

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of the New York State Environmental Conservation Law (ECL), and Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

-by-

ORDER

JOHANNA TRANSMISSION PARTS, INC., JOSE L. GARCIA, JONATHAN PENA¹ and JULIO J. SOSA,

DEC Case No.
CO2-20100615-22

Respondents.

This administrative enforcement proceeding concerns allegations that respondents Johanna Transmission Parts, Inc. (Johanna Transmission), Jose L. Garcia, Jonathan Pena and Julio J. Sosa (respondents) completed onboard diagnostic (OBD) II inspections of motor vehicles using noncompliant equipment and procedures in violation of 6 NYCRR 217-4.2. OBD inspections, when properly conducted, are designed to monitor the performance of major engine components, including those responsible for controlling emissions.

In accordance with 6 NYCRR 622.3(a)(3), staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this proceeding by service of a notice of hearing and complaint dated September 30, 2010.

Staff alleges that these violations occurred at an official emissions inspection station commonly known as Johanna Transmission Parts, located at 185 East 109th Street, New York, New York, during the period from March 26, 2009 through February 16, 2010. Staff alleges that respondents Jose Garcia and Julio Sosa owned and operated Johanna Transmission, and respondents Garcia, Pena and Sosa performed mandatory annual motor vehicle emission inspections at that facility.

Specifically, Department staff alleges that a device was used to substitute for and simulate the motor vehicle of record on 1,584 separate occasions. Staff contends that, of these inspections, respondent Jose Garcia performed 693 inspections, respondent Jonathan Pena performed 252 inspections, and respondent Julio Sosa performed 639 inspections (see hearing report [Hearing Report] of Administrative Law Judge [ALJ] Edward Buhrmaster, at Finding of Fact no. 29) and that, as a result, 1,578 certificates of inspection were issued based on these simulated inspections.

¹ The notice of hearing and the complaint identify Mr. Pena's first name as "Jonathon," but Mr. Pena spelled his first name as "Jonathan" on his application for a DMV motor vehicle inspector's certification. I have corrected the caption accordingly (see also Hearing Report, at 7, Finding of Fact no. 3).

In its complaint, Department staff alleged that respondents violated:

- (1) 6 NYCRR 217-4.2, by operating an official emissions inspection station using equipment and procedures that are not in compliance with the Department's procedures and standards (see Ex. 1, Complaint ¶¶ 10-14); and
- (2) 6 NYCRR 217-1.4, by issuing emission certificates of inspection to motor vehicles that had not undergone an official emission inspection (id. ¶¶ 15-19).

For these violations, Department staff requests that a civil penalty of seven hundred ninety-two thousand dollars (\$792,000) (id. at Wherefore Clause) be assessed jointly and severally against all respondents (see Hearing Transcript [Tr.] at 83:24-85:2).

None of the respondents was represented by counsel in this proceeding, and no respondent served an answer to the complaint. Respondents Garcia and Sosa appeared at a pre-hearing conference on November 17, 2010 (see Exhibit [Ex.] 3, ¶ 4). Respondents Garcia and Pena personally appeared and provided testimony at the hearing conducted by ALJ Buhrmaster on June 20, 2012. Respondent Sosa did not appear at the hearing.² Although served with the notice of hearing and complaint, respondent Johanna Transmission did not appear at any stage of the proceedings.³ Staff presented the testimony of (i) Lawrence Levine, an employee of the Office of Technical Services and Clean Air within the New York State Department of Motor Vehicles (DMV); and (ii) James Clyne, chief of the light duty vehicle section of the Division of Air Resources within DEC.

Based on a preponderance of the record evidence (see 6 NYCRR 622.11[c]), I adopt the ALJ's hearing report as my decision in this matter, subject to the following comments.

Liability

I concur with the ALJ's determination that Department staff is entitled to a finding of liability as against respondents with respect to the first charge; that is, those respondents operated an official emissions inspection station using equipment or procedures that are not in compliance with DEC procedures or standards, in violation of 6 NYCRR 217-4.2. I agree with the ALJ that Johanna Transmission is liable for all 1,584 violations "because, at the time they occurred, it held the license to 'operate' the official inspection station" (Hearing Report, at 25). I also agree with the ALJ that each respondent-inspector should be held liable for each of the noncompliant inspections he performed (id. at 25-26).⁴

² The ALJ mailed a notice of the hearing date to Mr. Sosa, and presumed that Sosa received the notice, because the mailing was not returned as undeliverable (see Hearing Report, at 23).

³ Staff served the complaint on respondent Johanna Transmission through the New York Secretary of State, pursuant to Business Corporation Law § 306, and through service on respondent Sosa, an owner of the business, and respondent Pena (see Exs. 6, 7, and 7A; see also Hearing Transcript, at 12:24-15:18).

⁴ I note here the ALJ's extended discussion, and ultimate rejection, of claims by respondent Garcia that: (i) he resigned from Johanna Transmission on August 6, 2009 (see Ex. 17); (ii) inspections were performed using his inspector's certificate even though he had resigned from the company and was out of town; (iii) he was never an

With respect to the second cause of action, violations of 6 NYCRR 217-1.4 cannot be found (Hearing Report, at 26-27) for the reasons stated in my prior decisions (see Matter of Jerome Muffler Corp., Order of the Commissioner, May 24, 2013 [Jerome Muffler], at 3 [citing Matter of Geo Auto Repairs, Inc., Order of the Commissioner, March 14, 2012, at 3-4 and other cases]). Accordingly, the alleged violations of 6 NYCRR 217-1.4 are hereby dismissed.

Civil Penalty

Staff requested a penalty of seven hundred ninety-two thousand dollars (\$792,000), representing a penalty of \$500 for each violation. The ALJ noted that, consistent with the penalty range established by ECL 71-2103 for such violations, the maximum penalties would be “in the tens of millions of dollars” (Hearing Report, at 28), an amount significantly higher than the amount that Department staff has requested.

The ALJ reviewed the factors set forth in the Department’s civil penalty policy, including the economic benefit of noncompliance, the gravity of the violations, and culpability (Hearing Report, at 28-30). The ALJ recommended a total civil penalty of two hundred eighty-one thousand six hundred dollars (\$281,600), assessed as follows: (i) respondent Johanna Transmission to be assessed a civil penalty of one hundred forty thousand eight hundred dollars (\$140,800); (ii) respondent Garcia to be assessed a civil penalty of sixty-one thousand six hundred dollars (\$61,600); (iii) respondent Sosa to be assessed a civil penalty of fifty-six thousand eight hundred dollars (\$56,800); and (iv) respondent Pena to be assessed a civil penalty of twenty-two thousand four hundred dollars (\$22,400) (Hearing Report, at 30-31).⁵

Prior decisions have noted the adverse impact of automotive emissions on air quality, and how the use of simulators subverts the regulatory regime designed to address and control these emissions (see e.g. Matter of Gurabo, Decision and Order of the Commissioner, February 16, 2012, at 6-7). Accordingly, substantial penalties are warranted where violations are found.

owner of Johanna Transmission, even though he admitted signing a DMV form requesting that his name be substituted as owner, president, vice president, secretary and treasurer, and signed a letter to DMV stating that the former owner was no longer affiliated with Johanna Transmission (see Exs. 16, 17); (iv) he did not read documents that he signed but simply signed them because his boss (also his father-in-law) told him to sign (see Exs. 16, 17; Tr. 97:6-100:4; 100:23-101:20). I adopt the ALJ’s conclusion that Mr. Garcia’s testimony is inconsistent with the other evidence and lacks credibility. I therefore hold that he is liable for the 693 noncompliant inspections containing his inspector identification number, 3SZ7 (see Hearing Report, at 18-21). I also adopt the ALJ’s conclusion that Mr. Pena was not a credible witness, and did not provide a reasonable explanation for his activities at Johanna Transmission. I therefore hold that he is liable for the 252 noncompliant inspections containing his inspector identification number, 7YS4 (id. at 21-22).

⁵ By recommending penalty amounts for each of the respondents, the ALJ rejected Department staff’s request for joint and several liability (see Hearing Report, at 30). Even though joint and several liability may be imposed in administrative enforcement proceedings, I hold that Department staff’s request for the imposition of joint and several liability in this matter is unsupported. No adequate rationale was provided by Department staff to justify imposing joint and several liability in this proceeding.

I have previously discussed the structure of penalties in administrative enforcement proceedings involving OBD II inspections of motor vehicles using noncompliant equipment and procedures (see e.g. Jerome Muffler; Matter of New Power Muffler Inc., Order of the Commissioner, July 15, 2013 [New Power]; Matter of Autoramo, Inc., Order of the Commissioner, August 13, 2013 [Autoramo]). I have concluded that the facility where the noncompliant inspections occurred should be subject to a substantially higher percentage allocation of the aggregate penalty (see Jerome Muffler, at 4-5; New Power, at 5; Autoramo, at 4-5). With respect to individual inspectors, I allocated the remaining penalty amount based on the number of noncompliant inspections that each inspector conducted. The aggregate penalty amount and the allocation of that amount (a) between the facility and the individual inspectors, and (b) among the inspectors themselves, may be modified based on aggravating or mitigating circumstances as appropriate in each case (see e.g. Jerome Muffler, at 4-5 [discussing examples of mitigating or aggravating factors]).

I concur with the ALJ's determination that Staff's request here is too high, and I further adopt the ALJ's recommendation of a total civil penalty in the amount of two hundred eighty-one thousand six hundred dollars (\$281,600).

In this matter, at the time the violations occurred, Johanna Transmission held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties (see Hearing Report, at 25). Johanna Transmission had the responsibility to ensure that inspections conducted at its facility comported with all legal requirements. However, it allowed simulators to be used in inspections at the facility and thereby failed to comply with applicable law. This subverted the intended environmental and public health benefits of the legal requirements to address and control vehicular air emissions.

In consideration of the penalty range established by ECL 71-2103(1), the impacts of this illegal activity (see Hearing Report at 29), and my decisions in Jerome Muffler, New Power and Autoramo, I am imposing on Johanna Transmission a civil penalty of two hundred twenty-five thousand three hundred dollars (\$225,300).

With respect to individual inspectors, as the number of inspections that an individual performs with noncompliant equipment increases, higher penalties shall be assessed, subject to any aggravating or mitigating circumstances. As evidenced by the appearance of each such respondent's unique inspector's certificate number on DMV inspection records, the inspector-respondents in this case performed a number of improper inspections, as follows: Garcia (693), Sosa (639) and Pena (252).⁶

⁶ See Exs. 10 (Garcia's application for certification as a motor vehicle inspector, reflecting inspector certificate number 3SZ7), 11 (Sosa's application, certificate number FW88), 9 (Pena's application, certificate number 7YS4); see also Exs. 12, 12A, 13, 13A, 14, 15 (DMV records reflecting inspections conducted by respondents); see also Tr., at 80:15-23 (identifying number of illegal inspections performed by each respondent as evidenced by DMV records and inspector certificate numbers).

Mr. Garcia conducted approximately forty-four percent (44%) of the 1,584 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that he performed, I assess a civil penalty against Mr. Garcia in the amount of twenty-four thousand eight hundred dollars (\$24,800).

Mr. Sosa conducted approximately forty percent (40%) of the 1,584 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that he performed, I assess a civil penalty against Mr. Sosa in the amount of twenty-two thousand five hundred dollars (\$22,500).

Mr. Pena conducted approximately sixteen percent (16%) of the 1,584 noncompliant inspections at this facility. Applying the penalty guidelines set forth above, and considering the number of inspections using noncompliant equipment and procedures that he performed, I assess a civil penalty against Mr. Pena in the amount of nine thousand dollars (\$9,000).

In sum, the overall amount of the civil penalty assessed by this order is two hundred eighty-one thousand six hundred dollars (\$281,600), which is substantial in light of the number of noncompliant inspections, and should serve as a deterrent against any future noncompliant activity of this kind.

NOW, THEREFORE, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Respondents Johanna Transmission Parts, Inc., Jose L. Garcia, Julio J. Sosa, and Jonathan Pena are adjudged to have violated 6 NYCRR 217-4.2 by operating an official emissions inspection station using equipment and procedures that are not in compliance with Department procedures and standards. One thousand five hundred eighty-four (1,584) inspections using noncompliant equipment and procedures were performed at Johanna Transmission Parts, Inc., of which Jose L. Garcia performed six hundred ninety-three (693), Julio J. Sosa performed six hundred thirty-nine (639), and Jonathan Pena performed two hundred fifty-two (252).
- II. Department staff's claim that respondents Johanna Transmission Parts, Inc., Jose L. Garcia, Julio J. Sosa, and Jonathan Pena violated 6 NYCRR 217.1-4 is dismissed.
- III. The following penalties are assessed:
 - A. Respondent Johanna Transmission Parts, Inc. is hereby assessed a civil penalty in the amount of two hundred twenty-five thousand three hundred dollars (\$225,300);
 - B. Respondent Jose L. Garcia is hereby assessed a civil penalty in the amount of twenty-four thousand eight hundred dollars (\$24,800);

C. Respondent Julio J. Sosa is hereby assessed a civil penalty in the amount of twenty-two thousand five hundred dollars (\$22,500); and

D. Respondent Jonathan Pena is hereby assessed a civil penalty in the amount of nine thousand dollars (\$9,000).

The penalty for each respondent shall be due and payable within thirty (30) days of the service of this order upon that respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department at the following address:

Blaise Constantakes, Esq.
Assistant Counsel
NYS DEC
Office of General Counsel
625 Broadway, 14th Floor
Albany, New York 12233-1500

- IV. All communications from any respondent to the DEC concerning this order shall be directed to Assistant Counsel Blaise Constantakes, at the address set forth in paragraph III of this order.
- V. The provisions, terms and conditions of this order shall bind respondents Johanna Transmission Parts, Inc., Jose L. Garcia, Julio J. Sosa, and Jonathan Pena, and their agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: August 21, 2013
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NY 12233-1550

In the Matter

- of -

Alleged Violations of Article 19 of the New York
State Environmental Conservation Law and Title 6,
Part 217, of the Official Compilation of Codes, Rules
and Regulations of the State of New York ("NYCRR") by:

**JOHANNA TRANSMISSION PARTS, INC., JOSE L. GARCIA,
JONATHAN PENA AND JULIO J. SOSA,
Respondents**

NYSDEC Case No. CO2-20100615-22

HEARING REPORT

- by -

_____/s/_____
Edward Buhrmaster
Administrative Law Judge

February 13, 2013

PROCEEDINGS

Pursuant to a Notice of Hearing and Complaint, dated September 30, 2010 (Exhibit No. 1), Staff of the Department of Environmental Conservation ("DEC") charged Johanna Transmission Parts, Inc. ("Johanna Transmission Parts"), Jose L. Garcia, Jonathan Pena and Julio J. Sosa (collectively, "the respondents") with violations of Part 217 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), which governs motor vehicle emissions testing.

In a first cause of action, the respondents were charged with violating 6 NYCRR 217-4.2, which states that no person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards. In a second cause of action, they were charged with violating 6 NYCRR 217-1.4 by issuing emission certificates of inspection to motor vehicles that had not undergone an official emissions inspection.

Both violations were alleged to have occurred during the period between March 26, 2009, and February 16, 2010, at Johanna Transmission Parts, an emissions inspection station located at 185 East 109th Street in Manhattan. During this period, DEC Staff alleged, Johanna Transmission Parts was a corporation duly authorized to do business in New York State, owned and operated by respondents Garcia and Sosa. According to DEC Staff, respondents Garcia, Sosa and Pena all worked at the station as certified motor vehicle inspectors.

DEC maintains that, during the period in question, the respondents performed 1,584 mandatory annual motor vehicle emission inspections using a device to substitute for and simulate the motor vehicle of record, and issued 1,578 emission certificates of inspection based on the simulated inspections.

The respondents are not represented by counsel. According to a statement of readiness provided by DEC Staff (Exhibit No. 3), the respondents served no answers to the complaint, though

respondents Garcia and Sosa appeared at a pre-hearing conference held on November 17, 2010.

In its statement of readiness, dated December 22, 2011, DEC Staff requested that DEC's Office of Hearings and Mediation Services schedule this matter for hearing. Upon my assignment to this matter, I issued a hearing notice dated May 9, 2012. As announced in that notice (Exhibit No. 4), the hearing went forward at 10 a.m. on June 20, 2012, at DEC's Region 2 office in Long Island City. DEC Staff appeared by Blaise Constantakes, an attorney in DEC's Office of General Counsel in Albany. Respondents Garcia and Pena appeared on their own behalf, but respondent Sosa did not appear personally or by counsel, and there was no appearance for Johanna Transmission Parts. My hearing notice, addressed to Johanna Transmission Parts at its business address, was returned in its envelope, which was stamped "Return to Sender, Not Deliverable as Addressed, Unable to Forward." (See Exhibit No. 5, notice and envelope.) My hearing notice, addressed to Mr. Sosa at the address for him provided by DEC Staff, was not returned.

Testifying for DEC Staff were Lawrence Levine, a technical analyst in DMV's Office of Technical Services and Clean Air, in Hempstead, and James Clyne, an environmental engineer and section chief in DEC's Division of Air Resources, Bureau of Mobile Sources and Technology Development, in Albany. Respondents Garcia and Pena testified on their own behalf after DEC Staff's witnesses were heard.

The hearing record includes a 140-page transcript as well as various exhibits, all of which were received in evidence. (See exhibit list attached to this report.) The first five exhibits were my own, to show how the matter came to hearing. Exhibits No. 6, 7 and 7-A address service of DEC Staff's notice of hearing and complaint. Exhibits No. 8 - 15 were received as part of DEC Staff's case, and Exhibits No. 16 - 19 were received through the testimony of respondent Garcia.

Under a cover letter of July 17, 2012, I provided copies of the transcript to the parties and afforded them an opportunity to submit proposed corrections. DEC Staff provided a list of

proposed corrections on July 18, 2012. Because neither Mr. Garcia nor Mr. Pena objected to them, I have adopted DEC Staff's corrections as my own, and written them into the transcript.

POSITIONS OF THE PARTIES

Position of DEC Staff

According to DEC Staff, the respondents completed 1,584 motor vehicle inspections using noncompliant equipment and procedures, and issued 1,578 certificates of inspection for these inspections, without testing the vehicles' onboard diagnostic ("OBD") systems, which are designed to monitor the performance of major engine components, including those responsible for controlling emissions. Staff explains that the OBD emissions portion of the vehicle inspection involves the electronic transfer of information from the vehicle to a computerized work station and, from there, to DMV via the Internet or a dedicated phone line. DEC Staff says that, for the inspections at issue here, the respondents did not check the vehicles' OBD systems, but instead simulated the inspections, based on a 15-field profile (or electronic signature) that Staff identified in the inspection data that was transmitted to DMV.

DEC Staff requested a civil penalty of \$792,000, for which all the respondents would be jointly and severally liable. The penalty was not apportioned between the two causes of action, but was calculated on the basis of \$500 per illegal inspection that was performed. DEC Staff considers its penalty formula "justified and reasonable" in light of the importance of the NYVIP program, the federal mandate for the program, and the environmental damage attributable to vehicles that are not regularly inspected.

Position of Respondent Jose Garcia

Jose Garcia asserts that he was the manager of Johanna Transmission Parts from 2004 until his written resignation effective August 6, 2009.

According to Mr. Garcia, Johanna Transmission Parts was jointly owned by Julio Sosa and Braulio Payano until Mr. Sosa, the former station manager, bought Mr. Payano's interest and became the sole owner. Mr. Garcia says that, after Mr. Sosa became the sole owner, he promoted Mr. Garcia from mechanic to manager, first verbally in 2004, and later by paperwork that Mr. Garcia says Mr. Sosa had him sign in or about 2008. Mr. Garcia adds that, with his promotion to manager, he was allowed to perform more inspections than he had performed as a mechanic.

Mr. Garcia says that when he first received his inspector license, Mr. Sosa took the license to his upstairs office for about 10 minutes while Mr. Garcia waited below, then returned with the license to put Mr. Garcia's information in the computer database, which allowed Mr. Garcia to perform OBD inspections. After the information was entered, Mr. Garcia claims, Mr. Sosa returned the license to him. Mr. Garcia claims that, apart from this one time, he always kept his license in his wallet, using it only when he needed it to perform an inspection.

Mr. Garcia says that, while working at Johanna Transmission Parts, Mr. Sosa made him "do things that I shouldn't even do" related to vehicle inspections, but that he felt obligated to do them to keep his job. He claims that he had a dispute with Mr. Sosa about illegalities in the way inspections were performed, but that Mr. Sosa never listened to him. He adds that, at one point, DMV ordered a three-month suspension of both the inspection station license and the licenses of its inspectors.

Because of poor treatment by Mr. Sosa and Mr. Sosa's daughter, to whom Mr. Garcia was married, Mr. Garcia says he decided to resign from Johanna Transmission Parts and leave New York City. He says that he performed his last OBD inspection there on August 5, 2009, and mailed his written resignation to Mr. Sosa the same day. Mr. Garcia says that he told Mr. Sosa that he did not want to work for him anymore. Mr. Garcia says that he left New York City by airplane on August 6, 2009, bound for Orlando, Florida, and came back to New York City on November 16, 2009, at which point he could not find another job. During the time he was in Florida, Mr. Garcia says his license was with him, in his wallet.

Mr. Garcia says that, after he left Johanna Transmission Parts, he and the station were fined \$500 by DMV in relation to an inspection that had been performed on a Sunday, a day he had off. In the context of the DMV hearing in that matter, held in July 2010, Mr. Garcia says that he realized that his license had been used in his absence, something he had previously suspected but had no evidence to prove. Apart from inspections that occurred during the period he was not in New York City, Mr. Garcia claims there were "a lot" of other inspections that he did not perform, but were still credited to his license number. Even so, he says he never saw Mr. Sosa with a copy of his license, and has no proof that Mr. Sosa copied the license during the one time he gave it to him, when the license was first issued.

Mr. Garcia's sworn testimony appears at pages 86 to 124 of the hearing transcript (T: 86 - 124). In conjunction with his testimony, I received a copy of what he said was his resignation letter (Exhibit No. 17) and what he described as travel documentation for his flights to and from Orlando (Exhibit No. 18). The hearing record was held open for documentation related to the DMV hearing that resulted in Mr. Garcia's \$500 fine. That documentation was faxed by Mr. Garcia to Mr. Constantakes for DEC Staff, who then forwarded it to me. Because DEC Staff had no objection to the receipt of the documentation, it was received as Exhibit No. 19, as confirmed in my letter of July 17, 2012.

Position of Respondent Jonathan Pena

Jonathan Pena says that he began working at Johanna Transmission Parts in early August, 2009, at about the time he says Mr. Garcia left, and performed his first inspection there on August 7, 2009. He adds that he stopped working there on or about December 3, 2010, a week before he says DMV revoked the facility's inspection station license.

Mr. Pena says that he obtained his inspector license about two months before he started working at Johanna Transmission Parts. He says that he obtained it at the encouragement of his

uncle, in whose shop he was working. Mr. Pena says that, while waiting for his license, he got into an altercation with his uncle and stopped working for him, and then went to Johanna Transmission Parts after hearing that Julio Sosa, the facility operator, needed someone.

Mr. Pena says that he is not a mechanic, and that, when he started working at Johanna Transmission Parts, he did not really know how to do inspections properly, though he gave Mr. Sosa his license and Mr. Sosa entered it into the inspection equipment's computer. Mr. Pena says that, while working at Johanna Transmission Parts, his duties were primarily to translate for Mr. Sosa, who did not know much English, and to help him write receipts, since Mr. Sosa's handwriting was sloppy.

Mr. Pena says that because he did not really know how to perform inspections himself, he did not work at the shop much. He says that, while there, he kept his inspector license in his pocket most of the time. However, he admits that there were times he left it under the keyboard of the inspection equipment, or in the office, both when he was working at the shop and when he was not there.

Mr. Pena says that, after a few weeks working at Johanna Transmission Parts, he noticed that Mr. Sosa was performing inspections illegally, by "doing things with the cable" in a manner different than his uncle had. However, he adds that he did not speak up because he was getting paid and "didn't really want to hassle the boss like that because supposedly he knew what he was doing."

Mr. Pena claims that, at the time he "got in the shop," he saw Mr. Sosa with a copy of his license. Mr. Pena also claims there were times when he could see that Mr. Sosa had used Mr. Pena's license when Mr. Pena was not there, though he concedes he has no proof of this.

Mr. Pena says that DMV fined himself, Mr. Sosa, Mr. Garcia and Johanna Transmission Parts for allegedly performing illegal inspections. As a result, he adds, the station's inspection license was revoked in December 2010, at which point Mr. Sosa

sold the business. According to Mr. Pena, Mr. Sosa told him he would pay Mr. Pena's fine, but he never did.

Mr. Pena's sworn testimony appears at pages 124 to 133 of the hearing transcript (T: 124 - 133).

FINDINGS OF FACT

1. By application to DMV (Exhibit No. 8), Johanna Transmission Parts, Inc. requested a license to operate as a repair shop and public inspection station at 185 East 109th Street, Manhattan. According to the application, Braulio Payano was the president and secretary of Johanna Transmission Parts, and Julio J. Sosa was the vice president and treasurer, with both men having 50 percent ownership interests in the corporation.

2. DMV approved the application of Johanna Transmission Parts and assigned it a facility number of 7099214. (Levine, T: 38.)

3. Jonathan Pena submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 9) and assigned Mr. Pena a certificate number of 7YS4. (Levine, T: 46.) (Mr. Pena's first name is recorded as "Jonathon" in the notice of hearing and complaint, but this hearing report identifies him as "Jonathan" Pena, consistent with the spelling in his DMV application.)

4. Jose L. Garcia submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 10) and assigned Mr. Garcia a certificate number of 3SZ7. (Levine, T: 46.)

5. Julio J. Sosa submitted an application to DMV for certification as a motor vehicle inspector. DMV approved the application (Exhibit No. 11) and assigned Mr. Sosa a certificate number of FW88. (Levine, T: 46 - 47.)

6. Required by the federal government under the Clean Air Act amendments of 1990 and 40 CFR Part 51, the New York Vehicle Inspection Program ("NYVIP") is a statewide mandatory vehicle emissions inspection program addressed principally to the control of ozone pollution. (Clyne, T: 48 - 52.)

7. Ozone, commonly called smog, is a pervasive pollutant that is highly corrosive, causing damage to human airways and affecting nasal, throat, and lung function. It also poses an environmental threat in terms of crop damage and damage to manmade infrastructure such as buildings and bridges. (Clyne, T: 53 - 54.)

8. The Clean Air Act Amendments of 1990 required vehicle inspection and maintenance ("I&M") programs in those areas of the country that did not comply with federal ozone standards. At that time, the nine-county New York City metropolitan area was in severe non-attainment with regard to ozone, and other parts of the state also did not meet the applicable ozone standard. Therefore, DEC and DMV proposed an I&M program in a State Implementation Plan ("SIP") which was reviewed and approved by the US Environmental Protection Agency ("EPA"). That program currently consists of NYVIP, which applies to light-duty vehicles in New York State. (Clyne, T: 49 - 53.)

9. Motor vehicles emit hydrocarbons as well as oxides of nitrogen, which contribute significantly to the formation of smog, especially on hot, sunny days. Over time, vehicles' emission systems degrade, and the mandatory inspections under NYVIP are intended to determine whether particular vehicles need repairs. (Clyne, T: 54 - 55.)

10. NYVIP inspections are performed at facilities licensed by DMV. To become licensed as an inspection facility, one submits an application to DMV. That application includes information about the facility's ownership and location. If the application is complete, DMV sends an inspector to the facility to ensure the accuracy of information supplied by the applicant. The inspector also checks for compliance with requirements addressing adequate space to conduct inspections, proper

signage, and possession of the required inspection equipment and tools. (Levine, T: 22 - 23.)

11. If the application is approved, an order is taken for inspection certifications (also known as inspection "stickers") and a wall-mounted license is issued to the facility. Inspections may begin after the bar code on the inspection station license, and the bar codes of the facility's inspectors, are scanned into the NYVIP inspection equipment. (Levine, T: 23 - 24; Clyne, T: 57.)

12. The NYVIP inspection equipment is purchased from and supplied by a single vendor, SGS Testcom, which also provides a manual with information about the equipment's use. (Levine, T: 25 - 26.)

13. The inspection equipment went through extensive testing before it was approved for use, and both DEC and DMV independently review software updates which occur approximately every year. (Clyne, T: 63 - 64.)

14. Applicants seeking certification as a motor vehicle inspector must attend a clinic conducted by DMV. (Levine, T: 27.)

15. The clinic includes instruction about the inspector's obligations, including the necessity of safeguarding the bar-coded card which serves as a license, and allows for use of the NYVIP inspection equipment. Applicants are advised not to duplicate their cards, share them with other inspectors, or allow other people to use them. (Levine, T: 28.)

16. Applicants are also told how to perform vehicle safety checks and emissions inspections, including OBD testing. (T: 28 - 29.)

17. Applicants must pass two multiple choice tests before they are able to perform actual inspections. The first test is administered at the clinic, and the second on the inspection station's NYVIP equipment. (Levine, T: 29 - 31; Clyne: 57.)

18. Second-generation OBD (also known as OBD II) is an emissions inspection required by EPA for certain model-year 1996 and newer vehicles. (Levine, T: 32; Clyne, T: 55 - 56, 58.)

19. For such vehicles, the inspection begins with the inspector scanning his or her certificate into the NYVIP equipment, and then obtaining information about the vehicle's year, make and model. (Levine, T: 33.)

20. After that, as part of the vehicle's safety inspection, the inspector makes pass/fail entries for various pieces of equipment. (Levine, T: 33.)

21. The inspector then makes a visual check for the presence of required emission control devices, making pass/fail entries for them as well. (Levine, T: 33.)

22. The inspector next checks the malfunction indicator light (or "MIL", also known as the check engine light), which is located on the vehicle dashboard. The light should illuminate when the key is turned on but the engine is not running, and should extinguish when the vehicle is started and the engine is running. (Levine, T: 34.)

23. After checking the MIL, the inspector is prompted by the test equipment to make a connection between the NYVIP tool link and the diagnostic link connector which is located beneath the vehicle's dashboard. Once this connection is made, the NYVIP equipment prompts the vehicle's computer, or power control module ("PCM"), to send its information to the NYVIP equipment as part of the OBD II inspection. (Levine, T: 34 - 35.)

24. The transmitted information is then analyzed by the software in the NYVIP equipment and evaluated on three criteria. The first is whether the MIL is being commanded "on" by the vehicle's PCM, since, if it is, that would result in a failure of the inspection. The second is whether there are diagnostic trouble codes stored in the vehicle's computer, as these would indicate an emissions system malfunction. The third is whether there are a sufficient number of non-continuous emission readiness monitors set to "ready". (The number of monitors that

are permitted to be "not ready" varies depending on the vehicle's model and year.) (Levine, T: 35 - 36; Clyne, T: 61.)

25. If the vehicle passes the NYVIP inspection, the test equipment prompts the inspector to scan the bar code on the next sticker available for issuance. The equipment also generates a vehicle inspection receipt containing the information about the passing inspection. (Levine, T: 36; Clyne: T: 61 - 62.)

26. If the vehicle fails the inspection, the test equipment generates a vehicle inspection receipt which serves as a rejection notice. The receipt specifies what caused the vehicle to fail the inspection, and whether the failure relates to a safety equipment item, an emissions control device item, or any of three criteria related to the OBD II data communication. (Levine, T: 36.)

27. Upon completion of the NYVIP inspection and issuance of the inspection sticker, the inspection results are communicated to DMV in a matter of seconds, with Testcom as data intermediary. The results are transmitted from the station's NYVIP equipment via phone line or broad band connection. (Levine, T: 37; Clyne, T: 62.)

28. Between March 26, 2009, and February 16, 2010, 1,584 annual motor vehicle inspections were performed at Johanna Transmission Parts using a device to substitute for and simulate the motor vehicle of record. (Clyne, T: 78.)

29. Of these 1,584 inspections, Mr. Garcia performed 693, Mr. Sosa performed 639, and Mr. Pena performed 252. (Clyne, T: 80.)

DISCUSSION

This matter involves charges that Johanna Transmission Parts and its three inspectors did not check the OBD II systems as part of 1,584 motor vehicle inspections conducted during the period between March 26, 2009, and February 16, 2010. In essence, DEC Staff alleges that the OBD II inspections for these

vehicles were simulated by use of non-compliant equipment and procedures, and that 1,578 emissions certificates resulting from these inspections were improperly issued.

On behalf of DEC Staff, Mr. Clyne explained that OBD testing is the cornerstone of NYVIP, a statewide vehicle emissions inspection program required by the federal Clean Air Act amendments of 1990 as well by state and federal regulation. (T: 49.) As Mr. Clyne testified, the 1990 Clean Air Act amendments require motor vehicle inspection programs in areas of the country that do not comply with federal ozone and carbon monoxide standards as established by EPA. In 1990, the nine-county New York City metropolitan area was in "severe non-attainment" with regard to the ozone standard, and some upstate areas were also non-compliant. (Clyne, T: 50 - 51.)

OBD II inspections occur at stations, like Johanna Transmission Parts, that are licensed by DMV. Each station purchases the test equipment, a NYVIP work station, from Testcom, the state's NYVIP contractor. The station operator scans the station's license into the NYVIP work station, so that the inspection station's identification number, shown on the license, appears in the data for each inspection. Work stations were subject to testing by DMV and DEC, independent of Testcom, before the NYVIP program was rolled out, and are subject to periodic reviews when software is updated. (Clyne, T: 56.)

According to Mr. Clyne, OBD testing provides a greater benefit than annual tailpipe testing. That is because OBD testing allows the vehicle to check itself each time it is in operation, and, by means of the MIL, to notify the motorist whenever a potential problem exists, so it can be corrected promptly by a qualified repair technician. (Clyne, T: 60.)

Locating the Simulator Signature

According to Mr. Clyne, in or about September 2008, DMV informed DEC that it believed a simulator was being used at inspection stations in the downstate, nine-county New York City metropolitan area. (T: 64.) A simulator, Mr. Clyne explained, is a device that can be used to mimic a vehicle; in fact, DEC

and DMV both use simulators for the testing of software. (T: 64 - 65.)

Mr. Clyne said that DMV's belief was based on highly repetitive, unrealistic readings of revolutions per minute ("RPM") that were being recorded for vehicle engines. During an OBD II inspection, the NYVIP work station makes an electronic request to the vehicle to report RPM during the "key on and engine running" check of the vehicle's malfunction indicator light (in other words, when the engine is operating but the vehicle is parked). According to Mr. Clyne, a typical range of RPM readings at that point in the inspection would be from 200 to 300 on the low side, to 1,100 to 1,200 on the very high side. However, DMV field employees were noting RPM readings of 6,138, which recurred from inspection to inspection. (Clyne, T: 65.)

With the RPM information, DEC Staff performed a query of its database for the New York metropolitan area and found that these repetitive, unrealistic readings occurred at approximately five inspection stations. Suspicious that the readings were attributable to a simulator, DEC and DMV sought the assistance of the New York State Attorney General's office, which undertook an undercover operation from February 2009 until the early summer of that year. (Clyne, T: 65 - 66.) From that investigation, DEC found that RPM readings alone were not sufficient to pinpoint simulator use, but that a particular simulator could be identified on the basis of entries in 15 specific data fields generated during the inspection process. Eventually, a simulator was obtained from one of the five inspection stations that were initially identified, and that simulator generated an electronic profile (or signature) that matched one shown in the inspection data of 44 stations, including Johanna Transmission Parts. (Clyne, T: 67 - 69.)

According to Mr. Clyne, the simulator profile appeared in the statewide NYVIP inspection data during the period between March 2008 and July 2010. He said that his staff looked at the data for the approximately 18.5 million inspections conducted throughout New York State at more than 11,000 stations between September 1, 2004, and February 29, 2008, and found no matches to the 15-field profile, which indicated to DEC that no actual

vehicle would generate the simulator profile. Similarly, for the period since July 2010, there have been no matches to the profile. Mr. Clyne testified that if a real vehicle generated the simulator profile, the profile would be seen year after year when that vehicle was inspected, and there would be many vehicles with the same profile. (T: 68 - 69.)

As part of its case, DEC Staff retrieved from DMV certified abstracts of Johanna Transmission Parts' inspection data for the period between May 27, 2005, and March 16, 2010. (The abstracts were received as Exhibits No. 12-A and 13-A, and their associated certifications, by DMV records access officer Brad Hanscom, were received as Exhibits No. 12 and 13.)

As Mr. Clyne explained, these abstracts contain columns of data related to the motor vehicle, the inspection station and the inspector, and the OBD II inspections themselves, including the time and date that each one was performed. (T: 70 - 72.) Mr. Clyne delineated the simulator profile on the basis of the following 15 column headings, and the data entries (shown here in quotation marks) beneath them:

PCM ID1	"10"
PCM ID2	"0"
PID CNT 1	"11"
PIC CNT 2	"0" (should read as PID CNT 2) (T: 76)
RR COMP COMPONENTS	"R"
RR MISFIRE	"R"
RR FUEL CONTROL	"R"
RR CATALYST	"R"
RR O2 SENSOR	"R"
RR EGR	"R"
RR EVAP EMISS	"R"
RR HEATED CATA	"U"
RR O2 SENSOR HEAT	"R"
RR SEC AIR INJ	"U"
RR AC	"U"

(Clyne, T: 76 - 78.)

The inspections exhibiting these entries under the 15 column headings are highlighted in orange on Exhibits No. 14 and

15, which are otherwise the same as Exhibits No. 12-A and 13-A, respectively. For each highlighted inspection, Mr. Clyne testified that the OBD system of the vehicle was not checked, and that the NYVIP work station was plugged into a simulator instead. (Clyne, T: 80 - 81.)

Mr. Clyne was able to match the simulated inspections to Johanna Transmission Parts and its inspectors through the numbers assigned by DMV to the inspection station license and to the inspectors' certificates. Johanna Transmission Parts' facility number - - 7099214 - - appears in relation to each inspection under the heading "DMV FACILITY NUM" on the data abstracts. (Clyne, T: 78.) Also, the certified inspector numbers assigned to Mr. Garcia, Mr. Sosa and Mr. Pena appear under the heading "CI NUM" for those inspections highlighted in orange, allowing one to apportion the violations among them. (Clyne, T: 80.)

Mr. Clyne provided the example of a 2005 Honda Accord that was subject to two inspections at Johanna Transmission Parts, the first proper and the second simulated. (Clyne, T: 81 - 82.) For the first inspection, at "1511" (3:11 p.m.) on May 10, 2007, the reported vehicle identification number for the power train control module (or "PCM VIN," as it appears on the data abstract) matches the reported DMV vehicle identification number ("DMV VIN"), and the inspection data is representative of the vehicle as described. (The first inspection is reported on page 39 of Exhibit No. 14.)

For the second inspection, at "1344" (1:44 p.m.) on June 11, 2009, the reported "DMV VIN" is the same, and the vehicle is again described as a 2005 Honda Accord; however, no "PCM VIN" is reported, and the inspection data shows the 15 data fields constituting the simulator signature, rather than the electronic profile one would expect had a legitimate inspection been performed. (The second inspection is reported on page 95 of Exhibit No. 14.)

Consistent with DEC Staff's charges, Mr. Clyne testified that 1,584 simulated inspections were performed by the respondents, and that 1,578 emissions stickers were issued as a

result of these simulated inspections. (Clyne, T: 78.) He also testified that 693 of these inspections were performed by Mr. Garcia, 639 performed by Mr. Sosa, and 252 were performed by Mr. Pena. (Clyne, T: 80.)

Remarkably, Mr. Garcia and Mr. Pena, the only respondents attending the hearing, did nothing to impeach Mr. Clyne's testimony about the identification and significance of the simulator profile. Once Mr. Clyne's direct testimony was completed, neither respondent had any questions for him. (T: 83.) Also, they had no questions for Mr. Levine, who explained the inspector training process. (T: 83.)

There is no question that the inspections documented in Exhibits No. 12-A and 13-A (and again in Exhibits No. 14 and 15) were performed at Johanna Transmission Parts, because these exhibits were developed by sorting the state's inspection database for that station's DMV-assigned facility number (7099214), which appears for each entry in the fourth column from the left. Furthermore, that the inspections were performed by Mr. Garcia, Mr. Sosa and Mr. Pena is confirmed by the appearance of their inspector numbers in the seventh column from the left.

Respondents' Claims

Mr. Sosa did not appear at the hearing, and there is no evidence that he did not perform the 639 non-compliant inspections that are attributed to him in the data abstracts. On the other hand, Mr. Garcia and Mr. Pena did appear, and both suggested that Mr. Sosa also performed some of the inspections attributed to them. This, they surmised, could have been done by his use of their inspector cards (in the case of Mr. Pena) or copies of those cards that Mr. Sosa, who they called their employer, would have made when they presented those cards to him.

I find no credible evidence that Mr. Sosa did, in fact, perform any of the simulated inspections attributed to Mr. Garcia and Mr. Pena in the data abstracts. First, neither Mr. Garcia nor Mr. Pena said they directly observed Mr. Sosa using

their inspector cards, or copies thereof, to perform inspections himself. Second, the simulated inspections attributed to Mr. Sosa occur throughout the period of violations, close in time to those attributed to Mr. Garcia and Mr. Pena, which suggests no attempt to conceal his own wrongful conduct. Third, as discussed below, key aspects of Mr. Garcia's and Mr. Pena's testimony were not believable and, in Mr. Garcia's case, were contradicted by other evidence he presented.

To commence an inspection, the inspector must scan the bar code on his identification card into the NYVIP equipment, as explained by Mr. Levine (T: 33) and discussed in the NYVIP vehicle inspection system operators instruction manual, of which I took official notice at the hearing (T: 26). The record contains no evidence that scanning a copy of the card accomplishes the same purpose. However, even if it does, there is no evidence that this practice was employed at Johanna Transmission Parts.

Mr. Garcia and Mr. Pena both testified that, before conducting any inspections at Johanna Transmission Parts, they had to present their inspector certificates to Mr. Sosa, which might have afforded him an opportunity to copy them. In fact, DMV's regulations state that a person who has been issued a motor vehicle inspector's certificate must present that certificate to his current employer and to any subsequent employer, for the purpose of recording the certificate number on the station's NYVIP equipment. [15 NYCRR 79.17(b)(5).] That is what Mr. Sosa accomplished when he took their cards, as Garcia and Mr. Pena concede. Therefore, the demand for the cards was not, in itself, unusual or suspicious.

Neither Mr. Garcia nor Mr. Pena claims to have seen Mr. Sosa copy their inspector cards. Also, Mr. Garcia says he never saw Mr. Sosa with a copy of his card, and claims to have kept the original with him at all times. Mr. Pena says there was one time that he did see Mr. Sosa with a paper copy of his license. However, when I asked him when he saw that, he said only that it was "at the time that I got in the shop," not in the context of an actual inspection. (T: 126 - 127.)

Remarkably, Mr. Garcia and Mr. Pena did not deny performing any simulated inspections themselves. They argued instead that they were not responsible for all the simulated inspections attributed to each of them in the data abstracts. They claimed that some of these inspections occurred at times they were not working at Johanna Transmission Parts, but neither specified how many.

The simulated inspections attributed to Mr. Garcia in the data abstracts span the entire period of the alleged violations (i.e., from March 26, 2009, to February 16, 2010). However, he testified that he performed his last inspection at Johanna Transmission Parts on August 5, 2009, then resigned and left New York City for Orlando the following day, not returning for more than three months. To corroborate the account of his travel, he presented documentation (received as Exhibit No. 18) which included round trip travel itineraries and copies of boarding pass stubs for the outbound flights on August 6, 2009.

Because Mr. Garcia's certificate number appears regularly in relation to simulated inspections performed after his alleged resignation, including the period he says he was not in New York City, there is a question whether he performed these simulations, or whether they were performed by someone else using a copy of his certificate, since Mr. Garcia says he took his certificate with him when he left. Mr. Garcia said it was not until 2010, after he left Johanna Transmission Parts, that he realized that his license was being used there when he was not present. The realization, he added, came to him at a DMV hearing on a separate violation that had occurred on a Sunday, a day of the week he did not work. Mr. Garcia said that he had to pay a \$500 fine for the violation, and that Johanna Transmission Parts was fined as well.

Because Mr. Garcia said he had left the hearing documentation at home, I held the record open for him to submit it. Mr. Garcia subsequently faxed the documentation to Mr. Constantakes, who then forwarded it to me. Because DEC Staff did not object to me receiving the documents, they were received as Exhibit No. 19.

The documentation - consisting of a hearing notice, a charge sheet, and notices to Mr. Garcia confirming the \$500 civil penalty as well as revocation of his inspector license - indicate that Mr. Garcia was found to have violated Vehicle and Traffic Law Section 303(e)(3) for fraud, deceit or misrepresentation in the conduct of vehicle inspections at Johanna Transmission Parts, which is identified on the charge sheet by its facility number, 7099214. More precisely, he was found to have entered into the official inspection record via the NYVIP unit that a 2004 Chevrolet had passed an OBD II emissions test when, in fact, he had used electronic data from an unknown vehicle in order to produce passing results and the subsequent issuance of an inspection certificate. This practice - commonly known as "clean scanning" - is illegal, but does not involve use of a simulator for the same purpose.

Remarkably, the charge sheet indicates that the violation occurred on Sunday, February 28, 2010, about seven months after Mr. Garcia says he stopped working at Johanna Transmission Parts. Whatever Mr. Garcia realized at the hearing on this charge, there is no indication that he communicated it to the hearing officer or, if he did, that he was believed. The fact that he was fined and his license revoked for a violation that occurred at the facility at 9:57 a.m. on February 28, 2010, is inconsistent with his testimony that he resigned from the facility and performed his last inspection there on August 5, 2009. However, it is consistent with the information in the data abstracts produced by DEC Staff, which indicate that Mr. Garcia continued performing inspections at Johanna Transmission Parts until February 28, 2010, which, as it turns out, is the last day his certificate number appears, though the abstracts continue with inspections up until March 16, 2010, for which the certificate numbers assigned to Mr. Sosa and Mr. Pena are the only ones that appear. The inspection of the 2004 Chevrolet at 9:57 a.m. on February 28, 2010, appears in the data abstract, but because a simulator was not used, it is not highlighted and not part of this pending matter.

Because I cannot reconcile Mr. Garcia's testimony about his resignation with the documentation that he himself provided on the DMV matter, I do not credit his argument that he resigned

effective August 6, 2009, and therefore should not be held accountable for violations attributed to him after that date. Also, I note that for August 5, 2009, the date Mr. Garcia says he did his last inspection, there are eight inspections recorded in the data abstracts, all of them simulated, four by Mr. Garcia and four by Mr. Sosa. This tends to confirm that Mr. Garcia was involved in the simulator's use and not merely a witness to illegalities by Mr. Sosa, of which he spoke at the hearing.

The record also includes evidence, produced by DEC Staff, that Mr. Garcia owned and was president of Johanna Transmission Parts, not merely an employee of the facility. On February 15, 2010, DEC Staff issued a notice of violation in this matter to Braulio Payano, who, in addition to Mr. Sosa, was identified as a half-owner of Johanna Transmission Parts in its application to become an inspection station. In a response to this notice, Mr. Payano wrote that he had sold the business to Mr. Garcia, and had informed DMV of this by a form submitted on March 8, 2006. Though Mr. Payano did not appear at or testify at the hearing, his letter, with supporting documentation, was offered by DEC Staff and received, without objection, as Exhibit No. 16.

That documentation includes items that Mr. Garcia admits contain his signature. One is the DMV form requesting an amendment of Johanna Transmission Parts' certificate to substitute Mr. Garcia for Mr. Payano as owner, president, vice president, secretary and treasurer. Mr. Garcia acknowledged his signature in the section of the form adding him as an owner and officer of Johanna Transmission Parts, but added that the other entries on the form were not in his handwriting. Incredibly, he said he did not read the form before signing it, and that the entries on it must have been added later, because the page he signed was blank. Mr. Garcia said the form was presented to him while he was in the midst of tuning up a van, and that it was handed to him by Mr. Sosa, not Mr. Payano. He said he signed it at Mr. Sosa's direction, "to promote me as manager and to start paying my taxes," even though the form addresses neither of these things. (T: 98.)

Mr. Garcia also acknowledged his signature on a letter dated April 4, 2008, informing DMV that Mr. Payano was no longer

part of Johanna Transmission Parts, and requesting that Mr. Garcia be contacted should DMV need additional information on this point. Mr. Garcia denied preparing the letter but admitted signing it, again at the direction of Mr. Sosa. Mr. Garcia said that he questioned Mr. Sosa about the signature line, which identified Mr. Garcia as president of Johanna Transmission Parts, and that Mr. Sosa told him it was "nothing, it's only a corporation name, it doesn't mean anything, it could be management." (T: 106 - 107.) Mr. Garcia then added, unconvincingly, that he signed the paperwork "just so I could get my taxes paid and feel better that I am becoming the manager of the company, at least, because that's a good thing on a resume." (T: 107.)

Mr. Garcia testified that when he signed the documentation included in Exhibit No. 18, he did not review it first because he trusted Mr. Sosa, who was then his father-in-law, that it was related to his promotion from mechanic to manager, despite no indication of that on the face of the documents. Though the request for business amendment that he signed indicates a transfer of Mr. Payano's ownership interest to Mr. Garcia, Mr. Garcia testified that Mr. Payano actually transferred that interest to Mr. Sosa, and that Mr. Sosa, not Mr. Garcia, was the facility owner when he signed the form. DEC Staff could not confirm whether the completed form was received by DMV, though the fact that the notice of violation was issued to Mr. Payano suggests that it was not.

Because Mr. Garcia did not provide a reasonable explanation for his signatures on the documentation produced by DEC Staff, I find his testimony in that regard not credible.

I also find that Mr. Pena did not provide a reasonable, and therefore credible, explanation for his activities at Johanna Transmission Parts, though the data abstracts confirm his testimony that he did his first inspection there on August 7, 2009. According to the data abstracts, that inspection, of a 2001 Lincoln Town Car at 12:11 p.m., was simulated, as were three of four other inspections he performed that day.

Mr. Pena sought to distance himself from the violations in this matter, claiming he did not really know how to perform inspections himself. I find this difficult to reconcile with the inspector training he would have received, and the tests he would have had to pass - one at the end of the training clinic, and the other on the NYVIP equipment itself - before he could do inspections on his own.

Mr. Pena also claimed he did not work much at the station, and that when he was there his duties were mostly to translate and write receipts for Mr. Sosa. In fact, the data abstracts indicate that he was at the station and performed inspections - both simulated and not simulated - on a regular basis from August 7, 2009 until February 16, 2010, contemporaneously with Mr. Garcia and Mr. Sosa, though Mr. Pena testified that Mr. Garcia had left the station before he started there.

Mr. Pena suggested that Mr. Sosa, using Mr. Pena's certificate or a copy of it, may have performed simulations that were attributed to Mr. Pena in the data abstracts. Mr. Pena testified that there were times when he could see that Mr. Sosa used his license when Mr. Pena was not there, though he conceded he had no proof of it. Mr. Pena also said there were times he left his certificate under the keyboard of the NYVIP machine, or in the inspection station's office, both when he was at the station and away from it, which would have afforded Mr. Sosa an opportunity to use it himself.

Consistent with a requirement at 15 NYCRR 79.17(c)(2), certified motor vehicle inspectors are trained to not leave their certificates unattended, so it is not credible that Mr. Pena, having received the training, would make his available to Mr. Sosa, especially given his stated concerns about how Mr. Sosa performed inspections and the perceived illegality of those inspections.

In summary, because I did not find Mr. Garcia and Mr. Pena to be credible witnesses, I am discounting their testimony and, for the purpose of my findings, relying on the information contained in the data abstracts presented by DEC Staff, which indicate who did each of the simulated inspections.

Non-appearance by Johanna Transmission Parts and Julio Sosa

As noted above, there was no appearance at the hearing by or on behalf of Johanna Transmission Parts or Julio Sosa. According to 6 NYCRR 622.15(a), a respondent's failure to file a timely answer or, even if a timely answer has been filed, failure to appear at a scheduled hearing or pre-hearing conference constitutes a default and a waiver of that respondent's right to a hearing.

According to DEC Staff's statement of readiness (Exhibit No. 3), Johanna Transmission Parts did not file an answer and did not appear at the pre-hearing conference announced in its notice of hearing. That hearing notice was served on October 4, 2010, by delivery to the New York State Department of State for transmittal to Johanna Transmission Parts at its listed address for service of process: 185 East 109th Street, New York, New York, 10029. (See Exhibit No. 6, NYS Dept. of State receipt for service.) The hearing notice was also personally served at that address on Mr. Sosa and Mr. Pena, according to affidavits of a DEC environmental conservation officer (received as Exhibits No. 7 and 7-A.)

Because Johanna Transmission Parts did not answer the complaint attached to DEC Staff's hearing notice, did not appear at the pre-hearing conference announced in that hearing notice, and did not appear at the hearing (notice of which I sent to Johanna Transmission Parts at the address on file with the NYS Dept. of State), Johanna Transmission Parts may be deemed to have defaulted and waived its right to a hearing.

Likewise, Mr. Sosa, though he did appear at the pre-hearing conference scheduled by DEC Staff, may be deemed to have defaulted by not appearing at the hearing in this matter. I sent notice of the hearing to Mr. Sosa at the address for him provided by DEC Staff with its statement of readiness: 1480 Popham Avenue #1E, Bronx, New York, 10453. Because my hearing notice, sent to Mr. Sosa by regular mail, was not returned, I presume that he received it.

Because my hearing notice addressed to Johanna Transmission Parts was returned to me by the postal service marked "Not Deliverable as Addressed, Unable to Forward," I asked Mr. Constantakes at the hearing if he knew whether Johanna Transmission Parts was still operating at the address I had used, and he replied that he was not sure. (T: 5.) During completion of this hearing report, I verified that the address is still used by the NYS Dept. of State's Division of Corporations for mailing of process, though the corporation itself is listed on that agency's website as "inactive" by virtue of dissolution by proclamation/annulment of authority on October 27, 2010, a date subsequent to this proceeding's commencement.

At the conclusion of the hearing, I asked Mr. Constantakes if he was seeking a default judgment with regard to the respondents who did not appear at the hearing, and he replied that he was not, and that he was instead seeking a judgment on the merits with regard to all the named respondents. (T: 135 - 136.)

Liability for Violations

DEC has charged the respondents with violations of both 6 NYCRR 217-4.2 (first cause of action) and 217-1.4 (second cause of action). I find that the violations of 6 NYCRR 217-4.2 have been established as to each respondent, but do not find additional violations of 6 NYCRR 217-1.4. Furthermore, I find that all the violations of 6 NYCRR 217-4.2 may be attributed both to Johanna Transmission Parts as the licensed inspection station, and to Mr. Garcia, Mr. Pena and Mr. Sosa as the certified inspectors who actually performed the inspections.

- Violation of 6 NYCRR 217-4.2

According to 6 NYCRR 217-4.2, "[n]o person shall operate an official emissions inspection station using equipment and/or procedures that are not in compliance with Department [DEC] procedures and/or standards." For purposes of this regulation, "official emissions inspection station" means "[a] facility that has obtained a license from the Commissioner of Motor Vehicles,

under Section 303 of the VTL [Vehicle and Traffic Law], to perform motor vehicle emissions inspections in New York State" [6 NYCRR 217-1.1(k)]. VTL 303(a)(1) explains that a license to operate an official inspection station shall be issued only upon written application to DMV, after DMV is satisfied that the station is properly equipped and has competent personnel to make inspections, and that such inspections will be properly conducted.

I find that 6 NYCRR 217-4.2 was violated on 1,584 separate occasions by use of a simulator to perform OBD emissions inspections. Simulators have no place in the administration of actual emissions tests, and their use is not consistent with emissions inspection procedure set out at 6 NYCRR 217-1.3(a)(3)(i) and (ii), which requires testing of a vehicle's OBD system to ensure that it functions as designed and completes diagnostic routines for necessary supported emission control systems. If the inspector plugs the NYVIP test equipment into a simulator in lieu of the vehicle that has been presented, it cannot be determined whether the vehicle would pass the OBD inspection.

Johanna Transmission Parts is liable for all 1,584 violations because, at the time they occurred, it held the license to "operate" the official inspection station. Pursuant to 15 NYCRR 79.8(b), the official inspection station licensee "is responsible for all inspection activities conducted at the inspection station," and is not relieved of that responsibility by the inspectors' own duties, which include performing inspections in a thorough manner. [See 15 NYCRR 79.17(b)(1) and (c).] As a private corporation, Johanna Transmission Parts also falls within the definition of "person" at 6 NYCRR 200.1(bi).

Each inspector is also liable for the violations attributable to his own non-compliant inspections. This liability is due to the connection between the official inspection station, which is licensed under VTL 303, and the inspectors who work at the station, who are certified under VTL 304-a. Pursuant to 15 NYCRR 79.8(b)(2), the specific duties of the inspection station include employing at all times, at least one full-time employee who is a certified motor vehicle

inspector to perform the services required under DMV's regulations. In this sense, the inspection station operates through the services that its inspectors provide.

In summary, each inspector should share liability with the inspection station for the OBD inspections he performed using a device to simulate the vehicle that had been presented. However, there is no basis for holding the inspectors liable for each other's non-compliant inspections.

In the third paragraph of the complaint, DEC Staff says that Mr. Garcia owned and operated Johanna Transmission Parts from March 26, 2009, to February 16, 2010, the period of the alleged violations. However, in the fourth paragraph of the complaint, DEC Staff says that Mr. Sosa owned and operated Johanna Transmission Parts during this same period.

In fact, Johanna Transmission Parts held the license to operate the inspection station; therefore, it was the station operator and, as such, is responsible for all the charged violations. As a corporation, Johanna Transmission Parts exists independent of its ownership, as a separate legal entity. DEC Staff provided no basis for establishing liability based on ownership interest in the corporation. Also, the record contains conflicting evidence on this issue. According to Mr. Payano's correspondence, Jose Garcia owned the station during the period of the alleged violations. However, Mr. Garcia testified that during the period of his employment there, Mr. Sosa owned the station.

- Violation of 6 NYCRR 217-1.4

In a separate cause of action, the respondents are charged with violations of 6 NYCRR 217-1.4. According to this provision: "No official inspection station as defined by 15 NYCRR 79.1(g) may issue an emission certificate of inspection, as defined by 15 NYCRR 79.1(a), for a motor vehicle, unless that motor vehicle meets the requirements of section 217-1.3 of this Subpart."

Violations of 6 NYCRR 217-1.4 cannot be found because DEC offered no evidence that Johanna Transmission Parts was an official inspection station "as defined by 15 NYCRR 79.1(g)." Section 79.1(g) defines an "official safety inspection station" as one "which has been issued a license by the Commissioner of Motor Vehicles pursuant to Section 303 of the Vehicle and Traffic Law, to conduct safety inspections of motor vehicles exempt from the emissions inspection requirement" (emphasis added). There was no evidence that Johanna Transmission Parts had such a license; the only evidence was that it was licensed, pursuant to VTL Section 303, to inspect vehicles that are subject to emissions inspections. Also, there was no evidence that the respondents conducted improper safety inspections, or violated any laws or regulations in this regard; the only proof was with respect to emissions (OBD) inspections not being performed consistent with DEC procedure.

In paragraph 18 of its complaint, DEC Staff alleges that the respondents violated 6 NYCRR 217-1.4 by issuing emission certificates of inspections to motor vehicles which had not undergone an official emission inspection. However, an official safety inspection station, as defined by 15 NYCRR 79.1(g), does not issue emission certificates of inspection, because the vehicles it inspects are exempt from the emissions inspection requirement.

In summary, because there is no evidence that Johanna Transmission Parts was an official inspection station "as defined by 15 NYCRR 79.1(g)" (i.e., an official safety inspection station), the second cause of action must be dismissed, consistent with the dismissal of similar causes of action in matters involving other stations where simulators were used. (See, for instance, Matter of Geo Auto Repairs, Order of the Commissioner, March 14, 2012, at 3 and 4.)

Civil Penalties

In its complaint, DEC Staff proposed that the Commissioner assess a civil penalty of \$792,000 in this matter. Staff has not apportioned the penalty between the two causes of action, or among the respondents. According to DEC Staff, it is meant to

apply to the respondents as a whole, meaning they would be jointly and severally liable for it.

Civil penalties are authorized pursuant to ECL 71-2103(1). At the times the violations in this matter occurred, that section stated that any person who violated any provision of ECL Article 19 (the Air Pollution Control Act) or any regulation promulgated pursuant thereto, such as 6 NYCRR 217-4.2, would be liable, in the case of a first violation, for a penalty not less than \$375 nor more than \$15,000, and in the case of a second or any further violation, a penalty not to exceed \$22,500.

I agree with DEC Staff that each illegal inspection constitutes a separate violation of DEC regulation. Each simulated inspection was a discrete event occurring on a specific date and time, and, by itself, constituted operation of the emissions inspection station in a manner that did not comply with DEC procedure.

Consistent with ECL 71-2103(1), the violations in this matter could subject the respondents to penalties in the tens of millions of dollars. However, according to DEC's civil penalty policy ("CPP", DEE-1, dated June 20, 1990), the computation of the maximum civil penalty for all provable violations is only the starting point of any penalty calculation (CPP Section IV.B); it merely sets the ceiling for any penalty that is ultimately assessed.

DEC Staff is actually seeking \$500 per simulated inspection, calling that a "fair, reasonable and just" penalty formula that accounts for both the importance of NYVIP as a federally mandated program and the seriousness of protecting the New York metropolitan area from ozone pollution (T: 135).

Pursuant to DEC's civil penalty policy, an appropriate civil penalty is derived from a number of considerations, including the economic benefit of noncompliance, the gravity of the violations, and the culpability of the respondents' conduct.

- Economic Benefit

DEC's penalty policy states that every effort should be made to calculate and recover the economic benefit of noncompliance. (CPP Section IV.C.1.) In this case, that economic benefit, if it does exist, is unknown.

- Gravity

According to the penalty policy, removal of the economic benefit of noncompliance merely evens the score between violators and those who comply; therefore, to be a deterrent, a penalty must include a gravity component, which reflects the seriousness of the violation. (CPP Section IV.D.1.)

The violations committed here are quite serious to the extent that they frustrate the goal of OBD emissions testing, which is to protect air quality. In fact, OBD testing is required as part of NYVIP, which has been implemented due to ozone pollution in downstate New York. (Clyne, T: 70 - 71.) Also referred to as smog, ozone is highly corrosive and a threat to both human health and the environment. It damages human airways and affects nasal, throat, and lung function. It also damages crops and manmade infrastructure such as buildings and bridges. (Clyne, T: 53 - 54.)

While one cannot determine the actual damage caused by the violations charged here, there is a clear potential for harm to the extent that required OBD testing is not actually performed, as this removes an opportunity to identify vehicles with malfunctioning emission control systems and ensure those systems are repaired. Using a simulator to bypass the required emissions testing undermines the regulatory scheme that DEC and DMV have developed, the Commissioner has emphasized. (See Matter of Gurabo Auto Sales Corp., Decision and Order of the Commissioner, February 16, 2012, at 6 and 7.)

- Culpability

According to the policy, the penalty derived from the gravity component may be adjusted in relation to factors

including the culpability of the violator. In this case, violator culpability (addressed at CPP Section IV.E.1) is an aggravating factor warranting a significant upward penalty adjustment. As Mr. Levine explained, individuals seeking to become motor vehicle inspectors must attend a clinic that includes a discussion of the OBD testing process. Then they must pass two tests - the first at the end of the clinic and the second on their station's test equipment - before they can do an actual inspection. (Levine, T: 28 - 31.) Due to the training they would have received, the respondents would certainly have known that use of a simulator is not compliant with the procedures for a properly conducted OBD inspection.

Because of their knowing, intentional violation of inspection procedure over an extended period of time, substantial civil penalties are warranted for Johanna Transmission Parts and the inspectors themselves. Because, for each simulated inspection, responsibility may be apportioned between the inspector and the inspection station, I consider it appropriate that they each have their own separate penalty. These penalties should be in the same amount, to reflect the equal culpability of the station and its inspectors for the inspections that were simulated, consistent with the approach taken by the Commissioner in other matters.

- Penalty Recommendation

My recommendation is that, for 1,584 separate violations of 6 NYCRR 217-4.2, Johanna Transmission Parts should be assessed a civil penalty of \$140,800. Given the culpability of the three inspectors, but recognizing the unequal number of violations they committed, I recommend a civil penalty of \$61,600 for Mr. Garcia, \$56,800 for Mr. Sosa, and \$22,400 for Mr. Pena. On a per violation basis, these penalties are consistent with those assessed in prior matters involving similar sets of facts. Even combined, they are considerably less than the \$792,000 requested by DEC Staff, which I consider excessive. As noted above, Staff derived its penalty from a formula under which \$500 is allocated to each illegal inspection. This formula has not been adopted by me or the Commissioner in other matters where it has been offered for violations identical to these.

To account for the penalty framework in ECL 71-2103(1), the penalty apportioned to the first violation by each respondent should be \$375, with lesser penalties for each of the subsequent violations. The large number of violations equate to substantial penalties, which are intended to punish the respondents and to deter others from the same type of illegal activity in which they were engaged.

CONCLUSIONS

1. Between March 26, 2009, and February 16, 2010, respondent Johanna Transmission Parts, an official emissions inspection station, used a simulator to perform OBD II inspections on 1,584 separate occasions. These simulated inspections were performed by Jose L. Garcia, Julio J. Sosa and Jonathan Pena.

2. The use of a simulator was in violation of 6 NYCRR 217-4.2, which prohibits the operation of an emissions inspection station using equipment and/or procedures that are not in compliance with DEC procedures and/or standards.

RECOMMENDATIONS

1. For the first cause of action, involving alleged violations of 6 NYCRR 217-4.2, respondent Johanna Transmission Parts should be assessed a civil penalty of \$140,800, respondent Jose L. Garcia should be assessed a civil penalty of \$61,600, respondent Julio J. Sosa should be assessed a civil penalty of \$56,800, and respondent Jonathan Pena should be assessed a civil penalty of \$22,400.

2. The second cause of action, for alleged violations of 6 NYCRR 217-1.4, should be dismissed in relation to all the respondents.

ENFORCEMENT HEARING EXHIBIT LIST

**JOHANNA TRANSMISSION PARTS, INC., JOSE L. GARCIA, JONATHON PENA
and JULIO J. SOSA**

1. DEC Notice of Hearing and Complaint (9/30/10)
2. Cover letter for DEC Staff's Statement of Readiness (12/29/11)
3. DEC Staff's Statement of Readiness (12/22/11)
4. ALJ's Hearing Notice (5/9/12), with distribution list
5. Envelope transmitting hearing notice to Johanna Transmission Parts, Inc., returned to DEC "not deliverable as addressed, unable to forward" (received at DEC 5/21/12)
6. NYS Dept. of State receipt for Service of Notice of Hearing and Complaint (service date: 10/4/10)
7. Affidavit of Personal Service of Notice of Hearing and Complaint upon Johanna Transmission Parts (served upon Julio J. Sosa, 10/21/10)
- 7-A. Affidavit of Personal Service of Notice of Hearing and Complaint upon Johanna Transmission Parts (served upon Jonathon Pena, 10/21/10)
8. DMV repair shop and inspection station application for Johanna Transmission Parts, Inc. (pages 1 and 2) (undated)
9. DMV certified inspector application for Jonathan Pena (page 1 of 2) (undated)
10. DMV certified inspector application for Jose L. Garcia (pages 1 and 2) (11/23/04)
11. DMV certified inspector application for Julio J. Sosa (pages 1 and 2) (6/2/92)
12. Records certification of Brad Hanscom, DMV records access officer (1/20/10), in relation to records received as Exhibit No. 12-A
- 12-A. Abstract of Johanna Transmission Parts' OBD II inspection data for the period between 5/27/05 and 9/9/09
13. Records certification of Brad Hanscom, DMV records access officer (10/13/10), in relation to records received as Exhibit No. 13-A
- 13-A. Abstract of Johanna Transmission Parts' OBD II inspection data for period between 9/10/09 and 3/16/10
14. Data from Exhibit No. 12-A, with orange highlighting of simulated inspections

15. Data from Exhibit No. 13-A, with orange highlighting of simulated inspections
16. Letter from Braulio Payano to DEC (3/22/10), with various attachments
17. Resignation letter of Jose Garcia (8/1/09)
18. Travel documentation presented by Jose Garcia (various dates)
19. Documentation for DMV Case No. 2IN007328, including Notice of Hearing (6/1/10), Charge Sheet/Alleged Violations Notice, Notice of Revocation of Certified Inspector License (10/26/10), and Notice of Civil Penalty (11/2/10)