

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Angelo Cross, Notice of)	Case No. 10-914-TR-CVF
Apparent Violation and Intent to Assess)	(OH3228008327D)
Forfeiture.)	

OPINION AND ORDER

The Commission, considering the testimony and exhibits presented in this matter, the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Angelo Cross, 4225 Etna Street, Whitehall, Ohio, 43212 on his own behalf.

Mike DeWine, Ohio Attorney General, by Steve Reilly, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Commission.

OPINION:

I. Nature of the Proceeding and Background

On March 24, 2010, on U.S. Route 23 in Pickaway County, Motor Carrier Inspectors Dennis Bays (Inspector Bays) and Steven Daniel (Inspector Daniel) of the Ohio State Highway Patrol conducted an inspection of a commercial motor vehicle (CMV) owned by Aaron Boerger and driven by Angelo Cross (Mr. Cross). During the inspection, Inspectors Bays and Daniel found that Mr. Cross was in apparent violation of Title 49, Code of Federal Regulations (C.F.R.), Part 391.11(b)(5), which states that "... a person is qualified to drive a commercial motor vehicle if he/she ... has a currently valid commercial motor vehicle operator's license"

On June 1, 2010, Mr. Cross was timely served a Notice of Preliminary Determination (NPD) in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the NPD, Mr. Cross was notified that Commission staff intended to assess a total civil monetary forfeiture of \$250.00 for violating 49 C.F.R. 391.11(b)(5). On June 30, 2010, Mr. Cross requested an administrative hearing. A prehearing conference was initially scheduled for September 23, 2010, but was continued to November 9, 2010. The parties could not reach settlement at the November 9, 2010, conference. A hearing was

initially scheduled for January 6, 2011, but was continued and conducted on February 8, 2011.

II. The Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted the Federal Motor Carrier Safety Rules, found in 49 C.F.R. 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. In addition, Rule 4901:2-5-02(B), O.A.C., requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the U.S. Department of Transportation (USDOT). Further, Section 4919.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$10,000 per day, per violation against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, into or through this state!

III. Issues in the Case

The issue in this case concerns whether Mr. Cross was wearing corrective lenses, as required by a restriction on his commercial driver's license (CDL) and his medical examiner's certificate.

Staff's Position

Inspector Bays stated that he stopped Mr. Cross for an inspection because the USDOT had recorded a high incidence of safety violations for CMVs owned by Mr. Cross's employer (Tr. at 8). According to Inspector Bays, after stopping the CMV, he and Inspector Daniel approached CMV's cab and requested that Mr. Cross produce his CDL and medical examiner's certificate (*Id.* at 8, 15, 41). Inspector Bays noted that Mr. Cross's CDL indicated a corrective lenses restriction, and he testified that "at no time during the initial contact do I ever remember him having glasses on." Next, Inspector Bays asked Mr. Cross "... whether or not he had contacts on, or why he didn't have glasses on" (*Id.* at 8, 41-44). According to Inspector Bays, after Mr. Cross answered that he did not wear contact lenses, Mr. Cross picked up a pair of glasses from the dashboard, explained that the glasses were broken, and stated that he had an appointment for their replacement. Inspector Bays testified that the glasses were broken on the portion of the frame that rests on the ear (*Id.* at 8, 42-43; Staff Ex. 2). As part of the inspection, Inspector Bays issued a driver/vehicle examination report to Mr. Cross, who signed it. Mr. Cross was then placed out of service for not wearing corrective lenses (Tr. at 8-9).

Inspector Bays asserted that Mr. Cross said nothing during the inspection about his prescription glasses being broken and wearing another pair of glasses as a result (*Id.* at 44). Further, stated Inspector Bays, Mr. Cross was traveling 55-60 mph, it was a clear day, and the two inspectors had pulled onto a driveway immediately adjacent to and at the same level as the southbound lanes of U.S. Route 23, from which they could observe southbound drivers, including Mr. Cross, on a "straight stretch" of highway (*Id.* at 45-47, 51). Inspector Bays added that Mr. Cross's CMV had no tinted glass or other obstructions that would hinder looking inside the cab (*Id.* at 46). Inspector Bays asserts that he observed that Mr. Cross was not wearing glasses while driving the CMV (*Id.* at 44-47).

Inspector Daniel testified that he was also present during the inspection of Mr. Cross and that both inspectors approached the CMV's cab at the same time (*Id.* at 14-15, 48). Inspector Daniel stated that Mr. Cross's medical examiner's certificate indicated that corrective lenses are needed (*Id.* at 17-18; Staff Ex. 1). Like Inspector Bays, Inspector Daniel asserted that he does not "remember Mr. Cross having glasses on at all," including while Mr. Cross was driving the CMV (Tr. at 48).

Mr. Tom Forbes, Compliance Officer for the Commission's Transportation Department, testified regarding the calculation of the civil forfeiture. Mr. Forbes explained that the proposed forfeiture of \$250.00 was assessed using a procedure and a forfeiture schedule consistent with the Commercial Vehicle Safety Alliance (*Id.* at 25-28).

Mr. Cross's Position

Mr. Cross explained that at the time of inspection, his prescription glasses, which he wears when driving and reading, were being repaired for a damaged lens, and he claimed that he informed the inspectors of this. Mr. Cross added that he had two other pairs of glasses, one for reading and the other for driving (*Id.* at 29, 33, 35-36, 45-46). According to Mr. Cross, he was wearing glasses while driving, but after Inspector Bays came to the CMV's door and requested Mr. Cross's CDL, Mr. Cross removed his glasses because "they are real heavy" and he "set them up on the dash" (*Id.* at 30-31, 33, 38-39). He is unsure whether the inspectors saw him remove his glasses, but he asserts that, during the inspection, he pointed to the glasses he had placed on the dashboard. Mr. Cross contends that none of the glasses in his truck were broken (*Id.* at 35, 37, 50). He also stated that he had reading glasses in his pocket and that he told the inspectors that he does not wear contact lenses (*Id.* at 30-32, 35).

Mr. Cross also disputed that the inspectors could have been able to observe that he was not wearing glasses while operating the CMV. Mr. Cross contends that his cab "had tinted windows and . . . a visor on the front of the cab that shows a shadow over

the front of the cab windshield" (*Id.* at 45, 51). In Mr. Cross's opinion, the inspectors were sitting in the median and had "three lanes to look from to see in my truck. And it's a small window" (*Id.* at 50).

Commission Conclusion

Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. We find the testimony of Inspectors Bay and Daniel to be persuasive, and the evidence supports the conclusion that the violation occurred. Mr. Cross's CDL and medical examiner's certificate indicate that corrective lenses must be worn while operating a CMV (*Id.* at 8, 17-20, 42; Staff Ex. 1). Further, the location of the inspectors as they watched approaching traffic enabled them to observe Mr. Cross as he was driving; there were no hindrances such as weather conditions or tinted glass to obstruct the inspectors' ability to look inside the CMV's cab, and both inspectors testified that they observed Mr. Cross not wearing glasses while driving the CMV (Tr. at 44-48, 51). In addition, during the inspection, Mr. Cross admitted that he does not wear contact lenses, and both inspectors assert that at no time prior to or during the inspection was Mr. Cross wearing corrective lenses (*Id.* at 35, 41, 43-44, 46-48). Finally, the observations of Inspector Bays, including his notes regarding Mr. Cross's failure to wear corrective lenses, are contained in the driver/vehicle inspection report, which is prepared contemporaneously at the time of inspection and was signed by Mr. Cross (*Id.* at 36; Staff Ex. 2). In sum, the Commission finds that, based upon the record in this proceeding, Staff has proven that Mr. Cross operated a CMV without wearing corrective lenses, as required by his CDL, in violation of 49 C.F.R. 391.11(b)(5) as alleged.

Accordingly, the Commission finds that the proposed forfeiture of \$250.00 is fair and reasonable based on the facts and evidence in this case. Pursuant to Section 4919.99, Revised Code, Mr. Cross must pay the state of Ohio the assessed forfeiture of \$250.00 for violation of 49 C.F.R. 391.11(b)(5). Mr. Cross is directed to make payment of the \$250.00 civil forfeiture by certified check or money order made payable to "Treasurer, 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. Case No. 10-914-TR-CVF and Inspection Report No. OH3228008327 should be written on the face of the check. Payment must be made within 30 days of this opinion and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On June 30, 2010, Angelo Cross filed a request for an administrative hearing regarding apparent violation of 49 C.F.R. 391.11(b)(5), and a civil forfeiture of \$250.00 proposed by the Staff.
- (2) A prehearing conference was held on November 9, 2010.
- (3) A hearing was held on February 8, 2011.
- (4) Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (5) Based upon the record in this proceeding, Staff has proven that Mr. Cousino violated 49 C.F.R. 391.11(b)(5).
- (6) Based upon the record in this proceeding, the proposed forfeiture of \$250.00 is fair and reasonable. Therefore, Mr. Cross should be assessed the \$250.00 civil forfeiture for violation of 49 C.F.R. 391.11(b)(5).

ORDER:

It is, therefore,

ORDERED, That Mr. Cross pay the \$250.00 assessed civil forfeiture for the violation of 49 C.F.R. 391.11(b)(5) within 30 days of the date of this opinion and order to the State of Ohio, as set forth above. It is, further,

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

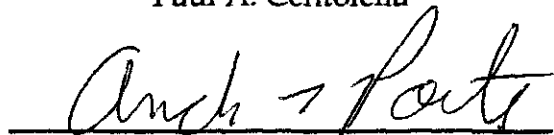
ORDERED, That a copy of this opinion and order be served upon all parties of record.

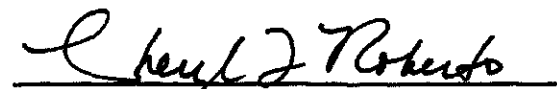
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Paul A. Centolella


Steven D. Lesser

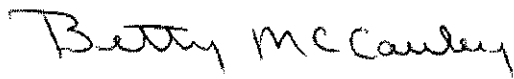

Andre T. Porter


Cheryl L. Roberto

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Entered in the Journal

JUN 01 2011



Betty McCauley
Secretary