

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF BARRON YOUNG,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.**

**CASE NO. 16-422-TR-CVF
(OH3258007932D)**

OPINION AND ORDER

Entered in the Journal on October 26, 2016

I. SUMMARY

{¶ 1} The Commission finds that Staff failed to prove, by a preponderance of the evidence, that Barron Young violated 49 C.F.R. 390.17, by using equipment and accessories in a manner that decreased the safety of his operation of a CMV—texting on a mobile phone, and finds that Mr. Young should not be assessed the \$250 forfeiture.

II. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} Following an October 20, 2015 inspection of a commercial motor vehicle (CMV) driven by Barron Young, Staff timely served him with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02. Mr. Young was cited in the NPD for violating 49 C.F.R. 390.17 (using equipment and accessories in a manner that decreased the safety of his operation of a CMV—texting on a mobile telephone). The NPD also notified Mr. Young that Staff intended to assess a \$250 civil monetary forfeiture for violating the Commission's transportation rules. Mr. Young filed a request for hearing on February 22, 2016. A prehearing conference was convened on March 17, 2016, and a hearing was held on May 9, 2016. Officer Melanie Kurtz of the Ohio State Highway Patrol, and Jonathan Frye, Compliance Chief of the Commission's Transportation Department, testified on behalf of Staff. Mr. Young testified on his own behalf. Staff and Mr. Young filed post hearing briefs on June 3 and June 13, 2016, respectively.

III. DISCUSSION

A. *Applicable Law*

{¶ 3} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Rules (FMCSR), specifically, 49 C.F.R. Sections 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 4} 49 C.F.R. 390.17 provides that "nothing in this subchapter shall be construed to prohibit the use of additional equipment and accessories *** provided such equipment and accessories do not decrease the safety of operation of the commercial motor vehicles on which they are used."

B. *Issue*

{¶ 5} Staff contends that Mr. Young was driving a CMV while using his right hand to hold a mobile telephone to type a text message and that reaching for and holding a mobile telephone created a distraction, causing him to swerve on the roadway and thereby decreasing his ability to safely operate his CMV. Mr. Young denies that he was swerving on the roadway, or texting or using his mobile telephone, and asserts that he had simply picked up his mobile telephone from where it had fallen to the floor of the CMV's cab.

C. *Summary of the Evidence Presented at the Hearing*

{¶ 6} Officer Kurtz testified that she was driving behind Mr. Young's CMV on U.S. Route 24 and, as another CMV began to pass Mr. Young, he drove left of center and forced the other CMV partially off the road. Officer Kurtz stated that, as she drove

alongside Mr. Young, she looked through her vehicle's passenger side window and into the CMV's driver side window, and observed Mr. Young steering with his left hand, while using his right thumb to type a text message. (Tr. at 6-7, 10, 24-25.) Officer Kurtz asserts that her vehicle, a Chevrolet Tahoe, is "a little bit higher" off the ground than some vehicles, enabling her to better see inside the CMV's cab (Tr. at 10-11). She added that weather conditions created no visibility problems (Tr. at 11-12).

{¶ 7} In Officer Kurtz's opinion, holding a mobile telephone while driving a CMV creates a distraction and poses a danger (Tr. at 9). Officer Kurtz added that, because the CMV's tractor is manufactured by Volvo, the accelerator and brake pedals are not attached to the floor of the cab. Consequently, she contends that, if Mr. Young's mobile telephone had fallen to the CMV's floor, he would have had no difficulty operating the vehicle (Tr. at 26-27). Further, she emphasized that, because U.S. Route 24 has a wide berm, Mr. Young could have pulled his vehicle over to the side of the road to retrieve the mobile telephone (Tr. at 27-28). Officer Kurtz added that Mr. Young never stated to her that he was reaching to pick up his mobile telephone after it had fallen to the floor of the cab (Tr. at 26). Further, Staff emphasizes that is irrelevant whether Mr. Young was or was not texting, because 49 C.F.R. 390.17 does not require that a driver actually use an accessory in any particular way. Rather, Staff contends, "it is sufficient if the accessory creates a distraction." In Staff's opinion, a mobile telephone is the kind of device that 49 C.F.R. 390.17 contemplates, because Regulatory Guidance to 49 C.F.R. 390.17 specifies that handheld or other wireless electronic devices carried into a CMV are "additional equipment and accessories." (Staff Br. at 4-5). Further, Staff asserts, because Mr. Young had to reach down to pick up the mobile telephone from the floor of the cab, it is reasonable to believe that he was distracted, causing him to swerve on the roadway. (Staff Br. at 5-6.)

{¶ 8} Jonathan Frye testified that the proposed forfeiture for this violation is appropriate and consistent with the fine schedule that Staff maintains (Tr. at 14-15).

Mr. Frye added that Mr. Young received the NPD when the parties could not reach a settlement (Tr. at 15). Mr. Frye contends that 49 C.F.R. 390.17 ensures that the driver is focused upon his duties, because simply possessing a hand-held mobile telephone is a distraction (Tr. at 16-17).

{¶ 9} In its brief, Staff emphasizes that while the parties disagree on what led to the inspection, the parties agree that Mr. Young was driving while holding a mobile telephone in his hand (Staff Br. at 3). Staff asserts that it is irrelevant that Mr. Young was or was not texting, because 49 C.F.R. 390.17 does not require that a driver actually use an accessory in any particular way. Rather, Staff contends, "it is sufficient if the accessory creates a distraction." In Staff's opinion, a mobile telephone is the kind of device that 49 C.F.R. 390.17 contemplates, because Regulatory Guidance to 49 C.F.R. 390.17 specifies that handheld or other wireless electronic devices carried into a CMV are "additional equipment and accessories." (Staff Br. at 4-5). Staff notes that Officer Kurtz and Mr. Frye contend that having a mobile telephone in your hand, or even simply in your possession, is a distraction. Further, Staff asserts, because Mr. Young had to reach down to pick up the mobile telephone from the floor of the cab, it is reasonable to believe that he was distracted. (Staff Br. at 5-6.)

{¶ 10} Mr. Young claims that he never drove his CMV across the center line of U.S. Route 24. He explained that his mobile telephone had fallen to the CMV's floor under his right foot, so he reached down to pick it up and tried to place it in a cup holder on top of the dashboard when Officer Kurtz pulled him over. (Tr. at 18-19, 23.) Mr. Young contends that he tried to show Officer Kurtz that he could not have been texting, because his mobile telephone was on the "locked" setting, which would require entering a code to use the telephone. Further, he asserts, the mobile telephone indicated three or four missed calls. (Tr. at 19.) He explained that he adjusts his seat to sit close to the floor of the cab, which enabled him to reach down and retrieve the mobile telephone without taking his eyes off the road. According to Mr. Young, Officer Kurtz "had to see me with

the phone * * * to pull me over,” but he denied that he was texting. (Tr. at 22.) He emphasized that Young Ex. 1, which is his text messaging record for October 20, 2015, from his cellular service provider, indicates that the only text messages at that time were inbound messages.

{¶ 11} In his brief, Mr. Young again asserted that Young Ex. 1 demonstrates he was not texting while driving. He explained that he picked up the mobile telephone from the floor of the CMV so that it “didn’t * * * slide underneath the pedal[s]” and cause an accident. In Mr. Young’s opinion, the law does not restrict a driver of a CMV from having a mobile telephone in his hands.

D. Commission Conclusion and Order

{¶ 12} Ohio Adm.Code 4901:2-7-20 requires, at hearing, that Staff prove the occurrence of a violation by a preponderance of the evidence. 49 C.F.R. 390.17 provides that additional equipment and accessories are not prohibited in a CMV, provided such equipment and accessories do not decrease the safety of operation of the commercial motor vehicles on which they are used. The Commission finds, based on a preponderance of the evidence, that Staff has not proven Mr. Young violated 49 C.F.R. 390.17

{¶ 13} First, we note Officer Kurtz’s assertion that she observed Mr. Young steering with his left hand while texting with his right thumb (Tr. at 6-7, 24-25). To accomplish this, Officer Kurtz would have had to maintain highway speed and direction in her vehicle while simultaneously observing movement in Mr. Young’s thumb through the passenger side window of her Chevrolet Tahoe and into the CMV’s cab. Second, although Officer Kurtz asserts that the Tahoe’s height helped her observe Mr. Young in his CMV, Mr. Young testified that he adjusts the driver’s seat so that he sits close to the cab floor, which would hinder observations of him from outside the CMV (Tr. at 10-11, 22). Third, Officer Kurtz did not refute Mr. Young’s remarks that, during the inspection,

he attempted to explain that the mobile telephone was "locked" and would require entry of a code for its use (Tr. at 19). Finally, Young Ex. 1 does not indicate any inbound or outbound text messages shortly before 3:02 p.m., which Staff Ex. 1, the Driver/Vehicle Examination Report, indicates as the time that the inspection began. Indeed, Young Ex. 1 indicates no outbound text messages at any time on the day of the inspection. Rather, Young Ex. 1 indicates one inbound text message at 1:20 p.m. Central Time (12:20 p.m. Eastern Time), several hours before Officer Kurtz observed Mr. Young in his CMV, and one inbound text message at 7:02 p.m. Central Time (8:02 Eastern Time). Staff did not dispute the authenticity or accuracy of Young Ex. 1 at the hearing, which demonstrates that no inbound or outbound calls were made on the cell phone at the time in advance of the inspection. Therefore, we find Staff has not proven, by a preponderance of the evidence, to demonstrate that Mr. Young was texting while driving, notwithstanding Officer Kurtz's testimony that she believes she observed his right thumb moving on a mobile telephone.

{¶ 14} Next, we turn to Staff's assertion that it is not relevant that Mr. Young may not have been texting while driving, because to violate 49 C.F.R. 390.17, "it is sufficient if the accessory creates a distraction." 49 C.F.R. 390.17 refers to the "use of additional equipment and accessories," and Regulatory Guidance to 49 C.F.R. 390.17 refers to "distraction from the driving task." In this case, the evidence shows that Officer Kurtz observed Mr. Young's CMV swerve on the roadway; however, there is no evidence that Mr. Young's driving was the result of his reaching for or holding a cell phone. Indeed, Staff acknowledged in its brief that it is unclear whether Mr. Young's alleged texting, or his retrieval of the mobile phone from the vehicle's floor and attempts to place the phone on the vehicle's dashboard, contributed to his erratic driving. Nonetheless, Staff surmised that "****it is reasonable to believe he was distracted by his phone." (Staff Brief at 6.) Absent some more definitive evidence, we find that Staff has not proven, by a preponderance of the evidence, that Mr. Young violated 49 C.F.R. 390.17.

{¶ 15} In sum, the Commission concludes that there is insufficient evidence to prove, by a preponderance of the evidence, that Mr. Young violated 49 C.F.R. 390.17. This does not mean that the Commission has found that Mr. Young was not texting while driving. Our opinion is limited to the finding that insufficient evidence was presented to determine that he violated 49 C.F.R. 390.17.

{¶ 16} Accordingly, the Commission finds that Mr. Young should not be assessed the \$250 forfeiture for violating 49 C.F.R. 390.17, and the alleged violation should be deleted from Mr. Young's Safety-Net record and history of violations.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 17} On October 20, 2015, Officer Melanie Kurtz stopped and inspected a CMV driven by Barron Young, and found that he was texting while driving, in violation of 49 C.F.R. 390.17.

{¶ 18} Mr. Young was timely served with an NPD, alleging a violation of 49 C.F.R. 390.17 (texting while driving), and indicating that Staff intended to assess a civil monetary forfeiture of \$250.

{¶ 19} A prehearing conference was conducted on March 17, 2016, and a hearing was held on May 9, 2016.

{¶ 20} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 21} Insufficient evidence has been presented to conclude that Mr. Young was texting while driving a CMV. Staff, therefore, has not proven, by a preponderance of the evidence, pursuant to Ohio Adm.Code 4901:2-7-20, that a violation of 49 C.F.R. 390.17 occurred.

{¶ 22} Barron Young should not be assessed the \$250 forfeiture, and the alleged violation should be deleted from his Safety-Net record and history of violations.

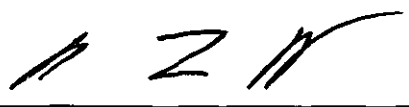
V. ORDER

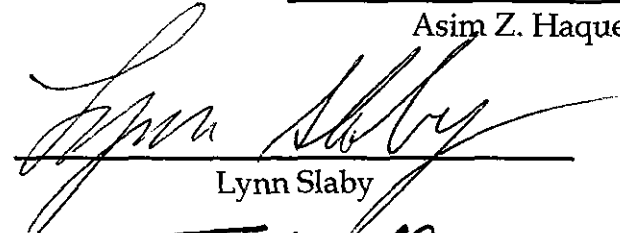
{¶ 23} It is, therefore,

{¶ 24} ORDERED, That Barron Young should not be assessed a civil forfeiture of \$250 for the alleged violation of 49 C.F.R. 390.17, which should be removed from his Safety-Net record and history of violations. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO


Asim Z. Haque, Chairman


Lynn Slaby


M. Beth Trombold

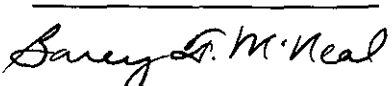

Thomas W. Johnson


M. Howard Petricoff

JML/sc

Entered in the Journal

OCT 26 2018


Barcy F. McNeal
Secretary