash that killed 16 and injured hundreds wherein public allegations of drug use were made regarding the train operators. *Id.*

In response to growing public pressure, the DOT devised testing requirements that applied to all its regulated private and public industries and affected more than 4 million private-sector employees. *Id.* The mandate required pre-employment, reasonable-cause, random, periodic, and post-accident drug testing of employees in safety-sensitive positions and stipulated that they be screened at a minimum for marijuana, cocaine, amphetamines, opiates, phencyclidine (commonly known as PCP or angel dust), and their metabolites. *Id.* Although the regulations do not specify disciplinary actions, such as dismissal, for positive drug tests, they do require that truckers be removed from duty until completion of a substance abuse prevention (SAP) program and a negative drug test. *Id.*

B. Pre-Employment Drug Screening:

Prior to the first time a driver performs any “safety-sensitive functions” for an employer, the FMCSR § 382.01 mandates that the “driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver,

UNDERSTANDING THE RIGHTS OF INSURED IN INSURANCE COVERAGE DISPUTES INVOLVING BUILDERS RISK INSURANCE AND COMMERCIAL GENERAL LIABILITY

who the employer intends to hire or use, to perform safety-sensitive functions unless the employer has received a controlled substances test result...” See 49 CFR 382.302(a).

The exception referenced in Section 382.301 allows commercial motor carriers to rely upon a prior negative drug test provided that the test for controlled substances was administered within the 6 months prior to the date of application with the carrier. See 49 CFR 382.302(b)(2).

In addition, the employer does not need to conduct pre-employment screening in the candidate for employment had participated in a random controlled substances testing program conforming with DOT guidelines for the 12 month period prior to the date of application with the employer. See 49 CFR 382.302(b)(2).

However, reliance upon either of these two exceptions comes with a significant caveat: the employer must ensure that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substances use rule of another DOT agency within the previous six months. See 49 CFR 382.302(b)(2).

In addition, the employer must contact the previous controlled substances testing program(s) in which the driver participated and shall obtain and obtain verification that the driver participated in the program, verification that the program is qualified under the FMCSR, verify that the driver has never refused a previous controlled substance test, and verify that the date that the driver was last tested for controlled substances. See 49 CFR 382.302(c).

Needless to say, the verification process can be quite burdensome. In general, the prudent measure would seem to be to simply conduct a pre-employment drug test as the legal pitfalls for relying upon an exception can be significant.

C. Post-Accident Drug Testing:

The drug testing area that most affects civil litigation seems to be with regard to post-accident drug testing. The FMCSR require post-

accident drug testing in certain situations outlined in 49 CFR § 382.303. Specifically, the statute states:

“As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for alcohol for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within 8 hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.

(b) As soon as practicable following an occurrence involving a commercial motor vehicle operating on a public road in commerce, each employer shall test for controlled substances for each of its surviving drivers:

(1) Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or

(2) Who receives a citation within thirty-two hours of the occurrence under State or local law for a moving traffic violation arising from the accident, if the accident involved:

UNDERSTANDING THE RIGHTS OF INSURED IN INSURANCE COVERAGE DISPUTES INVOLVING BUILDERS RISK INSURANCE AND COMMERCIAL GENERAL LIABILITY

(i) Bodily injury to any person who, as a result of the injury, immediately receives medical treatment away from the scene of the accident; or

(ii) One or more motor vehicles incurring disabling damage as a result of the accident, requiring the motor vehicle to be transported away from the scene by a tow truck or other motor vehicle.”

See 49 CFR § 382.302.

The language of the statute is somewhat awkward, but it can be easily explained.

In the instance where an accident involves a fatality, the statute requires a drug and alcohol test – every time. This is true regardless of whether a citation was issued to the driver.

If there is not a fatality, but a person involved in the accident sustained a bodily injury that required immediate medical attention, the statute does not require any testing if no citation was issued to the driver within a eight hour timeframe (for alcohol) or a thirty-two hour timeframe (for controlled substances).

Likewise, if one of the vehicles sustained significant, disabling property damage, that required the vehicle to be towed (a frequent occurrence), the statute does not require any testing if no citation was issued to the driver within a eight hour timeframe (for alcohol) or a thirty-two hour timeframe (for controlled substances).

Thus, whether or not there is a citation issued is of significant importance in determining whether or not a post-accident drug or alcohol screening is warranted. Risk managers and adjusters should be very cognizant of the determined time of accident as that will start the clock on the deadlines for issuance of the citation. If eight hours have passed and no citation is issued, then the company is under no obligation to screen for alcohol.

However, the complexities of whether or not a test is mandated by federal law has led many motor carrier to adopt more simplified and streamlined standards. Some carriers test for drugs/alcohol on every accident requiring police intervention. Some test on every accident requiring emergency medical response.

Such policies are easy to follow and eliminate any allegation of impropriety in subsequent civil litigation. However, given that it is not uncommon for police and DOT investigators to wait hours (even days) to complete their reconstruction and investigation prior to giving out citations, it only follows that such policies have produced positive drug test results against drivers where the test itself was not mandated by the statute.

Thus, the decision to streamline a motor carrier’s policy regarding post-accident drug testing carries some risk as well.

D. Other Mandated Drug Screenings:

Section 382.305 of the FMCSR mandates that all employers of commercial drivers maintain a program of random drug and alcohol screening. See 49 CFR 382.305.¹ Generally speaking, this type of test does not arise in the course of litigation as often as the pre-employment and post-accident contexts. However, the failure of the carrier to comply with the random drug test requirement can be compelling evidence against a motor carrier wherein a driver does test positive for drugs/alcohol in post-accident testing. The obvious argument is that random testing might have prevented the driver from consuming the substance in question or a positive test from a

¹ Section 382.305 mandates that every carrier shall conduct random drug screening on 50% of its total drivers annually for controlled substances. However, the statute allows the random drug test rate to be reduced from 50 percent to 25 percent of covered employees if the drug test positive rate on random tests is below 1 percent for two consecutive years. When an industry qualifies for the 25 percent testing rate, it must maintain the positive rate below 1 percent, or it will increase back to 50%. See 49 CFR 382.305.

UNDERSTANDING THE RIGHTS OF INSURED IN INSURANCE COVERAGE DISPUTES INVOLVING BUILDERS RISK INSURANCE AND COMMERCIAL GENERAL LIABILITY

random screening might have kept him off the road for the accident altogether.

In addition to the random testing requirement, Section 382.307 requires that an employer shall require a driver to submit to an alcohol or controlled substance test when the employer has “reasonable suspicion” to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol or a controlled substance. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. See 49 CFR 382.307. This test is clearly objective and does not tend to become an issue in trucking accident litigation.

III. ADMISSIBILITY OF EVIDENCE REGARDING POSITIVE DRUG TESTS

A. Standard in the Federal Courts

In the federal courts, case law demonstrates that the federal court will simply rely upon the “balancing tests” of Fed. R. Evid. 401, 402 and 403.

Rule 402 states that “all relevant evidence is admissible, except as otherwise provided by the Constitution, by statute or by these rules...” Fed. R. Evid. 402.

“Relevant evidence” is defined by Rule 401 as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” Fed. R. Evid. 401.

Obviously, a review of those rules demonstrates that there is an extremely broad determination of what constitutes “relevant evidence” and generally all such evidence would be considered admissible. However, the considerations of Rules 401 and 402 must be balanced against Rule 403, which excludes the introduction of evidence wherein the probative value of the evidence is outweighed by the

potential of unfair prejudice or confusion to the fact finder. Fed. R. Evid. 403. See also *Caparotta v. Entergy Corp.*, 168 F.3d 754, 758 (5th Cir. 1999).

This balancing test is essentially “judge-specific.” However, Fifth Circuit precedent has definitely established that the balancing test does not come out favorably to drivers/carriers in cases involving the admissibility of drug testing evidence.

In *Ballou v. Henri Studios, Inc.*, 656 F.2d 1147, 1155-56 (5th Cir.- 1981), the Fifth Circuit Court of Appeals held that results of blood alcohol test showing intoxication were erroneously excluded under Rule 403 because evidence of intoxication was highly relevant and outweighed any issue of prejudice resulting from admission of evidence.

In addition, the Fifth Circuit more recently affirmed the *Ballou* opinion in *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 588-91 (5th Cir. 2003). In *Bocanegra*, the Court held that a trial court’s exclusion of evidence regarding positive drug test on the basis that there had to be some evidence of a causal connection between the marijuana use and the accident was erroneous as the information was relevant and more probative than prejudicial.

Consequently, the Fifth Circuit has clearly established that as a general rule, evidence of drug use is relevant and admissible. This is obviously inclusive of all post-accident testing.

B. Standard in Texas State Courts

Texas has unusually well developed jurisprudence regarding the admissibility of drug tests in trucking litigation.

Texas intermediate Courts of Appeal have uniformly held that drug usage, without further evidence of negligence to establish a relationship of the drug use to causation, is inadmissible in trucking litigation. *Dorman v. Langlinais*, 592 S.W.2d 650, 652 (Tex.Civ.App.—Beaumont 1979, no writ).

UNDERSTANDING THE RIGHTS OF INSURED IN INSURANCE COVERAGE DISPUTES INVOLVING BUILDERS RISK INSURANCE AND COMMERCIAL GENERAL LIABILITY

As favorable as the *Dorman* standard seems, the practical impact of the decision was that the fact that the driver was involved in an accident itself constituted “further evidence of negligence” and thus, the drug test was considered admissible. *Trans-State Pavers, Inc. v. Haynes*, 808 S.W.2d 727, 729-33 (Tex.App.—Beaumont 1991, writ denied);. See also *McInnes v. Yamaha Motor Corp.*, 659 S.W.2d 704, 714 (Tex. App.—Corpus Christi 1983), *aff’d*, 673 S.W.2d 185 (Tex. 1984); *Nichols v. Howard Trucking Co.*, 839 S.W.2d 155 (Tex. App.—Beaumont 1992, no writ). Throughout the 1980s and 1990s, *Dorman* was essentially toothless as Courts routinely held that the accident itself was “further evidence of negligence.”

However, more recent Texas case law has refined the *Dorman* standard and possibly restored its preclusive effect. In *Bedford v. Moore*, 166 S.W.3d 454 (Tex. App. – Ft. Worth, no pet.), the Fort Worth Court of Appeals specifically held that results of positive post-accident drug tests for truck drivers are inadmissible as evidence in a negligence case in the absence of expert testimony to tie the presence of the controlled substance to impairment of the driver at the time of the accident.

In *Bedford*, the appellant alleged that the trial court erred in excluding all evidence regarding the positive results of a defendant truck driver’s post-accident drug screen. *Id.* at 464. The *Bedford* case explains that following the accident that was the subject of that litigation, a federally required drug screen showed that the defendant truck driver had methamphetamines in her system. *Id.*

During the trial, the plaintiff, Bedford, attempted to offer the testimony of an expert witness who had analyzed the drug screen conducted on the truck driver. *Id.* Upon objection, the expert was not allowed to testify about the correctness of the examination and the effects methamphetamine can have on an individual. *Id.* The expert also testified outside the presence of the jury that the testing showed

that sometime in a four day span that the truck driver had either eaten or injected or in some other way received methamphetamine into her system. *Id.* at 464-65. However, the expert did not provide any testimony or evidence connecting the positive test to impairment and that he could not tell the jury that the truck driver was impaired at the time of the accident. *Id.* at 465. The trial court excluded the evidence of the positive drug test. *Id.*

On appeal, the Second District Court of Appeals affirmed the decision of the trial court to exclude the introduction of the post-accident drug test from evidence. The Court held that under Texas law, drug usage, without further evidence of negligence, is inadmissible. *Id.* at 465. Citing *Dorman*, 592 S.W.2d at 652.

The Court further noted that “evidence of the use of intoxicants is inadmissible as immaterial unless there is further evidence of negligence and improper conduct of the part of the user.” *Bedford*, 166 S.W.3d at 465. The Court determined that such evidence of drug usage must provide some explanation for the negligence and improper conduct. *Id.* However, the court concluded that this was not present in the facts of the *Bedford* case because plaintiff’s expert witness could not tie the presence of methamphetamines in the truck driver’s body to impairment at the time of the accident, and therefore could not connect the presence of the drug to causation. *Id.*

Consequently, it appears that the *Bedford* decision has restored the teeth back to *Dorman*. However, it remains to be seen whether the other intermediate courts of appeal will follow *Bedford*.

C. Venue Considerations:

When faced with a trucking accident in Texas, coupled with the realization that your driver tested positive in a post-accident drug screening, the distinction between the Texas and federal courts regarding the admissibility of evidence of the positive test might be a consideration regarding whether or not the carrier should remove a case to federal court (or

UNDERSTANDING THE RIGHTS OF INSURED IN INSURANCE COVERAGE DISPUTES INVOLVING BUILDERS RISK INSURANCE AND COMMERCIAL GENERAL LIABILITY

even if a plaintiff should file the case in federal court to begin with).

As a general rule, most interstate motor carriers have favored the federal venue as it has been seen as less parochial than a state court whose judges are elected and whose jury pool does not extend beyond the county where the court sits. Federal judges are appointed and jury pools are usually taken from a multitude of counties, obviously such diversity amongst jurors can be effective at managing risk.

However, in the case where it is known that a positive drug test will be factor, it warrants consideration as to whether removal to a federal court benefits the defense.

Moreover, federal courts cannot rely upon *Bedford v. Moore* as substantive state law since the admissibility of evidence is not subject to the provisions of the *Erie* doctrine. See *Barron v. Ford Motor Co.*, 965 F.2d 195, 199 (7th Cir. 1992).

In fact the U.S. District Court for the Western District of Texas has already been asked to determine if federal precedent or state law determines whether or not a positive drug test is admissible. In *Javernick v. U.S. Xpress, Inc.*, 2007 U.S. Dist. LEXIS 57082 (W.D. Tex. 2007), the Court determined that issues of admissibility of a positive post-accident drug test are governed by Federal Rule of Evidence 403, and specifically declined to apply *Bedford v. Moore*.

Consequently, in addition to the typical venue issues that are considered at the onset of litigation, it would serve all parties well to consider the effect of the distinction of federal and state law on these issues.

IV. CONCLUSION

Clearly, drug testing of commercial drivers is here to stay. Motor carriers have adapted to the requirements of the FMCSR and adopted policies to ensure compliance. However, it certainly pays to keep up to date on issues

regarding the application of law requiring drug testing as policies might be too overreaching and essentially end up “buying” a claim of liability where one might not have existed if the carrier restricted itself to the requirements of federal law.

Moreover, the growing distinction between Texas state courts and federal jurisprudence certainly merits continued review as the distinctions between the two venues could be outcome determinative in litigation.