

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19V-0327TNC

IN THE MATTER OF THE PETITION OF ELIUD MERCADO-CARRION FOR A WAIVER OF RULE 6713 (PROOF OF MEDICAL FITNESS) OF THE RULES REGULATING TRANSPORTATION BY MOTOR VEHICLE, 4 CCR 723-6.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DISMISSING PETITION WITHOUT PREJUDICE**

Mailed Date: August 6, 2019

I. STATEMENT, FINDINGS, AND CONCLUSIONS

A. Summary.

1. This Decision dismisses Mr. Eliud Mercado-Carrion's Petition in this proceeding based on his failure to prosecute it. Dismissal is without prejudice, meaning, that Mr. Mercado-Carrion may file a new petition seeking the same or similar relief sought here.

B. Procedural History and Findings.

2. On June 10, 2019, Eliud Mercado-Carrion commenced this proceeding by filing a verified Petition for Waiver/Variance of Safety Regulations – Driver (Petition) with the Public Utilities Commission. The Petition seeks a waiver of Commission Rule 6109(c), concerning medical fitness of drivers for common carriers, limited regulation carriers, and large market taxi carriers. Commission Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6. Mr. Mercado-Carrion also confidentially filed medical records and his Official Colorado Seven-Year Driver Record (Driver's History), with the Petition.

3. On June 11, 2019, Mr. Mercado-Carrion filed a verified Petition for Waiver/Variance of Safety Regulations – TNC Driver (Second Petition) with the Commission. This Second Petition seeks a waiver of Rule 6713(c), pertaining to Transportation Network Companies. See Rule 6713(c) and 6700, 4 CCR 723-6.

4. On June 19, 2019, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition by minute entry.

5. On July 9, 2019, by Decision No. R19-0658-I, the undersigned ALJ construed the Second Petition as amending the first one, in order to seek a waiver of Rule 6713(c), 4 CCR 723-6, concerning medical fitness of drivers for transportation network companies.

6. After noting that the record lacked certain information relevant to the requested relief, the ALJ required that Mr. Mercado-Carrion provide additional information by the close of business on July 23, 2019. Decision No. R19-0568-I, ¶¶ 8-9 and Ordering ¶ 1. Specifically, the Decision requires Mr. Mercado-Carrion to submit a filing that:

- a. indicates whether he uses any instruments that impact his hearing impairment, and if so, how the instruments impact his hearing impairment and ability to operate a motor vehicle;
 - b. explains the circumstances surrounding his February 29, 2019 conviction for careless driving arising out of events occurring on September 21, 2018 (as reflected in his Driver's History), including whether his hearing impairment influenced or caused the violation, and if so, how;
- and
- c. provides any other information relevant to the above and to considerations of hardship or equity.

Ordering ¶ 1, Decision No. R19-0568-I.

7. The Decision also puts Mr. Mercado-Carrion on notice that if he does not make a filing as required, the ALJ will schedule an evidentiary hearing at which he will be required

to appear before the Commission and present evidence in support of the relief he seeks in this matter. *Id.* at ¶ 12. The record reflects that Decision No. R19-0568-I was served on Mr. Mercado-Carrion through the Commission's E-Filing System. Decision No. R19-0568-I, Certificate of Service. The record also reflects that Mr. Mercado-Carrion is a registered user with the Commission's E-Filing System. *Id.*

8. Mr. Mercado-Carrion failed to make the required filing. As a result, on July 24, 2019, the ALJ scheduled an evidentiary hearing on Mr. Mercado-Carrion's Petition for August 6, 2019 at 9:00 a.m. at a Commission Hearing Room. Decision No. R19-0630-I. The same Decision also states, "*Mr. Mercado-Carrion is advised and on notice that if he fails to appear at the hearing, the ALJ may deem that as abandoning his Petition, and may dismiss the Petition without granting Mr. Mercado-Carrion the relief he seeks.*" *Id.* at ¶ 5 (emphasis in original).

9. The record reflects that the Decision scheduling the hearing was served on Mr. Mercado-Carrion through the Commission's E-Filing System. Decision No. R19-0630-I, Certificate of Service.

10. As noticed, the ALJ called the matter for an evidentiary hearing at 9:00 a.m. on August 6, 2019 at a Commission Hearing Room. Mr. Mercado-Carrion did not appear. The ALJ took a 15-minute recess to allow Mr. Mercado-Carrion additional time to appear. The ALJ convened the hearing at 9:15 a.m.; Mr. Mercado-Carrion still did not appear. The ALJ adjourned the hearing.

11. Mr. Mercado-Carrion never submitted a filing requesting that the hearing be continued. In fact, Mr. Mercado-Carrion has submitted no filings in this proceeding since submitting the Second Petition on June 11, 2019. The ALJ finds that Mr. Mercado-Carrion has made no efforts to prosecute or pursue his Petition and/or Second Petition since filing the Second

Petition on June 11, 2019. Given this, Mr. Mercado-Carrion's delay in prosecuting the matter appears indefinite. And, the record lacks information as to the reasons for the delay.

II. RELEVANT LAW, ANALYSIS, AND CONCLUSIONS.

A. Service of Decisions on Mr. Mercado-Carrion.

16. When a party registers as a filer with the Commission's E-Filing System, the party "expressly" agrees to accept service in all Commission proceedings through the E-Filings System. Rule 1205(b), of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. Filing through the Commission's E-Filing System constitutes service on registered users in the System. *Id.*

17. Because Mr. Mercado-Carrion is a registered filer with the Commission's E-Filing System, and Decision No. R19-0630-I was served on him through the Commission's E-Filing System, the ALJ concludes that the Decision was properly served on Mr. Mercado-Carrion, and that he received proper notice of the August 6, 2019 hearing. *Id.*; Decision No. R19-0630-I, Certificate of Service.

18. For the same reasons, the ALJ concludes that Mr. Mercado-Carrion was also properly served with and had proper notice of Decision No. R19-0568-I, which required him to make a filing in this proceeding. Rule 1205(b), 4 CCR 723-1; Decision No. R19-0568-I, Certificate of Service.

B. Dismissal for Failure to Prosecute or Pursue Petition.

19. As the party seeking a Commission order, Mr. Mercado-Carrion carries the burden to prove that the relief sought should be granted. Rule 1500, 4 CCR 723-1 (proponent of an order carries the burden of proof; party commencing proceeding is the proponent of the order). As such, Mr. Mercado-Carrion also has the duty to prosecute or pursue his Petition and/or

his Second Petition without unnecessary or unreasonable delay. *See People in the Interest of R.F.A.*, 744 P.2d 1202, 1203 (Colo. App. 1987).

20. A petition may be dismissed for failing to prosecute it when the petitioner fails to appear at a properly noticed hearing. *See Rathbun v. Sparks*, 425 P.2d 296, 298-99 (Colo. 1967).

21. When determining whether to dismiss for failure to prosecute, the tribunal should “consider several factors when balancing the policies against unreasonable delay and favoring resolution of disputes on the merits,” including the length of delay, the reason for the delay, any prejudice that may result to other parties based on the delay, and the extent to which the petitioner has renewed efforts to prosecute the application. *Edmond v. City of Colorado Springs*, 226 P.3d 1248, 1253 (Colo. App. 2010).

22. Based upon the advisement provided to Mr. Mercado-Carrion in the Decision scheduling the hearing, the ALJ finds that when Mr. Mercado-Carrion failed to appear at the hearing, he assumed the risk that the Petition (and Second Petition) may be dismissed. Decision No. R19-0630, ¶ 5; *supra*, ¶ 8.

23. Given Mr. Mercado-Carrion’s failure to make the filing required by Decision No. R19-0568-I, his failure to appear at the hearing scheduled by Decision No. R19-0630-I, his failure to take any action in this proceeding since June 11, 2019, and his indefinite delay in prosecuting or pursuing the Petition and/or Second Petition, the ALJ finds that Mr. Mercado-Carrion’s delay in prosecuting the Petition and/or Second Petition is unreasonable. For the same reasons, the ALJ also concludes that Mr. Mercado-Carrion has abandoned his Petition and Second Petition.

24. Mr. Mercado-Carrion is the only party to this proceeding, but that does not negate his obligation to pursue his Petition and/or Second Petition, and not to abandon it.

25. The ALJ has considered all factors relevant to determining whether the Petition and/or Second Petition should be dismissed, including policies favoring resolution of disputes on the merits and disfavoring unreasonable delay. *See Edmond*, 226 P.3d at 1253.

26. Based on the foregoing reasons and authorities, the ALJ concludes that the Petition and Second Petition should be dismissed for failure to prosecute.

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

III. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, Mr. Mercado-Carrion's Petition for Waiver/Variance of Safety Regulations – Driver filed on June 10, 2019 and Petition for Waiver/Variance of Safety Regulations – TNC Driver filed on June 11, 2019 in this proceeding are dismissed without prejudice.

2. Proceeding No. 19V-0327TNC is closed.

3. This Recommended Decision will 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 will 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 will 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 must 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

MELODY MIRBABA

Administrative Law Judge