

Decision No. R14-0292

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14V-0207CP

IN THE MATTER OF THE PETITION OF ERIK J. BARNES FOR AN ORDER OF THE
COMMISSION AUTHORIZING A WAIVER OF RULE 6102 (DRIVER) OF THE RULES
REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CCR 723-6.

**PUBLIC VERSION OF
RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING PETITION AND
GRANTING WAIVER, *NUNC PRO TUNC*
AND SUBJECT TO CONDITIONS**

Mailed Date: March 17, 2014

I. STATEMENT, FINDINGS, AND CONCLUSIONS¹

1. On March 5, 2014, Mr. Erik J. Barnes (Petitioner) filed a verified Petition for Waiver of Safety Regulations – Driver. On March 6, 2014, Petitioner supplemented the March 5, 2014 filing. On March 13, 2014, Petitioner filed an amendment to the March 5, 2014 filing. As used in this Decision, unless the context indicates otherwise, Petition refers to the March 5, 2014 filing as supplemented on March 6, 2014 and as amended on March 6, 2014.

2. Three documents are attached to the Petition: (a) Petitioner's Colorado Motor Vehicle Record for the past three years (driving record); (b) Medical Examination Report for Commercial Driver Fitness Determination dated February 10, 2014 (Medical Examination Report); and (c) a letter from Dr. Heather E. Kelly (Kelly letter). Each of these documents contains Petitioner's social security number or date of birth, or both, or is a confidential medical

¹ The confidential information is redacted from this version of the Recommended Decision.

report. As a result, these documents contain information that is confidential and are filed under seal with the Commission. Reference in this Decision to information contained in those documents is confidential.

3. On March 12, 2014, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

4. Pursuant to § 40-6-109(2), C.R.S., the ALJ now transmits to the Commission the record of this Proceeding together with a written recommended decision.

5. The Petition requests a waiver of 49 *Code of Federal Regulations* (CFR) § 391.41(b)(3) (2010), as made applicable in Colorado by Rule 4 *Code of Colorado Regulations* 723-6-6102(a)(I).² Petitioner requests a two-year waiver, beginning February 11, 2014 and ending February 11, 2016.

6. Petitioner drives taxicabs in the Denver metropolitan area. This is his livelihood.

7. Petitioner has [REDACTED]

[REDACTED]. As a result, the Medical Examination Report (at 3) states that Petitioner is “temporarily disqualified [from certification as a commercial driver] due to” that medical condition. The Medical Examination Report establishes that Petitioner meets all other physical requirements and qualifications for certification as a commercial driver.

8. The Kelly letter states that, at present, Petitioner’s [REDACTED]
[REDACTED]. The Kelly letter contains the opinion that Petitioner is able safely to operate a motor vehicle and that there is no reason that Petitioner’s medical condition should prevent him from pursuing his occupation as a taxi driver.

² This Rule is found in the Rules Regulating Transportation by Motor Vehicle, Part 6 of 4 *Code of Colorado Regulations* 723.

9. Petitioner's driving record establishes that, in the past three years, he has had one moving violation (July 2011). It also establishes that, over that same period, Petitioner has not been involved in a traffic accident.

10. Petitioner seeks a two-year waiver of 49 CFR § 391.41(b)(3). That section reads: "A person is physically qualified to drive a commercial motor vehicle if that person -- ... has no established medical history or clinical diagnosis of [REDACTED] [REDACTED]"

11. The record in this Proceeding establishes: (a) Petitioner has [REDACTED] [REDACTED]; (b) but for the [REDACTED], Petitioner would be physically qualified to drive a commercial motor vehicle (*e.g.*, taxicab); (c) strict application of 49 CFR § 391.41(b)(3) would work a hardship on Petitioner because it would deprive him of the opportunity to continue in his profession as a taxi driver; and (d) granting the requested waiver will not compromise the public safety or the public interest, so long as Petitioner follows the prescribed medical regimen for [REDACTED] [REDACTED].

12. Based on the record of this Proceeding, the ALJ finds the Petitioner has met his burden of proof in this matter and that the Petition should be granted. In addition, the ALJ finds that the waiver should be subject to the conditions contained in the Ordering Paragraphs of this Decision. The ALJ concludes that, subject to the conditions contained in the Ordering Paragraphs, Petitioner Erik J. Barnes should be granted a waiver of 49 CFR § 391.41(b)(3) *nunc pro tunc* to February 11, 2014 and that the **waiver should expire on February 11, 2016.**

13. In accordance with § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. Subject to the conditions stated below, the verified Petition for Waiver of Safety Regulations - Driver filed on March 5, 2014 by Erik J. Barnes, as supplemented on March 6, 2014 and as amended on March 13, 2014, is granted.

2. Subject to the conditions stated below, Petitioner Erik J. Barnes is granted a waiver of 49 *Code of Federal Regulations* § 391.41(b)(3) (2010), as made applicable in Colorado by Rule 4 *Code of Colorado Regulations* 723-6-6102(a)(I). The waiver is granted *nunc pro tunc* to February 11, 2014. The waiver shall remain in effect through and including February 11, 2016, unless the Commission revokes the waiver upon notice to Mr. Barnes.

3. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Erik J. Barnes shall follow the medically-prescribed regimen for treatment of [REDACTED]. If this condition is not met, the waiver granted by this Decision is rendered void without further order of the Commission.

4. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Erik J. Barnes shall notify the Commission, in writing and within seven calendar days of the occurrence, if he is involved in a motor vehicle accident. This reporting requirement applies only to a motor vehicle accident that occurs while Petitioner Erik J. Barnes is driving a taxicab. This reporting requirement applies irrespective of the party at fault for the accident. The written notice shall be in the form of a letter addressed to the Commission's Chief of Transportation. If this condition is not met, the waiver granted by this Decision may be rendered void by subsequent order of the Commission.

5. The waiver granted in Ordering Paragraph No. 2 is subject to this condition: Petitioner Erik J. Barnes shall comply with the Rules Regulating Transportation by Motor Vehicle as they may be applicable to him and shall comply with the terms of this Decision. If this condition is not met, the waiver granted by this Decision may be rendered void by subsequent order of the Commission.

6. 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.

7. 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.

8. 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

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director