

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPARENT
VIOLATION AND INTENT TO ASSESS
FORFEITURE OF KENNETH WYLIE.

CASE NO. 15-2029-TR-CVF
(OH3270007648D)

ENTRY

Entered in the Journal on November 3, 2016

I. SUMMARY

{¶ 1} The Commission finds that Kenneth Wylie shall pay the assessed civil forfeiture of \$250 for using a hand-held mobile telephone while driving a commercial motor vehicle in violation of 49 C.F.R. 390.17.

II. DISCUSSION

{¶ 2} R.C. 4923.04 provides that the Commission shall adopt rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. Pursuant to Ohio Adm.Code 4901:2-5-02(A), the Commission adopted the Federal Motor Carrier Safety Regulations for the purpose of governing transportation by motor vehicle in the state of Ohio. Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day against any person who violates the safety rules adopted by the Commission.

{¶ 3} On August 5, 2015, a commercial motor vehicle (CMV) driven by Kenneth Wylie (Respondent) was inspected within the state of Ohio. As a result of the inspection, Respondent was issued a Driver/Vehicle Examination Report citing him for using a hand-held mobile telephone while driving a CMV in violation of 49 C.F.R. 390.17.

{¶ 4} On October 27, 2015, Staff served a notice of preliminary determination (NPD) upon Respondent, in accordance with Ohio Adm.Code 4901:2-7-12, at his address in Colorado, registered with the Commission (registered address). The NPD indicated that Staff intended to assess a civil forfeiture of \$250 for the violation of 49 C.F.R. 390.17.

{¶ 5} On December 3, 2015, Respondent filed a request for an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 6} By Entry issued December 28, 2015, a prehearing settlement conference was scheduled for January 28, 2016. The December 28, 2015 Entry was served on the Respondent at his registered address and the service notice was filed in this case docket. The prehearing settlement conference was held on January 28, 2016, between Staff and the Respondent, however, they were unable to settle this matter.

{¶ 7} On March 11, 2016, Respondent filed a letter in this case indicating that his mailbox had been vandalized in early February and thereafter was replaced. He claimed that much of his mail had come up missing during that time and requested that any correspondence would need to be resent.¹

{¶ 8} Thereafter, by Entry issued on March 17, 2016, the attorney examiner scheduled this matter for hearing to take place on April 21, 2016. A copy of the Entry scheduling the hearing was served upon the Respondent at his registered address and the service notice was filed in this case docket.

{¶ 9} The hearing was held on April 21, 2016, as scheduled, but Respondent failed to appear for the hearing or present evidence to explain why he should not be charged with the violation in this case. Additionally, Respondent did not file a notice or contact the attorney examiner indicating that he would be unable to attend the hearing. At the hearing, Staff presented testimony of Inspector Robert Keith Richards and Inspector Matthew Leite. Additionally, Staff introduced, as exhibits, the Driver/Vehicle Examination Report (Staff Ex. 1) and the NPD issued to Respondent (Staff Ex. 2). Further, at the hearing, Staff moved for a default judgment against Respondent in the amount of \$250 (Tr. at 16).

¹ No Commission correspondence had been issued or sent to the Respondent between the December 28, 2015 Entry and the date he filed his March 11, 2016 letter.

{¶ 10} By Entry issued May 18, 2016, the Commission granted Staff's motion for default judgment pursuant to Ohio Adm.Code 4901:2-7-14(E) for Respondent's failure to appear for hearing. The Commission found that Respondent should be assessed the civil forfeiture of \$250 for using a hand-held mobile telephone while driving a CMV in violation of 49 C.F.R. 390.17. A copy of the May 18, 2016 Commission Entry was served on the Respondent at his registered address and the service notice was filed in this case docket.

{¶ 11} On July 11, 2016, Respondent filed a second letter in this case. In Respondent's second letter, he notes that he requested that all correspondence prior to his first letter notifying the Commission that his mailbox was vandalized and replaced be resent. Respondent then asserts that he has now completed his research regarding the violation. Finally, Respondent notes he has so far been unable to obtain legal counsel for this matter.

III. CONCLUSION

{¶ 12} The Commission finds that nothing Respondent has indicated in his second letter warrants our finding that he should not be assessed the civil forfeiture of \$250 for using a hand-held mobile telephone while driving a commercial motor vehicle in violation of 49 C.F.R. 390.17, as we previously found. The letters filed by Respondent do not excuse his failure to appear for hearing, which was scheduled by Entry issued and served upon Respondent at his registered address subsequent to his letter and mailbox being replaced. Respondent's March 11, 2016 letter indicated that his mailbox had been vandalized and that it took a couple of weeks for it to be replaced. On March 17, 2016, after the Respondent's mailbox had been replaced, the attorney examiner issued an Entry scheduling this matter for hearing. In addition, the service notice of the March 17, 2016 Entry scheduling this matter for hearing indicates the Entry was served upon the Respondent at the his registered address after his mailbox had been replaced. Accordingly, the Respondent had proper notice of the hearing and he failed to file a notice or contact the attorney examiner regarding his unavailability for hearing. Further, the hearing was held on April 27, 2016, as scheduled, and a copy of the Entry scheduling the hearing was served on the Respondent at his registered address; however, the Respondent failed to appear at the hearing. Therefore, pursuant to

Ohio Adm.Code 4901:2-7-14, the Commission properly granted Staff's motion for default judgment against Respondent for his failure to appear at the hearing, properly found him in violation of 49 C.F.R. 390.17 for using a hand-held mobile telephone while operating a CMV, and properly directed him to pay the assessed civil forfeiture of \$250.

{¶ 13} Additionally, even if the Commission were to treat Respondent's second letter as an application for rehearing of the May 18, 2016 Commission Entry, it would be denied by operation of law for being improperly filed after the 30-day statutory deadline for filing an application for rehearing. Pursuant to R.C. 4903.10 and Ohio Supreme Court precedent, the Commission has no statutory jurisdiction to entertain an application for rehearing filed more than 30 days after the order was entered upon the journal of the Commission and service was made upon the parties. See *Dover v. Public Util. Comm.*, 126 OS 438 (1933); *Greer v. Public Util. Comm.*, 172 OS 361 (1961); *In re Trimat Construction*, Case No. 10-963-TR-CVF, Entry on Rehearing (May 25, 2011). In this case, service of the Commission's Entry granting Staff's motion for default judgement was made on May 18, 2016, at the Respondent's registered address; whereas Respondent's letter was filed on July 11, 2016, or 54 days after the Commission rendered its decision, which is outside the statutory timeframe for filing an application for rehearing.

{¶ 14} Accordingly, pursuant to R.C. 4923.99, Respondent is liable to the state of Ohio for payment of the \$250 assessed civil forfeiture for a violation of 49 C.F.R. 390.17 for using a hand-held mobile telephone while operating a CMV. Ohio Adm.Code 4901:2-7-22 provides that payment of such forfeitures shall be made by certified check or money order made payable to: "Treasurer, state of Ohio" and shall be mailed or delivered to: "Fiscal Division, Public Utilities Commission of Ohio, 180 East Broad Street, Columbus, Ohio 43215-3793." Respondent should write the case number (OH3270007648D) on the front of the check and shall have an additional 30 days from the date of this Entry to pay the assessed forfeiture. Pursuant to R.C. 4923.99, if payment is not received within 30 days of the date of this Entry, the Attorney General should bring a civil action in the Court of Common Pleas of Franklin County to recover the assessed forfeiture.

IV. ORDER

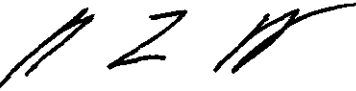
{¶ 15} It is, therefore,

{¶ 16} ORDERED, That Respondent be assessed the civil forfeiture of \$250 for a violation of 49 C.F.R. 390.17 for using a hand-held mobile telephone while operating a CMV. It is, further,

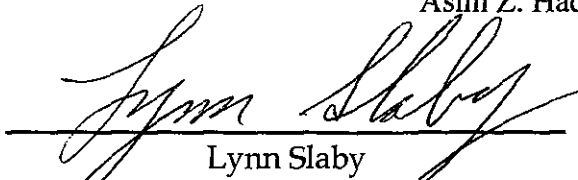
{¶ 17} ORDERED, That, if payment is not received within 60 days of the date of this Entry, the Attorney General of Ohio shall bring a civil action in the Court of Common Pleas of Franklin County, or take any other appropriate action allowed by law, to recover the assessed forfeiture. It is, further,

{¶ 18} ORDERED, That a copy of this Entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



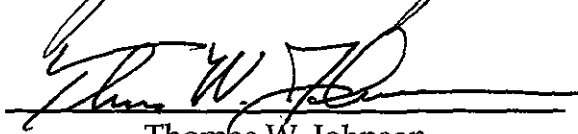
Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold



Thomas W. Johnson



M. Howard Petricoff

BAM/sc

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Barcy F. McNeal
Secretary