

Decision No. R14-1216

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14G-0714EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ROYAL BLUE CAR SERVICE LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
ASSESSING CIVIL PENALTY**

Mailed Date: October 3, 2014

TABLE OF CONTENTS

I. STATEMENT.....	2
II. FINDINGS OF FACT	3
III. DISCUSSION.....	6
IV. CONCLUSIONS	13
V. ORDER.....	13
A. The Commission Orders That:	13

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Royal Blue Car Service, LLC (Royal Blue).

2. On June 25, 2014, Staff issued Civil Penalty Assessment Notice (CPAN) No. 109242 to Royal Blue. The CPAN alleged two 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* (C.F.R.) § 391.45 and four violations of Rule 6105(c) 4 CCR 723-6. The CPAN assessed Royal Blue a total penalty of \$4,840.00 (or \$2,420 if paid within ten days), including an additional 10 percent surcharge seeking civil penalties. The CPAN was served on Respondent by hand delivery on June 26, 2014.

3. Staff and Royal Blue are the only parties to this proceeding.

4. The Commission referred this matter to an administrative law judge for resolution during its weekly meeting held July 23, 2014.

5. By Decision No. R14-1009-I, issued August 20, 2014, Staff was ordered to make a disclosure of whether any of the counts in the CPAN allege violation of a safety rule promulgated by the Commission. On September 12, 2014, Staff filed a disclosure that all counts in the CPAN allege violation of a safety rule promulgated by the Commission.

6. Decision No. R14-1009-I, issued August 20, 2014, also scheduled an evidentiary hearing.

7. At the scheduled time and place, the hearing was convened. Staff appeared through counsel, Assistant Attorney General Arax Ruth Corn. Respondent did not appear.

A recess was taken to allow additional time for Respondent to appear. After a 15-minute recess, Respondent still had not appeared. The hearing then proceeded as noticed.

8. As a preliminary matter, Staff tendered its trial brief to the ALJ, which was also served via E-filings and served upon Respondent via U.S. mail.

9. Brian Gates, Criminal Investigator for the Commission, testified on behalf of Staff in support of the allegations in the CPAN. Hearing Exhibits 1 through 18 were offered and admitted into evidence. At the conclusion of the evidence, Staff presented an oral closing argument. Staff also requested and was granted permission to submit proposed findings of fact and conclusions of law. The undersigned ALJ then closed the record and took the matter under advisement.

10. The undersigned ALJ has considered all arguments and evidence presented, even if such argument and/or evidence is not specifically addressed herein, in reaching this Recommended Decision.

11. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDINGS OF FACT

12. Brian Gates is a Criminal Investigator for the Commission. His duties include conducting Safety and Compliance Reviews of registered motor carriers and investigating complaints against motor carriers to verify compliance with Commission rules and Colorado law.

13. Respondent is a Luxury Limousine carrier currently operating pursuant to Commission Permit No. LL-02221. Hearing Exhibit 1. Respondent initially filed an application for authority with the Commission in March of 2013. Hearing Exhibit 2.

14. Staff received a consumer complaint regarding driver safety and vehicle safety. The complaint was referred to Mr. Gates for investigation on April 18, 2014, whereupon he undertook investigation of the complaint.

15. In the course of his investigation, Mr. Gates reviewed Commission records regarding Royal Blue. He found that a Safety and Compliance Review (SCR) of Royal Blue was conducted in June 2013, and an investigation of two consumer complaints led to a CPAN being issued to Royal Blue in March 2014.

16. In the SCR Final Report, dated June 18, 2013, Respondent was cited for violations including drivers that were not medically examined and certified and drivers that had not submitted fingerprints to the Commission.¹ The SCR final report expressly informed Royal Blue that the Commission could assess civil penalties for violations noted in the SCR and stated that Royal Blue must take remedial action to correct deficiencies. Hearing Exhibit 3.

17. In the CPAN issued to Royal Blue in March 2014 (CPAN No. 108278), Royal Blue was cited for violations including drivers that were not medically examined and certified, and drivers that had failed to submit fingerprints to the Commission, in violation of Commission requirements. Hearing Exhibit 4.

18. CPAN No. 108278 was resolved in Proceeding No. 14G-243EC, when Respondent acknowledged liability and paid the 50 percent penalty amount within ten days. Hearing Exhibit 5.

19. On May 2, 2014, Mr. Gates contacted Peter Russell, owner of Royal Blue, via telephone and explained he required certain documentation for investigation of a complaint.

¹ In violation of Rule 6102(a)(I) 4 CCR 723-6 and 49 C.F.R. § 391.45 and Rule 6105(c) 4 CCR 723-6.

After the phone call, Mr. Gates sent an email to Respondent setting forth the requested documentation. Specifically, he requested a list of all drivers, a copy of each driver's current medical examiner's certificate, time sheets for each driver for April 2014, a copy of the carrier's permit, and a list of all vehicles operated by the carrier along with each vehicle's registration and current periodic inspection.

20. In response, Royal Blue delivered documents including a list of vehicles operated by the carrier and a copy of: the first page of each driver's employment application; each driver's license, medical examiner's certificate, and time sheet; the registration and periodic inspection for each vehicle; and charter orders for the month of April.

21. Mr. Gates sent an additional email requesting any medical examiner's certificate issued prior to the ones previously provided for drivers Curtis Culkin and Hayden Jacobs. Royal Blue did not provide anything in response to this request.

22. In reviewing all documents submitted by Royal Blue, Mr. Gates determined that Royal Blue allowed two drivers to drive without having been medically certified as physically qualified to drive (*i.e.*, before obtaining a medical examiner's certificate). Hearing Exhibits 6, 7, 8, and 9. Specifically, Royal Blue's records demonstrated that the only medical examiner's certificates for Hayden Jacobs and Curtis Culkin provided were issued after the respective driver drove for Royal Blue, as documented in charter orders. Hearing Exhibits 6, 7, 8, and 9.

23. Next, Mr. Gates found that certain drivers failed to submit fingerprints to the Commission for a fingerprint-based criminal record check within ten days of being contracted to drive. Mr. Gates reviewed each driver's applications to determine their approximate hire date and then calculated, according to the timeframe in Commission Rule 6105, when fingerprints would be required to be submitted. Hearing Exhibits 9, 10, 11, 12, 13, 14, 15, and 16.

Mr. Gates searched the Fingerprint Tracking System database which contains records of all individuals that have submitted fingerprints to the Commission. Hearing Exhibits 10, 12, 14, and 16.

24. The database searches returned no record of fingerprints on file with the Commission associated with drivers Yvonne Taylor, Donald Wagner, Hayden Jacobs, or Curtis Culkin. Mr. Gates determined no driver fingerprints were submitted within ten days of contracting or being employed to drive. In fact, as of June 18, 2014, none of those drivers had ever submitted fingerprints. Hearing Exhibits 10, 12, 14, and 16.

25. Based on his investigation, Mr. Gates issued a CPAN No. 109242. Hearing Exhibit 17.

III. DISCUSSION

26. The evidence establishes the Commission's jurisdiction in this proceeding. Mr. Gates personally served the CPAN at Royal Blue's place of business. Service was made in accordance with § 40-7-116, C.R.S. The Commission has subject matter jurisdiction over this case and personal jurisdiction over Respondent.

27. Respondent did not appear for the hearing and therefore no defense was presented to the alleged violations in the CPAN.

28. 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.

29. Section 40-10.1-108, C.R.S., directs the Commission to promulgate safety rules to promote safety of operation for motor carriers. The Commission's safety rules contained in Rules 6100 through 6199 of the Rules Regulating Transportation by Motor Vehicle 4 CCR 723-6 were promulgated pursuant thereto to promote safety of operation of motor carriers. Those rules apply to limited regulation carriers, including luxury limousines. Rule 6100; § 40-10.1-301, C.R.S.

30. Section 40-10.1-108(2), C.R.S., directs the Commission to use the U.S. Department of Transportation regulations in fashioning safety rules. Certain regulations from the Federal Motor Carrier Safety Regulations, *inter alia*, 49 C.F.R. Part 391, have been incorporated by reference in Commission rules applicable to Colorado motor carriers. Rule 6102(a)(I).

31. As relevant to this proceeding, 49 C.F.R. § 391.45 provides that in order to drive for a passenger carrier, a person must be medically examined and certified as physically qualified to operate a commercial motor vehicle.²

32. The evidence establishes that drivers Hayden Jacobs and Curtis Culkin drove for Royal Blue, without being medically examined and certified as physically qualified to operate a commercial motor vehicle. Hearing Exhibits 6, 7, and 8.

² Although performance of the obligation to obtain medical certification is on the driver, the carrier has a duty to require observance of this obligation by its drivers. *See* 49 C.F.R. 390.11; Rule 6102(a)(I).

33. Mr. Jacobs drove for Royal Blue on April 16, 2014 and Mr. Culkin drove on April 22, 2014.³ Hearing Exhibit 7. Mr. Jacobs was not medically examined and certified as physically qualified to operate a commercial motor vehicle until April 25, 2014. Hearing Exhibit 6. Mr. Culkin was not medically examined and certified as physically qualified to operate a commercial motor vehicle until May 5, 2014. Hearing Exhibit 8.

34. Mr. Gates requested that Royal Blue provide any previous medical examiner's certificate for drivers Jacobs and Culkin. Per Rule 6005(b)(I), upon request by an enforcement official such as Staff, the motor carrier must make available records related to a complaint investigation within two days or be subject to penalties. *See* Rule 6017(d) 4 CCR 723-6. Respondent failed to provide any additional documentation in response to the request. There is no evidence either driver had a valid medical certificate other than those provided. Based on the nonproduction, in light of the carrier's obligations and after specific request, a reasonable inference can be made that neither driver had a valid medical certification prior to the issue date of the certificates that were provided, or April 25 and May 5, respectively.

35. The undisputed testimony and exhibits establish that Mr. Jacobs and Mr. Culkin drove for Respondent without being medically certified as physically qualified to drive. *See* Hearing Exhibits 6, 7, and 8.

36. Rule 6105(c) 4 CCR 723 requires that drivers submit a set of fingerprints to the Commission within ten days of contracting or being employed to drive for a criminal history record check. This requirement is in accordance with § 40-10.1-110(3), C.R.S., which contains,

³ Hearing Exhibit 7 reflects that Mr. Jacobs drove on April 16, 17, 18, 19, 21, 22, 23, and 24 (all dates prior to the date he was medically certified as qualified to drive); notwithstanding, the CPAN charges only one date of violation, April 16. Hearing Exhibit 7 further reflects that Mr. Culkin drove on April 22, 23, 24, 25, 26, 27, 28, 29, and 30 (all dates prior to the date he was medically certified as qualified to drive); notwithstanding, the CPAN charges only one date of violation, April 22.

based upon the results of the criminal record check that occurs once the fingerprints are submitted, criteria that disqualifies the individual from driving for a motor carrier.

37. The evidence establishes that Royal Blue's drivers Yvonne Taylor, Donald Wagner, Hayden Jacobs, and Curtis Culkin failed to submit fingerprints to the Commission at all, let alone within the ten-day timeframe in Rule 6105(c). Royal Blue is subject to penalties for violation pursuant to Rule 6106(f) 4 CCR 723-6.

38. Mr. Gates' investigation determined that no fingerprints associated with drivers Yvonne Taylor, Donald Wagner, Hayden Jacobs, or Curtis Culkin were ever received by the Commission.

39. The undisputed evidence establish that Royal Blue's drivers Yvonne Taylor, Donald Wagner, Hayden Jacobs, and Curtis Culkin failed to submit fingerprints to the Commission as required by Rule 6105(c).

40. Where the owner or other person allows a driver to operate in a way that violates statute or rule, when the person knows or has reason to know that the driver is engaged in a violation, civil penalties against the carrier are authorized. § 40-7-112(3), C.R.S. Moreover, in accordance with Rule 6105(j), a carrier must require its drivers to submit the drivers' fingerprints to the Commission for a criminal background check at least once every five years as a condition of continued employment. A carrier is prohibited from allowing a driver to drive if the driver has not complied with Rule 6105 as well as § 40-10.1-110, C.R.S. *See* Rule 6105(i).

41. Accordingly, it is found that Royal Blue violated the provisions of 4 CCR 723-6-6102(a)(I) and 49 C.F.R. § 391.45 as alleged in Counts 1 and 2 of the CPAN, and the provisions of 4 CCR 723-6-6105(c) as alleged in Counts 3, 4, 5, and 6 of the CPAN, and should be assessed a civil penalty for the violations. *See* 4 CCR 723-6-6106(c).

42. Having found the above violations of the cited regulations, it is necessary to determine the amount of the civil penalty to be assessed for these violations. Section 40-7-113, C.R.S., authorizes the Commission to assess civil penalties. In accordance with Rule 1302(b), the Commission may impose a civil penalty, where provided by law, after considering 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.

Rule 1302(b) of the Rules of Practice and Procedure, 4 CCR 723-1.

43. Where the violation is a safety rule promulgated by the Commission, there is no element of intentional violation required to assess civil penalties. Commission Decision No. C14-0774¶ 8, Proceeding No. 14G-0149EC issued July 8, 2014.⁴ However, Royal Blue was aware of the Commission's rules and agreed to abide by them. Royal Blue was also explicitly notified of the same violations in a prior SCR and acknowledged liability for the same nature of violation within a few months of the proven violation.

⁴ Although found not necessary to prove intent here, it is notable that "[a] respondent's knowledge or awareness of an obligation may be demonstrated in multiple ways. In addition to showing a prior violation of an identical obligation, such proof may include, for example, conversations or correspondence with the respondent about the requirement, receipt of SCRs explaining the obligations, or a respondent's execution of a document admitting knowledge of the rule." Decision No. C14-1187-I, issued September 29, 2014 in Proceeding No. 14G-0195EC. Mr. Russell, owner of Royal Blue, verified that "[t]he applicant is familiar with and will comply with the applicable PUC's[sic] Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6." Hearing Exhibit 2. Royal Blue was also explicitly notified of the violations in an SCR.

44. Based on the evidence presented, findings of fact, and discussion above, the ALJ finds that the maximum civil penalty should be assessed for all counts in CPAN No. 109242. Notwithstanding the advisement and awareness of obligations, Royal Blue failed to comply. These aggravating circumstances warrant imposition of the maximum penalty allowed by law for Counts 1 through 6 of the CPAN, for a total amount of \$4,840 (with the penalty amount for Counts 3 through 6 doubled per § 40-7-113(3) C.R.S.).

45. The Commission performs a critical health and safety function of guaranteeing luxury limousine carrier's drivers are operating in a safe manner to protect the traveling public. Respondent showed disregard for responsibilities to this Commission and the public.

46. Pursuant to § 40-10.1-112(1), C.R.S., after hearing upon notice to the motor carrier and upon proof of violation, the Commission is authorized to enter an order to cease and desist for, among other things: (a) a violation of this article or of any term or condition of the motor carrier's certificate or permit; or (b) a violation or refusal to observe any of the proper orders or rules of the Commission.

47. The CPAN states "Notice: Upon proof of any violation alleged above, the Public Utilities Commission may order you to cease and desist activities in violation of statutes of Commission rules." Therefore, Royal Blue had notice that a cease and desist order could issue in this proceeding. Respondent had more than ten days' notice of the evidentiary hearing in this matter, but failed to participate.

48. The ALJ finds that a cease and desist order should enter in this proceeding because Royal Blue had knowledge of the requirements that its drivers be medically certified and physically qualified to drive and Royal Blue's allowing drivers to drive without being medically qualified or without undergoing a fingerprint-based criminal record check has harmed and

continues to harm the traveling public. Royal Blue has shown ongoing inability or unwillingness to comply with regulations designed to protect the safety of the traveling public. The exigent nature of the particular safety rules Royal Blue is violating warrant that the Commission enter a cease and desist order.

49. The ALJ will order that Royal Blue cease and desist from operating as a motor carrier unless such time as all drivers for Royal Blue have been medically examined and certified as physically qualified to drive, and all drivers have submitted fingerprints to the Commission for a background check. The cease and desist order will continue in effect until modified by subsequent Commission Decision.

50. The ALJ finds that the combination of the maximum civil penalty assessment and the cease and desist order achieve the following purposes: (a) deterring future violations, whether by other similarly-situated carriers and by Respondent; (b) motivating Respondent to come into compliance with the law; and (c) punishing Respondent for its past illegal behavior.

51. Section 40-10.1-304, C.R.S. provides:

[i]f a carrier that holds a permit under this part 3 fails to pay a fine or civil penalty imposed under this article or a rule issued under this article within the time prescribed for payment, the commission may **immediately** revoke the carrier's permit and disqualify the carrier from applying for a permit for any of the following for three years after the date the fine or civil penalty is due:

- (a) The carrier;
- (b) Any owner, principal, officer, member, partner, or director of the carrier;
and
- (c) Any other entity owned or operated by that owner, principal, officer, member, partner, or director.

(emphasis added).

52. Based upon the totality of circumstances present, the undersigned finds that Respondent's permit should be revoked in the event that the civil penalty imposed by this Recommended Decision is not paid within the time prescribed for payment.

IV. CONCLUSIONS

53. Staff has sustained its burden of proving the violations alleged in Counts 1 through 6 of CPAN No. 109242 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

54. Royal Blue permitted drivers to drive that were not medically certified as physically qualified to drive, and permitted drivers to drive that had not timely submitted fingerprints to the Commission for a criminal record check.

55. The total civil penalty including a 10 percent surcharge for such violations is \$4,840.00 against Royal Blue.

56. Pursuant to § 40-10.1-112(1), C.R.S., Royal Blue will be ordered to cease and desist from operating as a motor carrier unless such time as all drivers for Royal Blue have been medically examined and certified as physically qualified to drive, and all drivers have submitted fingerprints to the Commission for a background check.

57. Pursuant to § 40-6-109(2), C.R.S., the ALJ recommends that the Commission enter the following order.

V. ORDER

A. The Commission Orders That:

1. Respondent Royal Blue Car Service LLC (Royal Blue) is assessed a civil penalty for violations in Counts 1 through 6 of Civil Penalty Assessment Notice No. 109242, including an additional 10 percent surcharge, in a total amount of \$4,840.00.

2. Royal Blue shall pay the total assessed penalty to the Commission within 30 days of the effective date of this Recommended Decision.

3. Royal Blue shall cease and desist from operating as a motor carrier unless such time as all drivers for Royal Blue have been medically examined and certified as physically qualified to drive, and all drivers have submitted fingerprints to the Commission.

4. If Royal Blue fails to pay the civil penalty assessed within the time prescribed for payment in compliance with Ordering Paragraph 2, then Permit No. LL-02221 shall be immediately revoked.

5. If Permit No. LL-02221 is revoked by Ordering Paragraph 4, then Royal Blue; any owner, principal, officer, member, partner, or director of Royal Blue; and any other entity owned or operated by any owner, principal, officer, member, partner, or director of Royal Blue shall be disqualified from applying for a permit for a period of three years following the due date of the civil penalty assessed by this Recommended Decision.

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)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge