

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04M-608CP

IN THE MATTER OF THE APPLICATION OF DENVER LINCOLN LIMOUSINE, INC. FOR AN ORDER OF THE COMMISSION EXEMPTING DRIVER JEFFREY A. KAPLAN FROM THE REQUIREMENT OF PART 391.41(B)(10) (EYESIGHT) OF THE COMMISSION'S RULES REGULATING SAFETY FOR MOTOR VEHICLE CARRIERS AND ESTABLISHING CIVIL PENALTIES, 4 CCR 723-15.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
GRANTING WAIVER**

Mailed Date: December 1, 2004

I. STATEMENT

1. By this application, Denver Lincoln Limousine, Inc. (Denver Limousine), seeks a two-year waiver of Rule 391.41(b)(10) of the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties (Safety Rules) found at 4 *Code of Colorado Regulations* (CCR) 723-15 in connection with driver Jeffrey A. Kaplan.

2. Rule 391.41(b)(10) provides that a person is physically qualified to drive a motor vehicle if that person has: (1) 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; (2) distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses; (3) field of vision of at least 70 degrees in the horizontal meridian in each eye; and (4) the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber.

3. On November 22, 2004, the matter was set for a hearing to be held on December 1, 2004 at 9:00 a.m. in a Commission hearing room in Denver, Colorado. At the assigned place and time the undersigned administrative law judge (ALJ) called the matter for hearing. Testimony was received from Arnold C. Poppenberg, Denver Limousine's President, and Jeffrey A. Kaplan, the driver for whom the subject waiver is sought. Exhibit 1, a copy of the application filed in this matter by Denver Limousine, was identified, offered, and admitted into evidence.

4. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

5. Denver Limousine is a provider of luxury limousine transportations services. It operates within Colorado under registration no. LL-139 issued to it by the Commission. It seeks to retain Mr. Kaplan as an independent contract driver to operate sedans and sport utility vehicles that have been qualified as luxury limousines.

6. Mr. Poppenberg testified that he has known Mr. Kaplan for a number of years and that he is well qualified as a luxury limousine driver. He does not believe that Mr. Kaplan's eyesight is impaired to the point that it would prevent him from safely operating motor vehicles on Denver Limousine's behalf. He has confirmed with Denver Limousine's insurance carrier that the company's insurance coverage will not be affected by its retention of Mr. Kaplan as a driver so long as it complies with all applicable safety regulations. Therefore, Denver Limousine is requesting that this application for waiver of Safety Rule 391.41(b)(10) be granted.

7. Mr. Kaplan will be 45 years old this month. He testified that he has suffered from a condition generally known as “lazy eye” in his left eye his entire life. However, he has been successfully operating luxury limousine vehicles for 14 years and his vision has never been a problem. During that time he has had no accidents. He generally understands that his right eye has compensated for any deficiency in his overall vision that might result from the “lazy eye” condition.

8. On November 16, 2004, Mr. Kaplan was examined by a Dr. Kalenko at the LoDo Health-One Medical Center. That examination revealed that the uncorrected visual acuity of Mr. Kaplan’s left eye was 20/200 (Snellen). As a result, Dr. Kalenko found that he did not meet the standards imposed by Safety Rule 349.41(b)(10). *See*, page 5 of Exhibit 1.

9. On November 17, 2004, Mr. Kaplan was examined by James A. Simonson, O.D. Dr. Simonson confirmed that the uncorrected visual acuity of Mr. Kaplan’s left eye was 20/200 (Snellen). He found that the uncorrected visual acuity of Mr. Kaplan’s right eye was 20/20 and that the uncorrected visual acuity of both eyes was also 20/20. *See*, page 4 of Exhibit 1. This effectively confirms Mr. Kaplan’s understanding that his right eye has effectively compensated for the visual problem posed by his left eye.

10. Dr. Simonson prescribed a contact lens for Mr. Kaplan’s left eye. *See*, page 13 of Exhibit 1. Use of the lens improves the visual acuity in that eye to 20/50, with the visual acuity of both eyes remaining at 20/20. *See*, page 4 of Exhibit 1. However, even this level of improvement in the visual acuity of Mr. Kaplan’s left eye does not meet the 20/40 visual acuity requirement imposed by Safety Rule 349.41(b)(10).¹ This leaves him medically unqualified to

¹ Dr. Simonson’s examination confirmed that Mr. Kaplan’s vision complies with the other requirements of Safety Rule 349.41(b)(10); *i.e.*, he has a horizontal field of vision of greater than 70 degrees and he is able to recognize the colors of traffic signals and devices showing standard red, green, and amber. *See*, page 4 of Exhibit 1.

operate motor vehicles unless he receives a waiver from the provisions of Safety Rule 391.41(b)(10).

11. The report submitted with the application by Dr. Simonson indicates that Mr. Kaplan can safely operate commercial motor vehicles if he uses the contact lens prescribed for his left eye. *See*, page 11 of Exhibit 1. Mr. Kaplan testified that he will do that. If so used, Dr. Simonson does not recommend that Mr. Kaplan be precluded from operating any specific type of motor vehicle. *See*, page 11 of Exhibit 1. This suggests that Dr. Simonson is of the opinion that Mr. Kaplan is capable of safely operating motor vehicles even though the visual acuity in his left eye can only be corrected to 20/50.

12. The evidence indicates that Mr. Kaplan's "lazy eye" condition, even when uncorrected, has never inhibited his ability to safely operate motor vehicles. Indeed, his current uncorrected vision when using both eyes is 20/20. It is rare that a driver would be required to rely on only one eye when operating a motor vehicle. However, use of the contact lens prescribed by Dr. Simonson will materially enhance the visual acuity in Mr. Kaplan's left eye should that be necessary.

13. As a result of the above, sufficient evidence has been presented justifying Denver Limousine's request for a two-year waiver of Safety Rule 391.41(b)(10). Under the circumstances, strict enforcement of that rule would work a hardship on both Denver Limousine and Mr. Kaplan.

14. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER**A. The Commission Orders That:**

1. Docket No. 04M-608CP, being an application of Denver Lincoln Limousine, Inc., is granted.

2. Denver Lincoln Limousine, Inc. is granted a two- year waiver from the provisions of Rule 391.41(b)(10) of the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties found at 4 *Code of Colorado Regulations* 723-15 in connection with driver Jeffrey A. Kaplan.

3. Denver Lincoln Limousine, Inc. shall promptly (within 30 days) notify and file with the Commission any documents and information concerning any accidents, arrests, license suspensions, revocations or withdrawals, or any traffic-related citations or convictions involving Mr. Kaplan during the period of the waiver granted herein.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or Stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge