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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

[FHWA Docket No. FHWA–98–4334] —14

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 23 individuals from the vision requirement in 49 CFR 391.41(b)(10).

DATES: April 5, 1999.

FOR FURTHER INFORMATION CONTACT: For information about the vision exemptions in this notice, Ms. Sandra Zywokarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about legal issues related to this notice, 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.

SUPPLEMENTARY INFORMATION:

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Background

Twenty-four 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 Gary R. Andersen, Joe F. Arnold, Jack E. Atkinson, Gary A. Barrett, Ivan L. Beal, Johnny A. Beutler, Richard D. Carlson, David John Collier, Tomie L. Estes, Jay E. Finney, Britt D. Hazelwood, Jon R. Houston, Chad M. Kallhoff, Loras G. Knebel, Rodney D. Lemburg, Dexter L. Myhre, James H. Oppliger, Stephanie D. Randels, Duane L. Riendeau, Darrell Rohlfs, Marvin L. Swillie, Larry Waldner, and Ronald Watt. 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 December 1, 1998, the agency published notice of its preliminary determination and requested comments from the public (63 FR 66226). The comment period closed on December 31, 1998. One comment was received, and its contents were carefully considered by the FHWA in reaching the final decision to grant the petitions.

The FHWA has not made a decision on one applicant, Mr. Jon R. Houston of Iowa. Subsequent to the publication of the preliminary determination, the agency received additional information from the Iowa Department of Transportation, and we are evaluating that information. A decision on Mr. Houston's petition will be made in the future.

When the remaining 23 individuals filed their vision waiver applications on various dates before June 9, 1998, the FHWA was authorized by 49 U.S.C. 31136(e) to waive the vision standard if the agency determined the waiver was consistent with the public interest and the safe operation of CMVs. As 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), Pub. L. No. 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 sections 31315 and 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 23 applications in this proceeding fall within the scope of an exemption request under the revised statute.

The amendments to 49 U.S.C. 31315 and 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 flexibility and discretion to deal with exemptions than the previous standard. (See H.R. Conf. Rep. No. 105-550, at 489 (1998).)

Although the 23 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). With respect to the new standard, nothing in the statute, its history, or the facts in this proceeding meets either of these two tests. In fact, the new standard is more equitable as 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. In addition, the "public interest" finding required under the previous standard is not necessary under the new exemption standard. These changes enhance the FHWA's discretion to consider exemptions, thus benefitting the 23 applicants rather than causing an injustice.

For that reason, we applied the new standard in our evaluation of these 23 petitions and determined that exempting these 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.

Vision and Driving Experience of the Applicants

The vision requirement in 49 CFR 391.41(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.

Since 1992, the FHWA has undertaken studies to determine if this vision standard should be amended. The latest report from our medical panel recommends changing the field of vision standard from 70° to 120°, while leaving the visual acuity standard unchanged. (See Frank C. Berson, M.D., Mark C. Kuperwaser, M.D., Lloyd Paul Aiello, M.D., and James W. Rosenberg, M.D., "Visual Requirements and Commercial Drivers," October 16, 1998, filed in the docket). The panel's conclusion supports the FHWA's view that the present standard is reasonable and necessary as a general standard to ensure highway safety. The FHWA also recognizes 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 23 applicants fall into this category. They are unable to meet the vision standard in one eye for various reasons, including amblyopia, retinal and cornea1 scars, and loss of an eye due to an accident. In most cases, their eye conditions were not recently developed. All but five applicants were either born with their vision impairments or have had them since childhood. They have lived with them for periods ranging from 16 to 46 years. The five individuals who sustained their vision conditions as adults have had them for periods ranging from 4 to 25 years.

Although each applicant has one eye which does not meet the vision standard in Section 391.41(b)(10), each has at least 20/40 corrected vision in the other eye and, in a 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. All these applicants satisfied the testing standards for their 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 23 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 4 to 36 years. In the past 3 years, the 23 drivers had a total of five moving violations among them. Two drivers were involved in minor accidents in their CMVs, but there were no injuries and neither person received a citation.

The qualifications, experience, and medical condition of each applicant were stated and discussed in detail in 63 FR 66226, December 1, 1998. Since the lone docket comment did not focus 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 66226.

Basis for Exemption Determination

Under revised 49 U.S.C. 31315 and 31136(e), the FHWA may grant an exemption from the vision standard in 49 CFR 391.41(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 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/her 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 demonstrate the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, 13345, 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 1971). 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 3-year record of the 23 applicants, we note that cumulatively the applicants have had only two minor accidents and five traffic violations in the last 3 years. None of the violations represented a serious traffic violation as defined in 49 CFR 383.5, and neither of the accidents involved bodily injury or resulted in a citation. The applicants 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 4 years, most for much longer. Their experience and driving records lead us to believe the 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 this reason, the agency will grant the exemptions for the 2-year period allowed by 49 U.S.C. 31315 and 31136(e).

We recognize that the vision of an applicant may change and affect his/her 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 23 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 that the vision in the better eye continues to meet the standard in 49 CFR 39 1.4 1 (b) (10) , and (b) by a medical examiner who attests that the individual 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 the employer for retention in its driver qualification file, or keep a copy in his/her driver qualification file if he/she is self-employed. The driver 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 Comment

The FHWA received one comment in this proceeding. In that comment, J.B. Hunt Transport, Inc. (Hunt) expresses general opposition to exemptions from the physical qualification standards and raises procedural objections to this proceeding.

On the procedural issue, Hunt maintains that the applicants should reapply under the standards which will be adopted in Docket No. FHWA–98–*4* 14 *5, Federal Motor Carrier Safety Regulations; Waivers, Exemptions, and Pilot Programs; Rules and Procedures,* 63 FR 67600, December 8, 1998, to implement the TEA-21 changes to the agency's exemption authority. It asserts that the agency is disregarding the rulemaking process by considering vision waiver requests filed after the waiver program was closed and before rules are fully adopted to implement the new provisions of 49 U.S.C. 31315 and 31136(e).

Section 4007 of TEA-2 1 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 (from June 9, 1998) to implement the new procedural regulations. On December 8, 1998, the agency published interim final rules in Docket No. FHWA-98-4 145 to implement section 4007. The interim rules will govern exemption requests filed on or after June 9, 1998, until final rules are adopted in that proceeding.

Before publishing its notice of intent to grant these applications, the FHWA determined that applying the new procedural requirements of section 4007 of TEA-2 1 would adversely affect the applicants. As we explained in 63 FR 66226, December 1, 1998, it would have been manifestly unjust to hold applications filed before June 9, 1998, in abeyance until new procedural regulations were implemented in December, and then require the applicants to submit conforming, supplementary information to support their exemption request. Such delay not only would have been unjust but would have provided nothing to enhance safety. For these reasons, the FHWA decided not to apply the procedural requirements of section 4007 to exemption requests filed before its effective date, June 9, 1998. As these applications were filed before that date, we processed them under procedures in effect at the time they were filed, a decision supported by ***Bradley v. School Board of the City of Richmond,*** 416 U.S. 696 (1974).

The balance of Hunt's comments relate to its opposition to exemptions for drivers who cannot meet the existing medical standards. First, Hunt asserts that "minimum safety standards" should apply to every CMV driver in interstate commerce without the possibility of waiver or exemption. If the vision standard in 49 CFR 39 1.4 1 (b) (10) is the appropriate minimum standard, Hunt urges, it should be applied without exception. If it is not, the standard should be reviewed in accordance with several guidelines suggested by Hunt in its comments.

The FHWA continues to review the vision standard in 49 CFR 39 1.4 1 (b) (10), as evidenced by the medical panel's report dated October 16, 1998, filed in this docket, and we welcome Hunt's suggested guidelines to factor into our review process. Notwithstanding the

ongoing review of the vision standard, however, the FHWA must comply with ***Rauenhorst v. United States Department of Transportation, Federal High way Administration, 95*** F.3d 715 (8th Cir. 1996), and grant individual exemptions under standards that are consistent with public safety. Meeting those standards, the 23 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. Accordingly, they qualify for an exemption under 49 U.S.C. 31315 and 31136(e).

Hunt also asserts that motor carriers should be given regulatory relief which would allow them to maintain the more stringent vision standard found in 49 CFR 39 1.4 1 (b) (10) and the right to legally decline the use of a driver with an exemption. Absent that relief, Hunt urges that motor carriers "forced to use a waived or exempted driver" should receive a hold harmless agreement from the FHWA relieving them of liability in case a medically exempted driver has a traffic accident.

The FHWA's physical qualification standards are minimum requirements; thus, carriers already have the right to maintain standards that meet or exceed those established by the agency (49 CFR 390.3(d)). When motor carriers apply higher physical standards than required by the FHWA, however, they must be prepared to justify their requirements if challenged under the Americans with Disabilities Act, Pub.L. 101-336, 104 Stat. 327, or any other law. In short, a motor carrier has a legal obligation not to discriminate on the basis of a disability, and the FHWA cannot relieve a carrier of that obligation.

Conclusion

After considering the comment to the docket and based upon its evaluation of the 23 waiver applications in accordance with ***Rauenhorst v. United States Department of Transportation, Federal High way Administration, supra,*** the FHWA exempts Gary R. Andersen, Joe F. Arnold, Jack E. Atkinson, Gary A. Barrett, Ivan L. Beal, Johnny A. Beutler, Richard D. Carlson, David John Collier, Tomie L. Estes, Jay E. Finney, Britt D. Hazelwood, Jerome R. Jessen, Chad M. Kallhoff, Loras G. Knebel, Rodney D. Lemburg, Dexter L. Myhre, James H. Oppliger, Stephanie D. Randels, Duane L. Riendeau, Darrell Rohlfs, Marvin L. Swillie, Larry Waldner, and Ronald Watt from the vision requirement in 49 CFR 39 1.4 1 (b) (1 0), subject to the following conditions: (1) That each individual be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in the better eye continues to meet the standard in 49 CFR 391.4 1 (b) (10), and (b) by a medical examiner who attests that the individual is otherwise physically qualified under 49 CFR 39 1.4 1; (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 the employer for retention in its driver qualification file, or keep a copy in his/her driver qualification file if he/she is self-employed. The driver 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.

In accordance with revised 49 U.S.C. 3 13 15 and 3 1136(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. 31315 and 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. 31315 and 31136; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: March 29, 1999.

Kenneth R. Wykle,

Federal Highway *Adminis* tra *tor.*

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