

docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 8, 1999.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.
[FR Doc. 99-32204 Filed 12-10-99; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA-99-6601]

Notice of Receipt of Petition for Decision That Nonconforming 1990-1991 Toyota MR2 Passenger Cars Are Eligible for Importation

AGENCY: National Highway Traffic Safety Administration, DOT.

ACTION: Notice of receipt of petition for decision that nonconforming 1990-1991 Toyota MR2 Passenger cars are eligible for importation.

SUMMARY: This notice announces receipt by the National Highway Traffic Safety Administration (NHTSA) of a petition for a decision that 1990-1991 Toyota MR2 passenger cars that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards are eligible for importation into the United States because (1) they are substantially similar to vehicles that were originally manufactured for importation into and sale in the United States and that were certified by their manufacturer as complying with the safety standards, and (2) they are capable of being readily altered to conform to the standards.

DATES: The closing date for comments on the petition is January 12, 2000.

ADDRESSES: Comments should refer to the docket number and notice number, and be submitted to: Docket Management, Room PL-401, 400 Seventh St., SW, Washington, DC 20590. (Docket hours are from 9 am to 5 pm)

FOR FURTHER INFORMATION CONTACT: George Entwistle, Office of Vehicle Safety Compliance, NHTSA (202-366-5306).

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 30141(a)(1)(A), a motor vehicle that was not originally manufactured to conform to all applicable Federal motor vehicle safety standards shall be refused admission into the United States unless NHTSA has decided that the motor vehicle is substantially similar to a motor vehicle originally manufactured for importation into and sale in the United States, certified under 49 U.S.C. 30115, and of the same model year as the model of the motor vehicle to be compared, and is capable of being readily altered to conform to all applicable Federal motor vehicle safety standards.

Petitions for eligibility decisions may be submitted by either manufacturers or importers who have registered with NHTSA pursuant to 49 CFR part 592. As specified in 49 CFR 593.7, NHTSA publishes notice in the **Federal Register** of each petition that it receives, and affords interested persons an opportunity to comment on the petition. At the close of the comment period, NHTSA decides, on the basis of the petition and any comments that it has received, whether the vehicle is eligible for importation. The agency then publishes this decision in the **Federal Register**.

G&K Automotive Conversion, Inc. of Santa Ana, California (G&K) (Registered Importer 90-007) has petitioned NHTSA to decide whether 1990-1991 Toyota MR2 passenger cars are eligible for importation into the United States. The vehicles which G&K believes are substantially similar are 1990-1991 Toyota MR2 passenger cars that were manufactured for importation into, and sale in, the United States and certified by their manufacturer, Toyota Motor Corporation, as conforming to all applicable Federal motor vehicle safety standards.

The petitioner claims that it carefully compared non-U.S. certified 1990-1991 Toyota MR2 passenger cars to their U.S. certified counterparts, and found the vehicles to be substantially similar with respect to compliance with most Federal motor vehicle safety standards.

G&K submitted information with its petition intended to demonstrate that non-U.S. certified 1990-1991 Toyota MR2 4-Door passenger cars, as originally manufactured, conform to many Federal motor vehicle safety standards in the same manner as their U.S. certified counterparts, or are capable of being readily altered to conform to those standards.

Specifically, the petitioner claims that non-U.S. certified 1990-1991 Toyota MR2 passenger cars are identical to their

U.S. certified counterparts with respect to compliance with Standard Nos. 102 *Transmission Shift Lever Sequence*, 103 *Defrosting and Defogging Systems*, 104 *Windshield Wiping and Washing Systems*, 105 *Hydraulic Brake Systems*, 106 *Brake Hoses*, 113 *Hood Latch Systems*, 116 *Brake Fluid*, 118 *Power Window Systems*, 124 *Accelerator Control Systems*, 201 *Occupant Protection in Interior Impact*, 202 *Head Restraints*, 204 *Steering Control Rearward Displacement*, 205 *Glazing Materials*, 206 *Door Locks and Door Retention Components*, 207 *Seating Systems*, 209 *Seat Belt Assemblies*, 210 *Seat Belt Assembly Anchorages*, 212 *Windshield Retention*, 216 *Roof Crush Resistance*, 219 *Windshield Zone Intrusion*, and 302 *Flammability of Interior Materials*.

Additionally, the petitioner states that non-U.S. certified 1990-1991 Toyota MR2 passenger cars comply with the Bumper Standard found in 49 CFR part 581.

Petitioner also contends that the vehicles are capable of being readily altered to meet the following standards, in the manner indicated:

Standard No. 101 *Controls and Displays*: (a) Installation of a seat belt warning lamp that displays the required seat belt symbol; (b) recalibration of the speedometer/odometer from kilometers to miles per hour.

Standard No. 108 *Lamps, Reflective Devices and Associated Equipment*: (a) Installation of U.S.-model headlamp assemblies; (b) installation of U.S.-model front sidemarkers; (c) installation of U.S.-model taillamp assemblies; (d) installation of a high mounted stop lamp on vehicles that are not already so equipped.

Standard No. 110 *Tire Selection and Rims*: Installation of a tire information placard.

Standard No. 111 *Rearview Mirror*: Replacement of the passenger side rearview mirror with a U.S.-model component.

Standard No. 114 *Theft Protection*: Installation of a warning buzzer microswitch in the steering lock assembly and a warning buzzer.

Standard No. 208 *Occupant Crash Protection*: (a) Installation of a seat belt warning buzzer; (b) installation of a driver's side air bag and knee bolster, identical to those installed on the vehicle's U.S. certified counterpart. The petitioner states that the vehicles are equipped with Type II seat belts in the front outboard designated seating positions, which are the only seating positions in the vehicle.

Standard No. 214 *Side Impact Protection*: Installation of U.S.-model

door beams on vehicles that are not already so equipped.

Standard No. 301 *Fuel System Integrity*: Installation of a rollover valve in the fuel tank vent line between the fuel tank and the evaporative emissions collection canister.

The petitioner states that prior to importation, the vehicle's vehicle identification number (VIN) will be inscribed on 14 major vehicle parts and a theft prevention certification label will be affixed to the vehicle to comply with the Theft Prevention Standard found in 49 CFR part 541.

The petitioner also states that a VIN plate must be affixed to the vehicle so that it can be read from the left windshield pillar, and a VIN reference label must be affixed to the edge of the door or to the latch post nearest the driver, to meet the requirements of 49 CFR part 565.

Interested persons are invited to submit comments on the petition described above. Comments should refer to the docket number and be submitted to: Docket Section, National Highway Traffic Safety Administration, Room 5109, 400 Seventh Street, SW, Washington, DC 20590. It is requested but not required that 10 copies be submitted.

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 at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. Notice of final action on the petition will be published in the **Federal Register** pursuant to the authority indicated below.

Authority: 49 U.S.C. 30141(a)(1)(A) and (b)(1); 49 CFR 593.8; delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: December 8, 1999.

Marilynne Jacobs,

Director, Office of Vehicle Safety Compliance.
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DEPARTMENT OF TRANSPORTATION

Office of Motor Carrier Safety

[OMCS Docket No. 99-5473 (formerly FHWA Docket No. 99-5473)]

Qualification of Drivers; Exemption Applications; Vision

AGENCY: Office of Motor Carrier Safety (OMCS), DOT.

ACTION: Notice of final disposition.

SUMMARY: The OMCS announces its decision to exempt James F. Durham from the vision requirement in 49 CFR 391.41(b)(10).

DATES: December 13, 1999.

FOR FURTHER INFORMATION CONTACT: For information about the vision exemptions in this notice, Ms. Sandra Zywockarte, Office of Motor Carrier Safety, (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:

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

On May 18, 1999, the FHWA published notice of its preliminary determination to grant Mr. Durham an exemption from the vision standard applicable to drivers of commercial motor vehicles (CMVs) in interstate commerce (64 FR 27025). We refer readers to that notice for the history of his application. Two public comments were received and have been considered in our final decision to grant Mr. Duncan an exemption. On October 9, 1999, the Secretary of Transportation transferred the motor carrier safety functions performed by the FHWA to the Office of Motor Carrier Safety, a new office created in the Department of Transportation. This transfer was performed pursuant to section 338 of the Department of Transportation and Related Agencies Appropriations Act, FY 2000, Public Law 106-69, 113 Stat. 986, as amended by Public Law 106-73, 113 Stat. 1046. As a result of the transfer of functions, the OMCS now

administers the driver qualification standards in 49 CFR part 391 and processes requests for exemptions from the vision standard under 49 U.S.C. 31315 and 31136(e). Accordingly, an OMCS docket number has been assigned to this proceeding.

Mr. Durham's Vision and Driving Experience

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, we have 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 Docket FHWA-98-4334). The panel's conclusion supports the OMCS's view that the present standard is reasonable and necessary as a general standard to ensure highway safety. The OMCS 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.

Mr. Durham falls into this category. He suffered a penetrating trauma to his right eye in 1992 that caused aphakia and corneal and retinal scarring. As a result, vision in his right eye has been reduced to finger counting. Uncorrected vision in his left eye falls well within the regulation's standard, however, and his doctor has stated that Mr. Durham is capable of performing tasks related to driving a CMV.

Mr. Durham's driving record supports the doctor's opinion. He drove a CMV for 4 years with his limited vision (1992 to April 1996) until his employer disqualified him for failing to meet the vision qualification standard. Following an 18-month break, he resumed driving part-time from October 1997 until July 1998, giving him about 5 years of experience driving with his vision

deficiency. Mr. Durham committed no traffic violations while driving with his limited vision and was involved in 1 non-injury accident. His driving performance supports the doctor's conclusion that Mr. Durham can safely perform the tasks related to driving a CMV.

Basis for Exemption Determination

Under revised 49 U.S.C. 31315 and 31136(e), the OMCA 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, Mr. Durham cannot drive a CMV in interstate commerce. With the exemption, he can. Thus, our analysis focuses on whether allowing Mr. Durham to drive in interstate commerce will negatively affect the level of safety that presently exists.

To evaluate the effect of his exemption, the OMCS has considered not only the medical reports about Mr. Durham's vision but also his driving record 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 are filed in Docket No. FHWA-97-2625.

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.

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 Mr. Durham's record, we note that he has committed no traffic violations and had 1 non-preventable accident since 1994. The accident resulted in property damage but no bodily injury. Mr. Durham achieved this record of safety while driving with his vision impairment, demonstrating he has adapted his driving skills to accommodate his condition. Moreover, his clean driving record between October 1997 until July 1998 demonstrates that the break in driving experience from April 1996 to July 1997 did not diminish his driving skills. As Mr. Durham's driving history with his vision deficiency is a predictor of future performance, the OMCS concludes his ability to drive safely can be projected into the future. Consequently, the OMCS finds that exempting Mr. Durham from the vision standard in 49 CFR 391.41(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 exemption for the 2-year period allowed by 49 U.S.C. 31315 and 31136(e).

We recognize that Mr. Durham's vision 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 OMCS will impose requirements on his exemption consistent with the grandfathering provisions applied to drivers who participated in the agency's vision waiver program.

Those requirements are found at 49 CFR 391.64(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 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.

Discussion of Comments

Advocate for Highway and Auto Safety (AHAS) filed two comments in this proceeding. Each comment was considered and is discussed below.

In its first submission filed on June 16, 1999, the AHAS commented that the agency has misinterpreted statutory language related to exemptions (49 U.S.C. 31315 and 31136(e)), questioned the agency's reliance on conclusions drawn from the vision waiver program, and raised procedural objections to this proceeding. We will address these comments in order.

First, the AHAS believes that the agency misinterpreted the current law on exemptions by considering them slightly more lenient than the previous law. This was unquestionably the intention of Congress in drafting section 4007 of the Transportation Efficiency Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107 (See 63 FR 67601, quoting from H.R. Conf. Rep. No. 105-550, at 489-490). Regardless of how one characterizes the new exemption language, the OMCS strictly adheres to the statutory standard for granting an exemption. In short, we determine whether granting the exemption is likely to achieve an equal or greater level of safety than exists without the exemption.

Next, the AHAS maintains that the OMCS cannot rely on data from the waiver study program as a standard for evaluating Mr. Durham's qualifications for an exemption. Its opinion is based on the fact that a valid research model was not used for the vision waiver study program; thus, the results cannot be extrapolated to other drivers who were not in the program. The validity of research designs cannot be accepted or dismissed in a blanket, simplistic statement. The approach used by the agency for the assessment of risk is a valid design that has been used in epidemiology for studies of occupational health. These observational studies compare a treated or exposed group of finite size to a

control group that is large and represents outcomes for the nation as a whole (e.g. national mortality rates or truck accident rates.) This design has been used to investigate risk relative to the hazards of asbestos and benzene with regulatory decisions based on the outcomes.

The strength of the design is that it provides a high level of external validity. Being able to compare outcomes to a national norm places the focus in proper perspective for regulatory matters. This, of course, is the strength relative to the waiver program where the General Estimates System (GES) accident rates represent a national safety norm. While the design has been successfully used in critical risk areas, its application has not been without challenges. Most of the criticism has focused on the data used in the models. It has been correctly argued that exposure to hazards has not always been clearly measured because recordkeeping is not accurate or complete. Criticism has also focused on the poor measurement of health outcomes. Vagueness in the assessment of outcomes was due to poor recordkeeping or exposed individuals not being examined. Threats to the validity of measurement do not appear to be as large an issue in the waiver program's risk assessment. Exposure, for example, in the assessment is manifested by participation in the waiver program (as exposure to a treatment) and through vehicle miles traveled (as exposure to risk). The measurement of participation in the program had no vagueness by virtue of the required recordkeeping. Exposure to risk by vehicle miles traveled was measured by self-report and could, of course, contain errors. As reports were made on a monthly basis, however, it was not expected that the reporting for these short periods would contain significant systematic error over the life of the program. Risk outcomes in this assessment were determined through accident occurrence. Accident occurrence was verified in multiple ways through self-report (a program requirement), the Commercial Driver License Information System, State driving records, and police accident reports. As a result, it is believed that the research approach used in the waiver program did not suffer serious flaws relative to the validity of measurement.

Criticism of the approach taken by the waiver program relative to internal validity could have some merit. Even the original design proposed for the waiver study received concern for its internal validity. That design proposed

to use a sample of commercial motor vehicle (CMV) operators without vision deficiencies as a comparison group. While the design was appealing, it had potential for flaws relative to internal validity. Due to the nature of the vision deficiencies examined, the drivers could not be randomly assigned to the waiver and comparison groups as is done in clinical trials. As the desirable paradigm for science, clinical trials go to great length to guarantee internal validity. But, as is being increasingly pointed out in medical research where randomized trials are seen as the basis of good science, even these studies can have flaws which undermine their external validity (U.S. General Accounting Office, "Cross Design Synthesis; A New Strategy for Medical Effectiveness Research," March 1992, GAO/PEMD-92-18).

In the source cited above, it was suggested that the results obtained through randomized clinical trials be adjusted to apply to a patient population which was not represented in the trial, and, thereby, enhanced external validity. Moreover, it was also suggested that the results from other observational (i.e., non-random) studies be used to support the evidence provided by clinical trials. Of course, these studies would have to be assessed to determine the degree of bias present relative to internal validity. If it existed, adjustments would be required. As is more often being recognized, all aspects of scientific endeavor contain flaws; design, measurement, and even the research questions asked (Cook, J.D. "Postpositivist Critical Multiplism" in L. Shortland and H.M. Mark (eds.) *Social Science and Social Policy*. Newbury Park, CA: Sage 1985). The necessary approach to obtaining valid results is to thoroughly examine a study for bias and make adjustments where possible. If the original waiver study comparative design had been implemented, it would have probably required adjustments related to both internal and external validity.

The waiver program and its research design were reviewed on several occasions. Most of the critical discussion concerned analytic methodology given the nature of the GES comparison group. The risk monitoring aspect of the design was largely endorsed. However, one researcher correctly criticized the comparison with the national GES data because it would not be possible to assess the potential for comparison bias as a threat to internal validity. This criticism was correct because such potential confounding factors as age and driving patterns are not available in the

GES data to determine if a lack of balance exists between the waiver group and the comparison data. If the factors were not balanced, adjustments could not be made. The bias, if it existed, would therefore be hidden. This was a concern to us. To address this concern, a sensitivity analysis was performed to assess the impact of possible hidden bias (Rosenbaum, P.R. *Observational Studies*, New York, Springer-Verlag 1995). The analysis examined outcomes under various levels of hidden bias and the results showed that the comparison with GES accident rates is largely insensitive to hidden bias. The results of this sensitivity analysis, filed in Docket No. FHWA-99-5578, provide evidence to support the internal validity of the comparison to GES data.

Based on the various assessments, it would appear that the results of the waiver program risk analysis are basically valid. The measurement of exposure and risk outcomes were conducted with virtually no error. The external validity is ensured because a national norm is the focus of comparison and, based on the sensitivity analysis, the degree of internal validity is strengthened. To obtain valid results that point to a clear causal connection between an action and an outcome basically rests on ruling out other influences on the outcome. While these appear to be largely accomplished based on an examination of the various types of validity, there remains an additional threat to the validity of the results. Relative to this, it has been argued that the drivers in the various waiver programs have lower accident rates because they are aware of being monitored, and monitoring is a strong motivation to exercise care. Given the possible threat, the agency conducted a follow up assessment after the wavered drivers were given grandfather rights in March 1996. Conducted in June 1998, an assessment of the drivers' accident experience was made for the period to December 1996. The results, on file in Docket No. FHWA-99-5578, showed that the drivers who had been in the program continued to have an accident rate that was lower than the national norm.

Based on the information discussed above, it is reasonable to conclude that the results generated by the waiver program have a high degree of validity. It then remains to determine how these results can be used, i.e., what inferences can be drawn from results and what are the boundaries on these inferences? The AHAS states categorically that "the agency cannot extrapolate from the experience of drivers in the vision waiver program to other vision impaired

drivers who did not participate in the program." To some degree this statement is correct. Based on the design, data collection and analysis associated with the waiver program, the agency does not wish to generalize the results of the study to other drivers with vision deficiencies per se. That is, drivers are not the focus of inference. They are associated with the inference but are not necessarily the subject of inference. Nor are the vision standards the focus of inference from the results. As the AHAS pointed out, "The FHWA recognizes that there were weaknesses in the waiver study design and believes that the waiver study has not produced, by itself, sufficient evidence upon which to develop new vision and diabetes standards." (61 FR 13338, 13340). In making this statement, the FHWA merely recognized that the study design did not ask questions concerning whether there are vision characteristics other than those in standards that could permit safe operating of a CMV. The agency conducted a feasibility assessment to determine if such a study could be designed and implemented. It was concluded that resources were not available to do this.

The target of inference in the waiver study is suggested in another quote offered by the AHAS. The AHAS points out that the agency has stated "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." This statement captures the focus of inference while being somewhat restrictive relative to the type of vision deficiency involved. The target of the test in the research design was the process of granting waivers. That is, it can be inferred that drivers with vision deficiencies who are approved by the screening process in the waiver program will be able to operate CMVs in a manner that is as safe or safer than the prevailing national safety norm. The inference is not being made to screening processes in general. It is only being inferred for the single process in the waiver program and that this process is viable for the purpose intended. That the AHAS has stated such a conclusion is not tenable because a valid research design was not used is in itself a proposition that does not enjoy support. The discussion of the validity of the approach clarifies the value of results. If the inferences drawn from these results focus on the process tested, the conclusions are valid. It follows ipso

facto that the application of the waiver process to future screening should also produce valid results.

The AHAS points out that Mr. Durham differs from other drivers in the vision waiver study program in that his driving record contained a "gap," whereas drivers in the program had 3 years of continuous experience immediately prior to receiving their waiver. As the AHAS notes, that fact contributed to the agency's previous denial of Mr. Durham's request for an exemption. When the FHWA, and now OMCS, reconsidered that decision, however, we concluded that Mr. Durham does meet the criteria in the study program notwithstanding his break in driving experience. He had over 3 years of continuous driving experience with this vision deficiency and established a safe driving record from 1992 to April 1996. This experience exceeded the driving required by the study program criteria and provides a basis for projecting his future performance. The 18-month break from April 1996 to October 1997 would have undermined the reliability of that experience, as a predictor of his ability to drive safely, if he had not resumed driving. By driving from October 1997 until July 1998 without an accident or traffic citation, Mr. Durham demonstrated he still has the ability to adapt his driving skills to accommodate his limited vision. Based on these specific facts, we have concluded that Mr. Durham satisfies the criteria applied in the vision waiver study program and qualifies for an exemption, notwithstanding his break in driving.

In its third point, the AHAS objects to the procedure employed in processing these petitions for exemptions, contending that there is no statutory basis for making a "preliminary" determination which tends to pre-judge the outcome. The AHAS makes an analogy to an interim final rule where an agency "has already made its decision and the burden is unduly and improperly placed on the public to overcome the agency's initial decision to grant the exemption." This analogy is misplaced. The agency's "preliminary determination" is more aptly compared to a notice of proposed rulemaking, wherein the agency analyzes the basis upon which a new or amended regulation has been considered, and then proposes that the new rule take effect. The agency then considers the information obtained in response to the NPRM and issues a final rule. In a similar vein, the agency analyzes the information provided in an exemption application. Some applications are denied outright. Only when the agency

proposes to grant a petition does it publish that proposal, with its analysis of the information submitted in support of the exemption, for public comment. After consideration of public comment, a final decision is published. This procedure is consistent with 49 U.S.C. 31315(b)(4)(A) which requires the OMCS, and previously the FHWA, to publish in the **Federal Register** a notice explaining the request that has been filed, giving the public an opportunity to inspect the safety analysis and any other relevant information known to the agency and allowing the public to comment on the exemption request.

The AHAS filed its second comment on July 7, 1999, to urge that the FHWA reconsider its application of *Rauenhorst v. United States Department of Transportation, Federal Highway Administration*, 95 F.3d 715 (8th Cir. 1996), in light of the U.S. Supreme Court's decision in *Albertson's Inc. v. Kirkingburg*, 119 S.Ct. 2162 (June 22, 1999). According to the AHAS, the court's decision supports its view that this agency cannot rely on data collected in the vision waiver program to justify issuing additional exemptions. We disagree with the AHAS's interpretation of the *Kirkingburg* case. The court specifically stated in Footnote 21 that the current exemption program was not challenged or considered in its opinion. For that reason, we do not view the case as affecting Mr. Durham's exemptions.

Conclusion

After considering the comments and evaluating Mr. Durham's qualifications in accordance with *Rauenhorst, supra*, the OMCS exempts James F. Durham from the vision requirement in 49 CFR 391.41(b)(10), subject to the following conditions: (1) That he be physically examined every year (a) by an ophthalmologist or optometrist who attests that the vision in his left eye continues to meet the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests that 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 of in its driver qualification file, or keep a copy in his driver qualification file if he is self-employed. Mr. Durham 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.