

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF MICHAEL HYMES,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 21-886-TR-CVF
(OH3255013636D)

OPINION AND ORDER

Entered in the Journal on August 10, 2022

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Michael Hymes violated 49 C.F.R. 392.16(a), failing to use a seat belt while operating a CMV, and 49 C.F.R. 392.82(a)(1), using a hand-held mobile telephone while operating a CMV.

II. PROCEDURAL HISTORY

{¶ 2} On June 28, 2021, Motor Carrier Enforcement Inspector Angus McCormack (Inspector McCormack) of the Ohio State Highway Patrol stopped and inspected a commercial motor vehicle (CMV) operated by MDH Property Care LLC and driven by Michael Hymes (Respondent or Mr. Hymes). At the time of the inspection, Inspector McCormack prepared a report indicating the following violations of the Federal Motor Carrier Safety Regulations (FMCSR), specifically, 49 C.F.R. 392.16(a), which states: “No driver shall operate a * * * [CMV] that has a seat belt assembly installed at the driver’s seat unless the driver is properly restrained by the seat belt assembly” and 49 C.F.R. 392.82(a)(1), which states: “No driver shall use a hand-held mobile telephone while driving a * * * [CMV].”

{¶ 3} On August 17, 2021, Staff served a notice of preliminary determination (NPD) upon Respondent in accordance with Ohio Adm.Code 4901:2-7-07, alleging a violation of the Commission’s Transportation regulations.

{¶ 4} On August 24, 2021, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} On September 28, 2021, the attorney examiner scheduled a prehearing conference for November 5, 2021, pursuant to Ohio Adm.Code 4901:2-7-16(B). The prehearing conference was conducted as scheduled but the parties were unable to reach a settlement.

{¶ 6} On February 10, 2022, the attorney examiner scheduled a virtual hearing for March 15, 2022. On February 17, 2022, the virtual hearing was rescheduled to March 18, 2022.

{¶ 7} At the hearing on March 18, 2022, Inspector McCormack testified in support of the violations identified by Staff. Mr. Hymes was represented by counsel, Michael Yemc, and testified on his own behalf.

III. LAW

{¶ 8} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the FMCSR, specifically, 49 C.F.R. Sections 40, 367, 380, 382, 383, 385, 386, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Through the same rule, the Commission also adopted those portions of the regulations contained in 49 C.F.R. 107, Subparts F and G, and 49 C.F.R. 171 to 180, as are applicable to transportation of hazardous materials by motor vehicle. 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 this state. 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.

IV. ISSUE

{¶ 9} During testimony, Mr. Hymes admitted that he was not wearing a seat belt while driving the CMV (Tr. at 13). Therefore, the only issue in this case is whether Staff has satisfied its burden to show, by a preponderance of the evidence, that Respondent was using a hand-held mobile telephone (cell phone) while operating a CMV, in violation of 49 C.F.R. 392.82(a)(1). Mr. Hymes disputes the violation and asserts that, because of a medical condition known as sebopsoriasis, what was perceived as using a cell phone was actually him scratching himself and using an aluminum wallet to cool the inflammation behind his ears.

V. SUMMARY OF THE EVIDENCE

{¶ 10} Inspector McCormack stated that on June 28, 2021, he was southbound on Interstate 71 in Medina County when he approached the CMV from behind (Tr. at 8). He added that traffic was light and that he was driving in the lane to the left of the CMV when he observed the alleged violations (Tr. at 14-15). Inspector McCormack explained that he was driving a 2011 Chevrolet Tahoe, while Mr. Hymes was in a straight truck. Inspector McCormack contends that Mr. Hymes was seated in a slightly higher position than was Inspector McCormack and that both vehicles were traveling approximately 70 miles per hour (Tr. at 12-13). Inspector McCormack emphasized that, while he was driving, he had no problem looking into the CMV's cab and observing Mr. Hymes because the CMV "does not sit as high as a standard roll-off truck or a tractor-trailer" (Tr. at 33).

{¶ 11} According to Inspector McCormack, as he approached the CMV, he looked to his right and observed Mr. Hymes "holding a cell phone in his right hand up to his right ear with the charger cord coming from the phone" (Tr. at 9). Inspector McCormack testified that Mr. Hymes then looked to his left, noticed Inspector McCormack, and began scratching his left ear with his left hand (Tr. at 9-10). Inspector McCormack added that he promptly prepared an inspection report after completing the inspection and provided Mr. Hymes with a copy (Tr. at 10-11; Staff Ex. 1).

{¶ 12} Counsel for Staff stated, during the hearing, that the parties had agreed to stipulate that \$350.00 is the correct total forfeiture for the two violations at issue in the case (Tr. at 16).

{¶ 13} Mr. Hymes states that he was not holding a cell phone to his ear when Inspector McCormack observed him. Instead, Mr. Hymes contends that the air conditioning on his CMV “gets really cool,” and he was using his metal wallet, which was chilled by the air conditioning, to cool and scratch inflammation behind his ears. Mr. Hymes explained that the inflammation is caused by sebopsoriasis. (Tr. at 21-24; Respondent Ex. A-E.) In response to Inspector McCormack’s assertion that a charger cord was attached to Respondent’s cell phone, Mr. Hymes asserts “I don’t know where the charger came from” (Tr. at 21).

{¶ 14} Mr. Hymes testified that sebopsoriasis is “like a scaly rash behind my ears and the back of my head * * * it’s painful and it itches when it’s flared up” (Tr. at 20). Mr. Hymes explained that stress and heat during the summer months make the condition worse (Tr. at 21, 24, 26). Additionally, Mr. Hymes noted that, at the time of the inspection, he was under much stress; specifically, his dog was ill, his grandmother had recently passed away, the Covid pandemic was ongoing, and his work was stressful (Tr. at 24-26; Respondent Ex. E-F). Mr. Hymes stated that the heat, combined with the stress he was experiencing at the time of the inspection, caused a flareup of sebopsoriasis, so he used the cool metal wallet in an attempt to lessen the inflammation (Tr. at 26).

{¶ 15} Further, Mr. Hymes emphasized that he does not hold a cell phone in his hand for use while driving; instead, his cell phone uses Bluetooth to synchronize with speakers in the CMV. According to Mr. Hymes, his Bluetooth links automatically to his cell phone when the CMV’s engine is started. Mr. Hymes explained that, when he uses the cell phone, a speaker above his head in the CMV’s cab enables him to talk. Mr. Hymes contends that he has no difficulty hearing through the CMV’s speakers. (Tr. at 18-19, 31.) Mr. Hymes added that he does not hold his cell phone up to his ear even when he is not driving because

the pressure and heat from the cell phone makes the sebopsoriasis hurt even more. (Tr. at 26-27.) Mr. Hymes confirmed that his cell phone was within his reach on the day of the inspection (Tr. at 30).

{¶ 16} Mr. Hymes asserts that, when he noticed Inspector McCormack's vehicle, the inspector was "towards the back" of the CMV and that, if the inspector had driven alongside the CMV, Inspector McCormack "wouldn't even be able to see me * * * at all" (Tr. at 23, 32). Mr. Hymes contends that Inspector McCormack's Chevrolet Tahoe "sits much lower" than his Ford F750 straight truck (Tr. at 18, 27-28).

{¶ 17} Mr. Hymes admitted to not wearing his seat belt while driving the CMV (Tr. at 27).

VI. COMMISSION CONCLUSION

{¶ 18} After reviewing the evidence, the Commission finds that Staff has demonstrated that violations of 49 C.F.R. 392.16(a) and 49 C.F.R. 392.82(a)(1) occurred. As noted above, 49 C.F.R. 392.16(a) states: "No driver shall operate a * * * [CMV] that has a seat belt assembly installed at the driver's seat unless the driver is properly restrained by the seat belt assembly." Additionally, 49 C.F.R. 392.82(a)(1) states: "No driver shall use a hand-held mobile telephone while driving a * * * [CMV]."

{¶ 19} Inspector McCormack testified that he observed Mr. Hymes holding a cell phone in his right hand up to his right ear with the charger cord attached to the cell phone (Tr. at 9). Inspector McCormack added that the driver's seat in the CMV was only slightly higher than the driver's seat in the Chevrolet Tahoe when he observed Mr. Hymes driving (Tr. at 13). Further, it is also significant that Mr. Hymes admitted that his cell phone was within his reach the day of the inspection (Tr. at 30). Based on our review of the evidence and testimony, we find that Staff has proven by a preponderance of the evidence that Mr. Hymes violated 49 C.F.R. 392.82(a)(1). In reaching this conclusion, we find that Inspector McCormack credibly describes his ability to see inside Respondent's vehicle and describes

his observing Respondent's use of a hand-held cell phone, which included an attached charging cord. Accordingly, we reject Respondent's claim that the inspector misidentified what was really an aluminum wallet. Finally, we note that, during testimony, Mr. Hymes admitted to violating 49 C.F.R. 392.16(a), by failing to use a seat belt while operating a CMV (Tr. at 27).

{¶ 20} Thus, Mr. Hymes is directed to make payment of the \$350 civil forfeiture within 60 days of this Opinion and Order. Payment of the forfeiture shall be made via the Commission website or by certified check or money order (referencing Case Number 21-886-TR-CVF and inspection number OH3255013636D) made payable to: "Public Utilities Commission of Ohio" and shall be mailed or delivered to: Public Utilities Commission of Ohio, Attn: CF Processing, 180 E. Broad St., 4th floor, Columbus, Ohio 43215-3793.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 21} On June 28, 2021, Inspector McCormack stopped and inspected a CMV operated by MDH Property Care LLC and driven by Mr. Hymes. At the time of the inspection, Inspector McCormack identified the following FMCSR violations: 49 C.F.R. 392.16(a) (failing to use a seat belt while operating a CMV) and 49 C.F.R. 392.82(a)(1) (using a hand-held mobile telephone while operating a CMV).

{¶ 22} In accordance with Ohio Adm.Code 4901:2-7-12, Mr. Hymes was served with an NPD. In the NPD, Respondent was notified that Staff intended to assess a total civil forfeiture of \$350 for the violations.

{¶ 23} A prehearing conference was conducted on November 5, 2021, but the matter was not resolved. Accordingly, an evidentiary hearing was held on March 18, 2022.

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

{¶ 25} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. Hymes violated 49 C.F.R. 392.82(a)(1) by using a hand-held mobile telephone while operating a CMV. Further, during the hearing, Mr. Hymes admitted that he violated 49 C.F.R. 392.16(a) by failing to wear a seat belt while operating a CMV.

{¶ 26} Mr. Hymes should be assessed the \$350 total forfeiture for violating 49 C.F.R. 392.16(a) (failing to use a seat belt while operating a CMV) and 49 C.F.R. 392.82(a)(1) (using a hand-held mobile telephone while operating a CMV) and should pay the total forfeiture of \$350 within 60 days from the date of this Opinion and Order.

VIII. ORDER

{¶ 27} It is, therefore,

{¶ 28} ORDERED, That Michael Hymes pay a civil forfeiture of \$350 within 60 days of this Opinion and Order. Payment of the forfeiture shall be made via the Commission website or by certified check or money order (referencing Case Number 21-886-TR-CVF and inspection number OH3255013636D) made payable to: "Public Utilities Commission of Ohio" and shall be mailed or delivered to: Public Utilities Commission of Ohio, Attn: CF Processing, 180 E. Broad St., 4th floor, Columbus, Ohio 43215-3793. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

JML/CAQ/hac

**This foregoing document was electronically filed with the Public Utilities
Commission of Ohio Docketing Information System on**

8/10/2022 2:26:12 PM

in

Case No(s). 21-0886-TR-CVF

Summary: Opinion & Order that the Commission finds that Staff demonstrated, by a preponderance of the evidence, that Michael Hymes violated 49 C.F.R. 392.16(a), failing to use a seat belt while operating a CMV, and 49 C.F.R. 392.82(a)(1), using a hand-held mobile telephone while operating a CMV electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio