

Decision No. R14-0120

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13G-1056EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

DUKE EXECUTIVE LIMO,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
ASSESSING CIVIL PENALTY
AND CLOSING PROCEEDING**

Mailed Date: January 31, 2014

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I. STATEMENT

1. On October 4, 2013, Trial Staff (Complainant or Staff) of the Commission served Respondent Duke Executive Limo (Respondent or Duke), with Civil Penalty Assessment Notice

(CPAN) No. 107754 arising out of alleged violations of *Rule 6102(a)(I) of the Rules Regulating Transportation by Motor Vehicle*, 4 *Code of Colorado Regulations* (CCR) 723-6; 49 *Code of Federal Regulations* (CFR) § 396.3(b); and Rule 6103(b)(II), 4 CCR 723-6.

2. On October 29, 2013, counsel for Staff entered her appearance.

3. On October 30, 2013, this matter was referred to an administrative law judge (ALJ) by minute entry of the Colorado Public Utilities Commission (Commission or PUC).

4. Pursuant to Decision No. R13-1414-I, issued on November 8, 2013, an evidentiary hearing was convened in the Commission offices on January 23, 2014. Staff appeared through its counsel, Assistant Attorney General Jean S. Watson-Weidner. Respondent Duke, appeared through Mr. Nduka Onyeali. Mr. Onyeali stated that Duke is a sole proprietorship and he is the sole owner. Mr. Onyeali requested to represent the interests of Duke.

5. The ALJ explained Mr. Onyeali's rights and the hearing procedures. After being satisfied that Mr. Onyeali understood his rights and hearing procedures and was able to understand and communicate in English, the ALJ allowed Mr. Onyeali to proceed *pro se*.

6. Staff offered the testimony of William Schlitter. Respondent offered the testimony of Mr. Onyeali. Hearing Exhibits 1, and 2, and 4 through 15 were offered and admitted. At the conclusion of the evidence, both Staff presented an oral closing statement, Mr. Onyeali declined to make a closing statement. At that point, the ALJ closed the record and took the matter under advisement.

7. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

8. William Schlitter is a criminal investigator employed by the Commission's Transportation Investigation and Enforcement Section. His duties include performing safety and compliance reviews on carriers that are regulated by the Commission.

9. Respondent is a Luxury Limousine carrier operating with Commission Permit No. LL-01751.

10. Mr. Nduka Onyeali is the sole owner of Duke.

11. Duke is registered as a corporation in good standing with the Secretary of State of Colorado. *Hearing Exhibit 4*

12. The registered agent for Duke is Mr. Nduka Onyeali. *Hearing Exhibit 15, p.1.*

13. The address on record at the Commission for Duke is 6750 Green River Drive #E, Highlands Ranch, Colorado 80130. *Hearing Exhibit 7.*

14. Safety and compliance reviews entail reviewing any applicable PUC files on the carrier, driver qualifications files, vehicle maintenance files, and inspecting the vehicles.

15. On September 25, 2013, Investigator Schlitter conducted a safety and compliance inspection for Duke at 6750 Green River Drive #E, Highlands Ranch, Colorado. Investigator Brian Gates accompanied Investigator Schlitter and assisted in the inspection.

16. The safety and compliance inspection for Duke was completed at 1:19 p.m. on September 25, 2013.

17. As a result of the inspection, Investigator Schlitter found a total of seven violations. Among the violations was the failure of the Respondent to have vehicles periodically

inspected, and allowing Mr. Onyeali to drive passengers for compensation with an expired medical certificate.¹ *Hearing Exhibit 9*.

18. During the inspection, Mr. Onyeali admitted to having transported passengers for compensation on September 24, 2013, when his medical certificate was expired.

19. A safety and compliance inspection had previously been performed at Duke on June 25, 2009 by Investigator J.P. Opeka. In that inspection, Investigator Opeka documented ten violations including failure to have vehicles periodically inspected and allowing Mr. Onyeali to drive passengers for compensation with an expired medical certificate. *See Hearing Exhibit 10*.

20. Investigator Schlitter discussed the violations he found at Duke during his inspection with his supervisor and after taking account the severity of the violations, risk to public safety, and if the violations were repeat violations, he determined which violations to cite Duke.

21. Investigator Schlitter issued a CPAN on September 30, 2013 for two of the seven violations found during the safety and compliance inspection conducted on September 25, 2013. The violations were for failure to keep records of periodic inspections and maintenance of a vehicle² and allowing a driver to drive with an expired medical certificate³. *Hearing Exhibit 12*.

22. Investigator Schlitter mailed the CPAN via certified mail to Duke at the address that is registered with the Commission. *Hearing Exhibit 14*.

23. The CPAN was delivered to Duke on October 4, 2013, and signed for by Nduka Onyeali. *Hearing Exhibit 13*.

¹ Testimony was presented that the medical certificate expired on April 17, 2013.

² Rule 6102(a)(I), 4 CCR 723-1 and 49 CFR § 396.3(b).

³ Rule 6103(b)(II), 4 CCR 723-1.

24. The Respondent does not contest the violations cited in the CPAN. He admits his medical certificate was expired, although he states he was unaware it was expired at the time of the inspection. He also admits that he failed to provide Investigator Schlitter with any records of periodic inspections or maintenance of his vehicle.

25. The Respondent did obtain a new medical certificate and provided that information to Investigator Schlitter within four hours of the inspection. *Exhibit 11*.

26. As of the date of the hearing, Duke has failed to provide any records of periodic inspections or maintenance of his vehicle to the Commission.

III. DISCUSSION AND CONCLUSION

27. As the proponent of a Commission order, Complainant has the burden of persuasion in this proceeding pursuant to 4 CCR 723-1-1500 of the Rules of Practice and Procedure.

28. Section 40-7-116, C.R.S., mandates a number of procedures for the imposition of civil penalties by the Commission: After specifying that the listed officials are the ones authorized to issue civil penalty assessments for violations of law, § 116(1)(a) states that, "When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice." Section 116(1)(b) further directs that the civil penalty assessment notice "shall be tendered by the enforcement official, either in person or by certified mail, or by personal service by a person authorized to serve process under rule 4(d) of the Colorado rules of civil procedure." § 40-7-116, C.R.S.

29. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order." § 24-4-105(7), C.R.S. As provided in Commission Rule 4 CCR 723-1-1500,

“[t]he proponent of the order is that party commencing a proceeding.” Here, Staff is the proponent since it commenced the proceeding through issuance of the CPAN. Complainant bears the burden of proof by a preponderance of the evidence. *See*, § 13-25-127(1), C.R.S.; 4 CCR 723-1-1500. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App.1985). While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

30. The Respondent does not contest the alleged violations contained in the CPAN. The Respondent freely admits he failed to keep records to show that periodic inspections or maintenance has been performed on his vehicle and that he also allowed his medical examiners certificate to expire.

31. Respondent’s defense is that he has had periodic inspections and maintenance performed on his vehicle but has failed to keep any receipts or records of the inspections and maintenance and that he was unaware his medical certificate had expired and that he is healthy.

32. It is vital for all regulated carriers to be able to provide records that periodic inspections and maintenance have been performed on vehicles that are put into service. This requirement is necessary to ensure public safety. A statement with no documentary evidence is insufficient.

33. Mr. Onyeali testified that maintenance has been performed on his vehicle; there is no tangible evidence that any maintenance has been performed. During the inspection on September 25, 2013 no records of inspections or maintenance were presented to Investigator Schlitter and none were presented during the hearing.

34. Staff has met its burden of proof by a preponderance of the evidence that Duke failed to keep records of periodic inspections and maintenance of its vehicle.

35. Knowledge that a medical certificate has expired is not an element of the violation of transporting passengers for compensation without a valid medical certificate. It is only necessary to show that a person without a valid medical certificate transported passengers for compensation. Both Investigator Schlitter and Mr. Onyeali testified that Mr. Onyeali transported passengers on September 24, 2013 for compensation without a valid medical certificate.

36. Staff has met its burden of proof by a preponderance of the evidence that Duke allowed a driver to drive passengers for compensation when the driver's medical examiners certificate was expired.

37. Proper service of the CPAN is vital. "The mandatory requirements for valid service of process are fundamental because of the due process requirements of notice." *Bush v. Winker*, 892 P.2d 328, 332 (Colo. App. 1994).

38. In the instant case Mr. Schlitter sent the CPAN certified mail to the address listed, with the Commission, by the Respondent, as the mailing address for Duke. The certified letter was signed for by Mr. Onyeali. These actions are all consistent with proper service under § 40-7-116, C.R.S.

39. Service was made in accordance with § 40-7-116, C.R.S.

40. Having found violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. The Commission is authorized to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessment. § 40-7-113, C.R.S.

41. Pursuant to Commission Rule 4 CCR 723-1-1302(b):

The Commission may impose a civil penalty...will consider any evidence concerning some or all of the following factors:

- (I) the nature, circumstances, and gravity of the violation;
- (II) the degree of the respondent's culpability;
- (III) the respondent's history of prior offenses;
- (IV) the respondent's ability to pay;
- (V) any good faith efforts by the respondent in attempting to achieve compliance and to prevent future similar violations;
- (VI) the effect on the respondent's ability to continue in business;
- (VII) the size of the respondent's business; and
- (VIII) such other factors as equity and fairness may require.

42. A warning was issued to Duke in 2009 for the same violations contained in the CPAN issued in this proceeding.

43. There was no evidence presented of any previous CPAN issued or assessed against Duke.

44. It is noted the Respondent rectified his expired medical certificate within four hours of the inspection.

45. It is also noted that the Respondent has admitted culpability for the violations.

46. The welfare of the public is at stake with the safety and compliance review. It is through these reviews that the Commission can ensure the proper level of safety for everyone on the roads of Colorado. These are important regulations and cannot be ignored or deemed unimportant.

47. Respondent has hopefully come to understand that it is Duke's responsibility to follow regulations. The Respondent is required to follow the regulations or be subject to fines for violations.

48. For the foregoing reasons, the ALJ concludes that Respondent committed the violations as listed on CPAN No. 107754 between September 24, 2013 and September 25, 2013 and that an assessment of \$1,050.00 civil penalty, plus \$105.00 surcharge is warranted.

49. The ALJ finds that the civil penalty imposed achieves the following purposes underlying civil penalty assessments to protect the safety of those affected to the maximum extent possible within the Commission's jurisdiction: (a) deterring future violations, whether by other similarly situated carriers or by Respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for past illegal behavior.

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

IV. ORDER

A. The Commission Orders That:

1. As alleged in Civil Penalty Assessment Notice No. 107754, Respondent, Duke Executive Limo (Respondent), violated 4 *Code of Colorado Regulations*, 723-6-6102(a)(I); 49 *Code of Federal Regulations* 396.3 (b); and Rule 6103(b)(II).

2. Respondent is ordered to pay to the Commission within 30 days of the date that this Recommended Decision becomes the decision of the Commission, the sum of \$1,155.00. This amount represents the total of the civil penalty assessed for the violations found in Ordering Paragraph No. 1 plus the mandatory surcharge imposed by § 24-34-108, C.R.S.

3. Proceeding No. 13G-1056EC is now closed.

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.

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge