

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF VICTOR KUTSAR,
NOTICE OF APPARENT VIOLATION AND
INTENT TO ASSESS FORFEITURE.

CASE NO. 22-570-TR-CVF
(OH3223005287D)

OPINION AND ORDER

Entered in the Journal on May 15, 2024

I. SUMMARY

{¶ 1} The Commission finds that Staff demonstrated, by a preponderance of the evidence, that Victor Kutsar violated 49 C.F.R. 392.80(a), prohibiting a driver from engaging in texting while operating a commercial motor vehicle.

II. PROCEDURAL HISTORY

{¶ 2} On March 15, 2022, Ohio State Highway Patrol Motor Carrier Enforcement Inspector Drew Bauer (Inspector Bauer), stopped and inspected a commercial motor vehicle (CMV) operated by Emerson Trucking LLC and driven by Victor Kutsar (Mr. Kutsar or Respondent). At the time of the inspection, Inspector Bauer prepared a report indicating a violation of the Federal Motor Carrier Safety Regulations (FMCSR), as published in the Code of Federal Regulations (C.F.R.), 49 C.F.R. 392.80(a), driving a CMV while texting. (Tr. at 7-9; Staff Ex.1.)

{¶ 3} 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. The NPD notified Respondent that Staff intended to assess a \$250 civil forfeiture for violating the Commission's transportation rules.

{¶ 4} On June 6, 2022, Respondent requested an administrative hearing in accordance with Ohio Adm.Code 4901:2-7-13.

{¶ 5} A prehearing conference was conducted on September 9, 2022, but the matter was not resolved, and a hearing was conducted on August 22, 2023. At the hearing, Staff witnesses Inspector Bauer and Assistant Chief of Compliance Brad Long (Mr. Long) testified in support of the violation identified by Staff. Mr. Kutsar testified on his own behalf.

III. LAW

{¶ 6} 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. 49 C.F.R. 392.80(a) provides that “No driver shall engage in texting while operating a commercial motor vehicle.” Further, 49 C.F.R. 390.5T defines texting as “manually entering alphanumeric text into, or reading text from, an electronic device” and includes “engaging in any other form of electronic text retrieval or entry, for present or future communication.”

IV. ISSUE

{¶ 7} The 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, a cell phone, to engage in texting while operating a CMV, in violation of 49 C.F.R. 392.80(a).

Staff alleges that Mr. Kutsar was engaging in texting while driving a CMV, thereby decreasing his ability to safely operate the CMV. Respondent disputes the violation and asserts that he was using his GPS, not texting, when the officer pulled him over.

V. SUMMARY OF THE EVIDENCE

{¶ 8} Inspector Bauer testified that on March 15, 2022, he observed Mr. Kutsar's vehicle crossing the right lane of the highway, and when he looked up into the window, he observed Respondent manipulating a cell phone with his right hand that was mounted on the windshield of the tractor-trailer. Inspector Bauer explained that after pulling Respondent over, he viewed the cell phone mounted in the cell phone holder still with an open text message. Inspector Bauer identified that the text message was addressed to Jacob Trans and an unfinished text message reading "will be ready" had not been sent. (Tr. at 8-10; Staff Ex. 1.) In the driver/vehicle examination report that Inspector Bauer prepared, the inspection notes state that "driver said that people text and drive all the time" and "driver stated that he was figuring out a way to get to his yard. I told him I don't understand because he lives local and he uses this route often." (Staff Ex. 1.)

{¶ 9} Staff's next witness, Mr. Long, testified that the \$250 assessed civil forfeiture for the alleged violation is consistent with the uniform guidelines established by the Commercial Vehicle Safety Alliance (Tr. at 16-20). Mr. Long also testified that the required notices were sent to Respondent (Tr. at 20-23; Staff Exs. 2 and 3).

{¶ 10} Mr. Kutsar testified that at the time he was pulled over, he was test driving his truck after some repairs and also testing a transponder for Easy Pass on the Turnpike. He stated that his phone was malfunctioning, and the GPS function on the phone was glitching and freezing up so he decided to test his GPS on that test drive, as well. Mr. Kutsar stated that although he did not need his GPS to get home, as he was close to home and familiar with the route, he was using GPS to test its functionality. (Tr. at 25-26, 30-31, 43.) Respondent testified that he began a text message before he started driving, got interrupted, and then left before finishing or sending the text message. Mr. Kutsar stated that it was a

coincidence that the unfinished text message came up when Inspector Bauer looked at it. Respondent also stated that he didn't know that it was a violation to use his GPS while driving. (Tr. at 26-28.) Mr. Kutsar also presented a document that he says demonstrates that no text messages were sent at the time of the inspection. He stated that the phone utilizes pacific time, so he manually wrote in the times in the eastern time zone next to the applicable fields. (Tr. at 31-32, 35-36; Respondent Ex. 1.) As to the inspection notes that "driver said that people text and drive all the time," Respondent disputes that he ever said that (Tr. at 13, 28, 29, 43). On cross examination, Respondent confirmed that he utilizes GPS on his phone regularly when driving and did so at the time he was pulled over by Inspector Bauer (Tr. at 39-42).

VI. COMMISSION CONCLUSION

{¶ 11} Ohio Adm.Code 4901:2-7-20 requires that Staff, at a hearing, prove the occurrence of a violation by a preponderance of the evidence. The Commission finds that, based on a preponderance of the evidence, Staff has met its burden of proving that Mr. Kutsar has violated the Commission's transportation rules, specifically, a violation of 49 C.F.R. 392.80(a), which states: "No driver shall engage in texting while operating a commercial motor vehicle." Further, 49 C.F.R. 390.5T defines texting as "manually entering alphanumeric text into, or reading text from, an electronic device" and includes "engaging in any other form of electronic text retrieval or entry, for present or future communication."

{¶ 12} Here, Inspector Bauer testified that he observed Mr. Kutsar manipulating a cell phone that was mounted on the windshield while driving (Tr. at 9). Then when Inspector Bauer stopped and approached the vehicle, he testified that he saw an unfinished text message on Respondent's phone. Inspector Bauer observed specific details about the text message, including the recipient's name and the exact text that had been typed. (Tr. at 10; Staff Ex. 1.) In the inspection report, Inspector Bauer wrote that "driver said that people text and drive all the time" (Staff Ex. 1).

{¶ 13} Respondent explained that, rather than texting, he was utilizing his GPS on his cellphone (Tr. at 26-27, 30-31, 43). Mr. Kutsar asserts that the text message was up on his cellphone screen when Inspector Bauer approached his vehicle, rather than a GPS screen, due to a cell phone malfunction (Tr. at 31). Respondent also denies ever making the statement that people text and drive all the time (Tr. at 13, 28, 29, 43).

{¶ 14} Considering the document presented by Respondent that he purports is his texting records, we note that the document has no heading demonstrating that it was prepared by Respondent's cellphone carrier. Rather, it is a document with data in a spreadsheet format with handwritten times added to some of the rows. As noted by Staff's counsel, this chart could have been created by anyone in a spreadsheet (Tr. at 37). Nothing about this document demonstrates that it is a complete list of text messages sent and received. Although Respondent testified that the times listed are in the pacific time zone, nothing on the document itself states a time zone, although certain headers in the document indicate "Mtn," which could refer to the Mountain Time Zone. We also note that the text message that Inspector Bauer described was not a text message that had been transmitted. Rather, the text message was an unfinished draft, so there would be no record of the transmittal of that text message at the time of the inspection. The prohibition in 49 C.F.R. 392.80(a) applies even if a text message is not transmitted. For these reasons, we find that the document has little probative value.

{¶ 15} Given the totality of the evidence and testimony, the Commission determines that Staff has proven by a preponderance of the evidence that Mr. Kutsar violated 49 C.F.R. 392.80(a). Respondent never disputes the fact that a text message was on his screen at the time of the inspection rather than a GPS screen, although he justifies the text draft being on his screen due to a cellphone malfunction (Tr. at 31). In the inspection report, Inspector Bauer wrote that Mr. Kutsar said he was using his GPS to find his way back to his yard, which Inspector Bauer questioned because of how close he was to home and on a frequently travelled route (Staff Ex. 1). Importantly, Mr. Kutsar did not explain why his statement changed from the time of the inspection to his testimony at hearing, at

which time he stated that he was merely testing his GPS (Tr. at 26-27, 30-31, 43). The inspection report also says that Mr. Kutsar said “people text and drive all the time,” which Mr. Kutsar disputes (Staff Ex. 1). We find that the evidence in total demonstrates that Mr. Kutsar was texting while driving, in violation of 49 C.F.R. 392.80(a).

{¶ 16} Thus, Mr. Kutsar is directed to make payment of the \$250 civil forfeiture within 30 days of this Opinion and Order via the Commission website or by certified check or money order payable to “Public Utilities Commission 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 22-570-TR-CVF and inspection number OH3223005287D 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

{¶ 17} On March 15, 2022, Ohio State Highway Patrol Motor Carrier Enforcement Inspector Drew Bauer stopped and inspected a CMV operated by Emerson Trucking LLC and driven by Mr. Kutsar. Inspector Bauer issued a citation for violation of 49 C.F.R. 392.80(a), driving a CMV while texting.

{¶ 18} In accordance with Ohio Adm.Code 4901:2-7-12, Mr. Kutsar was served with an NPD. In the NPD, Respondent was notified that Staff intended to assess a total civil forfeiture of \$250 for the violation.

{¶ 19} A prehearing conference was conducted on September 9, 2022, but the matter was not resolved.

{¶ 20} An evidentiary hearing was held on August 22, 2023.

{¶ 21} 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.

{¶ 22} Based on the record in this proceeding, the Commission finds that Staff has proven, by a preponderance of the evidence, that Mr. Kutsar violated 49 C.F.R. 392.80(a), driving a CMV while texting.

{¶ 23} Mr. Kutsar should be assessed a \$250 forfeiture for violating 49 C.F.R. 392.80(a), driving a CMV while texting, and should pay the total forfeiture within 30 days from the date of this Opinion and Order.

VIII. ORDER

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That Mr. Kutsar pay a civil forfeiture of \$250 within 30 days of this Opinion and Order via the Commission website or by certified check or money order payable to “Public Utilities Commission 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 22-570-TR-CVF and inspection number OH3223005287D should be written on the face of the certified check or money order to ensure proper credit. It is, further,

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

COMMISSIONERS:

Approving:

Jenifer French, Chair
Daniel R. Conway
Lawrence K. Friedeman
Dennis P. Deters

Recusal:

John D. Williams

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Case No(s). 22-0570-TR-CVF

Summary: Opinion & Order that the Commission finds that Staff demonstrated, by a preponderance of the evidence, that Victor Kutsar violated 49 C.F.R. 392.80(a), prohibiting a driver from engaging in texting while operating a commercial motor vehicle electronically filed by Ms. Donielle M. Hunter on behalf of Public Utilities Commission of Ohio.