

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF CECILVAL WILLIAMS,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.**

**CASE NO. 17-119-TR-CVF
(OH3291011328D)**

OPINION AND ORDER

Entered in the Journal on November 21, 2017

I. SUMMARY

{¶ 1} The Commission finds that Staff has proven, by a preponderance of the evidence, that Cecilval Williams violated Commission rules by using a hand-held mobile telephone while operating a commercial motor vehicle. In addition, the Commission finds that Mr. Williams should be assessed the \$250 civil forfeiture proposed by Staff.

II. PROCEDURAL HISTORY

{¶ 2} On September 7, 2016, Officer John Holzworth of the Ohio State Highway Patrol (OSP) conducted an inspection of a commercial motor vehicle (CMV) driven by Cecilval Williams (Respondent). At the time of the inspection, Officer Holzworth prepared an inspection report that identified a violation of the Federal Motor Carrier Safety Regulations (FMCSR), specifically 49 C.F.R. 392.82(a)(1), which prohibits a driver from using a hand-held mobile telephone while driving a CMV. Staff timely served Respondent with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02, which indicated that Staff intended to assess a \$250 civil monetary forfeiture for violating 49 C.F.R. 392.82(a)(1). Counsel for Mr. Williams filed a request for hearing on January 12, 2017. A prehearing conference was convened on March 7, 2017, and a hearing was conducted on May 2, 2017. Officer Holzworth testified for Staff. The parties stipulated to the testimony of Staff witness Rod Moser concerning the NPD that was sent to Respondent and the civil forfeiture that was calculated. Mr. Williams was represented by counsel Michael C. Yemc Jr. and testified on his own behalf.

III. DISCUSSION

A. *Applicable Law*

{¶ 3} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. 40, 42, 383, 387, and 390-397, 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. Further, R.C. 4923.99 authorizes the Commission to assess a civil forfeiture of up to \$25,000 per day, per violation, against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, in or through this state. 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.

{¶ 4} 49 C.F.R. 392.82(a)(1) states that “no driver shall use a hand-held mobile telephone while driving a commercial motor vehicle.”

B. *Issue*

{¶ 5} The issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent was using his hand-held mobile telephone while driving a CMV, and thus was in violation of 49 C.F.R. 392.82(a)(1).

C. *Summary of the Evidence Presented at the Hearing*

{¶ 6} Officer Holzworth testified that he has been an OSP trooper for 20 years (Tr. at 6). He stated that on September 7, 2016, he was sitting stationary in a crossover facing three lanes of southbound traffic on Interstate 71 (Tr. at 11). Officer Holzworth explained that the crossover is slightly elevated and looks down upon the highway, so that vehicles are moving “downhill [to] where I am sitting, so I can see right into their cab” (Tr. at 11, 13). Officer Holzworth estimated that he observed, for approximately ten seconds, Mr. Williams driving in the center lane of three traffic lanes (Tr. at 10, 12, 14). He added that the distance

from the crossover to the center lane was "approximately * * * 25, 30 feet, so I have got a pretty good view" (Tr. at 12). Officer Holzworth stated that "* * * [I]t was a decent day. There was no rain. There was no fog. It was daylight" (Tr. at 11). Officer Holzworth asserts that, as Mr. Williams drove by in the CMV, he was talking on a "large smart phone" that he was holding in his right hand and up to his right ear (Tr. at 10, 12, 14; Staff Ex. 1). After observing this, Officer Holzworth stopped Mr. Williams for an inspection (Tr. at 15).

{¶ 7} According to Officer Holzworth, during the inspection Mr. Williams stated that he had been using a Bluetooth earpiece, not a hand-held mobile telephone, while talking (Tr. at 16; Staff Ex. 1). When Officer Holzworth asked to see the earpiece, Mr. Williams "had to pop the center console and overhead compartment and retrieve * * * [the earpiece] from there." Officer Holzworth checked Mr. Williams' call history on the hand-held telephone, which indicated that a call had originated at 7:25 a.m. and ended at 7:34 a.m., when the inspection started. (Tr. at 10-11, 16-17, 26; Staff Ex. 1.)

{¶ 8} Mr. Williams explained that, before driving that day, he was conducting a pre-trip inspection at a truck stop and was holding his hand-held mobile telephone while talking to his wife (Tr. at 30-31, 44-45, 61). He contends that, as he left the truck stop and began driving, he used a Bluetooth earpiece to continue his conversation (Tr. at 31-32, 44; Williams Ex. B). According to Mr. Williams, after leaving the truck stop he was drinking from a milk box that he had purchased at a convenience store. He surmises that Officer Holzworth had mistakenly believed that the milk box was his hand-held telephone. (Tr. at 41-43, 60.)

{¶ 9} When the inspection began, Respondent asserts his hand-held mobile telephone was recharging in the sleeper berth behind the driver's seat (Tr. at 32, 40, 46). A photo of the sleeper berth shows an electric outlet and a cord used for recharging the hand-held telephone (Williams Ex. A). When Officer Holzworth asked to see the hand-held telephone, Respondent contends that he unbuckled his seat belt, got out of the seat, and walked behind a curtain into the sleeper berth to pick up the telephone (Tr. at 40, 56-58).

Mr. Williams added that he had removed the earpiece from his ear as he waited for Officer Holtzworth to approach after stopping the CMV. When Officer Holtzworth spoke to him from the passenger side of the CMV, Mr. Williams asserts he placed the earpiece in a small mesh net just above driver's sun visor. (Tr. at 36-38, 50; Williams Ex. C.) According to Mr. Williams, during the inspection the milk box was on the CMV's floor and immediately next to the driver's seat (Tr. at 41-43, 59). Respondent explained that he did not tell Officer Holtzworth about the milk box because he did not remember its location at that time (Tr. at 51, 59). At Staff's request during the hearing, Mr. Williams demonstrated that the hand-held telephone did not fit fully into his shirt pocket and was large enough to extend from his fingertips to the base of his palm of his hand. (Tr. at 56; Williams Ex. D.)

D. Commission Conclusion

{¶ 10} Ohio Adm.Code 4901:2-7-20 requires, at hearing, that Staff prove the occurrence of a violation by a preponderance of the evidence. The Commission finds, based on a preponderance of the evidence, that Staff has proven Mr. Williams violated 49 C.F.R. 392.82(a)(1), which requires that "no driver shall use a hand-held mobile telephone while driving a commercial motor vehicle."

{¶ 11} It is not disputed that Mr. Williams was involved in telephone call while operating a CMV when he was observed by Officer Holtzworth on September 7, 2016 (Tr. at 10, 32). At issue is whether Mr. Williams was using a hand-held mobile telephone while driving. According to Officer Holtzworth, for approximately ten seconds he observed Mr. Williams holding a large smart phone in his right hand and up to his right ear while driving and talking (Tr. at 10, 12, 14). The evidence shows that Officer Holtzworth had parked in a crossover that was slightly elevated and looked down upon three lanes of traffic, enabling him to have a "good view" inside the cab of Mr. Williams' oncoming CMV. Furthermore, the distance from the crossover to the center lane, where Mr. Williams was driving, was estimated by Officer Holtzworth at only 25 to 30 feet. (Tr. at 11-13.) Officer Holtzworth also asserted that the weather conditions provided good visibility and that it was

daylight (Tr. at 11). We note that, at hearing, Respondent demonstrated that the hand-held mobile telephone did not fit fully into his shirt pocket and extended from his fingertips to the base of the palm of his hand (Tr. at 56; Williams Ex. D). In sum, the size of the hand-held mobile telephone, the location from which Officer Holtzworth observed Respondent as he was driving the CMV, and favorable weather conditions enabled the Officer Holtzworth to clearly observe Mr. Williams driving while talking on a hand-held mobile telephone.

{¶ 12} We are unpersuaded by Respondent's argument that, although he was admittedly participating in a telephone call, Officer Holtzworth mistakenly concluded that the milk carton was a mobile telephone. First, the record shows that Respondent did not mention the milk carton to Officer Holtzworth during the inspection (Tr. at 51, 59). Second, Mr. Williams could not definitely say he was drinking from the carton when observed by Officer Holtzworth; instead, Mr. Williams only maintains that he drank the milk at some point after leaving the truck stop (Tr. 42-43). In addition, although Mr. Williams asserted that he was talking on his Bluetooth earpiece while driving, when the inspection began he had to retrieve the earpiece from a storage compartment near the driver's sun visor (Tr. at 10, 36-38).

{¶ 13} Therefore, based on the evidence and testimony submitted in this case, the Commission finds, by a preponderance of the evidence, Mr. Williams was in violation of 49 C.F.R. 392.82(a)(1) and should be assessed a civil forfeiture of \$250. Mr. Williams is directed to make payment of the assessed civil forfeiture of \$250 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. Case number 17-119-TR-CVF and inspection number OH3291011328D 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.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 14} On September 7, 2016, Officer John Holzworth stopped and inspected a CMV driven by Cecilval Williams. Mr. Williams was found in violation of 49 C.F.R. 392.82(a)(1) for using a hand-held mobile telephone while operating a CMV.

{¶ 15} Mr. Williams 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, and indicating that Staff intended to assess a civil monetary forfeiture of \$250.

{¶ 16} A prehearing conference was convened on March 7, 2017, and a hearing was conducted on May 2, 2017.

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

{¶ 18} Based upon the record in this proceeding, sufficient evidence has been presented to conclude that Mr. Williams was using a hand-held mobile telephone while driving 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.

{¶ 19} Mr. Williams should be assessed the \$250 forfeiture for a violation of 49 C.F.R. 392.82(a)(1).

V. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That Cecilval Williams pay a civil forfeiture of \$250 for a violation 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 mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Division, 180 East Broad Street, 4th Floor, Columbus, Ohio 43215-3793. Case number 17-119-TR-CVF and inspection number OH3291011328D 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,

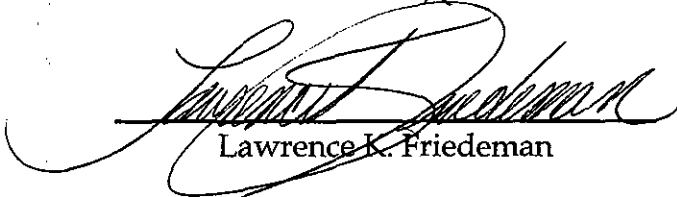
{¶ 22} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

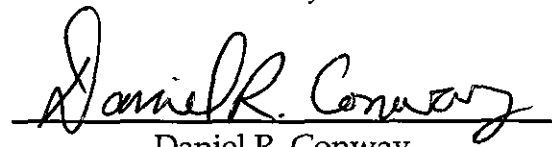
THE PUBLIC UTILITIES COMMISSION OF OHIO

Asim Z. Haque, Chairman


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Barcy F. McNeal
Secretary