

Decision No. R04-0829

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-061EC AND 04G-194EC

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

LAWRENCE TORREZ, D/B/A ABSOLUTELY DEVINE LIMOUSINES,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
ASSESSING CIVIL PENALTY**

Mailed Date: July 21, 2004

I. STATEMENT

1. These are civil penalty assessment proceedings brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Lawrence Torrez, doing business as Absolutely Devine Limousines (Torrez).

2. In Civil Penalty Assessment Notice (CPAN) No. 28402, Staff alleges that between December 2, 2003 and January 31, 2004, Torrez violated § 40-16-103, C.R.S. (offering or providing transportation services without being registered with the Commission) on six occasions (Counts 1 through 5 and 7) and § 40-16-104, C.R.S. (providing transportation services without the proper insurance) on two occasions (Counts 6 and 8). CPAN No. 28402 seeks

imposition of a civil penalty in the total amount of \$28,600.00 for these alleged violations. *See*, Exhibit 10.

3. In CPAN No. 28573 Staff alleges that on April 17, 2004, Torrez again violated §§ 40-6-103 and 40-6-104, C.R.S. (Counts 1 and 2). It also alleges that Torrez violated 49 *Code of Federal Regulations* (CFR) Part 392.2 (violation of laws, ordinances, and regulations of the jurisdiction in which motor vehicle is being operated) of the October 1, 1998 edition of the Federal Motor Carrier Safety Regulations, 49 CFR Chapter III on that date.¹ CPAN No. 28573 seeks imposition of an “enhanced” civil penalty for Counts 1 and 2 pursuant to § 40-7-113(3), C.R.S. The total amount of the civil penalty sought in CPAN No. 28573 is \$24,400.00. *See*, Exhibit 14.²

4. On February 4, 2004, the Commission issued an Order Setting Hearing and Notice of Hearing setting a hearing in CPAN No. 28402 for March 16, 2004, in Denver, Colorado. However, the hearing was continued three times, twice at the request of Torrez and once at the request of Staff.³

5. On June 14, 2004, Staff moved to consolidate Docket No. 04G-061EC (CPAN No. 28402) with Docket No. 04G-194EC (CPAN No. 28573). That motion was granted

¹ This federal regulation has been incorporated into the Commission’s Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties, 4 *Code of Colorado Regulations* (CCR) 723-15, by 4 CCR 723-15-2.1.

² The reference in CPAN No. 28573 to a total penalty amount of \$24,200 is erroneous.

³ Torrez’ first continuance request (from March 16, 2004 to April 14, 2004) was designed to provide him an opportunity to secure legal counsel. *See*, Decision No. R04-0304-I. However, no attorney ever entered his/her appearance in either of these matters on his behalf. Torrez’ second continuance request (from April 14, 2004 to June 16, 2004) resulted from an alleged family emergency that purportedly required him to attend a funeral in the state of Florida on April 17, 2004. *See*, Decision No. R04-0418-I. Staff’s request for a continuance (from June 16, 2004 to July 1, 2004) resulted from the lack of funds with which to retain counsel during the fiscal year ending June 30, 2004. *See*, Decision No. R04-0637-I.

on June 22, 2004, and the parties were advised that the hearing in this consolidated proceeding would be held on July 1, 2004. *See*, Decision No. R04-0684-I.

6. The undersigned Administrative Law Judge (ALJ) called the matter for hearing at the assigned time and place. Staff appeared through its legal counsel. Torrez did not appear.

7. During the course of the hearing testimony was received in support of Staff's case from Mr. John Opeka and Mr. Tony Munoz, Commission Compliance Investigators, Ms. Eileen Zschoche, Operations Manager for the American & Foreign Insurance Company (American Foreign), and Ms. Amy Madsen.⁴ Exhibits 1 and 3 through 14 were identified, offered, and admitted into evidence. Administrative notice was taken of Exhibit 2. At the conclusion of the hearing the ALJ took the matter under advisement.

8. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

9. On November 20, 2003, Staff received a telephone call from Mike Percy, the Manager of Ground Transportation at Denver International Airport (DIA). He reported observing Torrez on November 18, 2003, dropping off passengers at DIA in a Ford stretch pick-up truck bearing Colorado License No. 831-EIG (Torrez vehicle). In response to questions posed by Mr. Percy, Torrez denied that he was conducting commercial transportation operations at that time but admitted that he was conducting such operations in other areas. Torrez provided Mr. Percy with a copy of the luxury limousine registration (LL-01127) previously issued to him by the Commission.

⁴ Ms. Madsen appeared pursuant to a Subpoena to Testify issued on June 23, 2004.

10. This matter was assigned to Mr. Opeka for investigation on November 20, 2003. Initially, he reviewed the Commission's records and determined that LL-01127 had been revoked on October 15, 2003, as a result of Torrez' failure to maintain the proper public liability insurance as required by §§ 40-16-103 and 40-16-104, C.R.S. Subsequent reviews of the Commission's records by Mr. Opeka revealed that LL-01127 was never reinstated and that Torrez never re-registered as a luxury limousine operator by filing valid evidence of appropriate insurance coverage at any time after October 15, 2003.

11. On January 16, 2004, Torrez contacted Mr. Opeka and advised him that he had secured and was paying for appropriate insurance coverage through the Manor Insurance Company (Manor). Mr. Opeka contacted a Manor representative on January 19, 2004, and was advised that, although it had provided Torrez a quote for such insurance, the required premium had never been paid. Mr. Opeka contacted Manor again on January 26, 2004 and February 2, 2004, and was again advised that it had not issued Torrez the necessary insurance coverage.

12. Based on information provided to him by other carriers, Mr. Opeka determined that Torrez was advertising his commercial transportation services in Denver-based newspapers. His review of *The Denver Post* and *The Rocky Mountain News* revealed that the December 2, 8, and 15, 2003, issues of these publications contained advertisements for commercial transportation services being offered by Torrez. See, Exhibits 3 through 8. His review of the January 4, 2004, issue of *The Denver Post* revealed that an identical advertisement was printed in that publication on that date. See, Exhibit 9.

13. On January 5, 2004, Mr. Munoz called one of the telephone numbers (303-457-3339) listed in the above-described advertisements and, posing as a consumer needing commercial transportation services, requested such service from the Pepsi Center to a restaurant

located at 20th and Welton Streets in downtown Denver. He arranged this service with Torrez who identified himself as “L.T.” In response to that request, Mr. Munoz was picked-up at the Pepsi Center at approximately 9:40 p.m. on January 5, 2004, by Torrez’ driver, Jerry Thomatos. Mr. Thomatos transported Mr. Munoz to the requested destination in the Torrez vehicle and confirmed to Mr. Munoz that he had been dispatched by “L.T.” Mr. Munoz paid Mr. Thomatos \$180.00 in cash for the subject transportation and received a receipt in the form of a Torrez business card. *See*, Exhibit 12. The business card referred to “L.T. Torrez” and to Torrez’ trade name, Absolutely Devine Limousine. It also bore the telephone number used by Mr. Munoz to arrange the subject transportation.

14. On January 31, 2004, Mr. Opeka observed the Torrez’ vehicle providing commercial transportation services for a group of students attending the Cherry Creek High School Snowball Dance. On February 3, 2004, he spoke to Laura Barton, the individual who hired Torrez to transport the students to this function. She confirmed that she paid Torrez \$975.00 for that service.⁵ *See*, Exhibit 1.

15. Mr. Opeka prepared CPAN No. 28402 on February 5, 2004, based on the incidents and investigation described above.⁶ After several unsuccessful attempts to serve Torrez with a copy of CPAN No. 28402 himself, he enlisted the aid of the Adams County Sheriff’s Office. That office was successful in serving Torrez with a copy of CPAN No. 28402 on February 10, 2004. *See*, Exhibit 11.

16. On February 17, 2004, the Commission received, via facsimile transmission, a Form E Uniform Motor Carrier Bodily Injury and Property Damage Liability Certificate of

⁵ Mr. Thomatos was operating the Torrez vehicle. This incident is apparently the subject of a separate CPAN proceeding involving Mr. Thomatos. *See*, Docket No. 04G-053EC.

Insurance (Torrez Form E) purportedly issued on Torrez' behalf by American Foreign. *See*, Exhibit 2. The Torrez Form E indicated that American Foreign had issued the necessary insurance coverage to Torrez and that such coverage was effective from September 29, 2003 through September 29, 2004, a period of time encompassed by CPAN No. 28402.

17. Mr. Opeka noticed several irregularities in the Torrez Form E and, as a result, initiated an investigation concerning its validity. On February 20, 2004, he contacted American Foreign and forwarded it a copy of the Torrez Form E. A representative of that company's internal security department investigated the matter and on March 10, 2004, advised Mr. Opeka that neither American Foreign nor any of its affiliated companies had issued the Torrez Form E and had never provided insurance coverage for Torrez.

18. This was confirmed at hearing through the testimony of Ms. Zschoche, American Foreign's Operations Manager. Based on her review of company records she confirmed that neither American Foreign nor any of its affiliates issued the Torrez Form E. In this regard, she noted a number of discrepancies between it and those regularly issued by American Foreign (AF Form E). An AF Form E contains an expiration date and the notation "Uniform Information Services, Inc." at the bottom and an "Executed in Triplicate" notation at the top. The Torrez Form E does not contain these notations. The Torrez Form E is also missing a full sentence that is regularly contained in an AF Form E. In addition, the Torrez Form E refers to an erroneous policy number,⁷ includes a policy expiration date not contained in an AF Form E, refers to an

⁶ A summary of Mr. Opeka's investigation giving rise to CPAN No. 28402 is contained in the Complaint Report he prepared in this matter. *See*, Exhibit 1.

⁷ Policy numbers issued by American Foreign contain three alpha characters followed by six numeric characters. The Torrez Form E refers to three alpha characters and nine numeric characters.

erroneous address for American Foreign,⁸ and is executed by an individual who has never been employed by American Foreign or its affiliates. Ms. Zschoche also testified that AF Form Es are always filed directly with the involved regulatory agency. Copies of the same are not provided directly to the insured carrier.

19. At about 10:00 p.m. on the evening of April 17, 2004, Mr. Opeka received a call at home indicating that Torrez was at the Denver Merchandise Mart providing commercial transportation services in connection with the Horizon High School Prom (Prom) with the Torrez vehicle. Mr. Opeka went to the Merchandise Mart, arriving at approximately 10:30 p.m. Torrez had departed the area, but returned at about midnight. Mr. Opeka, a member of the Adams County Sheriff's Office, and a member of the Thornton Police Department approached the Torrez vehicle at that time. An unidentified female occupied the vehicle and its doors were locked. They persuaded her to unlock the doors and, upon doing so, she advised them that Torrez had been driving the vehicle but was then hiding in the back of the vehicle. They then persuaded Torrez to exit the vehicle.

20. Mr. Opeka questioned Torrez at that time and a member of the Adams County Sheriff's Office administered a sobriety test.⁹ Torrez denied providing commercial transportation services in connection with the Prom. He contended that the subject services were provided without compensation since his daughter was among the group of students for whom the transportation was provided. However, members of the party who Torrez transported to the

⁸ Ms. Zschoche testified that neither American Foreign nor any of its affiliates has ever had an office in Jamestown, New York, the address referred to in the Torrez Form E.

⁹ Based on the results of the sobriety test, Torrez was arrested by the Adams County Sheriff's Office. He has been charged with driving while under the influence of drugs, driving while his license was revoked, for unlawful possession of Meth Amphetamines, and for contributing to the delinquency of a minor. See, Exhibit 13. Mr. Opeka testified that, to his knowledge, these charges are still pending and Torrez has not been convicted of them.

Prom advised Mr. Opeka that Torrez had been hired to transport them to and from the Prom with the Torrez vehicle and that he had been compensated for these services.

21. Mr. Opeka then prepared CPAN No. 28573 on the basis of this information.¹⁰ See, Exhibit 14. He verbally advised Torrez of the substance of the allegations contained therein and provided a copy of CPAN No. 28573 to the arresting officer of the Adams County Sheriff's Office for service on Torrez. Mr. Opeka testified that he reviewed the Commission's records on April 16 and 19, 2004 (the business days before and after the above-described incident), and had confirmed that Torrez was not validly registered as a luxury limousine operator on these dates.

22. Ms. Madsen was one of the 12 members of the party who hired Torrez to transport them to and from the Prom. She located Torrez in early February 2004 through a Yellow Pages listing when she contacted him to arrange for the subject transportation. On April 17, 2004, Torrez transported Ms. Madsen's party in the Torrez vehicle from the residence of another member of the party to Maggiano's Restaurant in downtown Denver for dinner. After dinner he transported them in the Torrez vehicle to the Prom at the Merchandise Mart. Ms. Madsen testified that Torrez operated the vehicle in an erratic and reckless manner. Ms. Madsen's party paid Torrez a total of \$1,638.52 for the subject services.¹¹ Ms. Madsen testified that Torrez' daughter was not a member of her party.

III. DISCUSSION

23. Section 40-16-103, C.R.S., provides that no motor vehicle carrier exempt from regulation as a public utility (Exempt Carrier) may offer transportation services unless it is

¹⁰ A summary of Mr. Opeka's investigation giving rise to CPAN No. 28573 is contained in the Complaint Report he prepared in this matter. See, Exhibit 13.

¹¹ Ms. Madsen paid \$370.00 of this amount and the remainder was paid by other members of the party. This amount was also to include transportation back to the point of origin after the Prom was over. However, Torrez was unable to provide this service as a result of his arrest.

registered with the Commission. As part of the registration process, the Exempt Carrier must, among other things, submit proof that it has in place the insurance coverage required by § 40-16-104, C.R.S. That statute requires that Exempt Carriers maintain a general liability insurance policy in certain specified minimum amounts and also maintain adequate written documentation with the Commission that such insurance is in place. *See*, §§ 40-16-104(1) and (2), C.R.S.

24. An Exempt Carrier's failure to comply with the registration requirement imposed by § 40-16-103, C.R.S., subjects it to a civil penalty of not more than \$1,100.00 for each day's violation. *See*, §§ 40-7-113 (1)(f) and 40-7-115, C.R.S. An Exempt Carrier's failure to comply with the insurance requirement imposed by § 40-16-104 C.R.S., subjects it to a civil penalty of not more than \$11,00.00 for each day's violation. *See*, §§ 40-7-113 (1)(a) and 40-7-115, C.R.S. These penalty amounts may be doubled if the Exempt Carrier receives a second civil penalty assessment for these violations within one year after receiving an initial civil penalty assessment. *See*, § 40-7-113(3), C.R.S.

25. The statutory definition of Exempt Carrier includes "luxury limousine services." *See*, § 40-16-101(4), C.R.S. That term is defined as "...a specialized, luxurious transportation service provided on a prearranged, charter basis." *See*, § 40-16-101(3.3), C.R.S. *See also*, § 40-16-101(3)(a), C.R.S., which, in pertinent part, defines a "luxury limousine" as "...a chauffeur-driven, luxury motor vehicle with a rear seating capacity of three or more, for hire on a prearranged charter basis to transport passengers in luxury limousine service...."

26. The evidence establishes that Torrez was providing or offering to provide luxury limousine services within the meaning of the statutes referred to above on the dates encompassed by CPAN Nos. 28402 and 28573. The Torrez vehicle qualifies as a "luxury limousine" since, as described in Exhibits 3 through 9, it is a "super stretch" vehicle designed to hold up to

24 passengers. The service actually provided by Torrez to Mr. Munoz and Ms. Madsen's group satisfies the definition of luxury limousine service since it was rendered on a prearranged, charter basis with the Torrez vehicle, a luxury limousine. Therefore, Torrez was, on the dates in question, subject to the registration and insurance requirements set forth in §§ 40-16-103 and 40-16-104, C.R.S.

27. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence.

28. Exhibits 1 and 3 through 9 conclusively establish that Torrez was offering to provide luxury limousine services on December 2, 8, and 15, 2003, and on January 4, 2004. Mr. Opeka's undisputed testimony establishes that Torrez was not registered with the Commission as a luxury limousine carrier on these dates. Therefore, Torrez has violated § 40-16-103, C.R.S., as alleged in Counts 1 through 4 of CPAN No. 28402.

29. The undisputed testimony of Mr. Munoz, along with Exhibits 1 and 12, establish that Torrez provided luxury limousine services on January 5, 2004. Mr. Opeka's undisputed testimony establishes that Torrez was not registered with the Commission as a luxury limousine carrier on that date. The undisputed testimony of Mr. Opeka and Ms. Zschoche, along with Exhibit 2, establish that Torrez did not have the necessary insurance in effect or proof of the same on file with the Commission on that date. Therefore, Torrez has violated §§ 40-16-103 and 40-16-104, C.R.S., as alleged in Counts 5 and 6 of CPAN No. 28402.

30. The undisputed testimony of Mr. Opeka, along with Exhibit 1, establishes that Torrez provided luxury limousine services on January 31, 2004. Mr. Opeka's undisputed testimony establishes that Torrez was not registered with the Commission as a luxury limousine

carrier on that date. The undisputed testimony of Mr. Opeka and Ms. Zschoche, along with Exhibit 2, establish that Torrez did not have the necessary insurance in effect or proof of the same on file with the Commission on that date. Therefore, Torrez has violated §§ 40-16-103 and 40-16-104, C.R.S., as alleged in Counts 7 and 8 of CPAN No. 28402.

31. The undisputed testimony of Mr. Opeka and Ms. Madsen, along with Exhibit 13, establishes that Torrez provided luxury limousine services on April 17, 2004. Mr. Opeka's undisputed testimony establishes that Torrez was not registered with the Commission as a luxury limousine carrier on that date. The undisputed testimony of Mr. Opeka and Ms. Zschoche, along with Exhibit 2, establish that Torrez did not have the necessary insurance in effect or proof of the same on file with the Commission on that date. Therefore, Torrez has violated §§ 40-16-103 and 40-16-104, C.R.S., as alleged in Counts 1 and 2 of CPAN No. 28573.

32. Mr. Opeka testified that the violation of 49 CFR Part 391.2 referred to in Count 3 of CPAN No. 28573 was based on the criminal charges brought against Torrez when he was arrested by the Adams County Sheriff's Office on April 18, 2004. He also testified that Torrez had not been convicted of these charges. The subject federal regulation requires every motor vehicle to be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. Since Torrez has not been convicted, it has yet to be established that he actually violated the "laws, ordinances, and regulations" in question. Therefore, the evidence is insufficient to establish that Torrez violated 49 CFR Part 391.2 as alleged in Count 3 of CPAN No. 28573.

33. Section 40-7-113, C.R.S., authorizes the Commission to assess civil penalties for the involved violations of "not more than" \$1,100.00 for each violation of § 40-16-103, C.R.S., and "not more than" \$11,000.00 for each violation of § 40-16-104, C.R.S. Therefore, it has the

ability to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments. These include, among others, deterring future violations, motivating a carrier to come into compliance with the law, and punishing a carrier for prior, illegal behavior.

34. Based on the findings of fact and discussion above, the ALJ finds that the maximum civil penalty should be assessed in this case. Torrez did not appear at the hearing to defend the subject charges or to present mitigating evidence. Therefore, the evidence presented by Staff has not been disputed. The aggravating nature of that evidence is significant and compelling. It includes, in part at least, the following: (a) Torrez' prior record of public utility law violations and his failure or refusal to pay civil penalties assessed in connection with the same (*see*, Decision No. R03-0741 and CPAN No. 28017); (b) Torrez' failure to discontinue offering to provide or providing luxury limousine services in the absence of having the required insurance coverage in place; (c) Torrez' misrepresentation of facts and circumstances surrounding his request for a continuance of the hearing set in this matter on April 16, 2004;¹² (d) Torrez' misrepresentations concerning the status of his insurance coverage, including the misrepresentation made to Mr. Opeka in connection with insurance coverage purportedly secured through Manor, and his apparent complicity in preparing and/or filing fraudulent evidence of insurance coverage through American Foreign with the Commission (*i.e.*, the Torrez Form E); and (e) Torrez' providing passenger transportation in a reckless manner and, apparently, while under the influence of intoxicants.

35. The maximum civil penalty for Counts 1 through 8 of CPAN No. 28402 is \$28,600.00. Torrez received a second civil penalty assessment (CPAN No. 28573) involving the

same violations as were contained in CPAN No. 28402 within one year after receiving that CPAN. As a result, the maximum penalty amounts for Counts 1 and 2 of CPAN No. 28573 may be doubled (from \$1,100.00 to \$2,200.00 and from \$11,000.00 to \$22,000.00) pursuant to § 40-7-113 (3), C.R.S. This results in a total maximum civil penalty for Counts 1 and 2 of CPAN No. 28573 of \$24,200.00. The total combined civil penalty to be assessed to Torrez for CPAN Nos. 28402 and 28573 is, therefore, \$52, 800.00.

IV. CONCLUSIONS

36. Staff has sustained its burden of proving the allegations contained in Counts 1 through 8 of CPAN No. 28402 and Counts 1 and 2 of CPAN No. 28573 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

37. Staff has failed to sustain its burden of proving the allegation contained in Count 3 of CPAN No. 28573 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

38. Torrez should be assessed the maximum civil penalty for the above-described violations due to the aggravating factors discussed above.

V. ORDER

A. The Commission Orders That:

1. Respondent, Lawrence Torrez, doing business as Absolutely Devine Limousines, is assessed a civil penalty in the amount of: (a) \$1,100.00 each in connection with Counts 1 through 5 and 7 of Civil Penalty Assessment Notice No. 28402; (b) \$11,000.00 each in connection with Counts 6 and 8 of Civil Penalty Assessment Notice No. 28402; (c) \$22,000.00 in

¹² The incident that gave rise to CPAN No. 28573 occurred on the same day Torrez represented to the Commission that he would be attending a family funeral in Florida.

connection with Count 1 of Civil Penalty Assessment Notice No. 28573; and (d) \$2,200.00 in connection with Count 2 of Civil Penalty Assessment Notice No. 28573. He shall pay the total assessed penalty of \$52,800.00 within ten days of the effective date of this Order.

2. Count 3 of Civil Penalty Assessment Notice No. 28573 is dismissed.

3. 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.

4. 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.

5. 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

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