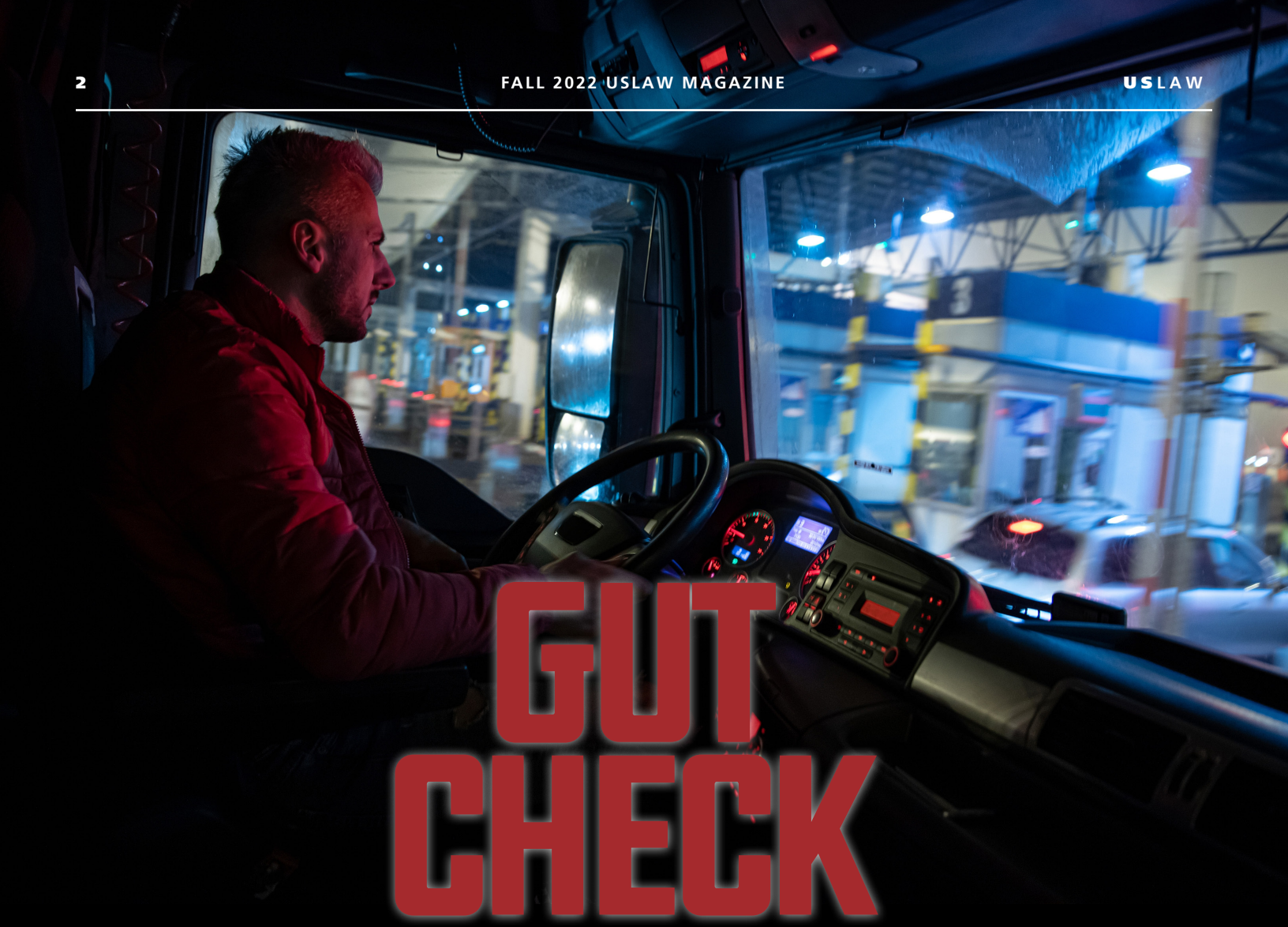

GUT CHECK

When a Valid Medical Card Isn't Enough

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INTRODUCTION

Other than a valid CDL, one of the most important documents a driver can present to a motor carrier is a valid medical card. But, in today's climate, is a valid medical card enough? A recent trend in litigation across the country, but specifically in the southeast, is to perform discovery into a driver's full medical history and then use any medical conditions and/or illness to invalidate the driver's qualifications to operate a commercial motor vehicle. The driver, most certainly, has an obligation to be truthful and forthcoming with their medical certifying doctor. But, as the motor carrier, what additional obligations do you have to assess the driver's medical qualifications? The answer is just about as clear as mud!

MEDICAL CARD REQUIREMENTS

49 C.F.R. § 391.41(a) requires that the driver have a valid medical examiner's certification to prove physical qualifications. The physical qualifications are proven through a proper medical examination that evaluates 13 different categories of the driver's physical abilities. At the outset of the medical examination, the driver supplies the examiner with a health history, which the examiner then transcribes onto the long-form medical card. It is incumbent on the driver to provide an accurate health history as the examiner will not have access to the driver's prior medical records. A failure to be forthcoming, according to the card itself, can invalidate the medical certification and subject the driver to criminal action. In the context of litigation, the driver's prior medical records are admissible to show that the medical card was fraudulently obtained by a failure to provide an accurate medical history. *Hayter v. Griffin*, 785 S.W.2d 590, 596 (Mo. App. 1990). Based on the examination and interview of the driver, a medical card is issued for the prescribed period of typically six months, one year or two years.

Armed with a valid medical card, the

driver confidently advises their prospective or current employer that they are qualified to drive a commercial vehicle. Larger carriers tend to track when the driver's medical card is expiring to ensure that cards are up to date at all times. For mid-size or small carriers, this can create more of a problem. However, failure to ensure the driver is carrying a valid medical card can create direct liability against the carrier in the event of an accident. In a 2016 Michigan case, a Court held that a jury could reasonably conclude that there was a connection between competency to drive a commercial motor vehicle and the lack of a valid medical card. *Melrose v. Warner*, No. 325717, 2016 Mich. App. LEXIS 1470, at *8 (Ct. App. Aug. 2, 2016). This created a path to a direct action against the motor carrier. It is important to remember that the effort to monitor compliance on the front end can have big payoffs if, and when, litigation ensues.

PREVENTING DISCOVERY INTO MEDICAL HISTORY

Federal Rules of Evidence 401 states that relevant evidence "(a) has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence to determining the action." Courts across the country have held that patients have a right to refuse disclosure of medical records *unless patient has put his medical condition at issue. See Powell v. McLain*, 105 So. 3d 308, 314-15 (Miss. 2012); *Empley v. Fedex Ground Package Sys.*, 2016 U.S. Dist. LEXIS 194561, *26 (D.N.M., July 7, 2016). Generally, if the plaintiff is requesting medical records from the defendant, the obvious argument is that the defendant has not placed his medical condition at issue, and as such, any evidence related to that condition is irrelevant. Therefore, medical records related to that condition would not be likely to lead to the discovery of admissible evidence. The issue over the production of a driver's past medical records is not simply a dispute over invasiveness, but rather, the dispute is fundamentally one over the relevance, privilege, and general discoverability of the medical records of a commercial vehicle driver who has been medically certified pursuant to onerous federal guidelines, not placed his health at issue in the litigation, and has not waived his legally protected privilege to his private health records merely by being hauled into court by the plaintiff.

BEYOND THE MEDICAL CARD

Other than simply accepting a medical card, some employers do require that an application field be completed indicating if the driver is physically qualified to perform job-related duties. In addition, on rare occasions, employers ask if the prospective driver is taking any medication which might impact their ability to operate a commercial motor vehicle. I have never seen or heard of a carrier asking these questions on a continuing basis. Of course, there are many carriers with policies related to the notification of a change in the health status of medication. However, as a matter of course, I do not see a question on, for example, the annual MVR certification related to a driver's physical fitness to operate a commercial motor vehicle. But is this required? Under the FMCSRs, the answer is no. However, I think public opinion (i.e., a jury) would dictate that a carrier make this assessment on a continuing basis.

In a recent case pending in Alabama, while defending the carrier, plaintiff's counsel discovered a driver with a storied medical history that went unreported to his medical examiner; nevertheless, some of his health issues were obvious to the naked eye. The argument advanced by plaintiff's counsel centered not only on the driver's dishonesty but also on how the company acted when presented with the medical issues that could be observed by those on the local management level. This led to an interesting analysis of the motor carrier's obligations, or rather rights, under the Americans with Disabilities Act (ADA) and Health Insurance Portability and Accountability Act. Apart from examinations necessitated by law, medical testing without evidence of current *performance issues* or observable evidence that a driver poses a *direct threat* is only allowed where the employees are in a *position affecting public safety. Jackson v. Regal Beloit America, Inc.*, 2018 U.S. Dist. LEXIS 103682, *8 (E.D. Ky. Jun. 21, 2018). The guidance to (s) 391.45 explains that the FMCSRs do not require an examination in the event a driver returns from an illness or injury "unless the injury or illness has impaired the driver's ability to perform his/her normal duties. However, the motor carrier may require a driver returning from any illness or injury to take a physical examination. But, in either case, the motor carrier has the obligation to determine if an injury or illness renders the driver medically unqualified." Based on the guidance quoted above, as well as the limitations on ADA, a savvy opposing counsel will be able to articulately argue that a motor carrier with evidence that a driver suffers from illness or injury has an obligation to require the driver to undergo an additional medical examination before allowing him to operate a commercial motor vehicle.

Of course, in real-world scenarios, enforcement of policies requiring more than just a valid medical card would be incredibly difficult. Nevertheless, it is the adherence to the "minimum standards" that often results in the irrationally high verdicts we see coming down across the county. To contradict arguments related to driver fitness based on observable illness or injury, there are multiple sources at which to direct a jury. First, look at a driver's drug testing results. Testing is prescribed on six occasions: pre-employment, reasonable suspicion, random, post-accident, return-to-duty, and follow-up situations. 49 C.F.R. §§382.309, .311. If all the driver's drug screening results are negative, this is one piece of evidence upon which a company can rely in determining if a driver is fit to drive. Second, consider maintaining a copy of the driver's long form, which discloses health history and medication usage. Keeping the long form will establish that the carrier is going beyond the minimum standards of the FMCSRs, and up to the thresholds of ADA and HIPAA. Additionally, a company can rely on the driver's PSP and MVR. The PSP allows companies to make an informed decision before hiring a driver by reviewing any history of unsafe driving available therein. Annual MVR checks are another way to ensure continued safe driving. Continued safe driving is another piece of circumstantial evidence upon which a company can rely to determine that a driver is physically capable of meeting the job requirements and mandates of the FMCSRs.

CONCLUSION

The rise of arguments related to a driver's medical fitness to operate a CMV is just beginning. It is incumbent on the carrier and defense counsel to fully address and evaluate these issues at the outset of a claim or, better yet, before a claim arises. Sharing our strategies in combating arguments placings an unreasonable burden on carriers is vital to obtaining defense wins.

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