

Decision No. R14-0588

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14V-0520EC

IN THE MATTER OF THE PETITION OF ERNEST SMALL FOR AN ORDER OF THE COMMISSION AUTHORIZING A WAIVER OF RULE 6102 (DRIVER) OF THE RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CCR 723-6.

**CONFIDENTIAL VERSION OF
RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING PETITION IN PART AND
GRANTING WAIVER, IN PART, *NUNC PRO
TUNC* AND SUBJECT TO CONDITIONS**

Mailed Date: May 30, 2014

I. STATEMENT, FINDINGS, AND CONCLUSIONS¹

1. On May 20, 2014, Mr. Ernest H. Small (Petitioner) filed a verified Petition for Waiver of Safety Regulations - Driver. On May 27, 2014, Petitioner supplemented the May 20, 2014 filing. In this Decision, unless the context indicates otherwise, Petition refers to the May 20, 2014 filing as supplemented on May 27, 2014.

2. Four documents are attached to the Petition: (a) Petitioner's Colorado Motor Vehicle Record for the past three years (driving record); (b) Medical Examination Report for Commercial Driver Fitness Determination dated May 20, 2014 (Medical Examination Report); (c) a letter from Dr. Teresa S. Welsh (Welsh letter); and (d) a letter from Mr. Christopher P. Cary, Chauffeur/Dispatch Manager, Presidential Limousine (Cary letter).

¹ Confidential information is highlighted in this version of the Recommended Decision.

3. The driving record, Medical Examination Report, and Welsh letter contain Petitioner's social security number or date of birth, or both, or is a confidential medical report. As a result, these documents contain information that is confidential and are filed under seal with the Commission. Reference in this Decision to information contained in those documents is confidential.

4. On May 28, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

5. Pursuant to § 40-6-109(2), C.R.S., the ALJ now transmits to the Commission the record of this Proceeding together with a written recommended decision.

6. The Petition requests a waiver of 49 *Code of Federal Regulations* (CFR) § 391.41(b)(3) (2010), as made applicable in Colorado by Rule 4 *Code of Colorado Regulations* 723-6-6102(a)(I).² Petitioner requests a two-year waiver, beginning May 15, 2014 and ending May 15, 2016.

7. Petitioner works for Presidential Limousine (Presidential) in Denver, Colorado; has been a chauffeur employed by Presidential since 2005; and is a valued employee. Cary letter at 1. Driving is Petitioner's livelihood. Petition at 2.

8. Petitioner has **diabetes, which is controlled by insulin**. As a result, the Medical Examination Report (at 3) states that Petitioner "meets standards, but periodic evaluation [is] required due to Medical Hx[.] Driver [is] qualified only for 1 year[.]" provided Petitioner obtains **an "insulin** waiver/exemption." The Medical Examination Report establishes that

² This Rule is found in the Rules Regulating Transportation by Motor Vehicle, Part 6 of 4 *Code of Colorado Regulations* 723.

Petitioner meets all other physical requirements and qualifications for certification as a commercial driver.

9. The Welsh letter states that, at present, Petitioner's **diabetes is well-controlled with insulin**. The Welsh letter contains the opinion that Petitioner is able safely to operate a motor vehicle and that there is no reason that Petitioner's medical condition should prevent him from pursuing his occupation as a driver.

10. Petitioner's driving record establishes that, in the past three years, he has had no moving violations. It also establishes that, over that same period, Petitioner has not been involved in a traffic accident.

11. Petitioner seeks a two-year waiver of 49 CFR § 391.41(b)(3). That section reads: "A person is physically qualified to drive a commercial motor vehicle if that person -- ... has no established medical history or clinical diagnosis of **diabetes mellitus currently requiring insulin for control[.]**"

12. The record in this Proceeding establishes: (a) Petitioner has **diabetes and the diabetes is, at present, well-controlled with insulin**; (b) but for the **insulin-controlled diabetes**, Petitioner would be physically qualified to drive a commercial motor vehicle (*e.g.*, limousine); (c) strict application of 49 CFR § 391.41(b)(3) would work a hardship on Petitioner because it would deprive him of the opportunity to continue in his occupation as a limousine driver; and (d) granting the requested waiver will not compromise the public safety or the public interest, so long as Petitioner follows the prescribed medical regimen for **the treatment of his diabetes**.

13. Based on the record of this Proceeding, the ALJ finds the Petitioner has met his burden of proof in this matter; that the Petition should be granted, in part; and that, consistent with the Medical Examination Report, the requested waiver should be granted for a period of one

year. In addition, the ALJ finds that the waiver should be subject to the conditions contained in the Ordering Paragraphs of this Decision. The ALJ concludes that, subject to the conditions contained in the Ordering Paragraphs, Petitioner Ernest H. Small should be granted a waiver of 49 CFR § 391.41.(b)(3) *nunc pro tunc* to May 15, 2014 and that the **waiver should expire on May 15, 2015.**

14. In accordance with § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above and subject to the conditions stated below, the verified Petition for Waiver of Safety Regulations - Driver filed on May 20, 2014 by Ernest H. Small, as supplemented on May 27, 2014, is granted in part.

2. Consistent with the discussion above and subject to the conditions stated below, Petitioner Ernest H. Small is granted a waiver of 49 *Code of Federal Regulations* § 391.41(b)(3) (2010), as made applicable in Colorado by Rule 4 *Code of Colorado Regulations* 723-6-6102(a)(I). The waiver is granted *nunc pro tunc* to May 15, 2014. The waiver shall remain in effect through and including May 15, 2015, unless the Commission revokes the waiver upon notice to Mr. Small or unless the provisions of Ordering Paragraph No. 3 apply.

3. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Ernest H. Small shall follow the medically-prescribed regimen for treatment of **his insulin-controlled diabetes**. If this condition is not met, the waiver granted by this Decision is rendered void without further order of the Commission.

4. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Ernest H. Small shall notify the Commission, in writing and within seven calendar days of the occurrence, if he is involved in a motor vehicle accident. This reporting requirement applies only to a motor vehicle accident that occurs while Petitioner Ernest H. Small is driving a limousine. This reporting requirement applies irrespective of the party at fault for the accident. The written notice shall be in the form of a letter addressed to the Commission's Chief of Transportation. If this condition is not met, the waiver granted by this Decision may be rendered void by subsequent order of the Commission.

5. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Ernest H. Small shall comply with the Rules Regulating Transportation by Motor Vehicle, Part 6 of 4 *Code of Colorado Regulations* 723, as they may be applicable to him and shall comply with the terms of this Decision. If this condition is not met, the waiver granted by this Decision may be rendered void by subsequent order of the Commission.

6. 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.

7. 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.

8. 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.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director