

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14V-0953EC

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

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

Mailed Date: October 7, 2014

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I. STATEMENT

1. On September 22, 2014, Mr. Robert Miller, Sr. (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) of the Rules Regulating Transportation by Motor Vehicle, 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* (CFR) 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 by telephone on October 6, 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 currently employed as a taxicab driver with MKBS, LLC, doing business as Metro Taxi (Metro Taxi). On September 5, 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 also specifies the medications he is required to take both orally and by injection for symptoms associated with type 2 diabetes. However, the medical examination report indicates that Petitioner was given a provisional Medical Examiner’s Certificate due to his insulin dependence. The Medical Examiner’s Certificate indicates that it must be accompanied by a diabetes waiver

or exemption in order to be valid. The Medical Examiner's Certificate expires on September 5, 2015.

6. Other than the type 2 diabetes and the requirement that Petitioner take daily doses of insulin as well as oral medication, the medical examination report shows that Petitioner is in relatively good health. His uncorrected eyesight in both eyes is 20/25 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 in May 2013. However, Petitioner admits that he has not been under the regular care of a physician since that time. Petitioner self-injects insulin on occasion and takes oral medication for diabetes twice a day. 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. However, Petitioner did admit that he does not eat regularly and sometimes only eats one meal a day.

8. Petitioner testified that he does not manage his diabetes well. He does not get regular check-ups with his primary care physician; nor has he had a recent eye exam. Petitioner stated that he does not recall when his last 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 he does not know his current A1c level to determine whether his blood glucose is controlled. Petitioner does conduct a finger stick test twice a day. Petitioner states that his levels from those tests indicate that his daily blood glucose levels are fairly well controlled.

9. Petitioner also testified that he spoke with someone from Commission Staff in person on or about September 12, 2014 and was told by the Staff member that he was “OK to drive.”

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

III. FINDINGS AND CONCLUSIONS OF LAW

11. 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 issued December 26, 2000 in Proceeding No. 00M-660CP. 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.*

12. This Commission is generally in accord with the 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.

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).

13. 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), Rules of Practice and Procedure.

14. 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. Nonetheless, Petitioner also admits that he does not get regular checkups or eye exams and has not had his A1c levels checked.

15. Petitioner testified that he was diagnosed with type 2 diabetes in May of 2013 and began a regimen of oral medication and injectable insulin. After about one month on the medication, the dosage was doubled. However, Petitioner has not had a medical exam since February 2014.

16. Petitioner also included a copy of his driving record from the Department of Motor Vehicles. That record shows that Petitioner was cited several times in 2010 and 2011 for various moving violations. Petitioner has had no citations in Colorado since 2011.

17. It is troubling that Petitioner is currently driving a taxi for Metro Taxi. It is unclear why Metro Taxi would allow Petitioner to operate a taxicab when the Medical Examiner's Certificate clearly indicates that it must be accompanied by a diabetes waiver or exemption. Metro Taxi is advised that any similar action on its part in the future could result in appropriate sanctions.

18. It is also unclear why Commission Staff would advise Petitioner that he could drive a taxicab without a waiver as Petitioner testified². Nonetheless, Commission Rule 4 CCR 723-1-1007(c) provides in relevant part that “[o]pinions expressed by Commission staff do not represent the official views of the Commission, but are designated to aid the public and to facilitate the accomplishment of Commission functions. Nothing communicated by the Commission staff constitutes legal advice.”

19. As a result, neither Petitioner nor Metro Taxi may rely on any unofficial statements from Commission Staff regarding Petitioner’s ability to drive a taxicab without a valid waiver.

20. Because Petitioner has not demonstrated that his diabetes is fully managed and controlled at this time, it is appropriate to only provisionally grant a waiver of Commission regulations here. In order to ensure the health, safety and welfare of the traveling public, it is prudent to place conditions on the approval of the waiver of the Safety Rule.

21. 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 in effect 30 days after the effective date of this Decision. However, as a condition of the grant of the requested waiver, Petitioner must obtain a complete medical exam within 30 days of the effective date of this Decision. In addition, Petitioner must obtain a diabetes eye exam also within 30 days of the effective date of this Decision. Petitioner must provide Commission Transportation Staff with proof that he has completed those exams no later than five days after they are completed. If Petitioner fails to obtain these exams within the required 30 days and

² A review of the Medical Examiner’s Report indicates that the examiner found Respondent fit to receive a Medical Examiner’s Certificate. However the finding of fitness was contingent on Petitioner receiving a diabetes waiver or exemption. Likewise, The Medical Examiner’s Certificate indicates that the certificate is contingent upon Respondent receiving a diabetes waiver or exemption.

provide to Commission Transportation Staff proof that the exams have been completed, the provisional waiver granted here will be revoked.

22. If Petitioner complies with the above requirements and is provided a waiver to accompany his Medical Examiner's Certificate, Petitioner must get regularly scheduled medical exams with his primary care physician every three months. Further, Petitioner must keep on file at the Commission, 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 Metro Taxi and Commission Transportation Staff immediately of any medical exam results that indicate a worsening of Petitioner's condition.

23. 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.

24. 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.

25. Petitioner shall also submit to the Commission, the results of his follow up examinations regarding his type 2 diabetes within 30 days from the date of the follow up examination.

26. 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.

27. Because Mr. Miller testified that he began driving a taxicab for Metro Taxi on or about September 12, 2014, this provisional waiver will be retroactive to September 12, 2014.

28. 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. Robert Miller, Sr. is provisionally 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. Miller shall obtain a full medical examination no later than 30 days after the effective date of this Decision.
- b. Mr. Miller shall obtain a diabetes eye examination no later than 30 days after the effective date of this Decision.

- c. Mr. Miller shall provide the results of each examination to Mr. Larry Herold of Commission Transportation Staff no later than five days after receiving the results from each examination.
 - d. Mr. Miller shall continue regularly scheduled exams every three months thereafter with his primary care physician.
 - e. Mr. Miller shall keep a copy of his subsequent, regularly scheduled medical exam reports, which he shall keep on file and make available to Commission Transportation Staff upon request within the confines of HIPAA restrictions.
 - f. Mr. Miller shall notify Commission Transportation Staff immediately of any medical exam results that indicate a worsening of Mr. Miller's condition within the confines of HIPAA restrictions.
 - g. In the event that Mr. Miller experiences any adverse symptoms associated with his type I 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. Miller 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.
 - h. It is advised that Mr. Miller 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. Miller 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. Miller during the period of the waiver granted herein.
4. The grant of this provisional waiver shall be retroactive to September 12, 2014.
5. 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.
6. 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.

7. 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

PAUL C. GOMEZ

Administrative Law Judge