



Illinois Chapter

MERIT UPDATE

JULY 06, 2009

U.S. COURT OF APPEALS UPHOLDS DIRECT OBSERVATION TESTING BY CANDY WENDT, MIDWEST TRUCKERS ASSOCIATION

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EMPLOYEES REGULATED BY THE U.S. DEPT. OF TRANSPORTATION (DOT) REGULATIONS THAT TEST POSITIVE OR REFUSE TO TEST MUST SUCCESSFULLY COMPLETE A DRUG TREATMENT PROGRAM AND PASS RETURN TO DUTY AND FOLLOW UP TESTS AS A CONDITION OF RETURNING AND CONTINUING TO PERFORM SAFETY-SENSITIVE DUTIES. TO PREVENT CHEATING, DOT CHANGED ITS REGULATIONS IN AUGUST, 2008 TO REQUIRE THOSE TESTS BE CONDUCTED UNDER DIRECT OBSERVATION.

THE COURT STAYED THE DIRECT OBSERVATION REQUIREMENT PENDING THE RESOLUTION OF THE CONSOLIDATED PETITIONS FILED BY SEVERAL TRANSPORTATION INDUSTRY UNIONS AND THE BNSF RAILWAY COMPANY, WITH SUPPORT BY THE ASSOCIATION OF AMERICAN RAILROADS (PETITIONERS). THE PETITIONERS ARGUED THAT DOT HAD VIOLATED THE ADMINISTRATIVE PROCEDURE ACT PROHIBITION BY DICTATING AND CHANGING AGENCY ACTION AND VIOLATING THE FOURTH AMENDMENT'S PROTECTION AGAINST UNREASONABLE SEARCHES.

DOT CAREFULLY CONSIDERED VOLUMES OF EVIDENCE OF THE INCREASING AVAILABILITY OF A VARIETY OF PRODUCTS DESIGNED TO DEFEAT DRUG TESTS. THEY CITED CONGRESSIONAL TESTIMONY DESCRIBING THE READY AVAILABILITY THROUGH INTERNET SALES, OF HUNDREDS OF DIFFERENT CHEATING PRODUCTS, THE MOST ELABORATE OF WHICH IS A PROSTHETIC DEVICE THAT LOOKS LIKE REAL COLOR-MATCHED HUMAN ANATOMY THAT CAN BE USED TO DELIVER SYNTHETIC OR DRUG-FREE URINE. DOT ALSO RELIED ON THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO) REPORT INDICATING THAT EXISTING DRUG TESTING PROTOCOLS WERE INADEQUATE TO PREVENT CHEATING. BASED ON ALL THE EVIDENCE, DOT DETERMINED IT WAS NOT PRACTICABLE TO IGNORE THE CHEATING PROBLEM.

DOT ACKNOWLEDGED THE INTRUSIVENESS OF DIRECT OBSERVATION TESTING AND LIMITED IT TO SITUATIONS THAT POSE A HIGH RISK OF CHEATING. DOT'S CONCLUSIONS WERE REASONABLE IN THE COURT'S VIEW, THAT RETURNING EMPLOYEES HAVE A HEIGHTENED INCENTIVE TO CHEAT, AND WITH THIS INCENTIVE, COUPLED WITH THE INCREASED AVAILABILITY OF CHEATING DEVICES, DO CREATE A HIGH RISK.

IN THE COMMENT PERIOD SUBMITTED LAST YEAR, SEVERAL SUBSTANCE ABUSE PROFESSIONALS SUPPORTED THE DIRECT OBSERVATION REQUIREMENT, AND DOT PUT A GREAT DEAL OF WEIGHT ON THEIR COMMENTS, STRESSING THEIR EXPERTISE AND FIRST-HAND EXPERIENCE IN ADMINISTERING TREATMENT PROGRAMS AND PLANNING FOLLOW UP TESTING. DOT EMPHASIZED DATA SHOWING THAT THE VIOLATION RATE FOR RETURN TO DUTY AND FOLLOW UP TESTING IS TWO TO FOUR TIMES HIGHER THAN THAT OF RANDOM TESTING (IN THE MTA CONSORTIUM FOR CDL DRIVERS-THERE WAS A 2.32% POSITIVE RATE FOR RETURN TO DUTY AND FOLLOW UP TESTING AND THE 0.43% POSITIVE RATE FOR RANDOM TESTING IN 2008).

PETITIONERS COMPLAINED THAT DOT FAILED TO CONSIDER LESS INTRUSIVE ALTERNATIVES. COMMENTS SUBMITTED LAST YEAR SUGGESTED THAT THE DOT SHOULD TEST HAIR AND SALIVA RATHER THAN URINE. DOT EXPLAINED THE OMNIBUS TESTING ACT OF 1991 REQUIRED THEM TO USE ONLY TESTING METHODS APPROVED BY THE DEPT. OF HEALTH & HUMAN SERVICES, WHICH HAS NOT APPROVED ANY SPECIMEN TESTING EXCEPT URINE. PETITIONERS ALSO SUGGESTED THE EXISTING REGULATIONS THAT PERMIT, BUT DO NOT REQUIRE, DIRECT OBSERVATION FOR RETURNING EMPLOYEES ADEQUATELY ENSURES TRANSPORTATION SAFETY. HOWEVER, DOT FOUND THAT EMPLOYERS, CONCERNED ABOUT THE EFFECTS ON LABOR-MANAGEMENT AGREEMENTS AND FEAR OF UPSETTING EMPLOYEES RARELY EXERCISE THIS OPTION (WE HAVE NEVER HAD ANY EMPLOYER ASK US TO CONDUCT DIRECT OBSERVATION TESTS ON RETURN TO DUTY OR FOLLOW UP TESTS). ALTHOUGH THE PRECISE DATES OF FOLLOW UP TESTS ARE UNANNOUNCED, EMPLOYEES KNOW WHEN THEY RETURN TO WORK THEY WILL SUBJECT TO AT LEAST SIX TESTS OVER THE FIRST YEAR OF THEIR RETURN TO WORK. RETURNING EMPLOYEES CAN EASILY OBTAIN AND CONCEAL CHEATING DEVICES, AND KEEP THEM HANDY EVEN FOR UNANNOUNCED FOLLOW UP TESTS.

INDIVIDUALS HAVE EXTREMELY STRONG INTERESTS IN FREEDOM FROM SEARCHES THAT ARE AS INTRUSIVE AS DIRECT OBSERVATION TESTING. HOWEVER, RETURNING EMPLOYEES' PRIVACY INTERESTS ARE REDUCED BECAUSE THEY VIOLATED THE DOT'S DRUG REGULATIONS BY TESTING POSITIVE OR REFUSING TO TEST. EMPLOYEES SUBJECT TO DIRECT OBSERVATION TESTS PERFORM SAFETY-SENSITIVE DUTIES IN AN INDUSTRY THAT IS REGULATED TO ENSURE SAFETY. EMPLOYEES WHO CHOOSE TO VIOLATE DOT'S DRUG REGULATIONS HAVE PLACED THEMSELVES IN A VERY DIFFERENT POSITION FROM THEIR COWORKERS. THE COURT'S OPINION, DOT HAS REASONABLY CONCLUDED THAT THE RAPID INCREASE IN THE AMOUNT OF CHEATING DEVICES MAKES DIRECT OBSERVATION NECESSARY TO EFFECTIVELY PROTECT THE TRAVELING PUBLIC.

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217-523-4692
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**GET A MEMBER,
GET SOME CASH !**

**ANY MEMBER WHO
RECRUITS A NEW
MEMBER THAT
PAYS IN FULL IN
JULY WILL RECEIVE
\$100.00 CASH!
FOR MORE
INFORMATION
PLEASE CONTACT
ALICIA MARTIN AT
217-523-4692**



CONGRATULATIONS!

**TROY OZENKOSKI OF
K. WOHLTMAN
CONSTRUCTION, CHAD
ARMSTRON OF AKRA
BUILDERS, SCOT BARR OF
SANDSCHAEFER ELECTRIC,
AND MIKE WENTE OF
WENTE PLUMBING WHO
PARTICIPATED IN
REPRESENTATIVE DAVID
REIS' GOLF OUTING IN
NEWTON , IL AND WON!**

**ALSO, THANK YOU TO RICH
LOBERG AND HIS FOURSOME
FOR PARTICIPATING IN
REPRESENTATIVE JIM
SACIA'S OUTING IN
FREEPORT, IL**

**WE APPRECIATE YOUR
SUPPORT OF THESE
REPRESENTATIVES!**

THE COURT HAD TO BALANCE THE INDIVIDUALS' INTEREST WITH DOT'S INTEREST. IT IS THE CHOICE OF INDIVIDUALS TO WORK IN A DOT-REGULATED INDUSTRY. RATHER THAN ASKING INDIVIDUALS TO CHANGE THEIR CAREER ENTIRELY; IT IS MORE REASONABLE TO ASK THEM TO COMPLY WITH REGULATIONS FORBIDDING DRUG USE. THE COURT ACKNOWLEDGED DIRECT OBSERVATION IS EXTREMELY INVASIVE, BUT THE INTRUSION IS JUSTIFIED BY THE FACT THAT EMPLOYEES CAN AVOID IT ALTOGETHER BY SIMPLY COMPLYING WITH THE DRUG REGULATIONS. IN THE COURT'S OPINION, DOT HAS REASONABLY CONCLUDED THAT THE RAPID INCREASE IN THE AMOUNT OF CHEATING DEVICES MAKES DIRECT OBSERVATION NECESSARY TO EFFECTIVELY PROTECT THE TRAVELING PUBLIC.

AT ORAL ARGUMENT PETITIONERS CLAIMED THAT NO COURT HAS EVER UPHELD DIRECT OBSERVATION TESTING WITHOUT CAUSE ON PEOPLE, UNLESS THEY WERE IMPRISONED OR PAROLED. THE COURT AGREED, BUT THE PETITIONERS DID NOT CITE ANY PREVIOUS CASE PRESENTING FACTS SIMILAR TO THIS CASE. GIVEN THE COMBINATION OF THE VITAL IMPORTANCE OF TRANSPORTATION SAFETY, THE EMPLOYEE'S PARTICIPATION IN A REGULATED INDUSTRY, THEIR PRIOR VIOLATIONS OF THE DRUG REGULATIONS, AND THE EASE OF OBTAINING CHEATING DEVICES CAPABLE OF DEFEATING STANDARD TESTING PROCEDURES, THE COURT FOUND THE CHALLENGED REGULATIONS FACIALLY VALID UNDER THE FOURTH AMENDMENT.

ALTHOUGH THE COURT DECIDED IN DOT'S FAVOR, THERE IS AN OPPORTUNITY FOR THE PARTIES TO SEE REHEARING OF THE COURT'S RULING; THEREFORE, THE COURT'S STAY OF THE DIRECT OBSERVATION RULE CONTINUES IN EFFECT. DIRECT OBSERVATION COLLECTIONS FOR RETURN TO DUTY AND FOLLOW UP TESTING WILL REMAIN AN EMPLOYER'S OPTION FOR THE DURATION OF THE REHEARING PROCESS.

S1113 SAFE ROADS ACT - THE SAFE ROADS ACT OF 2009 (ACT) WOULD DIRECT U.S. TRANSPORTATION SECRETARY LAHOOD (SECRETARY) WITHIN 2 YEARS OF ENACTMENT TO ESTABLISH AND MAINTAIN A NATIONAL CLEARINGHOUSE FOR POSITIVE DRUG/ALCOHOL TEST RESULTS OR REFUSALS TO TEST. IN CREATING THE CLEARINGHOUSE, THE SECRETARY WOULD ESTABLISH SECURED ACCESS FOR AUTHORIZED USERS AND PREVENT UNAUTHORIZED ACCESS. THE SECRETARY WOULD DEVELOP A PROCESS TO ARCHIVE ALL RECORDS FOR AUDITING PURPOSES. THE SECRETARY WOULD ALSO CONSIDER WHETHER THE CLEARINGHOUSE WOULD BE CAPABLE OF COMBINING DATA WITH ONE OR MORE OPERATING SYSTEMS LIKE CDLIS (COMMERCIAL DRIVER'S LICENSE INFORMATION SYSTEM).

IN ANOTHER PART OF THE ACT, THERE IS AN ADDITIONAL PROVISION TO IMPROVE COLLECTION SITES. THE SECRETARY WOULD REQUIRE EACH COLLECTION SITE TO REGISTER WITH DOT AND SUBMIT ANNUAL CERTIFICATIONS TO THEM (WE CAN ONLY ASSUME THE ACT IS REFERRING TO CLINICS OR HOSPITALS, NOT EMPLOYERS' BUSINESSES WHO TEST ON-SITE). THE COLLECTION SITES WOULD BE LISTED ANNUALLY IN THE FEDERAL REGISTER AND THE LIST WOULD BE PUBLIC INFORMATION (WE WOULD FURTHER ASSUME THAT IF THE COLLECTION SITE WAS NOT IN THE FEDERAL REGISTER, IT COULD NOT BE USED). THE ACT WOULD REQUIRE THE SECRETARY TO IMPLEMENT THE CERTIFICATION PROCESS FOR THE COLLECTION SITES.

IF THE ACT IS PASSED BY CONGRESS, THERE WOULD BE ENOUGH MONEY APPROPRIATED TO ESTABLISH, OPERATE AND MAINTAIN THE NATIONAL CLEARINGHOUSE FOR POSITIVE DRUG AND ALCOHOL RESULTS. IF MORE FUNDING IS NEEDED, UP TO \$5 MILLION COULD BE ACCESSED FROM THE HIGHWAY TRUST FUND (THIS IS A JOKE SINCE THE HIGHWAY TRUST FUND WILL BE BROKE BY AUGUST, 2009).

LET'S HOPE THE SAFE ROADS ACT 2009 PASSES. IT CERTAINLY WOULD KEEP THE JOB HOPPERS OUT OF COMMERCIAL MOTOR VEHICLES UNTIL THEY COMPLETE THE RETURN TO DUTY PROCESS.

DRUG & ALCOHOL-FREE WORKPLACE TESTING CONSORTIUM - WE HAVE A DRUG & ALCOHOL-FREE WORKPLACE TESTING CONSORTIUM. IF YOU ARE INTERESTED IN IMPLEMENTING A WORKPLACE PROGRAM FOR THEIR EMPLOYEES NOT COVERED UNDER THEIR DEPT. OF TRANSPORTATION CDL DRUG & ALCOHOL TESTING PROGRAM, CONTACT OUR OFFICE AT (217) 525-4692



ABCIL ANNUAL CHICAGO GOLF OUTING

**THE 2009 CHICAGOLAND GOLF OUTING IS ONE MONTH AWAY!
REGISTRATION IS LIMITED TO THE FIRST 100 GOLFERS!
DON'T WAIT, SIGN UP TODAY!**

AVAILABLE SPONSORSHIPS: PRESENTING SPONOSOR, T-SHIRT SPONOSR, DINNER SPONSOR, BEVERAGE CART SPONSOR, DOORE PRIZE SPONSOR, CONTEST HOLE SPONSOR, GOODIE BAG SPONSOR, HOLE SPONSOR.

CALL THE ABCIL OFFICE TODAY TO SIGN UP!

**ABCIL'S ANNUAL
CHICAGOLAND
GOLF OUTING**



COST:

- ⇒ INDIVIDUAL GOLF & DINNER \$165
- ⇒ FOURSOME GOLF & DINNER \$600,
- ⇒ DINNER ONLY \$40

COST INCLUDES:

- ⇒ GREEN FEES
- ⇒ LUNCH
- ⇒ ALL BEVERAGES AND ITEMS FROM THE BEVERAGE CART/KEG HOLE
- ⇒ DINNER BUFFET
- ⇒ ONE HOUR OPEN BAR AT DINNER
- ⇒ DOOR PRIZES

AVAILABLE SPONSORSHIPS:

PRESENTING SPONSOR
\$2,000

T-SHIRT SPONSOR
\$2,000

DINNER SPONSOR \$1,000

BEVERAGE CART
SPONSOR: \$600 EACH (2
AVAILABLE)

DOOR PRIZE SPONSOR \$500
EACH (4 AVAILABLE)

HOLE SPONSOR \$ 250
(15 AVAILABLE)

KEG HOLE SPONSOR SOLD!

CONTEST HOLE SPONSOR
\$100 PLUS GIFT FOR
CONTEST WINNER

GOODIE BAG
SPONSOR PRODUCT ONLY

FOR MORE INFORMATION OR
TO REGISTER/SPONSOR
PLEASE CONTACT LISA AT
LISA@ABCIL.ORG

DON'T MISS THESE EVENTS!

JULY 14, 2009

BUSINESS NEEDS AND OSHA

THIS SEMINAR IS IDEAL FOR BUSINESS OWNERS, SAFETY MANAGERS, AND/OR FACILITY MANAGERS OF MANUFACTURING, DISTRIBUTION, OR INDUSTRIAL BUSINESS. AREAS TO BE COVERED INCLUDE: WHO NEEDS TO BE IN COMPLIANCE AND WHEN DOES OSHA COME INTO PLAY, THE BASIC SAFETY NEEDS OF A BUSINESS, "GENERAL DUTY CLAUSE", HAZARD RECOGNITION, INSPECTION AND DEALING WITH YOUR WORKPLACE HAZARDS, AND "INSPECTION" VS. MANAGEMENT OF SAFETY.

MORNING SESSION: 8:00—10:00 AM. AFTERNOON SESSION: 4:00-6:00 PM

LOCATION: ABCIL OFFICE, 1541 ELMHURST RD. ELK GROVE VILLAGE, IL 60007

COST: \$10.00 PER PERSON

FOR MORE INFORMATION PLEASE CONTACT STEVE FOLTIN AT 847-709-2960

JULY 15, 2009

BANKING & BONDING WEBINAR

TIME: 11 A.M. (ET) / 10 A.M. (CT) / 9 A.M. (MT) / 8 A.M. (PT)

LENGTH: 75 MINUTES REGISTRATION FEE: \$99

WHO SHOULD ATTEND

- CONTRACTORS
- CEOs/OWNERS
- COOs/CFOS
- SENIOR MANAGERS
- FINANCIAL MANAGERS
- ANYONE INTERESTED IN LEARNING ABOUT THE INDUSTRY AND ITS BONDING PRACTICES!

WEBINAR DESCRIPTION

SECURING CONTRACTS IS A CRITICAL PART OF A SUCCESSFUL CONSTRUCTION BUSINESS. A CONTRACTOR'S ABILITY TO SECURE WORK MAY BE LIMITED IF IT IS UNABLE TO OBTAIN BID, PERFORMANCE AND PAYMENT BONDS—THREE ESSENTIAL SURETY BONDS REQUIRED FOR PUBLIC CONSTRUCTION PROJECTS.

THIS WEBINAR WILL GIVE PARTICIPANTS AN OVERVIEW OF THE SURETY BONDING PROCESS, INCLUDING HELPFUL GUIDANCE AND INSIGHTS ON BONDING OPTIONS AND REQUIREMENTS, HOW TO INCREASE BOND CAPACITY, AND HOW TO WORK MORE EFFECTIVELY WITH AN AGENT.

PARTICIPANTS WILL HEAR ABOUT THE STEP-BY-STEP PROCESS OF OBTAINING A SURETY BOND, AS WELL AS LEARN HOW TO INCREASE CONTRACTING OPPORTUNITIES, SECURE LOANS, COMPETE FOR MARKET SHARE AND GROW. **FOR MORE INFORMATION PLEASE CLICK [HERE](#).**

JULY 30, 2009

ABCIL ANNUAL CHICAGOLAND GOLF OUTING

THE EVENT WILL BE HELD AT PHEASANT RUN RESORT, 4051 EAST MAIN ST. SAINT. CHARLES, IL 60174. REGISTRATION WILL BEGIN AT 11:45 AM, LUNCH WILL BE SERVED AT 12:00 PM, FOLLOWED BY A 1:00 PM SHOTGUN START. DINNER WILL BEGIN AT 6:00 PM. (PLEASE SEE THE COST LIST IN THE LEFT MARGIN)

FOR MORE INFORMATION OF TO REGISTER PLEASE CONTACT LISA AT LISA@ABCIL.ORG