

decision affects the legal validity of vision exemptions.

On the first issue regarding the appointment and confirmation of an Administrator for the Federal Motor Carrier Safety Administration, an Acting Deputy Administrator has been appointed and delegated functions required for the operation of the new agency. The other issues raised by the AHAS were addressed at length in 64 FR 51568 (September 23, 1999), 64 FR 66962 (November 30, 1999), 64 FR 69586 (December 13, 1999), and 65 FR 159 (January 3, 2000). We see no benefit in addressing these points again and refer interested parties to those earlier discussions for reasons why the points were rejected.

Notwithstanding the FMCSA's ongoing review of the vision standard, as evidenced by the medical panel's report dated October 16, 1998, and filed in this docket, the FMCSA must comply with *Rauenhorst v. United States Department of Transportation*, 95 F.3d 715 (8th Cir. 1996), and grant individual exemptions under standards that are consistent with public safety. Meeting those standards, the 34 veteran drivers in this case have demonstrated to our satisfaction that they can continue to operate a CMV with their current vision safely in interstate commerce because they have demonstrated their ability in intrastate commerce. Accordingly, they qualify for an exemption under 49 U.S.C. 31315 and 31136(e).

## Conclusion

After considering the comments to the docket and based upon its evaluation of the 34 waiver applications in accordance with *Rauenhorst v. United States Department of Transportation*, *Federal Highway Administration*, *supra*, the FMCSA exempts Rodney D.

Blaschke, Thomas B. Blish, Ronnie Freamon Bowman, James C. Bryce, Thomas L. Corey, James D. Davis, Glenn Gee, Lloyd E. Hall, Byron Dale Hardie, Robert N. Heaton, Edward E. Hooker, James M. Irwin, Laurent G. Jacques, Alfred G. Jeffus, Oskia Johnson, Michael W. Jones, Don R. Kennedy, Dennis E. Krone, James F. Laverdure, Christopher P. Lefler, David R. Linzy, Richard Joseph Madler, Earl E. Martin, David P. McCabe, Richard John McKenzie, Jr., Kenneth R. Piechnik, Tommy L. Ray, Jr., William A. Reyes, Carl A. Sigg, Sammy D. Steinsultz, Edward J. Sullivan, John C. Vantaggi, Winston Eugene White, and Turgut T. Yilmaz from the vision requirement in 49 CFR 391.41(b)(10), 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 391.41(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.

In accordance with 49 U.S.C. 31315 and 31136(e), each exemption will be valid for 2 years unless revoked earlier by the FMCSA. 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 FMCSA for a renewal under procedures in effect at that time.

**Authority:** 49 U.S.C. 322, 31315 and 31136; 49 CFR 1.73.

Issued on: April 6, 2000.

**Julie Anna Cirillo,**

*Acting Deputy Administrator, Federal Motor Carrier Safety Administration.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

[FMCSA Docket No. 2000-6938]

### Qualification of Drivers; Exemption Applications; Vision

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Notice of petition and intent to grant application for exemption; request for comments.

**SUMMARY:** This notice announces the FMCSA's preliminary determination to grant the application of Todd E. Kautzman for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations

(FMCSR). Granting the exemption will enable Mr. Kautzman to qualify as a driver of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

**DATES:** Comments must be received on or before May 15, 2000.

**ADDRESSES:** Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

**FOR FURTHER INFORMATION CONTACT:** For information about the vision exemption in this notice, Ms. Sandra Zywockarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about the legal issues related to this notice, Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-2519, Federal Motor Carrier Safety 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:

#### Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

#### Background and Procedural History

Mr. Kautzman originally applied for a waiver of the vision standard in 1995 when the Federal Highway Administration (FHWA) performed motor carrier safety functions within the Department of Transportation. On

January 1, 2000, the Federal Motor Carrier Safety Administration (FMCSA) was created and assumed responsibility for performing the motor carrier safety functions involved in this case. (See Motor Carrier Safety Improvement Act of 1999, Public Law 106-159, 113 Stat. 1748). Accordingly, the FMCSA is now the appropriate agency to consider Mr. Kautzman's exemption request.

Mr. Kautzman's application for an exemption has a lengthy history that is intertwined with the development and demise of the vision waiver study program conducted by the Office of Motor Carriers within the Federal Highway Administration. The history of that program forms the backdrop for our discussion and evaluation of his exemption application.

In 1992, the FHWA began a review of the vision standard in response to several waiver applications and congressional committee reports requesting such review. See 57 FR 6793, February 28, 1992. A commissioned study by the Ketron Corporation noted that adequate vision in both eyes is critical to driving and recommended that the current rule requiring binocular visual acuity of 20/40 in each eye not be changed. *Id.* at 6794-95. The study suggested that efforts be made to generate better empirical statistics for vision-impaired drivers.

In March 1992, a plan to obtain empirical data was implemented. The FHWA established a vision waiver study program in which experienced vision-impaired drivers would be granted temporary waivers for a period of up to three years. Their driving records during that period would be evaluated to determine if they could safely operate a CMV and if the vision standard could be changed. See 57 FR 10295, March 25, 1992. Under the program, waivers were available to drivers with good driving records for at least three years and with vision in one eye meeting the Federal standard of at least 20/40 (Snellen). 57 FR 31458, 31460, July 16, 1992. We stressed from the beginning of the program that "[a]ll drivers eligible for a waiver have proven experience and have demonstrated their ability to safely operate a CMV for a number of years." *Id.*, at 31459.

The conservative screening criteria applied to drivers in the program was not enough to overcome a challenge to the program's legality. In August 1994, the D.C. Circuit invalidated the vision waiver program "because the agency lacked the data necessary to support its determination that the vision waiver program 'is consistent with the safe operation of commercial motor vehicles.'" *Advocates for Highway and*

*Auto Safety v. FHWA*, 28 F.3d 1288 (D.C. Cir. 1994) (quoting 49 U.S.C. App. 2505(f) (1988)). The court held that any waiver of Federal safety regulations must be supported by empirical data showing that the waiver is consistent with the safe operation of commercial motor vehicles. Because the agency had acknowledged the lack of empirical data to establish a link between vision disorders and commercial motor vehicle safety, the court held that it was improper for the agency to conclude that granting the temporary waivers was consistent with the safe operation of commercial motor vehicles. *Id.*

In reaching this conclusion, the court rejected the agency's finding that the temporary waiver program was consistent with safety because it limited waivers to only those drivers with proven experience and good driving records. *Id.* at 1293. These factors, the court held, "beg the question whether those sight-impaired drivers will be able to operate their CMVs with the same degree of safety as those who meet the agency's current vision standards." *Id.* The court therefore vacated the agency's rule creating the program and remanded to the agency for further rulemaking proceedings.

In response to the remand, the FHWA proposed to revalidate the waiver study program. 59 FR 50887, October 6, 1994. The agency explained the underlying basis for the original vision waiver program, noting that a requirement that participating drivers "have a three-year safe driving record with their vision impairment" was based upon studies "indicating that past experience can be used to predict future performance \* \* \*." *Id.* at 50888. It also "relied upon opinions from the medical community that individuals with vision impairments are often able to compensate for that impairment over a period of time." *Ibid.* The agency chose three years to provide "added assurance that drivers would have sufficient time to develop compensatory behavior" and because it was the longest period of time for which driver histories were available. *Ibid.* Based on these principles and additional studies, the FHWA again determined "that three years of safe driving experience with the vision deficiency not only allowed for sufficient adjustment by drivers to the condition, but also provided the longest period of experience for which records were uniformly available from which to predict future performance." *Id.* at 50889.

We then determined that sufficient evidence existed to show that continued waiver for the group of drivers currently remaining in the program would be

consistent with safety. *Id.* at 50891. We based this finding upon studies showing that past accident-free performance tends to indicate safe performance in the future, as well as interim results showing that the remaining drivers in the program had accident rates lower than the general driving population. *Id.* at 50890. The agency also recognized that elimination of the waiver study program would mean that drivers with known safety records would be replaced by less-experienced drivers with unproven safety records. *Ibid.* In addition, the agency noted that by March 1996, "approximately 93 percent of the drivers presently participating in the study will have completed at least three years driving in the study program." *Id.* at 50891.

The Advocates for Highway and Auto Safety (AHAS) filed an emergency motion the same day the notice was published in the **Federal Register** asking the court to enforce its decision invalidating the program. On October 21, 1994, the court issued its mandate restating that the rule authorizing the vision waiver program was vacated, and remanded the case to the FHWA. Three days later, the court denied the AHAS motion, presumably finding that the agency had complied with the remand. The FHWA thereafter published a notice of final determination, announcing its decision to continue the waiver program through March 1996 for those drivers in the program. 59 FR 59386, November 17, 1994.

At this point—when the program was limited to existing participants as a consequence of the AHAS decision and the final determination—Mr. Kautzman first applied for a vision waiver. His May 1995 application was denied by the FHWA on September 5, 1995, on the basis that the program was closed to new participants. Mr. Kautzman appealed the agency's denial to the United States Court of Appeals for the Eighth Circuit, the same court before which a similar appeal by David R. Rauenhorst was pending. As the cases involved the same issue, the court approved an agreement between the FHWA and Mr. Kautzman to hold his case in abeyance until Mr. Rauenhorst's case was decided and then apply the Rauenhorst decision to Mr. Kautzman's case.

While the cases progressed, the vision waiver study program expired by its own terms on March 31, 1996. The FHWA issued "grandfather" rights to the drivers remaining in the program so they could continue to drive a CMV in interstate commerce. (49 CFR 391.64). This decision was based on their continuous and sustained safe

performance which showed that this particular group of monocular drivers could operate without compromising safety. 61 FR 13338, 13345, March 26, 1996. We emphasized in our decision that the drivers were experienced from the beginning, had been heavily monitored, and that the poorest performers had been eliminated. *Ibid.*

Shortly after the FHWA issued permanent waivers to the drivers in the waiver study program, the Eighth Circuit issued its decision in *Rauenhorst v. United States Department of Transportation, Federal Highway Administration*, 95 F.3d 715 (8th Cir. 1996). Mr. Rauenhorst was a monocular truck driver who would have met the criteria for admission to the waiver group, but who did not apply. See *id.* at 717-718. He later applied for an individual waiver and sought review of the agency's denial. The court held that the FHWA erred in failing to consider Mr. Rauenhorst's application for a waiver and directed the agency to grant "separate, individually tailored waivers" grounded on "specific tests or standards." *Id.* at 723.

After Rauenhorst, the FHWA began granting individual waivers for monocular drivers who met the same criteria as the drivers who participated in the waiver study program. For instance, we granted Mr. Rauenhorst a waiver, finding "that he has adapted his driving techniques to accommodate the limited vision in his right eye." 63 FR 1524, 1525, January 9, 1998. His application reflected over 21 years of experience driving with his vision deficiency and an accident-free record. *Ibid.* Similarly, we granted waivers to another 12 applicants who met the waiver study program criteria and thus demonstrated that they had adapted their driving skills to accommodate their vision deficiency. 63 FR 54519, October 9, 1998.

To conform with the Rauenhorst ruling, the FHWA agreed to individually evaluate Mr. Kautzman's application on its merits. The FHWA requested specific information and documentation from Mr. Kautzman about his driving experience and physical condition in correspondence exchanged between February 1997 and March 1998. Mr. Kautzman's responses were inconsistent. According to one statement, he stopped driving in April 1995. According to another, he stopped driving in October 1996. Both dates created a significant gap between the time he stopped driving and July 28, 1997, when he provided information about his driving experience following the Rauenhorst decision. Because of the gap, the FHWA concluded that Mr.

Kautzman failed to present evidence of 3 years' recent driving experience, a requirement in the vision waiver program. In addition, the agency could not determine exactly how much driving experience Mr. Kautzman had due to his contradictory statements. Thus, the FHWA denied his application on November 13, 1998.

Mr. Kautzman appealed the agency's decision (*Todd E. Kautzman and Richard Carlson v. United States Department of Transportation, Federal Highway Administration, and the United States of America*, No. 99-1070 (8th Cir. docketed Jan. 7, 1999)). The FHWA and Mr. Kautzman agreed to settle the case by remanding his application to the agency for reconsideration without regard to driving gaps arising during litigation. As part of the settlement, Mr. Kautzman provided the FHWA with an affidavit of his driving experience to resolve the discrepancies in his previous submissions. Using that information, we have evaluated his application as of the original filing date, May 22, 1995, without regard to gaps in experience after April 12, 1995, as required by the litigation settlement agreement. In accordance with 49 U.S.C. 31315 and 31136(e), we have preliminarily determined that exempting Mr. Kautzman from the vision requirement is likely to achieve a level of safety equal to, or great than, the level that would be achieved without the exemption.

#### **Mr. Kautzman's Experience and Vision Condition**

Mr. Kautzman has held a license to drive a commercial motor vehicle since 1986. His current CDL was issued by the State of North Dakota and expires on April 12, 2002. According to medical statements, Mr. Kautzman suffered a traumatic injury to his left eye at age one when a rubber-band projectile hit the central part of the cornea, destroying the central vision. Left eye vision measures 20/400 corrected or uncorrected. Right eye vision measures 20/15 corrected. According to his doctor, Mr. Kautzman's vision condition is stable and does not interfere with his ability to drive a CMV.

Mr. Kautzman began his driving career as a self-employed, part-time driver. From January 1989 until August 1, 1992, he transported agricultural products two Saturdays per month, driving about 5 hours each day. He became a full-time, self-employed driver on August 1, 1992, and worked 78 hours a week transporting grain, fertilizer, and feed in interstate commerce until April 12, 1995.

Mr. Kautzman stopped driving on April 12, 1995, when he found he was not qualified in interstate commerce, and took immediate steps to seek a waiver from the vision standard. No consideration was given to his application at that time because the vision waiver program had ceased to operate. As the FMCSA is responsible for delaying consideration of his application until now, our agreement to settle the most recent lawsuit and the interest of equity constrain us to consider his application without regard to his lack of driving since April 1995.

#### **Analysis of Mr. Kautzman's Qualifications**

Visual capacity in Mr. Kautzman's left eye measures 20/400 (Snellen) with or without correction. The standard applicable to drivers of commercial motor vehicles in interstate commerce requires vision in each eye to measure at least 20/40 Snellen, corrected or uncorrected (49 CFR 391.41(b)(10)). As his vision does not meet the regulation's standard, Mr. Kautzman cannot qualify to drive in interstate commerce unless he is exempted from its applicability.

Mr. Kautzman holds a valid CDL today, just as he did in 1995. The vision condition of his left eye has long been stable, and his right eye meets the vision standard. Moreover, his doctor does not believe the vision deficiency affects Mr. Kautzman's ability to perform the tasks involved in driving a CMV safely. Other than the vision deficiency in his left eye, Mr. Kautzman meets all other physical qualification standards in 49 CFR part 391. Furthermore, his driving record from 1992 to the present reflects none of the disqualifying conditions specified in the vision waiver criteria.

In the three years prior to April 12, 1995, Mr. Kautzman had considerable experience driving a CMV. Until August 1, 1992, he spent three years driving a CMV casually, 10 hours a month, transporting agricultural products. From August 1, 1992, through April 12, 1995, he drove a tractor-trailer combination transporting feed and grain, regularly 78 hours a week. If he averaged a modest 40 miles per hour, Mr. Kautzman would have compiled over 300,000 accident-free, incident-free, violation-free miles in both inter- and intrastate commerce. If any applicant presented such a three-year record to the agency today, undoubtedly an exemption would be approved under the criteria we have been employing.

The only evidence we have of Mr. Kautzman's safety record since 1995 is that which he compiled in a private automobile (non-CMV). It shows that he had two speeding convictions, one in

1997 and one in 1998. The agreement settling Mr. Kautzman's lawsuit does not preclude the agency's consideration of such safety events. Neither conviction, however, would have been disqualifying, even if the violation had been committed in a CMV, and there is no cause to conclude that either conviction related to Mr. Kautzman's visual deficiency.

#### **Basis for Preliminary Determination To Grant Exemption**

Independent studies support the principle that past driving performance is a reliable indicator of future safety. The studies are filed in FHWA Docket No. FHWA-97-2625 and discussed at 63 FR 1524, 1525 (January 9, 1998). 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, 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.

In evaluating applications, it is the policy of the agency to screen out submissions which do not meet the criteria for consideration in terms of minimum visual capacity, duration and recency of CMV driving experience, and driving record. Thereafter, each application is individually considered on its merits. To be sure, in Mr. Kautzman's case, his experience and safe driving record in a CMV are not as recent as would normally pass the initial screening. The unique circumstances of this case justify special consideration due to the protracted litigation. In Mr. Kautzman's case, therefore, the FMCSA is dispensing with the screening stage, and has considered his case on the merits. Mr. Kautzman has qualifications similar to those possessed by drivers in the waiver program. His actual driving of CMVs was unusually intense over a 32-month period in all periods of the day and night, and under varying highway conditions. His experience and safe driving record operating CMVs demonstrate that he had adapted his driving skills to accommodate his vision deficiency. For these reasons, and under the conditions set forth below, the FMCSA believes exempting this applicant from 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 as long as vision in his better eye continues to meet the standard specified in 49 CFR 391.41(b)(10). As a condition of the exemption, therefore, the FMCSA proposes to impose requirements on Mr. Kautzman similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are the following: (1) That he be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in his better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests he is otherwise physically qualified under 49 CFR 391.41; (2) that he 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 he 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 is self-employed. He must also have a copy of the certification when driving to present to a duly authorized Federal, State, or local enforcement official.

In accordance with revised 49 U.S.C. 31315 and 31136(e), the proposed exemption will be valid for 2 years unless revoked earlier by the FMCSA. The exemption will be revoked if: (1) Mr. Kautzman fails to comply with the terms and conditions of the exemption; (2) the exemption results 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(e). If the exemption is effective at the end of the 2-year period, Mr. Kautzman may apply to the FMCSA for a renewal under procedures in effect at that time.

#### **Request for Comments**

In accordance with 49 U.S.C. 31315 and 31136(e), the FMCSA is requesting public comment from all interested parties on the exemption petition and the matters discussed in this notice. All comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but the FMCSA may issue an exemption to Mr. Kautzman and publish in the **Federal Register** a notice of final determination at any time after the close of the comment period. In addition to

late comments, the FMCSA will also continue to file in the docket relevant information which becomes available after the closing date. Interested persons should continue to examine the docket for new material.

A copy of this notice will be mailed to compliance and enforcement personnel in the State of North Dakota, in accordance with 49 U.S.C. 31315(b)(7) and 31136(e), and we welcome comments from State officials.

**Authority:** 49 U.S.C. 322, 31315 and 31136; 49 CFR 1.73.

Issued on: April 6, 2000.

**Julie Anna Cirillo,**

*Acting Deputy Administrator.*

[FR Doc. 00-9256 Filed 4-13-00; 8:45 am]

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## **DEPARTMENT OF TRANSPORTATION**

### **Maritime Administration**

**[Docket No. MARAD-2000-7224]**

#### **Information Collection Available for Public Comments and Recommendations**

**AGENCY:** Notice and request for comments.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Maritime Administration's (MARAD) intentions to request approval for three years of a new information collection titled "Intermodal Access Impediments to U.S. Ports and Marine Terminals Survey."

**DATES:** Comments should be submitted on or before June 13, 2000.

**FOR FURTHER INFORMATION CONTACT:** Evie Chitwood, Office of Intermodal Development, 400 Seventh Street, SW, Room 7209, Washington, DC 20590, telephone number—202-366-5127. Copies of this collection can also be obtained from that office.

#### **SUPPLEMENTARY INFORMATION:**

*Title of Collection:* Intermodal Access Impediments to U.S. Ports and Marine Terminals Survey.

*Type of Request:* Approval of a new information collection.

*OMB Control Number:* 2133-NEW.

*Form Number:* MA.

*Expiration Date of Approval:* Three years from the date of approval.

*Summary of Collection of Information:* The "Intermodal Access Impediments to U.S. Ports and Marine Terminals Survey," was designed to be a questionnaire of critical infrastructure impediments that impact the Nation's