

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Philip Smith, Notice of                     )  
Apparent Violation and Intent to Assess                     ) Case No. 09-422-TR-CVF  
Forfeiture.   ) (OH3288003473D)

OPINION AND ORDER

The Commission, considering the applicable law and evidence of record, and being otherwise fully advised, hereby issues its opinion and order in this matter.

APPEARANCES:

Philip Smith, 629 S. Fayette, Washington Courthouse, Ohio 43160, on his own behalf.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and William Wright, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

Nature of the Proceeding:

On June 7, 2007, the Ohio State Highway Patrol (Patrol) stopped and inspected a commercial motor vehicle (CMV) operated by Philip Smith. The Patrol found Mr. Smith in violation of 49 Code of Federal Regulations (C.F.R.) 391.45(b)(1), which provides:

Except as provided in Section 391.67,<sup>1</sup> the following persons must be medically examined and certified in accordance with Section 391.43<sup>2</sup> as physically qualified to operate a commercial motor vehicle:

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(b)(1) Any driver who has not been medically examined and certified as qualified to operate a commercial motor vehicle during the preceding 24 months.

Thereafter, Mr. Smith was timely served with a Notice of Intent to Assess Forfeiture and a Notice of Preliminary Determination in accordance with Rules 4901:2-7-07 and 4901:2-7-12, Ohio Administrative Code (O.A.C.), respectively. In these notices, Mr. Smith

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<sup>1</sup> 49 C.F.R. 391.67 provides rules applicable to farm vehicle drivers of articulated CMVs.

<sup>2</sup> 49 C.F.R. 391.43 provides rules applicable to medical examinations.

was advised that the Commission staff intended to assess a civil forfeiture of \$100 for the violation. A prehearing teleconference was conducted; however, the parties failed to resolve this matter. Thereafter, a hearing was held on October 20, 2009.

### Background

At the hearing, Patrol officer Owen Adkins testified that, on June 7, 2007, he conducted an inspection of a vehicle operated by Mr. Smith. Officer Adkins stated that he found Mr. Smith in violation of 49 C.F.R. 391.45(b), by operating a CMV without being medically examined or certified within the last 24 months as qualified to operate a CMV (Tr. at 11-14). Mr. Smith did not dispute these facts, nor dispute that his conduct violated 49 C.F.R. 391.45(b) (Tr. 27-28, 31). In addition, John Canty, assistant chief of the Commission's Compliance Division, testified regarding the staff's calculation of the \$100 civil forfeiture, which Mr. Smith similarly did not contest (Tr. at 18, 25, 42).

### Issue in the Case

The sole issue raised by Mr. Smith relates to whether, under Section 4905.55, Revised Code, the driver or motor carrier is liable for payment of the civil forfeiture that was assessed in this case.

Section 4905.55, Revised Code, provides that:

The act, omission, or failure of any officer, agent, or other person, acting for or employed by a public utility or railroad, while acting within the scope of his employment, is the act or failure of the public utility or railroad.

Mr. Smith argues that, under this statute, the motor carrier is responsible for paying the civil forfeiture for the driver's violation.

Mr. Smith testified that he has been employed by the motor carrier ABF Freight System Inc. (ABF) for 20 years pursuant to a union contract.<sup>3</sup> He claimed that, during this time, ABF has scheduled and paid for his medical examinations, which must be performed every 24 months; however, he asserted that ABF failed to schedule his most recent examination (Tr. 27-28, 31). As a result, he acknowledged that, at the time he was stopped and inspected by the Patrol in this case, he was not medically examined nor certified as qualified to operate a CMV; and he admitted that it is the driver's responsibility to be so certified (Tr. at 44). Mr. Smith insisted that he was unaware that his medical certification had expired 23 days prior to the Patrol's inspection in this case; even though he admitted

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<sup>3</sup> While Mr. Smith made reference to the union contract under which he is employed by ABF, he asserted that his position in this case was based solely on his position on Section 4905.55, Revised Code (Tr. at 31-32).

that he had previously been stopped by the Patrol and asked to produce proof of medical certification, which he likened to showing one's driver's license (Tr. at 28, 29). He asserted that, even with an expired medical certification, he could continue to drive because he believed that it was the company's responsibility to insure that he was medically certified (Tr. at 40). Ultimately, Mr. Smith argued that because ABF is a motor carrier and a public utility, and because he was within the scope of his employment (driving a CMV) at the time he was stopped and inspected by the Patrol, his failure to be medically certified is the failure of ABF because of Section 4905.55, Revised Code (Tr. at 30). As a result, Mr. Smith contended that ABF should be responsible for payment of the civil forfeiture (Tr. at 41).

Historically, the Commission has recognized that, pursuant to Section 4905.55, Revised Code, motor carriers, with the incentives of fewer accidents, fewer employee injuries and fines, and lower insurance rates, are in the best position to ensure compliance with motor carrier safety regulations. However, Section 4905.55, Revised Code, does not absolve Mr. Smith of the violation of the Commission's motor carrier rules; it merely recognizes that a public utility can also be held liable for the acts, omissions, or failures of its employees.<sup>4</sup> In this case, Mr. Smith's employer, ABF, was not cited by the Patrol, Mr. Smith was. More importantly though, the Commission is directed by Section 4921.99, Revised Code, to assess a civil forfeiture upon the person (i.e., carrier or individual) who it determines, by a preponderance of the evidence, committed the violation. In this case, the preponderance of the evidence demonstrates that Mr. Smith, and not ABF, operated a CMV, but was not medically examined and certified, in accordance with 49 C.F.R. Section 391.43, as physically qualified to operate a CMV. Thus, Mr. Smith, and not ABF, committed the cited violation and, therefore, is liable for payment of the \$100 civil forfeiture. We do not find that ABF's scheduling failure in any way absolves Mr. Smith of his responsibility to be medically examined and certified in accordance with 40 C.F.R. 391.43. Staff should investigate ABF to determine that it has a program in place for insuring that its drivers are medically examined and certified, in accordance with 49 C.F.R. 391.43 and report back to the Commission within 60 days. Correspondingly, the absence of knowledge by Mr. Smith that his certification had lapsed does not exonerate him from the liability for the violation. Accordingly, Mr. Smith, and not ABF, is liable for the \$100 civil forfeiture assessed for violation of 49 C.F.R. Section 391.45(b).

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 7, 2007, the Patrol stopped and inspected a CMV operated by Philip Smith and found that Mr. Smith was operating a motor vehicle with an expired medical examiner's certificate in violation of 49 CFR 391.45(b).

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<sup>4</sup> Mr. Smith acknowledged that both he and the company could be held liable for the civil forfeiture for this violation (Tr. at 32).

- (2) Mr. Smith was timely served with a Notice of Intent to Assess Forfeiture and a Notice of Preliminary Determination.
- (3) A hearing in this matter was held on October 20, 2009.
- (4) The violation in this case was proven by a preponderance of the evidence.
- (5) Mr. Smith is liable for the civil forfeiture assessed for violation of 49 C.F.R. Section 391.45(b).
- (6) Pursuant to Section 4905.83, Revised Code, Mr. Smith shall have 30 days from the date of this opinion and order to pay the \$100 civil forfeiture.
- (7) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793. In order to assure proper credit, Mr. Smith is directed to write the citation number (OH3288003473D) on his check or money order.

It is, therefore,

ORDERED, That Mr. Smith pay the assessed amount for the violation of 49 C.F.R. 49 CFR 391.41, within 30 days from the date of this opinion and order to the State of Ohio in accordance with this opinion and order. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That staff investigate ABF to determine that it has a program in place for insuring that its drivers are medically examined and certified, in accordance with 49 C.F.R. 391.43 and report back to the Commission within 60 days. It is, further,

ORDERED, That a copy of this opinion and order be served on each party of record.

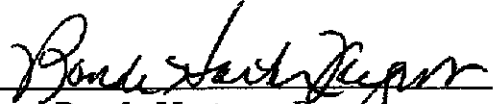
THE PUBLIC UTILITIES COMMISSION OF OHIO



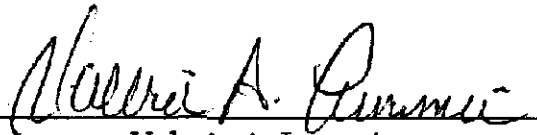
Alan R. Schriber, Chairman



Paul A. Centolella



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SEF:ct

Entered in the Journal

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Renee J. Jenkins  
Secretary