

COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC NO. 5288-15

SECRETARY OF THE LABOR CABINET
COMMONWEALTH OF KENTUCKY

COMPLAINANT

v.

D.W. WILBURN, INC.

RESPONDENT

Hon. Steven Fields, Frankfort, for the Secretary of the Labor Cabinet. Hon. Michael R. Eaves, Richmond, Kentucky, for D.W. Wilburn, Inc.

DECISION AND ORDER
OF THIS REVIEW
COMMISSION

This case comes to us from D.W. Wilburn, Inc.'s ("D.W. Wilburn's") timely petition for discretionary review of our hearing officer's recommended order. We granted review and asked for briefs. *See* 803 KAR 50:010, Section 48. For the reasons discussed herein, we will downgrade the Citation to other-than-serious and eliminate the proposed penalty.

Standard of Review

KRS § 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky Occupational Safety and Health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the Commissioner of the Department of Workplace Standards issues citations. KRS § 338.141 (1). If the cited employer notifies the Commissioner of his intent to challenge

a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS § 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS § 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission, which may grant the PDR, deny the PDR, or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Secretary of Labor v. O.S.H.R.C.*, 487 F.2d 438, 441 (8th Circ. 1973), the Eighth Circuit said when the Commission hears a case it does so "de novo." *See also Accu-Namics, Inc. v. O.S.H.R.C.*, 515 F.2d 828, 834 (5th Circ. 1975), where the Court said "the Commission is the fact-finder, and the judge is an arm of the Commission . . ."¹

As stated by our Supreme Court in *Secretary of Labor v. Boston Gear, Inc.*, 25 S.W.3d 130, 133 (Ky. 2000), "[t]he review commission is the ultimate decision-maker in occupational safety and health cases...the Commission is not bound by the decision of the hearing officer." "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another." *Terminix International, Inc. v. Secretary of Labor*, 92 S.W.3d 743, 750 (Ky. Ct. App. 2002).

¹ See federal commission rule 92 (a), 29 CFR §2200.

Facts and Summary of Proceedings

This matter arose from a fatality and serious injury that occurred during a construction project at Boone National Guard Center in Frankfort on June 15, 2015. D.W. Wilburn, Inc. ("D.W. Wilburn") was the general contractor and had subcontracted with Davis Brothers Roofing & Sheet Metal Fabricators Inc. ("Davis Brothers") to perform roofing, siding and insulation work. Two Davis Brothers employees were on a platform suspended about forty feet in the air by a rough terrain forklift being operated by Davis Brothers foreman Don Carr. D.W. Wilburn had rented the forklift for its use on the project and allowed Mr. Carr to operate it for this particular work. Mr. Carr operated the forklift contrary to operating instructions causing it to tilt and fall completely over on its side. One employee on the platform died and the other was seriously injured.

After a post-accident inspection, the Secretary of the Labor Cabinet ("Secretary"), acting through the Commissioner of the Department of Workplace Standards, cited D.W. Wilburn for a serious violation of 29 CFR §1926.602(d), which makes the general powered industrial truck standards in 29 CFR §1910.178 applicable to the construction industry and imposed a \$4,900 penalty.² The Citation reads as follows:

29 CFR 1926.602(d): The employer did not certify that each operator had been trained and evaluated as required by 1910.178(l) of this chapter.

On 6/15/15 D.W. Wilburn as the controlling employer, did not assure that Davis Brothers and Sheet Metal Fabricators had certified that the

² A rough terrain forklift is a type of powered industrial truck. *See* 29 CFR 1910.178(a)(1).

operator of the rough terrain forklift had been trained and evaluated as required by 29 CFR 1910.178(l).

The Citation does not specify which subparagraph of 1910.178(l) that D.W. Wilburn allegedly violated, but the term “certify” appears in 1910.178(l)(6):

Certification. The employer shall certify that each operator has been trained and evaluated as required by this paragraph (l). The certification shall include the name of the operator, the date of the training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.

The Secretary’s brief also confirms that the Citation alleges a violation of subparagraph (6).

Mr. Carr was certified to operate the forklift and had received the training and evaluation required under 29 CFR §1910.178(l) prior to working with Davis Brothers. Mr. Carr showed Ricky Davis, the president of Davis Brothers, a copy of a training certification that he obtained from a previous employer. Neither Davis Brothers nor Mr. Carr could produce a copy of this training certification following the accident.

On the date of the accident, Mr. Carr told a D.W. Wilburn supervisor, Terry Gregory, that he was trained and qualified to operate the forklift. Mr. Gregory did not ask to see the written certification of Mr. Carr’s training prior to allowing him to operate the forklift. The Secretary claims that D.W. Wilburn’s failure to look at the certification constitutes a serious violation of 29 CFR §1910.178(l)(6).

Proceedings and Hearing Officer’s Findings

D.W. Wilburn contested the Citation and the Review Commission assigned the matter to our hearing officer. In lieu of a hearing, the parties entered into the record

a stipulation agreement along with an affidavit from Ricky Davis. The parties submitted briefs based on this limited record.

Because one of D.W. Wilburn's employees were involved in the operation of the forklift, the Secretary cited D.W. Wilburn as a controlling employer pursuant to the multi-employer work site doctrine. That doctrine "provides that an employer who controls or creates a worksite hazard may be liable under the Occupational Safety and Health Act even if the employees threatened by the hazard are solely employees of another employer." *Dep. of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 138 (Ky. Ct. App. 2011) (quoting *Universal Const. Co. v. OSHRC*, 182 F.3d 726, 728 (10th Circ. 1999)). An employer who controls a work area and is responsible for its maintenance can be liable for an OSHA violation when a "hazard has been committed" and that area was accessible to its own employees or "those of other employers engaged in a common undertaking." *See id.* at 138 – 39. D.W. Wilburn conceded that the multi-employer worksite doctrine applied to it as a general matter.

The Secretary does not claim that D.W. Wilburn, as a controlling employer, had the duty to train Mr. Carr or create the certification documenting Mr. Carr's training. Rather, he contends that D.W. Wilburn's failure to review Mr. Carr's written certification, rather than orally verifying that Mr. Carr was trained, constitutes a serious violation of 29 CFR §1910.178(l)(6). The Secretary argues that serious death or injury could occur if general contractors did not verify the certification of all those who operate powered industrial trucks on the worksite. According to the Secretary, it was inconsequential that Mr. Carr was actually trained

and certified because a general contractor cannot rely on the subcontractor's verbal assurances.

D.W. Wilburn concedes that its failure to check documentation was a violation, but argued that the Citation should be considered *de-minimis* or at the most other-than-serious. D.W. Wilburn maintains that the violation could not be serious because Mr. Carr was trained and certified, and, therefore, there was absolutely no possibility that death or serious harm could have resulted from D.W. Wilburn's failure to look at a certification document prior to permitting him to operate the forklift. D.W. Wilburn also claims that, pursuant to OSHA Instruction CPL 02-00-111(G)(3)(d), when an employer has fully complied with a standard for training and evaluation, but has simply failed to create a written certification, no citation is justified. Under such circumstances, the instruction characterizes the violation of the certification standard as *de-minimis*.

Considering these arguments, our hearing officer affirmed the serious characterization of the citation. His recommended order provides:

8. The practice of allowing a person lacking the required certification of training to operate a power industrial truck creates a substantial probability of death or serious physical injury, and, therefore, constitutes a serious violation.

9. D.W. Wilburn relies upon OSHA Instruction CPL 02-00-111(G)(3)(d) for the proposition that "When the employer has fully complied with a requirement in a standard (e.g., for taking particular protective measures, for an evaluation, or for training), except that the employer has failed to make a required written certification that the action was taken, no citation shall be issued." However, Kentucky has not adopted this CPL. In addition, in the hearing officer's opinion the CPL would not apply to this case even if it was in effect in Kentucky. D.W. Wilburn did not comply with the requirement in the standard, because D.W. Wilburn did not train Don Carr, Davis Brothers did. D.W. Wilburn merely took

Don Carr's word for it that he had been trained, and lacked any independent knowledge as to whether or not that was the case. Thus this violation is not a case of simply not having the correct paperwork in a file. Don Carr could have lacked recent training or any training at all, and D.W. Wilburn would have had no idea if Mr. Carr chose to lie to Terry Gregory about it.

Recommended Order, Conclusions of Law, Nos. 8 – 9.³

Analysis

A controlling employer is an employer with general supervisory authority over the worksite and the power to correct safety violations or require others to prevent or correct them. *See* OSHA Instruction CPL 2.103. Here, D.W. Wilburn, as lessor of the lift, could have prevented Mr. Carr from using it had it been discovered he was untrained and uncertified to operate it. Thus, D.W. Wilburn was a controlling employer.

As a controlling employer, D.W. Wilburn is not subject to more rigorous safety obligations than the actual employer, Davis Brothers. The multi-employer worksite doctrine simply allows OSHA to cite more than one employer for the same hazardous condition that violates an OSHA standard. *See* Rothstein, *Occupational Safety & Health Law*, § 7:2 (2017 ed.); OSHA Instruction CPL 2.103. As such, the Secretary must still prove the same elements of a standards-based violation: (1) that the standard applies to the cited condition; (2) that the employer failed to comply with the terms of the standard; (3) an employee had access to the cited condition; and (4)

³ Our hearing officer erred in finding that Davis Brothers trained Mr. Carr. Mr. Davis's affidavit stated that Mr. Carr's previous employer had certified and provided the requisite training to him.

employer knowledge of the violative condition.⁴ *See Bowlin Group, LLC v. Sec. of Labor*, 437 S.W.3d 738, 744 (Ky. Ct. App. 2014); *Morel Construction*, KOSHRC No. 4147-04, 4151-04, 4949-04 (consolidated), *26 (Oct. 7, 2008). As a preliminary matter, we question whether the Secretary met his burden of proof for the second element because he stipulated that Davis Brothers employee, Mr. Carr, was trained and certified to operate the forklift.

The subject standard requires that an employer “certify” an operator’s training. The Secretary’s Brief to the Review Commission alleges that “certify” means D.W. Wilburn should have “assured” that Davis Brothers had trained and certified Mr. Carr by looking at the written certification of training. We disagree. In the context of the regulation, “certify” simply means to create written documentation of the required operator training and evaluation of competency. *See* 63 F.R. 66237 - 662274 (Dec. 1, 1998) (stating that an employer certifies the training by “keeping a record with the name of the trainee, the dates of training, and the signature of the person performing the training or evaluation”); *Sec. of Labor v. Equipment Depot, LTD*, 20 O.S.H. Cas. (BNA) 1189, 2003 WL 1563211, at *15 (O.S.H.R.C.A.L.J. Mar. 14, 2003) (citation for failure to “certify” training focused on whether employer’s “method of documenting such training” was equivalent to the “standard’s requirement that a formal certification be issued indicating the name of the operator,

⁴ As stated above, the employee who has access to the cited condition does not have to be an actual employee of the controlling employer.

the date of training, the date of the evaluation, and the identity of the person(s) performing the training or evaluation.”).

Because “certify” means to create a document attesting to the training an employee receives, it is not entirely clear how D.W. Wilburn violated the standard by failing to review Mr. Carr’s certification created by another employer. This is especially true given that the Secretary does not allege D.W. Wilburn had an obligation to create its own certification of training document contemplated by the standard. In fact, the Citation reads that D.W. Wilburn violated the subject standard by not “assuring” that Davis Brothers had certified Mr. Carr’s required forklift training.

Of course, the Secretary may cite D.W. Wilburn for Davis Brothers failure to comply with its OSHA duties on the worksite, including Davis Brothers independent duty to ensure that Mr. Carr was trained and certified. Thus, the Secretary may properly cite D.W. Wilburn under the subject standard if Mr. Carr was not certified and D.W. Wilburn had actual or constructive knowledge of that lack of certification. The Secretary, however, stipulated that Mr. Carr was trained and certified to operate the forklift. Oddly, he made such a stipulation even though Davis Brothers did not provide the written certification to the Secretary after the accident that killed one employee and seriously injured another. Regardless, this stipulation indicates that Davis Brothers complied with the subject standard when it allowed its own employee, Mr. Carr, to operate the forklift with two of its other employees situated on a platform attached thereto.

The Review Commission should not find that D.W. Wilburn violated the subject standard unless it could establish a violation of that same standard by Davis Brothers.⁵ To hold otherwise means that a general contractor could theoretically be liable for the violation of any standard by a subcontractor simply because the general contractor did not exercise sufficient reasonable diligence to detect a violation by the subcontractor that does not actually exist. That is not the law. The Secretary must prove that an employer failed to comply with the terms of the standard. *Morel Construction, supra; Bowlin Group, LLC, supra*. Only then, would the general contractor's reasonable diligence to detect that violation be relevant to the issue of whether the Secretary established the general contractor's knowledge thereof.⁶

Despite the questionable nature of the alleged violation, D.W. Wilburn does not dispute it violated the standard when it failed to check Mr. Carr's certification, and instead claims that its failure to do so was either *de-minimis* or other-than-serious. D.W. Wilburn may believe that it violated the standard because Davis Brothers could not produce a copy of the certification. Obviously, a certification only serves its purpose to document training if it is properly maintained and available for review by inspectors or employers. Moreover, a controlling employer has a duty under 29 CFR §178(l)(1) to "ensure" that operators are trained prior to permitting

⁵ As stated above, the Commissioner does not contend that D.W. Wilburn had the duty to create the written certification of training or provide training to Mr. Carr. That makes sense since the standard contemplates that the employer who provided the training should create the certification.

⁶ The hearing officer seemed to adopt this flawed reasoning when he stated that D.W. Wilburn violated the subject standard because it did not have sufficient knowledge of whether Mr. Carr was trained and certified, even though the stipulation indicated he was. *See* RO Conclusion of Law No. 9.

them to operate powered industrial trucks. OSHA Std. Int. 1910.178(l)(1) (Feb. 16, 1999.). D.W. Wilburn may acknowledge that only seeking verbal assurances from Mr. Carr about his training, without seeing the certification, was a failure to exercise reasonable diligence on its part to ensure that only trained operators use forklifts. The Secretary, however, did not cite D.W. Wilburn under 29 CFR §1910.178(1)(1). Even if he did, we are not convinced that a violation of 29 CFR §1910.178(1)(1) occurs (*i.e.* an employer fails to ensure that an operator is trained) unless an employee actually operates a forklift without the proper training and/or certification. *See e.g., Secretary v. Dierzen-Kewanee Heavy Industries, Ltd.*, 22 O.S.H. Cas. (BNA) 1656, 2009 WL 1351789 (O.S.H.R.C.A.L.J., Feb. 17, 2009) (finding a violation because operator was in fact not trained or certified); *Secretary v. Durco Contractors, Inc.*, 26 O.S.H. Cas. (BNA) 1090, 2016 WL 3537209 at *13 (O.S.H.R.C.A.L.J. May 18, 2016) (employees were not certified to operate a forklift); *Secretary v. Elite Builders, Inc.*, 2017 WL 4083647 * 13 - 15 (O.S.H.R.C.A.L.J. Aug. 2, 2017) (employees were not properly trained before operating); *Secretary v. CB Roofing & Construction, Inc.*, 22 O.S.H. Cas. (BNA) 1361, 2008 WL 5203150, at *2 (O.S.H.R.C. Aug. 22, 2008) (employee who operated was not formally trained or certified). Given the employer's concession that a violation occurred, however, we shall not dismiss the Citation on the basis that the Secretary failed to prove the second element of a violation.

We also reject D.W. Wilburn's argument that OSHA CPL 02-00-111(G)(3)(d) should result in a *de-minimis* characterization and dismissal of the Citation. First, we agree with our hearing officer's finding that Kentucky has not adopted this federal

CPL. Moreover, D.W. Wilburn cited to *Equipment Depot, supra*, which discussed this same CPL as it relates to the subject standard and found it inapplicable. The ALJ in that case rejected the argument that failure to certify was *de-minimis* because the certification served a distinct purpose apart from the requirement of training. We agree and adopt this reasoning as our own, and therefore, refuse to dismiss the Citation as *de-minimis*.

In order to sustain the serious characterization of a violation, the Secretary must prove that there is “a substantial probability that death or serious physical harm could result from a condition which exists, or from one (1) or more practices, means, methods, operations, or process which have been adopted or are in use, in such place of employment.” KRS §388.991(11); *see also, Gilbane Building Co.*, KOSHRC No. 4540-07, slip opinion at * 33- 35 (July 5, 2011); *Busch and Burchett, Inc.*, KOSHRC No. 4135-04, slip opinion at * 11 -13 (Feb. 6, 2007). The Secretary need not establish that an accident is likely to occur to prove that the violation is serious. *See Rothstein, supra*, at 14:3. Rather, he must show that “an accident is possible and there is a substantial probability that death or serious physical harm could result from an accident.” *Secretary v. D.W Wilburn, Inc.*, KOSHRC No. 4669-09, slip opinion at * 9 (Dec. 6, 2011) (quoting from *Flintco, Inc.*, 16 O.S.H. Cas. (BNA) 1404, 1405 (O.S.H.R.C. 1993)).

The Secretary and our hearing officer characterize the subject violation as serious based on a hypothetical situation. They both believe that failing to ensure that an operator has a written certification may result in untrained operators using

a powered industrial truck, which in turn could result in serious injury. Even though they may be correct as a general matter, offering this hypothetical is not enough to satisfy the Secretary's burden of proof in this particular case.

The Secretary instead must offer actual record evidence to support a finding of a substantial probability of death or serious physical injury because D.W. Wilburn did not look at Mr. Carr's certification prior to allowing him to operate the lift. *Gilbane Building Co., supra*⁷; *Busch & Burchett, Inc., supra*. He cannot meet his burden of proof by articulating a worst-case hypothetical scenario, even if that worst-case scenario may have been included as a reason for the subject standard. *See Secretary v. Natkin & Co., Mechanical Contractors*, 1 O.S.H. Cas. (BNA) 1204, 1973 WL 4007 at * 8 (O.S.H.R.C Apr. 27, 1973) (Secretary failed to meet burden by compliance officer offering his "evaluation of the possibility of 'substantial probability of death or serious physical harm' upon justification or reason for the standard rather as applicable to the facts existing in [the] specific condition."). For example, in *Bush & Bursch*, the Review Commission examined the record evidence to determine whether a fall from an unprotected platform greater than six feet above ground level could result in death or serious harm. Obviously, falls from that height as a general matter can result in serious injury or death. Yet, in that case, the Review Commission looked to the specific fall hazard at issue and found that the Secretary failed to prove

⁷ In *Gilbane Building*, the Review Commission did not presume that a tripping hazard could result in a fall onto cinder blocks based on generic testimony of the compliance officer. Instead, the Review Commission examined the photographic evidence and testimony and found that the Secretary failed to offer sufficient evidence to support a serious violation.

that a person falling over the edge of the platform onto a sloped bank would continue down an entire length of the slope and off a vertical retaining wall to the ground below. Since the fall onto the sloped rock did not present a substantial probability of death or serious injury, the Review Commission found the violation to be other-than-serious.

The record evidence does not support a serious characterization of the Citation. The parties stipulated that D.W. Wilburn asked Mr. Carr about whether he was trained and qualified and he responded that he was. If Mr. Carr had lied, D.W. Wilburn would have created a hazard to personnel by allowing an untrained operator to use a forklift on the worksite by not substantiating Mr. Carr's verbal assertion with the required written certification of that training. The Secretary, however, stipulated that Mr. Carr was telling the truth and was certified and had received all the training required pursuant to 29 CFR §1910.178(l) prior to D.W. Wilburn allowing him to operate the forklift. Based on these stipulations, there is no evidence to suggest that D.W. Wilburn's failure to ask for a written certification, in lieu of making a verbal inquiry, exposed any employee to an untrained operator. Without such record evidence, we hereby find that D.W. Wilburn's violation was other-than-serious. *Gilbane Construction, supra; Busch & Burchett, supra.*

The Secretary refers the Review Commission to *Secretary v. Dierzen-Kewanee Heavy Industries, Ltd.*, 22 O.S.H. Cas. (BNA) 1656, 2009 WL 1351789 (O.S.H.R.A.L.J., Feb. 17, 2009), to support his position that D.W. Wilburn's failure to check the certification constituted a serious violation. The employer in that case was

cited for two violations, one for failing to train its employees who were operating a power industrial truck pursuant to 29 CFR §1910.178(l)(1)(i), and two for failing to have a certification of training pursuant to 29 CFR §1910.178(1)(6). *See id.*, at *10. These two violations were grouped together under one item, which was considered serious. The ALJ noted that “both the operator and other employees can be exposed to potential broken bones or other injuries or death when untrained operators can strike employees with the forklift or cause material to fall on the operator.” *Id.* (emphasis added). This case, however, substantially differs from *Dierzen-Kewannee* because Mr. Carr had the training and certification required by the powered industrial truck standard. Thus, the hazards identified by the ALJ in *Dierzen-Kewannee* do not exist here.

Even though the facts of this case do not merit a serious violation, our holding in this case is limited to its particular facts. Permitting an untrained operator to work on site is a serious violation of 29 CFR §1910.178(l)(1), which requires employers to ensure that only trained and competent employees operate powered industrial trucks. *See Durco Contractors, Inc., supra*, at *13; *Elite Builders, Inc., supra* at * 13 - 15; *CB Roofing & Construction, supra*, at *2. A controlling employer, like D.W. Wilburn, has a non-delegable duty to make certain that others who are not its actual employees are properly trained and competent to operate power trucks on its work site. *See* OSHA Std. Int. 1910.178(l)(1) (Apr. 6, 1999) (host employer of warehouse does not need to train truck drivers who were not its employees, but must “ensure that such individuals have been trained before permitting them to operate powered

industrial trucks at its warehouse”). As it turned out, Mr. Carr’s assertions about having the requisite training and qualifications were true. If Mr. Carr did not have the required training, D.W. Wilburn would likely have constructive knowledge of his lack of training if it did not review a written certification. *See Secretary v. Barnhart, Inc.*, 2011 WL 6284749, at *20 (O.S.H.R.C.A.L.J. May 20, 2011) (noting that if a general contractor does not receive a certification of training, it should raise a “red flag” that the training was not provided as required).⁸

Having found that the Citation is other-than-serious, we must consider what penalty, if any, is appropriate. We have no record evidence from the Secretary discussing how he determined the \$4900 proposed penalty amount stated in the Citation. Presumably, the Secretary based the penalty amount on his serious characterization of the violation. Under the Secretary’s Field Operating Manual (FOM), other-than-serious violations that have a lesser probability of resulting in injury should be assessed no penalty. *See* FOM, p. VI-7. We believe that guidance fits here where the Secretary neglected to offer evidence that D.W. Wilburn’s failure to check Mr. Carr’s certification caused the incident that killed one Davis Brothers employee and seriously injured another. In fact, Mr. Carr had the requisite training. As noted above, it is also questionable whether the Secretary showed that D.W. Wilburn violated the subject standard when he stipulated that Mr. Carr had the

⁸ This case involved a fall protection standard, 29 CFR §1926.503(b), requiring an employer verify that it has an effective training program for employees exposed to fall hazards. A serious citation was affirmed against a controlling employer for failing to verify that its subcontractor had such a training program. The controlling employer relied on the false assertions of a subcontractor stating that it had such a training program, and untrained employees were exposed to fall hazards as a result.

requisite certification. At most, D.W. Wilburn appears to have been cited because Davis Brothers misplaced the certification and could not provide it to the Secretary upon his request. Considering these factors, the Review Commission shall not assess any penalty for the Citation.

Order

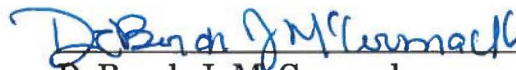
For the reasons discussed above, we hereby downgrade the Citation to other-than-serious and eliminate the proposed penalty.

It is so ordered.

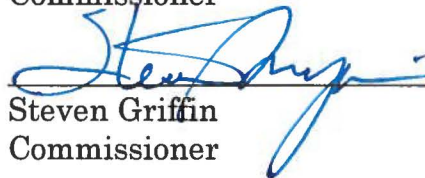
January 3, 2018.



D. Brian Richmond
Chair



DeBorah J. McCormack
Commissioner



Steven Griffin
Commissioner

Certificate of Service

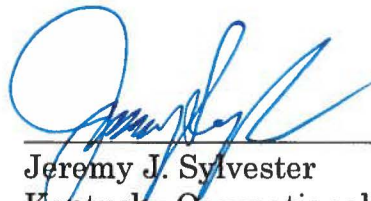
I certify that a copy of the foregoing brief has been served this 3rd day of January, 2018, on the following as indicated:

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