

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF ROBERT LEARN,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE .

CASE NO. 18-1623-TR-CVF  
(OH1238003263D)

## OPINION AND ORDER

Entered in the Journal on February 27, 2019

### I. SUMMARY

{¶ 1} The Commission finds that Staff did not demonstrate, by a preponderance of the evidence, that Robert Learn violated the Commission's transportation rules prohibiting the use of a hand-held mobile telephone while operating a commercial motor vehicle.

### II. PROCEDURAL HISTORY

{¶ 2} On August 24, 2018, Officer Charles Mendenhall (Officer Mendenhall) with the Ohio State Highway Patrol (Highway Patrol) stopped and inspected a vehicle operated by Gypsum Express, Ltd., and driven by Robert A. Learn (Mr. Learn or Respondent), in the State of Ohio. Officer Mendenhall noted that the reason for the stop and subsequent inspection was that the driver had committed an alleged violation of 49 C.F.R. 392.82(a)(1) for using a hand-held mobile telephone while operating a commercial motor vehicle (CMV).

{¶ 3} Respondent was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02. Respondent was cited in the NPD for violating 49 C.F.R. 392.82(a)(1). The NPD also notified Respondent that Staff intended to assess a \$250 civil monetary forfeiture for violating the Commission's transportation rules pursuant to Ohio Adm.Code 4901:2-7-07. (Staff Ex. 2.) Respondent filed a request for a hearing on October 29, 2018. A prehearing teleconference was held on November 29, 2018; however, the parties were unable to resolve this matter during the teleconference. Accordingly, an evidentiary hearing was held on January 15, 2019. At the hearing, Staff witnesses Officer Mendenhall and Rod Moser testified in support of the violation and forfeiture amount, respectively. Mr. Learn appeared pro se and submitted testimony on his own behalf.

### III. APPLICABLE LAW

{¶ 4} Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-01(C) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, in or through Ohio. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 5} The specific regulation to which Staff is alleging Respondent violated is 49 C.F.R. 392.82(a)(1), which states that "[n]o driver shall use a hand-held mobile telephone while driving a CMV."

### IV. ISSUE

{¶ 6} At issue is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent was, in fact, using a hand-held phone while driving a CMV, and was, thus, in violation of 49 C.F.R. 392.82(a)(1).

### V. SUMMARY OF EVIDENCE

{¶ 7} At the hearing, Officer Mendenhall testified that he works in the Licensed Commercial Standards section of the Highway Patrol, stating that he has been with the Highway Patrol for 18 years, and has completed training regarding inspections of CMVs (Tr. at 5). Officer Mendenhall testified that on August 24, 2018, he stopped and inspected a vehicle driven by Respondent while they were both traveling eastbound on State Route 82 near mile marker 12 in Trumbull County (Tr. at 8-9; Staff Ex. 1). Officer Mendenhall went on to state that he stopped the vehicle because he observed Respondent with a cell phone in his hand, which he first held by his ear, and then in front of the steering wheel. According

to Officer Mendenhall's testimony, the phone was black and had a black case. (Tr. at 8.) Officer Mendenhall testified that he stopped the vehicle after he observed Respondent put the phone back up to his ear, and informed Respondent of the reason he was conducting the inspection (Tr. at 9). During the stop, Respondent told Officer Mendenhall that he had been using a headset, but Officer Mendenhall stated that he would have seen the microphone on the headset had he been using it, and that he was sure he saw Respondent on his cell phone (Tr. at 9-10). On cross-examination, Officer Mendenhall testified that he did not know what color the phone was, but that it was in a black case (Tr. at 11). Officer Mendenhall testified that he was passing Respondent on the left when he saw him using his cell phone, and that he was in a high enough plane to be able to see into the cab of the truck (Tr. at 11-12). Finally, Officer Mendenhall stated that although they were traveling east, he could clearly see Respondent, who was positioned to the south of Officer Mendenhall, and that the rising sun did not impact his view of Respondent (Tr. at 12-13). Staff witness Rod Moser, the Chief of Compliance for the Transportation Department within the Commission, testified that the forfeiture amount was based on a model adopted by the Federal Motor Carrier Safety Administration, which is a system of violations that are applied uniformly to everyone (Tr. at 14-17). According to this model, a person found to be in violation of C.F.R. 392.82(a)(1) is subject to a standard fine of \$250. Mr. Moser testified that he believes this forfeiture to be the correct amount for this case, and recommended this amount to the Commission. (Tr. at 16-17.)

{¶ 8} Respondent testified that he was driving eastbound on State Route 82 when he saw Officer Mendenhall behind his vehicle with his lights on, and Respondent pulled over. Officer Mendenhall asked Respondent if he knew the reason for the stop, and Officer Mendenhall informed Respondent that he observed Respondent talking on a cell phone while he was driving. Respondent attempted to communicate to Officer Mendenhall that he had been using a headset and not holding the phone up to his ear. Respondent further stated that, contrary to Officer Mendenhall's testimony, his phone was white and was in a white case. (Tr. at 18-19.) Upon cross-examination, Respondent testified that he was using

a headset while on a phone call, and that he took the headset off when he pulled over to the side of the road. Respondent stated that the microphone on the headset falls generally in front of his mouth and off to the side when talking on it. (Tr. at 19-20.) In concluding his testimony, Respondent stated that he has had no accidents during his 12 years as a professional driver (Tr. at 21).

## VI. COMMISSION CONCLUSION

{¶ 9} Ohio Adm.Code 4901:2-7-20 requires that Staff prove the occurrence of a violation by a preponderance of the evidence at hearing. The Commission finds, based on a preponderance of the evidence, that Staff has not proven Mr. Learn violated C.F.R. 392.82(a)(1).

{¶ 10} The Commission notes that Officer Mendenhall stated that he saw Mr. Learn hold a cell phone up to his ear and in front of the steering wheel (Tr. at 8). This testimony is in direct conflict with that of Mr. Learn, who stated that, although he was on a phone call, he was using his headset (Tr. at 19). Officer Mendenhall stated that there was a headset in the cab of the vehicle at the time of the stop, though he believed it to be powered off at that point (Tr. at 9). Although Officer Mendenhall testified that he was certain that he saw the phone at the time of the stop, and that it was a black phone in a black case, Mr. Learn testified that he had a white phone in a white case in the vehicle with him. When Mr. Learn further inquired about the color of the phone on cross-examination, Officer Mendenhall stated that he didn't know what color the phone was, but that it was in a black case. (Tr. at 8-11.) The testimony shed no light on whether the headset microphone would have fallen to the right or left side of Mr. Learn's face had he been using it when Officer Mendenhall first observed him.

{¶ 11} Considering all of the evidence, the Commission finds that there was insufficient evidence presented to demonstrate that Mr. Learn was using his cell phone by holding it in his hand while operating a CMV. We find it credible that Mr. Learn was utilizing the headset that Officer Mendenhall saw in the vehicle during the stop, and that

Mr. Learn removed the headset upon being pulled over. Further, the discrepancy between Mr. Learn's and Officer Mendenhall's recollection of the color of the phone case reduces the likelihood that Officer Mendenhall saw Mr. Learn's phone in his hand. For these reasons, the Commission finds that insufficient evidence was presented to conclude that Mr. Learn was in violation of the Commission's transportation rules.

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 12} On August 24, 2018, an inspector for the Highway Patrol stopped and inspected a motor vehicle driven by Robert Learn in the State of Ohio. The Highway Patrol found the driver to be in violation of 49 C.F.R. 392.82(a)(1), for using a hand-held mobile telephone while driving a CMV.

{¶ 13} Respondent was timely served with an NPD, alleging a violation of 49 C.F.R. 392.82(a)(1), for using a hand-held mobile telephone while driving a CMV. In the NPD, Respondent was notified that Staff intended to assess a civil monetary forfeiture of \$250.

{¶ 14} A prehearing settlement conference was held on October 29, 2018. The parties were not able to reach a resolution during the conference.

{¶ 15} An evidentiary hearing was held on January 15, 2019.

{¶ 16} 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.

{¶ 17} Based upon the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Mr. Learn violated C.F.R. 392.82(a)(1) by using a hand-held mobile telephone while driving a CMV. Accordingly, the violation of 49 C.F.R. 392.82(a)(1) should be dismissed and removed from Mr. Learn's Safety-Net record and history of violations.

## VIII. ORDER

{¶ 18} It is, therefore,


{¶ 19} ORDERED, That the alleged violation of 49 C.F.R. 392.82(a)(1) by Mr. Learn be dismissed and removed from his Safety-Net record and history of violations. It is, further,

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

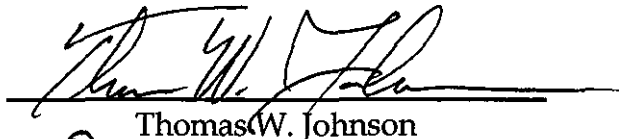
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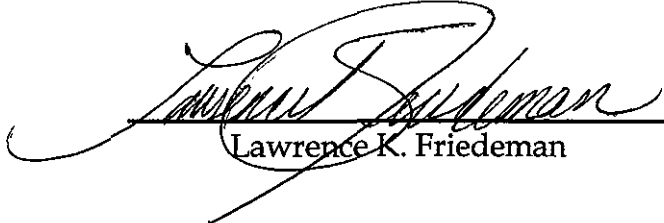
Asim Z. Haque, Chairman



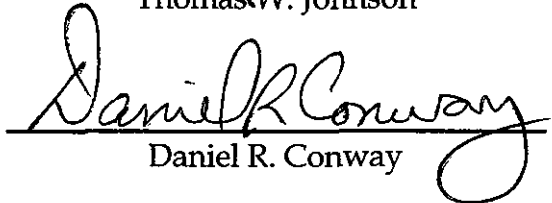
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