

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF D.L. WINNER  
LIVESTOCK EXPRESS, INC., NOTICE OF  
APPARENT VIOLATION AND INTENT TO  
ASSESS FORFEITURE.

CASE NO. 17-780-TR-CVF  
(CR201609120408)

OPINION AND ORDER

Entered in the Journal on December 13, 2017

I. SUMMARY

{¶ 1} The Commission finds that Staff has demonstrated, by a preponderance of the evidence, that D.L. Winner Livestock Express, Inc. violated the Commission's transportation rules for compliance with post-accident and random alcohol and controlled substances driver testing.

II. PROCEDURAL HISTORY

{¶ 2} On July 18 and 22, 2016, a compliance review was conducted at the facility of D.L. Winner Livestock Express, Inc. (D.L. Winner or Respondent or Company), located in New Weston, Ohio. As a result of the review, Respondent was cited for the following violations of the Code of Federal Regulations (C.F.R.):

<u>Code Section</u>	<u>Violation</u>
49 C.F.R. 382.303(a)	Failing to conduct post-accident alcohol testing on driver following a recordable crash – \$400.
49 C.F.R. 382.303(b)	Failing to conduct post- accident testing on driver for controlled substances – \$400.
49 C.F.R. 382.305(b)(1)	Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions – \$500.

- 49 C.F.R. 382.305(b)(2) Failing to conduct random controlled substances testing at an annual rate of not less than the applicable annual rate of the average number of driver positions—\$700.
- 49 C.F.R. 395.8(f) Failing to require driver to prepare record of duty status in form and manner prescribed (State) —\$0.
- 49 C.F.R. 395.8(f) Failing to require driver to prepare record of duty status in form and manner prescribed. (Federal) —\$0.
- 49 C.F.R. 382.305(i)(2) Failing to ensure that each driver subject to random alcohol and controlled substances testing has an equal chance of being selected each time selections are made—\$0.
- 49 C.F.R. 382.303(d)(2) Failing to prepare and maintain on file a record stating the reasons the controlled substances post-accident test was not properly administered—\$0.
- 49 C.F.R. 382.303(d)(1) Failing to prepare and maintain on file a record stating the reasons the alcohol post-accident test was not properly administered—\$0.
- 49 C.F.R. 395.8(e) False reports of records of duty status (inaccurate) (State) —\$0.

49 C.F.R. 395.8(e)

False reports of records of duty status  
(inaccurate) (Federal) —\$0.

{¶ 3} Respondent was timely served with a Notice of Preliminary Determination (NPD) of the above-noted violations in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Respondent was notified that Staff intended to assess civil forfeitures totaling \$2,000 for violations of 49 C.F.R. 382.303(b)), 49 C.F.R. 382.303(a), 49 C.F.R. 382.305(b)(1), and 49 C.F.R. 382.305(b)(2).

{¶ 4} On March 16, 2017, Respondent requested an administrative hearing, thereby initiating this case; thereafter, a prehearing conference was held on April 13, 2017. The parties, however, were unable to resolve the matter, and a hearing was scheduled on June 15, 2017. Subsequently, pursuant to Respondent's request for a continuance, the hearing date was continued and convened on August 24, 2017.

### 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, and 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.

{¶ 6} As relevant to this matter, for post-accident driver testing, each employer shall test for alcohol, 49 C.F.R. 382.303(a), and controlled substances, 49 C.F.R. 382.303(b), for each of its surviving drivers as soon as practicable after an accident involving a commercial motor vehicle (CMV). However, 49 C.F.R. 382.303(d)(1) and (2) state that if an alcohol test is not administered within 8 hours following the accident, or if a controlled substance test is not

administered within 32 hours following the accident, the employer must cease attempts to administer that test. In both cases, the employer must prepare and maintain a record stating the reason(s) the test(s) were not promptly administered. Further, concerning the percentage rate of random driver testing, 49 C.F.R. 382.305(b)(1) and 49 C.F.R. 382.305(b)(2) provide, respectively, that the minimum annual percentage rate for random alcohol and controlled substances testing shall be 10 percent (alcohol) and 50 percent (controlled substances) of the average number of driver positions.

{¶ 7} Pertaining to use of a service agent to meet Department of Transportation (DOT) alcohol and controlled substances testing requirements, 49 C.F.R. 40.15 provides that an employer may use a service agent to perform the tasks needed to comply with alcohol and controlled substances testing regulations, but the employer remains responsible for compliance with those regulations. Moreover, under 49 C.F.R. 40.15, if the employer violates DOT alcohol and controlled substances testing regulations because a service agent has not provided services as the rules require, a DOT agency can subject the employer to sanctions. The rule further provides that good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency in which alleged non-compliance with alcohol and controlled substances regulations may have resulted from the service agent's conduct.

#### IV. ISSUES

{¶ 8} The issues are whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent violated the above-noted, post-accident and annual-rate random driver testing requirements of the Federal Motor Carrier Safety Rules. Respondent disputes only those violations involving the \$2,000 in civil forfeitures – 49 C.F.R. 382.303(b), 49 C.F.R. 382.303(a), 49 C.F.R. 382.305(b)(1), and 49 C.F.R. 382.305(b)(2). At hearing, Mr. Winner and Steve Plummer of Tri-State Transportation Consulting, Inc. (Tri-State or the Consortium), D.L. Winner's transportation consultant and service agent for random alcohol and controlled substances driver testing, argued that D.L. Winner was not

liable because, for the post-accident testing violations, it was unable to conduct the required testing for alcohol and controlled substances due to a driver's incarceration following a traffic accident. Respondent's witnesses argued that the driver thus was unavailable for testing within the 8 and 32-hour time limits for alcohol and controlled substances testing, respectively, which are specified in 49 C.F.R. 382.303(d)(1) and (2), and that a written explanation as to why the Company was unable to do the required testing was misfiled in the driver's records at D.L. Winner's facility. Also, for the annual-rate random alcohol and controlled substances testing violations, Tri-State argued that the required testing actually had been performed at the specified annual rate and the paperwork for the testing had been completed, but that the Company was not liable because Tri-State's employee filed the wrong data collection forms for D.L. Winner (as a member of the Consortium).

{¶ 9} Respondent does not dispute the remaining violations that were discovered during the compliance review – 49 C.F.R. 395.8(f) (State and Federal), 49 C.F.R. 382.305(i)(2), 49 C.F.R. 382.303(d)(1), 49 C.F.R. 382.303(d)(2), and 49 C.F.R. 395.8(e) (State and Federal) (Tr. at 6-8). Therefore, lacking any rebuttal evidence from Respondent, the Commission finds that the compliance review report and the testimony of Staff's investigating officer as to the occurrence of those violations are sufficient at this point to establish that Respondent committed the violations as charged.

#### V. SUMMARY OF THE EVIDENCE

{¶ 10} D.L. Winner transports livestock in Ohio, Indiana, Kentucky and Michigan. The carrier is an authorized for-hire motor carrier with a fleet of 13 truck-tractors and 14 semi trailers, with a current employment of nine drivers. Further, because D.L. Winner is a member of the Consortium, or pool of drivers from different companies, Tri-State acts as a service agent and conducts alcohol and controlled substances tests for D.L. Winner in order to meet DOT drug and alcohol testing requirements. This is because, generally, by being a Consortium member, the Consortium handles the testing and the necessary paperwork, and

the Company qualifies to have fewer of its drivers tested for alcohol and controlled substances than if its drivers were tested as an individual pool outside of the Consortium.

{¶ 11} Pertinent to this case is the fact that, on April 22, 2016, a D.L. Winner driver was involved in a two vehicle accident on I-69 in DeKalb County, Indiana. As a result of the accident, D.L. Winner's driver was taken into custody by the Indiana State Police (ISP) for reckless driving and driving under the influence of a controlled substance, among other charges. While in ISP custody, the driver was tested for controlled substances. As a result of the crash, the driver was incarcerated and subsequently terminated in his employment by D.L. Winner effective April 22, 2016.

{¶ 12} At hearing, Daniel Winner, president of D.L. Winner, and Steve Plummer, president of Tri-State, presented evidence on behalf of the Company. Specialist Robert Barrett, who conducted the compliance review, and Rod Moser, chief of the Compliance Division in the Commission's Transportation Department, appeared as witnesses for Staff.

**A. *Testimony of Specialist Barrett***

{¶ 13} During the compliance review, Specialist Barrett found that D.L. Winner failed to obtain the results for the post-accident alcohol and controlled substances tests administered at the direction of the ISP to D.L. Winner's driver, which are able to be used in lieu of the Consortium, or the Company itself, to conduct post-accident testing, and that D.L. Winner also failed to prepare and provide upon request documentation indicating its reasons why post-accident testing was not conducted. Further, Specialist Barrett noted that the Company failed to provide a record of its attempts (e-mails, letters, or subpoena) to obtain law enforcement test results for controlled substances. (Tr. at 38-43; Staff Ex. 1A at 12-13.)

{¶ 14} Specialist Barrett testified that D.L. Winner belongs to the Consortium for purposes of random alcohol and controlled substances testing, and the Company's drivers are tested by the Consortium at a rate based on the number of drivers in the Consortium's

pool of drivers, which fulfills the Company's random alcohol and controlled substances testing requirements for a specified year. He stated that, by being a member of a transportation consortium, a carrier can rely on its consortium to administer its drug and alcohol testing and play no part in the selection of its drivers for the tests. However, if a consortium fails to meet the minimum driver testing percentages (controlled substances – 50 percent; alcohol – 10 percent), the guidance from the Federal Motor Carrier Safety Administration is that a carrier's drivers, as an individual testing pool, are to be reviewed for compliance with drug and alcohol testing requirements. (Tr. at 25-28; Staff Ex. 1 at 14.)

{¶ 15} Upon reviewing the annual summary for the Consortium's 2015 testing pool of drivers, Specialist Barrett found that the Consortium conducted 277 random controlled substances tests (CST) and 55 random blood alcohol tests (BAT); whereas, the Consortium was required to conduct a total of 278 random CST and 56 BAT, according to the required percentages for CST and BAT percentages for 2015. Based on this information, Specialist Barrett concluded that the Consortium's random testing program was non-compliant for 2015 and that, as a result, he then reviewed the random CST and BAT of DL Winner's individual pool of drivers. Specialist Barrett, however, found that D.L. Winner itself was also non-compliant in random driver testing for calendar year 2015. He noted that the Company was required to conduct at least six random CST and at least two random BAT and that it was determined that only two drivers had been selected and had completed random CST. (Tr. at 28-37; Staff Ex. 1 at 14.)

**B. Testimony of Mr. Moser**

{¶ 16} Rod A. Moser, chief of the Commission's Civil Forfeiture Compliance Division, identified Staff Exhibit 5, the NPD, which was sent to D.L. Winner notifying the Company of the violation, and testified that the NPD reflects the forfeitures assessed in this matter. Mr. Moser testified that the Commission received the information in the NPD via its computer system and that the amounts of civil forfeitures in this matter were determined by the severity of the violations. He also noted that calculation of the forfeitures was

consistent with the standards that would apply to any carrier or driver in similar circumstances having the same violations. Mr. Moser then confirmed that the forfeitures are consistent with the guidelines recommended by the Commercial Vehicle Safety Alliance and that Staff's recommendation to the Commission is to impose the forfeitures for the violations in this case. (Tr. at 43-50.)

*C. Testimony of Mr. Plummer*

{¶ 17} Mr. Plummer first referenced a page of Staff Exhibit 4, the Indiana Officer's Standard Crash Report and driver/vehicle examination report, which was completed by the investigating officer at the time of the accident involving D.L. Winner's driver. In the report, he noted the opinion of the investigating officer, that the cause of the accident was following too close and illegal drug use by D.L. Winner's driver. Mr. Plummer testified that the driver was taken immediately from the scene of the accident to jail and that D.L. Winner had no opportunity to perform drug or alcohol tests on him; also, the law enforcement authorities would not give D.L. Winner their test results. Mr. Plummer stated that, according to those authorities, the test results were part of the evidence in the court proceedings against the driver, and D.L. Winner could not get a copy of them until after the court proceedings concluded. (Tr. at 56.)

{¶ 18} Mr. Plummer testified that, within the 8-hour window allowed for the alcohol testing or the 32-hour window allowed for the controlled substances testing, D.L. Winner did not have a chance to perform the required tests. Mr. Plummer testified that D.L. Winner followed the rules and wrote out a record stating that the post-accident alcohol and controlled substances tests were not done due to the fact that the driver was incarcerated and that it was impossible for the Company to get a post-accident alcohol and controlled substances tests. (Tr. at 56-57.)

{¶ 19} Mr. Plummer testified that Respondent's Exhibit 3 is almost the same as a page from Staff Exhibit 4, the Indiana Officer's Standard Crash Report and driver/vehicle examination report, except for the following notation on the driver's signature line: "N/A

Jailed." Mr. Plummer testified that this notation gives credence to his contention that he was unable to give the driver alcohol and controlled substances tests. Mr. Plummer testified that the driver was not even allowed to sign the examination report, which just shows that the driver went directly to jail from the accident scene and that D.L. Winner was given no chance to do post-accident alcohol and controlled substances tests on him. (Tr. at 62, 65-66.)

{¶ 20} Mr. Plummer testified that Respondent's Exhibit 2 is a letter written by Mr. Winner, and placed in the driver's file, stating the reason that D.L. Winner could not do the required post-accident alcohol and controlled substances tests, which is what the Federal Motor Carrier Safety Association (FMCSA) says a company has to do if it is unable to perform the tests. Mr. Plummer explained that, according to the FMCSA, if a company is unable to perform alcohol and controlled substances tests, it needs to write out the reason why the tests were unable to be performed and to place that written explanation in the file in place of the actual alcohol and controlled substances tests. Mr. Plummer testified that is what D.L. Winner did when its driver was incarcerated and the Company was not allowed to obtain alcohol and controlled substances tests. (Tr. at 63-64.)

{¶ 21} Regarding the random testing violations, Mr. Plummer stated that the basis used by Specialist Barrett, for determining that D.L. Winner did not meet the 10 percent alcohol or 50 percent drug testing requirements, was that the Consortium did not perform the required number of tests. Mr. Plummer testified that he has the facts to prove that the Consortium did perform the required number of random alcohol and controlled substances tests and that, if it is anyone's fault, it is the Consortium's due to the fact the Consortium had an employee who sent out the wrong annual reports. Mr. Plummer testified that those reports, which were corrected, prove that the consortium was in compliance, which by that being done, makes D.L. Winner in compliance by being inside the Consortium. (Tr. at 57-58.)

{¶ 22} Mr. Plummer testified that he had a disgruntled employee, whom he terminated from his employment, who did not make new drug test reports for 2015; the

employee just copied the 2014 reports. Mr. Plummer testified that he has all of the alcohol and controlled substances tests results from Quest Diagnostics (Respondent's Exhibit 1) to back up the numbers showing that the Consortium did do a total of 751 drug tests – 740 negative, 10 verified positive, one positive for cocaine, and 64 for alcohol, with 56 of those random, and 8 post-accident. Mr. Plummer stated that, as soon as he found the discrepancy, Respondent's Exhibit 1 was given to Specialist Barrett. So, according to Mr. Plummer, Specialist Barrett had the information on the second day of the audit, and he knew that there was a correction made that put D.L. Winner in compliance before the audit was over. (Tr. at 57-58, 60, 72; Respondent's Ex. 1.)

{¶ 23} On cross examination, Mr. Plummer confirmed that the information in Respondent's Exhibit 1 comprises a different report than the information that is presented in Staff Exhibit 2, which was compiled by Specialist Barrett at the time of the compliance review. He testified that he brought the random testing information in Respondent's Exhibit 1 to the compliance review the next morning, along with supporting documentation. Mr. Plummer stated that he found out what had happened with the random testing report right away, because he knew that D.L. Winner was in compliance. He stated, however, that he could not understand what had happened without doing a check of all of D.L. Winner's records. (Tr. at 67-68.)

{¶ 24} On further cross examination, Mr. Plummer agreed that there is no certification date on the DOT drug and alcohol data collection form for random testing in 2015, which comprises Respondent's Exhibit 1, but that there is a certification date, February 2, 2016, on the DOT drug and alcohol data collection form that Staff submitted as Staff Exhibit 2. He testified that the form in Staff Exhibit 2 was certified by the former employee that he terminated from his employment. Then, for Respondent's Exhibit 2, the letter authored by Mr. Winner that purports to explain the absence of post-accident alcohol and controlled substances tests for D.L. Winner's driver, Mr. Plummer testified that the letter was in the driver's confidential file instead of his alcohol and controlled substances file. Mr.

Plummer testified that he and Mr. Winner found the misfiled letter after the compliance review, in the same week that the compliance review took place, but after the closing interview with Specialist Barrett. He testified, however, that he brought in the random testing information in Respondent's Exhibit 1 for Specialist Barrett the next morning, the day of the closing interview. (Tr. at 68-72.)

{¶ 25} Concluding his cross examination, Mr. Plummer testified that he did not attempt to go to the facility where D.L. Winner's driver was incarcerated and perform a drug test or obtain drug testing information from law enforcement authorities, because the 32 hours for allowed testing had expired, and because he knew, from past experiences, that the authorities would not release any testing information to him. In addition, Mr. Plummer confirmed his understanding that, under 49 C.F.R. 40.15, an employer using a service agent remains responsible for compliance with alcohol and controlled substances testing regulations and that good faith use of a service agent is not a defense in an enforcement action initiated by a DOT agency for alleged non-compliance with those regulations. (Tr. at 73-77.)

**D. Testimony of Mr. Winner**

{¶ 26} Mr. Winner testified that he did prepare the hand-written, Respondent's Exhibit 2 stating that the required tests for alcohol and controlled substances were not administered because D.L. Winner's driver was incarcerated and was not released before the allowed time for testing had expired. Mr. Winner testified that he and Mr. Plummer could not find Respondent's Exhibit 2 on the day of the audit because it was not in the correct file. (Tr. at 77-78.)

{¶ 27} On cross examination, Mr. Winner testified that Respondent's Exhibit 2 was not dated. He noted that the date appearing at the top of the document was the date that he faxed Respondent's Exhibit 2 to Mr. Plummer at Tri-State, April 13, 2017, and that he did not know exactly when he placed Respondent's Exhibit 2 in a file. Mr. Winner testified that Specialist Barrett did not see Respondent's Exhibit 2 at the compliance review, but that he

did see Respondent's Exhibit 3, the ISP driver/vehicle examination report with the "N/A Jailed" notation in place of the driver's signature. Mr. Winner stated that he presented Respondent's Exhibit 3 to Specialist Barrett at the compliance review and stressed that he could not get to the driver to obtain the results of drug tests conducted by local law enforcement authorities because of the driver's incarceration. (Tr. at 77-85.)

{¶ 28} On rebuttal, Specialist Barrett testified that he had a conversation with Mr. Plummer on the telephone about Respondent's Exhibit 1 after the compliance review was completed. He testified that, according to this conversation, Mr. Plummer had found that there was an error with the numbers and that the error involved his employee. Specialist Barrett stated that he does not recall being provided with Respondent's Exhibit 1 while the review was still open and active, but that he does recall, during the telephone call, referring Mr. Plummer to the Commission's due process procedures because the compliance review had already been put into the Commission's computer system. (Tr. at 90-91.)

{¶ 29} On further rebuttal, regarding Respondent's Exhibit 2, the letter written by Mr. Winner stating the reason that D.L. Winner could not perform the required post-accident drug and alcohol tests, Specialist Barrett testified that he had not seen it before the day of the hearing (Tr. at 91-92).

## VI. COMMISSION CONCLUSION

{¶ 30} Initially, the Commission observes that there is no dispute between the parties as to what Specialist Barrett actually discovered during the compliance review — that neither post-accident alcohol and controlled substances tests on D.L. Winner's incarcerated driver, nor a letter of explanation (49 C.F.R. 382.303(a) and (b)) violations), as to why those tests could not be performed on the driver, were present in the proper files at D.L. Winner's facility and that the random alcohol and controlled substances data testing form for 2015, which was available for Specialist Barrett's review, shows that the Company did not meet its 2015 testing requirements, either as a member of the Consortium or as an individual company (49 C.F.R. 382.305(b)(1) and (b)(2)) violations). D.L. Winner, in disputing the

violations, explains that an incident of record keeping falsification on the part of a former Tri-State employee and an inadvertent misfiling of required documentation were responsible for what Specialist Barrett discovered during the compliance review.

{¶ 31} With regard to Respondent's Exhibit 2, the letter of explanation about the absence of post-accident alcohol and controlled substances tests for D.L. Winner's driver, which Mr. Plummer and Mr. Winner testified was found after the compliance review, and which was first produced by Mr. Winner at the hearing, the Commission observes that the letter is not dated. Mr. Winner offered no explanation as to the date the letter was written, indicating only that it was written three or four months before the compliance review (Tr. at 80). Aside from maintaining that the letter existed at the time of the compliance review, Mr. Winner argued that, although the letter was not in the correct file during the compliance review, and thus not available for Specialist Barrett's inspection, Specialist Barrett did see Respondent's Exhibit 3, the ISP driver/vehicle examination report with the hand-written notation "N/A Jailed" in place of the driver's signature. Therefore, according to Mr. Winner, Specialist Barrett knew why the post-accident alcohol and controlled substances tests for the driver could not be obtained. (Tr. at 78-79.) Considering this assertion, the Commission surmises that Mr. Winner's inference is that the "N/A Jailed" notation in Respondent's Exhibit 3 provides the explanatory documentation that is required under 49 C.F.R. 382.303(a) and (b) about the absence of post-accident alcohol and controlled substances tests, and that such a notation should have been an acceptable substitute for an actual letter of explanation for purposes of the compliance review. (Tr. at 78-81.) In addition, we note that Specialist Barrett, for his part, testified that he never saw Respondent's Exhibit 2, the letter of explanation, before the day of the hearing (Tr. at 91-92).

{¶ 32} With regard to Respondent's Exhibit 1, the data collection form listing random alcohol and controlled substances driver testing data for 2015, which Mr. Plummer contends was in existence in D.L. Winner's files at the time of the compliance review, the

Commission observes that the form is not certified; there is no certification date anywhere in the form. Whereas, Staff Exhibit 2, the data collection form for random alcohol and controlled substances testing that was reviewed by Specialist Barrett during the compliance review, is certified with a hand-written notation of the certification date, "2/16/16." Mr. Plummer's explanation for the missing certification notation on Respondent's Exhibit 1 is that a former, disgruntled employee certified the wrong alcohol and controlled substances driver testing information, using the testing results for 2014, instead of the correct 2015 information (Tr. at 58). Moreover, Mr. Plummer contends that he produced Respondent's Exhibit 1 for Specialist Barrett's inspection on the day of the compliance review's closing interview (Tr. at 60, 72). Specialist Barrett, however, testified that, while he did speak with Mr. Plummer about Respondent's Exhibit 1, that conversation happened only on the telephone, and it occurred after the compliance review was completed and uploaded into the Commission's computer system. According to Specialist Barrett, Mr. Plummer informed him at that time, in a telephone conversation, about finding an error with the random test results that involved the actions of a Tri-State employee. (Tr. at 90-91.)

{¶ 33} As noted previously, Staff maintains that Staff Exhibit 2, which was reviewed by Specialist Barrett during the compliance review, shows the Company's actual, certified 2015 driver collection data for random alcohol and controlled substances tests and that Respondent's Exhibit 2, Mr. Winner's letter, which he contends explains the absence of post-accident driver testing for its driver, was produced for the first time at hearing. Mr. Plummer and Mr. Winner, on the other hand, insist that both Respondent's Exhibits 1 and 2 were in existence at the time of the compliance review, but were just not seen by Specialist Barrett due to either an intentional falsification of the 2015 driver collection data form by a Tri-State employee (Respondent's Exhibit 1), or the inadvertent misfiling by Mr. Winner of a letter of explanation in lieu of absent post-accident alcohol and controlled substances driver tests (Respondent's Exhibit 2). The Commission makes no comment about the seemingly contradictory nature of the testimony given by the parties with respect to Staff Exhibit 2 and Respondent's Exhibits 1 and 2. We do note, however, that a compliance review

is meant to encapsulate a carrier's compliance with the transportation regulations within the period of time covered by the review – in this matter, the review was conducted on two days, July 18 and 22, 2016, with a closing interview on July 27, 2017 (Staff Ex, 1A at 12). Further, we are of the opinion that, if we were to allow a carrier to rectify alleged non-compliance with the transportation regulations after the fact, by bringing somewhat questionable, corrective documentation to a hearing, such a procedure would abrogate the effectiveness of a compliance review as a means of ensuring carrier compliance with the transportation regulations. As set forth in the preceding paragraphs of this Opinion and Order, the questionable documentation that was presented by D.L. Winner at the hearing in this case consists of Respondent's Exhibit 1, which purports to remedy purposefully misfiled data by a Tri-State employee, but which bears no certification notion on the driver data collection form for random alcohol and controlled substances testing, and Respondent's Exhibit 2, which bears no date as to when Mr. Winner's claimed letter of explanation was written about the lack of alcohol and controlled substances tests for D.L. Winner's incarcerated driver.

{¶ 34} Finally, we note that the parties in this case were aware at hearing that, under 49 C.F.R. 40.15, if an employer violates alcohol and controlled substances testing regulations, because a service agent has not provided the correct services, the employer can be subjected to sanctions. The parties also recognized that, as 49 C.F.R. 40.15 further provides, good faith use of a service agent is not a defense to alleged non-compliance with alcohol and controlled substances regulations that result from a service agent's conduct. (Tr. at 76-77, 89-90.)

{¶ 35} After a review of the evidence, the Commission believes that clear and convincing evidence was presented at hearing in this matter – and that is, within the scope of the compliance review, the documentation in place in D.L. Winner's files, Staff Exhibit 2, shows that the Company was deficient in random alcohol and controlled substances testing of its drivers (49 C.F.R. 382.305(b)(1) and (b)(2)) violations) and that either the results of post-accident alcohol and controlled substances testing of D.L. Winner's incarcerated driver, or

an explanation as to why those results could not be obtained (49 C.F.R. 382.303(a) and (b) violations), was not presented for Specialist Barrett's review of D.L. Winner files. Consequently, the Commission concludes that D.L. Winner was not in compliance during the compliance review with the transportation regulations covering the contested alcohol and controlled substances violations. We, therefore, find that D.L. Winner was in violation of 49 C.F.R. 382.303(a), 49 C.F.R. 382.303(b), 49 C.F.R. 382.305(b)(1), and 49 C.F.R. 382.305(b)(2).

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 36} On July 18-19, 2016, the Staff of the Public Utilities Commission of Ohio conducted a compliance review of D.L. Winner at the Company's facility in New Weston, Ohio. As a result of the review, Staff found the following violations of the Code of Federal Regulations (CF.R.):

<u>Code Section</u>	<u>Violation</u>
49 C.F.R. 382.303(a)	Failing to conduct post-accident alcohol testing on driver following a recordable crash—\$400.
49 C.F.R. 382.303(b)	Failing to conduct post- accident testing on driver for controlled substances—\$400.
49 C.F.R. 382.305(b)(1)	Failing to conduct random alcohol testing at an annual rate of not less than the applicable annual rate of the average number of driver positions—\$500.
49 C.F.R. 382.305(b)(2)	Failing to conduct random controlled substances testing at an annual rate of not

- less than the applicable annual rate of the average number of driver positions—\$700.
- 49 C.F.R. 395.8(f) Failing to require driver to prepare record of duty status in form and manner prescribed (State) —\$0.
- 49 C.F.R. 395.8(f) Failing to require driver to prepare record of duty status in form and manner prescribed. (Federal) —\$0.
- 49 C.F.R. 382.305(i)(2) Failing to ensure that each driver subject to random alcohol and controlled substances testing has an equal chance of being selected each time selections are made—\$0.
- 49 C.F.R. 382.303(d)(1) Failing to prepare and maintain on file a record stating the reasons the alcohol post-accident test was not properly administered—\$0.
- 49 C.F.R. 382.303(d)(2) Failing to prepare and maintain on file a record stating the reasons the controlled substances post-accident test was not properly administered—\$0.
- 49 C.F.R. 395.8(e) False reports of records of duty status (inaccurate) (State) —\$0.

49 C.F.R. 395.8(e)

False reports of records of duty status  
(inaccurate) (Federal) – \$0.

{¶ 37} In a timely-served NPD, Respondent was notified of a total civil forfeiture of \$2,000 for the alcohol and controlled substances testing violations in this matter – 49 C.F.R. 382.303(a), 49 C.F.R. 382.303(b), 49 C.F.R. 382.305(b)(1), and 49 C.F.R. 382.305(b)(2). Further, in the NPD, no forfeitures were assessed for the remaining violations that were discovered during the compliance review – 49 C.F.R. 395.8(f) (State and Federal), 49 C.F.R. 382.305(i)(2), 49 C.F.R. 382.303(d)(1), 49 C.F.R. 382.303(d)(2), and 49 C.F.R. 395.8(e) (State and Federal).

{¶ 38} A prehearing conference was conducted on April 13, 2017, and a hearing was held on August 24, 2017.

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

{¶ 40} The civil forfeitures for the contested violations that were discovered in the compliance review are consistent with the standards of the Commercial Vehicle Safety Alliance and are reasonable.

{¶ 41} D.L. Winner's arguments at hearing were not sufficient to demonstrate that it should not be held liable for the forfeiture violations that it did contest – 49 C.F.R. 382.303(a), 49 C.F.R. 382.303(b), 49 C.F.R. 382.305(b)(1) and 49 C.F.R. 382.305(b)(2). Accordingly, the Commission finds that D.L. Winner is accountable for those violations, as well as the non-forfeiture violations that it did not contest at hearing – 49 C.F.R. 395.8(f) (State and Federal), 49 C.F.R. 382.305(i)(2), 49 C.F.R. 382.303(d)(1), 49 C.F.R. 382.303(d)(2), and 49 C.F.R. 395.8(e) (State and Federal).

{¶ 42} Pursuant to R.C. 4905.83, D.L. Winner must pay the State of Ohio the civil forfeitures assessed in this matter. DL Winner shall have 30 days from the date of this order to pay the total assessed forfeiture of \$2,000.

{¶ 43} Payment of the \$2,000 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, 4th Floor, Columbus, Ohio 43215-3793.

### VIII. ORDER

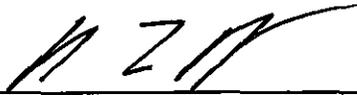
{¶ 44} It is, therefore,

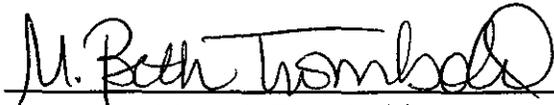
{¶ 45} ORDERED, That D.L. Winner's Safety Net record and history of violations reflect the occurrence of all of the violations set forth in the NPD in this matter. It is, further,

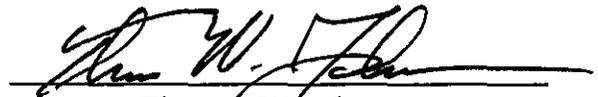
{¶ 46} ORDERED, That D.L. Winner pay the total assessed amount of \$2,000 for violation of 49 C.F.R. 382.303(a), 49 C.F.R. 382.303(b)), 49 C.F.R. 382.305(b)(1) and 49 C.F.R. 382.305(b)(2), as set forth in Paragraphs (38) and (39). Payment should be made payable to "Treasurer, State of Ohio" and mailed 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, D.L. Winner is directed to write the case number, 17-780-TR-CVF, and inspection report number, CR201609120408, on the face of the check or money order. It is, further,

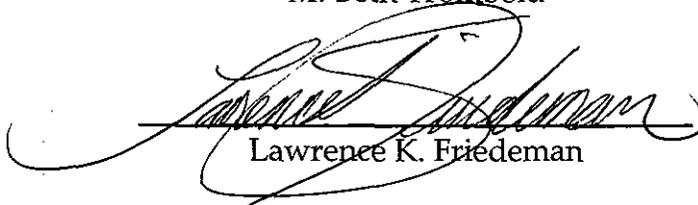
{¶ 47} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
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Asim Z. Haque, Chairman

  
\_\_\_\_\_  
M. Beth Trombold

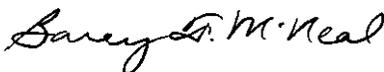
  
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Thomas W. Johnson

  
\_\_\_\_\_  
Lawrence K. Friedeman

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Daniel R. Conway

KKS/vrm

Entered in the Journal  
DEC 13 2017

  
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Barcy F. McNeal  
Secretary