

Decision No. R14-0954

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13G-1149HHG

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

MOVERS USA LLC.,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DISMISSING CIVIL PENALTY ASSESSMENT NOTICE**

Mailed Date: August 7, 2014

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I. STATEMENT, FINDINGS OF FACT, DISCUSSION AND CONCLUSIONS**A. Procedural History.**

1. On October 28, 2013, Commission trial Staff (Staff) with the Public Utilities Commission (Commission or PUC) filed a Civil Penalty Assessment Notice (CPAN) against Movers USA, LLC (Respondent) seeking to assess civil penalties against Respondent in the amount of \$4,235.00, including a 10 percent surcharge.

2. On November 26, 2013, the Commission referred the CPAN to an administrative law judge (ALJ) for disposition.

3. By Decision No. R13-1500-I issued on December 4, 2013, the ALJ scheduled this matter for an evidentiary hearing for February 12, 2014 at 9:30 a.m. The same Decision established deadlines for the parties to exchange and file disclosures of the evidence they intend to introduce at the hearing.

4. On January 23, 2014, Staff filed its exhibit and witness lists and exhibits. Respondent never filed a witness or exhibit list or exhibits.

5. At the date, time, and location designated, February 12, 2014 at 9:30 a.m., the ALJ convened the hearing on the CPAN. Staff appeared through counsel, Mr. Michael Axelrad. Mrs. Liat Levin appeared, but not on behalf of Respondent. Mrs. Levin is married to Mr. Levin, Respondent's owner and representative. *Infra*, ¶ 20. Mrs. Levin informed the ALJ that Mr. Levin could not appear at the hearing because he was incarcerated. She explained that Mr. Levin strongly desired to appear at the hearing.

6. For good cause shown, on February 14, 2014, the ALJ ordered that the hearing be continued to give Mr. Levin a further opportunity to appear. Decision No. R14-0168-I.

7. Decision No. R14-0168-I put Mr. Levin on notice that the hearing will not be continued indefinitely and that a hearing will be held in his absence if he makes no efforts to appear in person or by telephone at a hearing. Decision No. R14-0168-I required that by 5:00 p.m. on March 12, 2014, Respondent make a filing providing dates that Mr. Levin is available to appear at a hearing, and that if Mr. Levin is unavailable to appear in person by July 1, 2014 due to incarceration, his March 12, 2014 filing must address that, including information as to whether and how he may appear in this proceeding by telephone. Respondent failed to make this filing. In fact, Respondent has made no filing at all in this proceeding.

8. On March 31, 2014, upon finding that Respondent had ample opportunity to ensure its desired representative may appear at the hearing, and having failed to make efforts to this end, the ALJ rescheduled the hearing for May 20, 2014. Decision No. R14-0342-I. A new disclosure schedule was provided. *Id.* This gave Respondent approximately two months to make a filing with the Commission should Respondent object to the hearing date. Respondent made no such filing.

9. At the date, time, and location designated, May 20, 2014 at 10:00 a.m., the ALJ convened the hearing. Staff appeared through counsel. Respondent did not appear. The ALJ recessed the hearing until 10:15 a.m. to allow Respondent an additional opportunity to appear. Respondent still did not appear. A hearing was held in Respondent's absence.

10. During the course of the hearing, Hearing Exhibits 1 through 9 were identified, offered and admitted into evidence. Mr. William Schlitter testified on behalf of Staff.

B. Governing Legal Standards.

11. Staff, as the proponent of an order, bears the burden of proof by a preponderance of the evidence. §§ 13-25-127(1) and 24-4-205(7), C.R.S.; Rule 1500 of the Commission's

Rules of Practice and Procedure, 4 CCR 723-1. 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, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

12. Although the preponderance standard applies, the evidence must be substantial. Substantial evidence is defined as “such relevant evidence as a reasonable person’s mind might accept as adequate to support a conclusion . . . it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (internal citation omitted).

C. Statutory Violations Alleged by the CPAN.

13. Under Counts 1 to 4 of the CPAN, Respondent is charged with violating §§ 40-10.1-505(1) and 40-10.1-505(4), C.R.S. Count 5 charges Respondent with violating § 40-10.1-507, C.R.S.

14. Section 40-10.1-505(1), C.R.S., provides that at or before commencing work, a mover providing any moving services shall leave with the shipper a contract containing certain information. Among those are: the name, telephone number, and physical address where the mover’s employees are available during normal business hours; the date the document is prepared and the proposed date of the move; the name and address of the shipper, the addresses where the goods are to be picked up and delivered, and a telephone number where the shipper may be reached; the name, telephone number, and physical address of a location where the goods will be held pending further transportation; an itemized breakdown and description of costs and

rates for services to be provided during a move; and at least two statutorily enumerated acceptable forms of payment. In addition, § 40-10.1-505(1), C.R.S., requires that the contract be signed and dated by the shipper and the mover.

15. Under § 40-10.1-505(4), C.R.S., the mover is required to provide the shipper with a written consumer advisement at or before the time of commencing work, which: states that the company is registered with the Commission; encourages the shipper to contact the Commission about the mover; states that a mover without a permit cannot withhold any of the consumer's property pending payment; states that a mover must include its permit number, name, and physical address in its advertisements; states that the cost of the move could vary depending on various factors; and states that there is an arbitration option process available in the event of a dispute. The advisement should also include an acknowledgement (and signature) by the consumer that the advisement was provided. § 40-10.1-505(4), C.R.S.

16. No language in § 40-10.1-505(4), C.R.S., requires that the consumer advisement be included as a part of the parties' contract for services. Thus, as a matter of law, § 40-10.1-505(4), C.R.S., does not required the consumer advisement to be included as a part of the contract for services.

17. Section 40-10.1-507, C.R.S., requires that, in the event of a dispute between a mover and a shipper concerning the amount charged or lost or damaged goods, the mover shall offer the shipper the opportunity to participate in binding arbitration. This statute does not require that the offer for binding arbitration be made in the contract for services. As a matter of law, § 40-10.1-507, C.R.S., does not require that the offer to participate in binding arbitration to be in the contract for services.

18. In order to assess a civil penalty against a person who violated §§ 40-10.1-505(1), 40-10.1-505(4), and 40-10.1-507, C.R.S., Staff must show, by a preponderance of the evidence, that the person “intentionally” violated those statutes. § 40-7-113(1)(g), C.R.S.

D. Evidence Presented.

19. Mr. William Schlitter is a criminal investigator with the Commission’s Transportation section. As a part of his job duties, he conducts safety and compliance reviews and inspections on motor carriers subject to the Commission’s jurisdiction. He also investigates and verifies regulatory compliance of household good movers with applicable Commission rules and Colorado law. As a part of that, Mr. Schlitter investigates complaints the Commission receives from the public regarding regulated carriers.

20. Respondent was a licensed household goods mover at all times relevant to the allegations of the CPAN, under PUC No. HHG-00331. Hearing Exhibits 1 to 3 and 6. Respondent is a limited liability company, whose owner is Mr. Roni Levin.¹ Hearing Exhibit 8, p. 2.

21. The CPAN against Respondent was initiated based upon a complaint filed with the Commission’s Consumer Affairs Department (Consumer Affairs) in June 2013, relating to two moves performed by Respondent. The complaint was ultimately assigned to Mr. Schlitter to investigate.

22. The complaining party, Mr. Robert Grzywa, did not testify at the hearing. Mr. Schlitter explained that Mr. Grzywa did not testify because when Mr. Schlitter met with him,

¹ Ms. Liat Levin was listed as the sole proprietor for Respondent in the Application Respondent submitted for its household goods permit. Hearing Exhibit 7. The more recent filing, a “Renewal Application for Permit #HHG- 00331” (Renewal Application), updates this information to list Mr. Levin as the sole owner of Respondent. Hearing Exhibit 8, p. 2.

Mr. Grzywa was focused on his desire to get a refund for the moves performed. He was concerned that Mr. Grzywa would be unable to focus on the pertinent issues when testifying.

23. Mr. Schlitter talked to Mr. Grzywa and relayed the following information about Mr. Grzywa's complaints. Mr. Grzywa used Respondent's moving services to move his household goods on two separate occasions. Mr. Grzywa indicated that during the process of the moves, his property was damaged. Mr. Grzywa also believed he was not properly informed regarding insurance and cargo valuation options, and that Respondent did not provide him with the full and complete contract.

24. Mr. Grzywa provided copies of two contracts he entered into with Respondent to Mr. Schlitter. The first is dated February 9, 2013. Hearing Exhibit 1. The second contract is dated April 29, 2013. Hearing Exhibit 2. Mr. Grzywa told Mr. Schlitter that Hearing Exhibits 1 and 2 are complete contracts for each of the referenced transactions that Respondent provided to Mr. Grzywa for their transactions. Those contracts are each one-page long, and contain portions that are illegible. Hearing Exhibits 1 and 2.

25. Mr. Schlitter reviewed Hearing Exhibits 1 and 2 to ensure they comply with Commission rules and requirements. Mr. Schlitter noted that in the first contract (Hearing Exhibit 1), the following problems exist: (a) there is no signature and date for the "shipper" (Mr. Grzywa); (b) the address listed for Respondent was not on file with the Commission; (c) the contract does not contain specific language stating that Respondent is registered with the Commission; (d) the contract does not list acceptable forms of payment as required by Commission rules; (e) the contract was missing a required consumer advisement; and (f) there is no "full replacement" cost option related to cargo valuation.

26. According to Mr. Schlitter, the second contract (Hearing Exhibit 2) has all of the same issues identified above, but also lacks an address where the goods were to be picked up from, a phone number for the shipper, and no signature for the Respondent.

27. Mr. Grzywa filed a claim with his own insurance company, (Nationwide) for the damage to his property after one of the moves performed by Respondent. Mr. Schlitter relayed the following information that Mr. Grzywa told Mr. Schlitter about Mr. Grzywa's conversations with Nationwide. In the course of processing Mr. Grzywa's claim, Nationwide contacted Respondent directly to obtain a copy of the relevant contracts, and that Respondent provided those contracts to Nationwide. Mr. Grzywa obtained those documents from Nationwide, and provided them to Mr. Schlitter. Those are reflected in Hearing Exhibit 3.

28. Among the documents Nationwide gave Mr. Grzywa are two contracts, the first of which is a two page contract dated February 9, 2013 (2/9/13 Nationwide contract), and a one page contract dated April 29, 2013 (4/29/13 Nationwide contract). Hearing Exhibit 3, pp. 3-5. Hearing Exhibit 3 also includes a document that appears to be a "Mover's USA" customer feedback form filled out by "Robert" stating "you guys are awesome! Great crew." Hearing Exhibit 3, p. 6.

29. The 2/9/13 Nationwide contract is different from the contract Mr. Grzywa provided to Mr. Schlitter (Hearing Exhibit 1). In particular, the 2/9/13 Nationwide contract includes a signature in the space for Mr. Grzywa's signature (but is un-dated). The 2/9/13 Nationwide contract also includes some differences in the right-hand column. In particular, at approximately the middle of the right-hand column, some numbers are crossed out in a manner dissimilar to those crossed out in Hearing Exhibit 1. And, at the middle of the right-hand column, next to typed language starting with "packing at origin," there appears to be

additional dollar figures which do not appear in the same place on Hearing Exhibit 1. In addition, the 2/9/13 Nationwide contract also includes a second page for the contract that was not included with Hearing Exhibit 1. Hearing Exhibits 1 and 3. That second page includes what appears to be initials or signatures in several places. Hearing Exhibit 3. The second page is largely illegible. *Id.* Mr. Grzywa told Mr. Schlitter he never saw the second page and that the signatures appearing on the 2/9/13 Nationwide contract are not his.

30. The 4/29/13 Nationwide contract does not differ from the copy of that contract provided by Mr. Grzywa (Hearing Exhibit 2). Hearing Exhibits 2 and 3. Both of them are only one page long; both include Mr. Grzywa's signature (undated) but lack a signature for Respondent. Notably, both contain illegible language. *Id.*

31. Mr. Schlitter never contacted Respondent as a part of his investigation. Nevertheless, at some point, Respondent's owner, Mr. Levin, called Mr. Schlitter after receiving the CPAN. Mr. Schlitter testified that Mr. Levin was interested in reaching an agreement to resolve the CPAN. Mr. Schlitter did not testify as to any other discussions that may have occurred with Mr. Levin or any other representative of Respondent, (*e.g.*, whether Mr. Levin denied or admitted the CPAN's allegations).

32. However, according to Mr. Schlitter, Consumer Affairs did contact Respondent to discuss the allegations of Mr. Grzywa's complaint. No one from Consumer Affairs testified at the hearing. Thus, the record contains no evidence as to statements that may have been made by Respondent's owner or other agent relating to the allegations in the CPAN.

33. In addition, Mr. Schlitter testified that he understood that Consumer Affairs received copies of the subject contracts from Respondent, and that they were no different than

the contracts Mr. Schlitter obtained from Mr. Grzywa.² It is unclear whether Mr. Schlitter ever personally reviewed the contracts in Consumer Affairs' possession, or if his understanding was based on something else (*e.g.*, statements another individual made to him.). Nevertheless, Mr. Schlitter did not specify whether he understood that the Consumer Affairs' contracts were the same as the ones obtained by Mr. Grzywa from Nationwide, or the same as the contracts Mr. Grzywa retained himself and provided to Mr. Schlitter. *See* Hearing Exhibits 1 to 3. There are differences among those contracts, as noted above. The contracts that Consumer Affairs obtained from Respondent were not offered into evidence.

34. Mr. Schlitter testified that Mr. Grzywa told him that Respondent never informed him that, in the event of a dispute between them, that Mr. Grzywa has the opportunity to participate in binding arbitration.

35. Staff presented no evidence addressing whether Respondent committed the violations intentionally.³

36. As a result of his investigation, Mr. Schlitter issued the CPAN in this proceeding, charging Respondent with 5 counts of violating Colorado statutes. Hearing Exhibit 4.

37. Counts 1 and 3 of the CPAN charge Respondent with two counts of violating § 40-10.1-505(1), C.R.S., for failing to include in its contract for services information required by § 40-10.1-505(1), C.R.S., on two separate contracts, dated February 9, 2014 and April 29,

² Mr. Schlitter's testimony on this is vague. It is unclear whether Mr. Schlitter ever personally reviewed the contracts in Consumer Affairs' possession, or if his understanding was based on something else (*e.g.*, statements another individual made to him.). And, in any event, it is unclear whether the Consumer Affairs' contracts were the same as the ones obtained by Mr. Grzywa from Nationwide, or the contracts Mr. Grzywa had himself. There are differences among those contracts, as noted above.

³ The ALJ carefully reviewed the record for any evidence on this issue, and found none. There was no testimony on the subject, and no exhibits speak to the issue. For example, neither the Application nor the Renewal Application, (Hearing Exhibits 7 and 8), include any reference to the statutes alleged to be violated here.

2014. Counts 2 and 4 of the CPAN charge Respondent with two counts of violating § 40-10.1-505(4), C.R.S., for failing to provide the shipper with a consumer advisement on February 9, 2014 and April 29, 2014. Count 5 of the CPAN charges Respondent with violating § 40-10.1-507, C.R.S., on or about July 6, 2014, for failing to offer binding arbitration to the shipper (Mr. Grzywa).⁴

38. The CPAN was served by certified mail, return receipt requested upon Respondent both at the address on file with the Commission (on September 24, 2013), and to the address noted on the contracts (Hearing Exhibits 1 to 3) for Respondent on October 24, 2013. The CPAN was served at both addresses because Mr. Schlitter did not receive a return receipt showing that Respondent signed for and received the CPAN sent to the address on file with the Commission, 9390 East Mexico Avenue, Unit B, Denver CO 80247. Mr. Schlitter did receive a return receipt signed by Mr. Roni Levin on October 28, 2013, for the CPAN sent to the address on the contracts in Hearing Exhibits 1 to 3, that is, 9437 E. Colorado Ave., Denver, CO 80247. Hearing Exhibit 5. The ALJ finds that service upon Respondent is proper pursuant to § 40-7-116(1)(b), C.R.S.

E. Discussion.

39. Staff presented no evidence addressing whether Respondent committed the violations intentionally.

⁴ Staff identified several typographical errors on the CPAN. Count 4 of the CPAN incorrectly states the possible civil penalty is \$1,210.00, but should state that the proposed penalty is \$302.50. Count 5 of the CPAN states, “[t]he *shipper* failed to offer a binding arbitration process to the shipper,” but should say “[t]he *mover* failed to offer a binding arbitration process to the shipper.” Hearing Exhibit 4 (emphasis added). Staff requested that the CPAN be amended to correct these typographical errors. The ALJ granted this request, finding that the typographical errors are not substantive and that the Respondent’s substantial rights are not prejudiced by the amendments.

40. Staff presented only hearsay evidence in support of all Counts in the CPAN. In many instances, the evidence is double and triple hearsay. For example, Mr. Schlitter testified to: Mr. Grzywa's statements directly to Mr. Schlitter about Respondent (hearsay); Mr. Grzywa's statements to Mr. Schlitter relating statements made by Nationwide made to Mr. Grzywa (double hearsay); and Mr. Grzywa's statements to Mr. Schlitter relating statements Nationwide made to Mr. Grzywa about statements and information from a representative of Respondent to Nationwide company (triple hearsay). And, the contracts themselves are hearsay. Hearing Exhibits 1 to 3. Notably, there are multiple versions of at least one of the contracts and portions of the contracts are illegible. *Id.* All of the contracts were obtained from Mr. Grzywa, although Hearing Exhibit 3 was obtained first by Nationwide, provided to Mr. Grzywa, then provided to Mr. Schlitter.

41. While hearsay may be considered in administrative proceedings, the ALJ must determine the weight to be accorded to the hearsay. *See* § 24-4-105(7), C.R.S.

42. Here, where the hearsay comes from an individual who has ill will toward the Respondent, has a possible pecuniary interest in the outcome of this proceeding, the hearsay is compounded three-fold with triple hearsay, and the written hearsay contains illegible language, the reliability of the hearsay becomes more and more tenuous. Indeed, in such a circumstance, the witness's credibility is paramount.

43. The ALJ does not question the credibility of Mr. Schlitter's testimony. Even after accepting that Mr. Grzywa made all of the statements Mr. Schlitter related, that does not shed light on whether the facts Mr. Grzywa related are true, or whether he provided the correct and complete contracts. In short, Mr. Schlitter's credibility does not speak to Mr. Grzywa's credibility.

44. Since Mr. Grzywa did not testify, the ALJ was unable to assess Mr. Grzywa's credibility. Mr. Schlitter explained that Mr. Grzywa did not testify because he was so focused on his desire to get a refund from Respondent, that Mr. Schlitter was concerned that Mr. Grzywa would be unable to focus on the pertinent issues when testifying. This raises additional credibility questions about Mr. Grzywa that could only be assessed through his direct testimony.

45. There are multiple versions of at least one of the contracts at issue. Hearing Exhibits 1 to 3. This raises further questions as to which of the contracts, *if any*, were the final contracts between Respondent and Mr. Grzywa. (Hearing Exhibits 1 to 3). Moreover, portions of the contracts are illegible. This makes it difficult to determine the information or statements included in the contracts (or the lack thereof).

46. In addition, §§ 40-10.1-505(4) and 40-10.1-507, C.R.S., (Counts 2, 4, and 5) do not require that the consumer advisement, or that the offer to participate in binding arbitration be made in the contract for moving services. Given this, the contracts themselves cannot prove a violation of §§ 40-10.1-505(4) or 40-10.1-507, C.R.S.⁵ Mr. Schlitter's hearsay testimony relating statements that Mr. Grzywa made to him are the only evidence offered in support of Counts 2, 4, and 5.

47. This is not a situation where Mr. Schlitter spoke directly to a representative of Respondent, and offered those statements into evidence.⁶ Nor is it a situation where Mr. Schlitter obtained copies of the relevant contracts or other pertinent documentation from Respondent

⁵ During his testimony, Mr. Schlitter expressed the assumption that the consumer advisement should be included in the contract for services. As discussed, this is incorrect as a matter of law, based on the plain language of the statute. § 40-10.1-505(4), C.R.S. *Supra*, ¶¶ 15 - 17.

⁶ The ALJ recognizes that under the Colorado Rules of Evidence (CRE), such statements may not be hearsay, and instead, possibly statements of a party opponent, depending on who made the statements. CRE 801(d)(2).

directly and offered those documents into evidence. In such circumstances, the ALJ would likely give the out-of-court statements, and the hearsay contracts more weight than the hearsay evidence offered in this proceeding.⁷

48. Ultimately, the hearsay evidence in this proceeding has too many drawbacks to be afforded significant weight. Based on the foregoing, the ALJ gives the hearsay evidence little weight.

F. Conclusions.

49. Although the preponderance of the evidence standard applies, the evidence must be substantial. *City of Boulder*, 996 P.2d at 1278 (Colo. 2000); *Supra*, ¶¶ 11 – 12. Given the hearsay and credibility issues discussed above, the ALJ finds that the evidence presented does not amount to such evidence to cause a reasonable person’s mind to accept as adequate to support the conclusion that Respondent committed the alleged violations.⁸ *Supra*, ¶¶ 11 - 12 and 40 - 47. The ALJ concludes the evidence was not substantial, and did not rise to the level necessary to meet the preponderance of the evidence standard.

50. For the foregoing reasons and authorities, the ALJ finds that Staff has failed to meet its burden of proof to show by a preponderance of the evidence that Respondent committed the violations alleged in Counts 1 to 5 of the CPAN.

51. Pursuant to § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this proceeding along with this written recommended decision. The ALJ recommends the Commission enter the following order.

⁷ In that circumstance, the credibility issues present here would not exist.

⁸ Another fatal flaw is that there was no evidence presented to address whether Respondent committed the violations intentionally. As a result, even if Staff proved the elements of the violations, the ALJ could not assess a civil penalty. *See* § 40-7-113(1)(g), C.R.S.

II. ORDER

A. The Commission Orders That:

1. Civil Penalty Assessment Notice No. 106989 in this proceeding against Movers USA, LLC is dismissed with prejudice.

2. Proceeding No. 13G-1149HHG is closed.

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 § 40-6-109, 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.

5. 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

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director