



U.S. Department of Transportation
Pipeline and Hazardous Materials
Safety Administration

1200 New Jersey Ave, S.E.
Washington, D.C. 20590

MAR 31 2011

Mr. Eugene A. Miklaucic
Administrator
Spectrum Medical Corporation, LLC
77B Dutilh Road
Cranberry Township, PA 16066

Dear Mr. Miklaucic:

This letter is in response to your February 7, 2011, formal request for interpretations of 49 CFR Parts 40 and 199 regulations. Enclosed in your February 7, 2011, letter are two letters from June 2009. These letters were not considered formal requests for interpretation and PHMSA staff has already informally responded to these letters. The formal responses you have requested are below:

From your June 17, 2009, letter:

1. "May letter format documentation of a DOT drug test results meeting all listed criteria in 40.163(c) be refused as evidence of compliance with a DOT drug test program?"
- and
2. "Does the enclosed letter format drug test report meet 49 CFR 40.163(c)?"

While PHMSA does not have responsibility for responding to requests for interpretation of 49 CFR Part 40, we coordinated our response with the DOT Office of Drug & Alcohol Policy and Compliance (ODAPC). ODAPC is responsible for promulgating 49 CFR Part 40, as well as providing official written interpretations of its rule. In your inquiry, you ask whether Spectrum Medical Service's (SMS) drug test result report is compliant with Part 40.

Section 40.163 permits Medical Review Officers (MRO) to report drug test results either by using a signed or stamped and dated legible photocopy of Copy 2 of the CCF or, a written report (e.g., a letter) which must, at a minimum, include the information outlined in 40.163(c). The MRO may also report negative test results using an electronic data file. ODAPC has reviewed SMS' drug test result report format and found it meets the requirements in 49 CFR Part 163(c).

The Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety provides written clarifications of the Regulations (49 CFR Parts 190-199) in the form of interpretation letters. These letters reflect the agency's current application of the regulations to the specific facts presented by the person requesting the clarification. Interpretations do not create legally-enforceable rights or obligations and are provided to help the public understand how to comply with the regulations.

199 + 40.163(c)

From your June 12, 2009 letter:

1. "Does 49 CFR 199 require an individual self-employed subcontractor to have the supervisory training required by 49 CFR 199.113(c) and 199.241?"
- and
2. "What documentation is required to demonstrate compliance with the supervisory training required by 49 CFR 199.113(c) and 199.241?"

Responses:

No. 49 CFR 199.113(c) and 199.241 requiring reasonable cause drug and reasonable suspicion alcohol supervisor training do not apply to persons who do not supervise other covered employees who perform covered functions, as defined in § 199.3, on jurisdictional pipeline facilities.

Employers of covered employees must provide evidence that a supervisory training program exists and meets the requirements of both 49 CFR 199.113(c) and 199.241. Moreover, employers must provide certification (e.g., review by: EAP/SAP counselor, MRO, recognized substance abuse training authority, or applicable subject matter expert) that any conducted training "complies with the requirements for such training." 49 CFR 199.227(c)(6)(iv). A supervisor cannot self-certify completion of reasonable cause/suspicion substance abuse training.

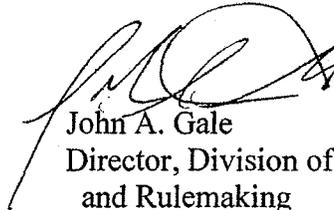
For supervisory reasonable cause drug testing determinations, documentation must show the existence of sufficient and pertinent content for "one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use." 49 CFR 199.113(c). For supervisory reasonable suspicion alcohol testing determinations, documentation must show the existence of sufficient and pertinent content for at least "60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse." 49 CFR 199.241. Examples of additional documentation that may help show the supervisory training is compliant with the requirements for the specified training may include, but are not limited to:

- Employer's policy on drug and alcohol abuse or misuse
- A syllabus or course outline
- Materials on drug or alcohol awareness
- Participant handouts
- EAP materials
- Video content description
- Computer or web based training content
- Description or recorded on-line presentation
- Instructor training plan

- Dated participant and instructor sign-up sheets
- Participant record of completion or qualification
- All documents required under 49 CFR 199.227(c)(6)

I hope that this information is helpful to you. If I can be of further assistance, please contact me at (202) 366-4046.

Sincerely,



John A. Gale
Director, Division of Standards
and Rulemaking



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7 February, 2011

U.S. Department of Transportation
Cynthia L. Quartermain, Administrator
Pipeline and Hazardous Materials Safety Administration
East Building, 2nd Floor
1200 New Jersey Ave., SE
Washington, DC 20590

Dear Administrator,

For well over a year I have awaited an answer to my formal letter requests to the Pipeline and Hazardous Materials Safety Administration, and the Office of Drug and Alcohol Policy and Compliance. As a retired military officer and a 22 year small business owner in Cranberry Township, PA I do not understand how simple interpretive requests are ignored. The lack of any acknowledgement whatsoever simply reinforces my belief that your agency favors competitors. My letters dated 12 June, 2009 and 17 June, 2009 were sent by FedEx. (I have receipts) Please see attachments (1) & (2) copies.

I have fought numerous battles about these and other issues, even to the point of having local legal counsel requesting a response, but **there has never been a response!** Having been a part of government I know that, if asked, any DOT general counsel would interpret and respond. I believe my formal request is being shelved because PHMSA does not like my proposed interpretation, even though legally accurate. As regards one of the issues a verbal response from PHMSA alleged "There is no such thing as a one person company". This is insufficient and, from my perspective, clearly inaccurate. Moreover, PHMSA historically answers requests for interpretation as shown via <http://phmsa.dot.gov/pipeline/regs/interps> so why are mine shelved?

I am obligated to respond as representative of ~850 PHMSA regulated Pittsburgh area clients. As a result, clarifying exactly what the DOT rules require is extremely important.

Can you please direct a response to the specific requests for interpretation?


Eugene A. Miklaucic, Administrator
Spectrum Medical

Attachment: (1) RFI 6/12/09
(2) RFI 6/17/09



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17 June, 2009

U.S. Department of Transportation
Office of Drug and Alcohol Policy and Compliance
W62-300
1200 New Jersey Avenue, SE
Washington DC 20590

COPY

Pipeline and Hazardous Materials Safety Administration
Attn: Stan Kastanas, Director
Office of Substance Abuse Policy, Investigations, & Compliance
Washington, DC 20590

SUBJ: REQUEST FOR INTERPRETIVE RULING

REF: A. 49 CFR 40.163
B. 49 CFR 199

Dear DOT representatives,

Due to the specific, continued demand for "DOT PHMSA required information" by a service agent, a compliance auditor representing various operators, I request a formal review and interpretive ruling on the issue set forth in attachment (1):

- Question:
- May letter format documentation of a DOT drug test results meeting all listed criteria in 40.163(c) be refused as evidence of compliance with a DOT drug test program?
 - Does the attached letter format drug test report meet 49 CFR 40.163(c)?

An auditor of DOT drug and alcohol programs under contract with Operators is tasked with verifying that "An Operator must require contractor employee(s) to meet the same requirements as their own employees". (199.115) While not specifically named as a service entity, such a service "to employers (Operator) and/or employees in connection with DOT drug and alcohol testing requirements" clearly qualifies the auditor as a service agent.

While performing audits of DOT required drug and alcohol testing programs the auditor ceased to accept the letter format (49 CFR 40.163(c)) for reporting DOT-PHMSA drug test results. The standard letter format used by Spectrum Medical Services, Inc. for reporting DOT drug test results is attachment (2). While http://www.dot.gov/ost/dapc/NEW_DOCS/part40.html plainly states a preference for reporting via Copy 2 the letter format remains acceptable by rule.

I presume that the service agent and/or Operator(s) represented would await a DOT/PHMSA decision on this matter. However, as immediate enforcement of a decision to bar subcontractors from covered service work is being contemplated, our counsel has presented the specifics of this situation to both service agent auditor and the operator(s) involved. We request an accelerated review and interpretation of this rule.

Sincerely,

Eugene A. Miklaucic, President
Spectrum Medical Services, Inc.

Attachment: (1) Request for interpretation Question/Answer
(2) Letter format drug test report

Question 1:

May letter format documentation of a DOT drug test result be refused as evidence of compliance with DOT programs when it meets all listed criteria in 40.163?

Overview

A C/TPA of substance abuse testing programs for Operators, companies and contractors provides DOT compliance with 49 CFR Part 199, Part 219, Part 382, Parts 655, and 46 CFR Parts 4, 5 & 16, among others, and delivers drug test results via letter format. A service agent (auditor) performs compliance auditing of subcontractor(s) for Operator(s) under contract and requests documentation of individual subcontractor compliance with applicable rules (49 CFR 199). See attachment (1) of the transmittal letter. The C/TPA has provided documentation of said compliance to the service agent (auditor) for over 10 years. However, attachment (1) and subsequent auditor requests have changed and now claim "...this pipeline operator's regulatory obligation.." has required "...a copy of the official drug test results..." and that "The official result is a copy of Page 2 of the chain of custody form signed by the MRO doctor." C/TPA disagrees that the only form of reporting drug test results is Copy 2, has replied with the rule citation in attachment (2) of the transmittal letter, and continues to provide the results in letter format. The C/TPA has continued to inquire regarding the legal basis, including specific operator preference due to the auditor position as operator's representative, but no response from the auditor to C/TPA has been received.

Rule Discussion

The C/TPA continues to report drug test results in the letter format (40.163(c) as its only means of reporting for a very elementary reason: Original Copy 2 information is frequently faint, illegible and undecipherable, even when high resolution scanning is used! It is frequently worse when only a fax copy is provided (40.163(b)) even though the rule plainly requires "legible" facsimile. Rejection of Copy 2 due to "legible" requirements is met with significant resistance from both collecting agent and client DER due to the great disruption to employee schedules. While Copy 2 page is rightly the DOT preferred method for reporting results due to its status as the evidentiary document for legal purposes, this C/TPA suggests that for compliance audit purposes DOT should prefer the letter format due to the detailed clarity!

Proposed Answer to Question 1:

It is clear (199.115) that an Operator must require contractor employee(s) to meet the same requirements as their own employees. Furthermore, PHMSA (RSPA) in FR Vol. 53 No. 224 Nov. 21, 1988 par. 2 & 3 page 47089 determined that "First, operators may require contractors to implement their own drug programs instead of including contractor employees in the operator's own program. So long as the operator is diligent about monitoring the contractor's compliance with such a requirement, the "knowingly" requirement should protect an operator from unfair liability." Under this principle when contracting a service agent (auditor) to perform due diligence monitoring of subcontractor's compliance with 49 CFR 40 & 199 the "operator remains responsible for ensuring that the requirements of this part are complied with;" for both operator and subcontractor employees. In either case the operator remains responsible for the accurate monitoring of compliance, including the action/inaction and DOT rule interpretations of the service agent (auditor) acting under contract in place of the operator.

40.163 clearly permit either the use of Copy 2 of the CCF to report test results, or a written report (e.g., a letter) for each test result meeting the stated information requirements. Either form of test result is acceptable to DOT. An operator may not refuse to accept documentation compliant with DOT rule as evidence of said compliance.



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Results of DOT (Urine) Controlled Substance Test
For
PRIVATE - CLIENT

Donor : **DUMMY PERSON - N** ID : **123-45-6789N**
Specimen ID : **123456789123**

Employer : **SAMPLE COMPANY - ON LINE SERVICE**
101 MAIN STREET
ANYWHERE, USA, 99999

Division :

Date of Test : 05/18/2004 Time Collected : 9:00 AM
Reason for Test : Pre-Employment Copy 2 Received :
Collection Center : **SPECTRUM MOBILE II**
CRANBERRY TOWNSHIP, PA 16066

Analysis Performed By : **CLINICAL REFERENCE LAB**
8433 QUIVIRA ROAD
LENEXA, KS 66215 800-445-6917

Substances Tested For : Marijuana, PCP, Opiates, Cocaine, Amphetamines

Chain of Custody Intact : Yes

Test Results Reported :

Results : Positive

Substances Tested Positive : Cocaine,

Reason for Cancel/Refusal : N/A

Medical Review Officer : Dr. David Thimons, D.O.

Date

Signature



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12 June, 2009

Pipeline and Hazardous Materials Safety Administration
Attn: Stan Kastanas, Director
Office of Substance Abuse Policy, Investigations, & Compliance
Washington, DC 20590

SUBJ: REQUEST FOR INTERPRETIVE RULING

REF: A. 49 CFR PART 199
B. Similar DOT training requirements reflected in 49 CFR PART 382,

Dear Mr. Kastanas,

Earlier this year you discussed the interpretation and applicability of certain aspects of 49 CFR 199 with Spectrum Medical Services, Inc. by telephone. Due to the continued demand for "DOT PHMSA required information" by third party compliance auditors I request a formal review and interpretive ruling on the following issue set forth in attachment (1):

- Q1 Supervisor Training - Applicability to a single person company
- Q2 Supervisor Training - Acceptable Documentation for Obtaining Compliance

While I presume an auditor or Operator would await a PHMSA decision on this matter, if either has decided to immediately enforce a Supervisor Training requirement for one (1) person companies I will be requesting a formal operator letter declaring said requirement on company letterhead. This serves to identify who is requiring the training, auditor or operator, since it is not immediately clear to me or other operators whose opinion differs from the auditors! At present there are thousands of self-employed single person companies affected by such a decision and the impact of either requiring immediate training, or placing the company out of compliance would be disastrous for operators and the affected companies.

Please call me at 7240776-6630 should you wish to discuss any aspect or issue of these items.

Sincerely,


Eugene A. Miklaucic, President
Spectrum Medical Services, Inc.

Enclosure: (1) Rule Discussion w/ Two (2) Questions

Enclosure (1) to SMS letter request for interpretive ruling to DOT dated June 12, 2009

Question 1:

Does 49 CFR 199 require an individual self-employed subcontractor to have the supervisor training required by 49 CFR 199.113(c) and 199.241?

Overview

Spectrum Medical Services, Inc. (SMS) is a Third Party Administrator of substance abuse testing programs for Operators, companies and contractors seeking DOT compliance with 49 CFR Part 199, Part 219, Part 382, Parts 653 & 654, 46 CFR Parts 4, 5 & 16, among others. Pipeline operators and their agent are performing compliance auditing of operator contractor employees per 199.115 & 245 and have requested documentation of their individual compliance with the applicable rules (49 CFR 199). SMS has provided documentation of said compliance since 1992. However, a recent request on behalf of "Operators" has required that individual, single person (self-employed) companies receive Supervisor Training under 49 CFR 199. Prior to 2009 the accepted interpretation was that an individual who supervised no other person was not required to obtain Supervisor Training as that self-employed person has no employee to supervise. This situation affects at least 500 client companies and the Operator(s) who utilize their services.

Answer to Question 1:

It is clear (199.115) that an Operator must require contractor employee(s) to meet the same requirements as their own employees. When contracting a third party to perform "drug testing, alcohol testing, training and education" the "operator remains responsible for ensuring that the requirements of this part are complied with;" for both operator and subcontractor employees who perform operating, maintenance or emergency response functions. In either case the operator remains responsible for the accurate performance of testing, training and education, including the action/inaction and DOT rule interpretations of a contracted auditor acting under contract in place of the operator.

There is no definition of "Supervisor" in OPS rules. There was discussion in the Final Rule FR Vol. 53 No. 224 Nov. 21, 1988 pages 47091-2 "*Reasonable Cause Testing*" and "*Education and Training*" where PHMSA (RSPA) recognized and accentuated that a supervisor was a person who monitored an employee. Webster's defines "Supervisor" as: one that supervises ; i.e. Superintend – to have or exercise the charge and oversight of; Furthermore, on page 47094 PHMSA (RSPA) recognized that "...for operators with fewer than 50 employees subject to this part. In that case, only one supervisor is necessary to determine that there is reasonable cause for an employee to be drug tested." and in Section IV.C. "The final rule requires that operators provide 1 hour of training for supervisory personnel who will determine whether an employee must be drug tested based on reasonable cause." In addition, PHMSA regulation requires "...at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse."

If the rule requires an individual self-employed contractor to obtain Supervisor Training it is asking that contractor to perform a self-evaluation for reasonable cause, then proceed to test themselves for drug and/or alcohol abuse. This unrealistic interpretation of the rule assumes that an individual who uses drugs will voluntarily test themselves because of a DOT rule. Such a person deciding not to test themselves is also technically "refusing to test", which is a positive test under the rules. In either case this interpretation requires that individual to void their right against self incrimination. As there is no regulatory basis to require that an individual self-employed contractor obtain Supervisor Training and there is legal basis to avoid conflict with an individual's civil rights against self-incrimination, individual self-employed plumbers are not required to have supervisory training prior to performing an operating, maintenance or emergency response function.

Enclosure (1) to SMS letter request for interpretive ruling to DOT dated June 12, 2009

Question 2:

What documentation is required to demonstrate compliance with the supervisor training required by 49 CFR 199.113(c) and 199.241?

Overview

As set forth in question 1 the operator and their agent are performing compliance auditing of contractor drug and alcohol program elements. Documentation of individual contractor compliance with the applicable rules (49 CFR 199) is required and Spectrum Medical Services, Inc. provides written and signed documentation of supervisor training per the attached certificate. The current concept of compliance auditing does not indicate that un-validated self-certification such as "Yes, I watched the on-line video." meets the specific regulation. i.e. the contractor's affirmation alone, without verifiable documentation, is not acceptable.

Answer to Question 2:

It is clear (199.113(c) & 199.241) that an Operator and any contractor or subcontractor thereof must provide their supervisory personnel:

"... one 60-minute period of training on the specific, contemporaneous physical, behavioral, and performance indicators of probable drug use." and

"...at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse."

When contracting a third party to perform "drug testing, alcohol testing, training and education" the "operator remains responsible for ensuring that the requirements of this part are complied with;" for both operator and subcontractor employees who perform operating, maintenance or emergency response functions. In either case the operator remains responsible for the accurate performance of testing, training and education, including the action/inaction and DOT rule interpretations of a contracted auditor acting under contract in place of the operator.

The following documentation of supervisor training records is required:

Drugs:

199.117 Recordkeeping.

(a) Each operator shall keep the following records for the periods specified and permit access to the records as provided by paragraph (b) of this section:

- (4) Records confirming that supervisors and employees have been trained as required by this part must be kept for at least 3 years.

Alcohol:

199.227 Retention of records.

(a) *General requirement.* Each operator shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

- (6) Records related to education and training:

Enclosure (1) to SMS letter request for interpretive ruling to DOT dated June 12, 2009

- (iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.
- (iv) Certification that any training conducted under this subpart complies with the requirements for such training.

Records related to supervisor and employee training must document the training and certify that the training complies with the specific regulations. Acceptable methods for meeting both the drug and alcohol documentation is:

1. A written certification by the person in charge of determining compliance under this rule or an independent third party (other than the attendee) which specifically attests to the training elements. i.e. date & time of training, length of training period for each type (drug or alcohol), the topics and identifying characteristics of the course.
2. An attendee is not permitted to self certify.
3. Those using the various forms of instruction other than classroom style (videotape, slideshow on-line video) must still provide written certification by the person in charge of determining compliance under this rule or an independent third party.

SPECTRUM MEDICAL SERVICES, INC.

As of June 12, 2009, Employee Name has completed Spectrum Medical Services' Drug and Alcohol Education and Training Class meeting federal Drug Free Workplace and Department of Transportation regulations.

Completion of this course provides participants with the knowledge of:

- * Effects and consequences of drug and alcohol use on personal health, safety, and work environment
- * The manifestations and behavioral indicators that may indicate drug and alcohol use and abuse
- * Specific, contemporaneous physical, behavioral, and performance indicators of probable drug use
- * Physical, behavioral, speech and performance indicators of probable alcohol misuse and use of Controlled substances
- * Personal health, safety, and work environment changes resulting from substance abuse

The course elements meet established private company requirements and federal U.S. Department of Transportation regulations in 49 CFR parts 199.113(c), 199.241, 219, 382.603, 655.14, 46CFR Part 16.401; and 14 CFR 121 App.I VIII B & App.J VIB. This includes minimum instruction time of one (1) hour concerning drug and one (1) hour concerning alcohol abuse issues.

Date _____

Presented By _____

Eugene A. Miklaucic, President