

Decision No. R14-0597

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0045TO

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

MC BIGGS, INC., DOING BUSINESS AS AUTOMATIC RECOVERY TOWING,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
ASSESSING CIVIL PENALTY**

Mailed Date: June 4, 2014

I. STATEMENT

1. The captioned proceeding was initiated on January 9, 2014, when the Staff of the Colorado Public Utilities Commission (Staff) issued Civil Penalty Assessment Notice (CPAN) No. 107848 to MC Biggs, Inc., doing business as Automatic Recovery Towing (Respondent), alleging one violation of 4 *Code of Colorado Regulations* (CCR) 723-6-6508(b)(I) of the Rules Regulating Transportation by Motor Vehicle, for failure to obtain proper authorization to tow a vehicle. The total amount of the civil penalty assessment for the violation of 4 CCR 723-6-6508(b)(I) is \$1,210.00. Respondent was served with a copy of CPAN No. 107848 on January 10, 2014 by certified mail, return receipt requested.

2. On February 3, 2014, Staff filed its entry of appearance in this matter through its legal counsel, the Office of the Colorado Attorney General.

3. On February 5, 2014, the Colorado Public Utilities Commission (Commission) referred this matter to an Administrative Law Judge (ALJ) for disposition. The matter was subsequently assigned to the undersigned ALJ.

4. CPAN No. 107848 provides that if Respondent wishes to contest the allegations contained therein, or if Respondent does not pay the penalty amount within 10 days of its receipt of the CPAN, Respondent is obliged, within 15 days of such receipt, to contact the Commission to set the matter for hearing. In the absence of such a contact, CPAN No. 107848 provides that it will become a Complaint to Appear Notice and that the Commission will set a hearing date without regard to Respondent's wishes.

5. Respondent failed to respond to the CPAN by indicating it admits that it violated the Commission Rules indicated by paying the civil penalty assessment within the time periods specified in CPAN No. 107848; nor did Respondent contact the Commission to set a hearing date regarding the alleged violations contained in CPAN No. 107848. Therefore, a hearing in this matter was set for Wednesday, March 19, 2014.

6. At the assigned place and time the evidentiary hearing in this proceeding was held. Appearances were entered by Commission Transportation Staff. Criminal Investigator (CI) Anthony Cummings testified on behalf of Staff. During the course of the hearing, Exhibit Nos. 1, 2, and 4 through 10 were identified, offered, and entered into evidence. Hearing Exhibit No. 3 was withdrawn. At the conclusion of the hearing, the undersigned ALJ took the matter under advisement.

7. 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 order.

II. FINDINGS OF FACT

8. The civil penalty assessment and testimony in this matter stems from a single incident which occurred on August 27, 2013.

9. CI Cummings testified that the Commission Investigations Unit was initially informed of the tow in question when the Consumer Affairs Unit of the Commission forwarded a complaint it received regarding a tow of a vehicle from 940 Motor City Drive in Florissant, Colorado. The complaint information form summarized information it received from the vehicle's owner regarding the alleged illegal tow by Respondent. The receipt of that complaint information form commenced Staff's investigation.

10. According to CI Cummings, a vehicle owned by a private party and parked along a public roadway was towed by Respondent without prior authorization. Because the vehicle was parked on a roadway, CI Cummings indicated that authorization of the vehicle owner or operator, or, after 48 hours, the authorization of law enforcement was required in order to tow the a vehicle. CI Cummings testified that no such authorization was given.

11. Rather, based on CI Cummings' investigation, he determined that Mr. Shawn Ansell, the branch operations manager of an Enterprise Rent-A-Car business located directly in front of the roadway requested that the vehicle be towed. According to the testimony, the vehicle in question was parked on the roadway in front of the car rental business. The manager of that business requested that the vehicle be towed and signed a tow invoice from Respondent, Automatic Recovery & Towing indicating that he indeed authorized the tow. *See*, Exhibit No. 2.

12. The invoice also shows that the tow occurred on August 27, 2013 at 11:55 a.m. at 940 Motor City Dr. in Florissant, Colorado, and the name of the tow truck driver was Scott Biggs. The invoice further indicates that Mr. Shane Ansell, previously identified as the manager of Enterprise Rent-A-Car was the person authorizing the tow. The amount of the tow with mileage and storage of the vehicle was listed at \$654.00.

13. CI Cummings further testified that on November 7, 2013, he contacted the owner of the towed vehicle to obtain additional information regarding the August 27, 2013 tow. According to CI Cummings, the vehicle owner stated that she went to Respondent's tow yard located at 307 Prairie Road to pay for the release of her vehicle.

14. CI Cummings also contacted the corporate office of Enterprise Rent-A-Car and learned that the company had reimbursed the vehicle owner \$654.00 for the amount she paid for the release of the vehicle. Subsequently, on December 20, 2013, CI Cummings sent a letter entitled *Request for Refund* to Respondent indicating that it was CI Cummings' position, based on the facts expressed in the letter, that Respondent violated 4 CCR 723-6-6508(b)(I). As a result, CI Cummings requested that Respondent provide a refund to Enterprise Rent-A-Car in the amount of \$654.00. Respondent was directed to provide a refund check to the Commission within three business days of receiving the letter.

15. CI Cummings testified that Respondent provided the refund check to the Commission in the amount requested, and the check was then forwarded to Enterprise Rent-A-Car. Hearing Exhibit No. 5 is a U.S. Postal Service certified mail return receipt which CI Cummings indicates shows that the check was in fact received by Enterprise Rent-A-Car.

16. CI Cummings further indicated that he contacted the Colorado Springs Police Department on October 17, 2013 regarding the tow. According to CI Cummings, based on his

conversation with the police department, the tow that occurred on August 27, 2013 was called in to the police as a private property tow. Based on the information he obtained, CI Cummings prepared CPAN No. 108474 on January 9, 2014, which alleges that Respondent violated Commission Rule 4 CCR 723-6-6508(b)(I) for failing to obtain proper authorization to tow the vehicle. *See*, Hearing Exhibit No. 6.

17. CI Cummings then provides the steps he followed in ensuring that the CPAN was properly served and received by Respondent. *See*, Hearing Exhibit No. 7 which is a screen shot from the Colorado Secretary of State's website by which CI Cummings verified Respondent's correct address. Hearing Exhibit No. 8 is a copy of the U.S. Postal Service return receipt indicating that the CPAN was received by Respondent on January 10, 2014. Hearing Exhibit No. 9 is a letter from the U.S. Postal Service confirming delivery of the CPAN to Respondent.

18. Finally, CI Cummings testified that it appears that Respondent is no longer operating as a towing carrier. He pointed out that Decision No. R14-0059, issued January 15, 2014 revoked Respondent's operating permit for failure to maintain evidence of financial responsibility or proof of insurance.

19. CI Cummings further testified that he did not determine any mitigating circumstances in this case, but did find aggravating circumstances. CI Cummings testified that the owner of the vehicle indicated to him during his interview with her on November 7, 2013 that Respondent provided her a check for \$100.00 on September 26, 2013, which CI Cummings assumed was accepted by the vehicle owner. CI Cummings maintains that the check was to influence the vehicle owner to drop her complaint with the Commission.

20. 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 order.

III. FINDINGS AND CONCLUSIONS

21. The Commission has subject matter jurisdiction over this matter and personal jurisdiction over the Respondent pursuant to §§ 40-1-103 and 40-10.1-102, C.R.S.

22. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence. 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 Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.

23. Pursuant to Commission Rule 4 CCR 723-1-1302(b) of the Rules of Practice and Procedure:

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 business of the respondent; and

(VIII) such other factors as equity and fairness may require.

24. Commission Rule 4 CCR 723-6-6508(b)(I) provides as follows:

(b) Authorization to Perform Nonconsensual Tow

(I) A towing carrier shall not tow any motor vehicle unless one of the following conditions is met:

- (A) the towing carrier is directed to perform a tow by a law enforcement officer;
- (B) the towing carrier is requested to perform a tow by the owner, authorized operator, or authorized agent of the owner of a motor vehicle; or
- (C) the towing carrier is requested to perform a tow upon the authorization of the property owner.

25. It is undisputed that the vehicle was parked alongside a roadway and was towed pursuant to a request by the manager of the business adjacent to the roadway, Enterprise Rent-A-Car. Indeed, Hearing Exhibit No. 4, Respondent's towing invoice, verifies CI Cummings' testimony. It is further undisputed that the vehicle owner was required to pay, and did pay, \$654.00 for the release of her vehicle. The evidence demonstrates that because the vehicle was parked alongside a roadway, Respondent conducted the non-consensual tow without the proper authorization as required by Rule 6508(b)(I). While CI Cummings testified that the Colorado Springs Police Department was notified of the tow, it was called in as a private property tow. Therefore, it is found that Respondent violated 4 CCR 723-6-6508(b)(I).

26. It is also undisputed that Enterprise-Rent-A-Car reimbursed the vehicle owner for the full amount of \$654.00 incurred for the tow. Respondent in turn reimbursed Enterprise Rent-A-Car in the amount of \$654.00 after being requested to do so by CI Cummings in a letter dated December 20, 2013.

27. CI Cummings testified that the vehicle owner was paid \$100.00 by Respondent in turn for dropping the complaint. However, the testimony was based purely on hearsay with no supporting affidavit provided by the vehicle owner attesting to such an allegation. Therefore, the testimony regarding the circumstances surrounding the \$100.0 payment will not be considered as an aggravating factor in this matter.

28. While CI Cummings testified that no mitigating factors could be ascertained, it is found that the prompt payment by Respondent to Enterprise Rent-A-Car for the full amount the company paid to the vehicle owner is a mitigating factor here. The lack of evidence of any previous violations of Commission Rules is also a factor in mitigation to be considered in assessing a civil penalty. It is also important to note that Respondent is no longer operating as a towing carrier. Staff provided evidence that Respondent's towing permit was revoked by Decision No. R14-0059. A subsequent inquiry by CI Cummings to the Colorado Springs Police Department confirmed that Respondent has closed its facilities and its tow trucks have not been seen in the area by the police.

29. One of the factors in assessing a civil penalty is for the amount to serve as inducement to refrain from violating laws and regulations in the future. As Respondent no longer operates as a towing carrier, this factor is no longer applicable unless Respondent seeks to obtain a towing carrier permit in the future pursuant to Commission Rules. It would appear that Respondent has accepted culpability to an extent as evidenced by the reimbursement of the towing charge to Enterprise Rent-A-Car.

30. Considering the provisions of Rule 1302(b), while it is found that Respondent is culpable for violating Rule 6508(b)(I), the civil penalty imposed on Respondent will be reduced to \$242.00. This amount is found to be appropriate under the circumstances of this case.

This civil penalty amount includes the 10 percent surcharge required pursuant to § 24-34-108, C.R.S. Such civil penalty assessment shall be due and payable no later than 30 days after the effective date of this Decision.

31. 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. MC Biggs Inc., doing business as, Automatic Recovery and Towing is assessed a civil penalty in the amount of \$242.00 for Count 1 of Civil Penalty Assessment Notice No. 107848 for one violation of 4 *Code of Colorado Regulations* 723-6-6508(b)(I) for failure to obtain proper authorization for non-consensual tow of motor vehicle.

2. MC Biggs Inc., doing business as, Automatic Recovery and Towing shall remit to the Colorado Public Utilities Commission, a civil penalty in the amount of \$242.00 within 30 days of the effective date of this Decision.

3. 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.

4. As provided by § 40-6-106, 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 recommended 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 a basic finding 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.

5. If exceptions to this Recommended 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

Doug Dean,
Director