

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of :
David W. Leisure : Case No. 09-49-TR-CVF
Notice of Apparent Violation :
and Intent to Assess Forfeiture :
- - -

PROCEEDINGS

Before Scott Farkas, Hearing Examiner, at the Public
Utilities Commission of Ohio, 180 East Broad Street,
Room 11-F, Columbus, Ohio, called at 10:00 a.m. on
Thursday, June 4, 2009.

- - -

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1 APPEARANCES:

2 Richard Cordray, Ohio Attorney General
3 By Thomas G. Lindgren, Esq.
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180 East Broad Street, 9th Floor
Columbus, Ohio 43215

5 On behalf of the Staff of the PUCO.

6 David W. Leisure
7 144 West High Street
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8 Pro se.

9 Also present, Rebecca L. Hussey.

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1 Thursday Morning Session,
2 June 4, 2009.

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4 HEARING EXAMINER FARKAS: Let's go on the
5 record. The Commission has called for hearing at this
6 time and place the matter of David Leisure, Notice of
7 Apparent Violation and Intent to Assess Forfeiture,
8 Case No. 09-49-TR-CVF. My name is a Scott Farkas. I'm
9 the Attorney Examiner assigned to hear this case.

10 At this time I'll take appearances, first
11 on behalf of Staff.

12 MR. LINDGREN: Your Honor, on behalf of
13 the Staff of the Public Utilities Commission, Ohio
14 Attorney General Richard Cordray, by Thomas G.
15 Lindgren, Assistant Attorney General. The address is
16 180 East Broad Street, 9th Floor, Columbus, Ohio
17 43215.

18 HEARING EXAMINER FARKAS: Thank you.

19 You're Mr. Leisure?

20 MR. LEISURE: Yes.

21 HEARING EXAMINER FARKAS: And you are
22 proceeding without counsel; is that correct?

23 MR. LEISURE: Yes.

24 HEARING EXAMINER FARKAS: All right. At
25 this time, Staff, you may call your first witness.

1 MR. LINDGREN: Thank you, Your Honor. The
2 Staff calls Alvin Holscher.

3 HEARING EXAMINER FARKAS: You may come up
4 here. Raise your right hand.

5 OFFICER ALVIN W. HOLSCHER,
6 being by the Hearing Examiner first duly sworn, as
7 hereinafter certified, testifies and says as follows:

8 HEARING EXAMINER FARKAS: You may be
9 seated. Before we get started, Mr. Leisure, you will
10 be allowed to ask any witness factual questions; okay?

11 MR. LEISURE: Okay.

12 HEARING EXAMINER FARKAS: After counsel
13 finishes his questioning.

14 Proceed.

15 DIRECT EXAMINATION

16 By Mr. Lindgren:

17 Q. Good morning, Mr. Holscher.

18 A. Morning.

19 Q. Would you state and spell your full name
20 for the record, please.

21 A. My full name is Alvin W. Holscher,
22 A-l-v-i-n, middle initial W, last name is Holscher,
23 H-o-l-s-c-h-e-r.

24 Q. And what is your business address?

25 A. 1275 Experiment Farm Road, Troy, Ohio.

1 Q. And where are you employed?

2 A. State of Ohio, Motor Carrier Enforcement
3 Inspector. It's Post 12, and I'm assigned to
4 District 5.

5 Q. Is that part of the highway patrol?

6 A. Yes, sir.

7 Q. And what is your position?

8 A. I'm a Motor Carrier Enforcement Inspector.

9 Q. What are your duties in that job?

10 A. My duties are to inspect commercial
11 vehicles, to enforce the Federal Motor Carrier Safety
12 Administration rules and regs., stopping trucks for the
13 intent of doing an inspection for obvious violations.

14 Q. What sort of training have you received
15 for your position?

16 A. I have -- I've gone through North American
17 Standards training, basic hazmat, hazmat bulk, and
18 motor coach training, and I've been certified every
19 year for those.

20 Q. Are you trained in the application of the
21 Federal Motor Carrier Safety Regulations?

22 A. Yes, sir, I am.

23 Q. Do you hold any certifications?

24 A. I have a certification for North American
25 Standards as an inspector, hazmat inspector, and motor

1 coach inspector.

2 Q. Thank you. Do you recognize the driver
3 here today, Mr. Leisure?

4 A. Yes, sir, I do.

5 Q. And do you recall inspecting a truck
6 operated by him on April 1st of 2008?

7 A. Yes, sir, I do.

8 Q. What caused you to initiate this
9 inspection?

10 A. He had an obvious violation. He had a
11 lighting violation. I was stationary at the 60 mile
12 marker, watching westbound traffic when he passed my
13 location. As he passed my location, I seen an ID light
14 out, so I came out of the crossover. I initiated the
15 traffic stop. I got him stopped at the 58 mile marker
16 on the westbound side. I approached the vehicle,
17 started the interview process with Mr. Leisure. After
18 I got his driver's license and his medical card and
19 found where he was coming and going to, I noticed that
20 there was a cooler, like a -- something you chill your
21 beverages in, setting in close proximity to Mr.
22 Leisure. I asked him what he had in it. For my safety
23 reasons, I didn't want to have a gun or anything in
24 there. He told me he had water, and I asked him if
25 he'd care to open it up, at which time he did, and when

1 he opened it up, he did have bottled water, but he also
2 had a can of Bud Light in there.

3 HEARING EXAMINER FARKAS: Can I ask a
4 clarifying question?

5 THE WITNESS: Yes, sir.

6 HEARING EXAMINER FARKAS: You said you
7 were at a certain mile marker. On what --

8 THE WITNESS: Interstate 70, Interstate
9 70. I was working in Clark County that day.

10 HEARING EXAMINER FARKAS: Thank you.

11 Go ahead.

12 Q. Where was this cooler located in the cab?

13 A. Next to the driver, in between the driver
14 and passenger seat.

15 Q. Was it within the driver's reach, then?

16 A. Yes, sir, it was.

17 Q. Thank you. You said you saw a can of Bud
18 Light?

19 A. Yes, sir, I did.

20 Q. Is Bud Light a brand of beer, to your
21 knowledge?

22 A. Yes, it is, sir.

23 Q. And did you do anything to determine if
24 the can was full?

25 A. Yes, sir, I did. I went and got my camera

1 to take pictures of it so I could document it. As it
2 was laying there, I had to pick it up to get a picture
3 of the top, see if it was intact, and at the time I
4 picked it up, it was a full can of beer, sir.

5 Q. Thank you. Did you ask the driver
6 anything about this can?

7 A. I asked the driver what it was in there
8 for, and he said he had been working on his vehicle
9 that weekend. I said well, this is a violation. He
10 says we can take care of that now. He says I'll just
11 dump it out here, and I informed him that he couldn't
12 do that. I was just going to write it for having
13 alcohol in a commercial motor vehicle at that time.

14 Q. Did you take any photographs in the course
15 of your inspection?

16 A. Yes, sir, I did. I took a picture of the
17 truck, the ID light that was out. He also had a
18 violation --

19 (Discussion off the record.)

20 A. He had several violations besides the can
21 of beer inside the vehicle.

22 HEARING EXAMINER FARKAS: You just need to
23 slow down a little. She's writing down everything.

24 A. He had an ID light out. I took a picture
25 of that. He also had an exhaust leak that I took a

1 picture of, and I took several pictures of the can of
2 beer and the cooler inside the vehicle.

3 Q. Mr. Holscher, do you have the photographs
4 that you took with you? Do you have a set of those?

5 A. I have them with me over there.

6 MR. LINDGREN: May I approach the
7 witness?

8 HEARING EXAMINER FARKAS: Yes.

9 MR. LINDGREN: This will be Staff
10 Exhibit 1.

11 HEARING EXAMINER FARKAS: All the pictures
12 you're marking as Staff Exhibit 1?

13 MR. LINDGREN: Yes.

14 HEARING EXAMINER FARKAS: All right. Why
15 don't we --

16 MR. LINDGREN: Maybe we could use letters,
17 1A, 1B.

18 HEARING EXAMINER FARKAS: Why don't we do
19 that.

20 MR. LINDGREN: Starting with the first
21 page, that will be 1A and then 1B.

22 HEARING EXAMINER FARKAS: Let's go off the
23 record for a second.

24 (Discussion off the record.)

25 (EXHIBITS HEREBY MARKED FOR IDENTIFICATION

1 PURPOSES.)

2 HEARING EXAMINER FARKAS: Let's go back on
3 the record. While we were off the record we marked the
4 pictures, exhibit numbers on the pictures.

5 You can proceed.

6 MR. LINDGREN: Thank you, Your Honor.

7 Q. Mr. Holscher, do you recognize these
8 pictures?

9 A. Yes, sir, I do. These were pictures I
10 took during the inspection.

11 Q. Do they accurately reflect what you saw
12 during that inspection?

13 A. Yes, it does.

14 HEARING EXAMINER FARKAS: Can I just stop
15 you for a second? The pictures you're talking about,
16 are these the Exhibits 1A through 1G?

17 THE WITNESS: Yes, sir.

18 HEARING EXAMINER FARKAS: Thank you.

19 Q. Let's first take a look at Exhibit 1A.
20 Can you briefly explain what that depicts?

21 A. 1A depicts one of three center ID lights
22 that's not working, and that was the reason for my
23 stop.

24 Q. Thank you. So this was the front end of
25 the vehicle operated by Mr. Leisure?

1 A. Yes, sir.

2 Q. Can you explain what Exhibit 1B depicts?

3 HEARING EXAMINER FARKAS: Before we go to
4 1B, 1A, the center ID lights, are these the lights
5 above the windshield?

6 THE WITNESS: Yes, sir.

7 HEARING EXAMINER FARKAS: The one in the
8 middle of the windshield, your testimony is it is --

9 THE WITNESS: The ID light.

10 HEARING EXAMINER FARKAS: Was out?

11 THE WITNESS: Right. It was inoperative,
12 not working.

13 HEARING EXAMINER FARKAS: Thank you.

14 Q. Let's now turn to Exhibit 1B --

15 HEARING EXAMINER FARKAS: Let me stop you
16 again. And that is the reason why you stopped --

17 THE WITNESS: Yes, sir. That is a --

18 HEARING EXAMINER FARKAS: That's the cause
19 for the inspection?

20 THE WITNESS: Yes, sir.

21 HEARING EXAMINER FARKAS: Thank you.

22 Q. Turning to Exhibit 1B, can you explain
23 what that depicts?

24 A. Just -- that's a picture of the license
25 plate that was on the commercial vehicle that I stopped

1 when I stopped it. I wanted to make sure that I had a
2 clear picture of that.

3 Q. Exhibit 1C?

4 A. The side of the truck. It's the operating
5 authority that he was running under at that time, USDOT
6 number. He worked for Transinternational System.

7 Q. Thank you.

8 A. That also shows a picture of the hood
9 latch, which is a violation.

10 Q. Where is the hood latch located?

11 A. Right in front of the passenger door. If
12 you look at the Freightliner sign there, there's a
13 latch. It's supposed to go on that hood to secure the
14 hood down.

15 Q. So that was another violation you noted?

16 A. Yes, sir.

17 Q. Turning to Exhibit 1D, can you explain
18 what that depicts?

19 A. That's the cooler that was setting inside
20 the truck next to Mr. Leisure.

21 Q. Thank you.

22 HEARING EXAMINER FARKAS: And is the --
23 there appears to be, on the top left side of the
24 picture, a blue -- it looks like denim, a piece of
25 clothing?

1 THE WITNESS: That's what it appears to
2 be, sir.

3 HEARING EXAMINER FARKAS: Is that where
4 the driver's seat is?

5 THE WITNESS: No, sir. That would be in
6 the sleeping compartment. If you look to the top
7 right, up here, I believe that would be Mr. Leisure's
8 leg (indicating).

9 HEARING EXAMINER FARKAS: Okay. So you're
10 taking this picture from the passenger side?

11 THE WITNESS: Yes, sir. I always approach
12 a commercial -- never approach from the driver's side.
13 I always approach from the passenger side for my
14 safety.

15 HEARING EXAMINER FARKAS: Okay. Thank
16 you.

17 Q. Turning now to Exhibit 1E, can you explain
18 what that depicts?

19 A. It depicts what was inside the cooler.
20 Again, I asked him, since it was so close to him, what
21 he had in there that day. He told me bottles of water,
22 and I asked him if he would mind opening it up for me
23 just for my safety, and at that time he opened it up,
24 and that's what I saw.

25 Q. Thank you. Now, did you do anything with

1 the contents of the cooler after you opened it?

2 A. Well, once I seen what it was, I went and
3 got my camera. I obviously started taking the
4 pictures, but I picked the can up to see if it was an
5 empty can, and that's why I took a picture. If you'll
6 look at 1F, the top of that can is still intact, and
7 when I picked it up to set it upright, that can was
8 full and there was nothing leaking out of it.

9 Q. So is 1F a picture of the can after you
10 turned it upright?

11 A. Yes, sir, it is.

12 Q. Okay. And what about Exhibit 1G?

13 A. That's an exhaust leak. At the rear of
14 the cab, you're not allowed to have any leaks, also
15 made to have -- or allow the exhaust, and I took a
16 picture of that to show the exhaust, where it had been
17 burning.

18 HEARING EXAMINER FARKAS: On 1G there's a
19 pipe that curves at a 90-degree angle?

20 THE WITNESS: Yes, sir.

21 HEARING EXAMINER FARKAS: Then at the
22 curve there is a darker spot. Is that what you're
23 saying is the leak?

24 THE WITNESS: That's the exhaust leak
25 right there. That exhaust pipe, which is exactly what

1 that is, it's a 90-degree upturn to go to the stack.
2 That has a -- I wrote that up as a crack lengthwise in
3 the exhaust system.

4 HEARING EXAMINER FARKAS: How long is the
5 crack?

6 THE WITNESS: Sir, I couldn't tell you
7 that.

8 HEARING EXAMINER FARKAS: You couldn't
9 guess at all?

10 THE WITNESS: No. I didn't put a tape
11 measure up to it.

12 HEARING EXAMINER FARKAS: Okay.

13 Q. Inspector Holscher, what did you do with
14 these pictures after you took them?

15 A. I submitted them with the inspection
16 report to the Public Utilities Commission of Ohio.

17 Q. Do these pictures appear to have been
18 altered at all from the time when you sent them in?

19 A. No, sir.

20 Q. Thank you. Did you prepare any reports in
21 the course of your inspection or following your
22 inspection?

23 A. Yes, sir, I did.

24 MR. LINDGREN: May I approach the witness
25 again?

1 HEARING EXAMINER FARKAS: Yes.

2 MR. LINDGREN: Let the record reflect that
3 I'm handing the witness what has been marked as Staff
4 Exhibit 2.

5 HEARING EXAMINER FARKAS: Thank you.

6 Q. Mr. Holscher, do you recognize this
7 document?

8 A. Yes, sir, I do.

9 Q. And can you explain what it is?

10 A. This is my inspection report. After
11 making my initial traffic stop and doing an inspection
12 of the vehicle, I did what was called a Level II
13 inspection, which is a walk-around. It involves driver
14 credentials and the vehicle.

15 Q. Did you note the violations you found in
16 the inspection on this report?

17 A. Yes, I did. There were four.

18 Q. Can you explain what those violations
19 were?

20 A. First one was a driver violation,
21 possession, use, or under the influence of alcohol
22 within four hours prior to going on duty, and the
23 description was, "In possession of alcohol in cooler
24 inside cab of truck, one 12-ounce Bud Light." The
25 second violation was one of three center cab ID lights

1 inoperative at the time of inspection. The third
2 violation was hood not securely fastened, right side
3 hood latch not fastened at the time of inspection. The
4 last violation was inspection, repair and maintenance
5 of parts and accessories, exhaust leak on 90 degree
6 elbow to stack, crack is lengthwise.

7 Q. Thank you. Does this report accurately
8 reflect the results of your inspection of the vehicle
9 operated by David Leisure?

10 A. Yes, sir, it does.

11 Q. What did you do with this report after you
12 prepared it?

13 A. I -- I gave Mr. Leisure a copy of it, and
14 I placed him out of service. Then I transmitted this
15 electronically to the Public Utilities Commission of
16 Ohio.

17 Q. Does this report appear to have been
18 altered at all since the time you transmitted it?

19 A. No, sir, it does not.

20 Q. Thank you. What did you do after you
21 observed the can of beer in the cooler and took those
22 pictures?

23 A. I contacted Trooper Mica Hatcher, Unit
24 0726, to conduct a field sobriety test on Mr. Leisure
25 because I did not want to have to move him -- because I

1 was going to place him out of service for that alcohol
2 being in the truck, and I did not want him to be moving
3 or driving that vehicle if he was impaired, and Trooper
4 Hatcher came out and gave him a field sobriety test at
5 that time.

6 Q. Did he pass that test?

7 A. Yes, sir, he did.

8 Q. So after that was he allowed to proceed?

9 A. I escorted him back to Exit 59 and placed
10 him out of service for 24 hours for having alcohol in
11 his truck.

12 Q. Thank you. I have no further questions.

13 HEARING EXAMINER FARKAS: After you placed
14 him out of service, you escorted him to an exit?

15 THE WITNESS: Yes, sir, I did. I escorted
16 him to an exit and put him off in a truck stop. I put
17 him in a safe location and said he was out of service
18 at that time for alcohol in a commercial vehicle.

19 HEARING EXAMINER FARKAS: Then what
20 happened?

21 THE WITNESS: Then I went back to work.

22 HEARING EXAMINER FARKAS: You left him
23 there?

24 THE WITNESS: Yes, sir, I did.

25 HEARING EXAMINER FARKAS: Okay. That's

1 all I have.

2 Do you have any questions?

3 MR. LEISURE: Yes.

4 CROSS-EXAMINATION

5 By Mr. Leisure:

6 Q. Of course, I'm not a lawyer, so I don't
7 have -- I don't know some of this stuff. When you
8 first pulled me over, you pulled me over for the light;
9 right?

10 A. Yes.

11 Q. We agree on that. When you come up to my
12 passenger side, like you said, I always do -- you
13 always do the passenger side. You seemed to know
14 everything that happened or remember from a year ago.
15 Do you remember what you first told me you was going to
16 give me a violation for?

17 A. No, sir, I do not.

18 Q. Okay. When you first pulled up there, you
19 tried to open my door on the passenger side, and it was
20 locked.

21 A. Okay.

22 Q. Do you remember that?

23 A. Yeah.

24 Q. And then I told you that door was hard to
25 open. I tried to open it a couple of times to get it

1 unlocked, to get it open, and you said that's a
2 violation right there.

3 A. It is.

4 Q. Well, it seems to me like you was looking
5 for some kind of a reason just to put me out of
6 service.

7 A. No, sir, I was not.

8 Q. I mean, once the beer can was found, you
9 forgot all about this other stuff.

10 A. I didn't forget about it because it's
11 noted on this inspection report. All vehicles -- in a
12 commercial vehicle, if that vehicle was manufactured
13 with a door, it has to operate, okay, and if you can't
14 open the door, then it's a violation, and I'll write
15 that up, and I've wrote it up multiple times for doors
16 that can't open. If you're involved in an accident and
17 that's my only access to get to you to save your life
18 and I can't get in, then there's a problem. So at the
19 time when you said it doesn't open or doesn't open very
20 good, at that point, if it doesn't open, I will write
21 that violation.

22 Q. But you didn't remember that?

23 A. No, sir, I did not, because it's not on
24 the report.

25 Q. So you're going to offer the report, not

1 memory?

2 A. Pardon?

3 Q. You're going to offer what you wrote down
4 on the report, not memory?

5 A. It's wasn't a violation because you got it
6 open.

7 Q. I'm talking about the whole situation.

8 A. No. I remember the whole situation.

9 Q. But you didn't remember that part about
10 the door?

11 A. It wasn't a violation, so I didn't write
12 it.

13 Q. You just said it was a violation if it
14 didn't open.

15 A. If it did not open. If you look at the
16 pictures, on the one -- starting with 1D, I'm standing
17 at the passenger door with it open, so it's not a
18 violation.

19 Q. No. I got the door open.

20 A. Yes, sir.

21 Q. And I told you, I said I can get the door
22 open. It's hard to open. It takes a few minutes.
23 Well, that's a violation, that's the way you put it.

24 A. No. You told me it did not open.

25 Q. No. I said it was hard to open.

1 A. If I told you that I was going to write
2 you a violation for the door not opening, it would have
3 been because you said the door didn't open. I said if
4 you can't get it open, then I'll write it as a
5 violation so you can get it fixed.

6 Q. Okay. That was just something I was
7 curious about, because after -- like I said, after the
8 beer can was found, nothing else is mentioned about the
9 door, and later on in the process I did get the door
10 open. Yes, I understand why that was dropped, okay,
11 why you didn't take anything else about that.

12 You keep saying that it was a full beer,
13 and the only reason that can was in there was because
14 it was empty. There was a hole in the bottom of it.
15 When I was working on the truck, it was a joke, the guy
16 handed it to me, and that's why it was left in there.
17 I noticed it on the floor a couple of days later.

18 HEARING EXAMINER FARKAS: If you want to
19 make your case when it's your turn, but right now you
20 have the opportunity to ask him questions.

21 MR. LEISURE: Oh, okay.

22 HEARING EXAMINER FARKAS: You can testify
23 later on to what you want.

24 MR. LEISURE: Okay.

25 Q. When you called the highway patrolman to

1 give me the test to see if I had any alcohol, did you
2 come up with that idea or did I?

3 A. I did.

4 Q. You did?

5 A. Yes, sir.

6 Q. I don't have anything else.

7 HEARING EXAMINER FARKAS: All right. Do
8 you have any redirect?

9 MR. LINDGREN: No. Thank you, Your
10 Honor.

11 EXAMINATION

12 By Examiner Farkas:

13 Q. It's your testimony, though, that the can
14 is full -- that the can was full?

15 A. Yes, sir.

16 Q. When you first saw the can, it was on its
17 side?

18 A. Yes.

19 Q. Were you able to see the bottom of the
20 can?

21 A. No, sir, I was not. I picked the can up.

22 Q. Okay.

23 A. To take a picture of the top, to show that
24 it was intact. Nothing was leaking out of the bottom.
25 It was a full can.

1 Q. And did the -- from the time you picked
2 the can up on its side to turn the can on its end, did
3 you -- was there -- your testimony is it was a full can
4 of beer?

5 A. Yes, sir.

6 HEARING EXAMINER FARKAS: All right.

7 MR. LINDGREN: Thank you, Mr. Holscher.
8 You may sit down.

9 THE WITNESS: Thank you, Your Honor.

10 (Witness excused.)

11 HEARING EXAMINER FARKAS: Call your next
12 witness.

13 MR. LINDGREN: Thank you. The Staff at
14 this time calls Tom Forbes.

15 THOMAS FORBES,
16 being by the Hearing Examiner first duly sworn, as
17 hereinafter certified, testifies and says as follows:

18 HEARING EXAMINER FARKAS: You may be
19 seated.

20 You may proceed.

21 MR. LINDGREN: Thank you.

22 DIRECT EXAMINATION

23 By Mr. Lindgren:

24 Q. Good morning, Mr. Forbes.

25 A. Good morning.

1 Q. Can you state and spell your full name for
2 the record, please.

3 A. Tom Forbes, F-o-r-b-e-s.

4 Q. Thank you. What is your business address?

5 A. Public Utilities Commission of Ohio,
6 Transportation Department, Compliance Division, 180
7 East Broad Street, Columbus, Ohio 43215.

8 Q. Are you employed by the Public Utilities
9 Commission?

10 A. Yes, sir.

11 Q. What is your position there?

12 A. I am a Compliance Officer.

13 Q. How long have you been in that position?

14 A. Roughly four years.

15 Q. What sort of training have you received in
16 connection with your position?

17 A. I'm a certified inspector. I've received
18 the North American Standards vehicle and driver
19 inspection, hazardous materials inspection, cargo,
20 tank, and other bulk package training, radioactive
21 Level 6 training, compliance review, inspector
22 training, and I've attended numerous in-services that
23 the Commission puts on in reference to inspecting
24 vehicles. I've also been trained by a mentor on how to
25 properly assess roadside violations and reviews for

1 civil forfeiture reasons.

2 Q. What are your duties as a Compliance
3 Officer?

4 A. I assess violations from inspections that
5 are uploaded through either the highway patrol or the
6 Public Utilities investigators. I assess violations
7 from compliance reviews that are uploaded from the
8 Public Utilities Commission investigators. I answer
9 technical calls from motor carriers, shippers, and
10 drivers, reference the regulations, testify in
11 hearings, and I perform enough inspection to keep my
12 certifications current.

13 Q. Thank you.

14 MR. LINDGREN: May I approach the
15 witness?

16 HEARING EXAMINER FARKAS: Yes.

17 MR. LINDGREN: Let the record show I am
18 handing the witness what has been marked as Staff
19 Exhibit 3.

20 HEARING EXAMINER FARKAS: So marked.

21 Q. Mr. Forbes, do you recognize this
22 document?

23 A. Yes, sir.

24 Q. Can you explain what it is?

25 A. It is a Notice of Preliminary

1 Determination letter that was sent to Mr. Leisure at
2 his Jeffersonville address. A Notice of Preliminary
3 Determination letter is sent to a Respondent, carrier,
4 shipper, or driver, after they've had an opportunity
5 for conference and did not come to a resolution at the
6 conference, the case was not settled at the conference
7 level. In this case, the case was not settled at the
8 conference level. This letter was sent to Mr. Leisure
9 with an instruction sheet that explains how to request
10 an administrative hearing or to pay the forfeiture,
11 whichever he desired.

12 Q. Thank you. What is the forfeiture amount
13 stated in this Notice?

14 A. The original forfeiture amount stated in
15 the Notice of Preliminary Determination was \$500 for
16 possession, use, or under the influence of alcohol.
17 The computer generates the fines on motor carrier
18 violations. It generates them off of the code
19 violation Section 392.5A in this case. Both possession
20 and use are under that one code section, and for
21 compliance reasons, possession is \$100 fine, and use or
22 under the influence is a \$500 fine. Initially, the
23 computer sends out all violations for this code site as
24 a \$500 fine. If you look at Page 2 of Staff Exhibit 3,
25 at conference this fine was reduced to \$100 because it

1 was a possession violation, not an under the use or
2 influence of alcohol violation.

3 Q. Based on your experience, is \$100 the
4 correct forfeiture amount that should have been
5 assessed for this violation?

6 A. Yes, sir.

7 Q. Are you familiar with the standards for
8 forfeitures of the Commercial Motor Vehicle Safety
9 Alliance?

10 A. Yes, sir.

11 Q. Is this \$100 amount consistent with those
12 standards?

13 A. Yes, sir.

14 Q. Is this amount of \$100 the amount that
15 would typically be assessed against a driver for the
16 same violation?

17 A. Yes. It would be reduced to 100. The
18 initial assessment would be 500, and then at conference
19 it would be reduced to 100.

20 Q. Thank you. Is the forfeiture of \$100 the
21 amount you would recommend that the Public Utilities
22 Commission assess against this driver?

23 A. Yes.

24 Q. Thank you.

25 I have no further questions for this

1 witness.

2 HEARING EXAMINER FARKAS: Is there any
3 other penalty associated with this violation such as
4 loss of license?

5 THE WITNESS: No, sir. This is not --
6 possession is not a disqualifying offense for Mr.
7 Leisure's CEO. The violation does go on the company
8 safety record, though.

9 HEARING EXAMINER FARKAS: Okay. Thank
10 you.

11 Do you have any questions?

12 CROSS-EXAMINATION

13 By Mr. Leisure:

14 Q. So what you're saying is, like in my
15 situation, if I would have had the alcohol in my truck
16 and I was guilty and I was going to pay the fine and I
17 sent that \$500 check in, I only owed \$100?

18 A. Yes.

19 Q. And I would have paid \$500?

20 A. Yes, sir.

21 Q. And I would have had to pull teeth from
22 the State of Ohio to get my \$400 back?

23 A. We do make reimbursements, refunds on a
24 regular basis. Sometimes carriers pay twice or a
25 violation is overassessed initially, and the State of

1 Ohio makes refunds. It's not a large deal. You
2 contact us and let us know that the mistake was made.
3 We investigate it, and we notify our division to cut
4 you a check.

5 Q. Okay. I'm just curious how many times
6 that has happened.

7 HEARING EXAMINER FARKAS: Do you have a
8 guesstimate on how often that happens?

9 THE WITNESS: No. I work on some of the
10 refunds. I would estimate two to three times a month,
11 but that's strictly an estimate. I don't have an exact
12 number.

13 HEARING EXAMINER FARKAS: But it does
14 happen?

15 THE WITNESS: It does happen, yes. I've
16 processed --

17 Q. These people always get their money back,
18 the extra money?

19 A. Yes. If we became aware of a mistake, we
20 correct it.

21 Q. The Code 392.5A, can you tell me exactly
22 what that -- the definition of that is?

23 A. I would have to have the book in front of
24 me. If it's okay, if I use Mr. Lindgren's book --

25 Q. Sure.

1 HEARING EXAMINER FARKAS: Just for the
2 record, can you identify what you're looking?

3 THE WITNESS: Yes. I'm looking at the
4 Federal Motor Carrier Safety Regulations dated October
5 1, 2007.

6 HEARING EXAMINER FARKAS: Thank you.

7 A. You just want me to read the section?

8 Q. Sure.

9 A. "392.5, Alcohol Prohibitions," A says, "No
10 driver shall: Use alcohol, as defined in 382.107 of
11 this subchapter, or be under the influence of alcohol
12 within four hours prior to going on duty, or having
13 physical control of a commercial motor vehicle; or,"
14 A-2, "Use alcohol, be under the influence of alcohol,
15 or have any measured alcohol concentration or detected
16 presence of alcohol while on duty, or operating, or in
17 physical control of a commercial motor vehicle; or,"
18 Section 3, "Be on duty or operate a commercial motor
19 vehicle while the driver possesses wine of not less
20 than one-half of one percent of alcohol by volume, beer
21 as defined in 26 US Code 5052(a) of the Internal
22 Revenue Code of 1954, and distilled spirits as defined
23 in Section 5002(a)(8) of such code. However, this does
24 not apply to possession of wine, beer, or distilled
25 spirits which are: Manifested and transported as part

1 of a shipment; or possessed or used by bus passengers."

2 Q. Now, that that you just read there, is
3 there anything in there that says you cannot have an
4 empty can in your vehicle?

5 A. No, sir.

6 Q. Okay. I don't have any more questions.

7 HEARING EXAMINER FARKAS: Okay. Thank
8 you. You're excused.

9 (Witness excused.)

10 HEARING EXAMINER FARKAS: Does the Staff
11 have any more witnesses?

12 MR. LINDGREN: No. Thank you, Your
13 Honor.

14 HEARING EXAMINER FARKAS: You're resting
15 your case at this time?

16 MR. LINDGREN: Yes. I would like to move
17 the admission of Staff Exhibits 1A through 1G, 2 and
18 3.

19 HEARING EXAMINER FARKAS: Is there any
20 objection to the admission of those exhibits?

21 MR. LEISURE: No, sir.

22 HEARING EXAMINER FARKAS: Okay. They will
23 be admitted.

24 (EXHIBITS ADMITTED INTO EVIDENCE.)

25 HEARING EXAMINER FARKAS: Mr. Leisure,

1 you're allowed to testify now, and you can take the
2 stand and tell your side of the story.

3 MR. LEISURE: Okay.

4 DAVID W. LEISURE,
5 being by the Hearing Examiner first duly sworn, as
6 hereinafter certified, testifies and says as follows:

7 HEARING EXAMINER FARKAS: You may be
8 seated. Please state your name and address for the
9 record.

10 THE WITNESS: David W. Leisure, D-a-v-i-d,
11 initial W, L-e-i-s-u-r-e.

12 HEARING EXAMINER FARKAS: All right.

13 DIRECT TESTIMONY

14 THE WITNESS: My whole point is here I was
15 just -- the officer was on the stand, and I just wanted
16 to see if he remembered everything that happened during
17 that, and obviously he didn't. He didn't remember
18 about the door not opening, and he was going by his
19 report on a lot of it, on a lot of what happened, and I
20 just wanted to make that -- how do I say this? I just
21 wanted to make my point on he couldn't remember
22 everything that happened there because he's making
23 stops every day and every day, and he's not making
24 reports, that they wind in together and he can't
25 remember who was who and what was what.

1 My main thing is this can was empty. I
2 was working on my truck the weekend before, and I
3 had -- laying on the floor, I had my hands up
4 underneath the dash, working on wiring, and my friend
5 that was helping me, he pulled out this can and handed
6 it to me, and it was empty. It had -- I don't know
7 what happened in shipping or something. There was a
8 very small crack in the bottom of it, and it had leaked
9 out. He handed it to me. We had a little laugh, and I
10 thought well, I'm going to keep this can, it's pretty
11 neat, but I had it sitting in the truck. Well, a
12 couple days later I was driving down the road, and
13 there was something rolling around, and I realized
14 that's what it was, that can in there rolling around;
15 so I picked it up and threw it in the cooler and forgot
16 about it, and that's why the can was in there. The can
17 was empty. If he couldn't remember about telling me
18 that it was a violation for that door not to open, how
19 can he remember if that can was empty or not? All he
20 done was took his fingers and set it up to get the
21 picture of it. The other officer that read the law
22 says there's no law against having an empty can, and it
23 was an empty can. I think that's all I got to say.

24 HEARING EXAMINER FARKAS: All right. Do
25 you have any questions?

1 MR. LINDGREN: Yes, Your Honor.

2 CROSS-EXAMINATION

3 By Mr. Lindgren:

4 Q. Mr. Leisure, you don't deny that there was
5 a can labeled Bud Light in the cooler; right?

6 A. Right.

7 Q. Do you make a practice of throwing trash
8 or discarded items in the cooler?

9 A. Well, no, I don't throw trash in my
10 cooler. I keep water in my cooler, and to keep it from
11 rolling around and underneath the brake pedal or
12 something, I set it in there. It was the safest place
13 to put it rather than pulling off the side of the road
14 or throwing it under the bunk or something.

15 Q. You could have put this somewhere other
16 than the cooler; right?

17 A. I could have threw it out the window. Is
18 that what you're asking?

19 Q. No. You could have put it in an empty bag
20 or something like that?

21 A. I didn't have an empty bag beside me going
22 down the road.

23 Q. Well, you'd agree with me that normally
24 the purpose of putting something in a cooler is to keep
25 it cold; right?

1 A. That's what they're for, yes.

2 Q. Okay. Mr. Leisure, do you recall asking
3 Inspector Holscher if you could dump out the contents
4 of this can by the side of the road?

5 A. No, I didn't say that. I didn't say
6 that. I remember him saying that up here earlier that
7 I said that, but, no, I did not say that. My comment
8 to him was that it was an empty can. He said I don't
9 care. It's a violation. You're out of service.
10 You're done.

11 Q. Thank you. I have no further questions.

12 EXAMINATION

13 By Examiner Farkas:

14 Q. Mr. Leisure, do you have the can with
15 you?

16 A. No, I don't. I don't. When he put me out
17 of service and he escorted me to that truck stop, I was
18 out of service. I couldn't drive the commercial
19 vehicle. I called a friend of mine who had a CDL. He
20 come from where he lives in Washington Court House up
21 to the truck stop there at 41 and 71, and we dropped my
22 trailer, because the company was coming to get it so
23 they could get that load delivered, and he climbed into
24 my truck and drove it to my house, and I climbed in his
25 pickup truck and drove it, and that's how we got out of

1 there. In the process of waiting on him to get there,
2 I threw it in the trash can at that truck stop so he
3 wouldn't get in trouble.

4 Q. Okay. So the can, you just threw the can
5 away?

6 A. Yes. I should have had it. I should have
7 kept it, but my thought was my friend is coming up to
8 drive this truck. I don't know if he's sitting around
9 the corner waiting on me to leave, see if I'm going to
10 take off and leave, get me for a violation again, or
11 somebody else is going to pull him over and see that
12 can in there and him having to go through the same
13 thing that I'm going through now. At that point in
14 time the can -- I wanted to keep the can, but at that
15 point in time the can wasn't important to me. I was
16 looking at losing my job for this.

17 Q. Did it ever occur to you, when the officer
18 picked up the can, to show him the bottom of the can or
19 where you're saying there was a leak or a hole in the
20 can?

21 A. I told him the can was empty, and he just
22 grabbed it, like, with a couple of fingers and set it
23 up. He took a picture, reached in there and took a
24 couple fingers and stood it up, took another picture.
25 I said what's the big deal. It's an empty can. He

1 said I don't care. He said you're done, and that's the
2 way he put it, you're done, you're shut down.

3 HEARING EXAMINER FARKAS: All right.
4 Let's go off the record. Let's take a recess for about
5 10 minutes.

6 (Recess taken.)

7 HEARING EXAMINER FARKAS: You didn't have
8 any more questions for Mr. Leisure?

9 MR. LINDGREN: That's correct, Your
10 Honor.

11 By Examiner Farkas:

12 Q. Mr. Leisure, I had one last question for
13 you. Was there any liquid in the cooler, water or
14 anything like that?

15 A. Water, yes.

16 Q. I mean other than bottles of water, was
17 there water in the bottom of the cooler or was it just
18 dry, holding the bottles of water?

19 A. Unless there was -- I mean, I didn't
20 actually pour any water in there. I don't know if
21 there might have been any moisture in there or not. I
22 don't know. I don't remember.

23 Q. Okay. There seems to be, like, a plastic
24 bag or something in the cooler, if you look at the
25 pictures.

1 A. I think that is what the bottles of water
2 came in.

3 Q. Okay.

4 (Discussion off the record.)

5 Q. Is that -- the plastic, is that from a
6 convenience store?

7 A. I actually think I got that bag from my
8 house. We buy that water by the case, and I think I
9 actually threw some of the water in that thing to
10 carry, to put in my truck.

11 MS. HUSSEY: Basically, though, that's
12 just a white plastic bag you get from maybe a grocery
13 store or something to that effect?

14 THE WITNESS: Yes, yes.

15 MS. HUSSEY: Okay.

16 Q. Again, when the -- after you were -- after
17 the pictures were taken of the can, you did not say to
18 the officer -- you had said to the officer that the can
19 was empty; correct?

20 A. Yes.

21 Q. Did you pick it up and show it to him?

22 A. No, because when he opened that cooler and
23 looked in there, he saw that and he said you're done.
24 I said why. He said you got alcohol in this truck.
25 There's a beer can right there. I said it's an empty

1 can. He said you're done, you're shut down. He said
2 don't touch it, and that's when he went to get his
3 camera, came back and took pictures. He told me not to
4 touch it. I done what he told me. I didn't touch it.

5 Q. And after he took pictures, you said you
6 threw the can away?

7 A. After he escorted me to the truck stop and
8 put me out of service, then I threw that away, along
9 with some other trash that was laying on the floor,
10 threw it all away in the trash can at the truck stop.

11 Q. Okay.

12 (Witness excused.)

13 HEARING EXAMINER FARKAS: Do you have
14 anything further you want to offer as evidence or
15 anything else?

16 MR. LEISURE: No. I wish I had the can,
17 but like I said, I didn't want my friend getting in the
18 truck and driving it home and having the same problem,
19 you know. I wasn't thinking I was going to need the
20 can as evidence. I just -- I don't know. I don't know
21 what I was thinking. I was upset, and I wasn't
22 thinking that I was being shut down for an empty can
23 and out of service and possibly losing my job over it,
24 and I wasn't thinking of keeping the can. I threw it
25 in the trash.

1 HEARING EXAMINER FARKAS: Okay. So you
2 have nothing further?

3 MR. LEISURE: No.

4 HEARING EXAMINER FARKAS: All right.
5 Anything further?

6 MR. LINDGREN: Nothing further, Your
7 Honor.

8 HEARING EXAMINER FARKAS: Okay. We'll
9 submit this case on the record. Thank you.

10 MR. LEISURE: Pardon?

11 HEARING EXAMINER FARKAS: We'll submit the
12 case on the record, and you'll be informed of the
13 Commission's decision when they prepare the order and
14 vote on it.

15 MR. LEISURE: Okay.

16 HEARING EXAMINER FARKAS: Thank you.

17 (Thereupon, the hearing was concluded at
18 11:00 a.m.)
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24
25

CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings taken
by me in this matter on Thursday, June 4, 2009, and
carefully compared with my original stenographic notes.

s/Valerie J. Sloas
Valerie J. Sloas, Registered
Professional Reporter and Notary
Public in and for the State of
Ohio.

My commission expires June 8, 2011.

(VJS-629)

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Summary: Transcript David Leisure 6/4/09 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Sloas, Valerie J. Mrs.