

Decision No. R17-0840

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 17V-0608EC

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IN THE MATTER OF THE PETITION OF BURTON H. BRUSHEL FOR A WAIVER OF  
RULE 6102 (PROOF OF MEDICAL FITNESS) OF THE RULES REGULATING  
TRANSPORTATION BY MOTOR VEHICLE, 4 CCR-723-6.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
STEVEN H. DENMAN  
GRANTING WAIVER WITH CONDITIONS**

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Mailed Date: October 19, 2017

**I. STATEMENT**

1. On September 11, 2017, Burton H. Brushel (Petitioner) filed a Petition for Waiver of Safety Regulations - Driver (Petition), seeking a waiver of Rule 6102 of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6 (Proof of Medical Fitness). The filing commenced this Proceeding.

2. Petitioner seeks the waiver of Rule 6102(a), 4 CCR 723-6, in order to allow him to continue driving as a chauffeur for luxury limousine companies regulated by the Commission. According to the Petition, Petitioner has medical issues that preclude him from providing chauffeur/driving services. Petitioner requests a medical waiver for a period of two years.

3. Rule 6102(a) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, incorporates by reference Federal Rule 49 *Code of Federal Regulations* (CFR) Part 391.41(b)(3), which provides that a person is physically qualified to drive a commercial vehicle if that person “[h]as no established medical history or clinical diagnosis of diabetes mellitus requiring insulin for control.”

4. The Petition is unopposed. Petitioner is the sole Party in this Proceeding.

5. The Petition was set for hearing on October 13, 2017 by Interim Decision No. R17-0787-I (mailed on September 27, 2017).

6. Decision No. R17-0787-I also temporarily extended an existing two-year waiver of Rule 6102(a) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, granted by Decision No. R15-1092 (mailed on October 5, 2015) in Proceeding No. 15V-0741EC, which became a Commission decision by operation of law on October 26, 2017, pursuant to § 40-6-109, C.R.S. The ALJ extended the existing waiver until the effective date of a final Commission decision in the instant Proceeding.

7. At the designated time and place, the undersigned Administrative Law Judge (ALJ) called this Proceeding for hearing. During the course of the hearing, the ALJ received testimony from the Petitioner regarding the reasons the waiver should be granted. In addition, Confidential Hearing Exhibits No. 1 through 4 were offered and admitted into evidence.

8. Pursuant to § 40-6-109, C.R.S., the ALJ 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 decision.

## **II. FINDINGS OF FACT**

9. Petitioner currently is employed by Hermes Worldwide Transportation (Hermes) on a full-time basis as a chauffeur/driver. Petitioner drives sedans, SUVs, 15-passenger vans, and 28- passenger, 32- passenger, and 55-passenger buses. Petitioner has been employed by Hermes for approximately four months. Previously Petitioner was employed as a driver for Presidential Worldwide Transportation for three and one-half years.

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10. On July 27, 2017, Petitioner received a medical examination [REDACTED]  
[REDACTED] The medical examination report (Confidential Hearing Exhibit 1) confirms  
that [REDACTED] The  
medical examination report indicates that [REDACTED]  
[REDACTED] In addition, the medical examiner's certificate [REDACTED]  
[REDACTED] (Confidential Hearing  
Exhibit 1, page 4.)

11. The medical examination report indicates that Petitioner's [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] (Confidential Hearing Exhibit  
1, pages 2 and 3.)

12. Petitioner testified that [REDACTED]  
[REDACTED]  
Petitioner testified that [REDACTED]  
[REDACTED] Petitioner testified that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

[REDACTED]

(Confidential Hearing Exhibits 2 and 3.)

13. Petitioner testified that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Petitioner concluded that [REDACTED]

[REDACTED]

14. Petitioner testified that he needs a two-year waiver [REDACTED]

[REDACTED]

[REDACTED]

### III. FINDINGS AND CONCLUSIONS OF LAW

15. The Commission has acknowledged that the prohibition against insulin dependent drivers operating motor vehicles imposed by Rule 49 CFR § 391.41(b)(3) is designed to protect the public safety. The Commission has recognized that it would be “contrary to law” to grant a waiver of that rule in the absence of proper assurances that the public safety will be protected.<sup>2</sup>

16. This Commission is generally in accord with federal policy that it is feasible to have a safe and practicable protocol to allow some insulin-dependent drivers to operate commercial motor vehicles; however, when considering exemptions such as that requested here, there should be assurances that “the issuance of diabetes exemptions will not be contrary to the

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<sup>1</sup> In an A1C hemoglobin test, the patient’s blood is drawn and measured for the overall effectiveness of blood glucose control over a period of time.

<sup>2</sup> See, Decision No. R00-1465 (mailed on December 26, 2000) in Proceeding No. 00M-660CP.

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public interest and that the exemption achieves an acceptable level of safety.”<sup>3</sup> The federal government has for a number of years allowed an exemption based upon a person’s demonstrated ability to manage diabetes effectively with the use of insulin. This Commission’s policy is congruent with this federal policy.

17. Federal Rule 49 C.F.R. § 391.41(b)(3), as incorporated into Rule 6102(a), 4 CCR 723-6, provides that a person is physically qualified to drive a motor vehicle if that person has no established medical history or clinical diagnosis of diabetes mellitus (diabetes) currently requiring insulin for control. Nevertheless, the Commission may grant a waiver from this requirement for good cause shown, if it finds that the waiver would not be contrary to the public interest.<sup>4</sup>

18. Petitioner testified that [REDACTED]  
[REDACTED] Petitioner indicated that [REDACTED]  
[REDACTED] Further, Petitioner  
confirmed that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Substantial evidence in the record demonstrates  
that [REDACTED]

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<sup>3</sup> A Report to Congress on the Feasibility of a Program to Qualify Individuals with Insulin-Treated Diabetes mellitus to Operate in Interstate Commerce as Directed by the Transportation Equity Act for the 21st Century. 68 Fed. Reg. 52443 (2003).

<sup>4</sup> See Rule 1003(a) of the Rules of Practice and Procedure, 4 CCR 723-1.

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19. Because Petitioner has demonstrated that [REDACTED], a grant of his request for a waiver is justified. However, in order to ensure the health, safety and welfare of his passengers, it is prudent to place conditions on the approval of the waiver of Rule 6102(a) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and Rule 49 CFR § 391.41(b)(3).

20. The denial of the requested waiver would cause Petitioner to suffer a financial hardship.

21. [REDACTED]  
[REDACTED] the waiver will be granted for a two-year period from the effective date of this Decision. As a condition granting the requested waiver, Petitioner must [REDACTED]

[REDACTED] Further, Petitioner must keep on file, a copy of his medical examination reports and make those reports available to Commission Transportation Staff upon request. Petitioner must notify Commission Transportation Staff immediately of any medical exam results that indicate a worsening of his condition.

22. As a further condition of the grant of the Petition, Petitioner should also [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] In the event that Petitioner experiences any adverse symptoms associated [REDACTED]  
[REDACTED] he must immediately park his vehicle in a safe and secure location and [REDACTED]. Petitioner should not proceed to drive a motor vehicle under

the jurisdiction of this Commission until [REDACTED] have caused all adverse symptoms to cease.

23. Pursuant to Commission Rule 6014(b) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, Petitioner shall carry a copy of this waiver Decision in his vehicle whenever Petitioner is operating a motor vehicle over which the Commission has jurisdiction. In addition, Petitioner shall provide Hermes, or any future employer that is a regulated motor vehicle carrier, with a copy of this Decision for its files.

24. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

#### **IV. ORDER**

##### **A. The Commission Orders That:**

1. The Petition for Waiver of Safety Regulations of Rule 6102(a), 4 *Code of Colorado Regulations* 723-6, and incorporated by reference, Federal Regulation 4 *Code of Federal Regulations* § 391.41(b)(3), filed by Mr. Burton H. Brushel, is granted for a two-year period from the effective date of this Decision.

2. The Petition for Waiver is granted subject to the following conditions:

- a. Mr. Brushel shall continue regularly scheduled exams every three months, but no longer than four months, with his primary care physician.
- b. Mr. Brushel shall keep on file, a copy of his medical examination reports, and make them available to Commission Transportation Staff upon request, within the confines of Health Insurance Portability and Accountability Act (HIPAA) restrictions.
- c. Mr. Brushel shall notify Commission Transportation Staff immediately of any medical exam results that indicate a worsening of his condition, within the confines of HIPAA restrictions.

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- d. In the event that Mr. Brushel experiences any adverse symptoms associated with [REDACTED] he shall immediately park his vehicle in a safe and secure location and administer [REDACTED]. Mr. Brushel shall not proceed to drive a vehicle under the jurisdiction of this Commission until [REDACTED] have caused all adverse symptoms to cease.
- e. Mr. Brushel shall carry a copy of this Decision in his vehicle at all times he is transporting passengers. He shall also provide Hermes Worldwide Transportation, or any future regulated motor vehicle carrier employer, with a copy of this Decision for its files.
3. Mr. Brushel shall promptly (within 30 days) notify and file with the Commission, any documents or information concerning any accident, arrest, license suspension, revocation or withdrawal, as well as any convictions involving Mr. Brushel during the period of the waiver granted herein.
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,

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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.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,  
Director