

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04M-093CP

IN THE MATTER OF THE PETITION OF VAIL VALLEY TAXI, INC. AND VAIL VALLEY TRANSPORTATION, INC. FOR AN ORDER OF THE COMMISSION EXEMPTING DRIVER JAMES EDWARD MYERS FROM THE REQUIREMENT OF PART 391.41(B)(10) (EYESIGHT) OF THE COMMISSION'S RULES REGULATING SAFETY FOR MOTOR VEHICLE CARRIERS AND ESTABLISHING CIVIL PENALTIES, 4 CCR 723-15.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
CONDITIONALLY GRANTING WAIVER**

Mailed Date: March 15, 2004

I. STATEMENT

1. By this petition, Vail Valley Taxi, Inc., and Vail Valley Transportation, Inc. (collectively, Vail Valley), seek a two-year waiver of Rule 391.41(b)(10) of the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties found at *4 Code of Colorado Regulations* (CCR) 723-15 in connection with driver-applicant James Edward Myers.

2. On March 5, 2004, the matter was set for a hearing to be held on March 12, 2004 at 10:00 a.m. in a Commission hearing room in Denver, Colorado. Subsequently, Vail Valley requested that the hearing be held via telephone conference call for the convenience of the parties.¹ That request was granted and the hearing was held in that manner at the assigned time. During the course of the hearing testimony was received from Cheryl E. Emmeluth, Vail Valley's

¹ Vail Valley is based in Minturn, Colorado, and Mr. Myers apparently resides in Eagle County, Colorado.

Secretary/Treasurer; James Edward Myers (Myers), the Vail Valley driver-applicant for whom the subject waiver is sought; and John Opeka, a representative of the Commission's Safety and Enforcement Staff (Staff). Exhibits 1 through 7 were identified, offered, and admitted into evidence.

3. Pursuant to § 40-6-109, C.R.S., the Administrative Law Judge hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order.

II. FINDINGS OF FACT; CONCLUSIONS OF LAW

4. Vail Valley is a common carrier of passengers providing various types of for-hire transportation services generally within the Eagle County, Colorado area pursuant to authority issued to it by this Commission in Certificates of Public Convenience and Necessity PUC Nos. 40920, 22485, and 9745.

5. Myers has been employed by Vail Valley as a driver for approximately four years. He operates Dodge Grand Caravan and Ford Club Wagon vehicles. Myers is currently 62 years old. At age ten a childhood accident resulted in the loss of vision in his left eye. This restricts the field of Myers' vision on his left side. His right eye is normal and healthy and he has a full field of vision on his right side. The Medical Examination Report for Commercial Driver Fitness Determination (Medical Report), the February 26, 2004, correspondence from Dan E.

Weitzenkorn, M.D. (Weitzenkorn correspondence), and Dr. Weitzenkorn's examination notes submitted at the hearing as Exhibits 3, 5, and 6 respectively confirm Myers' monocular vision.²

6. Rule 391.41(b)(10) provides that a person is not physically qualified to drive a motor vehicle unless he/she has distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses, field of vision of at least 70 degrees in the horizontal meridian in each eye, and the ability to recognize the colors of traffic signals and devices showing standard red, green, and amber. Therefore, monocular drivers such as Myers do not qualify to operate motor vehicles under this rule unless granted a waiver of the same pursuant to 4 CCR 723-15-11.

7. Myers has continuously operated motor vehicles since he was 16 years old while suffering from the above-described condition. He compensates for the limited field of vision on his left side by using the normal vision afforded by his right eye. This is accomplished by turning his head more radically to the left side when executing driving maneuvers that require vision on that side. He also makes sure that the vehicles he operates are equipped with "spotter" mirrors. This type of mirror has a convex shape and, as a result, allows for a wider range of vision than regular rear-view mirrors.

8. Prior to his employment with Vail Valley, Myers worked as a driver for three other passenger carriers operating in the Vail area. In total, he has been operating motor vehicles for 46 years and has been employed as a driver of commercial motor vehicles for 15 to 18 years.

² The Medical Report and the Weitzenkorn correspondence indicate that the uncorrected visual acuity in Myers' right eye is 20/20 (Snellen). The Medical Report indicates that Myers' horizontal field of vision in his right eye is 75 degrees and is, therefore, within acceptable limits. It also indicates that he is able to recognize and distinguish among traffic control signals and devices showing standard red, green, and amber colors.

Myers' monocular vision has never inhibited his ability to successfully operate motor vehicles or been the cause of any traffic-related incident (*i.e.*, accident, traffic citation, etc.). He testified that the single citation shown on his Colorado Motor Vehicle Record (Exhibit 2) did not result from his monocular vision.³ During the 46 years he has been driving, Myers has qualified for issuance of drivers' licenses in three other states besides Colorado. He has never been denied issuance of a driver's license or had such a license suspended or revoked as a result of his monocular vision. Nor has he ever been denied liability insurance coverage as a result of this condition. He currently holds a valid, unrestricted Colorado Driver's License. *See*, Exhibit 2.

9. Myers has successfully completed two recent road tests administered by Ms. Emmeluth of Vail Valley and by Mr. Opeka, a representative of the Staff. In connection with the Vail Valley road test administered on February 15, 2004, Ms. Emmeluth has certified that, in her opinion, Myers possesses sufficient driving skill to safely operate the type of commercial motor vehicle typically operated by Vail Valley. *See*, Exhibit 7. Mr. Opeka testified that he also administered a road test to Myers on March 11, 2004, and that the results were completely satisfactory.

10. Ms. Emmeluth describes Myers as an excellent driver. Vail Valley has no reservations about his ability to safely operate motor vehicles on their behalf. It has not been denied liability insurance coverage by its insurance carrier as a result of Myers' monocular condition. Similarly, Mr. Opeka testified that neither he nor the Staff had any objection to this waiver petition or any reason to believe that Myers could not continue to safely operate motor vehicle equipment.

³ The subject incident involved a speeding violation that occurred in Eagle County over four years ago. The original speeding citation was reduced to a citation for operating a defective or unsafe vehicle.

11. Myers' testimony indicates that he is very aware of his monocular vision condition, that he has fully adapted to it over the past 52 years, and that he takes precautions to ensure that it does not negatively affect his ability to safely operate motor vehicles. Given this awareness, the fact that Myers has successfully operated motor vehicles for 46 years while suffering from this condition, the lack of any traffic-related incidents attributable to such condition during that time, and the opinions of Vail Valley and the Staff that he is and will be a safe driver, it is found and concluded that Vail Valley has demonstrated that Myers can safely operate its motor vehicles notwithstanding the fact that he has monocular vision.

12. Strict enforcement of Rule 391.41(b)(10) would work a hardship on both Vail Valley and Myers and, therefore, the requested waiver will be granted. Vail Valley will be granted a waiver from the provisions of Rule 391.41(b)(10) for a period of two years.

13. However, waiver petitions of this type are normally accompanied by an opinion from an ophthalmologist or optometrist confirming that, in his/her opinion, the driver/applicant can safely operate a motor vehicle of the type he/she intends to operate notwithstanding the monocular condition. Here, the Weitzenkorn correspondence fails to include such an opinion. Therefore, in addition to the standard reporting requirements imposed by the Commission in connection with waivers of this type, the grant of this petition will be conditioned upon Myers being re-examined within one year by an optometrist or ophthalmologist who can attest to the fact that the visual acuity in Myers' right eye continues to measure at least 20/40 (Snellen).⁴ Such an attestation shall be provided to the Staff within one year of the effective date of this

⁴ It is suggested that any future waiver requests submitted by or on Myers' behalf include an opinion from his ophthalmologist or optometrist confirming that, in his/her opinion, Myers can safely operate motor vehicles of the type he is to operate notwithstanding his monocular condition.

Order. The failure to do so may, upon petition by the Staff, result in the termination of the waiver granted by this Order.

III. ORDER

A. The Commission Orders That:

1. Docket No. 04M-093CP, being a petition of Vail Valley Taxi, Inc., and Vail Valley Transportation, Inc., is granted, subject to reporting requirements and conditions set forth below.

2. Subject to reporting requirements and conditions set forth below, Vail Valley Taxi, Inc., and Vail Valley Transportation, Inc., are granted a two-year waiver from the provisions of Rule 391.41(b)(10) of the Commission's Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties found at 4 *Code of Colorado Regulations* 723-15 in connection with driver-applicant James Edward Myers.

3. Vail Valley Taxi, Inc., and Vail Valley Transportation, Inc., shall promptly (within 30 days) notify and file with the Commission any documents and information concerning any accidents, arrests, license suspensions, revocations or withdrawals, or any traffic-related citations or convictions involving James Edward Myers during the period of the waiver granted herein.

4. The waiver granted by this Order is conditioned upon James Edward Myers being re-examined within one year by an optometrist or ophthalmologist who can attest to the fact that the visual acuity in his right eye continues to measure at least 20/40 (Snellen). Such an attestation shall be provided to the Commission's Safety and Enforcement Staff within one year of the effective date of this Order. The failure to do so may, upon petition by the Commission's Safety and Enforcement Staff, result in the termination of the waiver granted by this Order.

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.

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.

7. 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.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge