

Decision No. R04-0809

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-193EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ANTHONY J. MULLANE, DOING BUSINESS AS ANTHONY'S LIMOUSINE,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ASSESSING CIVIL PENALTY**

Mailed Date: July 20, 2004

Appearances:

Paul Hoffman, Staff of the Colorado Public Utilities Commission;
and

No appearance by or on behalf of Anthony J. Mullane, doing
business as Anthony's Limousine, Respondent.

I. STATEMENT

1. On April 14, 2004, Staff of the Public Utilities Commission (Staff) issued Civil Penalty Assessment Notice (CPAN) No. 28565 to Anthony J. Mullane, doing business as Anthony's Limousine (Respondent).

2. Staff charged Respondent with six violations of Rule 4 *Code of Colorado Regulations* (CCR) 723-15-2.1, which incorporates certain federal carrier safety regulations. Specifically, the CPAN alleged that Respondent violated 49 *Code of Federal Regulations* (CFR)

§§ 391.23(a)(2) and 391.23(c) (twice); 49 CFR § 391.25 (twice); and 49 CFR § 391.27(a) (twice).

3. On May 11, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing. This Order established a hearing on July 9, 2004, in Colorado Springs, Colorado. Review of the Commission file in this docket shows that the Order was mailed to Respondent at his place of business, which is the address on file with the Commission.

4. The hearing was held on July 9, 2004. Although scheduled to begin at 10 a.m., the hearing began at 10:30 a.m. Testimony was received from Mr. Paul Hoffman of the Commission's transportation safety staff. Respondent did not appear, either in person or through counsel. Exhibits No. 1 through No. 3 were marked for identification and admitted into evidence. At the conclusion of the hearing the matter was taken under advisement.

5. Pursuant to § 40-6-109, C.R.S., the record and exhibits of the proceeding together with a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

6. Respondent is registered with this Commission to provide luxury limousine service. *See* Luxury Limousine Registration No. 53589.

7. Respondent's failure to appear at the hearing is unexplained. Respondent knew of the hearing and, after receiving the Order Setting Hearing and Notice of Hearing, contacted Mr. Robert Laws of Staff in advance of the hearing date to discuss this matter. From the content of the discussion as related to Mr. Hoffman by Mr. Laws, it appears that Respondent had received the Order and was aware of the hearing. At no time did Respondent contact the undersigned Administrative Law Judge (ALJ), her office, Mr. Hoffman, or the Commission

either to request another hearing date or to indicate that he would not be present at the scheduled hearing.

8. The facts establish the Commission's jurisdiction in this proceeding. The Commission has subject matter jurisdiction over this case. In addition, the Commission has personal jurisdiction over Respondent, who acknowledged receipt of the CPAN when it was served on him by personal service. See CPAN filed in the Commission's file of this docket.

9. On April 14, 2004, Mr. Hoffman served Respondent with CPAN No. 28565, charging Respondent with six violations of Rule 4 CCR 723-15-2.1 and, more specifically, of 49 CFR §§ 391.23(a)(2) and 391.23(c) (two counts); of 49 CFR § 391.25 (two counts); and of 49 CFR § 391.27(a) (two counts). Each of these alleged violations carries a civil penalty of \$200, for a total civil penalty of \$1,200. See Exhibit No. 1.

10. The violations charged by Staff in the CPAN are the result of a safety and compliance review and inspection performed by Staff member Paul Hoffman on April 7, 2004 (see Exhibit No. 2). As shown in Exhibit No. 2, Mr. Hoffman found numerous violations of the safety rules adopted by the Commission. Mr. Hoffman issued the instant CPAN citing three areas of violations. Not all of the violations found by Mr. Hoffman resulted in civil penalty assessment charges. Compare Exhibit No. 2 (Transportation Safety and Compliance Review Report) with Exhibit No. 1 (CPAN No. 28565).

11. The violations of 49 CFR §§ 391.23(a)(2) and 391.23(c), of 49 CFR § 391.25, and of 49 CFR § 391.27(a) charged on the CPAN issued on April 14, 2004 are repeat violations. The Safety and Compliance Review performed by Staff on March 21, 2003 (see Exhibit No. 3) shows that the same safety rule violations charged in the current CPAN (issued in 2004) were found to exist in 2003. The 2003 compliance review contained specific recommendations for corrective

action. In addition, Respondent was personally present during, and personally discussed with Mr. Hoffman the results of, the 2003 compliance review. Respondent was personally present during, and personally discussed with Mr. Hoffman the results of, the 2004 compliance review; this is the review which underpins this proceeding.

12. In this case Staff bears the burden of proof by a preponderance of the evidence. *See* Rule 4 CCR 723-1-82(a). Staff has met this burden of proof with respect to the six violations alleged in the CPAN.

13. The evidence of record establishes, and the ALJ finds, that Respondent violated the rules as charged in CPAN No. 28565. The specific violations charged in the CPAN are repeat violations found in at least one previous compliance and safety review conducted by Staff. Staff brought these violations to the attention of Respondent and made specific recommendations, as contained in the transportation safety and compliance reviews, for corrective action. *See* Exhibits No. 2 and No. 3. The record does not establish that Respondent has made any significant improvement since the March 2003 compliance review. The Commission has adopted the safety rules for the protection of the public. It is necessary that carriers which are registered with the Commission as luxury limousines adhere to these safety rules.

14. Having found that Respondent violated the rule provisions, it is necessary to determine the amount of the civil penalty to be assessed for these violations. In the CPAN, Staff seeks a civil penalty of \$1,200.

15. Based on the findings of fact and discussion above, the ALJ finds and concludes that \$1,200 is the appropriate civil penalty amount to be assessed in this case. In making this determination, the ALJ began with the maximum civil penalty for these violations (*i.e.*, \$1,200); considered Commission guidance provided in previous civil penalty cases; considered the

purposes of civil penalties; considered the factors in aggravation; considered the factors in mitigation; and considered the range of civil penalty assessments found to be reasonable in other civil penalty cases.

16. As factors in aggravation the ALJ considered that Respondent's violations were knowing in that in March 2003 Staff performed a compliance review of Respondent, found the same violations as those contained in CPAN No. 28565 issued in April 2004, and discussed the violations with Respondent personally. The ALJ also took into consideration the fact that, apparently, Respondent did not implement the recommendations contained on the March 2003 Transportation Safety and Compliance Review Report. *See* Exhibit No. 3. Finally, the ALJ took into account the type and seriousness of the violations alleged.

17. As Respondent did not appear, and was not represented, at the hearing, there were no facts presented which the ALJ could consider in mitigation.

18. The ALJ finds that a civil penalty of \$1,200 achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers and by the Respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for his past illegal behavior. Assessing a civil penalty of a significant amount underscores the seriousness of the violations which occurred and should act as a deterrent. The civil penalty and CPAN also trigger increased civil penalties in the event Respondent violates these provisions in the future. *See* §§ 40-7-113(3) and 113(4), C.R.S.

19. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER**A. The Commission Orders That:**

1. Anthony J. Mullane, doing business as Anthony's Limousine, is in violation of the Commission rules as set forth in Civil Penalty Assessment Notice No. 28565.

2. Anthony J. Mullane, doing business as Anthony's Limousine, is assessed a civil penalty in the amount of \$1,200.

3. Anthony J. Mullane, doing business as Anthony's Limousine, shall remit to the Public Utilities Commission the amount of \$1,200 within 30 days of the effective date of this Recommended Decision.

4. 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.

5. 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.

6. 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