

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Thomas L. Vanmeter,)
Notice of Apparent Violation and Intent) Case No. 13-1580-TR-CVF
to Assess Forfeiture.) (OH119008678D)

OPINION AND ORDER

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

APPEARANCES:

Mike DeWine, Ohio Attorney General, by John Jones and Katie Johnson, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of Staff of the Public Utilities Commission of Ohio.

Richard E. Hackerd, 1370 Ontario Street, Suite 2000, Cleveland, Ohio 44113-1726, on behalf of Thomas L. Vanmeter.

OPINION:

I. Nature of the Proceeding and Background

On December 7, 2012, Trooper Ron Kisner of the Ohio State Highway Patrol conducted an inspection of a commercial motor vehicle (CMV) on State Route 80 in Lorain County operated by Great Lakes Petroleum Co., and driven by Thomas L. Vanmeter (Respondent). Trooper Kisner allegedly noticed that Respondent was not wearing a seat belt and stopped the vehicle to conduct an inspection. Trooper Kisner found that Respondent committed an apparent violation of 49 C.F.R. 392.16, for not properly wearing a seat belt while operating a CMV.

On June 3, 2013, Staff timely served a Notice of Preliminary Determination (NPD) on Respondent in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Respondent was notified that Staff had assessed a \$100.00 forfeiture but had agreed not to impose the civil forfeiture for violating 49 C.F.R. 392.16. The parties could not

reach a settlement at an August 27, 2013, prehearing conference. The hearing was conducted on November 7, 2013.

II. Applicable Law

The Commission adopted the Federal Motor Carrier Safety Rules pursuant to Ohio Adm.Code 4901:2-5-02(A), for the purpose of governing transportation by motor vehicle in the state of Ohio. The Federal Motor Carrier Safety Rules are found in 49 C.F.R. 40, 107 subparts (f) and (g), 367, 380, 382, 383, 385, 386, 387, and 390-397. In addition, Ohio Adm.Code 4901:2-5-02(B) requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the United States Department of Transportation (USDOT). Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce.

Ohio Adm.Code 4901:2-7-01 through 4901:2-7-22 govern all proceedings of the Commission to assess forfeitures and make compliance orders. These rules require that a respondent be afforded reasonable notice and the opportunity for a hearing where Staff finds a violation of the Federal Motor Carrier Safety Rules. Ohio Adm.Code 4901:2-7-20(A) also provides that, during the evidentiary hearing, the staff must prove the occurrence of the violation by a preponderance of the evidence.

III. Issue

The issue in this case is whether Respondent was wearing a seat belt while operating a CMV. The Commission notes that Respondent does not contest that he was required to wear a seat belt.

IV. Discussion and Conclusion

At the hearing, Staff presented testimony by Trooper Kisner, who is a State Trooper/Motor Carrier Inspector who works for the Ohio State Highway Patrol (Tr. at 6). He has been in his position for 17 years (Tr. at 6). Trooper Kisner testified that he conducted a level three inspection of Respondent and then filled out an inspection report indicating a violation of 49 C.F.R. 392.16 for failing to wear a seat belt (Tr. at 14). Trooper Kisner testified that he observed Respondent at approximately 10:00 a.m. and that he was probably a couple hundred feet away when he observed him, though he could not remember for certain (Tr. at 18).

Trooper Kisner testified that he was in a Chevrolet Tahoe and that there was nothing obstructing his view of Respondent, though he could not remember the weather on the day of his inspection or whether the windows of Respondent's vehicle were tinted (Tr. at 18-19). Trooper Kisner testified that Respondent was wearing a white shirt and that the seat belt was black (Tr. at 19). On cross-examination, Trooper Kisner testified that his memory was vague about the matter prior to reviewing the inspection report before hearing (Tr. at 23). Trooper Kisner then testified that he believed the truck he observed was white (Tr. at 24). Additionally, Trooper Kisner testified that he could not remember whether he was on the side of the road, in a travel plaza, or in the crossover. He also could not remember whether he was in motion at the time of making his observation or what speed the Respondent was traveling (Tr. at 25, 29, 31). Furthermore, he did not remember pulling onto the highway to pursue the Respondent or whether he executed a U-turn before pursuing the Respondent to make an inspection (Tr. at 31).

Respondent did not dispute that he was required to wear a seat belt while operating a vehicle; however, Respondent did contest the facts of the case; specifically that he was driving without wearing a seat belt. Respondent testified that he remembered the inspection and had a clear recollection of the weather on the day of the inspection (Tr. at 37-38). Respondent testified that he was wearing a seat belt while he was driving, as well as continuously throughout the incident (Tr. at 41). Respondent testified that he was traveling westbound on Route 80 at 60 miles per hour and that he observed Trooper Kisner enter Route 80 heading eastbound (Tr. at 39, 41). On cross-examination, Respondent confirmed that he was wearing a white shirt and that his seat belt was black (Tr. at 42). However, Respondent also testified that his truck was not white, as Trooper Kisner testified, but it was red (Tr. at 42).

After a review of the testimony and evidence submitted in this case, the Commission finds that Staff has not demonstrated by a preponderance of the evidence that Respondent was driving a CMV without wearing a seat belt in violation of 49 C.F.R. 392.16. It is undisputed that Respondent is required to wear a seat belt while operating a CMV. While Trooper Kisner testified that he observed Respondent driving without a seat belt, his recollection of the events is too vague to demonstrate the violation beyond a preponderance of the evidence (Tr. at 23-26, 29, 31). Trooper Kisner could not remember whether he was on the side of the road, in a travel plaza, or in the crossover (Tr. at 25, 26). We believe that Trooper Kisner cannot demonstrate that he clearly observed the Respondent driving without a seat belt, as he cannot remember where he was when he made his observation, the

details of the inspection, the weather, the color of the truck, the traffic, or the speeds of the vehicles (Tr. at 24, 38, 42). With Trooper Kisner's vague recollection of the inspection and the numerous inconsistencies provided in the record, we must conclude that Staff has not presented beyond a preponderance of the evidence a violation of 49 C.F.R. 392.16. Accordingly, the violation should be deleted from Respondent's Safety-Net record and history of violations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On July 3, 2013, Respondent filed a request for an administrative hearing regarding the apparent violation of 49 C.F.R. 392.16 and a civil forfeiture of \$0.00 agreed to by the Staff.
- (2) A prehearing conference was held on August 27, 2013.
- (3) A hearing was held on November 7, 2013.
- (4) Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.
- (5) Insufficient evidence has been presented to conclude that Respondent was not wearing a seat belt while driving. Staff, therefore, has not proven by a preponderance of the evidence, pursuant to Ohio Adm.Code 4901:2-7-20 that a violation of 49 C.F.R. 392.16 occurred.
- (6) Thomas L. Vanmeter should not be assessed a forfeiture, and the alleged violation should be deleted from his Safety-Net record and history of violations.

ORDER:

It is, therefore,

ORDERED, That Thomas L. Vanmeter should not be assessed a civil forfeiture for the alleged violation of 49 C.F.R. 392.16, and the alleged violation should be removed from his Safety-Net record and history of violations. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

M. Beth Trombold

Lynn Slaby

Asim Z. Haque

BAM/sc

Entered in the Journal

FEB 13 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary