

Decision No. R04-0730

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04M-318CP

IN THE MATTER OF THE PETITION OF SHAMROCK TAXI OF FORT COLLINS, INC.,
FOR AN ORDER OF THE COMMISSION EXEMPTING DRIVER ADRIAN DEN HOED
FROM THE REQUIREMENT OF PART 391.49 OF THE RULES REGULATING SAFETY
FOR MOTOR VEHICLE CARRIERS AND ESTABLISHING CIVIL PENALTIES, 4 CCR 723-
15.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING WAIVER, WITH
CONDITIONS, AND CLOSING DOCKET**

Mailed Date: July 1, 2004

I. STATEMENT

1. On June 14, 2004, Shamrock Taxi of Ft. Collins, Inc. (Shamrock), filed the Petition for Waiver of Safety Regulations - Driver (Petition) which commenced this docket.

2. By its Petition, Shamrock seeks a two-year waiver of 49 *Code of Federal Regulations* (CFR) § 391.41(b)(1),¹ incorporated by reference in Rule 2.1 of the 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 Adrian Den Hoed. Section 391.41(b)(1) provides that a person is physically qualified to drive a motor vehicle if that person *either* has no loss of a foot, a leg, a hand, or an arm *or* has been granted a waiver pursuant to 49 CFR § 391.49.

¹ The Petition mistakenly identifies 49 CFR § 391.49 as the rule for which a waiver is sought. That rule, however, sets forth the alternative physical qualification standards for the loss of a limb and so contains the standards under which the Commission is to assess the instant Petition. Shamrock relies upon, and so does not seek to waive the applicability of, that rule.

3. The Commission set the hearing in this proceeding for June 29, 2004. *See* Order Setting Hearing and Notice of Hearing dated June 16, 2004.

4. On June 29, 2004, at the time and place noticed for the hearing, the undersigned Administrative Law Judge (ALJ) called this matter for hearing. During the course of the hearing, Mr. Thomas Hoffman, Shamrock's President and owner, testified in support of the Petition. This was the only testimony. Exhibits No. 1 through No. 7 were identified, offered, and admitted into evidence.

5. At the conclusion of the hearing, the ALJ closed the evidentiary record and took the matter under advisement.

6. Pursuant to § 40-6-109, C.R.S., the ALJ now 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 AND CONCLUSIONS OF LAW

7. Shamrock is a common carrier of passengers providing taxicab services in and around Ft. Collins, Colorado, pursuant to operating authority issued to it by the Commission.

8. Mr. Den Hoed, the person for whom the waiver is sought, lost his right arm in 1983. Prior to that time he had been a truck driver.

9. Mr. Hoffman testified that Mr. Den Hoed will drive only taxicabs equipped with automatic transmissions and will transport no more than three or four passengers in any one trip. In addition, he testified that Shamrock will implement a radio policy which will apply only to Mr. Den Hoed. *See* Exhibit No. 7 (Radio Policy for Adrian Den Hoed). Mr. Den Hoed is

familiar with, and will abide by, this policy.² Finally, Mr. Hoffman testified that he understood that, if the waiver is granted, Shamrock will be required to report specified information to the Commission. Shamrock agreed to these restrictive conditions if the requested waiver is granted.

10. Shamrock is anxious to employ Mr. Den Hoed as a taxicab driver. It believes that Mr. Den Hoed is the type of steady and reliable individual who will be an asset to Shamrock and who will provide safe taxicab service.

11. Exhibit No. 3 is Mr. Den Hoed's Alaska Driving/Clearance Record. Review of that Exhibit reveals that Mr. Den Hoed had neither a moving violation nor an accident during the period covered by the driving record.

12. Exhibit No. 2 is Mr. Den Hoed's Colorado Motor Vehicle Record. Review of that Exhibit reveals that Mr. Den Hoed has had neither a moving violation nor an accident during the period covered by the driving record.

13. Exhibit No. 4 is the Medical Examiner's Report for Commercial Driver Fitness Determination which contains the results of Mr. Den Hoed's physical examination conducted on May 21, 2004. Exhibit No. 5 is a statement concerning Mr. Den Hoed by Dr. Rosalinda Pineiro, M.D., pursuant to 49 CFR § 391.43. That one-page Exhibit, dated June 3, 2004, contains Dr. Pineiro's assessment that, notwithstanding the loss of his right arm, Mr. Den Hoed is able safely to drive a vehicle with an automatic transmission *provided* the vehicle is *not* "a commercial truck or a vehicle that has more than three to four passengers."

² Shamrock intends to make adherence to the radio policy a condition of Mr. Den Hoed's employment and to make violation of that policy grounds for termination of employment. Granting the waiver will be conditioned upon Mr. Den Hoed's compliance with the radio policy.

14. Exhibit No. 6 is a Certification of Road Test for Mr. Den Hoed. The test consisted of Mr. Den Hoed's driving one of Shamrock's taxicabs approximately 15 miles. The Certification states that, in the opinion of the tester (Shamrock's Taxi Coordinator), Mr. Den Hoed can safely operate the type of vehicle in which he took the road test (*i.e.*, a taxicab with automatic transmission) and that the results of the road test were satisfactory. Mr. Hoffman testified that he personally conducted a second and later driving test with Mr. Den Hoed; that the second test lasted approximately 30 minutes and consisted of driving in Ft. Collins and environs; and that Mr. Den Hoed drove one of Shamrock's taxicabs (a Toyota Camry) during that road test. Based on that personal experience, Mr. Hoffman testified that he is personally satisfied that, notwithstanding the loss of his arm, Mr. Den Hoed has the skills and ability necessary to be a safe taxicab driver.

15. The Petition is unopposed.

16. Rule 4 CCR 723-15-11 provides that, *inter alia*, the Commission may grant a variance from the provisions of Rule 4 CCR 723-15-2, which incorporates 49 CFR § 391.41(b)(1), "for good cause shown if it finds that compliance is impossible, impracticable, or unreasonable, if such variance is not contrary to law." The prohibition imposed by 49 CFR § 391.41(b)(1) is designed to protect the public safety. It would be "contrary to law" to grant the requested waiver in the absence of proper assurances that the public safety will be protected.

17. The evidence establishes that, notwithstanding the loss of his right arm, Mr. Den Hoed can safely operate, as a taxi driver, vehicles with automatic transmissions provided that the vehicle carries no more than three or four passengers and provided further that Mr. Den Hoed complies with the Shamrock radio policy set out in Exhibit No. 7. Under the

circumstances, strict enforcement of 49 CFR § 391.41(b)(1) would be unreasonable. Therefore, a waiver of that provision should, and will, be granted, subject to the conditions stated below.

18. Shamrock and Mr. Den Hoed are advised that the waiver will expire in two years and that, at that time, it will be necessary to obtain another waiver from the Commission in order for Mr. Den Hoed to continue to drive a taxicab. In practical terms, this means that Shamrock and/or Mr. Den Hoed will need to file a new petition for waiver approximately three months before the expiration of the waiver granted by this Decision.

19. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. The Petition for Waiver of Safety Regulations - Driver filed by Shamrock Taxi of Ft. Collins, Inc., is granted.

2. Shamrock Taxi of Ft. Collins, Inc., is granted a two-year waiver from the requirements of 49 *Code of Federal Regulations* § 391.41(b)(1), as incorporated by reference in Rule 4 *Code of Colorado Regulations* 723-15-2.1, in connection with driver Adrian Den Hoed.

3. The period of the waiver granted by this Decision shall commence on the day this Recommended Decision becomes effective. *See* ¶ II.11, below.

4. This waiver is effective only so long as Adrian Den Hoed operates vehicles equipped with automatic transmissions.

5. This waiver is effective only so long as Adrian Den Hoed operates vehicles carrying no more than three or four passengers at one time.

6. This waiver is effective only so long as Adrian Den Hoed complies with the Shamrock Taxi of Ft. Collins, Inc., Radio Policy for Adrian Den Hoed.

7. Adrian Den Hoed shall carry a copy of the written waiver at all times when he is driving a taxicab for Shamrock Taxi of Ft. Collins, Inc.

8. Shamrock Taxi of Ft. Collins, Inc., shall maintain a copy of the written waiver in Adrian Den Hoed's driver qualification file.

9. Shamrock Taxi of Ft. Collins, Inc., shall promptly (that is, within 30 days) notify and file with the Commission any documents and information concerning any accident; arrest; license suspension, revocation, withdrawal; and conviction involving Adrian Den Hoed during the period of the waiver granted by this Decision.

10. Docket No. 04M-318CP is closed.

11. 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.

12. 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.

13. 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.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge