

Decision No. R19-0596

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0202TO

DAVID EMSLIE,

COMPLAINANT,

V.

BLACK HAWK TOWING INCORPORATED, DOING BUSINESS AS BLACK HAWK
TOWING,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
DISMISSING FORMAL COMPLAINT
WITH PREJUDICE, AND CLOSING PROCEEDING**

Mailed Date: July 15, 2019

I. STATEMENT

A. Procedural History

1. On April 18, 2019, David Emslie (Complainant) filed a Formal Complaint against Black Hawk Towing LLC, alleging that on or about November 8, 2018 his 1995 Chevy Pickup Truck was towed without notice from private mining land belonging to Mr. Paul Danio. Complainant alleges that the truck was on loan to Mr. Danio. The Commission served a copy of the Formal Complaint and an Order to Satisfy or Answer on Respondent on April 22, 2019. The Commission also gave Notice of a Hearing set for July 2, 2019 at 9:00 a.m.

2. This matter was referred to an Administrative Law Judge (ALJ) for resolution by minute entry during the Commission's Weekly Meeting held on May 1, 2019. The undersigned ALJ was subsequently assigned to preside over this Proceeding.

3. Decision No. R19-0425-I (mailed on May 16, 2017) vacated the hearing set for July 2, 2019 due to an irreconcilable scheduling conflict of the ALJ. The hearing was continued to July 9, 2019 at 9:00 a.m. in a Commission Hearing Room.

4. Decision No. R19-0425-I also corrected the legal name of Respondent from Black Hawk Towing LLC to "Black Hawk Towing Incorporated, doing business as Black Hawk Towing," as reflected in the Commission's records.

5. Mr. Emslie and Black Hawk Towing Incorporated, doing business as Black Hawk Towing (Black Hawk Towing or Respondent) are the only parties to this Proceeding.

6. Black Hawk Towing submitted a response on June 28, 2019, which the ALJ construed to be an Answer to the Complaint. Black Hawk Towing stated that the 1995 Chevy pickup truck was towed as an abandoned vehicle from property claimed to be owned by Mr. Patrick Maher, who paid the towing fee. According to Respondent, when Mr. Emslie complained to the Commission, Black Hawk Towing returned the vehicle to Mr. Emslie.

7. Finally, Decision No. R19-0425-I ordered Complainant and Respondent to file prehearing disclosures to provide adequate notice of the evidence each intended to introduce in the hearing and to give each party a meaningful opportunity to prepare for the hearing. Complainant was ordered to file his list of witnesses, summaries of the testimony of each witness, and copies of the exhibits he intends to offer into evidence at the hearing no later than June 15, 2019. Respondent was ordered to file its list of witnesses, summaries of the testimony of each witness, and copies of exhibits it intends to offer into evidence at the hearing no later

than June 28, 2019. The Parties were also ordered to serve copies of their prehearing disclosure filings on each other.

8. Decision No. R19-0425-I clearly warned Complainant and Respondent that:

The Parties are advised that failure to make the filings ordered in this Interim Decision may have consequences adverse to their interests. **The Parties are advised** that no witness will be permitted to testify, except in rebuttal, unless that witness was identified on a list of witnesses filed and served in accordance with this procedural schedule. **Parties are advised further** that no exhibit will be received in evidence, except in rebuttal, unless it was filed and served in accordance with this procedural schedule.¹

9. According to the certificate of service in the Commission's official file in this Proceeding, Decision No. R19-0425-I was served by U.S. mail on Mr. Emslie at 2532 South College Avenue, Fort Collins, Colorado 80525, which is the mailing address Mr. Emslie stated in the Formal Complaint. Decision No. R19-0425-I was also served by U.S. mail on Black Hawk Towing at 4877 Pearl Street, Denver, Colorado 80216, which is the mailing address listed for Respondent in Commission records.

10. The ALJ's review of the Commission's official file in this Proceeding revealed that Mr. Emslie failed to file his list of witnesses, summaries of the testimony of each witness, and copies of his hearing exhibits by June 15, 2019, and that there is no certificate of service in the file proving that he served any prehearing disclosures on Respondent, as ordered by Decision No. R19-0425-I. In addition, the file reveals that Mr. Emslie failed to file a motion to extend the deadline for filing his prehearing disclosures or to continue the evidentiary hearing.

11. On June 28, 2019, Black Hawk Towing timely filed its list of witnesses, summaries of the testimony of each witness, and copies of its hearing exhibits.

¹ Decision No. R19-0425-I, ¶ I.8 at page 3. (Emphasis in Original)

12. On July 9, 2019 at 9:00 a.m., the ALJ called the evidentiary hearing to order. Complainant failed to appear. At 9:05 a.m. the ALJ recessed the hearing for 15 minutes to give Mr. Emslie an opportunity to appear for the evidentiary hearing. Respondent appeared by Ms. Leah Ayers, Office Administrator of Black Hawk Towing. When the hearing was resumed, Mr. Emslie had still not appeared.

B. Findings and Conclusions

13. The ALJ finds and concludes that both Complainant and Respondent were properly served with Decision No. R19-0425-I, including the requirements and deadlines to make their prehearing disclosure filings and notice of the hearing re-scheduled for July 9, 2019.

14. The ALJ finds and concludes that Mr. Emslie's failure to file his list of witnesses, summaries of the testimony of each witness, and copies of its hearing exhibits by June 15, 2019 violated the ALJ's prehearing disclosure order in Decision No. R19-0425-I.

15. In Commission complaint proceedings, the complainant bears the burden of proof to prove the allegations in its complaint by a preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500, 4 *Code of Colorado Regulations* CCR 723-1 of the Commission's Rules of Practice and Procedure. The preponderance standard requires that the evidence of the existence of a contested fact outweighs the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013). That is, the finder of fact must 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, slightly tips in favor of that party.²

16. In this Proceeding, Complainant was required to prove by a preponderance of the evidence in an evidentiary hearing: (a) facts that prove the allegations in the Complaint and that support a finding that Respondent committed the violations of Commission rules, Colorado statutes, or Commission orders alleged in the Complaint; and (b) facts that support the relief requested in the Complaint.

17. The ALJ finds and concludes that Complainant's failure to appear for the evidentiary hearing constitutes a failure to prosecute his Formal Complaint against Black Hawk Towing, as well as a failure to prove the allegations in the Complaint by a preponderance of the evidence in the hearing.

18. The ALJ finds and concludes that the Formal Complaint against Black Hawk Towing, filed by Mr. Emslie on April 18, 2019 should and will be dismissed with prejudice.

19. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The Formal Complaint filed by Mr. David Emslie on April 18, 2019 against Black Hawk Towing Incorporated, doing business as Black Hawk Towing, is dismissed with prejudice.

2. Proceeding No. 19F-0202TO is closed.

² See *Douglas County Bd. of Co. Comm'rs. v. Public Utilities. Comm'n.*, 866 P.2d 919, 926 (Colo.1994); *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373, 1378 (Colo.1994).

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

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director