

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Edirgawi Transport Inc., )  
Notice of Apparent Violation and Intent ) Case No. 12-3161-TR-CVF  
to Assess Forfeiture. ) (OH1191008329C)

In the Matter of Edirgawi Transport Inc., )  
Notice of Apparent Violation and Intent ) Case No. 12-3162-TR-CVF  
to Assess Forfeiture. ) (OH3296013037C)

OPINION AND ORDER

The Commission, considering the evidence of record, the applicable law, and being otherwise fully advised, issues its opinion and order in these matters.

APPEARANCES:

Essam E. Babkkir, 7799 Steadman Street, Dearborn, Michigan 48126, on behalf of Edirgawi Transport.

Mike DeWine, Ohio Attorney General, by John H. Jones and Ryan P. O'Rourke, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

OPINION:

I. Nature of the Proceedings and Background.

These cases involve two separate inspections. In the first inspection in Case No. 12-3161-TR-CVF (12-3161), which occurred on August 15, 2012, Trooper Ron Kisner with the Ohio State Highway Patrol (Highway Patrol) inspected a vehicle operated by Edirgawi Transport Inc. (Edirgawi) and driven by Essam Babkkir in the state of Ohio. The Highway Patrol found various violations of Title 49 of the Code of Federal Regulations (C.F.R.), including the following:

<u>C.F.R. Section</u>	<u>Violation</u>
393.75(a)	Flat tire, shredded, left side, inside tire, last axle
393.207(a)	Axle positioning parts defective/missing, left side trailing arm is broken

In the second inspection, which occurred on September 10, 2012, in Case No. 12-3162-TR-CVF (12-3162), Officer Mark Lambert with the Highway Patrol inspected a vehicle operated by Edirgawi and driven by Mr. Babkkir in the state of Ohio. The Highway Patrol found various violations of Title 49 of the C.F.R., including the following:

<u>C.F.R. Section</u>	<u>Violation</u>
393.47(e)	Clamp or roto type brake out-of-adjustment 5R 1/8 out
396.3A1T	Tires (general) 4LO bulge in sidewall

Mr. Babkkir was timely served with Notices of Preliminary Determination (NPD) in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the NPDs, Mr. Babkkir was notified that Commission Staff (Staff) intended to assess no civil monetary forfeitures for any of the violations of the above-noted sections of the C.F.R. A prehearing teleconference was conducted in these cases on January 4, 2013; however, the parties failed to reach a settlement agreement during the conference. Thereafter, a hearing was held on February 5, 2013, at which Mr. Babkkir appeared on behalf of Edirgawi.

## II. Background in 12-3161

Trooper Ron Kisner testified that on August 15, 2012, he conducted an inspection of the vehicle driven by Mr. Babkkir at approximately the 77 milepost on the Ohio Turnpike. He stated that the walk-around inspection occurred around 5:45 a.m. Prior to arriving on the scene to conduct the inspection, Trooper Kisner testified that the Highway Patrol Dispatch (Dispatch) initially received a call regarding the Edirgawi vehicle, indicating that the vehicle was being driven with a shredded tire that was emitting sparks. Based on this information, Trooper Kisner explained that Highway Patrol troopers were on watch for the Edirgawi vehicle. According to Trooper Kisner, the Edirgawi vehicle was subsequently stopped by Trooper Brian Holden, who then called Trooper Kisner to the scene where the vehicle was stopped. Upon inspection, Trooper Kisner testified that he observed the axle controlling arm was broken and was being held together with chains and he also noticed a shredded tire. Trooper Kisner concluded that the vehicle was unsafe and placed the vehicle out of service. (Tr. at 10-20, 22-23; Staff Exs. 2I, 2J.)

Trooper Kisner asserted that the trooper who pulled behind Mr. Babkkir was waiting for him in the median because he had received a call of the vehicle throwing sparks. Trooper Kisner speculated that Mr. Babkkir pulled over because he saw the trooper waiting. However, Trooper Holden did not appear or provide testimony at the hearing and Trooper Kisner also admitted that, if he would have come upon Mr. Babkkir disabled on the side of the road, he would not have issued the violations because Mr. Babkkir was already stopped and aware of the violations. (Tr. at 52-53.)

Mr. Babkkir explained that while he was driving his vehicle, he heard a "thud" and looked in his rearview mirror and realized that the tire was shredded and the mudflap blown. At the time, Mr. Babkkir stated he was traveling in the middle lane of the highway and tried to pull over to the right lane to exit the highway, but that it may have taken him several minutes to come to a complete stop. When he pulled over, he realized a trooper had pulled in behind him. Mr. Babkkir stated that he had pulled over and then the trooper left the median and pulled behind him. He also indicated that, when he was stopped, the trooper approached him and called a wrecker to repair the tire. Mr. Babkkir further explained that when the trooper questioned the chain on the axle, he explained that he had taken his truck to the shop and had the axle welded and the chain put on just as an additional safety precaution. Mr. Babkkir stated that approximately 45 minutes elapsed after the wreckers and service repair were already on the scene before Trooper Kisner arrived and conducted the inspection. (Tr. at 32-51.)

### III. Issue in 12-3161

Rule 4901:2-7-20, O.A.C., provides that Staff must prove the occurrence of a violation by a preponderance of the evidence. The sole issue in this case is whether Mr. Babkkir was properly inspected and cited for either of the violations. The basis for properly citing violations of the Commission's transportation regulations is found in Rule 4901:2-5-13, O.A.C.

Rule 4901:2-5-13, O.A.C. provides, in pertinent part, as follows:

- (C) Authorized employees of the commission's transportation department shall utilize the following criteria in determining which documents, motor vehicles, and cargo to inspect and which employees of an offeror or motor carrier to interview:

- (1) Complaints received and processed by the commission's transportation department headquarters staff and issued to field employees.
- (2) Observed possible violations of any rules and statutes listed in paragraph (A) of this rule.
- (3) Knowledge that the motor vehicle was recently inspected and had serious safety defects at the time of inspection.
- (4) Motor vehicles, motor carriers, and offerors designated by the headquarters staff of the commission's transportation department as "special interest".
- (5) Any uniform statistical selection procedure, such as every fifth motor vehicle or every motor vehicle entering an inspection site.
- (6) Any inspection selection system developed by the federal highway administration and utilizing a carrier or driver's safety performance record as a factor.

In the present case, the only applicable basis for the inspection and citing of Mr. Babkkir's vehicle would be contained in section (C)(2) of Rule 4901:2-5-13, O.A.C., that possible violations of the Commission's transportation rules were observed. In this case, there was no direct evidence that possible violations of the Commission's transportation rules were observed which would have led to the inspection. Observation of the violations potentially could have come from the trooper who initially arrived after Mr. Babkkir stopped his vehicle, but that trooper did not testify at the hearing. Further, neither of those alleged observers of a violation who called into Dispatch gave testimony at the hearing. Instead, the evidence shows, as Mr. Babkkir maintained, that he was not stopped by the initial trooper, but that the initial trooper pulled in behind him once he was stopped. In addition, both Mr. Babkkir and Trooper Kisner agreed that Trooper Kisner did not arrive at the scene of the stop until a wrecker had already been called.

Moreover, although Trooper Kisner attempted to infer that Mr. Babkkir must have stopped because he saw the trooper who was first to the scene sitting in the median, there was no direct testimony or other evidence to that effect. To the contrary, Mr. Babkkir testified that he became aware that a tire had blown and promptly made his way to the right lane to stop. In addition, Trooper Kisner testified

that, had he come upon Mr. Babkkir's vehicle sitting along the side of the road, already broken down, he would not have issued the violations in this case.

The Commission finds that Staff's evidence, which is the speculation of Trooper Kisner, is not sufficiently persuasive to find that Rule 4901:2-5-13(C)(2), O.A.C. applies, in that he observed possible violations of the Commission's transportation rules. The Commission cannot rely on third-hand hearsay evidence to justify finding a violation in this case. Therefore, we find that the issuance of the violations in the present case was in error and the violations should be removed from Edirgawi's Safety Net record and history of violations. However, we emphasize that our decision in this case is based on the specific facts at issue here.

#### IV. Background in 12-3162

Officer Mark Lambert testified that on September 10, 2012, he was sitting in the crossover facing westbound on State Route 2, when Mr. Babkkir drove by in an Edirgawi vehicle with the paper temporary license plate on the trailer. Officer Lambert then drove behind the vehicle operated by Mr. Babkkir and he observed the license plate was expired. Thereafter, he stopped Mr. Babkkir in a rest area, and conducted an inspection of Mr. Babkkir's vehicle. Upon inspecting the vehicle, Officer Lambert observed that the brakes were out-of-adjustment and that one of the left tires had a bulge in the sidewall, in the four left out position. (Tr. at 69-79.)

In response, Mr. Babkkir testified that he had purchased the trailer a few weeks prior to the violation, and had a full Department of Transportation (DOT) inspection at the time of purchase. Accordingly, Mr. Babkkir concluded that there were no problems with the vehicle. Mr. Babkkir provided the report of the DOT Inspection, but on cross-examination, admitted that there were not any brake measurements recorded on the form. (Tr. at 83-88.)

#### V. Issue in 12-3162

The sole issue in this case is whether the Edirgawi vehicle's brakes were out of adjustment, in violation of C.F.R. Section 393.47(e) and had a tire with a bulge in the sidewall, in violation of C.F.R. Section 396.3A1T.

#### VI. Conclusion 12-3162

Rule 4901:2-7-20(A), O.A.C., requires that, at the hearing, staff prove the occurrence of the violation by a preponderance of the evidence. The Commission finds that, based upon the record in this proceeding, Staff has proven the occurrence of

the violations by a preponderance of the evidence. The evidence shows that Officer Lambert provided direct testimony of the existence of both of the violations. Further, Mr. Babkkir's only argument against the violations was that his vehicle had been the subject of the DOT inspection several weeks prior on August 22, 2012; however, he acknowledged that the DOT form included no recorded brake measurements. In addition, Mr. Babkkir never denied that the tire in question had a bulge in the sidewall, in violation of 49 C.F.R. 396A1T. The Commission finds Mr. Babkkir's arguments unconvincing. Accordingly, Edirgawi should be cited for violation of 49 C.F.R. 393.47(e) and 396.3A1T. However, as with the prior case, we note that there is no civil forfeiture at issue in the present case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On August 15, 2012, the Highway Patrol stopped and inspected a motor vehicle, driven by Essam Babkkir and owned by Edirgawi Transport, Inc. in the state of Ohio. The Highway Patrol found the following violations of Title 49 C.F.R.:

<u>C.F.R. Section</u>	<u>Violation</u>
393.75(a)	Flat tire, shredded, left side, inside tire, last axle
393.207(a)	Axle positioning parts defective/missing, left side trailing arm is broken

- (2) On September 10, 2012, the Highway Patrol stopped and inspected a motor vehicle, driven by Essam Babkkir and owned by Edirgawi Transport, Inc. in the state of Ohio. The Highway Patrol found the following violations of Title 49 C.F.R.:

<u>C.F.R. Section</u>	<u>Violation</u>
393.47(e)	Clamp or roto type brake out-of-adjustment 5R 1/8 out
396.3A1T	Tires(general) 4LO bulge in sidewall

- (3) Mr. Babkkir was timely served NPDs that set forth no civil forfeiture assessments for the above-noted violations of the C.F.R.
- (4) A prehearing conference was held on January 3, 2013.
- (5) A hearing was held on February 5, 2013.
- (6) Rule 4901:2-5-13, O.A.C., provides various criteria for authorized employees to use when determining which motor vehicles to inspect.
- (7) 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.
- (8) Based upon the record in this proceeding, Staff has not proven that any of the criteria set forth in Rule 4901:2-5-13, O.A.C., were applicable to the August 15, 2012, inspection of the vehicle owned by Edirgawi and driven by Mr. Babkkir. Therefore, the inspection was in error and the violations should be removed from Edirgawi's Safety Net record and history of violations.
- (9) Based upon the record in this proceeding, Staff has proven that Edirgawi was in violation of 49 C.F.R. 393.47(e) and 396.3A1T.
- (10) There was no civil forfeiture at issue in these cases.

It is, therefore,

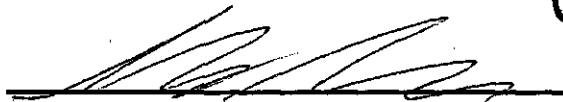
ORDERED, That the alleged violation of 49 C.F.R. 393.75(a) and 393.207(a) be removed from Edirgawi's Safety-Net record and history of violations. It is, further,

ORDERED, That Edirgawi is in violation of 49 C.F.R. 393.47(e) and 396.3A1T. It is, further,

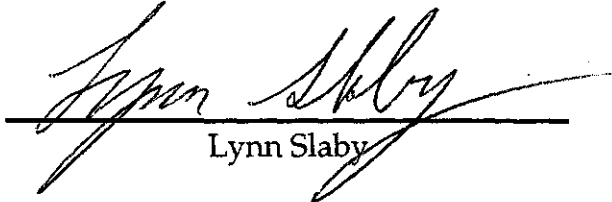
ORDERED, That a copy of this Opinion and Order be served upon each party of record.

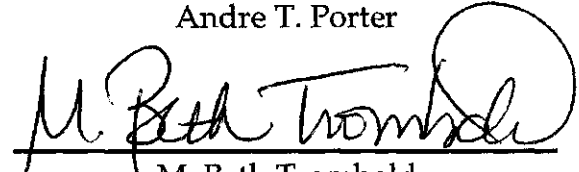
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Spitchler, Chairman

  
Steven D. Lesser


  
Andre T. Porter

  
Lynn Slaby

  
M. Beth Trombold

KLS/sc

Entered in the Journal  
MAR 20 2013



Barcy F. McNeal  
Secretary