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Ohio
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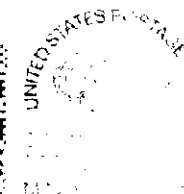
**Public Utilities
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HOLLIDAY, STEVEN
5311 DUNCAN STREET #2
PITTSBURG PA 15201

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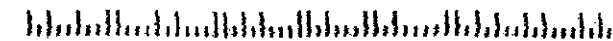
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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Request of Steven) Case No. 09-859-TR-CVF
Holliday for an Administrative Hearing.) (OH3276007054D)

OPINION AND ORDER

The Commission, considering the applicable law and evidence of record, and being otherwise fully advised, hereby issues its opinion and order in this matter.

APPEARANCES:

Steven Holliday, 511 Duncan Street, Apartment 2, Pittsburgh, PA, 15201, on his own behalf.

Richard Cordray, Ohio Attorney General, by Duane W. Luckey, Section Chief, and Sarah Parrot, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Commission.

NATURE OF THE PROCEEDING:

On May 27, 2009, the Ohio State Highway Patrol (Patrol) stopped and inspected a commercial motor vehicle (CMV) operated by Steven Holliday. The Patrol found Mr. Holliday in violation of 49 Code of Federal Regulations (C.F.R.) 391.11, for failure to be physically qualified to operate a CMV.¹

Thereafter, Mr. Holliday was timely served with a Notice of Apparent Violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination in accordance with Rules 4901:2-7-07 and 4901:2-7-12, Ohio Administrative Code (O.A.C.), respectively. In the notice, Mr. Holliday was advised that the Commission staff intended to assess a civil forfeiture of \$250.00 for the violation. A prehearing teleconference was conducted; however, the parties failed to resolve this matter. Thereafter, a hearing was held on January 27, 2010.

APPLICABLE LAW:

In Rule 4901:2-5-02, O.A.C., the Commission adopted the provisions of the Motor Carrier Safety Regulations of the U.S. Department of Transportation contained in Title 49, Parts 40, 382, 383, 385, 387 and 390 through 397, C.F.R.

¹ A person must have the requisite visual acuity to operate a CMV, with or without corrective lenses. See 49 C.F.R. 391.41(b)(10).

The Commission adopted the civil forfeiture and compliance proceeding rules contained in Rules 4901:2-7-01 through 4901:2-7-22, O.A.C. These rules require that a respondent be afforded reasonable notice and the opportunity for a hearing where the Commission staff finds a violation of the United States Department of Transportation Motor Carrier Safety Regulations. Rule 4901:2-7-20(A), O.A.C., also provides that, during the evidentiary hearing, the staff must prove the occurrence of the violation by a preponderance of the evidence.

BACKGROUND:

The inspection took place on May 27, 2009, at the Cambridge scales facility (scales facility) on Interstate 70 in Guernsey County, Ohio. At the time of the inspection, Mr. Holliday was not wearing his corrective lenses. At the conclusion of the inspection, in addition to some mechanical issues with the vehicle, Mr. Holliday was cited for a violation of 49 C.F.R. 391.11, by operating a CMV without his corrective lenses.

ISSUE IN THE CASE:

The sole issue raised in this case is whether Mr. Holliday was wearing his corrective lenses while operating the CMV. Mr. Holliday does not dispute that he was required, as a restriction on his driving privileges, to wear some type of corrective lenses while operating the vehicle. However, while Staff argues that Mr. Holliday was unable to produce his glasses for the inspector when required to do so, Mr. Holliday asserts that, although unable to find his glasses when requested, he subsequently showed them to Officer Kernik immediately after the completion of the inspection and before he exited the scales facility.

Officer Kernik testified that while completing the inspection of the CMV operated by Mr. Holliday, he questioned Mr. Holliday as to whether he was in possession of glasses, or was wearing contact lenses. According to Officer Kernik, Mr. Holliday responded that he was not wearing contact lenses and was unable to produce a pair of glasses; therefore, Officer Kernik placed Mr. Holliday out of service. According to Officer Kernik, between the beginning and the end of the inspection, Mr. Holliday was unable to produce a pair of glasses. (Tr. at 18.)

Mr. Holliday testified that he was in possession of his glasses, and he was wearing his glasses while driving the CMV on Interstate 70. According to Mr. Holliday, once he pulled into the scales facility, he remained in his vehicle at the scales for a substantial length of time behind an oversize load vehicle. While waiting at the scales, Mr. Holliday states that he took off his glasses and set them on top of his duffel bag,

which was sitting on the passenger seat. Mr. Holliday surmises that when he pulled around the back of the facility for the inspection, his glasses must have slid off of his bag. (Tr. at 41-45.)

According to Mr. Holliday, Officer Kernik did not question him about his glasses until the end of the inspection. Mr. Holliday testified that, at that time, he explained to Officer Kernik that he had the glasses with him when he pulled across the scales after the stop. According to Mr. Holliday, Officer Kernik informed him that he would be placed out of service for the violation, and then Officer Kernik went back into the building at the scales facility. At that time, Mr. Holliday testified that he went back to his vehicle, opened the passenger door, and found his glasses on the passenger seat. After finding his glasses, Mr. Holliday stated that he then walked to the scales facility office, showed the glasses to Officer Kernik, and Officer Kernik responded "okay". (Tr. at 36-37, 40.)

Officer Kernik testified that Mr. Holliday did not present him with a pair of glasses during the inspection. According to Officer Kernik, when he is conducting an inspection, and he asks about corrective lenses, that is the point in time when they need to be presented. Officer Kernik represented that if the glasses were presented to him at some point during the inspection, he would not have listed the violation, but stated that once he asked for the glasses "I need to see them upon command." With respect to Mr. Holliday's assertion that he subsequently found his glasses and showed them to Officer Kernik, Officer Kernik stated that he could not remember if those events occurred. However, he noted that, if Mr. Holliday was able to leave the scales facility that day, the mechanical problems must have been corrected and Mr. Holliday must have had his glasses. (Tr. at 50-51).

Upon further clarification, Officer Kernik clarified that, even if Mr. Holliday was able to produce the glasses, he would not have removed the violation from the report, because Mr. Holliday was still unable to produce the glasses upon request during the inspection. According to Officer Kernik, if Mr. Holliday produced his glasses, the service condition would be lifted, but the violation would still exist due to the failure to produce the glasses during the inspection. (Tr. at 52-55.)

DISCUSSION:

The Commission finds that, based upon the record in this proceeding, Staff has not proven that Mr. Holliday violated 49 C.F.R. 391.11. At the hearing, Mr. Holliday testified that he could not find his glasses upon request during the inspection. However, Mr. Holliday states that immediately after the inspection, he opened the passenger side door and found his glasses, where he believes they landed after sliding off of his bag. Officer Kernik was unable to remember whether Mr. Holliday

subsequently found his glasses and was unable to refute Mr. Holliday's assertion that he presented his glasses immediately after Officer Kernik completed the inspection and went back inside the scales facility.

Moreover, the Commission is mindful that nothing in the language of 49 C.F.R. 391.11 requires that Mr. Holliday be able to produce his glasses on demand at the inspection facility. Rather, Mr. Holliday is required to wear his glasses while operating the CMV. The Commission notes that there was no testimony or evidence that Mr. Holliday was not wearing his glasses while operating the CMV on Interstate 70, and, in fact, Mr. Holliday testified that he did not remove his glasses until he was off of the highway, waiting at the scales facility.

This Commission has previously found that, during an inspection, some leeway is appropriate when requesting a driver produce a requested item. In *In the Matter of Bobby Yates, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 08-283-TR-CVF, the Commission found that some leeway is appropriate when requiring that a driver produce his log book. Specifically, the Commission found that a reasonable amount of time to tender the log book was justified.

After reviewing this evidence, there does not appear to be sufficient evidence to establish that Mr. Holliday was not wearing glasses while operating a CMV. Mr. Holliday testified that his glasses were in his vehicle throughout the inspection and he was unable to find them. According to Mr. Holliday, he found his glasses immediately after the conclusion of the inspection and showed them to Officer Kernik, who was unable to remember whether Mr. Holliday had produced his glasses. Therefore, the evidence shows that Mr. Holliday produced his glasses within a matter of minutes after the conclusion of the inspection, which we find to be a reasonable amount of time.

In sum, there is insufficient evidence on the record to demonstrate that Mr. Holliday was not wearing his glasses while he was operating the CMV. Therefore, the \$250.00 forfeiture assessed against Mr. Holliday for violating 49 C.F.R. 391.11 should be eliminated, and the violation will be deleted from Mr. Holliday's Safety-Net record.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On May 27, 2009, the Patrol stopped and inspected a CMV operated by Steven Holliday and found that Mr. Holliday was operating a motor vehicle without his corrective lenses in violation of 49 C.F.R. 391.11.
- (2) Mr. Holliday was timely served with a Notice of Apparent Violation and Intent to Assess Forfeiture and a Notice of Preliminary Determination.

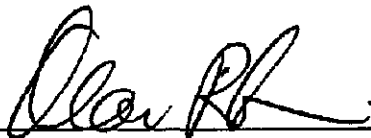
- (3) A hearing in this matter was held on January 27, 2010.
- (4) Rule 4901:2-7-20, O.A.C., requires that, at hearing, Staff prove the occurrence of a violation by preponderance of the evidence.
- (5) Based upon the record in this proceeding, Staff has not proven that Mr. Holliday violated 49 C.F.R. 391.11.
- (6) The \$250.00 forfeiture assessed against Mr. Holliday for violating 49 C.F.R. 391.11 should be eliminated, and the violation will be deleted from Mr. Holliday's Safety-Net record.

It is, therefore,

ORDERED, That the violation of 49 C.F.R. 391.11 be deleted from Mr. Holliday'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 on each party of record.

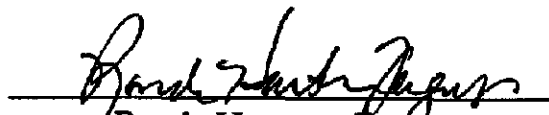
THE PUBLIC UTILITIES COMMISSION OF OHIO



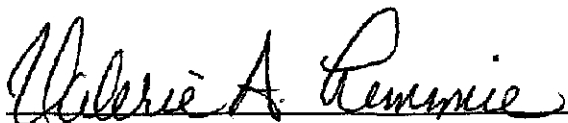
Alan R. Schriber, Chairman



Paul A. Centolella



Ronda Hartman Fergus




Valerie A. Lemmie



Cheryl L. Roberto

KLS/dah

Entered in the Journal
APR 06 2010



Renee J. Jenkins
Secretary