

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ECONOMY DRAIN
SERVICE/MARK H. SMITH, NOTICE OF
APPARENT VIOLATION AND INTENT TO
ASSESS FORFEITURE.

CASE NO. 17-1540-TR-CVF
(OH3225009419C)
CASE NO. 17-1541-TR-CVF
(OH3225009419D)

OPINION AND ORDER

Entered in the Journal on February 28, 2018

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated at hearing, by a preponderance of the evidence, that Economy Drain Service/Mark H. Smith violated the Commission's transportation safety rules by operating a commercial motor vehicle with an improper commercial driver's license, insecure cargo, defective trailer brakes, and a missing carrier name display.

II. PROCEDURAL HISTORY

{¶ 2} Following an April 17, 2017 inspection of a commercial motor vehicle (CMV) operated by Economy Drain Service and driven by Mark H. Smith (Mr. Smith or Respondent), Respondent was timely served with Notices of Preliminary Determination (NPDs) in accordance with Ohio Adm.Code 4901:2-7-12, as notification that Staff intended to assess Respondent civil monetary forfeitures for both carrier and driver violations of the Commission's transportation safety rules, including the following violations that are relevant to this case:

Case No. 17-1540-TR-CVF:

<u>Code</u>	<u>Violation</u>	<u>Forfeiture</u>
393.9	Inoperable Required Lamp	\$0
393.9	Inoperable Required Lamp	\$0
392.9(a)(1)	Failing to secure cargo	\$100

393.43(d)	No or defective automatic trailer brake	\$50
390.21(B)	Carrier name not displayed as required	\$100

Case No. 17-1541-TR-CVF:

<u>Code</u>	<u>Violation</u>	<u>Forfeiture</u>
383.91(a)	Operating a CMV with an improper commercial driver's license	\$250
391.41A-F	No valid medical certificate	\$100

The total civil forfeiture noticed in the NPDs in Case Nos. 17-1540-TR-CVF and 17-1541-TR-CVF: \$600

{¶ 3} A prehearing conference was conducted on October 26, 2017, and a hearing was held on December 13, 2017. At hearing, Mr. Smith did not contest the carrier and driver violations cited in the inspection report and the NPDs, with the exception of the medical certificate violation. In response to Mr. Smith's testimony, Staff moved to withdraw and dismiss the medical certificate violation after discovering the charge was not properly cited and noticed to Respondent.

{¶ 4} By letter filed in these case dockets on December 14, 2017, Staff stated that, following the hearing, Staff and Respondent agreed to a reduction of the proposed civil forfeiture of \$250 to \$100 on Mr. Smith's commercial driver's license (CDL) violation, based on Respondent providing proof that he now has a Class "A" CDL. Staff stated that Respondent has corrected his CDL status originating from the inspection and is now in compliance with the Commission's rules and regulations. Staff stated that the parties, therefore, request that the record be supplemented with Staff's civil forfeiture assessment recommendation being modified from \$250 to \$100 for Respondent's violation of 49 C.F.R. 383.91(a) for operating a CMV with an improper CDL. In addition, staff noted that, with its

withdrawal of Mr. Smith's medical card violation and the resultant \$100 reduction in the total forfeiture amount, the total civil forfeiture assessed in Case Nos. 17-1540-TR-CVF and 17-1541-TR-CVF is now \$350.

III. LAW

{¶ 5} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

IV. SUMMARY OF THE EVIDENCE

{¶ 6} At hearing, Staff initially identified and submitted as evidence Staff Exhibit 1, the inspection report, Staff Exhibits 2 and 3, the NPDs, and Staff Exhibit 4, photographs taken by the inspector at the inspection site. Mr. Smith then acknowledged Staff's representation that, with the exception of the medical certificate violation, he did not attend the hearing to contest the violations for the carrier or the driver, but that he merely wanted to provide mitigating evidence to the Commission showing that he has taken the necessary steps to bring himself into compliance with the regulations of the Commission (Tr. at 5).

{¶ 7} Mr. Smith testified that he now has his CDL and that he went to the Bureau of Motor Vehicles (BMV) at three locations and requested the document that he signed when he received his CDL, so that he could then get a medical card. He stated that, at all three BMV locations, he was told that he did not need a medical card. Mr. Smith testified that he is contesting the medical card violation because the BMV was his only option at that point

and all three BMV locations told him the same thing, that a medical card was not required for his CDL. (Tr. at 10-12.)

{¶ 8} Mr. Smith testified that he is not a commercial truck driver, even though he has a CDL. He stated that he is in compliance with the Ohio Department of Transportation (ODOT) standards, but he is not for hire, so he does not need a ODOT number. Further, Mr. Smith testified that, with regard to the violation of not having the proper binding on the tractor that he was hauling, he did have binders on it, but just did not have enough of them. (Tr. at 12-14.)

{¶ 9} On cross examination, Mr. Smith testified that when he passed the CDL test, he went directly to the BMV and signed a paper stating that he would not drive outside the state; and, that's when BMV personnel told him that he did not need a medical certificate. Thereafter, Staff stated that, in light of Mr. Smith's testimony concerning the violation for not having a medical certificate — 49 C.F.R. 391.41 A - F, it would withdraw that violation and the associated \$100 forfeiture in the driver's case. Staff stated that, with regard to the remaining violations for both the carrier and the driver, which Mr. Smith is not contesting, it would ask the Commission to find that Mr. Smith committed those violations. (Tr. 17-19.)

V. COMMISSION CONCLUSION

{¶ 10} In light of the fact that Staff has withdrawn the medical certificate violation, which is the sole violation that Mr. Smith took issue with in this matter, and Mr. Smith's acknowledgement that he is not disputing the remaining carrier and driver violations, the Commission agrees with the parties' position that this is now an uncontested case. Further, according to the evidence presented at hearing, the Commission concurs with Staff's assertion that Mr. Smith is now in compliance with the transportation regulations.

{¶ 11} Consequently, the Commission finds that, based on a preponderance of the evidence, Staff has proven that, with the exception of the now-withdrawn medical certificate

violation, Mr. Smith and his company, Economy Drain Service, are liable for the violations set forth in this Opinion and Order. As Staff has noted, with the withdrawal of the medical certificate violation and its \$100 civil forfeiture, and the reduction of the proposed civil forfeiture of \$250 to \$100 for the CDL violation, the total civil forfeiture for Case Nos. 17-1540-TR-CVF and 17-1541-TR-CVF is \$350. Further, with the exception of the medical certificate violation, the violations in these cases will be listed in Mr. Smith's Safety Net record and history of violations. The medical certificate violation, 49 C.F.R. 391.41 A - F, should be dismissed and removed from the Commission's records.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 12} Following an April 17, 2017 inspection of a CMV, which was operated by Economy Drain Service and driven by Mark H. Smith (Mr. Smith or Respondent), Respondent was timely served with NPDs in accordance with Ohio Adm.Code 4901:2-7-12, notifying him that Staff intended to assess him civil monetary forfeitures for both carrier and driver violations of the Commission's transportation safety rules.

{¶ 13} Mr. Smith was timely served with NPDs listing a total civil forfeiture amount of \$600 for the violations listed in the inspection report for Case Nos. 17-1540-TR-CVF and 17-1541-TR-CVF.

{¶ 14} A prehearing conference was conducted on October 26, 2017, and a hearing was held on December 13, 2017.

{¶ 15} At hearing, Staff moved to dismiss the medical certificate violation against Mr. Smith after discovering the charge was not properly cited and noticed to Respondent. Further, in a December 14, 2017 letter filed in this matter, Staff stated that it agreed with Respondent to a reduction of the proposed civil forfeiture of \$250 to \$100 for Respondent's CDL violation, based on Respondent providing proof to Staff that he now has corrected his CDL status.

{¶ 16} The total civil forfeiture amount established for Case Nos. 17-1540-TR-CVF and 17-1541-TR-CVF is \$350.

{¶ 17} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 18} Based upon the record in this proceeding, the Commission finds that, as modified in this Opinion and Order, Staff has proven, by a preponderance of the evidence, that Mr. Smith committed the carrier and driver violations listed in the NPDs in these cases.

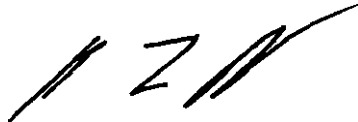
VII. ORDER

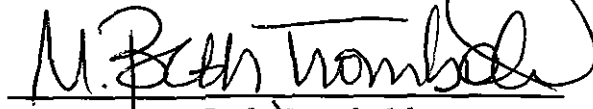
{¶ 19} It is, therefore,

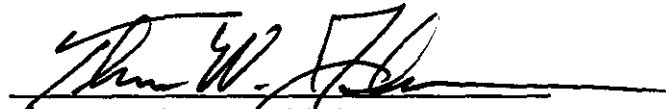
{¶ 20} ORDERED, That Mr. Smith pay the assessed amount of \$350 for carrier and driver violations of the Commission's transportation safety rules, as set forth in this Opinion and Order. Payment should be made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Mr. Smith is directed to write the case numbers, 17-1540-TR-CVF and 17-1541-TR-CVF, and inspection report numbers, OH3225009419C and OH3225009419D, on the face of the check or money order. It is, further,

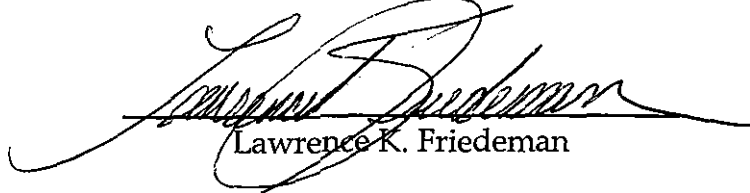
{¶ 21} ORDERED, That a copy of this Opinion and Order be served upon each party of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Asim Z. Haque, Chairman


M. Beth Frombold


Thomas W. Johnson

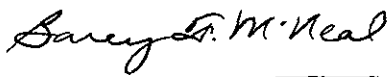

Lawrence K. Friedeman


Daniel R. Conway

KKS/vrm

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FEB 28 2018


Barcy F. McNeal
Secretary