

Decision No. C14-1187-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0195EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ALL ACCESS TRANSPORTATION INC,

RESPONDENT.

**INTERIM DECISION GRANTING EXCEPTIONS AND
REMANDING MATTER FOR FURTHER PROCEEDINGS**

Mailed Date: September 29, 2014

Adopted Date: September 10, 2014

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I. STATEMENT

1. In this Decision, the Public Utilities Commission (Commission or PUC) grants the Exceptions filed by Staff of the Colorado Public Utilities Commission (Staff) to Recommended Decision No. R14-0626 (Recommended Decision) on July 2, 2014.

Staff had asserted 13 counts in Civil Penalty Assessment Notice (CPAN) No. 108832 against Respondent All Access Transportation, Inc. (All Access), for violations of state and incorporated federal transportation rules. These rules require regulated motor carriers to maintain records documenting driver employment and qualifications, vehicle inspection and maintenance, and time keeping. Because Staff did not offer the state and incorporated federal rules into the evidentiary record to show All Access acted in violation of the rules and did so intentionally, the Recommended Decision dismissed all counts alleged in the CPAN. The offering of the governing legal standards or rules into evidence is not necessary to demonstrate a respondent acted in violation of those rules, or to prove a respondent acted with the intent to violate those rules, and therefore the Commission reverses the Recommended Decision and remands this matter for further proceedings.

II. BACKGROUND AND RECOMMENDED DECISION

2. All Access is a motor carrier located in Fairplay, Colorado, providing luxury limousine services. All Access owns one limousine and employs one driver, Mr. Timothy Gardner. Staff conducted a Safety and Compliance Review of All Access on February 7, 2014 (2014 SCR). As stated in the Recommended Decision, “[t]he purpose of a Safety and Compliance Review is to determine whether a regulated motor carrier is in compliance with all applicable state and federal regulations pertaining to the motor carrier’s vehicles and drivers,” and the 2014 SCR “led to the issuance of the CPAN.”¹

¹ Recommended Decision, at ¶¶ 40-41.

3. On March 1, 2014, Staff commenced this Proceeding by sending the CPAN to All Access. The CPAN asserts the following 13 counts against All Access for violations of the Commission's rules and incorporated federal rules:

- a. Count 1: One violation of 4 CCR 723-6-6102(a)(I), incorporating 49 C.F.R. § 391.21(a), for failure "to furnish carrier with a driver employment application."
- b. Count 2: One violation of 4 CCR 723-6-6102(a)(I), incorporating 49 C.F.R. § 391.51(a), for failure "to maintain a driver qualification file."
- c. Count 3: One violation of 4 CCR 723-6-6102(a)(I), incorporating 49 C.F.R. § 396.3(b), for failure "to keep minimum records of inspection and vehicle maintenance."
- d. Counts 4 through 13: Ten violations of 4 CCR 723-6-6103(d)(II)(C), for failure "to maintain accurate and true time records."

4. Staff introduced into evidence an SCR of All Access conducted in June, 2010 (2010 SCR). The 2010 SCR listed 11 violations of state and incorporated federal rules. Staff offered the 2010 SCR in an attempt to demonstrate All Access's awareness in 2014 of the subject requirements because, in Staff's opinion, "every violation listed in the 2014 SCR Final Report is found in the violations listed in the 2010 SCR Final Report."²

5. The Recommended Decision required proof of two elements for each count seeking a civil penalty under § 40-7-113(1)(g), C.R.S.: (1) All Access violated the state or incorporated federal rule; and, (2) the violation was intentional. The Administrative Law Judge (ALJ) ruled that a violation is intentional "when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction."³

² *Id.*, at ¶ 64.

³ See, for example, Recommended Decision, at ¶ 71.

6. The Recommended Decision noted the absence of the state and federal regulations from the evidentiary record and made the following categorical statement:

Although Rule 4 CCR 723-1-1501(c) is the means by which Staff could have requested administrative notice of the federal regulations and Commission Rule in order to prove these elements, Staff made no request that the ALJ take administrative notice of those regulations or that Rule. When it put neither the federal regulations nor the Commission Rule into the evidentiary record, Staff made a litigation decision with which it must live. The ALJ will not put into the evidentiary record by administrative notice the documents that Staff should have put into the evidentiary record. This is a matter of maintaining the ALJ and the Commission as objective and neutral decision makers.⁴

7. The Recommended Decision dismissed the 13 counts for failure to prove violations of the applicable rules and for failure to show that any violation was intentional. Although the analysis varies among the counts, the Recommended Decision predicated the dismissals upon Staff's failure to offer the subject state incorporated federal regulation into the evidentiary record.

8. In Count 1, the ALJ identified the threshold issue of whether a requirement to furnish an employment form applies to a motor carrier or only to the employee.⁵ The ALJ dismissed Count 1, because Staff did not offer any documents or testimony addressing the substance of § 391.21 into the evidentiary record. The Recommended Decision concluded: "Without the information, the ALJ does not know the substance of 49 CFR § 391.21(a) (as revised on October 1, 2010) and, thus, cannot make a finding that Respondent is the person on whom the obligation falls and that Respondent violated that federal regulation on February 7, 2014."⁶ The Recommended Decision also found insufficient evidence of the second element of

⁴ Recommended Decision, n.6.

⁵ *Id.*, at ¶¶ 75-77.

⁶ *Id.*, at ¶ 78.

Count 1, intentional misconduct, due to the absence of the federal rules in the evidentiary record.⁷

9. The Recommended Decision dismissed Count 2, which alleged a failure by All Access to maintain a driver qualification file, due to the absence of proof of intentional misconduct. The ALJ noted evidence of Staff's verbal and written exchanges with All Access as part of the 2010 SCR that predated the alleged 2014 violations; but, "to make a finding that a violation was intentional, the record must establish that the substance of the cited federal regulation was the same in 2007 [which was applicable to the 2010 SCR] and in 2010 [applicable to the 2014 SCR]."⁸

10. The Recommended Decision dismissed Count 3, because, without the federal rules in evidence, the ALJ was unable to ascertain the substance of the regulation and thus make a finding of whether a violation occurred.⁹ The record also did not support intentional misconduct according to the Recommended Decision, due to the absence of evidence showing the rules supporting the 2010 SCR were the same as those underlying the 2014 SCR.¹⁰

11. Counts 4 through 13 alleged ten violations for failure to maintain accurate and true time records from January 22 through 31, 2014. The Recommended Decision applied the same reasoning to dismiss each of these counts as it did to dismiss Count 3.¹¹

⁷ *Id.*, at ¶ 80.

⁸ *Id.*, at ¶ 92.

⁹ *Id.*, at ¶ 103.

¹⁰ *Id.*, at ¶¶ 105, 106.

¹¹ *Id.*, at ¶¶ 116, 121-22.

III. STAFF'S EXCEPTIONS

12. Staff requests that the PUC reverse the ALJ's rulings requiring Staff to offer the state and federal regulations into evidence to sustain its burden to prove a violation of Commission rules. The exceptions seek remand of this proceeding and also requests that the Commission provide guidance of evidentiary requirements for future cases.

13. Staff cites and quotes §§ 13-25-106(1) and (2), C.R.S., the Colorado Rules of Evidence, and Professor Sheila K. Hyatt's treatise, *Colorado Evidence Law*, to argue that: the judge takes notice of state and federal common law, statutes, and rules; the parties do not offer the governing legal standards into evidence through exhibits or testimony; and, the court is charged with the responsibility of gathering and determining the legal standards to be applied to the facts. Staff's exceptions contrast a judge taking notice of governing state and federal *law* versus a requirement for a party to offer adjudicative *facts* through judicial or administrative notice procedures into the evidentiary record.

14. Staff's exceptions also question the necessity to prove the separate element of intentional misconduct. Referencing a Commission decision in another proceeding issued after the Recommended Decision at issue here, Staff contends intentional misconduct is not necessary to assess penalty for violations of obligations classified as "safety rules."¹²

IV. DISCUSSION

15. The Commission grants Staff's exceptions and remands this matter to the ALJ for further proceedings. Staff is correct; legal standards governing the alleged conduct at issue are

¹² Staff's Exceptions, n.3., citing Proceeding No. 14G-0149EC.

not facts to be proven through documentary or testimonial evidence. The judge ascertains the applicable law through briefing or other processes and applies the law to the findings of fact. The legal authorities cited and quoted by Staff control and decide the issues on exceptions. Section 13-25-106(1), C.R.S., says: “Every court of this state shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States.” As analyzed by Professor Hyatt, “[t]he law governing a case is not subject to ‘proof’ in the sense that other facts are proved under the rules of evidence. Hyatt, *Colorado Evidence Law*, 23 Colorado Practice Series § 201:1 (2008).

16. The procedures for taking administrative notice of facts for the evidentiary record do not apply to a judge’s determination of the governing case law, constitutional provisions, statutes, or rules.

17. We reverse the Recommended Decision’s dismissal of any count asserted in the CPAN based upon a ruling that, because Staff did not offer the state or federal rule into evidence, the judge is unable to ascertain the substance of the regulation to make a finding of whether the regulation applies to All Access or whether a violation occurred. We remand this proceeding to allow the judge to ascertain the applicable legal standards, determine whether the obligations apply to All Access, and apply the legal standards to the existing evidentiary record to conclude whether Staff carried its burden to show All Access violated the rules underlying the 13 counts.

18. We agree with the ALJ’s identification of the threshold issue in Count 1 of whether All Access is subject to the obligation to furnish an employment application. Incorporated Federal Rule 49 *Code of Federal Regulations* (C.F.R.) § 391.21(a) says: “a person shall not drive a commercial motor vehicle unless he/she has completed and furnished the motor carrier that employs him/her with an application for employment that meets the requirements of

paragraph (b) of this section.” This rule appears to impose obligations only upon an employee; yet, 49 C.F.R. § 391.1(b), defining the scope of part 391, says: “A motor carrier who employs himself/herself as a driver must comply with both the rules in this part that apply to motor carriers and the rules in this part that apply to drivers.” These rules thus require on remand a determination of whether the application requirement applies to All Access as a corporation employing on driver.

19. The Commission clarified in Proceeding No. 14G-0149EC that proof of intentional misconduct is not necessary to impose a penalty for violation of an obligation classified as a “safety rule.”¹³ We remand this proceeding for a determination of whether any of the rules underlying the 13 counts are “safety rules” and thus do not require proof of intentional misconduct for assessment of penalty.

20. We also address the procedure on remand if any of the counts are not based upon a safety rule and a showing of intent is required. Staff does not dispute the ALJ’s standard of intentional misconduct as “when a person is aware of a requirement or restriction and nonetheless commits an act, or fails to act, and that act or omission violates the requirement or restriction.”¹⁴ A respondent’s knowledge or awareness of an obligation may be demonstrated in multiple ways. In addition to showing a prior violation of an identical obligation, such proof may include, for example, conversations or correspondence with the respondent about the requirement, receipt of SCRs explaining the obligations, or a respondent’s execution of a document admitting knowledge of the rule. We reverse, therefore, the Recommended Decision to the extent it required proof of intent only by a showing of a prior, identical violation and

¹³ *Pub. Utils. Comm’n v. Advanced Limousine, LLC*, Proceeding No. 14G-0149EC, Decision No. C14-0774, issued July 8, 2014, at ¶ 8.

¹⁴ *See, for example*, Recommended Decision, at ¶ 71.

through a comparison of the state or federal rules that applied to the prior violation and to the alleged violations in the case. We remand this proceeding back to the ALJ for ~~a~~determination of whether the existing record demonstrates that the Staff carried its burden of proving awareness of the governing obligation at the time ~~of~~the allegedly violative action or omission.

V. ORDER

A. It Is Ordered That:

1. The Exceptions to Recommended Decision No. R14-0626 filed by Staff of the Colorado Public Utilities Commission on July 2, 2014, are granted.
2. The Commission remands this matter to the Administrative Law Judge for further proceedings consistent with this Decision.
3. This Decision is effective upon its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 10, 2014.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners