

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Samuel Allen, Notice of)
Apparent Violation and Intent to Assess) Case No. 09-570-TR-CVF
Forfeiture.) (OH1191004778D)

OPINION AND ORDER

The Commission, considering the testimony and exhibits presented in this matter, the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

APPEARANCES:

Samuel Allen, 7627 Douglas Road, Lambertville, Michigan 48144, on his own behalf.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Bill Wright and Vern Margard, Assistant Attorneys General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Commission.

OPINION:

I. Nature of the Proceeding and Background

On January 9, 2009, on the Ohio Turnpike/Interstate 80 in Erie County, Trooper Ron Kisner of the Ohio State Highway Patrol conducted an inspection of a commercial motor vehicle (CMV) owned by Fresenius USA Manufacturing Inc. and driven by Samuel J. Allen. During the inspection, Trooper Kisner found Mr. Allen in violation of the following section of Title 49, Code of Federal Regulations (C.F.R.), Part 392.3, which provides in part as follows:

No driver shall operate a commercial motor vehicle . . . while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle. . . .

On June 15, 2009, Mr. Allen was timely served a Notice of Preliminary Determination (NOPD) in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the NOPD, Mr. Allen was notified that Commission staff intended to assess a civil monetary forfeiture of \$100.00 for violating 49 C.F.R. 392.3. On July 7, 2009, Mr. Allen requested an administrative hearing. A prehearing conference was held on August 18, 2009; however, the parties could not reach settlement. A hearing was conducted on October 15, 2009.

II. The Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted the Federal Motor Carrier Safety Rules, found in 49 C.F.R. 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. In addition, Rule 4901:2-5-02(B), O.A.C., requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the U.S. Department of Transportation (USDOT). Further, Section 4919.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to \$10,000 per day, per violation against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, into or through this state.

III. Issue in the Case

The sole issue in this case is whether Mr. Allen's driving ability was impaired or so likely to become impaired through fatigue, illness, or any other cause as to make it unsafe for him to continue to operate a CMV.

Staff's Position

Staff maintains that the evidence demonstrates that Mr. Allen operated a CMV while ill or fatigued. Trooper Kisner stated that he had concerns with Mr. Allen's driving because he was following about one hundred feet behind Mr. Allen and observed Mr. Allen drive onto the right side rumble strips twice in one mile, so he stopped Mr. Allen to investigate (Tr. at 7-9, 33). According to Trooper Kisner's notes on his inspection report, when Mr. Allen was stopped he said "I was on the [highway] shoulder and am a little tired" (Staff Ex. 1).¹ When Mr. Allen drove onto the rumble strips, stated Trooper Kisner, the vehicle traveled about two feet off the road (*Id.* at 18).

Trooper Kisner testified that he has applied 49 C.F.R. 392.3 previously and that its purpose is to prevent accidents from drivers who are sleepy or ill. Trooper Kisner asserted that "speed and drivers falling asleep . . . are the number one cause of our accidents, our fatalities," and he asserted that several fatal crashes have recently occurred on that part of Interstate 80 (*Id.* at 11, 35). According to Trooper Kisner, his observation of Mr. Allen's driving, in addition to Mr. Allen's acknowledging that he was tired, made Trooper Kisner conclude that Mr. Allen's driving ability was impaired (*Id.* at 11-12). Under 49 C.F.R. 392.3, explained Trooper Kisner, a driver is placed out of service until he is no longer ill or fatigued, at which time he can resume driving (*Id.* at 11, 14). Trooper Kisner added that if a

¹ The inspection report indicates that the inspection began at 11:06 and ended at 11:33, approximately 27 minutes.

driver swerves because of turning on a radio or a cell phone, it is dangerous but would not result in a 49 C.F.R. 392.3 violation, because "if they don't admit to being tired, then you can't make them tired" (*Id.* at 13). Trooper Kisner was unable to recall whether, following the inspection, he or Mr. Allen left the inspection site first (*Id.* at 16).

Mr. John Canty, Compliance Officer for the Commission's Transportation Department, testified regarding the calculation of the civil forfeiture (*Id.* at 19-20). Mr. Allen did not contest the calculation of the amount of the civil forfeiture (*Id.* at 21).

Mr. Allen's Position

Mr. Allen disagrees that he drove two feet off the road onto the rumble strips (*Id.* at 22, 26). Mr. Allen testified that he crossed over the white line on the edge of the pavement just once, and that he did so while adjusting the radio on a vehicle that he drives only once or twice a month, much less often than other vehicles in the company fleet. As a result, he explained, he was unfamiliar with the radio controls and had to look down at them (*Id.* at 22, 25-26, 29-30). He added that he was maneuvering the vehicle back on the road when the tires begin to "buck" and grab at the pavement, making the handling of the truck "squirrely" and causing the trailer to swing (*Id.* at 26, 30, 33).

Concerning whether he was ill or fatigued, Mr. Allen acknowledged that he had been ill with the flu on a Tuesday evening and did not work on Wednesday and Thursday to allow himself extra time for recovery (*Id.* at 26-27). Mr. Allen added that when he returned to work on Friday, he was feeling better, had eaten several meals, "was on the recoup," and was capable of driving a vehicle safely (*Id.* at 22-23, 26-28). In Mr. Allen's opinion, although he was pale and "a little tired" as he entered the final forty-five minutes of his trip, his comments that were quoted by Trooper Kisner were "out of context," because he did not mean that he was "sleepy tired, I can't keep my head up or I can't keep my eyes open, but just a tiredness you would get after working a ten-hour day" (*Id.* at 22, 23, 28, 30-32). Mr. Allen asserted that he left the inspection site before Trooper Kisner. He also argued that, if he had been seriously ill or tired, Trooper Kisner should have required him to remain at the inspection site for a time to rest, but no such request was made (*Id.* at 15-16.)

Mr. Allen contends that he has "a clean driving record" and makes "wise decisions when it comes to operating a motor vehicle," because he has a family and has "much more to lose to fall asleep or kill somebody . . . than to make a dollar driving" (*Id.* at 23-24). He emphasized that he does not take lightly the safety risks of driving a commercial motor vehicle and will contact his employer if he believes that he is "not fit to drive" on a particular day (*Id.* at 28).

Commission Conclusion

The Commission finds, based upon the record in this proceeding, that Staff has not proven that Mr. Allen violated 49 C.F.R. 392.3. It is clear that Trooper Kisner placed Mr. Allen out of service after observing Mr. Allen twice drive onto the highway shoulder and hearing Mr. Allen's admission that he was "a little tired" (*Id.* at 11-12). Indeed, Mr. Allen testified that he had become ill on January 6, 2009, and did not work on January 7 and 8, 2009, just prior to the January 9, 2009 inspection (*Id.* at 26-27). Still, whether Mr. Allen's physical condition caused him to drive onto the highway shoulder is unclear. Mr. Allen contends that he was not in a condition under which he could not keep his head up or eyes open; rather, asserts Mr. Allen, he had swerved off the highway while looking down and adjusting the radio on an unfamiliar vehicle (*Id.* at 23, 25-26). Mr. Allen adds that when he attempted to reenter the highway, the vehicle's tires began to "buck" at the edge of the pavement, causing the trailer to swing (*Id.* at 26, 30, 33). As for Mr. Allen's contentions that he did not work for several days to better ensure his recovery from illness, his record of duty status indicates that he was indeed off duty for at least January 7, 2009 (Staff Ex. 1). Finally although Trooper Kisner believed that Mr. Allen was sufficiently fatigued to warrant being stopped, cited, and placed out-of-service for unsafe driving, the record does not indicate that Mr. Allen was required to rest for any time after the inspection, which lasted only 27 minutes. Nor did Trooper Kisner escort Mr. Allen to a rest area or exit ramp that had lodging to insure that his "fatigue" was alleviated before he would resume driving (Tr. at 11-12, 14-16). In sum, then, there is insufficient evidence in the record to demonstrate that Mr. Allen's ability or alertness was so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to continue to operate a CMV. Therefore, the \$100.00 civil forfeiture assessed against Mr. Allen for violating 49 C.F.R. 392.3 should be eliminated, and the violation should be deleted from Mr. Allen's Safety-Net record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On July 7, 2009, Samuel Allen filed a request for an administrative hearing regarding an apparent violation of 49 C.F.R. 392.3, and a civil forfeiture of \$100.00 proposed by the Staff.
- (2) A prehearing conference was held on August 18, 2009.
- (3) A hearing was held on October 15, 2009.
- (4) Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

- (5) Based upon the record in this proceeding, Staff has not proven that Mr. Allen violated 49 C.F.R. Section 392.3.
- (6) The \$100.00 forfeiture assessed against Mr. Allen for violating 49 C.F.R. 392.3 should be eliminated, and the violation will be deleted from Mr. Allen's Safety-Net record.

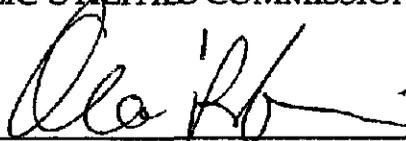
ORDER:

It is, therefore,

ORDERED, That the violation of 49 C.F.R. 392.3 be deleted from Mr. Allen's Safety-Net record, and the associated civil forfeiture be eliminated. It is, further,

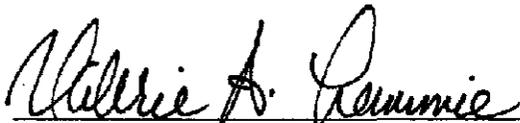
ORDERED, That a copy of this opinion and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schriber, Chairman

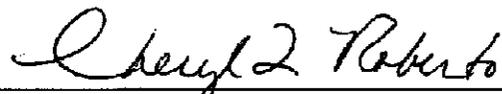
Paul A. Centolella



Valerie A. Lemmie



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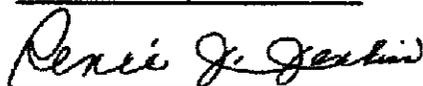


Cheryl L. Roberto

JML:ct

Entered in the Journal

JAN 27 2010



Renee J. Jenkins
Secretary