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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–98–3637] – 8

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of final disposition.

SUMMARY: The FHWA announces its decision to exempt 12 individuals from the vision requirement in 49 CFR 391.41(b)(10).

DATES: This decision is effective on November 9, 1998.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Thomas, Office of Motor Carrier Research and Standards, (202) 366-8786, or Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

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Background

Twelve individuals petitioned the FHWA for a waiver of the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of commercial motor vehicles (CMVs) in interstate commerce. They are Larry A. Dahleen, Earl D. Edland, Dale Hellmann, Dan E. Hillier, Robert J. Johnson, Bruce T. Loughary, Michael L. Manning, Leo L. McMurray, Gerald Rietmann, Jimmy E. Settle, Robert A. Wagner, and Hubert Whittenburg. The FHWA evaluated the petitions on their merits, as required by the decision in ***Rauenhorst v. United States Department of Transportation, Federal Highway Administration, 95*** F.3d 715 (8th Cir. 1996), and made a preliminary determination that the waivers should be granted. On June 3, 1998, the agency published notice of its preliminary determination and requested comments from the public. (63 FR 30285). The comment period closed on July 6, 1998. Three comments were received, and their contents have been carefully considered by the FHWA in reaching its final decision to grant the petitions.

When its notice of preliminary determination was published on June 3, 1998, the FHWA was authorized by 49 U.S.C. 31136(e) to waive application of the vision standard if the agency determined the waiver was consistent with the public interest and the safe operation of CMVs. Because the statute did not limit the effective period of a waiver, the agency had discretion to issue waivers for any period warranted by the circumstances of a request.

On June 9, 1998, the FHWA's waiver authority changed with enactment of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107. Section 4007 of TEA-21 amended the waiver provisions of 49 U.S.C. 31315 and 31136(e) to change the standard for evaluating waiver requests, to distinguish between a waiver and an exemption, and to establish term limits for both. Under revised section 31136(e), the FHWA may grant a waiver for a period of up to 3 months or an exemption for a renewable 2-year period. The 12 applications in this proceeding fall within the scope of an exemption request under the revised statute.

The amendments to 49 U.S.C. 31136(e) also changed the criteria for exempting a person from application of a regulation. Previously an exemption was appropriate if it was consistent with the public interest and the safe operation of CMVs. Now the FHWA may grant an exemption if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." The new standard provides the FHWA greater discretion to deal with exemptions than the previous standard because it allows an exemption to be based on a reasonable expectation of equivalent safety, rather than requiring an absolute determination that safety will not be diminished. (See H.R. Conf. Rep. No. 105-550, at 489 (1998)).

Although the 12 petitions in this proceeding were filed before enactment of TEA-21, the FHWA is required to apply the law in effect at the time of its decision unless (1) its application will result in a manifest injustice or (2) the statute or legislative history directs otherwise. ***Bradley v. School Board of the City of Richmond, 416*** U.S. 696 (1974). As the FHWA preliminarily determined the 12 applicants in this proceeding qualified for waivers under the previous stricter standard, they are not prejudiced by our application of the new, more flexible standard at this stage of the proceeding. As nothing in the statute or its history directs otherwise, we have applied the new exemption standard in 49 U.S.C. 31136(e) in our final evaluation of their petitions and determined that exempting these 12 applicants from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption.

Although applying TEA-21's new exemption standard does not adversely affect the applicants, subjecting their applications to the new procedural requirements would adversely affect them. Section 4007 requires the Secretary of Transportation to promulgate regulations specifying the procedures by which a person may request an exemption. The statute lists four items of information an applicant must submit with an exemption petition and gives the Secretary 180 days to get the new procedural regulations in place.

Although the FHWA intends to meet that deadline, it would be manifestly unjust to the 12 applicants to delay our decision until the new procedural regulations are in place, and then at that time, require them to submit conforming information to support their exemption request. To avoid this delay and injustice, we will not apply the new procedural requirements of Section 4007 to exemption petitions filed before its effective date, June 9, 1998.

Vision And Driving Experience of the Applicants

The vision requirement in 49 CFR 39 1.4 1 (b) (10) provides:

> A person is physically qualified to drive a commercial motor vehicle if that person has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70° in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

The FHWA recognizes, however, that some drivers do not meet the vision standard but have adapted their driving to accommodate their vision limitation and demonstrated their ability to drive safely.

The 12 applicants fall into this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, retinal detachment, and loss of an eye due to an accident. Their eye conditions were not recently developed. Six (6) applicants were born with their vision impairments and have lived with them for periods ranging from 35 to 57 years. Four (4) applicants developed their conditions during early childhood and have lived with them for periods ranging from 29 to 50 years. One sustained an accident at age 16 and has lived with his injured eye for 15 years. One suffered a retinal detachment at age 30 and has lived with that condition for 23 years. Although one eye does not meet the vision standard in section 39 1.4 1 (b) (10), each applicant has at least 20/40 corrected vision in his other eye and, in his doctor's opinion, can perform all the tasks necessary to operate a CMV.

The doctors' opinions are supported by the applicants' possession of a valid commercial driver's license (CDL). Before issuing a CDL, States subject drivers to knowledge and performance tests designed to evaluate their qualifications to operate the CMV. Each of these applicants satisfied the testing standards for his State of residence. By meeting State licensing requirements, the applicants demonstrated their ability to operate a commercial vehicle, with their limited vision, to the satisfaction of the State.

While possessing a valid CDL, these 12 drivers have been authorized to drive a CMV in intrastate commerce even though their vision disqualifies them from driving in interstate commerce. They have driven CMVs with their limited vision for careers ranging from 7 to 37 years. Most have worked for their current employer for over five years. In the past three years, none of the applicants had an accident; three were convicted of a speeding violation; the other nine drivers had no traffic violations.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in 63 FR 30285, June 3, 1998. As no comments focused on the qualifications of a specific applicant, we have not repeated the individual profiles here. Our summary analysis of the applicants as a group, however, is supported by the information published in 63 FR 30285.

Basis for Exemption Determination

Under revised 49 U.S.C. 31136(e), the FHWA may grant an exemption from the vision standard in 49 CFR 39 1.4 1 (b) (10) if the exemption is likely to achieve an equivalent or greater level of safety than would be achieved without the exemption. Without the exemption, applicants will continue to be restricted to intrastate driving. With the exemption, applicants can drive in interstate commerce. Thus, our analysis focuses on whether applicants are likely to achieve an equal or greater level of safety driving in interstate commerce as they have achieved in intrastate commerce.

To evaluate the effect of these exemptions on safety, the FHWA has considered not only the medical reports about the applicants' vision but also their driving records and experience with the vision deficiency. Recent driving performance is especially important in evaluating future safety, according to several research studies designed to correlate past and future driving performance. Results of these studies support the principle that the best predictor of future performance by a driver is his past record of accidents and traffic violations. Copies of the studies have been added to the docket.

We believe we can properly apply the principle to monocular drivers because data from the vision waiver program clearly demonstrates the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 6 1 FR 13338, March 26, 1996.) That monocular drivers in the waiver program demonstrated their ability to drive safely supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.

The first major research correlating past and future performance was done in England by Greenwood and Yule in 1920. Subsequent studies, building on that model, concluded that accident rates for the same individual exposed to certain risks for two different time periods vary only slightly. (See Bates and Neyman, University of California Publications in Statistics, April 1952.) Other studies demonstrated theories of predicting accident proneness from accident history coupled with other factors. These factors, such as age, sex, geographic location, mileage driven and conviction history, are used every day by insurance companies and motor vehicle bureaus to predict the probability of an individual experiencing future accidents. (See Weber, Donald C., "Accident Rate Potential: An Application of Multiple Regression Analysis of a Poisson Process," Journal of American Statistical Association, June, 197 1.) A 1964 California Driver Record Study prepared by the California Department of Motor Vehicles concluded that the best overall accident predictor for both concurrent and nonconcurrent events is the number of single convictions, This study used 3 consecutive years of data, comparing the experiences of drivers in the first 2 years with their experiences in the final year.

Applying principles from these studies to the past three year record of the applicants, we note that the 12 applicants have had no accidents and only 3 traffic violations in the last 3 years. They achieved this record of safety while driving with their vision impairment, demonstrating they have adapted their driving skills to accommodate their condition. As the applicants' driving histories with their vision deficiencies are predictors of future performance, the FHWA concludes their ability to drive safely can be projected into the future.

In addition, we believe applicants' intrastate driving experience provides an adequate basis for evaluating their ability to drive safely in interstate commerce. Intrastate driving, like interstate operations, involves substantial driving on highways in the interstate system and on other roads built to interstate standards. Moreover, driving in congested urban areas

exposes the driver to more pedestrians and vehicle traffic than exist on interstate highways. Faster reaction to traffic and traffic signals is generally required because distances are more compact than on highways. These conditions tax visual capacity and driver response just as intensely as interstate driving conditions. The veteran drivers in this proceeding have operated a CMV safely under those conditions for at least 7 years, most for much longer. Their experience and driving record lead us to believe applicants are capable of operating in interstate commerce as safely as they have in intrastate commerce. Consequently, the FHWA finds that exempting applicants from the vision standard in 49 CFR 39 1.4 1 (b) (10) is likely to achieve a level of safety equal to that existing without the exemption. For that reason, the agency will grant the exemptions for the two-year period allowed by 49 U.S.C. 31136(e).

We recognize, however, that the vision of an applicant may change and affect his ability to operate a commercial vehicle as safely as in the past. As a condition of the exemption, therefore, the FHWA will impose requirements on the 12 individuals consistent with the grandfathering provisions applied to drivers who participated in the agency's vision waiver program.

Those requirements are found at 49 CFR 39 1.64(b) and include the following: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests his vision continues to measure at least 20/40 (Snellen) in the better eye, and (b) by a medical examiner who attests he is otherwise physically qualified under 49 CFR 391.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to his employer for retention in its driver qualification file or keep a copy in his driver qualification file if he becomes self-employed. He must also have a copy of the certification when driving so it may be presented to a duly authorized Federal, State, or local enforcement official.

Discussion of Comments

The FHWA received three (3) comments to the docket in response to its June 3, 1998, notice of intent to approve the 12 applications for a vision waiver. Each comment was considered and is discussed below.

Mr. Roger A. Sproul of Augusta, Maine, supported the FHWA's determination to grant the waivers. Mr. Sproul is a truck driver who has a vision deficiency in one eye. He agrees the applicants have demonstrated their ability to drive CMVs safely.

Dr. Kurt T. Hegmann, an Associate Professor at the Medical College of Wisconsin, opposes granting the waivers. He believes a person's driving history, even that of "an individual who has had one million miles" of driving experience, is not an indicator of his future performance. In his opinion, only a controlled trial using a comparison group and following epidemiological principles can yield a determination of a person's ability to drive safely in the future. We recognize opinions differ about the validity of using past driving performance as a predictor of future performance. The studies discussed above in "Basis for Waiver Determination", however, support the FHWA's decision to use the driving record and experience of these 12 applicants as a predictor of their future driving performance.

The American Trucking Associations (ATA) opposes granting waivers to drivers who cannot meet the existing medical standards. As it has consistently stated, the ATA believes current standards ensure drivers are in sufficiently good health to drive safely; it believes the vision standard is particularly important because driving responses are based primarily on what is seen. If waivers are granted, the ATA agrees the 12 drivers should be subject to the same annual examination requirements imposed on the grandfathered drivers in FHWA Docket MC-96-2 (61 FR 13338, March 26, 1996). The organization also believes the 12 should be required to report involvement in any DOT-recordable accident directly to the FHWA and be prohibited from driving until they have undergone a medical and vision examination following the accident.

Except for their vision, the health of the 12 drivers is not at issue because they meet all other medical qualification standards in 49 CFR 391.4 1 (b). The good driving records they have established with their limited vision reflect their ability to make safe and appropriate driving responses to visual stimuli. The FHWA is satisfied these 12 individuals qualify under 49 U.S.C. 31136 for an exemption from the vision requirements, subject to the conditions enumerated in this decision. One of those conditions requires them to undergo annual vision examinations which will disclose any deterioration in their visual capacity and will affect their qualifications for the exemption. In view of their driving records over at least the last 3 years, there is no reason to believe their vision will play any greater role in a potential accident than the vision of a driver who meets the standard. For that reason, the FHWA does not agree special conditions regarding accident reporting and driving suspension are warranted.

The ATA also comments that granting vision waivers removes the preemptive effect that FHWA regulations have over the Americans with Disabilities Act (ADA), Public Law 101-336, 104 Stat. 327, as amended. This action "forces motor carriers to assume the risk of waiving vision requirements that the FHWA itself has not determined can be safely waived." As a result, "motor carriers * * * are therefore placed in the unenviable position of having to choose between allowing waived drivers to operate their vehicles or facing possible litigation for violation of the ADA if they refuse to hire such drivers."

The exemptions granted in this proceeding do not affect the vision standard in 49 CFR 39 1.4 1 (b) (10), except as that standard applies to these 12 drivers. For these drivers, we have determined the vision standard can be safely waived. This determination does not relieve anyone else from complying with the vision standard or any other physical qualification requirement in 49 CFR part 39 1. For that reason, our action has no general effect on the relationship between FHWA safety regulations and the ADA.

The court's decision in ***Rauenhorst v. United States Department of Transportation, Federal High way Administration, 95*** F.3d 715 (8th Cir. 1996), requires the FHWA to individually evaluate applications for exemptions from the vision standard in 49 CFR 39 1.4 1 (b) (10). The statutory standard in 49 U.S.C. 31136(e) governs our evaluation of exemption petitions. Meeting that standard, the 12 veteran drivers in this case have demonstrated to our satisfaction that they can operate a CMV with their current vision as safely in interstate commerce as they have in intrastate commerce. For that reason, granting them an exemption complements the purpose of the ADA by promoting employment opportunities for the disabled without jeopardizing safety.

Conclusion

After considering the comments to the docket and based upon its evaluation of the 12 waiver applications in accordance with ***Rauenhorst v. United States Department of Transportation, Federal High way Administration, supra,*** the FHWA exempts Larry A. Dahleen, Earl D. Edland, Dale Hellmann. Dan E.

Hillier, Robert J. Johnson, Bruce T. Loughary, Michael L. Manning, Leo L. McMurray, Gerald Rietmann, Jimmy E. Settle, Robert A. Wagner, and Hubert Whittenburg from the vision requirement in 49 CFR 391.4 1 (b) (10) , subject to the following conditions: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests his vision continues to measure at least 20/40 (Snellen) in the better eye, and (b) by a medical examiner who attests he is otherwise physically qualified under 49 CFR 39 1.41; (2) that each individual provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that each individual provide a copy of the annual medical certification to his employer for retention in its driver qualification file or keep a copy in his driver qualification file if he becomes self-employed. He must also have a copy of the certification when driving so it may be presented to a duly authorized Federal, State, or local enforcement official.

To satisfy 49 U.S.C. 31136(e) and 3 13 15(b) (7), this exemption will become effective 30 days from the date of publication in the **Federal** Register to allow notification of State safety compliance and enforcement personnel and the public that the 12 applicants will be operating pursuant to the exemptions granted in this proceeding.

In accordance with revised 49 U.S.C. 31136(e), each exemption will be valid for 2 years unless revoked earlier by the FHWA. The exemption will be revoked if (1) the person fails to comply with the terms and conditions of the exemption; (2) the exemption has resulted in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31136. If the exemption is still effective at the end of the 2-year period, the person may apply to the FHWA for a renewal under procedures in effect at that time.

Authority: 49 U.S.C. 31136 and 31315; 23 U.S.C. 3 15; 49 CFR 1.48.

Issued on: October 2, 1998.

Kenneth R. Wykle,

Federal High way Administrator.

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