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Inspector General

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August 23, 2019

Mr. Andrew Byford
President
MTA New York City Transit
2 Broadway, 20th Floor
New York, NY 10004

Re: Improving Hospital Access for Post-Accident Drug and Alcohol Testing of NYC Transit Employees Following Accidents MTA/OIG #2019-15

Dear Mr. Byford:

Federal Transit Administration (FTA) regulations require that New York City Transit (NYC Transit, or Transit) test employees for drugs and alcohol following an accident involving a mass-transit vehicle. Recognizing that these substances are eliminated by the body fairly rapidly, these regulations require that tests be conducted as soon as practicable following a fatal accident. However in our recent review, the Office of the MTA Inspector General (OIG) found that NYC Transit is often denied the ability to test employees who seek medical assistance at a hospital after an accident.

To fulfill the FTA requirements, Transit established detailed policies and procedures governing drug and alcohol testing. In the vast majority of cases, trained technicians perform the tests in one of five Medical Assessment Centers (MACs) operated by Transit's Division of Occupational Health Services (OHS). On rare occasions, though, a Transit supervisor or manager will ask OHS staff to administer the drug/alcohol tests to a Transit employee who has gone directly to a hospital from the accident site.

In reviewing OHS testing data and recent investigative reports by the New York Public Transportation Safety Board (PTSAB), the OIG noted that in some instances hospital personnel denied OHS staff access to employees. To determine frequency of these denials and whether there is a pattern as to which facilities allow access and which do not, we reviewed the 18 cases in which NYC Transit sought to perform post-accident drug and alcohol testing in hospitals in 2017 and 2018. We found that in 8 of these 18 instances (over 40 percent), OHS was denied permission to enter the facility so testing could not be conducted right after the accident. The timeliness of post-incident testing is crucial; the longer the elapsed time between incident and test, the higher the likelihood that an impaired employee might evade detection and avoid discipline.

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To allow NYC Transit to comply with FTA regulations and obtain critical information, we recommended that Transit establish formal agreements with local hospitals to allow OHS staff access for testing purposes. These findings were shared with you in our draft report of July 12, 2019. We have incorporated your comments into this final report following our recommendation. Thank you for your prompt response and accepting our recommendation to proactively engage hospital administrators on this matter.

Post-Accident Procedures and Testing Time Frames

When accidents occur, NYC Transit is required by its Drug and Alcohol Policy Statement #4.30.01, dated 8/29/2018, consistent with the federal regulation cited above, to test “each safety-sensitive employee operating the public transportation vehicle at the time of the accident unless their behavior can be discounted as a contributing factor to the accident.” The NYC Transit supervisor assigned to investigate the scene is authorized to decide whether the testing of one or more employees is necessary. An employee selected for testing is typically accompanied by a supervisor to one of the MACs.¹

In some instances—which are the focus of our review—an employee who is required to have a post-accident test does not immediately report to a MAC because he or she is escorted instead to a hospital or medical facility. Sometimes the employee seeks medical attention, which may delay the requirement to administer drug and alcohol tests. Under these circumstances, NYC Transit’s Post-Accident/Incident Drug and Alcohol Testing Policy/Instruction 5.7.1, dated 2/2/2007, states that “the supervisor or manager must, as soon as practicable, notify OHS, which will make appropriate arrangements to secure testing.”

At the request of a Transit supervisor, OHS management contacts the administrator of the hospital to gain access since OHS technicians do not have the authority to perform in-hospital testing without the permission of hospital administration. If the administrator on duty grants permission, an OHS technician brings portable testing equipment to the hospital, and seeks access to the employee to conduct the required tests. Federal regulations require two types of tests: breath testing for alcohol and urine testing for specific prohibited drugs.

Because alcohol is metabolized so quickly, if an alcohol breath test is not administered within *two hours* following a non-fatal accident, the FTA requires that NYC Transit prepare and maintain on file a record stating the reason(s) the test was not promptly administered. If *eight hours* have elapsed following the accident, Transit must cease its attempts to administer the breath test and document the reason(s) for the missed test.^{2,3}

¹ Two MACs are located in Brooklyn, including one site open 24 hours a day and on weekends. Manhattan, Queens, and Staten Island have one MAC each, open Monday–Friday, 8:00 a.m. to 4:00 p.m.

² 49 CFR § 655.44 (a)(2)(ii).

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The timeliness of post-incident testing is crucial; the longer the elapsed time between incident and test, the higher the likelihood that an impaired employee might evade detection and avoid discipline.

Hospital Administrators Prevented OHS Access about Half the Time

According to OHS's comprehensive database, 7,055 NYC Transit employees underwent alcohol testing after an accident that met either FTA or Transit standards of severity in the two-year period of 2017–2018.⁴ As of May 2019, PTSB had completed reviews of 319 accidents occurring during this time period.

According to the OHS data and PTSB reports we reviewed, on at least 18 instances in the two-year period, OHS officials sought permission to perform post-incident testing at hospitals; yet in eight of the cases hospital administrators denied the request. OHS officials told us that the authority to allow hospital access rests with the specific administrator on duty at the time OHS makes a request, and these officials had not identified any significant patterns to the denials. We found that administrators were not always consistent in their decisions even within the same hospital; our analysis revealed that at Jacobi Medical Center in the Bronx, two administrators denied three separate requests while a third administrator granted OHS access on another occasion. At two other hospitals, Kings County Hospital Center and New York-Presbyterian Brooklyn Methodist Hospital, administrators denied requests for two tests each, and the remaining instance occurred at Harlem Hospital. Notably, three of these four hospitals are part of the New York City Health and Hospitals Corporation.

OHS officials also told us that administrators give a variety of reasons for their denials, including a belief that in-hospital testing violates the employee's rights under the Health Insurance Portability and Accountability Act or that the employee "does not want to see [OHS personnel]." The officials said that in other instances the administrator did not provide a rationale. Significantly, though, the officials also said that to their knowledge, NYC Transit has not attempted to proactively enter into agreements with specific hospitals regarding patient access for testing purposes.

³ Regarding drug testing, the FTA requires NYC Transit to collect a urine sample as soon as practicable but within 32 hours of an accident. 49 CFR § 655.44 (b).

⁴ Because federal regulations allow NYC Transit up to 32 hours following an accident to conduct a urine test to identify drug usage, the denial of prompt hospital access does not significantly curtail OHS' ability to conduct the test. Therefore, our review addressed alcohol testing only.

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RECOMMENDATION

Given that it is often crucial to the evidence-gathering purpose of an accident investigation to test employees as quickly as possible following the accident, OIG recommends the following: NYC Transit should establish formal agreements with selected hospitals within its service area to grant pre-authorized access to Occupational Health Services technicians seeking to administer federally required drug and alcohol tests to NYC Transit employees within limited time-frames after accidents involving Transit vehicles.

Agency Response

In your August 9, 2019 response to our preliminary report, you agreed with our recommendation and informed us that NYC Transit has sent letters to individual hospitals and networks seeking to establish formal testing access agreements with Occupational Health Services.

As always, we appreciate the courtesy and cooperation afforded to us at all times by members of your staff. Should you have any questions, or need additional information, please contact me at (212) 878-0050 or Executive Deputy Inspector General Elizabeth Keating at (212) 878-0022.

Very truly yours,



Carolyn Pokorny