

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF JOHN M. SHIREY,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 19-183-TR-CVF
(OH3233010037D)

OPINION AND ORDER

Entered in the Journal on October 23, 2019

I. SUMMARY

{¶ 1} The Commission finds that Staff has failed to demonstrate, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules.

II. PROCEDURAL HISTORY

{¶ 2} On October 14, 2018, Trooper Gatesman with the Ohio State Highway Patrol (Highway Patrol) performed a post-crash inspection of a vehicle operated by Cal-Ark International, Inc. and driven by John M. Shirey (Respondent or Mr. Shirey), in the State of Ohio. Upon inspection, Trooper Gatesman prepared a report identifying various violations of the Commission's transportation regulations, including that the Respondent had possession of alcohol while on duty, or operating, or in physical control of a commercial motor vehicle (CMV). (Staff Ex. 1.)

{¶ 3} Commission Staff timely served Mr. Shirey with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-02, alleging a violation of 49 C.F.R. 392.5(a)(2) for driver having possession of alcohol while on duty, or operating, or in physical control of a CMV. The NPD also notified Respondent that Staff intended to assess a \$250 civil monetary forfeiture for violating the Commission's transportation rules pursuant to Ohio Adm.Code 4901:2-7-07. (Staff Ex. 3.)

{¶ 4} On January 28, 2019, Respondent's counsel, Frank Leonetti, III, filed a request for a hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} By Entry dated February 7, 2019, the attorney examiner scheduled a prehearing telephone conference for March 6, 2019, pursuant to Ohio Adm.Code 4901:2-7-16(B). During the conference, parties were unable to resolve the matter.

{¶ 6} By Entry dated March 12, 2019, the attorney examiner scheduled an evidentiary hearing for May 1, 2019.

{¶ 7} At the hearing, Staff witness Rod Moser testified in support of the forfeiture amount and to the authenticity of Staff's exhibits. Staff did not present any other witnesses. Respondent's counsel was present; however, Respondent did not attend the hearing, claiming to have recently suffered a stroke that left him medically incapacitated and unable to travel. Respondent's counsel presented exhibits but offered no other witnesses.

III. APPLICABLE LAW

{¶ 8} R.C. 4923.04 provides that the Commission shall adopt rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations. Specifically, the Commission adopted 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(C) requires all motor carriers engaged in 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 Ohio. Ohio Adm.Code 4901:2-7-20 requires that, at the hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 9} The specific regulation that Staff alleges Respondent violated is 49 C.F.R. 392.5(a)(2). The Commission notes that the violation description listed next to the violation

code citation in Staff Exhibit 1 appears to misstate the language of 49 C.F.R. 392.5(a)(2) as “[d]river having possession of alcohol * * *” (Staff Ex. 1). Upon review, 49 C.F.R. 392.5(a)(2) actually requires that a driver, while on duty, or operating, or in physical control of a CMV, to not “[u]se alcohol, be under the influence, or have any measured alcohol concentration or detected presence of alcohol[.]” However, a violation related to “possession” of alcohol is found in a different regulation subsection, 49 C.F.R. 392.5(a)(3), which requires that no driver shall “be on duty or operate a commercial motor vehicle while the driver possesses * * * beer * * *” unless it is part of the shipment or possessed or used by bus passengers. Although this matter only concerns Respondent’s potential violation of 49 C.F.R. 392.5(a)(2), for clarity purposes, the Commission will discuss both code sections in its conclusion, below.

IV. ISSUE

{¶ 10} At issue is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent used or possessed alcohol while on duty, or operating, or in physical control of a CMV and was, thus, in violation of 49 C.F.R. 392.5(a)(2) or 392.5(a)(3).

V. SUMMARY OF EVIDENCE

{¶ 11} At the hearing on May 1, 2019, the only live testimony Staff presented was that of Rod Moser, Chief of the Compliance Division within the Commission’s Transportation Department, due to Trooper Gatesman’s, Trooper Harrison’s, and other potential witnesses’ unavailability (Tr. at 5). Mr. Moser, who is involved with Staff’s management of records submitted by the Highway Patrol, identified Staff Exhibit 1, the driver/vehicle examination report, and Staff Exhibit 2, the vehicle inventory/custody report, and testified to their authenticity as records kept in the ordinary course of business of the Highway Patrol (Tr. at 7-14; Staff Ex.1; Staff Ex. 2). According to Staff Exhibits 1 and 2, on October 14, 2018, a CMV driven by Mr. Shirey crashed on Interstate 71 in Medina County, Ohio (Staff Ex. 1; Staff Ex. 2). Trooper Gatesman conducted a post-crash inspection on the same day of the crash, from 2:42 p.m. to 5:15 p.m., and cited Mr. Shirey with various

violations, including a violation of 49 C.F.R. 392.5(a)(2). The violation description section of the driver/vehicle examination report indicates that the driver was in possession of alcohol while on duty, or operating, or in physical control of a CMV and that beer cans were found in the cab of the CMV at the crash location. (Staff Ex. 1.) Mr. Moser explained that the designation, "Unit D," within Staff Exhibit 1, refers to this violation being assigned to the driver (Tr. at 11). Staff Exhibit 2, the vehicle inventory/custody report, was completed by Highway Patrol Trooper Harrison at 3:45 p.m. on the same day of the accident and indicates that Mr. Shirey was the driver of the CMV. The report provides a list of items found in the front passenger side of the CMV's cab: a Yeti coffee mug, a two-liter Coca-Cola, a hoodie, "Miller Lite Beer," V8 juice, trash, a headset, and papers. The report also states that manufacturing racks were found in the 53-foot trailer. (Staff Ex. 2.)

{¶ 12} Additionally, Mr. Moser testified regarding the assessment of forfeitures following roadside inspection (Tr. at 15-16). Referring to Staff Exhibit 3, the NPD, Mr. Moser explained that the particular violation noted—a single violation of 49 C.F.R. 392.5(a)(2)—is always assessed a \$250 fine (Tr. at 20-22).

{¶ 13} On cross-examination, Respondent's counsel presented Mr. Moser with Respondent's Exhibit H, the Highway Patrol traffic crash report. Upon review of the exhibit, Mr. Moser testified that the report did not indicate that the CMV contained alcohol or specifically, any beer (Tr. At 17-18). Mr. Moser testified that he did not see beer cans either in the photographs taken at the scene of the accident, which were part of the Highway Patrol traffic crash report, or in photos from the accident scene captured by another investigator (Tr. at 23-25; Respondent Ex. B, C, D, E, F, and G). Drawing from his experience as a former Highway Patrol trooper, Mr. Moser testified that he found it unusual that the vehicle inventory report did not consist of photos of the alcohol, stating that photos should have been taken (Tr. at 18-19). Mr. Moser also testified that he could see another truck damaged in one of the photographs and that the material scattered on the road in some of the photographs may possibly be liquid, but it was unclear if the liquid was alcohol (Tr. 24-26; Respondent Ex. E and G).

{¶ 14} Respondent's counsel also cross-examined Mr. Moser about Respondent's Exhibit I, Staff's request for additional information from the Highway Patrol to supplement Trooper Gatesman's inspection report. The exhibit shows Staff requesting more evidence, such as photographs, concerning the violation and states that the inspection report, "* * * gives little detail on the offense other than to say there were beer cans in the truck cab. Not even if they were full or empty." (Tr. at 19; Respondent's Ex. I.) According to this request for additional information, the Highway Patrol responded by saying they had no changes to report. However, the report provided a brief statement, purportedly from Trooper Gatesman, about the inspection. Trooper Gatesman stated that he was primarily focused on other vehicle violations during the inspection and not the alcohol violation, so he forgot to photograph the beer cans found in and around the CMV's cab. In the statement, Trooper Gatesman also claimed that the cab smelled overwhelmingly of alcohol, that he was unsure if the driver had alcohol in his system since the driver was already taken to the hospital, and that firefighters, tow truck drivers, and other troopers claimed to see alcohol at the scene as well. (Respondent Ex. I.)

{¶ 15} Finally, Respondent's counsel submitted an affidavit executed by Mr. Shirey and page 24 of a medical record purported to be created on October 14, 2018, as a result of Mr. Shirey's visit to the hospital following the accident (Tr. at 31; Respondent's Ex. A). In the affidavit, Mr. Shirey denies possessing any alcohol or having any alcohol in his system while operating the CMV, the latter of which he said is evidenced by the attached medical record. He also explained that he was unable to attend the hearing because he was medically incapacitated by a stroke, and, as a result of the stroke, he is now unable to walk without assistance or drive a vehicle. (Tr. at 31; Respondent's Ex. A.)

VI. COMMISSION CONCLUSION

{¶ 16} Ohio Adm.Code 4901:2-7-20 requires that Staff prove the occurrence of a violation by a preponderance of the evidence at hearing. The Commission finds, based on a preponderance of the evidence, that Staff has failed to prove that Mr. Shirey violated 49 C.F.R. 392.5(a)(2) or C.F.R. 392.5(a)(3).

{¶ 17} We initially note that neither Trooper Gatesman, author of Staff Exhibit 1, or Trooper Harrison, author of Staff Exhibit 2, were present at the hearing to provide testimony regarding their CMV inspections and reports (Tr. at 5; Staff Ex. 1 and 2). Furthermore, other possible witnesses, the firefighters, tow truck drivers, and other troopers who Trooper Gatesman claimed also saw alcohol at the scene, were not present to offer their testimony (Tr. at 5; Respondent's Ex. I). Consequently, the Commission was deprived of the opportunity to probe the veracity of these reports and statements, which, outside of their acknowledged authenticity as records kept in the ordinary course of business for the Highway Patrol and Staff, reduces their credibility. The Commission acknowledges that the Respondent failed to show as well, but the burden of proof regarding the violation ultimately lies with Staff (Tr. at 6; Respondent's Ex. A).

{¶ 18} While the Commission has previously found that an alcoholic beverage should not be carried anywhere on the vehicle, from the front bumper of the cab to the taillights of the trailer, under these circumstances, we find little for the existence of a violation. See, e.g., *In re James Martindale, Notice of Apparent Violation and Intent to Assess Forfeiture*, Case No. 97-143-TR-CVF, Opinion and Order (July 2, 1997). Though beer was identified in the CMV's cab by two different troopers conducting two separate inspections during an overlapping time period provides some support for Staff's contentions that the violation occurred, no evidence exists beyond the following statements in these inspection and inventory reports: "[b]eer cans found in the cab of the truck at the crash location" and "Miller Lite Beer" (Staff Ex. 1 and 2). The reports are also sparse on details. For example, the troopers failed to indicate whether the alcoholic containers were empty or full and failed to photograph the interior of the badly damaged cab that allegedly held beer cans. None of the photos in the record depicted the presence of beer cans or bottles, which Mr. Moser acknowledged as being unusual considering the alleged violation. (Tr. at 18-19; 23-25; 27-28; Respondent's Ex. B, C, D, E, F, G, and I.) Also, when the Staff requested that the inspection report written by Trooper Gatesman be supplemented due to the scarcity of details regarding the violation cited in it, the Highway Patrol provided only a brief, second-

hand statement purportedly given by Trooper Gatesman about the inspection. Trooper Gatesman stated that he forgot to photograph the alcohol because he was focused more on the other vehicle violations during his inspection than the alcohol violation and, in support of the alcohol violation, claimed that other responders at the scene also saw alcohol. (Respondent's Ex. I.) Because Trooper Gatesman was not present at the hearing, nor were the other troopers, firefighters, or tow truck drivers, the Commission is unable to give the evidence sufficient weight. Furthermore, no other convincing evidence was provided demonstrating that the presence of alcohol was detected at the scene or that Mr. Shirey used, was under the influence of, or had a measured alcohol concentration while on duty, operating, or in physical control of the CMV.

{¶ 19} Additionally, as noted above, the violation description listed next to the violation code citation in Staff Exhibit 1 appears to inaccurately describe 49 C.F.R. 392.5(a)(2) as "[d]river having possession of alcohol * * *" (Staff Ex. 1). 49 C.F.R. 392.5(a)(2) requires that no driver, while on duty, or operating, or in physical control of a CMV, shall "[u]se alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol[.]" Comparatively, 49 C.F.R. 392.5(a)(3) requires that no driver shall "be on duty or operate a commercial motor vehicle while the driver possesses * * * beer * * *" unless it is part of the shipment. Staff specifically argues that "Respondent is only charged with being in possession of alcohol while on duty. He is not charged with driving under the influence" (Tr. at 33). The Commission notes that Trooper Gatesman and Staff may have been attempting to argue that Trooper Gatesman detected a presence of alcohol, thus violating 49 C.F.R. 392.5(a)(2); however, each subsection is specifically worded and both Trooper Gatesman and Staff consistently used the incorrect terminology ("presence" versus "possession") when citing to the specific code section. The potentially inaccurate citation also calls into question the forfeiture amount since Mr. Moser specifically testified regarding the fine for violating 49 C.F.R. 392.5(a)(2) but not subsection (a)(3) (Tr. at 20-22). Nevertheless, as explained above, the Staff failed to provide evidence that convincingly demonstrated Mr. Shirey violated either rule. Of note, Mr. Shirey may very well be unable

to drive a vehicle again, negating one of the effects intended by the forfeiture—to deter future violations (Tr. at 6; 31; Respondent Ex. A).

{¶ 20} Accordingly, after reviewing all the evidence presented, we find that the record in this case does not reveal, by a preponderance of the evidence, whether Respondent used or possessed alcohol while on duty, or operating, or in physical control of a CMV in violation of 49 C.F.R. 392.5(a)(2) or 392.5(a)(3). This finding that Staff did not meet its burden of proof delineated in Ohio Adm.Code 4901:2-7-20(A) does not mean that the Commission has found that Respondent did not use or possess alcohol while on duty or operating, or in physical control of a CMV. The Commission's opinion is limited to the finding that insufficient evidence has been presented to conclude that Respondent violated 49 C.F.R. 392.5(a)(2) or 392.5(a)(3).

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 21} On October 14, 2018, Trooper Gatesman of the Highway Patrol performed a post-crash inspection of a commercial motor vehicle operated by Cal-Ark International, Inc. and driven by Mr. John M. Shirey. Trooper Gatesman found a driver violation of 49 C.F.R. 392.5(a)(2), for having possession of alcohol while on duty, or operating, or in physical control of a CMV.

{¶ 22} Mr. Shirey was timely served with a Notice of Preliminary Determination, alleging a violation of 49 C.F.R. 392.5(a)(2) for having possession of alcohol while on duty, or operating, or in physical control of a CMV. In the NPD, Mr. Shirey was notified that Staff intended to assess a civil monetary forfeiture of \$250.

{¶ 23} Mr. Shirey's counsel participated in a prehearing teleconference on March 6, 2019.

{¶ 24} An evidentiary hearing was held on May 1, 2019.

{¶ 25} 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.

{¶ 26} Based upon the record in this proceeding, the Commission finds that Staff has failed to prove, by preponderance of the evidence, that Respondent violated 49 C.F.R. 392.5(a)(2) or 392.5(a)(3) for using alcohol or having possession of alcohol while on duty, or operating, or in physical control of a CMV.

VIII. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That the alleged violation of 49 C.F.R. 392.5(a)(2) be dismissed and removed from Respondent's history of violations. It is, further,

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

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Daniel R. Conway

Dennis P. Deters

MJS/AAS/mef

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Case No(s). 19-0183-TR-CVF

Summary: Opinion & Order that the Commission finds that Staff has failed to demonstrate, by a preponderance of the evidence, that Respondent violated the Commission's transportation rules electronically filed by Docketing Staff on behalf of Docketing