

Decision No. C23-0515

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0381TO

KEVIN MCCLUSKY,

COMPLAINANT,

V.

TOWING DONE RIGHT, LLC,

RESPONDENT.

**COMMISSION DECISION DENYING REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: August 3, 2023

Adopted Date: July 19, 2023

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I. BY THE COMMISSION**A. Statement**

1. Through Decision No. C23-0402, issued June 15, 2023 (Exceptions Decision), the Commission corrected certain typos in Recommended Decision No. R23-0132, issued February 24, 2023 (Recommended Decision), but ultimately found that Towing Done Right, LLC, formerly known as Towing Done Right, Inc. (Towing Done Right) failed to overcome the Recommended Decision's conclusions that Towing Done Right violated Commission regulations, and that refund and release of the impounded vehicle at no further charge were warranted. On July 5, 2023, Towing Done Right filed a "Motion to Reopen or Rehear Exceptions to Ruling," which we understand is intended to be a request for rehearing, reargument, or reconsideration (RRR), as permitted by § 40-6-114, C.R.S.

2. Considering the RRR filing, and reviewing the record as a whole, we continue to agree with the Administrative Law Judge (ALJ) that it is more likely than not that Towing Done Right violated multiple Commission rules and standards. Consistent with the discussion below, we deny the RRR.

B. Background and Filing Summary

3. On September 1, 2022, Kevin McClusky (Complainant) filed a Complaint against Towing Done Right, alleging that Towing Done Right wrongfully towed his vehicle and demanding reimbursement.¹ The facts in this case were disputed before the assigned ALJ, who determined it was more probable than not that Towing Done Right violated multiple Commission

¹ Complaint at 1-2.

rules and standards. The ALJ therefore ordered a refund of charges and release of the 2008 BMW at issue without further charge.

4. Through its Exceptions Decision, the Commission found that Towing Done Right's filings seeking initial rehearing and reconsideration were late, internally inconsistent, and devoid of support.² The Commission nevertheless corrected certain errors of the ALJ raised by Towing Done Right, but ultimately found that Towing Done Right's arguments failed to meet the necessary burden to reopen or otherwise reconsider a number of violations found in this case. The Commission ultimately upheld the relief ordered in this case, including the refund of charges and release of the 2008 BMW at issue without further charge.

5. On July 5, 2023, Towing Done Right submitted RRR filings: (1) revising its arguments that Complainant did not have standing; (2) arguing that it lacked "due process" in considerations regarding related immobilization of the Complainant's wife's vehicle; (3) claiming it did make timely filings; (4) asserting the Commission must address booting determinations; and (5) disputing certain findings regarding the tow invoice violations. Consistent with the discussion below, Towing Done Right's arguments are unsupported and insufficient to overturn the conclusions reached that Towing Done Right violated numerous booting and towing requirements, and that the relief provided in this case should be overturned or reconsidered.

C. Complainant Standing and Penalty Assessments

6. The Exceptions Decision rejected Towing Done Right's argument that the ALJ improperly found that Complainant had standing to pursue the complaint.³ The Commission both

² The Exceptions Decision found, for example, that even though the ALJ misstated the permit number at issue, Towing Done Right failed to raise numerous violations found, including that some violations still included towing invoice errors. Even one violation is sufficient to require a refund or release, under Commission rules.

³ Exceptions Decision, at ¶ (D)(6).

affirmed the ALJ on this point and noted that § 40-6-108(1), C.R.S. permits that a complaint may be made by “any” person, which has been broadly interpreted in Colorado courts. On RRR, Towing Done Right now argues that the statute “clearly” allows the Commission to entertain a complaint by any person.⁴ However, it then argues that the standing issue is unresolved, as to the relief provided here.

7. Towing Done Right argues that “[t]he statute provides authority for the commission to issue rules and penalty assessments, encoded at 4 CCR 723-6.” Towing Done Right claims that the Commission improperly ordered refund of paid amounts and release of the vehicle at no charge.

8. Towing Done Right’s limited argument in RRR is based on incomplete analysis that, among lacking support, wholly ignores Commission’s rules. The Commission maintains broad authority in Title 40, including in the relief provided through this Complaint proceedings. Regarding the specific relief provided here – refund and release of a vehicle – Rules 4 *Code of Colorado Regulations* (CCR) 723-6-6511(g) (tow) and 6817(a)(III) (booting), require that for any finding of noncompliance, “[a]ny money collected must be returned to the owner, authorized operator, or authorized agent of the owner of the motor vehicle.”

9. As the authorized operator of the vehicles in question, and where “any” person may raise a complaint to the Commission of alleged violations, Complainant had standing under § 40-6-108(1), C.R.S. to pursue a complaint regarding unauthorized booting and tow of the vehicles at issue. The Commission properly ordered the refund of amounts paid and no further charges for release of any vehicle held regarding the matter at issue, consistent with the Commission’s rules and authority, pursuant to Title 40.

⁴ RRR, at ¶ 3(a) (citing *Danks v. Colo. Pub. Utils. Comm’n*, 2022 CO 26, ¶23, 512 P.3d 692, 697, 2022 Colo. LEXIS 571, *11, 2022 WL 2112965).

10. Towing Done Right is correct that the Commission *also* has fining authority, as authorized in statute and rule. In this specific case, fines were not sought. We do not order fines through this proceeding. As it deems appropriate, Staff of the Colorado Public Utilities Commission can independently assess if it would choose to pursue fines.⁵

D. Related Vehicle Due Process Claims

11. Towing Done Right next argues that it did not have notice, and therefore no due process, for findings regarding Complainant's wife's vehicle. Towing Done Right claims that, because Complainant did not amend the complaint, the vehicle was "never at issue" and that the Commission constructively amends the complaint to include the secondary vehicle.

12. Towing Done Right fails to understand the administrative adjudicatory processes, Commission rules, and the scope of the Commission's authority in making its considerations. The Commission is instructed to conduct all of its proceedings "in such manner as will best conduce the proper dispatch of business and the ends of justice." § 40-6-101(1), C.R.S. Hearings and investigations are further governed by the Commission's rules and the technical rules of evidence do not apply. § 40-6-101(4), C.R.S. Towing Done Right also does not clarify if it is raising procedural or substantive due process, or any claim with particularity as required under the standards to seek reconsideration in § 40-6-114, C.R.S. The argument fails for lack of specificity alone.

⁵ Consistent with Commission Rules, including 4 CCR 723-6-6017 and 6018, the Director of the Commission is authorized to issued Civil Penalty Assessment Notices for violations of Article 10.1 of Title 40, Article 7 of Title 40, C.R.S., as well as 49 C.F.R. 386, subpart G and relevant appendices. For findings in this case and given the record at issue here, our determinations focus on the refunded amounts and charges imposed. Additional fines were not raised. Civil Penalty Assessment Notices, if any, may be pursued through separate process, and in Staff's discretion.

13. However, to the extent these arguments concern procedural due process, “due process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The essence of procedural due process is fundamental fairness, including at a minimum notice and the opportunity for meaningful hearing before an impartial tribunal. *Mathews v. Eldridge*, 424 U.S. 319, 333, 348-49 (1976). Three factors are weighed in determining what procedures are required by due process in a particular situation: (1) the importance of the individual interest at stake; (2) the weight of the governmental interest in retaining challenged procedures, including the interest in avoiding increased administrative and physical burdens; and (3) the risk of an erroneous deprivation of liberty or property through the procedures used and the degree to which proposed procedures will lessen risk of erroneous decision. *Id.*, at 335.

14. Here, the wife’s vehicle was at issue throughout the hearing and necessarily tied to the first tow of the BMW. Due process is based on the circumstances presented. The vehicle was raised in the context of the full violation considerations stemming from the BMW being immobilized, leading to Towing Done Right’s tow of the first vehicle, the immobilization of the second vehicle, and ultimately, the second tow of the first vehicle. The full scope of events was clearly raised through the course of the proceeding, providing notice to Towing Done Right. Towing Done Right then had opportunity at hearing, through exceptions, and again here through RRR, respond to Complainant’s arguments and present its own arguments and support. Towing Done Right’s analysis in exceptions and again in RRR, which provides absolutely no citation or case law, is insufficient to overturn the ALJ on inclusion of his considerations regarding the second vehicle immobilization.

15. The Commission's regular processes and the course of this proceeding, in which the related potential violations of booting and towing rules were raised, provided both procedural and substantive due process to Towing Done Right. Including consideration and refund of the related charges also provides judicial efficiency and avoids duplicative litigation where these matters are so related. The findings here, as noted, are limited to only refund amounts and further process would necessarily follow if fines or other claims are raised appropriately.

16. Given the process provided here and interests at stake, Towing Done Right fails to support a plausible due process argument. We deny rehearing as to Towing Done Right's general "due process" argument.

E. Transcripts and Timing Claims

17. The next series of arguments claim that the transcript was timely filed on April 4, 2023, and that the amended exceptions citing those transcripts were timely filed on April 17, 2023. Through this argument, Towing Done Right seems to imply that the Commission's Exceptions Decision improperly noted that Towing Done Right failed to comply with the processes in statute and explained further in Commission rules requiring the timely transcript and exceptions filings, and should reconsider the record.

18. Again, Towing Done Right fails to support its arguments with statutory or rule citation. Rule 4 CCR 723-1-1204(b) provides that "[a]ll filings must be received at the Commission's office during normal business hours, 8:00 a.m. to 5:00 p.m. Mountain Time, Monday through Friday. Any document received for filing after normal business hours shall be deemed filed as of 8:00 a.m. Mountain Time, the following business day."

19. Review of the Commission's e-filings system confirms that Towing Done Right filed its revised exceptions after 5:00 p.m. on April 17, 2023. Despite the two extensions provided,

Towing Done Right still failed to timely file its revised exceptions, pursuant to the Commission's rules.

20. Despite these errors, the Commission nevertheless *did* consider, holistically, the record in this case as appropriate, including to correct clear errors in the ALJ's decision. Where competing evidence was raised, the Commission deferred to the ALJ, who heard the matter and could best make findings of credibility.⁶ The Commission further stated that Towing Done Right's sparse exceptions filings did not persuade the Commission in part because it failed to plead with any particularity which specific arguments it challenged, and failed entirely to raise each of the cited violations.⁷ The Commission corrected certain factual errors based on the record. But, as stated in the Exceptions Decision, one violation is sufficient to require refund under Commission rules.⁸ Towing Done Right's pleadings on exceptions and again in RRR are insufficient and incomplete in their challenges of each violation.

21. Towing Done Right's argument that the Commission erred in noting its late filing is unavailing to rehear this matter.

F. Booting Determinations

22. The final arguments raise factual disputes, as they apply to specific violations. First, Towing Done Right argues that the Commission must resolve "the booting issue and its own authority over the boot utilized in this action; and whether it property [sic] asserts any authority over respondent." Without citation, Towing Done Right states that, "The PUC does not maintain

⁶ In addition to the deference provided the hearing officer provided in § 40-6-113, C.R.S., the Commission's role in determining exceptions is akin to a reviewing court considering findings of a hearing officer in considering competent, often competing, evidence provided. *See e.g., Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304 (Colo. 1986).

⁷ Exceptions Decision, at ¶¶ (D)(10-11).

⁸ *Id.*

jurisdiction over the charges related to the booting of the vehicle; nor impliedly of the secondary vehicle ‘added’ to the ALJ order.”

23. Towing Done Right states that “conflicts in the evidence cannot stand” – in this case, the ALJ did not leave this conflict unresolved. The order found that Towing Done Right does not possess a booting permit and, yet, booted vehicles in violation of Colorado law. Under the standards of review here, and reviewing the record, we find that the booting violations, including lack of a permit⁹ but also failure to allow for cash payments,¹⁰ should not be overturned.

24. Under § 40-6-114(1), C.R.S., RRR filings *must* “specify with particularity the grounds upon which the applicant considers the decision unlawful.” Towing Done Right fails to plead any specifics of its argument for why the device that clearly immobilized each vehicle at issue should not be considered a “boot”, under Commission rules. Towing Done Right’s arguments fail for this reason, but based on the record here, Towing Done Right’s immobilization device at issue is more likely than not a “boot.”

25. “Boot or booting” is defined in Rule 4 CCR 723-6-6811(a) as “a wheel immobilization device upon a motor vehicle for the purpose of prohibiting the operation of the motor vehicle.”

26. As noted in the Exceptions Decision, Towing Done Right through its own pleadings recognizes the immobilization device as a “boot”. In fact, Towing Done Right has no other word to describe its immobilization device. The agreements with the property also refer and consider the immobilization device to be a “boot”.

⁹ Recommended Decision, at ¶ 41.

¹⁰ Recommended Decision, at ¶ 42.

27. It is unclear what other authority Towing Done Right would possibly possess to immobilize vehicles and charge individuals, under Colorado law. Indeed, Towing Done Right provides none.

28. Representations from DORA or PUC Staff, which allegedly determine that such devices used by Towing Done Right are not considered a “boot”, are not findings of the Commission. The document relied on by Towing Done Right (Exhibit 220), includes a “Vehicle Boot” demonstration video and Investigator Jay Estrada’s comment that the video from December 2020 is, in his opinion, not a “boot”. However, not only is it unclear whether the device used in the 2020 email is the same device used in the immobilization here, but representations from an investigator are not findings of the Commission. In this case, the device discussed in property agreements and by Towing Done Right itself, including in these RRR filings, is referred to as a “boot”.

29. Based on these facts, the hearing officer who heard the case and competing evidence agreed with Complainant that it was more likely than not that the immobilization device was a “boot”, subject to Commission regulation. Exceptions and now the RRR fail to plead with any particularity specific arguments regarding Towing Done Right’s position, as required by statute and rule.

G. Towing Violation Disputes

30. In its last argument, Towing Done Right argues that the Commission lacks substantial evidence for any violation involved in the towing of the BMW. Towing Done Right claims that the tow invoice violations found were “never even mentioned during the hearing more than six times in total” and were not raised prior to or in the course of the hearing as “an issue”.

31. Towing Done Right then goes on to cite various exhibits and claims that the invoices “substantially comply with all requirements of the PUC rules”. Through a lengthy list of noted inclusions in the invoice, and citing Hearing Exhibits 201 and 202, Towing Done Right claims that the invoice included all pertinent information.

32. The ALJ found, among other violations, that Towing Done Right’s tow invoice, dated August 15, 2022 (Hearing Exhibit 201), did not contain their towing permit number, the date and time of the completion of the tow, the date and time notice was given to the appropriate law enforcement agency, and the printed name of the tow truck driver. Therefore, the Recommended Decision found violations of Rules 4 CCR 723-6-6509(a)(II), (IV) and (IX).

33. Under Rule 4 CCR 723-6-6509(b), the “tow invoice”, as provided to the vehicle owner or authorized agent, must include the items found missing by the ALJ. On RRR, Towing Done Right appears to argue that this information could be contained in the “tow record” overall as well, which is why it points to Hearing Exhibit 202 that includes both the tow invoice – printed at a different date – and other information regarding the tow. However, the rule makes clear when it describes in subsection (b) that the *invoice*, as opposed to other parts of the “tow record/invoice” identified elsewhere in the rule *must* contain certain information.

34. Reviewing Exhibit 201 (and the correlating “tow invoice” in Exhibit 202), Towing Done Right is correct that the permit number is included on page 2, as required in Rule 4 CCR 723-6-6509(a)(II). Towing Done Right also argues that Rule 4 CCR 723-6-6509(b) allows some flexibility in that the name of the tow truck driver does not need to be on the tow invoice provided to the customer. We agree. However, and as found by the ALJ, the tow invoice does *not* include the date and time the towed vehicle was reported to law enforcement, as required by Rule 4 CCR

723-6-6509(a)(IV).¹¹ In addition, the tow invoice does not include the law enforcement report number, as required under Rule 4 CCR 723-6-6509(a)(XIII).

H. Conclusion

35. In sum, even recognizing that the ALJ potentially erred findings regarding the tow driver name and permit number finding, only one violation of the tow invoice is needed to support a finding that a refund is warranted. Towing Done Right more likely than not “booted” the vehicles in question, without the required permit, in violation of § 40-10.1-801, C.R.S., and Rule 6810(c), 4 CCR 723-6. Towing Done Right further failed to accept cash payments for release of the boots, in violation of Rule 6818(a), 4 CCR 723-6.¹² Towing Done Right does not challenge with specificity additional violations, including that it towed the BMW for past-due charges, in violation of the then-effective agreement that allowed only for the towing of parking violations.¹³ Towing Done Right committed multiple violations related to the Commission’s rules regarding tow invoice criteria, and while the ALJ’s findings erred in some identified areas, violations of Rule 4 CCR 723-6-6509(a)(IV) (omission of the date and time of the vehicle was reported to law enforcement) and Rule 4 CCR 723-6-6509(a)(XIII) (omission of the law enforcement report number) remain.

36. Towing Done Right’s exceptions and RRR filings are unconvincing in overturning the findings on exceptions to affirm refund amounts paid and order release of the vehicle at no further charge.

¹¹ Recommended Decision, at ¶ 46.

¹² Recommended Decision, at ¶ 42.

¹³ Recommended Decision, at ¶ 44.

II. ORDER**A. It Is Ordered That:**

1. The “Motion to Reopen or Rehear Exceptions to Ruling,” filed by Towing Done Right, LLC, formerly known as Towing Done Right, Inc. on July 5, 2023, is construed as a request for rehearing, reargument, or reconsideration (RRR), as permitted under § 40-6-114, C.R.S., and RRR is denied, consistent with the discussion above.

2. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
July 19, 2023.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners