

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Gregory Tincher Notice of)
Apparent Violation and Intent to Assess) Case No. 08-593-TR-CVF
Forfeiture.) (OH3256004572D)

OPINION AND ORDER

The Commission, considering the public hearing held on May 28, 2009, issues its opinion and order in this matter.

APPEARANCES:

Gregory Tincher, 14354 Hillcrest Road, Mount Orab, Ohio 45154, on his own behalf.

Richard Cordray, Attorney General of Ohio, by Stephen A. Reilly and Thomas G. Lindgren, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, 9th Floor, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

NATURE OF THE PROCEEDING:

On August 21, 2007, the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a motor vehicle, operated by Hillsboro Transportation Company, and driven by Gregory Tincher (Mr. Tincher, respondent) in the state of Ohio. The Highway Patrol found violations of the Code of Federal Regulations (C.F.R.), including the following violation relevant to this case:

49 C.F.R. Section 392.16 – Driver failing to use seat belt while operating a commercial motor vehicle (CMV).

Mr. Tincher was timely served with a Notice of Preliminary Determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the notice, Mr. Tincher was notified that staff intended to assess a civil forfeiture totaling \$100.00 for the violation of 49 C.F.R. Section 392.16 (Section 392.16). A prehearing settlement teleconference was conducted in the case. The parties, however, failed to reach a settlement agreement during the conference. Subsequently, a hearing was convened on May 28, 2009.

ISSUE IN THE CASE:

Section 392.16 specifies that a CMV that has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly. The staff maintains that Douglas Hostetler, a Highway Patrol trooper, observed Mr. Tincher driving a CMV without wearing a seat belt and, thereafter stopped his truck and cited him for violation of Section 392.16. Mr. Tincher maintains that he was wearing a lap belt at all relevant times, but admits that he was not wearing the shoulder harness strap that was attached to the lap belt.

Thus, the issue presented is whether a driver has "properly restrained himself with the seat belt assembly" within the meaning of Section 392.16 in a situation where the driver admittedly was not, while driving a CMV, wearing the shoulder harness strap portion of the seat belt assembly installed at the driver's seat of his vehicle, but was wearing the lap belt portion only of that seat belt assembly.

This is not the first time the Commission has faced the question of whether Section 392.16 requires the use of the shoulder strap portion of a seat belt assembly. In the Bardo case, namely, *In the Matter of Lynden Oil Company and Leslie J. Bardo, Notice of Apparent Violation and Intent to Assess Forfeiture* Case No. 08-734TR-CVF (O499006108D), Mr. Bardo admitted that he drove Lynden Oil's truck without the shoulder strap portion of the seat belt assembly in place. The Commission held that, because Mr. Bardo did not wear the shoulder strap of his seat belt properly across his chest, he was in violation of Section 392.16 (Bardo Opinion and Order issued June 18, 2009, at 6, 8).

SUMMARY OF THE TESTIMONY:

At hearing, Trooper Hostetler testified that he was stationed in the median and observed that Mr. Tincher didn't have any seat belt visible as he drove by (Tr. 19). He explained that as he walked up to the truck and greeted Mr. Tincher, he noticed that the driver was, by then, wearing his seat belt properly - clarifying that the driver's shoulder belt was engaged, different than the way it had been when the trooper had initially observed the driver (Tr. 20). Trooper Hostetler claimed that he has been through numerous training classes pertaining to the enforcement of commercial motor carrier safety regulations, including the seat belt regulation (Tr. 29). Trooper Hostetler provided an explanation of his understanding, based on such training, concerning the proper manner in which a seat belt assembly which has a shoulder strap must be worn by a CMV driver. According to Trooper Hostetler, all aspects of the seat belt assembly that is manufactured with the truck must be used to the full extent:

The shoulder strap should be strapped across your shoulder, as well as the bottom strap I refer to as the lap belt, usually they're attached so they're not independent of one another, [should be engaged in such a manner] that they're both used to their full extent.

This is not just my personal opinion; that's the regulations as well as the Ohio State Highway Patrol's enforcement. And if we should happen to encounter someone who has modified their shoulder belt, whether removed from their assembly, we are trained to consider that as a violation of the seat belt law (Tr. 29).

Trooper Hostetler added that any modification to a seat belt assembly that occurs after the manufacture of that assembly is considered to be a violation of the seat belt law (*Id.*).

Mr. Tincher's testimony makes clear that his truck has a seat belt assembly that includes, at the driver's seat, a lap belt and a shoulder harness, and that, at the time when Trooper Hostetler first observed him, Mr. Tincher was wearing the lap belt but not the shoulder harness, which he "had pulled down" (Tr. 11-13). Mr. Tincher elaborated that, in the course of the inspection, he even told Trooper Hostetler that he was not wearing his shoulder strap when Trooper Hostetler first observed him (Tr. 31). Mr. Tincher explained that because he is short in stature, when he uses the shoulder harness portion of the seat belt assembly installed at the driver's seat of his truck, the shoulder harness cuts into his neck (Tr. 12). Accordingly, Mr. Tincher "had the shoulder harness pulled down" at the time. Mr. Tincher argues that the involved safety regulation, namely Section 392.16, does not state what is "the proper way to wear a seat belt" (Tr. 12). Mr. Tincher further asserts that the rule requires only that the CMV driver must "properly restrain himself." It is Mr. Tincher's position that, by wearing the lap belt portion only, he did properly restrain himself under the meaning of the regulation and did not violate the rule (Tr. 11).

DISCUSSION:

In this case there is no issue of fact. The parties all agree that Mr. Tincher was driving a CMV that had a seat belt assembly, consisting of both a lap belt and a shoulder strap, installed at the driver's seat, and that Mr. Tincher was cited for violation of Section 392.16 because he was observed driving without using the shoulder strap. The only question presented is the legal one of whether, under such facts of record, the driver has "properly restrained himself with the seat belt assembly" within the meaning of Section 392.16.

The Commission takes administrative notice of Standard 209, set forth in Section 571.209 of Subpart B of the federal motor carrier vehicle safety standards issued by the Federal Motor Carrier Safety Administration (Standard 209). Standard 209 applies to seat belt assemblies for use in trucks, among other types of vehicles. The express purpose of Standard 209 is to specify the requirements for seat belt assemblies. Standard 209 defines a seat belt assembly as:

Any strap, webbing, or similar device designed to secure a person in a motor vehicle in order to mitigate the results of any accident, including all necessary buckles and other fasteners, and all hardware designed for installing such seat belt assembly in a motor vehicle.

Standard 209 defines two types of seat belt assemblies. It defines a Type 1 seat belt assembly as "a lap belt for pelvic restraint." It defines a Type 2 seat belt assembly as "a combination of pelvic and upper torso restraints." It further states that a Type 2A shoulder belt is "an upper torso restraint for use only in conjunction with a lap belt as a Type 2 seat belt assembly." Finally, Standard 209 defines an upper torso restraint as "a portion of a seat belt assembly intended to restrain movement of the chest and shoulder regions."

Putting these definitions together, we find that the unused shoulder belt at issue in this case must be considered as a portion of the seat belt assembly that was installed in the involved vehicle for use in conjunction with the lap belt portion of the same seat belt assembly (and only in conjunction with use of that lap belt) as a restraint against both pelvic and upper torso movements.

In this case, Mr. Tincher was driving a CMV that had a Type 2A shoulder belt installed at the driver's seat. It is also undisputed that, at the time of the incident that led to the citation, Mr. Tincher was not wearing the installed Type 2A shoulder belt. As previously noted, Section 392.16 specifies that a CMV that has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself with the seat belt assembly. The question thus presented is whether Mr. Tincher may be said to have "properly restrained himself with the seat belt assembly" when, admittedly, he was observed driving without use of the upper torso restraint portion of the Type 2 seat belt assembly that was installed at the driver's seat of the CMV he was driving. The Commission finds that this question must be answered in the negative.

Standard 209 requires both that a Type 2A shoulder belt be used only in conjunction with a lap belt and, further, that a Type 2A shoulder belt be used as a Type 2 seat belt assembly. Compliance with this standard would require Mr. Tincher to have used the Type 2A shoulder belt installed at the driver's seat of his vehicle as "a Type 2 seat belt assembly" which, by definition, means as "a combination of pelvic and upper

torso restraints." This is something that Mr. Tincher clearly did not do. Mr. Tincher's failure to use the shoulder belt amounts to an improper use of the Type 2 seat belt assembly that was installed in his CMV. Under the facts of record, Mr. Tincher completely failed, while driving his CMV, to use the shoulder belt that was installed both for the purpose of mitigating the result of any accident by physically restraining his upper torso and, incidentally, also for the purpose of providing him with the opportunity to comply with all pertinent seat belt regulations. Under such circumstances, the Commission concludes that Mr. Tincher failed to properly restrain himself with the seat belt assembly installed in the CMV he was driving, and thus violated Section 392.16.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On August 21, 2007, the Ohio Highway Patrol, stopped and inspected a motor vehicle driven by Mr. Tincher. The Highway Patrol found violations of the C.F.R. including the following violation relevant to this case: 49 C.F.R. Section 392.16, Driver failing to use seat belt while operating a CMV.
- (2) Mr. Tincher was timely served with a Notice of Preliminary Determination that indicated that the staff intended to assess a civil forfeiture totaling \$100.00 for the involved alleged violation.
- (3) A hearing in this matter was convened on May 28, 2009.
- (4) Staff demonstrated at hearing, by a preponderance of the evidence, that the respondent violated 49 C.F.R. Section 392.16.
- (5) Pursuant to Section 4905.83, Revised Code, the respondent must pay the State of Ohio the civil forfeiture assessed for violation of 49 C.F.R. Section 392.16 (seat belt). The respondent shall have 30 days from the date of this entry to pay the assessed forfeiture of \$100.00.
- (6) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, the State of Ohio" and mailed or delivered to Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793.

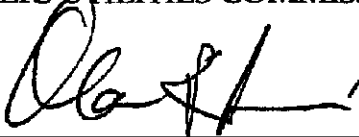
It is, therefore,

ORDERED, That the respondent pay the assessed amount of \$100.00 for violation of 49 C.F.R. Sections 392.16 as set forth in this Opinion and Order. It is, further,

ORDERED, That the Ohio Attorney General take all legal steps necessary to enforce the terms of this opinion and order. It is, further,


ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

Paul A. Centolella



Valerie A. Lemmie



Ronda Hartman Fergus



Cheryl L. Roberto

DEF/dah

Entered in the Journal

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Renee J. Jenkins
Secretary