

Decision No. R23-0752

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23G-0186TO

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

SERGIO CORNEJO DOING BUSINESS AS MMS TOWING LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
ASSESSING CIVIL PENALTY, ORDERING REFUND,
AND CLOSING PROCEEDING**

Mailed Date: November 9, 2023

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I. STATEMENT

1. This Proceeding concerns Civil Penalty Assessment Notice (CPAN) or Notice of Compliance to Appear No. 133217 (CPAN No. 133217) issued by Trial Staff of the Public Utilities Commission (Staff) on April 7, 2023 to Sergio Cornejo, doing business as MMS Towing LLC (MMS or Respondent). The CPAN assessed MMS a total penalty of \$6,008.75 for a total of nine

violations of Rules 6509(a)(II), 6509(a)(III), 6509(a)(IX), 6509(a)(VI), 6509(a)(X), 6511(b)(V), and 6513(a) of the Rules Regulating Transportation by Motor Vehicle 4 CCR 723-6, and §§ 40-10.1-405(2)(a)(I), 40-10.1-405(2)(a)(II), 40-10.1-405(7), C.R.S. The nature of the violations is listed in the CPAN as follows:

Tow Record/Invoice missing required information per rule (incorrect address and phone number for the business not on file with the Commission. The address and phone number on the invoice shows 403 N. Circle Dr., Colorado Springs, CO 80909 and 719-217-3304 but the mailing address on file shows 2910 Gunnison St., Colorado Springs, CO 80909 and number on file shows 719-310-4589)(Invoice [sic] #3950).

Tow Record/Invoice missing required information per rule (incorrect [sic] storage lot address and phone number. The address and phone number on the invoice shows 403 N. Circle Dr., Colorado Springs, CO 80909 and 719-217-3304 but the storage lot address on file shows 808 Bennett Ave. Unit B, Colorado Springs, CO 80909 and phone number on file shows 719-310-4589)(Invoice [sic] #3950)

Tow Record/Invoice missing required information per rule (No [sic] printed name or signature of the tow truck driver)(Invoice #3950).

Tow Record/Invoice missing required information per rule (No total miles between the origination address and destination address, only a dollar amount)(Invoice [sic] #3950).

Tow Record/Invoice missing required information per rule (No total of charges)(Invoice [sic] #3950).

Towing carrier failed to take required photographs of vehicle condition, prior to connecting to the vehicle (Only one photo taken of the front of the vehicle and not the required 4-one of each side).

Towing carrier failed to take required photographs of the reason for the vehicle being towed, prior to connecting to the vehicle (Only one photo taken of the front of the truck, no sign or marking signifying the reason).

Towing carrier improperly towed a vehicle from private property because the vehicle's registration was expired (Indicated on invoice #3950 as reason for the tow).

2. On May 1, 2023, Staff timely intervened of right.

3. On May 10, 2023, the Commission referred this proceeding to an Administrative

Law Judge (ALJ) by minute entry.

4. By Decision No. R23-0369-I, issued May 31, 2023, the undersigned ALJ acknowledged Staff's intervention, adopted procedures, and scheduled this matter for a hearing to occur on August 7, 2023, at 9:00 a.m.

5. On July 25, 2023, Staff's Motion to Amend CPAN (Motion to Amend) was filed by Staff.

6. By Decision No. R23-0507-I, issued July 31, 2023, the ALJ granted the Motion to Amend and amended CPAN No. 133217 so as to reduce Staff's requested penalty amount for violation nos. 7, 8, and 9 from \$1,100.00 to \$275.00 for each violation, and include Staff's requested surcharge amount of \$41.25 for a total of \$316.25 for each such violation.

7. Staff and Respondent are the only parties to this proceeding.

8. At the scheduled time and place, the undersigned ALJ called the matter for hearing. Staff appeared through counsel and participated in the hearing. Respondent did not appear at the hearing. During the course of the hearing, Hearing Exhibits 101, 102, 105, and 107 through 111 were identified, offered, and admitted into evidence. Criminal Investigator Jay Estrada testified in support of the allegations contained in the CPAN at issue herein.

9. In reaching this Recommended Decision, the undersigned ALJ has considered all arguments and evidence presented, even if such arguments and/or evidence are not specifically referenced herein.

10. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS

11. Investigator Estrada is an Investigator in the Transportation Section of the Colorado Public Utilities Commission. Investigator Estrada's duties include investigating complaints filed with the Commission. He is familiar with Commission statutes and Commission rules that govern towing operators.

12. Investigator Estrada investigated MMS leading to the issuance of CPAN No. 133217.

13. In the course of his investigation into MMS, Investigator Estrada reviewed Commission records, as well as documents and information that Investigator Estrada obtained from Respondent and Ms. Quiana Vargas, the complainant giving rise to Investigator's Estrada's investigation relevant herein, and the issuance of CPAN No. 133217.¹

14. At all times pertinent herein, Sergio Cornejo owned and operated MMS.²

15. At all times pertinent herein, MMS held PUC Permit No. T-04287.³

16. On or about October 6, 2022, at approximately 12:10 p.m., MMS towed a gray 2006 Chevrolet Colorado bearing license plate TQR-434 (Ms. Vargas' vehicle).⁴

17. The invoice for the tow of Ms. Vargas' vehicle on October 6, 2022 (Hearing Exhibit 109 or MMS' invoice), indicates that: Respondent's address and storage lot was 403 N Circle Dr., Colorado Springs, Colorado, 80909; MMS' phone number was 719-217-3304; Ms. Vargas' "[v]ehicle was... towed after tagged per Property Security expired plates;"⁵ MMS' assessed a total

¹ See Hearing Exhibits 101, 102, 107, 109, 110, and 111.

² See Hearing Exhibits 102 at 1 and 107.

³ See Hearing Exhibits 102.

⁴ See Hearing Exhibit 109.

⁵ *Id.*

of \$673.40 for the tow of Ms. Vargas' Vehicle, including a \$203 "Towing Charge," \$8.40 "Mileage" charge, \$312 "Storage" charge, and \$150 "Admin Fee;"⁶

18. MMS' invoice did not include: the name of the tow truck driver who conducted the tow of Ms. Vargas' vehicle, the signature of the tow truck driver who conducted the tow of Ms. Vargas' vehicle, the number of miles between the towing origination and destination locations, and the total amount of the charges on the invoice.⁷

19. Upon being requested by Investigator Estrada, MMS produced a single photo of the front of Ms. Vargas' vehicle.⁸

20. Respondent's address on file with the Commission, as of the time of the issuance of MMS' invoice was 2910 Gunnison Street, Colorado Springs, CO 80909.⁹

21. Respondent's storage lot address on file with the Commission, as of the date of the issuance of MMS' invoice was 808 Bennett Ave Unit B., Colorado Springs, CO 80909.¹⁰

22. Respondent's phone number on file with the Commission, as of the date of the issuance of MMS' invoice was 719-310-4589.¹¹

23. On October 13, 2022, Ms. Vargas paid MMS \$673.40 for the release of her vehicle.¹²

24. After identifying the violations related to the tow of Ms. Vargas' vehicle, Investigator Estrada requested Respondent refund \$673.40 to Ms. Vargas.

⁶ *Id.*

⁷ *Id.*

⁸ *See* Hearing Exhibit 111.

⁹ *See* Hearing Exhibit 102 at 4.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

¹² *See* Hearing Exhibit 110.

25. Ms. Vargas was never refunded any portion of the \$673.40 payment made to MMS.

26. Investigator Estrada did not receive any correspondence from Respondent after December 20, 2022.¹³

27. At the conclusion of his investigation, on April 7, 2023, Investigator Estrada issued CPAN No. 133217.¹⁴

28. Investigator Estrada mailed CPAN No. 133217, via certified mail, to two of Respondent's mailing addresses on file with the Commission.¹⁵

29. Respondent received and accepted delivery of CPAN No. 133217.¹⁶

30. Staff is seeking a full pursuit of CPAN No. 133217, as amended, as well as a refund for the \$673.50 tow fee paid for by Ms. Vargas.

III. DISCUSSION

31. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. This statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence. The Commission only has penalty assessment authority to the extent provided by statute and the Commission must follow the provisions of those statutes when it imposes such penalties against towing carriers.

32. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."¹⁷

¹³ See Hearing Exhibit 107.

¹⁴ See Hearing Exhibit 101.

¹⁵ See *id.* at 2 and Hearing Exhibit 105. The ALJ notes that Investigator Estrada testified that, in addition to sending CPAN No. 133217 via certified mail to the address shown on Hearing Exhibit 5, Investigator Estrada mailed CPAN No. 133217 to Respondent at 808 Bennett Street in Colorado Springs.

¹⁶ See Hearing Exhibit 105.

¹⁷ § 24-4-105(7), C.R.S.

As provided in Commission Rule 4 CCR 723-1-1500 of the Commission's Rules of Practice and Procedure, "[t]he proponent of the order is that party commencing a proceeding." Here, Staff is the proponent since it commenced the proceeding through issuance of the CPAN. Staff bears the burden of proof by a preponderance of the evidence.¹⁸ The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.¹⁹ While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

33. Section 40-7-116, C.R.S. mandates a number of procedures for the imposition of civil penalties by the Commission. Section 40-7-116(1)(a), C.R.S., states in part: "When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice." Section 40-7-116(1)(b), C.R.S., further directs that the civil penalty assessment notice "shall be tendered by the enforcement official, either in person or by certified mail, or by personal service by a person authorized to serve process under rule 4(d) of the Colorado rules of civil procedure." Section 40-7-116(1)(b) (I)-(VII), C.R.S., further directs that the civil penalty assessment notice shall contain:

- (I) The name and address of the person cited for the violation;
- (II) A citation to the specific statute or rule alleged to have been violated;
- (III) A brief description of the alleged violation, the date and approximate location of the alleged violation, and the maximum penalty amounts prescribed for the violation;
- (IV) The date of the notice;
- (V) A place for the person to execute a signed acknowledgment of receipt of the civil penalty assessment notice;

¹⁸ See § 13-25-127(1), C.R.S. and 4 CCR 723-1-1500.

¹⁹ *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985).

- (VI) A place for the person to execute a signed acknowledgment of liability for the violation; and
- (VII) Such other information as may be required by law to constitute notice of a complaint to appear for hearing if the prescribed penalty is not paid within ten days.

34. The evidence establishes the Commission's jurisdiction in this proceeding. CPAN No. 133217 was served upon Respondent in via certified mail and in accordance with § 40-7-116(1)(b), C.R.S.

35. Commission Staff met its burden of proof when the evidence, on the whole, tipped in its favor and was not rebutted by Respondent.

36. Rule 6509(a), 4 CCR 723-6 states in part:

- (a) Towing carriers shall use and complete all applicable portions of a tow record/invoice form for all nonconsensual tows, whether the motor vehicle is removed from private property or retrieved before removal (commonly known as a drop). The tow record/invoice form shall contain the following information:

- (I) the name, address, towing carrier permit number, and telephone number of the towing carrier that is on file with the Commission;
- (II) the address of the storage facility used by the towing carrier that is on file with the Commission, including the telephone number for that storage facility if the number is different than the telephone number of the towing carrier;

- (VI) the origin address of the tow, the destination address of the tow, and the one-way mileage between such addresses;

- (IX) the printed name and signature of the tow truck driver;
- (X) an itemized invoice of all towing charges assessed...

37. Rule 6511(b)(V), 4 CCR 723-6 states: “A towing carrier shall not charge or retain any additional fees not identified in these rules for the nonconsensual tow of a motor vehicle from private property.”

38. Pursuant to § 40-10.1-405(2)(a), C.R.S.:

(a) Before a towing carrier connects a towing vehicle to a vehicle without consent, the towing carrier shall document the vehicle’s condition and the reason for the tow by:

(I) Taking at least four photographs of the vehicle, with at least one photograph taken from the front, one photograph taken from the rear, one photograph taken from the driver’s side, and one photograph taken from the passenger’s side. These photographs must:

(A) Show the entire vehicle from the required angle;

(B) Have the vehicle fill at least three-fourths of the photograph, measured from side to side; and

(C) Be rendered in a resolution of at least two thousand pixels by at least two thousand pixels.

(I) Taking a photograph that shows the reason for the vehicle being towed without consent. The photograph must:

(A) Show the position of the vehicle in relation to the reason, including any sign, that the vehicle was towed; and

(B) Be rendered in a resolution of at least two thousand pixels by at least two thousand pixels.

39. Pursuant to § 40-10.1-405(7), C.R.S.:

No towing for expired registration. Unless the tow is based on an order given by a peace officer, a towing carrier shall not tow a vehicle from private property because the rear license plate of the vehicle or the record obtained using the system described in section 42-4-2103 (3)(c)(III) indicates that the vehicle’s registration has expired.

40. Here, the evidence of record, based upon Investigator Estrada’s investigation, demonstrates that Respondent committed each of the alleged nine violations of the statutory provisions of § 40-10.1-405, C.R.S., and the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6. As pertinent herein, Respondent’s business address, storage lot address, and phone

number on its invoice were not on file with the Commission as of the time of the tow in question in violation of Rule 6509(a)(II) and (III). MMS's invoice included neither the name, nor the signature of the tow truck driver in violation of Rule 6509(a)(IX). MMS's invoice did not include the number of miles between the origination and destination locations of the tow of Ms. Vargas' vehicle in violation of Rule 6509(a)(IV). MMS's invoice did not include the total amount of charges for the tow of MS. Vargas' vehicle in violation of Rule 6509(a)(X). MMS' invoices assessed an excessive administrative charge of \$150.00 instead of the maximum allowable \$75.00, in violation of Rule 6511(b)(V). Respondent failed to take at least four photographs of the vehicle, with at least one photograph taken from the front, one photograph taken from the rear, one photograph taken from the driver's side, and one photograph taken from the passenger's side, which is in violation of § 40-10.1-405(2)(a)(I), C.R.S. Respondent failed to take a photograph that shows the reason for the vehicle being towed without consent in violation of § 40-10.1-405(2)(a)(II), C.R.S. Respondent also improperly towed Ms. Vargas' vehicle for expired registration in violation of § 40-10.1-405(7), C.R.S.

41. Having found the above violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. Section 40-7-112, C.R.S., authorizes the Commission to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments.

42. According to Rule 1302(b) of the Rules of Practice and Procedure., 4 CCR 723-1:

- (I) the nature, circumstances, and gravity of the violation;
- (II) the degree of the respondent's culpability;
- (III) the respondent's history of prior offenses;
- (IV) the respondent's ability to pay;

- (V) any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- (VI) the effect on the respondent's ability to continue in business;
- (VII) the size of the respondent's business; and
- (VIII) such other factors as equity and fairness may require.

43. The ALJ notes that Respondent ceased corresponding with Investigator Estrada on December 20, 2022, and did not refute any of the evidence presented by Staff.

44. Based on the evidence presented and findings of fact, the ALJ finds that the following civil penalty achieves the following purposes underlying civil penalty assessments to the maximum extent possible within the Commission's jurisdiction: (a) deterring future violations, whether by other similarly situated carriers and by Respondent; and (b) punishing Respondent for its past illegal behavior.

45. Civil penalties, each in the amount of \$316.25, each of which includes the applicable surcharge, for a total of \$2,530.00, will be assessed for the proven violations in Counts 1-5 and 7-9 of CPAN No. 133217.

46. Civil penalty in the amount of \$632.50, which includes the applicable surcharge, will be assessed for the proven violations in Counts 1-5 and 7-9 of CPAN No. 133217.

47. Staff further requests that the Commission order Respondent to refund Ms. Vargas's tow charge payment of \$673.40. Such relief is consistent with Rule 6511(g) of the Rules Regulating Transportation by Motor Vehicle 4 CCR 723-6, and will be granted, as ordered below.

48. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

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

1. Sergio Cornejo, doing business as MMS Towing LLC (Respondent), is assessed a total civil penalty of \$3,162.50, inclusive of the applicable surcharge, for the violations discussed and found above.

2. No later than 30 days following the date of the final Commission decision issued in this Proceeding, Respondent shall pay to the Commission the civil penalties and the surcharge assessed in Ordering Paragraph No. 1.

3. In accordance with Rule 6511(g) of the Rules Regulating Transportation by Motor Vehicle 4 *Code of Colorado Regulations* 723-6, Respondent shall refund \$673.40 to Ms. Quiana Vargas no later than 30 days following the date of the final Commission decision issued in this Proceeding.

4. Proceeding No. 23G-0186TO is closed.

5. 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.

6. 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.

7. 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.

8. 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.

9. If exceptions to this Recommended 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)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

Rebecca E. White,
Director