

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

SILVER SPRING, MARYLAND

ORDER NO. 12,121

IN THE MATTER OF:

Served August 18, 2009

CHUKWUNENYE NNAKWU, Trading as) Case No. MP-2008-242
PROGRESSIVE MEDICAL CARE SERVICES,)
Suspension and Investigation of)
Revocation of Certificate No. 1078)

This matter is before the Commission on respondent's response to Order No. 12,038, served June 10, 2009, which, among other things, directed respondent to respond to allegations of operating a vehicle with invalid license plates, present vehicles for inspection by Commission staff, and submit proof of safety inspection for the allegedly impounded vehicle and respondent's current vehicle(s).

I. BACKGROUND

Under the Compact, a WMATC carrier may not engage in transportation subject to the Compact if the carrier's certificate of authority is not "in force."¹ A certificate of authority is not valid unless the holder is in compliance with the Commission's insurance requirements.²

Commission Regulation No. 58 requires respondent to insure the revenue vehicles operated under Certificate No. 1078 for a minimum of \$1.5 million in combined-single-limit liability coverage and maintain on file with the Commission at all times proof of coverage in the form of a WMATC Certificate of Insurance and Policy Endorsement (WMATC Insurance Endorsement) for each policy comprising the minimum.

Certificate No. 1078 was rendered invalid on November 8, 2008, when the \$1.5 million primary WMATC Insurance Endorsement on file for respondent terminated without replacement. Order No. 11,674, served November 10, 2008, noted the automatic suspension of Certificate No. 1078 pursuant to Regulation No. 58-12, directed respondent to cease transporting passengers for hire under Certificate No. 1078, and gave respondent thirty days to replace the terminated endorsement and pay the \$50 late fee due under Regulation No. 67-03(c) or face revocation of Certificate No. 1078.

Respondent subsequently submitted a new \$1.5 million primary WMATC Endorsement on November 13, 2008, with an effective date of November 19, 2008, but respondent did not pay the \$50 late insurance

¹ Compact, tit. II, art. XI, § 6(a).

² Compact, tit. II, art. XI, § 7(g).

fee. Certificate No. 1078 consequently was revoked in Order No. 11,772, served December 30, 2008, pursuant to Article XI, Section 10 (c).

Respondent thereafter paid the late fee and filed an application for reconsideration on January 2, 2009. Respondent argued that the Commission had revoked Certificate No. 1078 "without reasons". Order No. 11,772, however, states that the reason for revocation was respondent had not paid the \$50 late insurance fee under Regulation No. 67-03(c). Indeed, the record shows Commission staff contacted respondent on December 19 and informed him that the \$50 late fee was due, but respondent did not pay the late fee until January 2. The application for reconsideration was therefore denied in Order No. 11,800, served January 15, 2009, but because respondent had paid the late fee within the time prescribed for filing an application for reconsideration, the Commission reopened this proceeding on its own initiative and reinstated Certificate No. 1078.

To prevent circumvention of Regulation Nos. 60-01 and 67-02, respondent was directed to file a 2009 annual report and pay the 2009 annual fee on or before January 31, 2009. And because the effective date of respondent's new WMATC Endorsement was November 19, 2008, instead of November 8, 2008, Order No. 11,800 directed respondent to verify timely cessation of operations and corroborate with copies of pertinent business records in accordance with Regulation No. 58-14.

II. RESPONSE TO ORDER NO. 11,800

Respondent timely paid his 2009 annual fee and filed his 2009 annual report on January 30, 2009. Respondent submitted nothing further in response to Order No. 11,800, other than a request to amend Order No. 11,800 so as to make November 19, 2008, the effective date of the reinstatement of Certificate No. 1078 on the ground that November 19 is the effective date of the replacement WMATC Endorsement supporting reinstatement. The request was denied because respondent was not eligible for reinstatement prior to January 2, 2009, when respondent paid the outstanding \$50 late fee.

The only other documents in the record were two unsigned, unsworn statements disavowing operations during the suspension period and copies of supporting bank records submitted by respondent prior to Order No. 11,800 in attempted compliance with Regulation No. 58-14. Besides being unsigned and unsworn, the statements are inconsistent with respondent's own bank records and contradicted by correspondence obtained from one of respondent's clients, Health Services for Children with Special Needs, Inc., (HSCSN), as pointed out in Order No. 11,944.

According to a statement filed by respondent on January 2, 2009, respondent claims not to have "transported anyone since Nov 10, 2008." According to a statement filed by respondent on January 13, 2009: "Since June 2008 my contract was terminated by MTM. I have not signed any contract with anybody. I have not transported anybody."

These statements are inconsistent with respondent's own bank records showing numerous purchases from several gas stations throughout November 2008, and the statements are inconsistent with HSCSN's demands in a March 27, 2009, letter for repayment of money paid to respondent for service rendered "from November 10, 2008, through January 15, 2009", including service rendered on November 14, 16, 17, and 18, 2008, when respondent was not only suspended but at the time apparently uninsured.

The Commission thus concluded in Order No. 11,944 that respondent's bank records and the HSCSN correspondence established that respondent continued operating on and after respondent's WMATC Endorsement expired on November 8, 2008. The Commission also found no evidence that respondent had made any effort to ascertain whether the necessary WMATC Endorsement had been filed before continuing to operate on and after November 8, 2008, as required by Regulation No. 58-11. The Commission further found that respondent should have produced copies of his HSCSN invoices in response to Order No. 11,800.

Order No. 11,944 therefore gave respondent thirty days to show cause why the Commission should not assess a civil forfeiture against respondent, and/or suspend or revoke Certificate No. 1078, for knowingly and willfully violating Article XI, Section 6(a), of the Compact by conducting operations under an invalid/suspended certificate of authority, and for knowingly and willfully violating Order No. 11,800 by failing to produce documents as required.

III. RESPONSE TO ORDER NO. 11,944

On April 23, 2009, respondent filed a new \$1.5 million primary WMATC Insurance Endorsement with an effective date of November 8, 2008, thus closing the eleven-day gap in coverage created by the replacement endorsement filed November 13, 2008.

In a statement filed May 12, respondent continued to maintain that he "at no time engaged in transportation subject to the Compact without my certificate, Certificate No. 1078, being in force." This does not square with the evidence discussed above and is contradicted by respondent's request, filed the same day, asking the Commission to vacate the suspension of Certificate No. 1078 so that respondent might recoup fees for service rendered by respondent to HSCSN clients last November, December, and January while Certificate No. 1078 was suspended/revoked.

At this point, the Commission normally would have made its ultimate findings on these issues and meted out any sanctions that appeared warranted, but the Commission stayed its hand to give respondent time to respond to new allegations of additional violations.

IV. EVIDENCE OF OTHER VIOLATIONS

On May 28, 2009, the Commission received a copy of a letter dated May 15, 2009, from HSCSN to respondent advising respondent as follows:

Under the provisions of 12.4 of the Agreement between HSCSN and Progressive Medical Transportation (dated October 31, 2008), the Agreement is hereby suspended immediately based on HSCSN's belief that its members are in imminent danger. This suspension is permanent and will not be rescinded, and therefore this notification to you should also be considered notification of termination, effective May 15, 2009, the date hereof.

Accompanying the May 15 letter is a letter dated May 19, 2009, from HSCSN to the "Chief of Investigation" at 2100 Martin Luther King Avenue, SE, Washington, DC 20020, who apparently is an official in the District Government with oversight of matters involving Medicaid recipients. The letter recites the details of HSCSN's termination of its contract with respondent. According to the May 19 letter, respondent was arrested by "Capital Hill police" on May 14, 2009, for operating a "Camry" with "van tags". An HSCSN "member" who is also a Medicaid recipient was reportedly in the vehicle at the time of the arrest and had to be picked up and transported by another of respondent's drivers.

As noted in Order No. 12,038, the allegations in the two May letters raised the issues of whether respondent was operating a motor vehicle in violation of the District's motor vehicle laws, whether respondent was operating a vehicle that was not safe to operate, whether respondent was operating a vehicle without WMATC markings, whether respondent has reported to the Commission all of the vehicles in respondent's fleet, and whether respondent has reported all vehicles to his insurance company.

Order No. 12,038 accordingly directed respondent to confirm or deny the allegations in the May HSCSN letters and, if confirmed, produce any and all documents pertaining to the arrest and any and all safety inspection certificates issued for the impounded vehicle within the past 15 months. The order further directed respondent to submit a current list of vehicles used in WMATC operations, produce any and all safety inspection certificates issued for those vehicles within the past 15 months, and present said vehicles for inspection by Commission staff.

V. RESPONSE TO ORDER NO. 12,038

Respondent confirms he was arrested on May 14, 2009, and charged with "unregistered auto/misuse of tags" while transporting an HSCSN client. Respondent states that he transported the HSCSN client in a 1996 Toyota Camry that respondent borrowed from a family friend while respondent's van was out of service for repairs. A copy of an order issued by the Superior Court of the District of Columbia on June 29, 2009, and submitted to the Commission by respondent on

July 1, 2009, indicates that the charges were dismissed as of June 1, 2009. The dismissal, however, was without prejudice to the right of the prosecution to reinstate the charges at a later date.

Respondent presented his only vehicle, a 1999 Toyota Sienna, for staff inspection on July 16, 2009. The vehicle did not display a commercial for-hire license plate and did not display a safety inspection sticker. Respondent later submitted proof that the Sienna passed a safety inspection on July 27, 2009.

Respondent submitted a copy of a Maryland title and registration for the 1996 Toyota Camry. The title was issued May 18, 2009, four days after respondent was arrested for operating the Camry without proper tags. Respondent's name does not appear on the title. Respondent produced no safety inspection certificate for this vehicle. The title indicates that the Camry was last inspected January 27, 1998.

VI. ASSESSMENT OF FORFEITURE

A person who knowingly and willfully violates a provision of the Compact, or a rule, regulation, requirement, or order issued under it, or a term or condition of a certificate shall be subject to a civil forfeiture of not more than \$1,000 for the first violation and not more than \$5,000 for any subsequent violation.³

The term "knowingly" means with perception of the underlying facts, not that such facts establish a violation.⁴ The terms "willful" and "willfully" do not mean with evil purpose or criminal intent; rather, they describe conduct marked by intentional or careless disregard or plain indifference.⁵ Employee negligence is no defense.⁶ "To hold carriers not liable for penalties where the violations . . . are due to mere indifference, inadvertence, or negligence of employees would defeat the purpose of" the statute.⁷

A. Unauthorized Operations

As noted above, the record shows respondent operated while Certificate No. 1078 was suspended and revoked last November, December, and January. Specifically, the record shows respondent was paid by HSCSN for trips conducted on ten days in November, twenty-one days in December, and eight days in January prior to January 15. Based on the evidence discussed above, we find that these operations

³ Compact, tit. II, art. XIII, § 6(f).

⁴ *In re Metro Health-Tech Servs. Inc.*, No. MP-08-057, Order No. 11,588 (Sept. 24, 2008).

⁵ *Id.*

⁶ *In re Zee Transp. Serv., Inc.*, No. MP-07-120, Order No. 10,671 (Aug. 8, 2007).

⁷ *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 243, 58 S. Ct. 533, 535 (1938).

were conducted knowingly and willfully within the meaning of the civil forfeiture provision of the Compact.

The civil forfeiture provision of the Compact serves at least two functions: deterrence of future violations and disgorgement of unjust profits.⁸ Accordingly, one of the factors the Commission takes into consideration when determining the appropriate size of a forfeiture is whether the carrier profited from his misdeeds.⁹

The evidence in the record shows that HSCSN paid respondent \$16,746 for service rendered by respondent while Certificate No. 1078 was suspended/revoked. HSCSN later demanded repayment of the full \$16,746 on the ground that under HSCSN's contract with respondent payment was not due for service rendered while Certificate No. 1078 was suspended. When repayment was not forthcoming, HSCSN later decided to withhold payment on claims submitted by respondent for service rendered after Certificate No. 1078 was reinstated January 15, 2009, as a means of recouping the \$16,746. As of March 27, 2009, HSCSN had withheld \$7,018.75. Respondent has produced evidence indicating that HSCSN eventually withheld a total of \$15,808.31.

We will assess a civil forfeiture against respondent in the amount of \$250 per day¹⁰ for 39 days, for a total of \$9,750. We will suspend all but \$1,750 in recognition of applicant's lack of profit from those trips.¹¹ Failure to pay the net forfeiture in timely fashion shall result in reinstatement of the full \$9,750.

B. Safety Violation

Article XI, Section 5(a), of the Compact states that each authorized carrier shall provide safe and adequate transportation service, equipment, and facilities. Operation of a vehicle with an expired, invalid or missing safety inspection sticker violates Article XI, Section 5(a).¹² Such a vehicle is presumptively unsafe.¹³

Local motor vehicle laws require a safety inspection as part of the for-hire vehicle registration and registration renewal process.¹⁴ Respondent has produced no safety inspection certificate for the 1996 Toyota Camry that would cover respondent's operation of

⁸ *In re Transcom, Inc.*, No. AP-05-113, Order No. 10,114 at 3 (Nov. 30, 2006).

⁹ *Id.*

¹⁰ *See id.* (same).

¹¹ *See id.* (reducing forfeiture based on profit).

¹² *In re VOCA Corp. of Wash., D.C.*, No. MP-02-30, Order No. 7258 at 2 (June 20, 2003); *In re Junior's Enterprises, Inc.*, No. MP-01-103, Order No. 6549 (Feb. 21, 2002); *In re Safe Transp., Inc.*, No. MP-96-15, Order No. 4849 (May 17, 1996).

¹³ Order No. 7258; Order No. 6549; Order No. 4849.

¹⁴ *See e.g.*, www.marylandmva.com/AboutMVA/INFO/27300/27300-26T.htm; 18 DCMR 413.10, 421.2.

the Camry for hire under Certificate No. 1078 on May 14, 2009. In addition, respondent has produced no safety inspection certificate for the 1999 Toyota Sienna that would cover respondent's operation of the Sienna under Certificate No. 1078 at any time prior to July 27, 2009.

We will assess a forfeiture of \$500 against respondent for knowingly and willfully violating Article XI, Section 5(a), of the Compact.¹⁵ We will also direct respondent to obtain for-hire license plates for the Sienna.

C. Lease Violation

Under Regulation No. 62-01, a WMATC carrier may not operate a vehicle that is not titled in the carrier's name except pursuant to a lease agreement approved by the Commission. The Commission has no record of respondent filing a lease for the 1996 Toyota Camry respondent admits operating on May 14, 2009. We will assess a forfeiture of \$250 against respondent for knowingly and willfully violating Regulation No. 62.¹⁶

D. Violation of Order No. 11,800

As noted above, respondent should have produced his HSCSN records as required by Order No. 11,800. Respondent has yet to produce those records and has yet to offer any explanation for failing to do so. We will assess a forfeiture of \$250 for respondent's knowing and willful failure to timely produce documents as directed.¹⁷

VII. PROBATION

In situations similar to this one - operating while suspended but not while uninsured - the Commission has not just assessed a civil forfeiture. The Commission also has placed the carrier on probation for one year.¹⁸ We believe that would be appropriate in this case, as well.

THEREFORE, IT IS ORDERED:

1. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against respondent in the amount of \$9,750 for knowingly and willfully violating Article XI, Section 6(a), of the Compact; provided, that all but \$1,750 shall be suspended in recognition of respondent's lack of profit.

2. That pursuant to Article XIII, Section 6(f), of the Compact, the Commission hereby assesses a civil forfeiture against respondent in the amount of \$1,000 for knowingly and willfully violating Article

¹⁵ See Order No. 7258 at 4 (same).

¹⁶ See Order No. 7258 at 4 (same).

¹⁷ See *In re Sams Health Care Servs. Inc.*, No. MP-08-005, Order No. 11,947 (Apr. 23, 2009) (same).

¹⁸ *Id.*

XI, Section 5(a), of the Compact, Regulation No. 62, and Order No. 11,800.

3. That respondent is hereby directed to pay to the Commission within thirty days, by money order, certified check, or cashier's check, the sum of two thousand seven hundred fifty dollars (\$2,750).

4. That the full combined forfeiture of \$10,750 assessed in this order shall be immediately due and payable if applicant fails to timely pay the net combined forfeiture of \$2,750.

5. That respondent shall obtain for-hire license plates for the 1999 Toyota Sienna and file copies of the registration card with the Commission within thirty days of the date of this order.

6. That respondent shall serve a one-year period of probation; provided, that a willful violation of the Compact, or Commission rules, regulations, or orders thereunder, during the period of probation shall constitute grounds for immediate suspension and/or revocation of Certificate No. 1078 regardless of the nature and severity of the violation.

BY DIRECTION OF THE COMMISSION; COMMISSIONERS CHRISTIE AND BRENNER:



William S. Morrow, Jr.
Executive Director