

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Howard M. Henry, Notice )	Case No. 15-1932-TR-CVF
of Apparent Violation and Intent to Assess )	(OH1663003400D)
Forfeiture. )	

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, finding Howard M. Henry in violation of 49 C.F.R. 391.11(b)(4), because he was not wearing the corrective lenses necessary to be physically qualified while driving a commercial motor vehicle.

I. Procedural History

Following an inspection of a commercial motor vehicle (CMV) driven by Howard M. Henry (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 the Commission's transportation rules. A prehearing conference was conducted in this case on December 9, 2015, and a hearing was held on February 19, 2016. At the hearing, Phillip Melicant and Jonathan Frye appeared as witnesses for Staff and Respondent appeared on his own behalf.

II. Law

Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations, including 49 C.F.R. Parts 390 to 397, to govern the transportation of persons or property 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 hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

III. Issue

The issue is whether Respondent complied with 49 C.F.R. 391.11(b)(4), which requires that a person be physically qualified to drive a CMV; physical qualifications, as specified in Subpart E of Part 391, require that a driver have at least 20/40 vision with or without corrective lenses. "Driving time" is defined by 49 C.F.R. 395.2 as "all time spent at the driving controls of a [CMV] in operation." Staff alleges that Respondent was not wearing the corrective lenses that are required as indicated on his medical certificate, which

is necessary for Respondent to comply with 49 C.F.R. 391.11(b)(4). Respondent asserts that he was not required to wear his corrective lenses during the inspection, because he was not driving at that time.

#### IV. Summary of the Evidence Presented at the Hearing

Phillip Melicant, a trooper with the Ohio State Highway Patrol, testified that, on September 5, 2015, he inspected a CMV driven by Respondent, in Cuyahoga County, Ohio. Following a full inspection of the CMV, Trooper Melicant prepared a Driver/Vehicle Examination Report, noting one apparent driver-related violation. Trooper Melicant testified that Respondent was driving the CMV without corrective lenses as required by the Respondent's medical certificate. Trooper Melicant further testified that Respondent told him, at the time of the inspection, that he was not wearing contact lenses and that he had left his eyeglasses in his pickup truck. According to Trooper Melicant, Respondent did not have any corrective lenses in his possession at the time of the inspection. (Staff Ex. 1; Tr. at 7, 11-15, 19-20.)

Staff witness Jonathan Frye, the chief of the compliance division of the Transportation Department, testified that an NPD was issued to Respondent with a civil forfeiture of \$250.00 assessed for the violation in this case. Mr. Frye also testified that the monetary value of the forfeiture for Respondent's violation was determined by using a fine schedule. Further, Mr. Frye explained that the Commission applies the fine schedule and the procedures used in determining the forfeitures in the fine schedule uniformly to motor carriers and drivers, and that Respondent's assessed forfeiture is consistent with the recommended fine schedule and civil penalty procedures adopted by the Commercial Vehicle Safety Alliance (CVSA). (Staff Ex. 2; Tr. at 20-23.)

Respondent testified that, at the time of the inspection, his eyeglasses were on the seat next to him in the CMV and that he always keeps his eyeglasses with him. Respondent further testified that his vision is strong enough that he should not have a restriction on his commercial driver's license, but that the Bureau of Motor Vehicles will not remove the restriction. Finally, Respondent stated that he was not required to wear his eyeglasses at the time of the inspection, because the CMV was inspected at a service plaza and Respondent was not driving at that time. (Tr. at 28, 30-33.)

#### V. Commission Conclusion and Order

"Driving time" is defined, under 49 C.F.R. 395.2, as "all time spent at the driving controls of a [CMV] in operation." All drivers who are required to wear eyeglasses in order to comply with 49 C.F.R. 391.11(b)(4) must not remove their eyeglasses when their CMV is stopped for an inspection, as they are still at the driving controls of a CMV in operation. If, when an inspection begins, a driver is not wearing the eyeglasses necessary to comply with

49 C.F.R. 391.11(b)(4), the driver will be found in violation of 49 C.F.R. 391.11(b)(4). In this case, Trooper Melicant testified unequivocally that Respondent did not have any type of corrective lenses in his possession at the time of the inspection. Respondent, however, testified that his eyeglasses were on the seat next to him at the time of the inspection. Thus, even if the Commission were to give weight to Respondent's testimony, the record reflects that Respondent was not wearing his eyeglasses while at the driving controls of the CMV during the inspection. We, therefore, find that, based on a preponderance of the evidence, Staff has proven that Respondent violated 49 C.F.R. 391.11(b)(4) by failing to wear corrective lenses while driving a CMV. (Staff Ex. 1; Tr. at 13-15, 19-20, 28, 32-33.)

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 adopted by the CVSA. Consistent with the testimony of Staff witness Frye, we find that the assessed civil forfeiture is both reasonable and consistent with the fines recommended by the CVSA. Accordingly, based on the evidence of record, the Commission finds that Respondent was in violation of 49 C.F.R. 391.11(b)(4) and should be assessed a civil forfeiture of \$250.00. Respondent is directed to make payment of the \$250.00 civil forfeiture within 60 days of this Opinion and Order by check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The inspection number (OH1663003400D) should be written on the face of the check or money order to ensure proper credit.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On September 5, 2015, an inspector for the Ohio State Highway Patrol stopped and inspected a CMV driven by Respondent and found him to be in violation of 49 C.F.R. 391.11(b)(4).
- (2) Respondent was timely served with an NPD, alleging a violation of 49 C.F.R. 391.11(b)(4), and informing him that Staff intended to assess a \$250.00 civil forfeiture.
- (3) A prehearing conference was conducted on December 9, 2015, and a hearing was held on February 19, 2016.
- (4) In accordance with Ohio Adm.Code 4901:2-7-20, Staff has proven, by a preponderance of the evidence, that Respondent was in violation of 49 C.F.R. 391.11(b)(4).
- (5) Respondent should be assessed a \$250.00 civil forfeiture for the violation of 49 C.F.R. 391.11(b)(4).

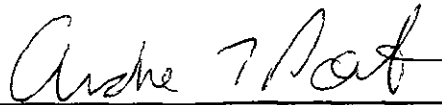
ORDER:

It is, therefore,

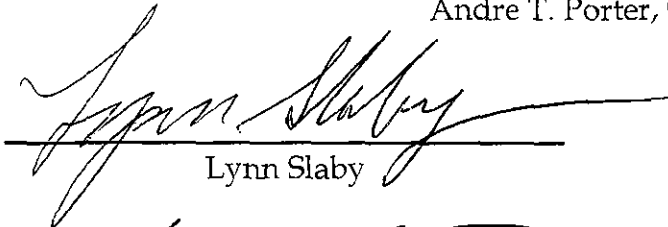
ORDERED, That Respondent pay a civil forfeiture of \$250.00 for the violation of 49 C.F.R. 391.11(b)(4), within 60 days of this Opinion and Order. Payment shall be made by check or money order payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: CF Processing, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. The inspection number (OH1663003400D) should be written on the face of the check or money 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



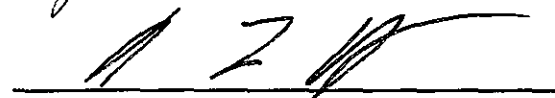
Andre T. Porter, Chairman



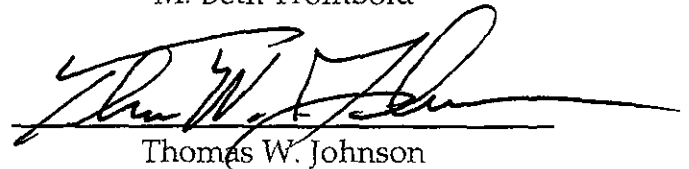
Lynn Slaby



M. Beth Trombold



Asim Z. Haque



Thomas W. Johnson

SJP/sc

Entered in the Journal

APR 27 2016

Barcy F. McNeal  
Secretary