

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

PAUL KOKINDA, t/d/b/a :
KOKINDA'S AUTO SERVICE, :
Plaintiff :
Vs. : No. 14-2095
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF TRANSPORTATION, :
Defendant :

Nicholas Quinn, Esquire Counsel for Plaintiff
Tricia Watters, Esquire Counsel for Commonwealth

MEMORANDUM OPINION

Matika, J. - January , 2015

This case is before the Court on an Appeal by Paul Kokinda t/d/b/a Paul Kokinda's Auto Service (hereinafter "Kokinda"). Kokinda appeals the "Order of Suspension of Official Inspection Station" issued by the Pennsylvania Department of Transportation Bureau of Motor Vehicles (hereinafter "the Department"). After conducting a hearing *de novo*, and giving both parties an opportunity to file any legal memorandum in support of their respective positions, this Court is prepared to decide this appeal.¹

FACTUAL AND PROCEDURAL BACKGROUND

Kokinda owns and operates an auto service business located at 32 E. Water Street, Lansford, Pennsylvania. As part of that

¹ Kokinda's Counsel submitted a "letter memorandum" in support of sustaining the Appeal; the Department's Counsel chose not to do so.

business, he obtained a certificate of appointment to operate an official safety inspection station pursuant to 75 Pa. C.S.A. §4722. On February 24, 2014, David Ems, the owner of the vehicle in question, a 1996 Jeep Grand Cherokee, possessing a VIN of 1J4GZ784ZTC216992, requested that Kokinda inspect that vehicle.² Kokinda testified that he did in fact inspect that vehicle, and as a result, passed it and issued an inspection sticker identified as A14-2882244. Subsequent to that date, ownership of this vehicle transferred hands several times. On or about May 13, 2014, the then owner, Jeffrey Miller, contacted the Department regarding the condition of that vehicle, and presented concerns that it should not have passed inspection some 78 days earlier. As a result of this complaint, Mark Zmiejko, a certified safety inspector since 1985 and a quality assurance officer for the vehicle inspections division of PENNDOT for 13 years, re-inspected the vehicle in question. Consequently, Zmiejko contacted Curtis Passaro, another quality assurance officer, who is actually the "coverage officer" for Carbon County. At the conclusion of Zmiejko's investigation and Passaro's follow-up investigation, which consisted of an interview with Kokinda, a determination was made by the

² The report of the Department's witness, Mark Zmiejko, testified that this inspection occurred in February, 2014 and was confirmed by page 4 of Commonwealth's exhibit 3 which identifies the date as February 24, 2014. Page 5 of that same exhibit (Zmiejko report) suggests that the date of the inspection was February 29, 2014, however, this is erroneous as 2014 was not a leap year. Zmiejko also noted on that report that the exact date on the inspection sticker itself was unable to be read.

Department that Kokinda's certificate of appointment as an official safety inspection station should be suspended for a period of two (2) months pursuant to 75 Pa.C.S.A. §4724 and 67 Pa. Code §175.51, as a result of the faulty inspection of this vehicle. The official order of suspension was mailed on August 19, 2014 and the instant appeal timely filed on September 16, 2014.

At the hearing *de novo* conducted in this matter, Zmiejko testified that over his nearly thirty (30) years as a certified safety inspector, he had performed thousands of vehicle inspections, including the re-inspection on the vehicle in question. Zmiejko testified that this vehicle should not have been given an inspection sticker due to eight (8) specific deficiencies or faults with the vehicle, namely³:

1. Front tires bad, no tread in middle;
2. Trailer hitch rusted to the point of large holes, no way it can safely tow a trailer;
3. Tinted tail light lenes (sic);
4. Tinted parking light lenes (sic);
5. Track bar that keeps front axel (sic) from moving side to side is so worn that jeep has a wobble in front end. You can not (sic) drive it at even moderate speeds. Vech. is uncontrollable;

³ Descriptions taken directly from Commonwealth Exhibit 3, page identified as #6.

6. Lower control arms for back rear that hold rear into place are so rusted, the bushing (sic) are sticking out where there should be metal;

7. Right rear tire bad;

8. Rust hole with sharp edges in pass side lower rocker, and front fender on pass side.

Zmiejko also testified that he did not "road test" this vehicle and his determination that the vehicle should not have passed inspection was based upon his observations of the vehicle.

In response, Kokinda testified that he personally inspected this vehicle and his recollection of this inspection was that none of the issues raised by Zmiejko were present at the time he inspected it. To the best of his recollection, however, Kokinda did testify that there was "no excessive rust" and that the car was "pretty clean." He also passed this vehicle based upon his personal road testing of the vehicle.

Kokinda also presented the testimony of David Ems, the owner of the vehicle at the time of inspection. Ems testified that he made changes to the vehicle after inspection, including tinting the lenses, changing tires, and replacing the shocks/track bar. Ems also testified that he never saw rust on

any part of the vehicle, including the trailer hitch.⁴

LEGAL DISCUSSION

Pursuant to 75 Pa.C.S.A. §4727(b),

"an official certificate of inspection shall not be issued unless the vehicle . . . is inspected and found to be in compliance with the provisions of this chapter including any regulations promulgated by the Department."

"The department shall supervise and inspect all official inspection stations and may suspend the certificate of appointment issued to a station which it finds . . . has violated or failed to comply with any of the provisions of this chapter or regulations adopted by the Department." 75 Pa.C.S.A. §4724(a).

Kokinda owned and operated an official inspection station, #6866, and was himself a properly certified inspector (Operator #19-848-684). On August 18, 2014, pursuant to the complaint received by the Department, after investigation and pursuant to 75 Pa.C.S.A. §4724(a) and 67 Pa.Code §175.51, the Department sent official notice to Kokinda that his certificate of inspection was being suspended for two (2) months due to the faulty inspection on this vehicle.

"Any person whose certificate of appointment has been denied or suspended under this chapter shall have the right to appeal to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure). The court shall set the matter for hearing upon 60 days' written notice to the department and take

⁴ During Ems' testimony, he showed pictures of the body of the vehicle in question in an attempt to show no rust while he owned it. These pictures were on Ems' phone, and were rather difficult to see because of their size despite Ems' attempts to "enlarge" them, which actually blurred them. While observed by the Court, these pictures were not admitted into evidence.

testimony and examine into the facts of the case and determine whether the petitioner is entitled to a certificate of appointment or is subject to suspension of the certificate of appointment under the provisions of this chapter." 75 Pa.C.S.A. §4724(b).

In a vehicle inspection certificate suspension appeal, the burden is on the Department to prove by a preponderance of the evidence that it is ". . . more likely than not, that a vehicle inspection was performed improperly." *Tropeck v. Dep't of Transp., Bureau of Motor Vehicles*, 847 A.2d 208, 212 (Pa. Commw. Ct. 2004). "Because firsthand testimony concerning the vehicle condition at the time of the official inspection is not likely to be available except when the police employ preplanned test inspections, there must be reliance upon credible opinion testimony to meet the needs of the situation." *Milanovich v. Commonwealth*, 445 A.2d 1337, 1338 (Pa. Commw. Ct. 1982). "[The Department] does not need to present 'concrete' evidence that a vehicle inspection was performed improperly." *Tropeck*, *Supra*. Questions of witness credibility are solely within the province of the trial court. *Firestone Tire & Service Center, O.I.S. No. 798 v. Dep't. of Trans.*, 871 A.2d 863, 867 (Pa. Commw. Ct. 2005); *Dep't of Transp., Bureau of Traffic Safety v. Karzenski*, 508 A.2d 610, 620 (Pa. Commw. Ct. 1986).

With these guiding principles of law in mind, this Court will address the eight (8) separate and distinct alleged faults

with the inspections, combining them where possible as claimed by the Department.

A. Tires (Items 1 and 7)

The Department offered testimony that on the date of the re-inspection, the front tires had no tread in the middle and the right rear tire was bad. Kokinda had countered that testimony stating that all tires showed a tread depth of 7/32 inch, which is passable for purposes of inspection. Further, Ems testified that the tires were "three-quarters" new at the time of inspection. It should be further noted that from the time of the inspection on February 24, 2014 until re-inspection by Zmiejko on May 13, 2014, an additional 2700 miles were put on the vehicle. Zmiejko also never proffered evidence that the 2700 miles could not have caused the tires to go from 7/32 depth tread (as testified to by Kokinda) to the condition in which he found them on May 13, 2014. Based upon this testimony, or lack thereof, and taking into consideration normal wear and tear, this Court concludes that the Department has not met its burden of proof that the tires were faulty at the time of the February 24, 2014 inspection by Kokinda.

B. Tinted Light lens (Items 3 and 4)

Zmiejko testified that on May 13, 2014, when he re-inspected this vehicle, he observed tinted taillight and parking light lenses and concluded that these were violations of the

regulations regarding inspections and accordingly recommended that this also lend itself to the conclusion that the February 24, 2014 inspection was faulty. While Kokinda testified that no such tinting was on the vehicle on February 24, 2014 when he inspected it, the more telling testimony came from Ems. Ems testified that he placed the "aftermarket" tinting on these lenses in April of 2014. Ems presented evidence that the tinting that he had on the lenses was actually removed by him on or before April 16, 2014 after being warned by the McAdoo Police Department; said warning and removal of tinting testimony being supported by Defendant's exhibit #1. Accordingly, Kokinda argues that, the tinting found on the vehicle on May 13, 2014 could not have been that which is alleged to have been on the vehicle on February 24, 2014. This Court agrees.

C. Track Bar (Item 5)

Zmeijko testified that this vehicle should also have been failed for inspection due to a problem with the "track bar." According to the regulation, 67 Pa. Code §175.80(e)(2)(ii), an inspection must be rejected if the "measured movement at the front or rear of a tire is greater than 1/4 inch." The regulation further explains how to make this determination without road testing. This regulation goes on to read as follows: "Eliminate all wheel bearing movement by applying the service brake; then, with the vehicle raised and wheels in the

straight ahead position, grasp the front and rear of the tire and attempt to move the assembly right and left without moving the steering gear. Measure the movement."

Zmejko testified that while he did not road test the vehicle, nor did he conduct the test suggested in the regulation, he did move the steering wheel itself which, in turn, moved the tires back and forth. While doing this, he testified that he could hear the track bar "popping", suggesting that there was greater than 1/4 inch play in the differential. Further, Zmejko's report, part of the Department's "Commonwealth Exhibit 3, page #6 (5)" states that the "track bar . . . is so worn that Jeep has a wobble in front end."

Kokinda countered by testifying that he did not observe, even when road testing the vehicle, any issue or concerns over the condition of the track bar or differential.⁵ Also, Ems testified that he, himself, replaced this track bar.

This Court believes that based upon the re-inspection conducted by Zmejko on May 13, 2014, the condition of the track bar would not allow this vehicle to pass inspection. However, that does not end this inquiry as it is the obligation of the Department to prove by a preponderance of the evidence that the

⁵ Kokinda and Zmiejko used both these terms when testifying about this issue. Admittedly, this Court confesses that it cannot be characterized as a "motorhead"; therefore, it would appear appropriate to defer to the knowledge and expertise of these individuals in their description of the various parts of the vehicle involved in this aspect of the inspection and assume *arguendo* they know the significance and relationship between these parts.

"unpassable" condition presented itself at the time of the original inspection of February 24, 2014. Based upon the testimony of all the witnesses on this issue, this Court finds that the Department has met its burden relative to the track bar. While Ems' uncontroverted testimony was that he replaced the track bar, that testimony cannot be found credible as it begs the following questions:

1) Why would he need to change the track bar if it was adequate to pass an inspection; and

2) How could it be that worn after such a short duration after replacement?

This Court finds Zmejko more credible than Ems and Kokinda on this issue.

D. Rust on Rocker and Fender (Item 8)

Zmejko testified that on the passenger side of the vehicle near the front tire, there were rust holes with sharp edges on both the lower rocker and front fender of the vehicle.⁶ He further testified that in his opinion, that "rusting" could not have occurred since the inspection of February 24, 2014, as rusting is not normal wear and tear and metal takes years to rust. The condition of this rusting, as evidenced by the photograph introduced into evidence confirm the safety concerns of Zmejko.

⁶ See Commonwealth Exhibit #2.

In an attempt to diffuse the significance of this testimony, Kokinda presented Ems. Ems testified that there was no rust on the vehicle while he owned it and supported that with "camera shots" on his phone depicting what he claimed were rust-free photographs of the vehicle.⁷ Interestingly, when Kokinda testified, which was before Ems, who was seated in the row of seats directly behind Kokinda during Kokinda's testimony, Kokinda testified that the vehicle was "pretty clean" and that there was "no excessive rust." This was in contravention of Ems' testimony, which came later. This Court believes the testimony of Zmejko over that of Kokinda and Ems. It is appropriate, considering the size of the rust holes, to draw a reasonable inference from the testimony presented by Zmejko that this rust was present on the date of this February 24, 2014 inspection and could not have simply progressed to that point after only two and one-half months.

Even though this Court finds that rust was present during the inspection of February 24, 2014, the inquiry does not end there. Pursuant to 67 Pa. Code §175.77(a), "All items on the body shall be in safe operating condition as described in §175.80 (relating to inspection procedure)" and subsection (d) states that "there may be no torn metal . . . protruding from the body of the

⁷ As previously stated, these photographs were not of great quality and worse yet, once Ems attempted to "enlarge" them on his phone, they became blurred to the point any evidence of the vehicle being rust-free was unable to be viewed in the area in question.

vehicle.” §175.80(a)(10) requires the inspector to “check for protruding metal and reject if torn metal, glass, other loose or dislocated parts protruding from a surface of a vehicle so as to create a hazard.” 67 Pa. Code §175.80(a)(10). Clearly in this case, with the condition of the rocker and fender, a safety hazard existed such that an individual coming in contact with this area of the vehicle could be injured. The Commonwealth has met its burden regarding this allegation of a faulty inspection.

E. Trailer Hitch (Item 2)

Similarly, Zmejko testified that this “item on the body” of the vehicle was likewise not in a safe operating condition as it too was rusted and had holes in it.⁸ Conversely, Ems claimed to have never seen any rust on the trailer hitch and Kokinda did not recall. Credibility will be afforded to the Department’s testimony and evidence over that of the Defendant. The Court concludes that the Department met its burden relative to this charge as well, based upon the condition of the vehicle observed on May 13, 2014 and the reasonable inferences that can be drawn regarding the rust.

F. Control Arms (Item 8)

Lastly, the Court examined the testimony relative to the control arms of the vehicle. Zmejko testified that the control arms on the back rear were rusted and that the rubber bushings

⁸ See 67 Pa. Code §175.77(a).

were showing or "sticking out." This was evident in the two (2) photographs taken on May 13, 2014 and admitted into evidence, Zmejko also testified that the control arms "could not get this bad in three (3) months" (referring to their respective rusted conditions). Zmejko opined that this dangerous condition warranted a rejection of the vehicle for inspection. Both Kokinda, and to a certain extent, Ems, testified that there were no problems with the "suspension" of the vehicle, to which the control arms belong. However, for the same reasons referenced to earlier, the significant rust found on these parts could not have resulted entirely just since the February 24, 2014 inspection. Therefore, this Court finds Zmejko credible and that the Department sustained its burden on this issue.

The Court now turns to the issue presented by Kokinda during his closing argument, which is if the Department proves only one (or less than all) of the eight allegations faulty with the inspection, does the penalty (a two-month suspension) fit the "crime?" Since the Court has dispelled Kokinda's argument that the Department has not sustained its burden as to any of the faults with the February 24, 2014 inspection, the Court turns now to the impact that our finding that the Department has met its burden relative to four of the eight claims. "The failure of a mechanic to meet any of the requirements of departmental regulations concerning inspections constitutes a faulty

inspection. (emphasis added) *Cariola v. Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Traffic Safety*, 444 A.2d 827, 828 (Pa. Commw. Ct. 1978). Accordingly, any one of the four faults with the Kokinda inspection justify a suspension of the certificate of appointment.

Lastly, Kokinda argued that should the Court find that the Department was able to prove less than all eight alleged defects in the inspection, it (the Court) had the power and authority to change the penalty.

Under *Department of Transportation, Bureau of Traffic Safety v. Kobaly*, 384 A.2d 1213, 1215 (Pa. 1978), "A trial court may modify a sanction where it makes different findings of fact and conclusions of law." *McCarthy v. Commonwealth, Dep't of Transp.*, 7 A.3d 346, 353 (Pa. Commw. Ct. 2010). However, the Court does not find Kobaly controlling. While the Court found that the Department only proved four out of the eight allegations involved in the February 24, 2014 faulty, inspection, it concluded that a faulty inspection and a violation of the law resulted nonetheless whether it was one or eight faults. While a trial court has the authority to modify the penalty imposed by the Department (See *Commonwealth, Dep't of Transp., Bureau of Traffic Safety v. Antram*, 409 A.2d 492 (Pa. Commw. Ct. 1979)), pursuant to 67 Pa. Code §175.51, for purposes of a faulty inspection of equipment or parts, the only

penalty for a first violation that could be imposed is a two (2) month suspension of the inspection privileges.⁹ Therefore, despite being vested with the authority, there is no lesser permissible penalty to modify it to pursuant to §175.51.

CONCLUSION

Accordingly, the Court enters the following Order:

⁹ See §175.51(1) Category 1(iii) for first time violators.

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ORDER OF COURT

AND NOW, this day of January, 2015, upon consideration of the "Petition for Appeal From Order of the Department of Transportation Suspending Official Inspection Station" and after hearing thereon, it is hereby **ORDERED and DECREED** that the Appeal of Paul Kokinda, t/d/b/a Paul Kokinda's Auto Service is **DENIED and DISMISSED** and the suspension of his certificate of appointment as an official safety inspection station as ordered and noticed by the Department in letter dated August 19, 2014 for a period of two (2) months is **ALLOWED** to stand.

BY THE COURT:

Joseph J. Matika, J.