

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of John M. Shirey :
Notice of Apparent Violation : Case No.
and Intent to Assess : 19-183-TR-CVF
Forfeiture. :

- - -

PROCEEDINGS

Before Anna Sanyal, Attorney Examiner, held at
the Public Utilities Commission of Ohio, 180
East Broad Street, Hearing Room 11-D, Columbus,
Ohio, on Wednesday, May 1, 2019, at 10:00 A.M.

- - -

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1 APPEARANCES:

2 Reminger
3 By Mr. Frank Leonetti, III
4 101 West Prospect Avenue, Suite 1400
5 Cleveland, Ohio 44115

6 On behalf of the Respondent.

7 Mr. Thomas Lindgren
8 Assistant Attorney General
9 30 East Broad Street, 16th Floor
10 Columbus, Ohio 43215

11 On behalf of the Staff of
12 the Public Utilities Commission
13 of Ohio.

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INDEX TO EXHIBITS

- - -

IDENTIFIED

STAFF EXHIBITS

1	Driver/Vehicle Examination Report	8
2	Vehicle Inventory/Custody Report	12
3	Notice of Preliminary Determination	15

RESPONDENT'S EXHIBITS

A	Affidavit	31
B	Photograph	22
C	Photograph	22
D	Photograph	23
E	Photograph	23
F	Photograph	26
G	Claim Photo	25
H	Crash Report	17
I	PUCO Request for Additional Information	19

- - -

1 Wednesday Morning,
2 May 1, 2019.

3 - - -

4 ATTORNEY EXAMINER: The Public
5 Utilities Commission of Ohio has called for a
6 hearing, Case No. 19-183-TR-CVF which is
7 captioned as in the matter of John M. Shirey
8 notice of apparent violation and intent to
9 assess forfeiture.

10 My name is Anna Sanyal, and I am the
11 Attorney Examiner assigned to this case. At
12 this point I will take appearances beginning
13 with Staff.

14 MR. LINDGREN: Thank you, your
15 Honor. On behalf of the Commission's Staff Ohio
16 Attorney General Dave Yost by Thomas G.
17 Lindgren, Assistant Attorney General. My
18 address is 30 East Broad Street, 16th Floor,
19 Columbus, Ohio 43215.

20 ATTORNEY EXAMINER: Thank you. Mr.
21 Lindgren. For the company.

22 MR. LEONETTI: I am Frank Leonetti.
23 I am the attorney for Cal-Ark International.
24 And I am with the Reminger firm. And with me
25 today is Leslie Stout, the Safety Director of

1 Cal-Ark International.

2 ATTORNEY EXAMINER: And I believe
3 Staff has a motion to put on the record.

4 MR. LINDGREN: Yes. Thank you, your
5 Honor. Staff requests a continuance of two
6 weeks due to the unavailability of several
7 witnesses we had intended to call this morning.

8 ATTORNEY EXAMINER: Thank you. And
9 Mr. Leonetti.

10 MR. LEONETTI: Yes. We would like
11 to object to the continuance for the reason that
12 this has been scheduled for more than a month,
13 maybe six weeks. And Leslie came all the way
14 from Arkansas today. And the expense of
15 returning for another time is unreasonable. So
16 we prefer that this proceed as best as possible
17 under the circumstances.

18 ATTORNEY EXAMINER: Thank you, Mr.
19 Leonetti. Does Staff have a response?

20 MR. LINDGREN: Your Honor, I would
21 just like to note the violation was assessed
22 against the driver here, and not the company.
23 And I would note that Mr. Shirey, the
24 acknowledged driver, is not present today.

25 ATTORNEY EXAMINER: Thank you. Mr.

1 Leonetti, do you have a response?

2 MR. LEONETTI: Yes. The driver is
3 never going to be present. He has had a stroke,
4 he can't travel, he cannot walk. He cannot
5 drive. And he lives in the southern part of
6 Tennessee, it's almost Alabama. So there is --
7 whether we continue this or not you will never
8 see Mr. Shirey here. It can't be done. Thank
9 you.

10 ATTORNEY EXAMINER: Thank you, Mr.
11 Leonetti. I am going to deny the motion
12 because as Mr. Leonetti put on the record we do
13 have witnesses coming in from Arkansas and
14 the Commission was not aware of Staff's witness
15 not being available until this morning.

16 So, is Staff ready to proceed?

17 MR. LINDGREN: Thank you, your
18 Honor. Staff calls Rod Moser to the stand.

19 (WITNESS SWORN)

20 - - -

21 ROD MOSER

22 called as a witness, being first duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25 By Mr. Lindgren:

1 Q. Good morning, Mr. Moser.

2 A. Good morning.

3 Q. Could you please state your full
4 name for the record?

5 A. My name is Rod Moser.

6 Q. Thank you. And what is your
7 business address?

8 A. 180 East Broad Street, Columbus,
9 Ohio 43215.

10 Q. Where are you employed, sir?

11 A. The Public Utilities Commission of
12 Ohio. Specifically the transportation
13 department, and I am the Chief of the compliance
14 section within the transportation department.

15 Q. And how long have you been the chief
16 of the compliance section?

17 A. A little over two years.

18 Q. Thank you. What are your duties in
19 that position?

20 A. Basically I administer the civil
21 forfeiture process for the PUCO's transportation
22 department.

23 Q. Thank you. And are you involved in
24 the management of records submitted to the
25 Commission by the State Highway Patrol?

1 A. I am, yes.

2 Q. Thank you.

3 MR. LINDGREN: May I approach the
4 witness?

5 ATTORNEY EXAMINER: You may do so.

6 (EXHIBIT MARKED FOR THE PURPOSE OF
7 IDENTIFICATION)

8 MR. LINDGREN: Let the record
9 reflect I am handing the witness what I have
10 marked for identification as Staff Exhibit 1.

11 ATTORNEY EXAMINER: Thank you.

12 Q. Mr. Moser, do you recognize
13 the document marked as Staff Exhibit 1?

14 A. It would be a copy of the inspection
15 completed for this particular case that we are
16 here on today.

17 Q. And how was this report submitted to
18 the Public Utilities Commission?

19 A. The inspector completes a roadside
20 and then submits it through a federal website
21 through the federal database and then it comes
22 to us electronically.

23 Q. Thank you. And is this the kind of
24 record that's kept in the ordinary course of the
25 Commission's business?

1 A. It is, yes.

2 Q. Thank you. Does anyone at the
3 Commission ever alter these reports after they
4 come into the Commission?

5 A. Well, occasionally, yes. I would
6 say edited based on conferences that we have
7 with respondents sometimes there are issues that
8 arise about maybe who the respondent is, or
9 whether a violation should be added or deleted.

10 In those cases we send what we call
11 an R-5 which is a request for information to the
12 originating agency. That agency would then tell
13 us what to do with the violation or the
14 respondent.

15 Sometimes direction is to make a
16 change. Those changes are made solely at the
17 direction of the originating agency.

18 Q. Thank you. Do you know if any
19 changes were made in this case?

20 A. There were none indicated, no.

21 Q. Thank you. And would it be
22 indicated if there was such a change?

23 A. Yes, sir.

24 Q. Thank you. Does this report reflect
25 any violations found in the inspection?

1 A. I see seven of them noted.

2 Q. And I believe we are only here this
3 morning on the first violation. Could you
4 describe what that is?

5 MR. LEONETTI: Objection. He didn't
6 prepare the report. He can testify to it's
7 authenticity, that it's kept in the ordinary
8 course of business, but everything in the report
9 is hearsay. And he has no personal knowledge of
10 what's in this report.

11 ATTORNEY EXAMINER: Mr. Lindgren.

12 MR. LINDGREN: Well, I wasn't
13 asking him the substance of the report. I was
14 asking him to describe the violation that is
15 recorded on this report.

16 ATTORNEY EXAMINER: I am going to
17 ask a question, Mr. Moser. Do you review
18 records such as the violations listed on reports
19 such as these in the course of your business?

20 THE WITNESS: I do regularly.

21 ATTORNEY EXAMINER: I will allow the
22 question.

23 MR. LINDGREN: Thank you.

24 Q. Could you describe the first
25 violation there listed?

1 A. Sure. The violation code is written
2 as 392.5(a)(2). And the description of that to
3 the right says "Driver having possession of
4 alcohol while on duty, or operating, or in
5 physical control of a CMV", commercial motor
6 vehicle.

7 And then the inspector wrote "Beer
8 cans found in the cab of the truck at the crash
9 location."

10 Also noted along the same row that
11 says "Unit D" which would indicate the violation
12 is assigned to the driver.

13 And OOS is marked yes or Y, meaning
14 that it's an out of service violation, meaning
15 the driver can't operate again until he meets
16 certain conditions.

17 MR. LINDGREN: Thank you. Thank
18 you. May I approach the witness again?

19 ATTORNEY EXAMINER: Yes, you may.
20 You may do so freely during your examination.

21 MR. LINDGREN: Thank you.

22 (EXHIBIT HEREBY MARKED FOR
23 IDENTIFICATION PURPOSES)

24 MR. LINDGREN: Let the record
25 reflect that I am handing the witness what has

1 been marked for identification as Staff Exhibit
2 2.

3 Q. Mr. Moser, do you recognize
4 the document marked as Staff Exhibit 2?

5 A. Yes, I do.

6 Q. Can you describe what it is?

7 A. It is an inventory custody report
8 that is in this case it was completed at
9 the crash scene on the day of the inspection.

10 Q. Thank you. And how was this
11 document transmitted to the Commission?

12 A. In this case it was e-mailed to me
13 by the Post Commander of that Patrol Post of the
14 Ohio State Highway Patrol.

15 Q. Thank you. And is this a record
16 kept in the ordinary course of the Ohio State
17 Highway Patrol's business?

18 A. It is, yes.

19 Q. Thank you. Are you yourself
20 familiar with the inventory reports kept by the
21 Ohio State Patrol? Do you have any experience
22 with that?

23 A. I worked for the -- I was a Trooper,
24 Sergeant, Lieutenant for the Highway Patrol for
25 just shy of 30 years. So, yes, I am very

1 familiar with this document.

2 Q. Thank you. And for the record could
3 you read what has been written in under
4 the heading inventory/remarks?

5 MR. LEONETTI: Same objection I made
6 before. This is hearsay evidence. He has no
7 personal knowledge how this information was
8 collected. And the document has been admitted
9 as a business record, and I understand that.
10 But the rest of it is not based on his personal
11 knowledge.

12 ATTORNEY EXAMINER: So this is what
13 we are going to do. I feel like we are going to
14 have an objection over and over again. So we
15 are going to take your objection under
16 advisement, put that on the record. And we are
17 going to let Mr. Lindgren examine the witness
18 and then the Commission will give this document
19 the weight it deserves.

20 MR. LEONETTI: Thank you.

21 ATTORNEY EXAMINER: Because we have
22 noted your continuing objection. Does that
23 work?

24 MR. LEONETTI: That works.

25 ATTORNEY EXAMINER: Okay.

1 MR. LINDGREN: Thank you.

2 Q. Mr. Moser, could you go ahead then
3 and read what has been written in under the
4 heading inventory/remarks?

5 A. Sure. In the left column there
6 under where it says LOC and the P1 indicated.
7 From my experience with the Patrol P1 indicates
8 that is the front passenger compartment. And
9 the officer that completed this form wrote "Yeti
10 coffee mug, Coca-Cola 2L, Hoodie, Miller Lite
11 Beer, V8 Juice, Trash, Headset, papers.

12 And then for T would indicate trailer,
13 manufacturing racks in 53 foot trailer.

14 And that is all that is marked in
15 that area.

16 Q. Thank you. Is there a way to tell
17 when this report was prepared?

18 A. Yes. It's the date and time is
19 noted on the report.

20 Q. Thank you. And does this report
21 identify the name of the driver?

22 A. It does, yes. The driver is listed
23 as having the last name of Shirey, first name is
24 John.

25 Q. Thank you. And is that the same

1 person that's identified on the inspection
2 report, which is Staff Exhibit 1?

3 A. Yes. The only difference is the
4 inspection report includes his middle initial as
5 well.

6 Q. Thank you.

7 MR. LINDGREN: Let the record
8 reflect I am handing the witness what has been
9 marked for identification as Staff Exhibit 3.

10 (EXHIBIT MARKED FOR THE PURPOSE OF
11 IDENTIFICATION)

12 Q. Mr. Moser, do you recognize
13 the document marked as Staff Exhibit 3?

14 A. I do.

15 Q. Can you explain what it is?

16 A. It's what we commonly call NPD or
17 Notice of Preliminary Determination. It's a
18 document that's sent to a respondent, or in this
19 case respondent's representative, following an
20 unsuccessful attempt to mediate the issues
21 involved with the inspection.

22 Q. Thank you. And does this document
23 state the amount of the forfeiture the driver is
24 being assessed?

25 A. It does, yes.

1 Q. Thank you. What is that?

2 A. \$250.

3 Q. Thank you. And can you explain how
4 that amount was calculated?

5 A. Sure. All the violations that come
6 in are divided into groups. Group zero through
7 4. And then also hazmat is separate.

8 Each of those groups has a certain
9 dollar amount assigned to violations. Group
10 zero never has a fine. Groups 1, 2 and 3 have
11 fines only if they are out of service
12 violations. And Group 4 always has a fine.
13 Group zero through 3 are generally mechanical
14 related violations. Group 4 is driver authority
15 and insurance related violations.

16 So, this particular fine is always
17 assessed \$250.

18 MR. LINDGREN: Thank you. I have no
19 further questions for this witness.

20 ATTORNEY EXAMINER: Okay. Mr.
21 Leonetti.

22 MR. LEONETTI: Thank you.

23 CROSS-EXAMINATION

24 By Mr. Leonetti:

25 Q. Mr. Moser, did you have the

1 opportunity to review the Ohio State Patrol
2 Traffic Crash Report?

3 A. I have, yes.

4 Q. Are you aware that the State Patrol
5 Traffic Crash Report makes no reference
6 whatsoever to finding of beer or alcohol in or
7 about the tractor or trailer? Were you aware of
8 that?

9 A. I am aware of that, yes, sir.

10 Q. Okay.

11 ATTORNEY EXAMINER: Are you
12 referencing the document that I do not have a
13 copy of?

14 MR. LEONETTI: Yes.

15 ATTORNEY EXAMINER: Okay.

16 MR. LEONETTI: Would you like a copy
17 of it?

18 ATTORNEY EXAMINER: Yes. That
19 would be great.

20 (EXHIBIT MARKED FOR THE PURPOSE OF
21 IDENTIFICATION)

22 Q. Mr. Moser, I would like to hand you
23 a document that I marked as Exhibit H. It's
24 entitled Traffic Crash Report, Local Report No.
25 521132-52. Can you identify that for me please,

1 A. It appears to be a copy of the
2 report for the crash involved in this incident.

3 Q. And that is what we were referring
4 to a minute ago when I said the traffic crash
5 report makes no reference whatsoever to
6 the finding of alcohol or beer of any type in
7 the tractor; is that correct?

8 A. I believe you are referring to
9 the same report, yes.

10 Q. Okay. You used to work as a State
11 Trooper; didn't you?

12 A. Yes, sir.

13 Q. And wasn't it your habit at that
14 time if you found beer or alcohol in a vehicle
15 you would make a note of it?

16 A. I probably would have.

17 Q. So it's unusual in this case that if
18 there was beer or alcohol found in the tractor
19 that there is no note in the State Patrol
20 report; fair?

21 A. I found it unusual.

22 Q. Is it also unusual for an inventory
23 report that makes reference to alcohol to show
24 no photographs of the alcohol?

25 A. Well, I would say that, yes, the

1 photos, there should be photos of it.

2 Q. In this case there was a request for
3 additional information and in it there was a
4 comment that there is no photographs, there is
5 no description that they were full or empty, and
6 that the report itself made no mention of the
7 cans; correct?

8 A. Yes, sir.

9 Q. Okay. And the reply from the
10 officer who prepared, or the inspector who
11 prepared the response for additional
12 information, simply said I forgot to do this;
13 isn't that correct?

14 A. I don't remember the response, I
15 don't recall the response from the Highway
16 Patrol. We have the R-5 there, I could refresh
17 my memory. If you have the reply there.

18 MR. LEONETTI: For the record I
19 have marked the PUCO request for additional
20 information as Exhibit I.

21 Q. Is that the document you were asking
22 to see?

23 A. Yes, sir.

24 Q. Do you want to take a minute to read
25 that, please, refresh your memory?

1 A. Okay.

2 Q. And the response --

3 A. Could I add one thing though?

4 Q. Sure.

5 A. You mischaracterized where this
6 response is from. The response is actually from
7 the Highway Patrol Motor Carrier Supervisor. He
8 is quoting the inspector.

9 Q. All right. So the inspector is Mr.
10 Gatesman?

11 A. Yes.

12 Q. But that's not who prepared this
13 response?

14 A. No.

15 Q. Do we have the name of the person
16 who prepared this response?

17 A. Sure. Jim Fetter. He is the Motor
18 Carrier Supervisor, but not the Patrol.

19 Q. Where does Mr. Fetter's name appear
20 on this document?

21 A. It does not.

22 Q. How do you know it's prepared by
23 Mr. Fetter if his name is not on it?

24 A. All the R-5s go to Mr. Fetter.

25 Q. Mr. Fetter's response then is that

1 he forgot to take pictures?

2 A. Yes.

3 Q. He was focused on the violations.

4 If you read the sentence, "I was focused on the
5 vehicle violations." Correct?

6 A. Yes.

7 Q. One of the violations was possession
8 of alcohol; correct?

9 A. Well, he is saying he is focused on
10 the vehicle violations, which is different. I
11 think he is referring to mechanical violations.

12 Q. You haven't discussed this with him;
13 have you?

14 A. I have not personally.

15 Q. You don't know, other than
16 speculation, you don't know what he is referring
17 to, correct, other than what it says?

18 A. What it says is vehicle violations.

19 Q. Isn't possession of alcohol in the
20 cab a vehicle violation?

21 A. It's a driving violation.

22 MR. LEONETTI: May I approach and
23 show him some photographs, please, that are part
24 of the State Patrol report?

25 ATTORNEY EXAMINER: Yes.

1 MR. LEONETTI: For the record these
2 are photographs that are part of the State
3 Patrol report which was previously marked as
4 Exhibit H.

5 Q. I would like to show you a
6 photograph marked as Exhibit B. Have you ever
7 seen that photograph before?

8 A. I am certain that I have. I looked
9 through all the photographs.

10 Q. Do you see any beer cans showing in
11 that photograph?

12 A. Not in this one, no.

13 Q. Do you see that the cab and the
14 chassis of the cab have been completely ripped
15 apart?

16 A. There is quite a bit of damage to
17 it.

18 Q. Would you agree that with that kind
19 of damage debris could be scattered all over the
20 place?

21 A. Sure.

22 Q. I will show you another photograph
23 from the same group. It's marked as Exhibit C.
24 It's the same angle, but different photograph.
25 Do you see any beer cans shown in that

1 photograph?

2 A. No, I don't.

3 Q. Show you a closer photograph marked
4 as Exhibit D from the same thing, only closer
5 up. Take a close look at it. Tell me whether
6 you see any beer cans in that photograph?

7 A. No, I don't.

8 MR. LINDGREN: The Staff would be
9 willing to stipulate that none of the pictures
10 show beer cans.

11 Q. I would like to show you another
12 photograph. This is marked Exhibit E. This is
13 a photograph -- I am sorry.

14 ATTORNEY EXAMINER: We will let you
15 go ahead since you only have two left; right?

16 MR. LEONETTI: I only have a couple
17 more left, yes.

18 ATTORNEY EXAMINER: We will let you
19 go ahead.

20 Q. Exhibit E is a photograph of the end
21 of the Cal-Ark trailer and another trailer, it
22 has Yukon Valley on it. Do you see what I am
23 referring to?

24 A. Yes. I don't see any beer cans
25 there.

1 Q. Would you agree that Yukon Valley
2 trailer is damaged?

3 A. Sure.

4 Q. Would you agree that there is beer
5 cans in that Yukon Valley trailer, that they
6 could have mixed in with the contents of
7 the tractor which it smashed up against?

8 A. That would be speculation.

9 Q. Would you agree that that is
10 possible?

11 MR. LINDGREN: Objection. He just
12 said it was speculation.

13 MR. LEONETTI: My question is
14 whether it's possible, not whether it's
15 speculation. My question is it's possible.

16 ATTORNEY EXAMINER: I will let you
17 respond.

18 A. Yes. All things are possible.

19 Q. Would you agree that if you look at
20 that photograph, in the background behind,
21 setting immediately behind, almost touching,
22 practically smashed together, that part of
23 the cab and Yukon Valley trailer are touching?

24 A. I don't think you can see that from
25 this picture definitively. They are in the same

1 picture, but from this angle I can't say that
2 they are touching.

3 Q. You agree that they are close?

4 A. They are in the same picture, yes.
5 They are in close proximity, but touching, I --

6 Q. Do you agree they are both damaged?

7 A. Sure.

8 Q. I will show you a photograph which
9 is not part of the State Patrol report. This is
10 taken by an investigator at the scene marked
11 Exhibit G. You can see at the top corner of
12 the top photograph part of what says Cal-Ark.
13 Do you see what I am referring to?

14 A. Sure.

15 Q. You also see the fluid on the road
16 in those photographs?

17 A. Well, I guess I don't know if that
18 is fluid, or what that is.

19 Q. Does it look like a liquid?

20 A. It looks like it was at one time,
21 but I don't know that it is there. It could
22 be -- well, I don't know.

23 Q. Do you know whether or not that
24 material, which we don't know what it is, but
25 appears to be a liquid of some sort scattered

1 across the road in stripes in both photographs
2 would have a smell to it?

3 A. Again, I don't know. I guess it's
4 possible. I think that is what you are asking.

5 Q. One more photograph to show you.
6 This is marked Exhibit F. It is from the State
7 Patrol report again.

8 It shows a car on a -- a smashed car
9 on a trailer to be towed away. Is that what it
10 shows?

11 A. It looks like it could be a pick-up
12 truck.

13 Q. Can you tell from looking at that
14 photograph whether any beer cans came from that
15 truck when it got smashed with the tractor that
16 is the subject of this hearing today?

17 A. I have no idea.

18 Q. As we sit here today you would
19 agree we have no photographs of any beer cans;
20 correct?

21 A. I didn't see any.

22 Q. You don't know how many beer cans
23 were found; correct?

24 A. In the inventory report is just says
25 Miller Lite beer.

1 Q. And it doesn't say exactly where
2 that Miller Lite beer was found; does it?

3 A. Well, it indicates it's in the front
4 portion of the cab, yes.

5 Q. The cab that is shown to be smashed,
6 separated from the chassis of the unit in those
7 photographs you looked at?

8 A. That is the only cab in this crash.
9 The only commercial vehicle.

10 Q. Would you agree it might be
11 dangerous to try to climb into that cab in that
12 condition at the scene?

13 A. Could be.

14 Q. As we sit here today we don't know
15 whether those beer cans had anything in them; do
16 we?

17 A. It says Miller Lite beer.

18 Q. We don't know if they were empty or
19 full; correct?

20 A. There is no indication of that. It
21 doesn't say cans either.

22 Q. It just says Miller Lite. It could
23 be a bottle in other words. So as we sit here
24 today you don't know whether Miller Lite were
25 bottles or cans and we don't know whether they

1 were full or empty. Is that fair?

2 A. Yes.

3 MR. LEONETTI: That is all I have
4 for the witness. Thank you.

5 ATTORNEY EXAMINER: Okay. Any
6 redirect, Mr. Lindgren?

7 MR. LINDGREN: Thank you, your
8 Honor.

9 REDIRECT EXAMINATION

10 By Mr. Lindgren:

11 Q. Mr. Moser, with all your experience
12 with the Ohio State Highway Patrol are you aware
13 of any instances where the contents from one
14 vehicle were transferred into the cab of a
15 another vehicle after an accident?

16 A. I can't recall anything
17 specifically, no.

18 Q. Thank you. Mr. Moser, do you know
19 what the trailer in this case was carrying, the
20 Respondent's trailer?

21 A. So in two different places it refers
22 to racks. On the inspection report it shows
23 cargo as other than it says empty racks. And
24 then on the inventory custody report for
25 the trailer it says manufacturing racks in 53

1 foot trailer.

2 Q. Does it appear that this vehicle was
3 carrying beer cans as cargo?

4 A. There is no mention of that, no.

5 MR. LINDGREN: Thank you. I have no
6 further questions.

7 ATTORNEY EXAMINER: Do you have any
8 recross based on --

9 MR. LEONETTI: Just one.

10 RECROSS-EXAMINATION

11 By Mr. Leonetti:

12 Q. Just one. And that is this. I
13 showed you a picture of the landscaping van that
14 was, correct, it was in the same photograph with
15 the trailer and the cab in the smashed
16 condition. Were you aware that that van was on
17 it's way to a landscaping convention?

18 A. No, I was not.

19 Q. Do you know whether or not that van
20 had beer as cargo in it?

21 A. I don't know.

22 MR. LEONETTI: I have no other
23 questions. Thank you.

24 ATTORNEY EXAMINER: Thank you. Any
25 other questions for this witness?

1 MR. LINDGREN: None, Your Honor.

2 And I would move for the admission of Staff

3 Exhibits 1, 2 and 3.

4 ATTORNEY EXAMINER: Objections other
5 than the one that we have on the record?

6 MR. LEONETTI: No. Thank you.

7 ATTORNEY EXAMINER: They shall be
8 admitted and given the weight they deserve.

9 (EXHIBITS ADMITTED INTO
10 EVIDENCE)

11 ATTORNEY EXAMINER: I am assuming
12 there are no other Staff witnesses.

13 MR. LINDGREN: Yes. Staff rests its
14 case at this point.

15 ATTORNEY EXAMINER: You may proceed,
16 Mr. Leonetti:

17 MR. LEONETTI: Thank you. First I
18 would like to move for the admission of
19 the exhibits that I used when I cross-examined
20 Mr. Moser.

21 ATTORNEY EXAMINER: Sure. Do you
22 have copies?

23 MR. LEONETTI: No, I do not. I have
24 only what I gave Mr. Moser.

25 ATTORNEY EXAMINER: May I have them?

1 And do you have copies for the court reporter?

2 MR. LEONETTI: I only have one set.

3 ATTORNEY EXAMINER: Okay.

4 MR. LEONETTI: I have Exhibit A
5 which is an affidavit signed by Mr. Shirey.
6 The affidavit explains that he was involved in
7 this accident, that he has had a stroke and
8 cannot travel.

9 And has attached to it a page from
10 his medical records which includes his blood
11 alcohol results that shows zero. And I am
12 asking that be admitted because he is
13 health-wise unavailable to travel. I believe
14 when someone is medically incapacitated the
15 affidavit should be admitted in lieu of their
16 personal appearance.

17 So, I have provided this to the
18 State already. I have a copy for the court
19 reporter and a copy for you. So I would ask for
20 the admission of that record because Mr. Shirey
21 cannot travel.

22 ATTORNEY EXAMINER: Any objection
23 or --

24 MR. LINDGREN: Your Honor, I object
25 to the Exhibit A, the affidavit, the medical

1 record. We don't have any way of verifying the
2 authenticity of it or cross-examination of the
3 health care provider who performed this
4 examination.

5 ATTORNEY EXAMINER: Mr. Leonetti,
6 response?

7 MR. LEONETTI: Mr. Shirey has
8 testified to its authenticity as part of his
9 medical record, which he was required to sign a
10 release in order for us to obtain. It's
11 verified by way of his affidavit.

12 ATTORNEY EXAMINER: I will overrule
13 the objection and allow it in. I didn't make it
14 clear for the record, but Exhibit A is admitted.
15 Were there any objections to the other
16 exhibits?

17 MR. LINDGREN: No, your Honor.

18 ATTORNEY EXAMINER: Okay. So those
19 exhibits B through I are also admitted.

20 (EXHIBITS ADMITTED INTO EVIDENCE)

21 ATTORNEY EXAMINER: And then there
22 were no objections to Staff's exhibits other
23 than the one that you have on the record;
24 correct?

25 MR. LEONETTI: Correct.

1 ATTORNEY EXAMINER: So those
2 exhibits are also admitted.

3 (EXHIBITS ADMITTED INTO EVIDENCE)

4 ATTORNEY EXAMINER: Mr. Leonetti,
5 do you have a witness that you wish to call?

6 MR. LEONETTI: No, I do not, because
7 of Mr. Shirey's unavailability.

8 ATTORNEY EXAMINER: Okay. Given
9 that we have some unusual circumstances pop up
10 in this case do we want to discuss a briefing
11 schedule?

12 Let's go off the record.

13 (DISCUSSION OFF THE RECORD)

14 ATTORNEY EXAMINER: Counsel for
15 both parties have indicated that they would like
16 to present a brief closing argument in lieu of
17 briefs. So, I will let Staff go first.

18 MR. LINDGREN: Thank you. Your
19 Honor, both the inspection report and the
20 inventory report reflect the fact that beer cans
21 were found in the cab of Respondent's vehicle.

22 Respondent is only charged with
23 being in possession of alcohol while on duty.
24 He is not charged with driving under the
25 influence. Therefore, it's irrelevance whether

1 alcohol was found in his blood after the crash
2 or not.

3 The fact is that beer cans were
4 present in the cab as identified by the State
5 Trooper who performed the inspection. There is
6 no other likely explanation for how the cans got
7 onto the truck other than the driver bringing
8 them with him in the cab where they could be
9 readily accessed while he was on duty.

10 Staff has proved its case of driver
11 having possession of alcohol and the Commission
12 should so find. Thank you.

13 ATTORNEY EXAMINER: Thank you. Mr.
14 Leonetti.

15 MR. LEONETTI: Thank you. I would
16 like to remind you of the burden of proof in
17 this case, and that is it's got to be beyond a
18 reasonable doubt that this -- that there was
19 alcohol found in the possession of Mr. Shirey in
20 that cab.

21 All we know is that in a inventory
22 report that Miller Lite beer, either a bottle or
23 a can, was found. We don't know whether it was
24 full or empty. If empty, Miller Lite bottle or
25 can is in the cab, that's not a violation. That

1 is just an empty can.

2 We also have -- the reason I showed
3 you those photographs, and asked you to review
4 the photographs, is this cab is completely
5 destroyed. How you could say anything was
6 definitively in that cab in that mess when it's
7 smashed into another vehicle, which you will see
8 in one of those photographs, it's a complete
9 wreck.

10 You will see that the landscaping
11 trailer, which is also smashed, I think it's
12 more likely that the beer, this Miller Lite
13 beer, came from a couple of people who were on
14 their way to a convention in Kentucky, a
15 landscaping convention, that a truck driver who
16 said in his affidavit I didn't have any beer in
17 my cab.

18 The burden of proof is on the State
19 here, and the State, all they can say is that
20 there was Miller Lite beer, it's unknown if it's
21 a can or bottle, we don't know if it was full,
22 we don't know if it was empty, we don't know how
23 many, was found either in or around. And again
24 if you look at the PUCO additional information
25 sheet, it says around, around the CMV.

1 We are not even sure where that came
2 from, inside or outside. It was just found
3 near.

4 The point is this. If you want to
5 issue a citation to somebody the State is going
6 to do this, and make a record. In the case
7 where people are seriously hurt you have to do a
8 better job. You can't not take photographs, you
9 can't forget to take photographs, you can't
10 forget to make better notes.

11 Even in this case, that's why there
12 is the PUCO request for additional information,
13 is because the information is so sparse, and so
14 incomplete, that they said what is this? We
15 said the same thing, what is this.

16 Why should Mr. Shirey, who will
17 never drive a truck again, and never drive any
18 vehicle again, have this violation, and from now
19 on have to go with this violation based on such
20 a sparse amount of evidence. They just need to
21 do better, there has to be more.

22 And what I request is that you
23 overrule the citation for the reason that there
24 is not sufficient evidence that there was
25 alcohol in possession. That is the citation,

1 alcohol in possession. We don't know anything
2 more than Miller Lite beer was found somewhere,
3 whether empty or full, in a can or bottle, it
4 was found somewhere in or about that smashed
5 trailer at the scene where there is several
6 other vehicles involved. Thank you.

7 ATTORNEY EXAMINER: Thank you.

8 MR. LINDGREN: Your Honor, may I
9 offer a brief rebuttal?

10 ATTORNEY EXAMINER: Sure.

11 MR. LINDGREN: Thank you. The
12 Respondent's counsel stated that the burden of
13 proof in this case is beyond a reasonable doubt.
14 However, as Your Honor well knows this is not a
15 criminal proceeding, it's an administrative
16 proceeding. So the standard of proof is by a
17 preponderance of the evidence. And Staff
18 submits that the preponderance of the evidence
19 does show a violation in this case. Thank you.

20 ATTORNEY EXAMINER: Thank you. Any
21 response to that?

22 MR. LEONETTI: No, thank you.

23 ATTORNEY EXAMINER: Are there any
24 other matters that we need to discuss before we
25 go off the record?

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MR. LINDGREN: None, Your Honor.

MR. LEONETTI: None. Thank you.

ATTORNEY EXAMINER: Thank you.

Well, seeing that there are no other issues that we need to discuss the case is submitted to the record and the Commission will issue an opinion in due course. Thank you very much.

(At 11:00 A.M. the hearing was concluded)

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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 May 1,
2019, and carefully compared with my original
stenographic notes.

Michael O. Spencer
Michael O. Spencer,
Registered Professional
Reporter.

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Summary: Transcript In the Matter of John M. Shirey Notice of Apparent Violation and Intent to Assess Forfeiture, hearing held on May 1st, 2019. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Spencer, Michael O. Mr.