

Decision No. R14-0183

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13G-1155EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

SILVER LION LIMOUSINE LLC,

RESPONDENT.

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

Mailed Date: February 18, 2014

I. STATEMENT

1. On November 13, 2013, Staff of the Colorado Public Utilities Commission (Staff) filed a Civil Penalty Assessment Notice (CPAN) with the Colorado Public Utilities Commission (Commission or PUC) against Silver Lion Limousine LLC (Respondent or Silver Lion). The CPAN alleged violations of *Rule 6102(a)(I) of the Rules Regulating Transportation by Motor Vehicle*, 4 *Code of Colorado Regulations* (CCR) 723-6 and 49 *Code of Federal Regulations* (CFR) § 396.21(a); *Rule 6105(c)*, 4 CCR 723-6; *Rule 6103(d)(II)(C)*, 4 CCR 723-6; and *Rule 6102(a)(I)*, 4 CCR 723-6 and 49 CFR § 396.3(b)(2).

2. On December 4, 2013, the Commission referred this matter to an Administrative Law Judge (ALJ) to decide the merits of the CPAN.

3. Pursuant to Decision No. R13-1515-I, issued on December 9, 2013, an evidentiary hearing was convened in the Commission offices on February 4, 2014. The hearing was commenced 30 minutes later than scheduled due to inclement weather. Staff appeared through counsel, Assistant Attorney General Michael Axelrad. Respondent failed to appear.

4. Respondent had not filed a motion to continue the evidentiary hearing.

5. Staff offered the testimony of Michael Gullatte and Hearing Exhibits 3 through 5 were offered and admitted into the evidentiary record. At the conclusion of the evidence, Staff declined to make a closing statement. At that point, the ALJ closed the record and took the matter under advisement.

6. 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

7. Michael Gullatte is a criminal investigator employed by the Commission's Transportation Investigation and Enforcement Section. His duties include performing safety and compliance reviews (SCRs) on carriers that are regulated by the Commission.

8. Mr. Gullatte has worked for the Commission for over one year and has conducted 70 to 75 SCRs during that time.

9. Respondent is a Luxury Limousine carrier. Respondent had been operating with Commission Permit No. LL-01343, but the permit was subsequently revoked in December of 2013 due to a lack of insurance.

10. Mr. Jean Diboundje is the sole owner of Silver Lion.

11. SCRs entail reviewing any applicable PUC files on the carrier, driver qualifications files, vehicle maintenance files, and inspecting the vehicles.

12. On October 18, 2013, Investigator Gullatte conducted an SCR for Silver Lion at 2064 E. Oswego Way, Aurora Colorado. Mr. Diboundje was present during the SCR. *Hearing Exhibit 5*.

13. Silver Lion has only one vehicle in its possession, a 2003 Lincoln. This vehicle was put into service by Silver Lion in June of 2013. *Hearing Exhibit 5, p. 9*

14. As a result of the inspection, Investigator Gullatte found a total of nine violations. Among the violations was the failure of the Respondent to provide an employment application,¹ failure to submit driver² fingerprints to the PUC within 10 days of employment, failure to maintain and retain accurate and true time records for a driver,³ and failure to maintain a means to indicate nature and due date of inspections and maintenance on a vehicle in service for at least 30 days.⁴

15. A safety and compliance inspection had previously been performed at Silver Lion on February 10, 2009 by Investigator J.P. Opeka. In that inspection, Investigator Opeka documented seven violations including failure of the Respondent to provide an employment application⁵, failure to submit driver⁶ fingerprints to the PUC within 10 days of employment, failure to maintain and retain accurate and true time records for a driver,⁷ and failure to maintain

¹ Jean Diboundje

² Jean Diboundje

³ Jean Didoundje

⁴ 2003 Lincoln

⁵ Jean Diboundje

⁶ Jean Diboundje

⁷ Jean Diboundje

a means to indicate nature and due date of inspections and maintenance on a vehicle in service for at least 30 days.⁸ *Hearing Exhibit 4*.

16. There is no evidence that Mr. Diboundje has ever submitted his fingerprints to the PUC for a background check.

17. Investigator Gullatte prepared a CPAN for Silver Lion that contained the four violations noted in both the 2013 SCR and the 2009 SCR. *Hearing Exhibit 3*.

18. Investigator Gullatte attempted to serve the CPAN on Silver Lion by mailing the CPAN via certified mail to the Respondent on several occasion but was unsuccessful. On November 12, 2013, Investigator Gullatte contacted Mr. Diboundje and asked him to come to the offices of the Commission. When Mr. Diboundje came to the offices of the Commission, Investigator Gullatte personally served the CPAN on Mr. Diboundje. *Id.*

III. DISCUSSION AND CONCLUSION

19. 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.

20. 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(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(b) further directs that the civil penalty assessment notice “shall be tendered by the

⁸ 2002 GMC

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.

21. 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

22. The Respondent failed to appear for the hearing so no defense or evidence was presented contrary to the testimony of Investigator Gullatte.

23. The testimony of Investigator Gullatte is credible and establishes the necessary elements of CPAN No. 107950 issued to Silver Lion on November 12, 2013.

24. Staff has met its burden of proof by a preponderance of the evidence that Silver Lion failed to provide an employment application, failed to submit driver fingerprints to the PUC within 10 days of employment, failed to maintain and retain accurate and true time records for a driver and failed to maintain a means to indicate nature and due date of inspections and maintenance on a vehicle in service for at least 30 days.

25. 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).

26. In the instant case Investigator Gullatte personally served the CPAN on the owner of Silver Lion, Mr. Diboundje. These actions are consistent with proper service under § 40-7-116, C.R.S.

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

28. 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.

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

The Commission may impose a civil penalty, when provided by law. The Commission 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.

30. A warning was issued to Silver Lion in 2009 for the same violations contained in the CPAN issued in this proceeding.

31. Silver Lion has failed to address the violations since the 2009 SCR.

32. The Respondent failed to appear at the hearing and no mitigation was presented on its behalf.

33. 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 all those on the roads of Colorado. These are important regulations and cannot be ignored or deemed unimportant.

34. Respondent will hopefully come to understand that it is Silver Lion's responsibility to follow regulations or be subject to fines for violations.

35. For the foregoing reasons, the ALJ concludes that Respondent committed the violations as listed on CPAN No. 107950 on October 18, 2013 and that an assessment of a \$1,525.00 civil penalty, plus \$152.50 surcharge is warranted.

36. 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.

37. 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. 107950, Respondent, Silver Lion Limousine LLC (Respondent), violated *Rule 6102(a)(I) of the Rules Regulating Transportation by Motor Vehicle*, 4 *Code of Colorado Regulations* (CCR) 723-6 and 49 *Code of Federal Regulations* (CFR) § 396.21(a); *Rule 6105(c)*, 4 CCR 723-6; *Rule 6103(d)(II)(C)*, 4 CCR 723-6; and *Rule 6102(a)(I)*, 4 CCR 723-6 and 49 CFR § 396.3(b)(2).

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 \$1,677.50. This amount represents the total of the civil penalty assessed for the violation found in Ordering Paragraph No. 1 plus the mandatory surcharge imposed by § 24-34-108, C.R.S.

3. Proceeding No. 13G-1155EC 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)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director