

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Phillip :
Smith, Notice of Apparent : Case No. 09-422-TR-CVF
Violation and Intent to :
Assess Forfeiture :

- - -

PROCEEDINGS

Before Scott E. Farkas, Hearing Examiner, at the Public
Utilities Commission of Ohio, 180 East Broad Street,
Room 11-F, Columbus, Ohio, called at 10:00 a.m. on
Tuesday, October 20, 2009.

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12 Pro se.

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Tuesday Morning Session,
October 20, 2009.

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HEARING EXAMINER FARKAS: Let's go on the record. The Commission has called for hearing at this time and place the matter of Phillip Smith, Notice of Apparent Violation and Intent to Assess Forfeiture, Case No. 09-422-TR-CVF. My name is Scott Farkas. I'm the Attorney Examiner assigned to hear this case. First of all, I'll take appearances.

On behalf of Staff.

MR. WRIGHT: Thank you, Your Honor. On behalf of the Transportation Staff and Ohio Attorney General Richard Cordray, Bill Wright and Vern Margard, M-a-r-g-a-r-d, Public Utilities Commission, 180 East Broad Street, Columbus, Ohio 43215.

HEARING EXAMINER FARKAS: Mr. Smith, would you identify yourself for the record.

MR. SMITH: Yes, sir. Phillip Smith.

HEARING EXAMINER FARKAS: And what is your address?

MR. SMITH: 629 South Fayette Street, Washington Court House, Ohio 43160.

HEARING EXAMINER FARKAS: Let me swear you in since you're going to be making a statement.

1 (Mr. Smith sworn in.)

2 HEARING EXAMINER FARKAS: And you are
3 appearing here without counsel today; is that correct?

4 MR. SMITH: That's correct.

5 HEARING EXAMINER FARKAS: And that is --
6 you understand you are able to get counsel if you so
7 choose? You're choosing not to; is that correct? You
8 could have gotten an attorney --

9 MR. SMITH: I agree with the last part of
10 your statement. There's a financial consideration on
11 ability.

12 HEARING EXAMINER FARKAS: Okay. But for
13 the hearing today, you are not represented by counsel
14 and you are willing to go forward without counsel?

15 MR. SMITH: That is correct, sir.

16 HEARING EXAMINER FARKAS: Okay. Thank
17 you. You can have a seat anywhere at the table if you
18 want to.

19 MR. SMITH: Thank you.

20 HEARING EXAMINER FARKAS: Okay. Staff,
21 you can call your first witness.

22 MR. WRIGHT: Thank you. At this time we
23 would call Officer Adkins.

24 HEARING EXAMINER FARKAS: Raise your right
25 hand.

1 OFFICER OWEN R. ADKINS,
2 being by the Hearing Examiner first duly sworn, as
3 hereinafter certified, testifies and says as follows:

4 HEARING EXAMINER FARKAS: You can be
5 seated.

6 And you can proceed.

7 MR. WRIGHT: Your Honor, can we go off the
8 record for five minutes?

9 (Discussion off the record.)

10 HEARING EXAMINER FARKAS: Go back on the
11 record.

12 You can proceed.

13 DIRECT EXAMINATION

14 By Mr. Wright:

15 Q. Good morning, Mr. Adkins. How are you?

16 A. Fine. How about yourself?

17 Q. I'm fine. Thanks. Would you please state
18 your name for the record.

19 A. Owen, middle initial R., Adkins.

20 Q. Is that O-w-e-n?

21 A. O-w-e-n, last name A-d-k-i-n-s.

22 Q. Okay. Mr. Adkins, by whom are you
23 employed?

24 A. By the State Highway Patrol, Motor Carrier
25 Enforcement.

1 Q. How long have you been with the patrol?

2 A. About 14 years. PUCO and all is 26 1/2
3 years.

4 Q. And in that time is it fair to say that
5 you've done hundreds, if not thousands of inspections
6 of motor vehicles?

7 A. Thousands.

8 Q. Thousands? Okay. In this particular
9 case, you did an investigation involving the driver,
10 Mr. Smith, back on June 7 of 2007; is that correct?

11 A. Yes, sir. That's the inspection date.

12 Q. Okay.

13 At this time, Your Honor, I'd like to mark
14 as Staff Exhibit 1 the inspection report.

15 HEARING EXAMINER FARKAS: Okay. So
16 marked.

17 (EXHIBIT HEREBY MARKED FOR IDENTIFICATION
18 PURPOSES.)

19 MR. SMITH: Thank you.

20 MR. WRIGHT: You're welcome.

21 Q. Mr. Adkins, you have in front of you -- it
22 should be the same thing -- what has just been marked
23 as Staff Exhibit No. 1. Do you have that in front of
24 you?

25 A. Yes, sir.

1 Q. And would that be the inspection report
2 that you prepared on June 7 of 2007?

3 A. That's correct.

4 Q. And that did, in fact, involve a driver by
5 the name of Phillip Smith?

6 A. Yes.

7 Q. Okay. Now, a couple of questions about
8 the report itself, this was a full Level I inspection;
9 is that correct?

10 A. That's correct.

11 Q. And would you explain for the record what
12 Level I means, please?

13 A. Level I, driver's qualifications, vehicle
14 registrations, and the safety of the vehicle, measure
15 brakes and all.

16 Q. Okay. And as a result of this inspection,
17 you wrote up several violations, did you not?

18 A. That's correct.

19 Q. And those appear in the violations section
20 of the report?

21 A. Yes, it does.

22 Q. Okay. Now, I'd like to direct your
23 attention to the first of the three, the first one
24 listed there, that violation is for an expired medical
25 examiner's certificate; is that right?

1 A. That's correct.

2 Q. Now, when you -- as you explained a moment
3 ago, your routine when you would do a Level I
4 inspection is to request of the driver certain
5 paperwork; correct?

6 A. That's correct.

7 Q. That would include his CDL?

8 A. CDL, logbook, if it's required, and
9 medical examination.

10 Q. CDL, for the record, is Commercial
11 Driver's License. And in this instance, you -- so Mr.
12 Smith would have handed you his medical certificate; is
13 that right?

14 A. That's correct.

15 Q. And you noted on that what? What did --
16 strike that. What's your understanding -- are medical
17 certificates required of all commercial vehicle
18 drivers?

19 A. Yes, it is.

20 Q. And is that usually at two-year intervals?

21 A. Most of the time, unless they have some
22 kind of a medical problem, high blood pressure or
23 something, and then it's required yearly.

24 Q. Okay. And you understand that that
25 requirement is found in the Code of Federal

1 Regulations?

2 A. Yes, it is.

3 Q. Okay. Now, when Mr. Smith would have
4 handed you his medical certificate -- what information
5 is on a medical certificate? Let's do it that way.

6 A. Well, the driver's name, usually -- and a
7 doctor's signature and the date of the exam and
8 expiration date.

9 Q. And the expiration date would either be
10 one or two years out from the date of the exam?

11 A. Yes.

12 Q. Both are on the card, is that what you're
13 saying?

14 A. The date of the examination, and usually
15 on the bottom it had the expiration date of it.

16 Q. Okay. In this instance, according to your
17 report, you noted that Mr. Smith's medical certificate
18 had been expired for roughly three weeks. Would that
19 be right?

20 A. Yes.

21 Q. May 15th, 2007?

22 A. Uh-huh.

23 Q. And, again, that date would appear right
24 on the certificate itself?

25 A. Yes, it would.

1 Q. Okay. All right. And would I be correct
2 at that point in time that you would have alerted Mr.
3 Smith that his medical card was expired?

4 A. Yes. Yes, I did.

5 Q. Okay. So, at that point in time, as of
6 the time you stopped him, Mr. Smith was driving without
7 a valid medical certificate; correct?

8 A. That's correct.

9 Q. Which you understand under the Federal
10 Regulations to be required of any commercial vehicle
11 driver?

12 A. That's correct.

13 Q. Okay. Now, what we've marked as Staff
14 Exhibit 1, Mr. Adkins, your examination report, this
15 report -- I notice the date on this, it's over two
16 years old. This report would have been prepared by you
17 at the time of the inspection; correct?

18 A. That's correct.

19 Q. And am I also correct that once you
20 plugged in all the information, some -- you have
21 equipment in your car that would generate a copy of
22 this that you then would provide to the driver?

23 A. At the time of the inspection.

24 Q. Okay. So a copy of this report would have
25 been given to Mr. Adkins before he drove away that day;

1 is that right?

2 A. Yes. And he's to submit it to his company
3 when he got back to the terminal.

4 MR. SMITH: Mr. Smith.

5 Q. Mr. Smith.

6 A. Yes.

7 Q. So the answer is yes, he would have had a
8 copy -- he would have been given a copy of this at that
9 time?

10 A. That's correct.

11 Q. And as you, I think, were starting to
12 indicate, it's then his responsibility to report that
13 back to -- to his employer, the carrier?

14 A. His employer may in about 15 days get it
15 back into the Public Utilities Commission.

16 Q. All right. Am I also correct, Mr. Adkins,
17 that not only would you have provided Mr. Smith with a
18 copy of this report, but you would have explained your
19 findings?

20 A. Yes.

21 Q. Not only the expired medical certificate,
22 but also the other violations that you noted; is that
23 right?

24 A. Yes.

25 Q. And those would have been things you would

1 have expected to have been fixed?

2 A. Yes.

3 Q. Promptly repaired. Okay. There can be no
4 confusion about the fact that the card was expired;
5 correct?

6 A. That's correct.

7 Q. I mean, the date is on the card?

8 A. The date's on the card. That's what we go
9 by, the dates.

10 Q. So if -- so, again, there's two dates. I
11 want to make sure I understand this. There's two dates
12 on the card, the date of the exam, and then the second
13 date would be one or two years out from that date?

14 A. Yes.

15 Q. Two years if it's a normal situation, one
16 year if there's a medical condition that requires it
17 more frequently?

18 A. Or the doctor's discretion on how often he
19 wants to keep checking the driver up, blood pressure or
20 something like that.

21 Q. Okay. And is it your understanding, Mr.
22 Adkins, that the responsibility for having a valid or
23 current medical certificate, that that, under the
24 Federal Regulations, is a responsibility that lies with
25 the driver?

1 A. The driver, the company. Also the
2 company, they -- usually a lot of them notifies their
3 drivers, but then a lot of companies don't. The
4 drivers keep track of it --

5 Q. But it's your -- I'm sorry.

6 A. That's okay.

7 Q. But is it your understanding that the
8 regulation itself imposes the requirement upon the
9 driver to have a valid medical --

10 A. Must have it in his possession while
11 driving a commercial vehicle.

12 MR. WRIGHT: Your Honor, I would like to
13 have marked as Staff Exhibit No. 2 the Federal
14 Regulation, 49 C.F.R. 391.45. I wouldn't normally do
15 this, but just for convenience of reference.

16 HEARING EXAMINER FARKAS: Okay. So
17 marked.

18 MR. WRIGHT: It will be Staff No. 2.

19 (EXHIBIT HEREBY MARKED FOR IDENTIFICATION
20 PURPOSES.)

21 Q. Now, Mr. Adkins, according to your
22 report --

23 May I approach the witness, Your Honor?

24 HEARING EXAMINER FARKAS: Yes.

25 Q. According to your report, you cited Mr.

1 Smith under 391.45; is that right?

2 A. 45(b).

3 Q. For the record, that would be 49 C.F.R.
4 391.45, and you said "b," did you not?

5 A. Correct.

6 Q. And "b" imposes, clearly imposes the
7 obligation on him. Is it the driver?

8 A. The driver has not been medically examined
9 or certified.

10 Q. Okay. So while the driver's employer, the
11 company, may help with some of the arrangements,
12 it's -- it's your understanding that the regulation
13 requires the medical certificate to be kept current by
14 the driver; is that right?

15 A. That's correct.

16 Q. Okay.

17 MR. WRIGHT: Can I confer just for a
18 second?

19 HEARING EXAMINER FARKAS: Yes.

20 (Discussion off the record.)

21 MR. WRIGHT: That's all the questions we
22 have, Your Honor. Thank you.

23 HEARING EXAMINER FARKAS: Mr. Smith, do
24 you have any questions for the witness?

25 MR. SMITH: No.

1 HEARING EXAMINER FARKAS: Okay. Then
2 you're excused. Thank you for your testimony.

3 (Witness excused.)

4 MR. WRIGHT: Your Honor, at this time we
5 would move the admission of Staff Exhibits 1 and 2.

6 HEARING EXAMINER FARKAS: Any objection?

7 MR. SMITH: I'd like to see a copy of No.
8 2, please.

9 MR. WRIGHT: Oh, I'm sorry. I apologize.

10 MR. SMITH: Thank you.

11 MR. WRIGHT: That's the regulations you
12 were cited under.

13 MR. SMITH: I understand.

14 HEARING EXAMINER FARKAS: Do you want a
15 few minutes to look at that?

16 MR. SMITH: I would like a moment.

17 HEARING EXAMINER FARKAS: Okay. Why don't
18 we take a five-minute recess.

19 MR. SMITH: Thank you.

20 (Discussion off the record.)

21 HEARING EXAMINER FARKAS: Let's go back on
22 the record. Mr. Smith, you wanted to make a statement
23 in regards to Staff Exhibit 2 that you had a chance to
24 review?

25 MR. SMITH: Yes, sir.

1 HEARING EXAMINER FARKAS: Okay.

2 MR. SMITH: In reading No. 2, I see no
3 reason to expect that the burden of providing the
4 medical examiner's certificate is on the driver.

5 HEARING EXAMINER FARKAS: Okay. So you --

6 MR. SMITH: Even though the question was
7 asked is the burden on the driver and the affirmative
8 was given in response, I see nothing in Exhibit No. 2
9 that indicates that.

10 HEARING EXAMINER FARKAS: So you are --
11 you have a different opinion with respect to what that
12 exhibit -- what that statute means, is that correct,
13 than the one you expect to testify?

14 MR. SMITH: That's correct.

15 HEARING EXAMINER FARKAS: But you don't
16 object to the admission of the exhibit itself, not the
17 interpretation, but the exhibit?

18 MR. SMITH: No, not at all.

19 HEARING EXAMINER FARKAS: Do you have any
20 objection to either of Staff's exhibits, the inspection
21 report or the C.F.R. section?

22 MR. SMITH: No, sir.

23 HEARING EXAMINER FARKAS: Okay. Then
24 those will be admitted.

25 (EXHIBITS ADMITTED INTO EVIDENCE.)

1 HEARING EXAMINER FARKAS: With respect to
2 your opinion of interpreting that section of the code,
3 you can make a statement with respect to that when
4 you're on the stand if you so choose.

5 MR. SMITH: Thank you, sir.

6 HEARING EXAMINER FARKAS: Okay.

7 You can call your next witness.

8 MR. WRIGHT: Mr. Canty.

9 JOHN J. CANTY,
10 being by the Hearing Examiner first duly sworn, as
11 hereinafter certified, testifies and says as follows:

12 DIRECT EXAMINATION

13 By Mr. Wright:

14 Q. Good morning, Mr. Canty.

15 A. Morning.

16 Q. Please state your name for the record.

17 A. John J. Canty.

18 Q. And you are employed by whom?

19 A. The Public Utilities Commission of Ohio.

20 Q. And what is your position?

21 A. I'm the Assistant Chief of the Compliance
22 Division.

23 Q. The civil forfeiture in this case that was
24 assessed was \$100; is that correct?

25 A. Yes.

1 Q. Is that a standard amount that is assessed
2 for a violation of this type?

3 A. Yes. That's the standard amount that's
4 assessed on every medical card violation.

5 Q. No guesswork? That is the fine; correct?

6 A. Right.

7 MR. WRIGHT: That's all the questions we
8 have for Mr. Canty.

9 HEARING EXAMINER FARKAS: All right.

10 Do you have any questions for Mr. Canty?

11 MR. SMITH: Yes.

12 HEARING EXAMINER FARKAS: All right.

13 CROSS-EXAMINATION

14 By Mr. Smith:

15 Q. Sir, the imposition of forfeiture upon the
16 driver that is policy at PUCO, is that based on Ohio
17 statute?

18 A. Whether it's imposed on the driver or the
19 carrier?

20 Q. Exactly.

21 A. Is that based on Ohio statute?

22 Q. Yes, sir.

23 A. No.

24 Q. Thank you very much.

25 HEARING EXAMINER FARKAS: Any redirect?

1 MR. WRIGHT: Yes, Your Honor.

2 REDIRECT EXAMINATION

3 By Mr. Wright:

4 Q. Just to follow-up on that last question,
5 Mr. Canty, what is the basis?

6 A. It would be the Federal Regulations, the
7 Federal Motor Carrier Safety Regulations.

8 Q. And it's your understanding of those
9 Federal Regulations that a violation of this type is
10 properly imposed on the driver; is that right?

11 A. Yes.

12 Q. And that is, in fact, what happened here;
13 is that right?

14 A. Yes.

15 Q. Thank you very much.

16 HEARING EXAMINER FARKAS: Just for the
17 record, has the Commission adopted the Federal
18 Regulations as regulations that the Commission
19 enforces, also?

20 THE WITNESS: Yes.

21 HEARING EXAMINER FARKAS: You can ask
22 another question in follow-up to that.

23 MR. SMITH: Thank you.

24

25

RECROSS-EXAMINATION

By Mr. Smith:

Q. The basis in the Federal Regulations of the imposition of the forfeiture upon the driver, is that basis contained in Exhibit No. 2?

A. I don't have Exhibit No. 2 in front of me.

MR. WRIGHT: Your Honor, may I approach?

HEARING EXAMINER FARKAS: Yes.

MR. WRIGHT: Federal Regulations, the exhibit (indicating).

A. Okay. I have Exhibit No. 2 in front of me.

MR. WRIGHT: While the witness was reading, I was going to ask to have the question reread.

MR. SMITH: May I repeat the question?

MR. WRIGHT: Sure.

MR. SMITH: May I repeat the question?

HEARING EXAMINER FARKAS: Yes. The court reporter was going to reread it, but --

MR. SMITH: I'm sorry. Please.

(Question before last read back.)

A. Yes is my answer to that question.

HEARING EXAMINER FARKAS: Do you want to

1 ask another question?

2 (Discussion off the record.)

3 Q. Is the basis for the PUCO's imposition of
4 the forfeiture upon the driver contained in Exhibit
5 No. 2?

6 A. Yes. Persons who must be medically
7 examined and certified, 391.45 states that the driver
8 must be medically examined and certified.

9 Q. It states that the driver must be
10 certified?

11 A. Yes.

12 Q. And because the driver must be certified,
13 the PUCO makes it policy to impose forfeiture upon the
14 driver rather than the company?

15 A. Well, I think it would be similar to other
16 statutes such as -- I don't have it in front of me, but
17 Title 45 of the Ohio Revised Code would require all
18 drivers to take a test to get a driver's license. I
19 think implied in that is that the driver takes that
20 test, and I think implied in this is that the driver
21 gets medically examined, not the company. It's the
22 person driving the vehicle who has to have the driver's
23 license. It's the commercial motor driver who has to
24 have the medical certificate. I think it's implied in
25 the language. I don't have -- as I say, I don't have

1 another section of the Ohio Revised Code in front of
2 me, but it would be my understanding that it would not
3 specifically state you, as a driver, must take a test.
4 I think it probably says that all drivers must take a
5 test, and it would be implied you're not going to get
6 the driver's license unless you take that test.

7 MR. WRIGHT: Your Honor, if I may, I would
8 like to make sure we're clear. I direct this to Mr.
9 Smith, your -- your point is whether or not -- I
10 believe the point you're trying to make is whether or
11 not the forfeiture should be imposed upon you or the
12 carrier. You are not, however, challenging the \$100
13 amount is incorrectly calculated; correct?

14 MR. SMITH: That is correct.

15 MR. WRIGHT: Okay. I just wanted to make
16 sure the record is clear on that point, and that's
17 really -- the latter is what this witness is being
18 sponsored for.

19 HEARING EXAMINER FARKAS: Do you have any
20 other questions for the witness?

21 MR. SMITH: I do have questions not
22 specifically directed to the witness. I'm unfamiliar
23 with the process of the legal system, and I do not
24 understand the process of my statements in
25 chronological reference to my adversarial companion,

1 and so I don't want to miss my opportunity to speak
2 because I don't know when that opportunity will ensue.

3 HEARING EXAMINER FARKAS: Okay. Mr.
4 Wright sponsors the witness, and that witness is
5 examined on direct examination. You then have the
6 opportunity to do cross-examination of Mr. Canty, the
7 witness. After you finished your cross-examination,
8 Mr. Wright is allowed to do what's called redirect,
9 which is to respond to any questions that you had with
10 the witness with his own questions, and thereafter you
11 are allowed to do recross-examination of the witness in
12 response to those immediate questions. There is no
13 more further examination that Mr. Wright can do of the
14 witness at this point because --

15 MR. WRIGHT: Your Honor, if I may --

16 MR. SMITH: Thank you.

17 MR. WRIGHT: And you understand once we're
18 done with our witnesses, you'll then have your
19 opportunity to make a statement.

20 MR. SMITH: Thank you.

21 MR. WRIGHT: Which I think is the
22 opportunity you're referring to.

23 MR. SMITH: That is the opportunity I'm
24 referring to. Thank you.

25 HEARING EXAMINER FARKAS: You are excused.

1 (Witness excused.)

2 MR. WRIGHT: We would -- we don't have to
3 move the admission of anything.

4 HEARING EXAMINER FARKAS: Right. That
5 completes the witnesses that the Staff has?

6 MR. WRIGHT: It does. Thank you, Your
7 Honor.

8 HEARING EXAMINER FARKAS: You will be
9 allowed to make a statement. Come up here to the
10 witness chair. For the record, I have previously sworn
11 you in.

12 MR. SMITH: Thank you.

13 HEARING EXAMINER FARKAS: You can go ahead
14 and make your statement.

15 PHILLIP SMITH,
16 being by the Hearing Examiner previously duly sworn, as
17 hereinafter certified, testifies and says as follows:

18 DIRECT TESTIMONY

19 THE WITNESS: Yes. I do not contest the
20 amount of the fine or the occurrence of the violation.
21 What I contest --

22 HEARING EXAMINER FARKAS: Just so I'm
23 clear, you're not contesting that you were driving a
24 commercial motor vehicle with an expired medical
25 certificate?

1 THE WITNESS: That is correct.

2 HEARING EXAMINER FARKAS: And you do not
3 contest that that violates the Commission's rules?

4 THE WITNESS: That is correct.

5 HEARING EXAMINER FARKAS: And you do not
6 contest the fact that the fine, the civil forfeiture
7 that would be assessed for that violation would be
8 \$100?

9 THE WITNESS: That is correct.

10 HEARING EXAMINER FARKAS: Okay. Go
11 ahead.

12 THE WITNESS: What I am contesting is the
13 fact that this forfeiture is being levied against me.
14 The previous witness stated that the statutory basis
15 for levying the forfeiture against me was implied in
16 the statute, and yet -- in a federal statute, and yet
17 in Ohio Statute 4905.55, entitled Liability for Act of
18 Agent, states, "The act, omission, or failure of any
19 officer, agent, or other person acting for or employed
20 by a public utility or railroad while acting in the
21 scope of his employment is the act or failure of the
22 public utility or railroad." Now, there is no simple
23 implication in that statute, and it is an Ohio statute,
24 and my contention is that the company, having for 25
25 years scheduled my medical appointment and having

1 acclimated me to that procedure and in missing the --
2 this specific scheduling of an appointment, which they
3 are contractually required to pay for and contractually
4 given the right to pick the examining facility, doctor,
5 or medical personnel, they are at least partially
6 culpable in the violation, and the assessment of
7 forfeiture completely on me, I believe to be arbitrary
8 and convenient. I guess that's my statement.

9 HEARING EXAMINER FARKAS: Okay.

10 MR. WRIGHT: Yes, Your Honor, I think I do
11 have a few questions.

12 CROSS-EXAMINATION

13 By Mr. Wright:

14 Q. Mr. Smith, you referenced an Ohio statute
15 there and then also the yellow book on the witness
16 stand. What is that yellow book, by the way?

17 A. It's a contract, the same contract -- if I
18 may be -- well, if I may remark, that contracts are
19 what got those bankers their hundreds of millions of
20 dollars of taxpayers' money when their banks, the jobs
21 that they did at their banks failed and the banks had
22 to be bailed out with hundreds of billions of taxpayer
23 dollars, and yet these people still got hundreds of
24 millions because it was contractual.

25 Q. So you're saying contracts can lead to bad

1 results? Is that what you're --

2 A. No. I'm saying contracts for rich people
3 are written in gold, and contracts for poor people
4 aren't worth the paper they're written on.

5 Q. Well, let's get to the point. You've been
6 driving for 20 --

7 A. Forty years.

8 Q. Forty years?

9 A. Yes, sir.

10 Q. I'm sorry. I thought you said 20-some
11 earlier.

12 A. At this company.

13 Q. Okay. You've been driving at this company
14 for 20-some years. Are you on a one- or two-year
15 interval for your medical card?

16 A. Two years.

17 Q. Two years. Okay. So your medical
18 certificate would expire every two years on or about
19 the same date; correct?

20 A. Yes, sir.

21 Q. All right. So it's your contention that
22 despite the fact that you carry that card, that you
23 hand that card -- have you been inspected by other
24 people other than Mr. Adkins?

25 A. Oh, yes, sir.

1 Q. Okay. And it's a fairly routine procedure
2 that you're asked for that medical card, aren't you?

3 A. Yes, sir.

4 Q. And is it fair to say that somewhere along
5 the line -- well, strike that. I assume you have
6 occasion to look at that medical card every now and
7 then?

8 A. No, sir.

9 Q. Or do you not pay any attention to it at
10 all?

11 A. No, sir. It's -- it's like your driver's
12 license. You only look at it when you need to display
13 it.

14 Q. So if, under your theory, if my driver's
15 license expires -- it's the window washers
16 (indicating). Excuse me. If my driver's license
17 expires and I'm out driving on the road and I get
18 stopped for speeding or something like that, should I
19 be responsible for that?

20 A. Well, if you have been acclimated to
21 receive notice from the State of Ohio that your
22 driver's license is about to expire, I would say no.
23 If the State of Ohio, for the term of your driving
24 career, notified you when you needed to renew your
25 license and one time they didn't and you overlooked the

1 general perception that the time is nearing to renew
2 your license through the expectation that you will
3 receive notice, I would say that in that situation the
4 culpability would be upon the state for not notifying,
5 and I'm correlating my experience with the company to
6 this in that the company has notified me every two
7 years that I need to take a physical. They are
8 required to pay for that physical contractually. They
9 reserve the right to pick the doctor contractually.

10 Q. Do they always do that or do you --

11 A. Yes, sir.

12 Q. They always pick the doctor?

13 A. They have always done that.

14 Q. All right. Well, let's see if we can't
15 get to the point. Who is this contract between?

16 A. The International Brotherhood of Teamsters
17 and the American Trucking Association.

18 Q. So it's a union contract; correct?

19 A. Yes, sir.

20 Q. And the union contract provides for --
21 probably provides for a lot of things, including a
22 grievance procedure, doesn't it?

23 A. Yes, sir.

24 Q. And if your position is that it's your
25 employer's responsibility to schedule your physical, to

1 choose your doctor, to notify you when it's time for
2 your physical, and your employer doesn't do that, then
3 your beef is with your employer under that contract, is
4 it not?

5 A. Well, presently --

6 Q. And I know you're not an attorney, sir, so
7 I'm not asking you for a legal conclusion. Now, if you
8 can answer my question. I apologize. I didn't mean to
9 interrupt you. I'm not interested in an interpretation
10 of the contract. I'm simply asking you, the contract
11 contains a number of terms and provisions that govern
12 your relationship, as a member of the union, with your
13 employer; is that fair?

14 A. It's fair. I think it's beside the point.

15 Q. Oh, it's the point you're relying on,
16 sir. You're saying that that contract establishes
17 liability in this case, and you're saying that you're
18 absolved from liability despite the fact that you've
19 been driving for 40 years, 20-some with this employer,
20 and had physicals every two years, you're saying hey,
21 not my problem, my employer's problem? Is that not
22 what you testified to here today?

23 A. Yes, but I am not basing it on the
24 contract between the International Brotherhood of
25 Teamsters and the American Trucking Association. I'm

1 basing it on Ohio Revised Code 4905.55, Liability for
2 the Act of an Agent.

3 Q. Are you an attorney?

4 A. No, sir.

5 Q. What does that mean?

6 A. It means that I am not an attorney.

7 Q. What does that statute mean in your
8 laymen's terms?

9 A. In laymen's terms, as I interpret that
10 statute, culpability for this violation lies with
11 Arkansas Best Freight System and not with me.

12 Q. Does that preclude both of you from being
13 imposed a fine?

14 A. No, sir.

15 Q. It doesn't, does it?

16 A. No, sir.

17 Q. And if your employer has assumed this
18 responsibility, are you surprised that we've not heard
19 from your employer at all in this case? I assume you
20 went to your employer after this happened, did you not?

21 A. I am not surprised because I don't know if
22 you have heard from my employer or not.

23 Q. I can assure you that we have not.

24 A. And your second question?

25 Q. My -- well, we have not heard from your

1 employer, and if -- if it's their responsibility,
2 wouldn't they have just paid the fine or provided
3 you -- came down here and represented you to complain
4 about it? Is it your -- is it your belief that that's
5 their responsibility? Should they be the ones sitting
6 in the chair today, not you?

7 A. Yes, sir.

8 Q. Your company? Okay.

9 A. Yes, sir.

10 Q. So it's their responsibility to fight this
11 thing, according to your story; right? Is that what
12 you're saying?

13 A. Yes, sir.

14 Q. Okay. And they, of course, are not in
15 this room today?

16 A. That is correct.

17 Q. And I'm happy to put Mr. Canty back on the
18 stand if you'd like. He will testify that we've not
19 heard anything from your employer in this case about
20 this specific violation.

21 A. They have not been notified of an intent
22 to assess forfeiture. Only I have been notified of an
23 intent to assess forfeiture.

24 Q. Did you not turn over the inspection
25 report to your employer?

1 A. Oh, yes.

2 Q. Okay. This isn't about the forfeiture.

3 You already acknowledged that. This is about --

4 A. This is only about the forfeiture.

5 Q. I'm sorry. I'm confused. You said
6 previously it's not about the amount of forfeiture,
7 it's about who is responsible here; right?

8 A. Exactly, for the forfeiture.

9 Q. Not for the violations?

10 A. Yes, sir.

11 Q. You're acknowledging --

12 A. That's right.

13 Q. You're acknowledging that you are
14 responsible for having a valid medical card?

15 A. Yes, sir. I am contending that the
16 forfeiture be billed rightly, pun intended.

17 Q. Pun intended?

18 A. Yes, sir.

19 Q. Okay. So now your position -- I'm sorry.
20 I'm confused. Now your position is that --

21 A. It hasn't changed, sir.

22 Q. -- that the forfeiture should have been
23 assessed to your employer?

24 A. Exactly.

25 Q. Okay. But the responsibility for having a

1 valid medical card is yours? That's what you're saying
2 now; is that right?

3 A. Well, I'm saying that it is both the
4 company and my responsibility. I'm sure that the
5 Federal Regulations require the company not to allow
6 anyone to operate their equipment without a valid
7 medical certificate, and they understand this, because
8 it's in the contract that they negotiate for labor for
9 them to set this up to be taken care of.

10 Q. So we're back to the contract. You're
11 saying --

12 A. That's an aside. It's not the point of
13 the --

14 Q. You're saying the contract lays out the
15 rights and responsibilities to have all these things
16 that you just said taken care of?

17 A. It's comparable to the fact that once the
18 company found out that I had been cited for an invalid
19 medical certificate, they did what they were supposed
20 to do the very next day. They wasted no time.

21 Q. Easy to do, isn't it? Easy to get that
22 appointment set up and done, and, in fact, you did it
23 the next day?

24 A. No, not me. Them. They did it the next
25 day, because they understand their liability.

1 Q. Well, you saw a local doctor, didn't you?

2 A. Yes, sir.

3 Q. Uh-huh. Same one you've probably been
4 seeing for a number of years, isn't it?

5 A. Yes, sir.

6 Q. Okay. Now, regardless of who chooses that
7 doctor, you're saying that you should not have to pay
8 any attention whatsoever to the expiration date on your
9 medical card?

10 A. If I made the appointment for the doctor,
11 I would be liable for the doctor's fees. They are
12 liable for the doctor's fees.

13 Q. Okay. I'm not talking about the fees to
14 pay the doctor. What I'm talking about is you're
15 saying -- I want to make sure I understand this.
16 You're saying you have no responsibility to pay any
17 attention to that medical card? Let's assume your
18 employer overlooked the date. You don't have any
19 responsibility to contact your employer and say hey,
20 look, my time is up, I've got to get this done? Is
21 that what you're saying?

22 A. No, sir. Because I advised the company's
23 secretary who takes care of making these appointments,
24 I advised her a couple of months beforehand. If she
25 forgets to make the appointment that I advised her I

1 needed, I am not culpable for that oversight of hers.

2 Q. Based on the division of responsibilities
3 in your union contract?

4 A. No, sir.

5 Q. Well, who is behind the wheel?

6 A. Me.

7 Q. The company or you?

8 A. Me.

9 Q. What's the purpose of having a medical
10 certificate?

11 A. To make sure I can do what I'm supposed to
12 do.

13 Q. Absolutely. And, again, it's the
14 company -- it's you behind the wheel, not the company;
15 correct?

16 A. That's correct.

17 Q. And you have -- do you have Staff Exhibit
18 No. 2 in front of you?

19 A. Yes, sir. Uh-huh.

20 Q. Very quickly, do you understand -- do you
21 have the inspection report as well?

22 A. Yes, sir.

23 Q. Right here. This is it right here
24 (indicating).

25 A. That -- this is exactly correct.

1 Q. Okay.

2 A. Exactly correct.

3 Q. May I ask you a question, sir?

4 A. Yes, sir.

5 Q. You were cited for an expired medical
6 examiner's certificate, which you do not deny; correct?

7 A. That's correct.

8 Q. And you were driving on an expired medical
9 certificate for at least three weeks; correct?

10 A. That's correct.

11 Q. And I direct your attention here, it
12 references 391.45, is that right --

13 A. Uh-huh.

14 Q. -- (b)?

15 A. Yes, sir.

16 Q. Small "b." And (b)(1), what's the second
17 word in (b)(1)? It describes who is required to
18 have --

19 A. I don't see (b)(1).

20 Q. (b)(1) is right here, sir, in the
21 regulation (indicating). It says "driver," does it
22 not?

23 A. "The following persons must be medically
24 examined and certified...as physically qualified to
25 operate a commercial motor vehicle: Any driver who has

1 not been medically examined and certified as qualified
2 to operate a commercial motor vehicle during the
3 preceding 24 months."

4 Q. There's no reference in there anywhere to
5 any driver who has made the appropriate arrangements by
6 contract or otherwise with their employer, is it?

7 A. That is correct. And there is also no
8 reference to who is liable for the forfeiture imposed
9 upon the violation, whereas there is reference in Ohio
10 Revised Code that the omission of any person acting --
11 while acting in the scope of his employment is the
12 omission of the public utility.

13 Q. How did you find that statute, sir? Were
14 you -- were you doing some legal research on your own?

15 A. Well, you have a Website.

16 Q. We do have a Website, that is correct.

17 A. I saw it on your Website.

18 Q. It is? Okay. All right. And, again,
19 your interpretation of that statute is a laymen's
20 interpretation? You're not an attorney?

21 A. Thank goodness.

22 Q. You're entitled to your opinion, sir. And
23 to the extent this was an oversight by your employer,
24 which is what you're saying --

25 A. Yes, sir.

1 Q. -- and maybe we'll be happy to send a
2 letter to your employer to that effect --

3 A. Yes, sir.

4 Q. -- to the extent you feel this is an
5 oversight by your employer, you have recourse against
6 your employer, do you not, just as you would if you
7 have to pay the forfeiture?

8 A. Well, actually, that does not concern you,
9 just like this contract does not concern you.

10 Q. Sir, answer my question, please.

11 A. Yes, I have recourse.

12 Q. Because you believe, under those
13 circumstances, that that would be a violation of the
14 responsibilities, as you understand them to be, between
15 you and your employer? You understand this to be the
16 responsibility of your employer to set this up;
17 correct?

18 A. That is my understanding.

19 Q. And unless the employer sets it up, it
20 could be six months expired, it could be twelve months
21 expired. You're still out there -- you're still out
22 there allowed to drive on the highways; right?

23 A. That is correct.

24 Q. Okay. Thank you very much.

25 A. Now --

1 MR. WRIGHT: Your Honor, there's no
2 question.

3 THE WITNESS: Now may I question myself?
4 May I make a statement?

5 HEARING EXAMINER FARKAS: Go ahead.

6 THE WITNESS: He had an opportunity to
7 question me.

8 HEARING EXAMINER FARKAS: Go ahead.

9 THE WITNESS: I'm here because I don't
10 think the Public Utilities Commission of Ohio
11 understands that the imposition of forfeiture on the
12 driver is an arbitrary and convenient remedy to a
13 violation of this type. That is why I'm here. I think
14 it's arbitrary because the Federal Regulations that the
15 imposition of this forfeiture is based on may only
16 imply that the driver may be assessed the forfeiture,
17 whereas the statute of the State of Ohio explicitly
18 states that the omission of an employee is the omission
19 of the public utility. My company is the public
20 utility. I am only an employee of that public utility,
21 and I'm being assessed a forfeiture on an omission of
22 theirs, and that is what I'm here to state. Thank you,
23 sir.

EXAMINATION

By Hearing Examiner Farkas:

Q. You believe that your failure to get and have a valid medical certificate is an omission of the company?

A. I believe that the company is statutorily required to preclude the operation of their equipment without the proper certifications.

Q. But you --

A. And, therefore, they are equally culpable with me in this violation.

Q. So you think the company should also be fined \$100?

A. I think the company only should be fined \$100.

Q. You don't deny that you are culpable for a violation; is that correct?

A. Well --

Q. You don't deny that you were operating a commercial motor vehicle without a valid medical certificate, do you?

A. No, I do not deny that.

Q. You don't deny that that's a violation of the Commission's rule?

A. No, I do not deny that.

1 Q. And you don't deny that it's your
2 responsibility to have a valid medical certificate, do
3 you?

4 A. You see, Judge Farkas, that is a very gray
5 area. The statutes and regulations do not specifically
6 lay the burden of responsibility on either the company
7 or the driver. This is why I'm here, because the
8 forfeiture is being assessed on the easiest one to
9 assess the forfeiture on, where the company is required
10 statutorily and contractually to take care of these
11 requirements. These are good requirements, and they
12 should be conformed to, and yet I'm here to pay a fine
13 because the company didn't do what they were supposed
14 to do. I advised the company every time it gets close
15 to the time I need a medical examination, and if they
16 don't call their doctor that they have to pick -- I'm
17 not allowed to pick the doctor. If they don't call
18 that doctor that they're required to pay -- if I call
19 him, I'd be required to pay, wouldn't I?

20 Q. You had said this type of violation. Do
21 you think -- do you believe that drivers have any
22 responsibility at all for compliance with Commission
23 rules or do you think because they're employees that
24 it's the carrier's responsibility?

25 A. Morally --

1 Q. Not morally.

2 A. -- and intellectually the driver has all
3 the responsibility. Fiscally and financially, it is
4 the company's responsibility to maintain a qualified
5 driver.

6 Q. And doesn't the driver have to be
7 qualified?

8 A. Of course.

9 Q. And isn't it the driver's responsibility
10 to be qualified?

11 A. Of course.

12 Q. Okay. So you knew you weren't
13 qualified, that you didn't have a medical certificate,
14 a valid --

15 A. I did not know that.

16 Q. You didn't know it was invalid?

17 A. Once it was checked, I understood it to be
18 invalid. I didn't know I was driving with an invalid
19 medical certificate. I had advised them a month or two
20 before, or thereabouts, and I assumed that they would
21 make the appointment, as they always have done, in time
22 to keep a valid medical certificate on file for me.

23 Q. But you don't deny that you were operating
24 with an --

25 A. No, sir, I do not.

1 Q. -- invalid medical certificate?

2 A. That is correct.

3 HEARING EXAMINER FARKAS: Anything else?

4 MR. WRIGHT: Your Honor, I think we've
5 beat this horse enough. I do -- I would like to mark
6 and have the witness acknowledge that he previously
7 submitted a statement, and I'd like to ask him a
8 question about the statement.

9 HEARING EXAMINER FARKAS: Okay.

10 You want to mark that as what?

11 MR. WRIGHT: I guess we'll call it
12 Staff 3.

13 HEARING EXAMINER FARKAS: That is the
14 four-page statement dated 7/29/09 --

15 MR. WRIGHT: Yes.

16 HEARING EXAMINER FARKAS: -- that was
17 docketed with the Commission?

18 MR. WRIGHT: Yes.

19 (EXHIBIT HEREBY MARKED FOR IDENTIFICATION
20 PURPOSES.)

21 RECROSS-EXAMINATION

22 By Mr. Wright:

23 Q. Do you happen to have that, your own
24 statement?

25 A. Yes, sir.

1 HEARING EXAMINER FARKAS: And that was
2 authored by Mr. Smith?

3 MR. WRIGHT: I was going to ask him that,
4 but, yes.

5 Q. Mr. Smith, you have in front of you a
6 four-page document --

7 A. Yes, sir.

8 Q. -- dated between 7/29/09 which purports to
9 be a statement you made; is that right?

10 A. Yes, sir.

11 Q. And is it fair to say that that statement
12 outlines the positions you're taking here today?

13 A. Yes, sir.

14 Q. And you stand by that statement?

15 A. Yes, sir.

16 Q. And it's your position, is it not, that
17 everything that happens in the process again leading up
18 to you actually getting the physical that you need
19 every two years, that that is contractual? And I
20 direct you -- sir, I direct you to Page 3 --

21 A. It's also statutory.

22 Q. I direct you to Page 3 of your statement,
23 please.

24 A. Yes, sir.

25 Q. And to shortcut this, let me show you what

1 I'm referring to, if I may.

2 A. Okay.

3 Q. Page 3 (indicating).

4 A. Yes, sir.

5 Q. This sentence beginning, "The company"
6 (indicating), please read that to yourself.

7 A. "The company notifies me of the
8 appointment, and I comply. This scenario is
9 contractual."

10 Q. Okay. Thank you. And it's your position,
11 as you stated on Page 4 -- the last sentence of the
12 first paragraph on Page 4, you state, do you not, "In
13 this instance, the company did not conform to these
14 requirements"?

15 A. That is correct.

16 Q. And so the company basically failed on its
17 end of the contract, and you're not getting the benefit
18 of the bargain that you believe you should get
19 vis-a-vis the contract; right?

20 A. That is correct.

21 Q. Thank you very much.

22 We would move the admission of Staff
23 Exhibit 3.

24 HEARING EXAMINER FARKAS: I take it you
25 don't object to your own statement being admitted?

1 THE WITNESS: Not at all, sir.

2 HEARING EXAMINER FARKAS: Then that will
3 be admitted.

4 (EXHIBIT ADMITTED INTO EVIDENCE.)

5 HEARING EXAMINER FARKAS: Is there
6 anything further you have that you would like to
7 present?

8 THE WITNESS: Yes, if I may take a
9 moment.

10 HEARING EXAMINER FARKAS: Okay.

11 THE WITNESS: We've been here over an
12 hour, and the whole gist of it is the PUCO exists to
13 regulate public utilities, not impose traffic tickets,
14 and that's -- that's why I don't understand why I'm
15 being charged with the forfeiture. Thank you, sir.

16 HEARING EXAMINER FARKAS: Okay. You can
17 step down.

18 (Witness excused.)

19 HEARING EXAMINER FARKAS: I believe that's
20 all we have.

21 MR. WRIGHT: I believe that's all we have,
22 Your Honor.

23 HEARING EXAMINER FARKAS: Let's go off the
24 record a second.

25 (Discussion off the record.)

1 HEARING EXAMINER FARKAS: Let's go back on
2 the record. The case will be submitted to the
3 Commission, and we'll stand adjourned.

4 (Thereupon, the hearing was concluded at
5 11:12 a.m.)
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CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings taken
by me in this matter on Tuesday, October 20, 2009, and
carefully compared with my original stenographic notes.

s/Valerie J. Sloas
Valerie J. Sloas, Registered
Professional Reporter and Notary
Public in and for the State of
Ohio.

My commission expires June 8, 2011.

(VJS-698)

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/4/2009 10:40:58 AM

in

Case No(s). 09-0422-TR-CVF

Summary: Transcript Transcript from 10/20/09 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Sloas, Valerie J. Mrs.