

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF VLADISLAV
BUBNOVSKIY, NOTICE OF APPARENT
VIOLATION AND INTENT TO ASSESS
FORFEITURE.

CASE NO. 16-641-TR-CVF
OH1651009889D

OPINION AND ORDER

Entered in the Journal on January 18, 2017

I. SUMMARY

{¶ 1} The Commission finds that Staff did not demonstrate, by a preponderance of the evidence, that Vladislav Bubnovskiy violated the Commission's transportation rules for using a hand-held mobile telephone while operating a commercial motor vehicle.

II. PROCEDURAL HISTORY

{¶ 2} Following an inspection of a commercial motor vehicle (CMV) operated by Vladislav Bubnovskiy, Staff served Mr. Bubnovskiy 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 civil monetary forfeiture for a violation of the Commission's transportation regulations. Specifically, Staff alleged a violation of 49 C.F.R. 392.82(a)(1) for using a hand-held mobile telephone while operating a CMV. On March 22, 2016, Mr. Bubnovskiy filed a request for an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13. A prehearing conference was held on July 12, 2016; however the parties were unable to reach a resolution. A hearing was held on October 4, 2016. At the hearing, Trooper Brian Hann and Thomas Persinger appeared as witnesses for Staff and Mr. Bubnovskiy appeared on his own behalf.

III. LAW

{¶ 3} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations, 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. As relevant to this case, 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 is whether Staff satisfied its burden to show, by a preponderance of the evidence, that Mr. Bubnovskiy was using a hand-held mobile telephone (hereinafter, "cell phone") while operating a CMV in violation of 49 C.F.R. 392.82(a)(1). Staff alleges that Mr. Bubnovskiy used a cell phone while driving his company's CMV. Mr. Bubnovskiy contests the violation, stating that he did not use his cell phone that day.

V. SUMMARY OF THE EVIDENCE

{¶ 5} Thomas Persinger, compliance officer with the Commission's motor carrier compliance division, testified that he reviews civil forfeiture assessments for the Commission to ensure that the fines are the correct amount and that he reviewed the assessment against the Respondent. Mr. Persinger also stated that the NPD in this matter (Staff Exhibit 1) identified the violation, the amount of the assessment for the violation, and was sent to Mr. Bubnovskiy (Tr. at 33-36).

{¶ 6} Trooper Brian Hann testified that, on December 8, 2015, he observed Mr. Bubnovskiy driving a CMV while using what appeared to be a hand-held cell phone. Trooper Hann testified that he approached Mr. Bubnovskiy's vehicle from behind while driving eastbound on the Ohio Turnpike near mile post 84. According to Trooper Hann, in the driver side mirror he observed Mr. Bubnovskiy holding something black in his right hand near his right ear. Trooper Hann stated he pulled up next to the vehicle and again witnessed Mr. Bubnovskiy holding a device up to his right ear. After stopping the vehicle,

Trooper Hann asserted he informed Mr. Bubnovskiy that he was stopped for using a cell phone while driving. According to Trooper Hann, Mr. Bubnovskiy denied using his cell phone and showed the trooper his call history on his cell phone. Trooper Hann testified that the call history showed no calls were made since December 4, 2015, although he questioned Mr. Bubnovskiy as to whether he deleted any of his call history. Mr. Bubnovskiy denied deleting his call history, according to Trooper Hann, but could not explain what he was holding up to his ear. Thus, Trooper Hann stated he believed Mr. Bubnovskiy was using his cell phone and cited him for the violation. (Tr. at 12-17.)

{¶ 7} Mr. Bubnovskiy, testifying through an interpreter, stated he did not use a cell phone on the day he was issued a citation. He asserted he does not personally own a cell phone and the cell phone he had in the vehicle belongs to his employer. According to Mr. Bubnovskiy, he never uses the phone while driving and only uses the phone while the vehicle is parked. Mr. Bubnovskiy contends that, according to his employer's phone records, there were no incoming or outgoing calls from his phone. Further, he notes that, for December 2015 billing period, according to the records, there were only a total of six calls. (Respondent Ex. C.) At the time he was pulled over, Mr. Bubnovskiy asserts he was wearing a black stocking cap. Further, just prior to being pulled over, Mr. Bubnovskiy avers he was using a gray, foldable, brush/massage device with his right hand to massage his neck (Respondent Ex. D). He contends he used the device for five to seven seconds and then straightened his cap. Mr. Bubnovskiy believes this is what Trooper Hann may have witnessed, although he states that when the trooper questioned him, he did not mention the massage device. (Tr. at 42-53.) On cross-examination, Trooper Hann stated it was possible that the massage device is what he saw in Mr. Bubnovskiy's hand, although he recalled the item he saw Mr. Bubnovskiy holding was black, while the device produced at the hearing was gray. Trooper Hann also acknowledged his observation was difficult, as Mr. Bubnovskiy was sitting at a higher level in his vehicle than the trooper and Mr. Bubnovskiy's head obscured his view of Mr. Bubnovskiy's right hand. (Tr. at 29-31.)

However, on rebuttal, Trooper Hann stated he did not recall seeing the massage device in vehicle's cab at any point (Tr. at 62).

VI. COMMISSION CONCLUSION

{¶ 8} The Commission notes that, pursuant to 49 C.F.R. 392.82(a)(1), "[n]o driver shall use a hand-held mobile telephone while driving a CMV." Further, under 49 C.F.R. 390.5, using a hand-held mobile telephone is defined as: "(1) Using at least one hand to hold a mobile telephone to conduct a voice communication, (2) dialing or answering a mobile telephone by pressing more than a single button, or (3) reaching for a mobile telephone in a manner that requires a driver to maneuver so that he or she is no longer in a seated driver position, restrained by a seat belt * * *." Trooper Hann testified that he observed Mr. Bubnovskiy driving a CMV while using a hand-held cell phone. However, as noted above, under 49 C.F.R. 390.5, the use of a cell phone is defined as: talking, dialing or answering by pressing more than a single button, or over-reaching for the phone so that a driver is no longer seated and properly restrained by a seat belt. Simply holding a cell phone, as Trooper Hann testified that he saw Mr. Bubnovskiy doing, does not constitute cell phone use under 49 C.F.R. 390.5. Further, we find that according to the evidence presented, it is not evident that Mr. Bubnovskiy was holding a phone when observed by Trooper Hann. Trooper Hann indicated it is possible that what he observed was not a cell phone but instead Mr. Bubnovskiy's comb/massager (Tr. at 30-31). Trooper Hann also admitted that his view of Mr. Bubnovskiy's right hand was difficult and obstructed (Tr. at 30). Further, call logs on Mr. Bubnovskiy's employer's records and on Mr. Bubnovskiy's phone do not indicate that any calls were made on the cell phone the day of the inspection (Tr. at 21, 50; Respondent Ex. C). Thus, since Trooper Hann did not testify that Mr. Bubnovskiy actually was conducting a conversation on his cell phone, nor was it clear that Mr. Bubnovskiy was even holding a cell phone, we conclude that Staff did not meet its burden of proof in this matter.

{¶ 9} The Commission, therefore, finds that, based on a preponderance of the evidence, Staff has not proven that Mr. Bubnovskiy violated 49 C.F.R. 392.82(a)(1) by using a cell phone while operating a CMV. Accordingly, the violation of 49 C.F.R. 392.82(a)(1) should be dismissed and removed from Mr. Bubnovskiy's Safety Net record and history of violations.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 10} On December 8, 2015, Trooper Brian Hann stopped a CMV driven by Mr. Bubnovskiy because of an alleged violation of the Commission's transportation regulations, 49 C.F.R. 392.82(a)(1), using a cell phone while driving a CMV.

{¶ 11} Mr. Bubnovskiy was timely served with an NPD listing a civil forfeiture of \$250 for violation of 49 C.F.R. 392.82(a)(1).

{¶ 12} A prehearing conference was conducted on July 12, 2016, and a hearing was held on October 4, 2016.

{¶ 13} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 14} Based upon the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Mr. Bubnovskiy violated 49 C.F.R. 392.82(a)(1) by using a cell phone while driving a CMV. Accordingly, the violation of 49 C.F.R. 392.82(a)(1) should be dismissed and removed from Mr. Bubnovskiy's Safety Net record and history of violations.

VIII. ORDER

{¶ 15} It is, therefore,

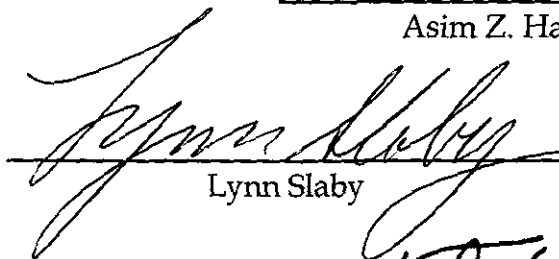
{¶ 16} ORDERED, That the alleged violation of 49 C.F.R. 392.82(a)(1) by Mr. Bubnovskiy be dismissed and removed from his Safety Net record and history of violations. It is, further,

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

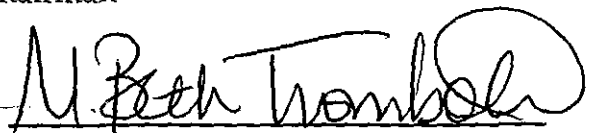
THE PUBLIC UTILITIES COMMISSION OF OHIO



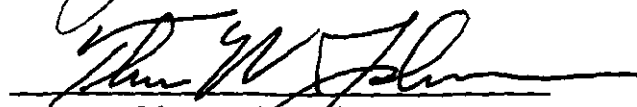
Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold



Thomas W. Johnson

NW/vrm

Entered in the Journal

JAN 18 2017Barcy F. McNeal
Secretary