

## THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF TOMMY SHAD,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE.

CASE NO. 15-1521-TR-CVF  
(OH3267009705D)

### OPINION AND ORDER

Entered in the Journal on June 8, 2016

#### I. SUMMARY

{¶ 1} The Commission, considering the applicable law and evidence of the record, finds Tommy Shad in violation of the Commission's transportation rules for use of a cellular telephone and an improper commercial driver's license while operating a commercial motor vehicle.

#### II. PROCEDURAL HISTORY

{¶ 2} Following an inspection of a commercial motor vehicle (CMV), Tommy Shad (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 two \$250 civil monetary forfeitures, totaling \$500, for violations of the Commission's transportation rules. A prehearing conference was conducted in this case on October 22, 2015, and a hearing was held on January 26, 2016. At the hearing, Inspector Richard David Bell and Thomas Persinger appeared as witnesses for Staff and Mr. Shad appeared pro se.

#### III. LAW

{¶ 3} 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 hearing, Staff prove the occurrence of a violation by a preponderance of the evidence. 49 C.F.R. 383.23(a)(2) provides that a CMV driver must have a properly issued commercial driver's license (CDL); 49 C.F.R. 392.82(a)(1) provides that no driver shall use a hand-held mobile telephone while driving a CMV.

#### IV. ISSUE

{¶ 4} At issue in this case is whether or not the driver, Mr. Shad, was properly licensed to be carrying the load on his vehicle. Staff alleges that while Mr. Shad's CDL restricted him to intrastate loads, he was carrying an international load. Mr. Shad asserts he thought the intrastate restriction on his CDL limited his travel, not his load. Also at issue is whether Mr. Shad was using a hand-held mobile phone while operating a CMV, in violation of 49 C.F.R. 392.82. Staff alleges that Officer Bell witnessed Mr. Shad using a phone while driving. Mr. Shad asserts that he was not using a phone.

#### V. SUMMARY OF THE EVIDENCE

{¶ 5} Officer Bell explained that he has completed training regarding inspections of CMVs for violations of the FMCSR and has been performing motor carrier inspections for over seven years. According to the officer, on average, he completes 1,200 to 1,400 inspections per year. (Tr. at 8-10.) Officer Bell testified that around 1:00 p.m. on July 8, 2015, through binoculars, he witnessed Mr. Shad drive past him. He expresses he had a clear, unobstructed view into the vehicle that was aided by the use of the binoculars. As Mr. Shad drove past him, Officer Bell states he observed the driver with a phone in his hand. Officer Bell asserts it is a violation of the Commission's transportation rules to be using a phone in any manner while driving a CMV. After pulling over Mr. Shad, Officer Bell says he questioned the driver about his phone use and Mr. Shad told him that he was trying to communicate with his supervisor. According to Officer Bell, this confirmed that the driver was using his phone while driving. (Tr. at 20-24.)

{¶ 6} Officer Bell also states that Mr. Shad's CDL had an intrastate restriction by which Mr. Shad was only permitted to operate a CMV carrying products produced in Ohio and delivered in Ohio. Officer Bell states he examined the label of the product Mr. Shad was delivering and determined the load originated in China, thus making the delivery a continuation of an international move. Because Mr. Shad's CDL restricted him to intrastate loads, Officer Bell asserts Mr. Shad was in violation of 49 C.F.R. 383.23(a)(2). (Tr. at 13-19; Staff Ex. 2; Staff Ex.3.)

{¶ 7} Thomas Persinger, staff member of the Commission's Transportation Department, Compliance Division, testified regarding the assessment of forfeitures following roadside inspections. Mr. Persinger explained that the forfeiture amount is calculated from a fine schedule where, depending upon the type of violation that is found on the inspection report, a certain dollar amount may or may not be assessed for that particular violation. According to Mr. Persinger, each violation was assigned a \$250 forfeiture. Mr. Persinger stated that the fine schedule used by staff in making the assessments in this case is consistent with the fine schedule recommended by the Commercial Vehicle Safety Alliance. (Tr. at 31-33.)

{¶ 8} Mr. Shad testified that he was not using his phone while driving. He maintains he was neither sending a text nor making a call. According to Mr. Shad, his phone records show no record of a call being made corresponding to when he was pulled over. Mr. Shad further avers he did not tell Officer Bell he was texting his company. (Tr. at 40-41; Respondent Ex. 1.) As to the violation of 49 C.F.R. 383.23(a)(2), Mr. Shad states that he assumed his intrastate restriction limited where he could drive, not what he could carry. According to Mr. Shad, he did not know where the load originated and did not know he was restricted from carrying international loads. He expresses there is no reason for his CDL to be limited and that he changed his licensure from 'intrastate' to 'interstate' the day after receiving the violation. (Tr. at 38-39, 43-45.)

## VI. COMMISSION CONCLUSION

{¶ 9} The Commission finds that Staff has proven by a preponderance of the evidence that Mr. Shad was in violation of 49 C.F.R. 392.82(a)(1), which prohibits a driver from using a cellular phone while operating a CMV. We note that Officer Bell first witnessed Mr. Shad's use of a phone with binoculars as the driver passed. Officer Bell's observation was clear, unobstructed, and enhanced by the binoculars. (Tr. at 20.) Further, Mr. Shad admitted to the officer that he was texting his employer (Tr. at 21). Therefore, based on the evidence, the Commission finds Mr. Shad was in violation of 49 C.F.R. 392.82(a)(1) and should be assessed a civil forfeiture of \$250.

{¶ 10} The Commission also finds that Staff has proven by a preponderance of the evidence that Mr. Shad was in violation of 49 C.F.R. 383.23(a)(2), for operating a CMV without the proper licensure. Mr. Shad's CDL restricted him to intrastate shipments that originate in Ohio and are to be delivered in Ohio. Here, however, as evidenced by the shipping label, his load originated in China and was the continuation of an international move. (Tr. at 13; Staff Ex. 2; Staff Ex.3.) Thus, we find Mr. Shad violated 49 C.F.R. 383.23(a)(2). We take notice that Mr. Shad was not disqualified from having an interstate restriction and that, one day after the violation, Mr. Shad took corrective action and obtained interstate licensure (Tr. at 38, 43-44). Therefore, we find the civil forfeiture assessed to Mr. Shad should be \$100, not \$250.

{¶ 11} Mr. Shad is directed to make payment of the \$350 civil forfeiture within 60 days of this Opinion and Order 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 (OH3267009705D) should be written on the face of the certified check or money order to ensure proper credit.

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 12} On July 8, 2015, an inspector for the Highway Patrol stopped and inspected a motor vehicle driven by Tommy Shad and found the driver to be in violation of 49 C.F.R. 392.82(a)(1), for using a cellular phone while operating a CMV, and 49 C.F.R. 383.23(a)(2), for operating a CMV without a proper CDL.

{¶ 13} Respondent was timely served with an NPD, alleging a violation of 49 C.F.R. 392.82(a)(1) and 49 C.F.R. 383.23(a)(2) and that Staff intended to assess civil monetary forfeiture totaling \$500.

{¶ 14} A prehearing conference was conducted on October 22, 2015, and a hearing was held on January 26, 2016.

{¶ 15} In accordance with Ohio Adm.Code 4901:2-7-20, Staff has proven by a preponderance of the evidence that Mr. Shad was using a mobile phone while operating a CMV, constituting a violation of 49 C.F.R. 392.82(a)(1), and that Mr. Shad was operating a CMV without a proper CDL, a violation of 49 C.F.R. 383.23(a)(2).

{¶ 16} Mr. Shad should be assessed a \$250 forfeiture for a violation of 49 C.F.R. 392.82(a)(1) and a \$100 forfeiture for a violation of 49 C.F.R. 383.23(a)(2) and he should pay the forfeiture, totaling \$350, within 60 days from the date of this Opinion and Order.

## VIII. ORDER

{¶ 17} It is, therefore,

{¶ 18} ORDERED, That Tommy Shad violated 49 C.F.R. 392.82(a)(1) by using a mobile phone while operating a CMV and violated 49 C.F.R. 383.23(a)(2) by operating a CMV without a proper CDL. It is, further,

{¶ 19} ORDERED, That Mr. Shad pay a civil forfeiture totaling \$350 for violations of 49 C.F.R. 392.82(a)(1) and 49 C.F.R. 383.23(a)(2), within 60 days of 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 15-1521-TR-CVF and inspection number OH3267009705D should be written on the face of the check or money order. It is, further,

{¶ 20} ORDERED, That a copy of this Opinion and Order be served upon all parties in this proceeding.

**Commissioners Voting: Asim Z. Haque, Chairman; Lynn Slaby; Thomas W. Johnson.**

NJW/vrm