

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF TERRY HENRY-
BRITT, NOTICE OF APPARENT
VIOLATION AND INTENT TO ASSESS
FORFEITURE.

CASE NO. 18-1373-TR-CVF
(OH3291012365D)

OPINION AND ORDER

Entered in the Journal on May 1, 2019

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Terry Henry-Britt 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 May 3, 2018, a commercial motor vehicle (CMV) driven by Terry Henry-Britt (Respondent) and operated by Classic Carriers, Inc. was inspected within the state of Ohio by Inspector Jonathan Holzworth (Inspector Holzworth). As a result of the inspection, the inspector issued a Driver/Vehicle Examination Report citing Respondent for using a hand-held mobile telephone while driving a CMV in violation of 49 C.F.R. 392.82(A)(1).

{¶ 3} On August 2, 2018, Staff served a notice of preliminary determination (NPD) upon Respondent, in accordance with Ohio Adm.Code 4901:2-7-7. The NPD indicated that Staff intended to assess a civil forfeiture of \$250 for the violation of 49 C.F.R. 392.82(A)(1). (Staff Ex. 2.)

{¶ 4} On August 31, 2018, Respondent, through counsel, filed a timely request for an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} By Entry issued September 25, 2018, the attorney examiner scheduled a prehearing settlement conference to take place on October 25, 2018. The prehearing

settlement conference convened on October 25, 2018; however, the parties were unable to settle this matter.

{¶ 6} Thereafter, by Entry issued on October 26, 2018, the attorney examiner scheduled this matter for hearing to take place on December 11, 2018. At hearing, Inspector Holzworth and Rod Moser, Chief of Compliance, appeared as witnesses for Staff, and Respondent appeared with counsel and testified on her own behalf. Additionally, Staff introduced, as exhibits, the Driver/Vehicle Examination Report (Staff Ex. 1) and the NPD issued to Respondent (Staff Ex. 2). Respondent introduced, as an exhibit, a Cell Phone Call Log (Respondent Ex. 1).

III. APPLICABLE LAW

{¶ 7} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations, 49 C.F.R. Sections 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce 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. 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(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 8} Staff is alleging Respondent violated 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

{¶ 9} At issue is whether Staff 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 thus, in violation of 49 C.F.R. 392.82(A)(1).

{¶ 10} Staff alleges that Respondent used a hand-held mobile telephone while operating a CMV. Respondent disputes the carrier violation and asserts that she was not using a hand-held mobile telephone while operating a CMV.

V. SUMMARY OF THE EVIDENCE

{¶ 11} At the hearing, Inspector Holzworth testified that he has been working as a motor carrier enforcement inspector in the role as supervisor for six years and working as an inspector for 20 years (Tr. at 7). Inspector Holzworth testified that, on May 3, 2018, he stopped Respondent for using a hand-held mobile telephone while operating a CMV in Richland County, Mansfield, Ohio at 7:09 a.m. EST (Tr. at 8, 12). Inspector Holzworth stated that he was sitting stationary on Highway US 30, Milepost 14 facing eastbound traffic when he observed Respondent using a hand-held mobile telephone while operating a CMV. Inspector Holzworth testified that he had a clear and unobstructed view into Respondent's cab. (Tr. at 8.) Inspector Holzworth avers that he knew Respondent was holding a hand-held mobile telephone because when he witnessed Respondent drive past him, he saw Respondent holding a teal colored hand-held mobile telephone to her right ear with her right hand, and when Inspector Holzworth opened the passenger side door to conduct the traffic stop, Respondent had the same teal colored hand-held mobile telephone in a carrier mounted onto the vehicle (Tr. at 8-9). Inspector Holzworth stated that, after he turned his overhead lights on to initiate the traffic stop, it took Respondent quite a while to pull over and stop. According to Inspector Holzworth, the time it took Respondent to pull over was unusual given that the area provided a safe location to pull over. (Tr. at 9.) Inspector Holzworth stated that Respondent's hand-held mobile telephone was powered off when he made the initial contact with her (Tr. at 10). Additionally, Inspector Holzworth testified that

Respondent permitted him to look at her hand-held mobile telephone and that he saw a phone call was made, either outgoing or incoming, at 6:53 a.m. EST (Tr. at 9-10). Lastly, Inspector Holzworth stated that he prepared the Driver/Vehicle Examination Report at the time of his inspection and that the report accurately reflects the results of the inspection (Tr. at 11).

{¶ 12} On cross-examination, Inspector Holzworth stated that he was about 25 feet from Respondent when he observed her holding a hand-held mobile telephone while operating a CMV and that he first approached Respondent on her passenger side (Tr. at 12, 15). Further, Inspector Holzworth testified that Respondent's hair was worn down on the day of the inspection (Tr. at 13). In regards to witnessing Respondent wearing a Bluetooth headset in her left ear, Inspector Holzworth did not physically inspect the headset but noticed that the light on Respondent's headset was not illuminated (Tr. at 13-14). Inspector Holzworth maintained that he was about two feet away from Respondent's hand-held mobile telephone upon inspection and that he could read the screen accurately. Lastly, Inspector Holzworth clarified that Respondent's phone screen did not tell him how long the phone call lasted. (Tr. at 15.)

{¶ 13} Mr. Moser testified that he is employed at the Public Utilities Commission of Ohio as the Chief of the Compliance Section within the Transportation Department. Mr. Moser stated that Respondent received an NPD indicating a group 4 violation totaling \$250. Mr. Moser averred that, in his opinion, the forfeiture amount applied to Respondent is the standard amount assessed for this violation. (Tr. at 16-19.)

{¶ 14} Ms. Henry-Britt testified that, on May 3, 2018, she was traveling to retrieve a trailer and was driving without a trailer attached to the CMV when she saw Inspector Holzworth stationed in the median. Ms. Henry-Britt further averred that she had her seat belt across her front, her phone was in its holder, and her cruise control was set. Ms. Henry-Britt testified that she was not talking on a hand-held mobile telephone and that her smartphone was in its holder. (Tr. at 20.) Ms. Henry-Britt explained that she has two devices

that connect to her smartphone – an earpiece and a headset (Tr. at 27). Ms. Henry-Britt stated that, at the time of the traffic stop, she was wearing her earpiece and it was powered on (Tr. at 20). Ms. Henry-Britt explained that an onlooker could not see her earpiece because her long hair hides it and further clarified that her earpiece does not have a light indicating when it is powered on (Tr. at 20-21). Ms. Henry-Britt stated that she normally uses a BlueParrott headset, but it was charging at the time of the traffic stop (Tr. at 22). Ms. Henry-Britt testified that the BlueParrott goes over the head and has an observable light when it is powered on (Tr. at 22, 27).

{¶ 15} Ms. Henry-Britt testified that she could not be holding her cell phone in her right hand, as Inspector Holzworth testified, because she is left-handed (Tr. at 22). Ms. Henry-Britt stated that she only has one cell phone (Tr. at 22). Ms. Henry-Britt introduced, as an exhibit, cell phone records that she purports to be a call log for May 3, 2018. Ms. Henry-Britt testified that she came into possession of these records by asking a friend to print Ms. Henry-Britt's phone log from her online Verizon account and fax the records back to her (Tr. at 24). Ms. Henry-Britt testified that Respondent Exhibit 1 is accurate and that she could not have made a phone call at 6:53 a.m. EST as Inspector Holzworth testified because her call log did not reflect a phone call, outgoing or incoming, at 6:53 a.m. EST (Tr. at 24). Rather, Ms. Henry-Britt testified that she called her sister, located in Washington state, at 5:58 a.m. EST and that she called the company she was leased to at 7:51 a.m. EST to let them know about the traffic stop (Tr. at 24-25).

{¶ 16} On cross-examination, Ms. Henry-Britt clarified that the time reflected in Respondent's Exhibit 1 mirrors the time zone where her phone is located. Therefore, if Ms. Henry-Britt's phone is located in an Eastern Standard Time zone, her phone records will reflect Eastern Standard Time (Tr. at 26). However, Ms. Henry-Britt testified that her phone log does not indicate time zones. Further, Ms. Henry-Britt stated that, although she is left-handed, she can hold her cell phone in her right hand (Tr. at 26).

VI. COMMISSION CONCLUSION

{¶ 17} After reviewing the evidence, the Commission finds that Staff has demonstrated, by a preponderance of the evidence at hearing, that a violation of 49 C.F.R. 392.82(A)(1) occurred when Respondent used a hand-held mobile telephone while operating a CMV. In doing so, the Commission found Inspector Holzworth's testimony to be persuasive, as Inspector Holzworth recalled distinct details about the traffic stop through his testimony and the Driver/Vehicle examination report. Initially, we note Inspector Holzworth had a clear and unobstructed view of Respondent's cab because he was facing eastbound traffic, and Respondent was traveling eastbound towards Versailles, Ohio (Tr. at 8; Staff Ex. 1 at 1). Inspector Holzworth testified that he knew Respondent was holding a smartphone in her right hand because the same teal colored smartphone that he saw as she drove by him was holstered in a mount to the right of her person when he made the initial contact with Respondent (Tr. at 8-9). Inspector Holzworth's examination of the phone's call history confirmed that the phone was in use (Tr. at 10). Although Respondent provided a call log from her phone carrier, the call log lacked necessary details to be persuasive. Specifically, the call log does not have any logo, text, or the like that indicates the record came from her phone carrier. Furthermore, the document does not identify or reference Respondent's name (Respondent Ex. 1). Finally, Respondent did not provide any evidence to dispute Inspector Holzworth seeing a teal colored smartphone as she drove past him and when he made his initial contact with her.

{¶ 18} Accordingly, the Commission finds that sufficient evidence was presented to show that, more likely than not, the violation occurred. Thus, Respondent is directed to make payment of the \$250 civil forfeiture within 60 days of this Opinion and Order by certified check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-1373-TR-CVF and inspection number OH3291012365D should be written on the face of the certified check or money order to ensure proper credit.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 19} On May 3, 2018, Inspector Holzworth stopped and inspected a CMV driven by Respondent because of an alleged violation of the Commission's transportation regulation, 49 C.F.R. 392.82(A)(1), for using a hand-held mobile telephone while operating a CMV.

{¶ 20} Respondent was timely served with an NPD recommending a civil forfeiture of \$250 for violation of 49 C.F.R. 392.82(A)(1), for using a hand-held mobile telephone while driving a CMV.

{¶ 21} A prehearing conference was conducted on October 25, 2018, and a hearing was held on December 11, 2018.

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

{¶ 23} Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Respondent violated 49 C.F.R. 392.82(A)(1). Accordingly, Respondent should be assessed a \$250 forfeiture for a violation of 49 C.F.R. 392.82(A)(1) and should pay the forfeiture within 60 days from the date of this Opinion and Order.

VIII. ORDER

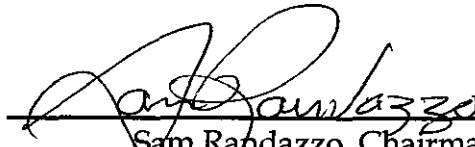
{¶ 24} It is, therefore,

{¶ 25} ORDERED, That Respondent pay a civil forfeiture of \$250 for a violation of 49 C.F.R. 392.82(A)(1), within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to the "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 18-1373-TR-CVF and inspection

number OH3291012365D should be written on the face of the check or money order. It is, further,

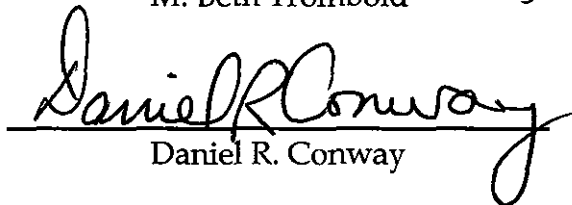
{¶ 26} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

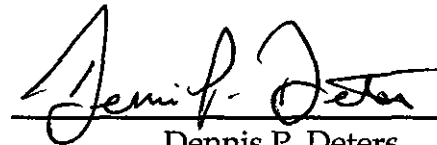
THE PUBLIC UTILITIES COMMISSION OF OHIO


Sam Randazzo, Chairman


M. Beth Trombold

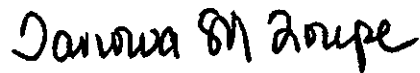
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Secretary