

Decision No. C23-0402

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23F-0381TO

KEVIN MCCLUSKY,

COMPLAINANT,

V.

TOWING DONE RIGHT LLC,

RESPONDENT.

**COMMISSION DECISION ADDRESSING EXCEPTIONS,
CORRECTING RECOMMENDED DECISION, AND
AFFIRMING REFUND AND RELEASE OF VEHICLE**

Mailed Date: June 15, 2023

Adopted Date: June 7, 2023

I. BY THE COMMISSION

A. Statement

1. Following initial exceptions on March 16, 2023, and after being granted two extensions to file exceptions through April 17, 2023, Towing Done Right, LLC, formerly known as Towing Done Right, Inc. (Towing Done Right), filed final exceptions on April 18, 2023, to Decision No. R23-0132, issued February 24, 2023 (Recommended Decision) that found multiple violations of Commission rules and statutes.

2. As discussed below, the Commission corrects certain errors in the Recommended Decision, and considering the exceptions filings and record as a whole, upholds the ultimate conclusion in the Recommended Decision to require a refund from Towing Done Right to *pro se*

Complainant, Kevin McClusky (Complainant or Mr. McClusky), and ordering release of Complainant's vehicle with no further charge.

B. Recommended Decision

1. On September 1, 2022, Complainant filed a Complaint against Respondent Towing Done Right, alleging that Towing Done Right wrongfully towed his vehicle and demanding reimbursement.¹

2. The facts in this case were disputed before the assigned Administrative Law Judge (ALJ). Within his findings, the ALJ included, without limitation, the following among the pertinent facts culminating in the alleged violations:

- a. In February 2022, Complainant's 2008 BMW was parked in the Parkview Townhomes complex parking lot and the permit was not outwardly visible.²
- b. Towing Done Right placed a device on the BMW, immobilizing it, and when Complainant contacted Towing Done Right for removal Mr. McClusky was informed that he had to pay \$350 via credit card, and was refused an option for cash payment.³
- c. The Complainant removed the device with bolt cutters and Towing Done Right subsequently towed the vehicle.⁴
- d. While the vehicle was impounded, Complainant's wife parked her vehicle in the same spot, with a note stating that Towing Done Right was in possession of the parking permit, since it was in the towed 2008 BMW.⁵
- e. Towing Done Right then booted Complainant's wife's vehicle, requiring \$350 for removal, which was paid.⁶

¹ Complaint at 1-2.

² Recommended Decision, ¶ 23. Testimony and findings in this case further address that Mr. McClusky was in possession of a permit, but the permit had fallen from the rearview mirror.

³ *Id.*, ¶¶ 24-25.

⁴ *Id.*, ¶ 26.

⁵ *Id.*, ¶ 29.

⁶ *Id.*

- f. Complainant ultimately paid \$850 for retrieval of the impounded 2008 BMW, but did not pay the initial \$350 sought by Towing Done Right for the first immobilization of that vehicle.⁷
- g. On August 5, 2022, Towing Done Right towed the 2008 BMW from Complainant's private parking space.
- h. At the time of the second tow of the 2008 BMW, the ALJ found that the Parkview Parking Rules authorized Towing Done Right to tow vehicles in reserved or private parking spaces that were improperly parked.⁸
- i. Testimony and evidence in this case includes, among other disputes, disagreement as to the reasoning of the August 2022 tow of the 2008 BMW. Mr. McClusky contends that upon contacting police to find the vehicle was with Towing Done Right, Towing Done Right informed him that his vehicle was towed because of past-due violations. A communication with Staff of the Colorado Public Utilities Commission from mid-August 2022 presented in this case from Towing Done Right claims that the vehicle was "observed and documented parked in violation..."⁹

3. Through the Recommended Decision, the ALJ rejected many of Towing Done Right's arguments in this case, including its claim that Complainant lacked standing to pursue the Complaint. Weighing the evidence presented in this case, the ALJ also found six violations of Commission rules regarding the booting and towing of the vehicles and, therefore, failure to comply with certain provisions of Title 40, C.R.S. Considering the record as a whole, Towing Done Right was ordered to refund all amounts paid and to release the 2008 BMW without charge.

C. Exceptions Filings

1. Pursuant to § 40-6-109, C.R.S., exceptions to the Recommended Decision were initially due March 16, 2023. Towing Done Right filed "initial exceptions" concurrent with an "unofficial transcript" and its first motion to enlarge time on March 16, 2023 (First Motion). Though its First Motion, Towing Done Right sought additional time – without specification – to

⁷ *Id.*, ¶¶ 30-32.

⁸ *Id.*, ¶ 35

⁹ *Id.*, ¶¶ 36-37.

file exceptions, such that it could provide an official transcript. The Commission granted the First Motion.¹⁰

2. On March 27, 2023, Towing Done Right filed a second motion to enlarge time (Second Motion), including that the transcript was expected by Monday, April 10, 2023, and asking for further time, such that citations to the record could be included in final filings. The Commission granted the Second Motion and allowed through April 17, 2023, for Towing Done Right to file exceptions.¹¹

3. Without explanation of further filings, on April 18, 2023, Towing Done Right filed “amended exceptions” to the Recommended Decision. Towing Done Right seeks rehearing or reopening of evidence. Substantively, the updated filing provided on April 18, 2023, is relatively similar to the initial exceptions filed on March 16, 2023, with some additional transcript citations. The filings challenge the legal findings and conclusions of the ALJ.

4. Complainant’s response, filed on May 9, 2023, points out that the exceptions were filed late, call the Complainant “Michael” McClusky, and emphasize that the ALJ’s findings are clear regarding each point raised. Complainant’s response disagrees with Towing Done Right regarding the challenges to findings of fact, and states that Towing Done Right’s filing is unclear on the facts and what testimony is being referenced.

D. Findings and Conclusions

1. Under § 40-6-113, C.R.S., any party that seeks to reverse, modify, or annul a recommended decision of an ALJ shall prepare and pay for a transcript, unless the party does not

¹⁰ Decision No. C23-0196-I, issued March 22, 2023.

¹¹ Decision No. C23-0221-I, issued March 29, 2023.

intend to amend, modify, annul or reverse basic findings of fact. If a party does not follow these statutory requirements, "it shall be conclusively presumed that the basic findings of fact, as distinguished from the conclusions and reasons therefor and the order or requirements thereon, are complete and accurate." § 40-6-113(4), C.R.S.

2. In addition, when exceptions are filed, the Commission reconsiders the matter and the recommended decision is stayed or postponed pending modifications of findings of fact and conclusions of the ALJ. *See* § 40-6-109(2), C.R.S.

3. Here, Towing Done Right was granted two extensions for the filings of exceptions and nevertheless filed its exceptions with transcript citations the day following the clear deadline set in Commission order.

4. Despite Towing Done Right's filing being convoluted¹² and delayed, given the initial exceptions filed that are substantively similar and were timely filed on March 16, 2023, we accept and consider Towing Done Right's filings, such that we can address the legal findings and conclusions of the Recommended Decision raised.

5. Accepting the filings for consideration, and despite errors in the ALJ's Recommended Decision, the filings are inconsistent and unsupported in overturning the ultimate conclusion of the ALJ to require a full refund and release of the vehicle.

¹² For example, Towing Done Right's filing includes citation to Rule 1506, 4 *Code of Colorado Regulations* (CCR) 723-1, and requests "rehearing or reopening of evidence." Despite the delayed filing, we do not construe the filing here as rehearing, reargument, or reconsideration (RRR), given initial exceptions filings staying the Recommended Decision, and so that we can correct certain errors identified in the Recommended Decision. Nevertheless, we also point out that under the RRR standards set forth in § 40-6-114(1), C.R.S., Respondent's pleadings fail to plead with particularity any of its arguments, and based on the instant filings, there is simply no basis or efficiencies gained in reopening the record and remanding the matter for further findings.

6. Towing Done Right makes two legal arguments in its filings. The first claim is that Mr. McClusky lacks standing to pursue the Complaint. This argument is rejected, where Mr. McClusky is the authorized user of the 2008 BMW and parking space in question, but also because § 40-6-108(1), C.R.S., permits that a complaint may be made by “any” person. This statutory language has been broadly interpreted, including recently in Denver District Court, and Towing Done Right provides no citation or argument to support its arguments here regarding standing.

7. The second legal claim is also rejected. Towing Done Right provides two sentences stating simply its conclusion that the ALJ failed to make credibility findings. Again, Towing Done Right cites no pertinent law and wholly fails to recognize that the Commission is not strictly bound by the rules of evidence, as set forth in § 40-6-101, C.R.S., and Rule 1501, 4 CCR 723-1, and that findings may be express or implied in reviewing the record as a whole.

8. The pleadings also include a number of brief sections challenging the ALJ’s Recommended Decision. Towing Done Right does appear to identify two conclusory errors of the ALJ. The ALJ inadvertently cites the incorrect towing permit. A review of the record provides that Respondent’s Towing Permit No. T-04884 was active in August 2022.¹³ In addition, considering Rule 6508(a)(I)(B), 4 CCR 723-6, that requires property owner information be present, pursuant to Rule 6501(p)(II), 4 CCR 723-6, the agent of a property owner may be listed. Exhibit 205 appears to meet the criteria of including a “property owner”, for purposes of Rule 6508(a)(I)(B), 4 CCR 723-6.

¹³ See, e.g., Recommended Decision, ¶ 21 (including the incorrect PUC No. T-40859, and concluding that that permit was suspended and ultimately canceled). The Recommended Decision includes citation to both PUC No. T-40859 in error and, the correct permit at issue, PUC No. T-04884.

9. However – while we agree that the conclusion reached regarding the incorrectly cited permit number and agent information consideration were in error – Towing Done Right’s remaining arguments are unclear, incomplete, and at best immaterial to the overall outcome reached in the Recommended Decision.

10. For example, Towing Done Right’s filing claims that it was not a regulated booting entity, but then also claims that the ALJ erred in finding the agreement and rules did not authorize the towing of a vehicle on which a “boot” was previously removed. These arguments rest on internal contradictions. However, and in any event, given the late filings made here by the Respondent that failed to comply with the extensions permitted and, therefore, failed to meet the transcript requirements in § 40-6-113, C.R.S., the factual findings are conclusively presumed as accurate. Factual findings aside, the pleadings also fail with any particularity to argue against the legal findings of the ALJ regarding the findings on these violations of rule and statute. Based on these pleadings, Towing Done Right fails to meet its burden.

11. Further still, Towing Done Right fails entirely to articulate or challenge multiple findings of the ALJ, including for example the parking invoice violations of Rule 6509(a)(II), (IV), and (IX), 4CCR 723-6, found in the Recommended Decision.¹⁴ Only *one* violation is sufficient to require a refund and release of the vehicle. The filing does not plead with particularity the unlawfulness of the Recommended Decision, and does not plead *at all* about the unlawfulness of each violation and the ultimate conclusion reached.

12. Findings of the Recommended Decision are therefore revised to reflect corrections, including that Towing Permit No. T-04884 was active in August 2022, and that the property owner

¹⁴ Recommended Decision, ¶ 46.

agent information is included, consistent with requirements in Rule 6508(a)(I)(B), 4 CCR 723-6. However, challenges to remaining violations found in the Recommended Decision are insufficient, unsupported, or entirely omitted. Findings of violations to Commission rules and statutes, including without limitation to 6509(a)(II), (IV), and (IX), 4CCR 723-6, remain. Towing Done Right fails to meet its burden to overturn the ultimate conclusions of the ALJ in ordering a refund in this matter and release of the vehicle.

13. Within ten days following issuance of this decision, unless Respondent has already done so, Respondent shall: (a) release, without charge, Complainant Vehicle 2008 BMW X5, bearing VIN #5UXFE83578L163481; (b) refund Complainant or Complainant's wife all funds paid by Complainant and/or Complainant's wife to Respondent in connection with the immobilization of vehicles in February 2022, including any interest and late fee charges; and (c) refund Complainant all funds paid by Complainant to Respondent in connection with Respondent's towing of Complainant's vehicle in August 2022, including any interest, late fees, impound, and storage charges.

14. In sum, we reject the legal arguments made, note corrections to errors in the Recommended Decision, but find that violations of Commission rule and Title 40, C.R.S., remain and Towing Done Right's filings are insufficient.

II. ORDER

A. It Is Ordered That:

1. The exception filings made by Towing Done Right, LLC, formerly known as Towing Done Right, Inc., on March 16, 2023, and April 18, 2023, are denied, in part, consistent with the discussion above.

2. The 20-day time period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 7, 2023.**

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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TOM PLANT

Commissioners

Rebecca E. White,
Director

COMMISSIONER MEGAN M. GILMAN
ABSENT