

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Christopher Wickham,)	
Notice of Apparent Violation and Intent)	Case No. 16-0753-TR-CVF
To Assess Forfeiture.)	

**BRIEF SUBMITTED ON BEHALF OF
THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

I. INTRODUCTION

Christopher Wickham (Respondent) violated provisions of the Federal Motor Carrier Safety Regulations by operating a commercial motor vehicle (CMV) without a valid commercial driver's license (CDL). He was preliminarily assessed a forfeiture of \$250.00.

The record shows that the Staff of the Public Utilities Commission of Ohio (Staff) offered the testimony of a highly qualified and credible Motor Carrier Enforcement inspector, as well as the testimony of a compliance officer of the Transportation Compliance Division of the Public Utilities Commission of Ohio (Commission), to support both the violation and the resulting civil forfeiture. The record supports the finding of the violations of the Motor Carrier Safety Regulations at issue in this proceeding. Based on the evidence of record, established precedent of the Commission,

and sound public policy, the total monetary civil forfeiture of \$250.00 should be imposed against Respondent.

II. STATEMENT OF FACTS

A. Procedural history of the case

According to Staff witness Tom Persinger, Respondent was timely and properly provided with all required notices and process in this case. Tr. at 19. Respondent was sent a Notice of Preliminary Determination on March 23, 2016, as required and described in Ohio Admin. Code §4901:2-7-12. Staff Exhibit 3.¹ The Notice of Preliminary Determination cited the following violation:

- 49 C.F.R. § 383.23(A)(2) – Operating a CMV without a CDL

Respondent then filed a request for a hearing in this matter. The hearing was conducted on June 21, 2016.

B. Factual background of the violations at issue in this proceeding

On February 1, 2016, Ohio State Highway Patrol Motor Carrier Enforcement Inspector Anthony Lester conducted a roadside inspection of a vehicle being operated by Respondent, Christopher Wickham. Tr. at 8. The inspection was performed as part of Inspector Lester's regular assigned duties and responsibilities. *Id.*

¹ Staff notes that the Transcript docketed in this case on July 12, 2016 incorrectly identifies Staff Exhibit 3 in the Index to Exhibits as "Part 391, Federal Motor Carrier Safety Administration." Tr. at 4. The document referenced there was a printout of Guidance provided by the Federal Motor Carrier Safety Administration of which the bench took administrative notice. Tr. at 54-55. The PUCO Exhibit Filing docketed on July 11, 2016 contains the correct document admitted as Staff Exhibit 3, the March 23, 2016 Notice of Preliminary Determination.

Inspector Lester, a 19-year veteran of the State Highway Patrol Motor Carrier Enforcement division, testified that he stopped Mr. Wickham's vehicle because the carrier's "safety rate was up a little bit." *Id.* Mr. Wickham's carrier was Rick Tomlison Trucking.

As he inspected Mr. Wickham's documents, Inspector Lester discovered an issue with his license. Tr. at 9. After searching Mr. Wickham's license on the Law Enforcement Administrative Data System (LEADS), Inspector Lester determined that the commercial driver's license (CDL) had been suspended for unspecified "[m]edical related" reasons. Tr. at 11. Although Mr. Wickham had and produced an unexpired Medical Examiner's certificate, Staff Exhibit 2, the Bureau of Motor Vehicles (BMV) reported that it did not have that certificate on file, and that the only certificate on file had expired the previous year, in February 2015. Tr. at 14.

III. LAW AND ARGUMENT

A. Drivers must comply with the Motor Carrier Safety Regulations.

The Commission, as the lead agency for the Motor Carrier Safety Assistance Program (MCSAP) in Ohio, regulates operation of commercial motor vehicles. Ohio Rev. Code § 4905.80. In furtherance of this obligation, the Commission has adopted rules governing the conduct of drivers, shippers, and motor carriers that are engaged in commerce. The Commission has adopted standards for motor carrier safety pursuant to authority delegated by the Ohio General Assembly. Ohio Rev. Code § 4905.81. These

rules, which are found under Ohio Admin. Code § 4901:2-5, largely adopt the U.S. Department of Transportation motor carrier safety regulations. The state has continually sought to implement programs to ensure the safety of the motoring public and to reduce accidents involving commercial motor carriers. It is the Commission's duty to keep Ohio's roadway safe from accidents involving commercial motor vehicles. Compliance with the regulations is imperative.

B. Respondent failed to comply with the regulations by operating a commercial motor vehicle without a valid commercial driver's license in violation of 49 C.F.R. § 383.23(a)(2).

Mr. Wickham did not have a valid CDL at the time of the inspection. The evidence of record demonstrates that Mr. Wickham had a history of license suspensions for medical certification reasons, was either aware of or chose to ignore the actions necessary to take corrective action, and imprudently relied on his carrier which, in turn, improperly relied on a third party to ensure his compliance.

1. Respondent was required to submit his medical examiner's certification to the Bureau of Motor Vehicles.

Respondent was cited for a single violation of 49 C.F.R. § 383.23(a)(2). That section provides that:

Except as provided in paragraph (b) of this section, no person may legally operate a CMV unless such person possesses a CDL which meets the standards contained in subpart J of this part, issued by his/her State or jurisdiction of domicile.

Records obtained from the Ohio Registrar of Motor Vehicles show that Mr. Wickham was issued a Medical Examiner's Certificate on October 16, 2014, that was to

expire in three months' time. Staff Exhibit 4, page 2. A month later, he was notified by the BMV that his medical certificate would expire within 60 days. Staff Exhibit 4, page 3. The notice specifically stated that he must submit a valid medical card to the BMV to continue operating a commercial motor vehicle. The notice also specifically directed his attention to "New Federal Regulations" for CDL holders requiring that medical certificates be filed with the BMV.

By that time, however, those regulations were certainly no longer new. The rules were issued on November 20, 2008, six years earlier. 73 Fed.Reg. 73096. They required that all non-excepted interstate CDL holders, like Mr. Wickham, submit medical certificates to their state driver licensing agency, the Bureau of Motor Vehicles in Ohio. 49 C.F.R. § 383.71(g), (h). Significantly, this process is called "self-certification." The obligation is imposed on the CDL holder alone.

The rules were adopted by the Federal Motor Carrier Safety Administration (FMCSA) "to prevent medically unqualified drivers from operating on the Nation's highways by providing State licensing agencies a means of identifying interstate CDL holders who are unable to obtain a medical certificate." 73 Fed.Reg. 73098. The rules were intended to put into place to assist "enforcement personnel [to] detect drivers who are operating CMV in interstate commerce without the proper medical certification; and, who are required to have it." 73 Fed.Reg. 73104.

They require, among other things, submission of medical examiner's certificates, by drivers operating in non-excepted, interstate commerce who are required to be medically certified, to the state's driver licensing agency. The state driver licensing

agency (BMV) must make the driver's medical certification status information electronically accessible to State and Federal enforcement officials via the Commercial Driver License Information System (CDLIS), and to drivers and their employers via the CDLIS motor vehicle records.

2. Respondent failed to heed notices that his CDL would be, and ultimately had been, suspended.

As noted above, Mr. Wickham was served with a notice from the BMV that his medical certificate would expire within 60 days. Staff Exhibit 4, page 3. He was informed that he would no longer be certified to operate a commercial vehicle if he did not submit a valid medical card before the current one expired. Mr. Wickham acknowledged receiving this notice. Tr. at 26.

On January 21, 2015, after his medical card had expired, he received a "Certification Status Change Notice" from the BMV stating that he was no longer certified to operate a commercial motor vehicle. He also acknowledged receiving this notice. Tr. at 28.

He had, however, secured a new medical card a couple of days earlier, on January 19, 2015. This certificate, however, was only good for one month, expiring on February 19, 2015. Mr. Wickham testified that this was because he had to have a sleep apnea test done, Tr. at 22; that the month extension would allow him to "get my test and everything together," Tr. at 28. But that certificate also expired before being renewed. On February 25, 2015, Mr. Wickham received another Certification Status Change Notice informing

him that he was no longer eligible to operate a CMV. Staff Exhibit 4, page 7. As before, he acknowledged receiving this notice. Tr. at 29.

On March 10, 2015, he obtained the medical certificate that he showed to Inspector Lester at the time of the inspection. Staff Exhibit 2; Staff Exhibit 4, page 11. Mr. Wickham said that he gave this certificate to his employer to send to the BMV, Tr. at 22, but there is no record that the BMV ever received it.

As a result, Mr. Wickham was sent a Notice of Opportunity for Hearing (CDL Privileges Cancellation) on March 25, 2015. He acknowledged receiving this notice, Tr. at 30, but disregarded it, assuming that the BMV “wasn’t caught up from the new physical that was put in.” Tr. at 23. Consequently, he neither requested a hearing, nor did he take any other action to ensure that the BMV had his updated medical card. Tr. at 31.

And so, on April 29, 2015, the BMV sent Mr. Wickham a CDL Privileges Cancellation Notice. Staff Exhibit 4, page 9. Although acknowledging that he received the notice,² he also admitted that he didn’t read it, and wasn’t fully aware that his CDL had been cancelled. Tr. at 32. At least from that date until the date of this inspection, Mr. Wickham was not authorized to operate a commercial motor vehicle.

The Federal Motor Carrier Safety Administration’s guidance to the regulation is very clear. Question 10 of the Guidance to 49 C.F.R. § 383.73 states:

² The acknowledgement puts Mr. Wickham’s credibility at issue. In his direct testimony, he claimed that “I never got any notice that my license had been suspended or nothing.” Tr. at 23. When confronted with the notice on cross-examination, however, he admitted having received it, and that he just “didn’t read the entire notice.” Tr. at 31.

Question 10: What action should enforcement officers take when a commercial driver's CDL has been declared invalid by the issuing State because of a lapse in the driver's medical certificate?

Guidance: Whatever the reason for the State's decision, a driver with an invalid CDL may not lawfully drive a Commercial Motor Vehicle (CMV).

Mr. Wickham's CDL was cancelled effective April 29, 2015. He was undeniably driving a commercial motor vehicle unlawfully at the time of the inspection on February 1, 2016. The Commission should find that the Respondent violated 49 C.F.R. § 383.23(a)(2).

3. It is insufficient that Respondent was able to produce the physical certificate at the time of the inspection.

Mr. Wickham produced a valid medical card at the time of the inspection. He testified that he had been informed that carrying it would be sufficient. Specifically, he stated:

Mr. Wickham: So as far as the new physical it was good, I had the card in my hand, which we have had another people come to meetings and another officer and told them as long as we hold the card, since it was still kind of new thing about putting it on your license, hold the card and if you got pulled over you had the card if it did not show on your license through the computer.

Tr. at 23.

But that is not what the regulation allows. While drivers used to have to carry medical cards, the regulations provide that, as of January 30, 2015, CDL drivers no longer needed to carry a current medical card. The card may be carried and used as valid proof of medical certification, but only for 15 days after the date on which it was issued. 49 C.F.R. 391.41(a)(2)(i).

Specifically, the rule provides that a driver “no longer needs to carry on his or her person the medical examiner’s certificate . . . for more than 15 days after the date it was issued.” *Id.* While this would appear to refer only to a driver’s obligation to carry a medical card, and not to the validity of the paper as proof of medical certification, that is clearly not the intent of the regulation. Since its adoption, the rule has provided that physical medical cards were to be phased out, and could not be used for proof of certification for more than 15 days after their issuance.

As originally adopted in 2008, the rule required that, after January 2012, state drivers licensing agencies were to provide drivers with a time-stamped receipt that the medical examiner’s certificate had been received. That time-stamped receipt could be used “for up to 15 days after the date stamped on that receipt as proof of medical certification.” 73 Fed.Reg. 73127. Effective 2010, the FMCSA removed the requirement for states to provide receipts to drivers, permitting drivers and employers to use the medical certificates themselves as evidence of medical certification for 15 calendar days from the date of issuance. 75 Fed.Reg. 28499. Specifically, that change provided that:

If there is no medical certification information on that driver's CDLIS motor vehicle record defined at 49 CFR 384.105, a current medical examiner's certificate issued prior to January 30, 2012, will be accepted until January 30, 2014. After January 30, 2014, a driver may use a copy of the current medical examiner's certificate that was submitted to the State for up to 15 days after the date it was issued as proof of medical certification.

75 Fed.Reg. 28502.

In 2011, the FMCSA amended the rule to its current form. The purpose of that change was “to maintain in effect, until January 30, 2014, the requirement for an interstate CDL holder subject to the Federal physical qualification standards to carry a paper copy of his or her medical examiner's certificate.” 76 Fed.Reg. 70662. Further changes merely extended the deadline for relying solely on CDLIS driver records instead of paper medical examiner's certificates from 2014 to 2015. 79 Fed.Reg. 2377.

Mr. Wickham could not rely on his physical medical examination certificate as proof of his medical certification to drive. Since the inspection was more than 15 days after the certificate was issued, indeed, nearly 11 months later, the document produced to Inspector Lester was irrelevant for purposes of this violation.

4. Respondent’s reliance on his employer to submit his medical certificate was misplaced, and does not excuse his non-compliance.

The record contains five separate notices sent to Mr. Wickham informing him that his CDL either would be or had been cancelled. Four of those notices informed him that he was no longer certified to operate a commercial motor vehicle. All of them provided the means of submitting the necessary documentation, and contact information for questions or additional information.

Instead, Mr. Wickham relied on instructions from his employer. Rochelle Fultz, the Compliance Coordinator for Rick Tomlison Trucking, testified that it was the company’s practice to have drivers bring in their updated medical cards for her to fax to the BMV. This was because, she testified, the company “wanted to take care of everything.” Tr. at 50.

While it is understandable that a driver like Mr. Wickham would want to rely on his employer to “take care of everything,” it was, at best, imprudent for him to have done so. It is a driver’s responsibility to ensure that they are properly licensed to drive a CMV. In response to concerns raised about the reliability of the medical certificate submission process, the FMCSA *emphasized* that “it is the driver’s responsibility to ensure the timely submission of the medical examiner’s certificate to the [state driver licensing agency].” 73 Fed.Reg. 73100. The FMCSA further emphasized “that it is a driver’s responsibility to maintain a current medical certification and to renew it before it expires.” 73 Fed.Reg. 73101.

Similarly, the fact that other inspections failed to discover that his CDL had been cancelled is irrelevant. Respondent’s witness Fultz testified that there were three roadside inspections prior to the one in this case where Mr. Wickham was not found to be operating without a valid CDL. Tr. at 36-37. The argument is that neither Mr. Wickham nor his employer had any reason to know that there was any issue with his CDL.

The record does not indicate why this violation was not found in the earlier inspections.³ It does, however, suggest that Mr. Wickham’s CDL status was purportedly verified at the time of those inspections. Respondent Exhibits 5 and 6. As noted above, the rule was intended to put recordkeeping procedures into place “so that licensing and enforcement personnel can detect drivers who are operating a CMV in interstate

³ It should be noted that the first such inspection occurred on March 16, 2015. Respondent Exhibit 4. That occurred before the March 25, 2015 Notice of Opportunity for Hearing (CDL Privileges Cancellation), Staff Exhibit 4, page 8, and the April 29, 2015 CDL Privileges Cancellation Notice, Staff Exhibit 4, page 9.

commerce without the proper medical certification; and, who are required to have it.” 73 Fed.Reg. 73104.

But even if the failure was due to oversight on the part of the inspecting officers, or poor recordkeeping on the part of the BMV, the fact remains that it is the driver’s responsibility to ensure that he is properly licensed to drive a CMV. Mr. Wickham had *actual notice* that his CDL had been cancelled and *did nothing* to verify his status or bring it into compliance, other than to tell his employer. He should not have been operating a CMV, and was undeniably in violation.

5. Respondent’s employer’s reliance on third party verification services was equally misplaced.

Despite being a “compliance coordinator” for six years, Ms. Fultz was neither trained for her position, nor did she seek training for it. Tr. at 47. When asked if she was familiar with the Motor Carrier Safety Regulations, she responded that “I am familiar with – well, no. Some I am, yes.” *Id.*

Instead, she testified that the company relies on “the Drug Consortium” to “take care of everything.” Tr. at 49. She acknowledged that they did not review the information that they got from the “Consortium,” and had no oversight, no double checks, on the services that it provided. *Id.* They do not know where the “Consortium” gets its information. Tr. at 51. Even when the “Consortium” reported in August 2015 that Mr. Wickham’s medical certificate had expired the previous February, Ms. Fultz did not follow up with the BMV. Tr. at 52.

It is the carrier's responsibility, and not some third party consortium, to ensure that it maintains accurate information on their drivers. Guidance provided by the Federal Motor Carrier Safety Administration to 49 C.F.R. § 391.25 clarifies that "the motor carrier is responsible for ensuring the [driver qualification] information is accurate." Nonetheless, and despite her earlier assertion that the company wanted to "take care of everything," Ms. Fultz disclaimed any responsibility for ensuring that company records were accurate:

Mr. Margard: I just want to make sure I am clear. Your understanding is that you are that responsible person at this carrier; is that correct?

Ms. Fultz: No. No.

Q: And who would that person be?

A: Well, once again, we pay Drug Consortium to take care of us.

Tr. at 56.

Ms. Fultz's inactions highlight the importance of holding drivers responsible for ensuring that they are properly certified to operate a CMV. That Ms. Fultz and Rick Tomlison Trucking failed Mr. Wickham in no way absolves him of the responsibility for his own inactions.

C. The Commission has authority to assess civil forfeitures.

The Commission has the statutory power to assess monetary forfeitures against motor transportation Companies for non-compliance with Federal Motor Carrier Safety

Regulations. Ohio Rev. Code § 4923.99. The Legislature granted the Commission the authority to assess forfeitures for violations of the motor carrier safety provisions. *Id.*

The Commission has authority to adopt safety rules applicable to motor carrier regulation and has, in fact, adopted the Federal Motor Carrier Safety Regulations of the U.S. Department of Transportation in Title 49 of the Code of Federal Regulations, Parts 40, 367, 380, 382, 383, 385, 386, 387 and 390 through 397. Ohio Admin. Code § 4901:2-5-03(A). The Commission has also adopted civil forfeiture and procedural rules. Ohio Admin. Code §§ 4901:2-7-01-4901:2-7-22. The Commission enforces the Motor Carrier Safety Regulations for the State of Ohio.

Staff witness Tom Persinger testified that the procedure for determining forfeiture assessments for violations of the Motor Carrier Safety Regulations is consistent with that recommended by the Commercial Vehicle Safety Alliance (CVSA). Likewise, the fine structure and forfeiture amounts are similarly consistent with those recommended by the CVSA. These procedures, and the resulting forfeiture amounts, are consistently followed and equally applied to all drivers, shippers, and carriers. Tr. at 17. In this case, the violation carries a \$250.00 forfeiture. In Mr. Persinger's opinion, based on his five years of experience as a Compliance Officer in the Commission Transportation Department, that amount was properly and fairly assessed against Mr. Wickham. Tr. at 18.

IV. CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Section

383.23(a)(2) of the Federal Motor Carrier Safety Regulations, and that the Commission hold Respondent liable for the civil forfeiture of two hundred fifty dollars (\$250.00) as recommended by the Staff.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by regular U.S. mail, postage prepaid, and fax, upon the following parties of record, this 15th day of July, 2016.

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Summary: Brief Submitted on Behalf of the Public Utilities Commission of Ohio. electronically filed by Ms. Tonnetta Scott on behalf of PUC