

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14V-0232CP

IN THE MATTER OF THE PETITION FOR WAIVER/VARIANCE OF SAFETY
REGULATIONS-DRIVER OF COMMISSION RULE 4 CCR 723-6-6102(A) OF
MR. MICHAEL PORRAS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
GRANTING WAIVER WITH CONDITIONS**

Mailed Date: April 14, 2014

I. STATEMENT

1. On March 17, 2014, Mr. Mike M. Porras, Jr. (Petitioner) filed a Petition for Waiver of Safety Regulations-Driver (Petition). Petitioner sought a waiver of Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-6-6102(a) to allow Petitioner to drive a taxicab. According to the Petition, because Petitioner was diagnosed with type 2 diabetes, and is insulin dependent, he is precluded from being certified medically to drive commercially without a waiver. Commission Rule 4 CCR 723-6-6102(a), incorporates by reference, Federal Rule, 49 *Code of Federal Regulations* Part 391.41(b)(3), which in turn provides that a person is physically qualified to drive a commercial vehicle if that person “has no established medical history or clinical diagnosis of diabetes mellitus requiring insulin for control.” The Petition is unopposed.

2. This matter was set for hearing on April 11, 2014. At the assigned place and time the undersigned administrative law judge (ALJ) called the matter for hearing.

3. During the course of the hearing, testimony was received from the Petitioner regarding the reasons the waiver should be granted.

4. 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

5. Petitioner is in the process of applying for a position as a taxicab driver with Metro Taxi. However, On March 17, 2014, Petitioner received a medical examination administered by V. Inez Brasher, D.C. located in Commerce City, Colorado. The medical examination report which was attached to the Petition, confirms that Petitioner has type 2 diabetes, is insulin dependent, and has been taking insulin to control the diabetes for a period of time prior to the date of the examination. The medical examination report indicates that Petitioner failed the exam due to insulin dependence and also indicates the medications he is required to take both orally and by injection for symptoms associated with type 2 diabetes.

6. Other than the type 2 diabetes and the requirement that Petitioner take daily doses of insulin, the medical examination report shows that Petitioner is in relatively good health. His corrected eyesight in both eyes is 20/20 acuity (Snellen). His peripheral vision is 90° horizontal field of vision in both eyes. Additionally, Petitioner's blood pressure is well within normal readings. No other health issues are indicated.

7. Petitioner was diagnosed with type 2 diabetes 15 years ago. Since that time, he has been under the care of his primary care physician. Petitioner self-injects two types of insulin three times a day. In addition, he takes oral medication. Petitioner represented that he suffers no symptoms during the day such as fatigue, dizziness or extreme hunger.

Petitioner further testified that he has never had any other symptoms typically associated with type 2 diabetes such as blurred vision, fainting or eyesight problems. Nor has he experienced diabetic coma, kidney damage or damage to his eyesight.

8. Petitioner testified that he manages his diabetes by getting regular check-ups with his primary care physician – at least once every three months. As part of his most recent checkup, Petitioner stated that an A1c hemoglobin test was conducted, in which his blood is drawn and measured for the overall effectiveness of blood glucose control over a period of time. Petitioner represented that his last A1c level was measured at 7.4, which indicates that his blood glucose is fairly well controlled. Petitioner also conducts a finger stick test every two days. His levels indicated from those tests also typically confirm that his daily blood glucose levels are fairly well controlled.

9. Petitioner has not received any prior waivers from the provisions of Safety Rule 391.41(b)(3).

III. FINDINGS, AND CONCLUSIONS OF LAW

10. The Commission has acknowledged that the prohibition against insulin dependent drivers operating motor vehicles imposed by Safety Rule 391.41(b)(3) is designed to protect the public safety. *See*, Decision No. R00-1465, Proceeding No. 00M-660CP issued December 26, 2000. The Commission has recognized that it would be “contrary to law” to grant a waiver such as that requested here, in the absence of proper assurances that the public safety will be protected. *Id.*

11. This Commission is generally in accord with federal policy that while a safe and practicable protocol to allow some insulin-dependent drivers to operate commercial motor vehicles is feasible, nonetheless, when considering exemptions such as that requested here,

there should be assurances that “the issuance of diabetes exemptions will not be contrary to the public interest and that the exemption achieves an acceptable level of safety.”¹ It is apparent that the federal government has repositioned its policy from an absolute bar to driving by individuals with insulin dependent diabetes, to a possible exemption based upon a demonstrated ability to effectively manage the diabetes with the use of insulin. This Commission’s policy course is congruous with federal policy.

12. While Rule 391.41(b)(3) 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, nonetheless, the Commission may grant a waiver or variance from this requirement for good cause shown, if it finds that the grant would not be contrary to statute. 4 CCR 723-1-1003(a).

13. Petitioner testified that his diabetic condition has not adversely affected his ability to safely operate a motor vehicle. Petitioner indicated that he has suffered no adverse symptoms such as fatigue, blurred vision, faintness or dizziness either on the job or in his daily routines. There is no reason to doubt his veracity regarding those representations. Further, Petitioner confirmed that he is vigorously maintaining his blood glucose levels by injecting insulin several times a day, which seems sufficient to maintain proper blood sugar levels throughout the day. His A1c tests and finger stick tests indicate that his blood glucose is well controlled. Petitioner’s glucose levels are currently tested every three months by his primary care physician and there was no indication that his daily maintenance routines have changed over the course of the last 15 years. It would appear that Petitioner’s diabetes is controlled at this time.

¹ *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).

14. Because Petitioner has demonstrated that his diabetes is managed and controlled at this time, a grant of that request 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 the Safety Rule.

15. Because type 2 diabetes is a serious medical condition, which can result in the onset of adverse symptoms without warning, the waiver will be granted for a one year period from the effective date of this Decision. As a condition of the grant of the requested waiver, Petitioner must continue with his regularly scheduled exams with his primary care physicians every three months. Further, Petitioner must keep on file, a copy of his medical exam reports and make those reports available to Commission Transportation Staff upon request. As a driver for a jurisdictional transportation provider, Petitioner must notify his jurisdictional transportation employer and Commission Transportation Staff immediately of any medical exam results that indicate a worsening of Petitioner's condition.

16. As a further condition of the grant of the Petition, Petitioner must also continue to monitor his blood sugar daily and carry a source of instant glucose on him when driving a taxicab for use if signs or symptoms of low blood sugar appear. In the event that Petitioner experiences any adverse symptoms associated with his type 2 diabetes, including, but not limited to, blurred vision, double vision, dizziness, faintness, extreme hunger or headache, he is to immediately park his vehicle in a safe and secure location and administer the instant glucose. Petitioner should not proceed to drive a vehicle under the jurisdiction of this Commission until the instant glucose has caused all related symptoms to cease. If Petitioner does not have instant glucose available, he is to carry on his person at all times a fast acting source of glucose such as "Smarties" or other similar source of glucose.

17. It is highly advisable that Petitioner also provide the Commission with a sworn affidavit that he waives pertinent Health Insurance Portability and Accountability Act (HIPAA) restrictions to allow the Commission limited access to pertinent medical exam results, as well as other medical information relevant to Petitioner's position as a taxicab driver to ensure compliance with this Waiver.

18. Petitioner shall also submit to the Commission, the results of his most recent follow-up examination regarding his type 2 diabetes within 60 days from the effective date of this Decision. Additionally, Petitioner will be required to submit the most recent examination report regarding his type 2 diabetes six months from the effective date of this Decision in order to determine whether his diabetes remains controlled.

19. Pursuant to Commission Rule 4 CCR 723-6-6014(b), Petitioner shall ensure that a copy of the waiver is: (1) carried on his person whenever Petitioner is operating a motor vehicle over which the Commission has jurisdiction; and (2) maintained in Petitioner's jurisdictional employer's driver's qualification file.

20. 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 Commission Rule 4 *Code of Colorado Regulations* 723-6-6102(a) and incorporated by reference, federal regulation 4 *Code of Federal Regulations* Part 391.41(b)(3) filed by Mr. Mike M. Porras, is granted for a one year period from the date of this Decision.

2. The Petition for Waiver is granted subject to the following conditions:
 - a. Mr. Porras shall continue regularly scheduled exams every three months with his primary care physician.
 - b. Mr. Porras shall keep on Commission file, a copy of his medical exam reports, which he shall keep on file and make available to Commission Transportation Staff upon request within the confines of Health Insurance Portability and Accountability Act (HIPAA) restrictions.
 - c. Mr. Porras shall provide a copy of his most recent medical exam report to Commission Transportation Staff within 60 days of the effective date of this Decision.
 - d. Mr. Porras shall provide Commission Transportation Staff with a copy of his most recent medical exam report six months from the effective date of this Decision.
 - e. Mr. Porras shall notify Commission Transportation Staff immediately of any medical exam results that indicate a worsening of Mr. Porras's condition within the confines of HIPAA restrictions.
 - f. In the event that Mr. Porras experiences any adverse symptoms associated with his type 2 diabetes, including, but not limited to, blurred vision, double vision, dizziness, faintness, or extreme hunger, he shall immediately park his vehicle in a safe and secure location and administer a source of instant glucose. Mr. Porras shall not proceed to drive a vehicle under the jurisdiction of this Commission until the instant glucose, in whatever form administered, has caused all related symptoms to cease.
 - g. It is advised that Mr. Porras should provide the Commission with a sworn affidavit that he agrees to waive pertinent HIPAA restrictions to allow the Commission to have limited access to his medical exam results when necessary.
3. Mr. Porras 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. Porras 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, 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

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director