

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Jerry W. Montgomery,)
Notice of Apparent Violation and Intent) Case No. 15-1177-TR-CVF
to Assess Forfeiture.) (OH1366001930D)

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 finding Jerry W. Montgomery in violation of 49 C.F.R. 392.82(a)(1) for using a hand-held mobile telephone while driving a commercial motor vehicle (CMV).

I. Procedural History

Following the stop of a CMV driven by Jerry W. Montgomery (Mr. Montgomery or Respondent), Respondent was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12, notifying him that Staff intended to assess a \$250.00 civil forfeiture for a violation of 49 C.F.R. 392.82(a)(1) for using a hand-held mobile telephone while operating a CMV (Staff Ex. 2). A prehearing conference was conducted in this case on July 23, 2015, and a hearing was conducted on October 21, 2015. At the hearing, Staff witnesses Trooper Lee Darden and Jonathan Frye testified in support of the violation and forfeiture amount and Respondent appeared pro se. No post hearing briefs were filed in this proceeding.

II. Law

Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations (FMCSR), 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. 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.

III. Issue

There is one issue to resolve in this case. The issue is whether Staff satisfied its burden to show, by a preponderance of the evidence, that Respondent was using a hand-held mobile telephone while operating a CMV, and was, thus, in violation of 49 C.F.R. 392.82(a)(1), which provides that no driver shall use a hand-held mobile telephone while driving a CMV.

IV. Summary of the Evidence Presented at the Hearing

Trooper Darden testified that on March 16, 2015, he was sitting in a crossover on US Route 33 and observed, with a clear line of sight, Respondent driving a CMV while holding a mobile telephone against his ear with his left hand. Trooper Darden stated that because this is a violation of 49 C.F.R. 392.82(a)(1), he stopped the vehicle and conducted an inspection at 2:04 p.m. (Tr. at 7-8, 16; Staff Ex. 2). Trooper Darden noted that the Respondent was also cited for a violation for operating with a suspended PUCO number (Tr. at 11, 16). Trooper Darden asserted that he explained to Respondent that he was being cited for using a hand-held mobile device while operating a CMV (Tr. at 14; Staff Ex. 2).

Staff witness Frye, the Chief of the Transportation Department's Compliance Division, testified that the monetary amount assessed for the violations was determined by using a civil forfeiture assessment worksheet, a civil forfeiture violations chart, and the inspection report in the case (Tr. at 18-21). Mr. Frye added that the forfeiture amount is consistent with the guidelines issued by the Commercial Vehicle Safety Alliance (CVSA)¹ and recommended that the Commission order the Respondent to pay this amount as a forfeiture (Tr. at 19; Staff Ex. 2).

Mr. Montgomery testified that he was initially traveling on 104 eastbound when he received a telephone call from his dispatch, which he answered and then hung up near Alum Creek Road (Tr. at 25). He stated that, as he was traveling on Route 33, he saw troopers in the median and when he was passing Trooper Darden, he put up his cigarette, flipped his ashes, and glanced at him (Tr. at 26). In addition, Respondent claimed that he was not on a phone because he did not have to use it. Further, he testified that the phone was in the middle of the truck and he could not have reached the phone with his seatbelt on. Respondent also testified that he had a sore behind his ear, so his hand was up to his ear because of the sore. Respondent also introduced his phone records (Resp. Ex. 1); however, the phone records indicate that Respondent was on a phone call at approximately the same time as he drove past Trooper Darden.

¹ CVSA is an international not-for-profit organization made up of local, state, and federal motor carrier safety officials and industry representatives that promotes safety and security.

Specifically, Respondent's phone records indicate that he received a call at 1:59 p.m. on March 16, 2015, that lasted until 2:02 p.m. (Resp. Ex. 1; Tr. at 31-32). The inspection report indicates that the inspection began at 2:04 p.m. (Staff Ex. 1).

V. Commission Conclusion and Order

As noted previously, 49 C.F.R. 392.82(a)(1) prohibits drivers from using a hand-held mobile telephone while driving a CMV. The FMCSA has also released guidance that provides 49 C.F.R. 392.82(a)(1) "prohibits unsafely reaching for a device, holding a phone, or pressing multiple buttons." In this case, the Commission finds that Staff has proven by a preponderance of the evidence that Respondent violated 49 C.F.R. 392.82(a)(1). The evidence demonstrates that Trooper Darden observed Respondent using a hand-held mobile telephone while operating a CMV. Notwithstanding Respondent's claim that he was not using his cell phone, his phone records indicate that he was on a phone call at approximately the same time as he drove past Trooper Darden (Resp. Ex. 1; Tr. at 31-32). Therefore, the evidence shows that Respondent was on the phone and using a hand-held mobile phone while driving a CMV, in violation of 49 C.F.R. 392.82(a)(1). Accordingly, Respondent should be assessed a civil forfeiture of \$250.00. Additionally, we note that the very purpose of 49 C.F.R. 392.82(a)(1) is to minimize the risk of accidents attributed to driver inattention. In this case, the evidence demonstrates that Respondent appeared particularly inattentive at the time Trooper Darden observed him, as he was simultaneously smoking a cigarette, talking on a hand-held mobile phone, and flipping his ashes out the window while driving a CMV.

Additionally, R.C. 4923.99 provides that in determining the amount of the forfeiture for a violation discovered during an inspection, the Commission shall utilize a system comparable to the recommended civil-penalty procedure and fine schedule adopted by the CVSA. Based on the testimony of Staff witness Frye, we find that the civil forfeiture is both reasonable and consistent with the fines recommended by the CVSA. Therefore, based on the evidence and testimony submitted in this case, the Commission finds, by a preponderance of the evidence, Respondent was in violation of 49 C.F.R. 392.82(a)(1) and should be assessed a civil forfeiture of \$250.00. Respondent is directed to make payment of the assessed civil forfeiture of \$250.00 by certified check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The inspection number (OH1366001930D) should be written on the face of the certified check or money order to ensure proper credit. Payment must be made within 60 days of this Opinion and Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On March 16, 2015, an inspector for the Ohio State Highway Patrol stopped and inspected a CMV driven by Jerry Montgomery and found the driver to be in violation of 49 C.F.R. 392.82(a)(1), for using a hand-held mobile telephone while operating a CMV.
- (2) Respondent was timely served with an NPD, alleging a violation of 49 C.F.R. 392.82(a)(1), for using a hand-held mobile telephone while operating a CMV. In the NPD, Respondent was notified that Staff intended to assess civil monetary forfeiture of \$250.00.
- (3) A prehearing conference was conducted on July 23, 2015, and a hearing was held on October 21, 2015.
- (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, sufficient evidence has been presented to conclude that the Respondent was using a hand-held mobile telephone while operating a CMV. Therefore, Staff has shown, by a preponderance of the evidence, that a violation of 49 C.F.R. 392.82(a)(1) occurred.
- (6) Jerry Montgomery should be assessed the \$250.00 forfeiture for a violation of 49 C.F.R. 392.82(a)(1).

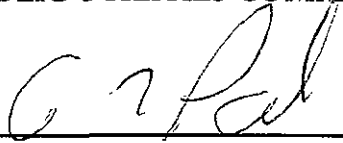
ORDER:

It is, therefore,

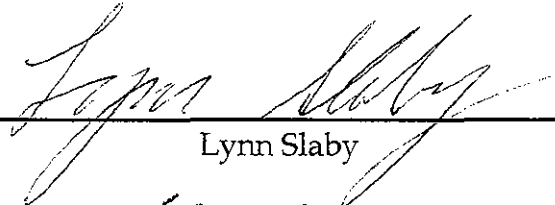
ORDERED, That Jerry Montgomery pay a civil forfeiture of \$250.00 for a violation of 49 C.F.R. 392.82(a)(1), in accordance with this Opinion and Order. Payment shall be made by check or money order payable to the "Treasurer, State of Ohio" and mail or deliver it to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 15-1177-TR-CVF and inspection number OH1366001930D should be written on the face of the check or money order. Payment must be made within 60 days of this Opinion and Order. 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



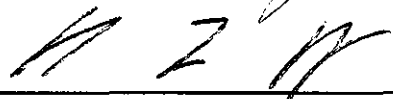
Andre T. Porter, Chairman



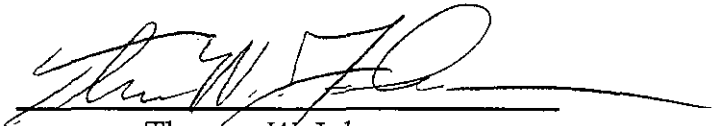
Lynn Slaby



M. Beth Trombold



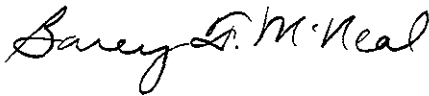
Asim Z. Haque



Thomas W. Johnson

BAM/sc

Entered in the Journal
JAN 20 2018



Barcy F. McNeal
Secretary