

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Gary McCaskey, Notice)
of Apparent Violation and Intent to) Case No. 13-1955-TR-CVF
Assess Forfeiture.) (OH0619000902D)

OPINION AND ORDER

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

APPEARANCES:

Mike DeWine, Ohio Attorney General, by Ryan O'Rourke, Assistant Attorney General, Public Utilities Section, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Commission.

Gary McCaskey, 213 Main Street, New Martinsville, West Virginia, on his own behalf.

OPINION:

I. Nature of the Proceeding and Background

On May 31, 2013, Trooper Kenneth Collins (Trooper Collins) of the Ohio State Highway Patrol (Highway Patrol) conducted an inspection of a commercial motor vehicle (CMV) on the Ohio Turnpike in Portage County. The CMV was operated by Dandy Service Corporation and was driven by Gary McCaskey (Mr. McCaskey). Trooper Collins found that Mr. McCaskey was not wearing his seat belt while operating the CMV, an apparent violation of 49 C.F.R. 392.16, which states that "a commercial motor vehicle which has a seat belt assembly installed at the driver's seat shall not be driven unless the driver has properly restrained himself/herself with the seat belt assembly."

On August 22, 2013, Staff timely served a Notice of Preliminary Determination (NPD) on Mr. McCaskey in accordance with Ohio Adm.Code 4901:2-7-12. In the NPD, Mr. McCaskey was notified that Staff intended to assess a civil monetary forfeiture totaling \$100.00 for violating of 49 C.F.R. 392.16. The parties could not reach settlement at an October 24, 2013, prehearing conference. The hearing was conducted on December 5, 2013.

II. The Law

Under Ohio Adm.Code 4901:2-5-02(A), the Commission adopted the Federal Motor Carrier Safety Rules (FMCSR), found in 49 C.F.R. 40, 107 subparts (f) and (g), 367, 380, 382, 383, 385, 386, 387, and 390-397, to govern transportation or offering for transportation by motor vehicle within Ohio. 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 U.S. 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.

III. Issue in the Case/ Discussion

The sole issue in this case is whether Mr. McCaskey had properly restrained himself with his seat belt while driving a CMV. It must be noted that, at hearing, Mr. McCaskey did not contest how the civil forfeiture was calculated; he only disputed whether the alleged violation actually occurred.

A. Staff's Position

Trooper Collins testified that he was at an Ohio Turnpike toll plaza on the day that he inspected Mr. McCaskey. As drivers approach the plaza, he explained, they must slow down and stop at a toll booth before obtaining a ticket to enter the highway; the only exception is when the driver has an Easy Pass transponder, in which case the driver does not fully stop while driving through the toll booth (Tr. at 11-13, 15, 17). Trooper Collins stated that when he is at a toll plaza, he usually is sitting in his parked vehicle, but sometimes he is standing outside of his vehicle and talking with toll collectors as they work (Tr. at 11-13). Trooper Collins asserted that regardless of whether he is sitting in his parked vehicle or standing next to a toll booth, he can see whether a driver is wearing a seat belt (Tr. at 12-13).

Trooper Collins did not recall whether he was sitting in his parked vehicle or standing next to a toll booth as he observed Mr. McCaskey drive toward the toll plaza at mid-afternoon (Staff. Ex. 1; Tr. at 12-13; 21-22). He also was uncertain whether he observed Mr. McCaskey from the driver's or the passenger's side of the CMV, which of "possibly three" traffic lanes Mr. McCaskey was in, or what the weather conditions were at the time (Tr. at 14-15, 17-18, 21). However, he asserted that as he faced the highway the toll booths were on his right hand side, and he contended that there were no obstructions to his vision or to his view of the approaching drivers, including Mr. McCaskey (Tr. at 13, 16, 20-21, 52). Trooper Collins estimated that he was about ten feet away from Mr. McCaskey when he noticed the alleged violation (Tr. 52-55). Trooper Collins contended that he could see that Mr. McCaskey was wearing a green

short sleeved shirt and that the shoulder harness of the black seat belt was not in use (Tr. at 16, 18).

Upon making his initial observation, Trooper Collins explained, he stopped Mr. McCaskey, approached the CMV alongside the driver's door, and confirmed that Mr. McCaskey was not wearing his seat belt shoulder harness (Tr. at 18-19, 52-55; Staff Ex. 1). The notes of the inspection report, prepared at 3:12 p.m. by Trooper Collins contemporaneously at the time of inspection, read as follows: "The driver came through the toll booth without wearing his safety belt. He stated that he moved his shoulder harness from across his torso. Green short sleeve shirt, black safety belt not seen going across his torso as he drove by my stationary position" (Tr. at 19; Staff Ex. 1). Trooper Collins reasserted during his testimony that the belt was not on Mr. McCaskey's left shoulder and across his torso, but rather was "far behind him" (Tr. at 52-55).

Tom Persinger of the Compliance Division within the Commission's Transportation Department also testified for Staff. He explained that the civil forfeitures were calculated according to a fine schedule maintained by the Compliance Division (Tr. at 26). Mr. McCaskey had no questions for Mr. Persinger.

B. Mr. McCaskey's Position

Mr. McCaskey asserted that it is "inconceivable" that he was driving without wearing his shoulder harness (Tr. at 32, 41). He explained that at a toll plaza vehicles are merging haphazardly, so a driver "needs to broaden his perspective 360 degrees" and use the seat belt's flexibility to allow the driver to see vehicles that might otherwise be in the driver's blind spot (Tr. at 32, 43). Therefore, Mr. McCaskey added, when he approaches a toll plaza in his CMV and slows to a maximum 10 m.p.h., he typically loosens the shoulder harness by pulling on it; he then rolls down his window and leans forward, to better hear and see vehicles along both sides of his CMV. He asserted that under such circumstances he is still wearing the shoulder harness. While not completely sure that he followed such procedures on this particular day, Mr. McCaskey contended that his seat belt was buckled and the shoulder harness not underneath his left arm (Tr. at 33-40, 49-50). He also asserted that he must have been properly wearing the seat belt, because "when a driver exits a truck he's got to take the belt and retract it all the way and snap it shut. Otherwise it's a tripping hazard" (Tr. at 41).

CONCLUSION:

Ohio Adm.Code 4901:2-7-20(A) requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. McCaskey was in violation of 49 C.F.R. 392.16. First, although

Trooper Collins is uncertain whether he was sitting in his parked vehicle or standing next to a toll booth as he watched Mr. McCaskey approach, Trooper Collins emphasized that there were no obstructions to his vision or to his ability to see Mr. McCaskey (Tr. at 13, 16, 20-21, 52). Second, Trooper Collins estimated that he was in close proximity to Mr. McCaskey, i.e. about ten feet away, when he noticed the alleged violation. Third, the inspection report, which Trooper Collins prepared when he stopped Mr. McCaskey after observing him enter the plaza, indicates that the inspection began at 3:12 p.m. Thus, Trooper Collins' initial observation of Mr. McCaskey occurred at mid-afternoon, not at a time when adequate daylight for visibility would be an issue (Staff Ex. 1; Tr. at 21, 52-55). Finally, whether he was sitting in his parked vehicle or standing next to a toll booth, Trooper Collins was stationary as he watched Mr. McCaskey approach, and Mr. McCaskey had slowed to a maximum 10 m.p.h. as he neared the plaza; each of these factors would also help Trooper Collins better observe whether Mr. McCaskey was properly restrained by his seat belt (Tr. at 36, 38). In light of these aspects of the record, Mr. McCaskey's arguments at hearing were not sufficient to demonstrate that he should not be held liable for the civil forfeiture assessed for violation of 49 C.F.R. 392.16.

Therefore, Mr. McCaskey shall pay the \$100.00 civil forfeiture to the Commission by check or money order, made payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case No. 13-1955-TR-CVF and Inspection Report No. OH0619000902D shall be written on the check. Payment shall be made within 30 days of this opinion and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 18, 2013, Gary McCaskey filed a request for an administrative hearing regarding the apparent violation of 49 C.F.R. 392.16.
- (2) A prehearing conference was held on October 24, 2013.
- (3) A hearing was held on December 5, 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) Based upon the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. McCaskey had not properly restrained himself with his seat belt while driving his CMV on May 31, 2013.

- (6) The Commission finds it reasonable that Mr. McCaskey pay \$100.00 within 30 days of this opinion and order.

ORDER:

It is therefore,

ORDERED, That Mr. McCaskey pay a \$100.00 civil forfeiture for the violation of 49 C.F.R. 392.16. It is, further,

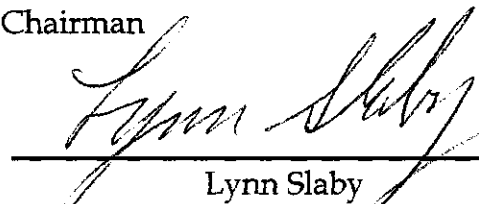
ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

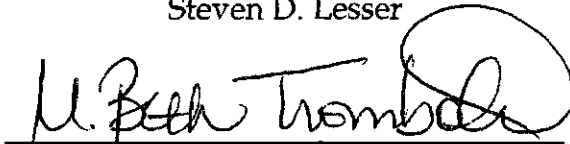
ORDERED, That a copy of this Opinion and Order be served upon all parties of record.


THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Shitchler, Chairman


Steven D. Lesser


Lynn Slaby

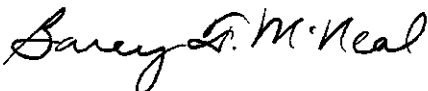

M. Beth Trombold


Asim Z. Haque

JML/sc

Entered in the Journal

MAR 12 2014



Barcy F. McNeal
Secretary