



### F23 The Significance of Informed Consent in Workers' Compensation Forensic Blood Toxicology Testing

Helen D. O'Connor, LLM\*, Robert O'Connor, Jr., Houston, TX 77056-8187

**Learning Overview:** This presentation will inform attendees of the significance of informed consent in drug/alcohol forensic testing with relation to workers' compensation statutes, state and federal constitutional privacy protections, the United States Health Insurance Portability and Accountability Act (HIPAA) statute, and also the medical ethical principle of *primum non nocere* in the preparation and disclosure of a workers' compensation forensic science expert report.

**Impact on the Forensic Science Community:** This presentation will impact the forensic science community by providing the legal and ethical support for the requisite of informed consent of blood samples used in workplace injury forensic science analysis.

Informed consent is a process by which a patient (who is legally of the age of majority) and medical care providers document the agreement under which medical care, treatment, or services are provided to the patient. If an adult patient is competent, then consent for treatment must be obtained by the medical care provider and documented in writing. In emergency situations, when the patient does not have the legal competency to properly give consent for medical treatment, the consent is implied to protect the emergency medical provider under the "Good Samaritan" laws. In the case of minors, the authorized legal representatives (usually the custodial parent/s), are authorized to give consent for the medical care and treatment of the minor patient.

Under workers' compensation statutes, there is a defense/bar for the insurer of the subscriber to provide benefits to the injured worker if the circumstances of the workplace injury occurred when the worker was "intoxicated," whether under the influence of alcohol or other drugs. The legal definition of "intoxication" is set forth under the relevant workers' compensation statute and is proven by forensic science testing of either urine or blood samples from the worker at the time of the injury incident. The focus of this presentation is on blood sampling forensic science expert reports, with analogous principles applicable in urine testing. The effect of forensic science testing of worker blood samples can foreclose the possibility of treatment and monetary benefits to the worker for his workplace injury if the incident occurred while the worker was in a state of "intoxication." An analogy is the criminal sanction for drivers who operate vehicles while in a state of "intoxication," which can include confinement, loss of driving privileges, and/or monetary penalties.

The worker/patient's blood testing is part of the Protected Health Information (PHI) under the United States HIPAA statute. The United States HIPAA statute requires health care providers to protect PHI from unauthorized disclosure, including drug testing in any patient/injured worker, and mandates documentation of consent by the worker/patient for any disclosure.

The PHI information of the worker/patient involves state and federal constitutional guarantees of "privacy," which require that the worker/patient must have executed a proper consent for the "intoxication" testing to be performed by the medical care provider, including: the sampling, the laboratory processing of the specimen, the toxicology analysis, and the disclosure of such forensic science results in an expert report.

The consent requirements ensure statutory and constitutional protections for workers/patients for their medical care and treatment—including forensic science analysis and reporting of blood sampling to workers' compensation subscribers and their insurers. Informed consent also encompasses the medical ethical principle of *primum non nocere* because the worker/patient will be harmed by deprivation of treatment and compensation if informed consent is absent for the forensic science analysis disclosure in the workers' compensation case. Hospital toxicology lab testing routinely notes the limitation of its use "for medical purposes only."

The principles of informed consent in the workers' compensation worker/patient scenario are discussed with specific relevant Texas statutes and constitution, and United States Constitution privacy protection in reported case law.

In the United States, proper consent must be in place for disclosure of the worker/patient blood alcohol/drug forensic science expert analysis in court/administrative hearings.

---

#### Consent, Jurisprudence, Ethics