

Decision No. R25-0089

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24G-0347TO

COLORADO PUBLIC UTILITIES COMMISSION,
COMPLAINANT,

V.

PHOENIX TOWING & RECOVERY, LLC,
RESPONDENT.

PROCEEDING NO. 24G-0348TO

COLORADO PUBLIC UTILITIES COMMISSION,
COMPLAINANT,

V.

PHOENIX TOWING & RECOVERY, LLC,
RESPONDENT.

**RECOMMENDED DECISION
IMPOSING CIVIL PENALTIES**

Issued Date: February 12, 2025

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 A. It is Ordered That:11

I. STATEMENT

1. Proceeding No 24G-0347TO concerns Civil Penalty Assessment Notice (“CPAN”) No. 140641 issued by Commission Staff (“Staff”) on August 14, 2024, against Respondent Phoenix Towing & Recovery LLC (“Respondent” or “Phoenix Towing”). The CPAN assessed a total penalty of \$1,265.00 for 1 violations of Rule 6007(j) 4 *Code of Colorado Regulations* (“CCR”) 723-6, as more specifically listed in the CPAN.

2. Proceeding No 24G-0348TO concerns Civil Penalty Assessment Notice No. 140813 issued by Staff on August 14, 2024, against Respondent Phoenix Towing. The CPAN assessed a total penalty of \$1,265.00 for 1 violations of Rule 6007(e)(II) 4 *Code of Colorado Regulations* (CCR) 723-6, as more specifically listed in the CPAN.

3. The CPANs indicate that they were personally served on August 14, 2024, and a representative of Phoenix Towing, upon service, signed the CPANs.

4. On October 3, 2024, Trial Staff of the Commission (“Staff”) filed its Notice of Intervention as of Right and Entry of Appearance in both proceedings.

5. On October 16, 2024, the Commission referred both proceedings to an Administrative Law Judge by minute entry.

6. On October 28, 2024, by Decision No. R24-0777-I, Proceeding No. 24G-0347TO and Proceeding No. 24G-0348TO were consolidated and set for a hearing on December 12, 2024.

7. On December 12, 2024, the above captioned consolidated proceeding was called. Counsel for Staff entered her appearance. Mr. Alex Yoder appeared for the Respondent.

8. The undersigned ALJ explained the hearing procedures to the Respondent and then allowed the Respondent to represent Phoenix Towing.

9. Staff offered the testimony of Criminal Investigator Joe Potts. Mr. Yoder testified on behalf of the Respondent. Hearing Exhibits 100 through 107 were offered and admitted. At the conclusion of the evidence the record was closed, and the matter was then taken under advisement.

10. In reaching this Recommended Decision the ALJ has considered all arguments presented, including those arguments not specifically addressed in this Decision. Likewise, the ALJ has considered all evidence presented at the hearing, even if the evidence is not specifically addressed in this Decision.

11. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

A. Proceeding No. 24G-0347TO

12. Joseph Potts is a Criminal Investigator (“CI”) for the Commission. CI Potts has been employed by the Commission for approximately three years. Hr. Tr. December 12, 2024, p. 13-14:1.22–4.

13. Ms. Mikia Birch filed a complaint against Phoenix Towing. Ms. Birch stated in the complaint that her vehicle had been stolen and later was recovered and towed by Phoenix Towing to Phoenix Towing's lot for storage on April 24, 2024. She was advised by Denver Police Department that there would be no tow or storage fees. *Id.* at p.14-15 l: 23-8.

14. CI Potts investigated the complaint filed by Ms. Birch in June of 2024. *Id.* at p.16 l: 5-7. CI Potts performed a search of Phoenix Towing's permit authority within the Commission's computer system and found that it was active¹. *Id.* at p. 18:1-19.

15. The registered agent for Phoenix Towing is Alex Yoder. *Id.* at p. 19: 16-8.

16. Ms. Birch told CI Potts that her vehicle was stolen from her residence and later located in a restaurant parking lot near 27th and Colorado in Denver. The Denver Police advised her that her vehicle was currently at Phoenix Towing and there would be no charge for the tow or storage of her vehicle. Ms. Birch was charged \$270.61 in fees to have her vehicle released from Phoenix Towing. *Id.* at p. 22-23:16-2 also *See* Exhibit 2.

17. On June 24, 2024, CI Potts spoke to Mr. Yoder about the incident involving Ms. Birch's vehicle. Mr. Yoder stated he was informed that Ms. Birch's daughter was driving the vehicle, got a flat tire, had broken down and parked the vehicle in a KFC parking lot where the vehicle sat for over a week before the property manager called Mr. Yoder to remove the vehicle. *Id.* at p. 25:13-20.

18. In the June 24, 2024, conversation CI Potts requested that Mr. Yoder provide documentation from the tow incident involving Ms. Birch's tow and Mr. Yoder agreed to provide the documentation. *Id.* at p. 25:13-22.

¹ Phoenix Towing's permit is no longer active.

19. On July 10, 2024, CI Potts contacted Mr. Yoder and advised him that he had still not received the documentation of Ms. Birch's tow. *Id.* at p. 25-26:24-11.

20. On July 22, 2024, CI Potts again requested the documents again. *Id.* at p. 26:22-24.

21. On July 30, 2024, CI Potts left a phone message for Mr. Yoder again requesting documentation of Ms. Birch's tow. *Id.* at p. 27:5-14.

22. On August 6, 2024, CI Potts still had not received the documentation, so he called all phone numbers associated with Phoenix Towing and was unable to speak to anyone. CI Potts also sent an email stating that a CPAN would be issued for failure to provide the documentation from Ms. Birch's tow. CI Potts received an email in return stating that the documentation would be provided. *Id.* at p. 27-28:15-3.

23. On August 9, 2024, CI Potts still had not received the documentation, so he prepared a CPAN. As of the day of the hearing the documents have not been provided. *Id.* at p. 28:4-13.

24. On August 14, 2024, service of the CPAN No. 140813 was made on Steven Virgil who worked for Phoenix Towing and was present at the place of business. *Id.* at p. 31-33:17-18.

B. Proceeding No. 24G-0348TO

25. A tow complaint was made by Matthew Hood against Phoenix Towing concerning a tow that occurred on May 10, 2024. Mr. Hood stated that he worked across the street from Torchy's Tacos ("Torchy's") at 1085 Broadway but parked his vehicle in Torchy's parking lot. When he returned to Torchy's parking lot, he discovered his vehicle had been towed by Phoenix Towing. *Id.* at p. 34:1-16.

26. CI Potts conducted the same investigation of Phoenix Towing as he conducted in Proceeding No. 24G-0347TO. *Id.* at p. 34:17-21.

27. On June 3, 2024, an email was sent by Phoenix Towing to the Commission's consumer affairs section with information concerning the tow of Mr. Hood's vehicle. On August 12, 2024, the email was forwarded to CI Potts to aid in his investigation. Hearing Ex. 104.

28. The June 3, 2024, email stated that the person who authorized the tow of Mr. Hood's vehicle was Shannon Ashbrook. Hearing Ex. 104.

29. Phoenix Towing entered into a contract with Torchy's for towing services on January 10, 2023. The contract automatically renewed unless there was a written agreement to end the contract. Hearing Ex. 106.

30. There was no evidence that a written agreement to end the contract was signed between Phoenix Towing and Torchy's. Hr. Tr. December 12, 2024, p. 42:10-16

31. As part of his investigation CI Potts spoke to Torchy's Vice President of Legal Affairs Jessica Kirker. Ms. Kirker stated that Shannon Ashbrook was a manager at that Torchy's for a short time but not employed by a Colorado Torchy's on the day the contract was signed or the day of the tow of Mr. Hood's vehicle. Hr. Tr. December 12, 2024, p. 53:17-25.

32. Ms. Kirker stated to CI Potts that a cease-and-desist order had been issued against Phoenix Towing. *Id.* at p. 58: 1. 1-6.

33. Mr. Yoder became the owner of Phoenix Towing prior to the incidents in the instant cases. *Id.* at p. 55: 1. 16-21.

34. There have been 16 CPANs issued to Phoenix Towing since January 2024. *Id.* at p. 47: 1. 9-10. It is unknown how many of the 16 CPANs were issued to Phoenix Towing when Mr. Yoder was the owner. *Id.* at p. 56: 1. 12-18.

35. The previous owner of Phoenix Towing, LaGrande Bonnett entered into the tow agreement for Phoenix towing and Torchy's. Hearing Ex. 106.

III. ISSUES

36. Did the Respondent fail to provide documents to enforcement staff as required under 4 CCR 723-6-6007(e)(II)?

37. Did the Respondent make or cause to be made fraudulent or intentionally false statements or records to the Commission or Commission staff in violation of 4 CCR 723-6-6007(j)?

IV. APPLICABLE LAW

38. As the proponent of a Commission order, Complainant has the burden of persuasion in this proceeding pursuant to 4 CCR 723-1-1500 of the Rules of Practice and Procedure.

39. Section 40-7-116, C.R.S., mandates a number of procedures for the imposition of civil penalties by the Commission: After specifying that the listed officials are the ones authorized to issue civil penalty assessments for violations of law, § 116 states that, “When a person is cited for such violation, the person operating the motor vehicle involved shall be given notice of such violation in the form of a civil penalty assessment notice.” Section 116 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.” § 40-7-116, C.R.S.

40. 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." § 24-4-105(7), C.R.S. As provided in Commission Rule 4 CCR 723-1-1500, “[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. Complainant bears the burden of proof by a preponderance of the evidence. *See*, § 13-25-127(1), C.R.S.; 4 CCR 723-1-1500.

The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (“Colo. App.1985”). 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.

41. Proper service of the CPAN is vital. “The mandatory requirements for valid service of process are fundamental because of the due process requirements of notice. *Bush v. Winker*, 892 P.2d 328, 332 (“Colo. App. 1994”).

42. An Enforcement Official has the authority to interview personnel of a Motor Carrier and to inspect records, Motor Vehicles used in providing transportation service, and the facilities of a Motor Carrier as follows:

- (I) immediately for any records required to be maintained in a Motor Vehicle or with the Driver, including towing authorizations, Mover estimates for service, Mover contracts for service, or any records related to insurance or safety;
- (II) within two days for any records related to a complaint or investigation; or
- (III) within ten days for all other records. 4 CCR 723-6-6007(e)(II).

43. No Motor Carrier shall make or cause to be made fraudulent or intentionally false statements or records to the Commission or Commission staff. 4 CCR 723-6-6007(j).

V. DISCUSSION

A. **Proceeding No. 24G-0347TO**

44. Service of the CPAN No. 140813 was proper and no argument has been made that service was improper.

45. Under 4 CCR 723-6-6007(e)(II) the records from a complaint are required to be made available to enforcement staff by a tow carrier within two days of a complaint.

46. The documentation from the tow of Ms. Birch's vehicle was requested for the first time on June 24, 2024. The request was made multiple times after June 24, 2024.

47. Mr. Yoder confessed that as of the date of the hearing, December 12, 2024, the documentation still has not been provided to an enforcement official. Hr. Tr. December 12, 2024, p. 71: l. 12-15.

48. The Staff has met its burden of proof on the alleged violation in CPAN No. 140813.

B. Proceeding No. 24G-0348TO

49. Service of the CPAN No. 140671 was proper and no argument has been made that service was improper

50. The allegation in this CPAN concerns the statement made in the email sent on June 3, 2024, by Phoenix Towing to the Commission's consumer affairs section. Hearing Ex. 106. Staff argues that the statement that Shannon Ashbrook authorized the tow in question was an intentionally false statement.

51. The testimony of Mr. Yoder was that he was aware that the contract with Torchy's was out of date and Ms. Ashbrook could no longer have been the appropriate authorizing party.

When I realized the two agreements were out of date and staff had changed, I went into Torchy's, like I said, I had gotten three contracts signed, one with each acting manager at the time. Hr. Tr. December 12, 2024, p. 72: l. 7-11.

52. This statement shows that Mr. Yoder had actual knowledge that Ms. Ashbrook could not have been the authorizing party for the tow of Mr. Hood's vehicle.

53. At no time has Phoenix Towing corrected the statement made on June 3, 2024.

54. The Staff has met its burden of proof on the alleged violation in CPAN No. 140671.

VI. CONCLUSION

55. Staff has met its burden of proof on the following alleged violations:

- a. One count of 4 CCR 723-6-6007(e)(II)
- b. One count of 4 CCR 723-6-6007(j)

56. Staff requests that the full penalty for each proven violation be assessed against the Respondent, a refund of any funds received for the tows in question and a cease-and-desist order be issued against the Respondent.

57. Pursuant to commission rules 4 CCR 723-1-1302(b):

The Commission may impose a civil penalty after considering any evidence concerning some or all of the following factors:

- a. The nature, circumstances, and gravity of the violation;
- b. The degree of the respondent's culpability;
- c. The respondent's history of prior offenses;
- d. The respondent's ability to pay;
- e. Any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- f. The effect on the respondent's ability to continue in business;
- g. The size of the business of the respondent; and
- h. Such other factors as equity and fairness may require.

58. Both incidents involve tows that are primarily paperwork violations. There is a discrepancy in the reason for the tow of Ms. Birch's vehicle. The missing paperwork would make the reason for the tow clear. Mr. Hood's vehicle, by his own admission, was illegally parked in Torchy's parking lot. The violation concerns the name stated as the authorizing party.

59. There is also conflicting, or at the least, inconclusive evidence if Phoenix Towing was authorized to perform tows at Torchy's in May of 2024.

60. Mr. Yoder admitted to the violations in both CPANs.

61. Hearing Exhibit 101 shows that multiple CPANs have been served on Phoenix Towing, although it is not clear if Mr. Yoder was the owner at the time all or any CPANs were issued.

62. At the hearing Mr. Yoder and CI Potts both stated that Phoenix Towing is no longer in business. No evidence was presented as to any assets that remain for Phoenix Towing.

63. Based on consideration of aggravating and mitigating factors, the Respondent shall be assessed a civil penalty, including any appropriate surcharge, in the amount of \$1,500.00 and provide a refund to Ms. Birch in the amount of \$270.61 and Mr. Hood in the amount of 371.79.

64. The undersigned ALJ finds the civil penalty amount of \$1,500.00 and to refund Ms. Birch in the amount of \$270.61 and Mr. Hood in the amount of 371.79 is the proper amount to be assessed. This amount is sufficient to motivate the Respondent to avoid any further violations of Commission regulations should the Respondent obtain Commission authority in the future.

65. The cease-and-desist order shall be denied since the Respondent is no longer in business.

VII. ORDER

A. It is Ordered That:

1. Phoenix Towing & Recovery LLC (“Respondent”) violated one count of 4 CCR 723-6-6007(j)(II), and one count of 4 CCR 723-6-6007(e).

2. Respondent is ordered to pay to the Commission, within 30 days of the date that this Recommended Decision becomes the decision of the Commission, the sum of \$1,500.00. This amount represents the total of the civil penalty assessed for the violations found in Ordering Paragraph No. 1 plus the mandatory surcharge imposed by § 24-34-108, C.R.S.

3. Consistent with the discussion above, Respondent shall refund the vehicle owner, Makia Birch, \$270.61 received for the tow conducted on April 29, 2024.

4. Consistent with the discussion above, Respondent shall refund the vehicle owner, Matthew Hood, \$371.79 received for the tow conducted on May 10, 2024.

5. The reimbursement ordered in Ordering Paragraph No. 3 and 4, is due and payable not later than 30 days following the date of the final Commission decision issued in this Consolidated Proceeding. Respondent may work with Transportation Staff of the Commission to facilitate the reimbursement.

6. The request for a cease-and-desist order is denied.

7. Consolidated Proceeding 24G-0347TO & 24G-0348TO is now closed.

8. 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.

9. 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.

10. 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

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director