

Decision No. R19-0726-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19G-0438HHG

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

ELEVATED MOVES,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
ADOPTING PROCEDURAL SCHEDULE
FOR PREHEARING FILINGS BY
THE PARTIES AND NOTICE OF HEARING**

Mailed Date: August 30, 2019

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I. STATEMENT**A. Procedural History**

1. This Proceeding was commenced on August 8, 2019, when Trial Staff of the Colorado Public Utilities Commission (Staff) issued Civil Penalty Assessment or Notice of Complaint to Appear (CPAN) No. 123654 to Respondent Elevated Moves.

2. The CPAN cites Respondent with one Count of violating § 40-10.1-107(1), C.R.S.,¹ in Carbondale, Colorado on July 17, 2019, specifically, for “Failure to maintain and file evidence of financial responsibility in sums as required by the Public Utilities Commission.” The CPAN also cites Respondent with one Count of violating § 40-10.1-502(1)(a), C.R.S.,² in Carbondale, Colorado on July 17, 2019, specifically, for “Operating and/or offering to operate as a mover in intrastate commerce without first having obtained a permit from the Commission.” (CPAN, page 1.)

3. The CPAN assessed for the first Count a civil penalty of \$11,000.00, plus an additional 15 percent surcharge required by § 24-34-108, C.R.S., for a total penalty of \$12,650.00. For the second Count, the CPAN assessed a civil penalty of \$1,100.00, plus the additional 15 percent surcharge, for a total penalty of \$1,265.00. The total amount of civil penalties assessed by the CPAN, including surcharges, is \$13,915.00. (CPAN, page 1.)

¹ Section 40-10.1-107(1), C.R.S., requires that: “Each motor carrier shall maintain and file with the commission evidence of financial responsibility in such sum, for such protection, and in such form as the commission may by rule require as the commission deems necessary to adequately safeguard the public interest..”

² Section 40-10.1-502(1)(a), C.R.S., requires that: “A person shall not operate or offer to operate as a mover in intrastate commerce pursuant to this article, or advertise services as a mover, without first having obtained a permit from the commission in accordance with this part 5.” Part 5 of Article 10.1 of Title 40, C.R.S., is entitled “Motor Carriers of Household Goods.”

4. The CPAN states that, if the Commission were to receive payment from Respondent within ten calendar days of the date of issuance of the CPAN, the total civil penalty would have been \$6,957.50, including the 15 percent surcharge. The CPAN also states that, if the Commission did not receive payment within ten days, Staff will seek civil penalties for the cited violations in the full total amounts stated in the CPAN. Further, the CPAN states that payment of the civil penalty assessment would be an acknowledgment (*i.e.*, an admission) by Respondent of liability for the violations cited. (CPAN, page 3.)

5. Mr. Lloyd E. Swint of Staff affirmed that, on August 8, 2019, he served the CPAN on Respondent by certified U.S. mail, return receipt requested. (CPAN, page 2.)

6. As of the date of this Decision, counsel for Staff has not filed a Notice of Intervention as of Right by Staff, Entry of Appearance and Notice Pursuant to Rule 1007(a) and Rule 1401.

7. A review of the Commission's file in this Proceeding reveals that no entry of appearance has been entered on behalf of Respondent.

8. Staff and Respondent are the only Parties to this Proceeding.

9. On August 28, 2019, by minute entry, the Commission referred this Proceeding to an Administrative Law Judge (ALJ) for disposition. Subsequently, the undersigned ALJ was assigned to preside over this Proceeding.

B. Representation

10. Elevated Moves is a party to this Proceeding and at this time is not represented by counsel. From a review of Commission records, the ALJ cannot determine the form of business organization of Respondent, that is, whether Respondent is a sole proprietorship, a corporation, or a limited liability company (LLC).

11. Rule 1201(a), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Rules of Practice and Procedure requires a party in a proceeding before the Commission to be represented by an attorney authorized to practice law in the State of Colorado. Rule 1201(b)(II), 4 CCR 723-1, provides an exception whereby an individual may appear without an attorney to represent the interests of a closely-held entity (including a closely-held corporation or an LLC) provided the requirements in § 13-1-127, C.R.S., are met. Section 13-1-127(2), C.R.S., allows an officer³ to represent a closely-held entity before the Commission if the following conditions are met: (a) the amount in controversy does not exceed \$15,000; and (b) the officer provides the Commission with evidence, satisfactory to the Commission, of the officer's authority to represent the closely-held entity. The owner of a sole proprietorship may represent his or her company without counsel, if the Commission approves.

12. The Commission has held that if the exception in Rule 1201(b)(II), 4 CCR 723-1, does not apply, an entity (such as a closely-held corporation or LLC) must be represented by counsel in an adjudication. In addition, the Commission has held that if a party must be, but is not, represented by an attorney, there are two consequences: first, any filing made by a non-attorney on behalf of the party is void and of no legal effect; and, second, a non-attorney cannot represent the party or participate in a prehearing conference, in an evidentiary hearing, and in an oral argument.

13. This Proceeding is an adjudication before the Commission.

14. To proceed in this matter without an attorney, Elevated Moves must meet the criteria of Rule 1201(b)(II), 4 CCR 723-1.

³ Section 13-1-127(1)(i), C.R.S., defines "Officer" as "a person generally or specifically authorized by an entity to take any action contemplated by" § 13-1-127, C.R.S.

15. Elevated Moves has the burden to prove that it is entitled to proceed in this case without an attorney. To meet that burden of proof, Elevated Moves must do the following: **First**, it must establish that it is a sole proprietorship or a closely-held entity. If Respondent is a closely-held entity, this means that a party must establish that it has “no more than three owners.” Section 13-1-127(1)(a), C.R.S. **Second**, Elevated Moves must demonstrate that it meets the requirements of § 13-1-127(2), C.R.S., which provides that an officer⁴ may represent a closely-held entity before this Commission if **both** of the following conditions are met: (a) the amount in controversy does not exceed \$15,000, other than possible penalties; **and** (b) the officer provides the Commission with evidence, satisfactory to the ALJ, of the authority of the officer to represent the closely-held entity.⁵

16. Elevated Moves will be ordered **either** to obtain counsel **or** to show cause why Rule 1201(a), 4 CCR 723-1, does not require it to be represented in this matter by an attorney at law currently in good standing before the Supreme Court of the State of Colorado. The show cause requirement means that Elevated Moves must file an affidavit regarding its form of business organization and, if it wishes to be represented by a non-attorney, that swears to the matters mentioned

17. If Elevated Moves elects to obtain counsel, then its counsel must enter an appearance in this matter on or before **close of business on September 12, 2019**.

18. If Elevated Moves elects to file the show cause affidavit, it **must file, on or before September 12, 2019, a verified (or sworn) statement** that: (a) establishes that Elevated

⁴ “Officer” includes an owner or managing member of an LLC.

⁵ As pertinent here, § 13-1-127(2.3), C.R.S., states that a person in whom the management of a limited liability company is vested “shall be presumed to have the authority to appear on behalf of the closely held entity upon providing evidence of the person’s holding the specified office or status[.]”

Moves is a sole proprietorship or a closely-held entity (*i.e.*, as a closely-held entity it has no more than three owners); (b) states that the amount in controversy in this matter does not exceed \$15,000 and explains the basis for that statement; (c) identifies the individual who will represent Elevated Moves in this matter; (d) establishes that the identified individual is an owner, or managing member in the case of an LLC, of Elevated Moves; and (e) if the identified individual is not an owner or managing member of Elevated Moves, has appended to it a resolution from the company's management that specifically authorizes the identified individual to represent Elevated Moves in this Proceeding.

19. If Elevated Moves wishes to proceed without an attorney in this matter, it must make the filing described in ¶¶ 18.

20. **Elevated Moves is advised that its failure to make the filing described in ¶¶ 18 above, or to have its Counsel file an entry of appearance, by September 12, 2019, may result in serious consequences adverse to its interests in this Proceeding.**

21. A CPAN filed against a motor vehicle carrier in Colorado is a serious proceeding. The ALJ strongly encourages Elevated Moves to retain competent counsel to represent it in this Proceeding.

C. Adopting the Procedural Schedule and Setting the Hearing

22. The ALJ will schedule an evidentiary hearing in this Proceeding for **October 8, 2019** in a Commission hearing room in Denver, Colorado. This Decision will also establish a fair and workable procedural schedule for each Party to disclose before the hearing its list of witnesses, detailed summaries of the testimony of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing.

23. Staff will be ordered to file, and to serve on Elevated Moves (and its counsel if counsel has entered an appearance), no later than **September 13, 2019**, a list of its witnesses, detailed summaries of the testimony of each of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing.

24. Elevated Moves will be ordered to file, and to serve on Staff and its counsel, no later than **September 27, 2019**, a list of its witnesses, detailed summaries of the testimony of each of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing.

25. If the Parties intend to negotiate stipulations or a settlement agreement, they must be filed no later than seven days before the hearing, or no later than **October 2, 2019**.

26. **The Parties are advised that no witness will be permitted to testify, except in rebuttal, unless that witness is identified on a list of witnesses filed and served in accordance with the procedural schedule adopted in this Interim Decision. The Parties are advised further that no exhibit will be received in evidence, except in rebuttal, unless filed and served in accordance with the adopted procedural schedule.**

27. Each Party shall bring to the hearing an original and three copies of each exhibit it intends to introduce at the hearing.⁶ The Parties are advised and are on notice that the Commission will *not* make copies of documents that are offered as exhibits at the hearing. The Parties are advised, and are on notice, that pre-filing exhibits in accordance with this Decision does *not* alter the requirement contained in this paragraph.

⁶ The original copy of hearing exhibits will be for the Court Reporter to mark for identification, and if the exhibit is admitted into evidence, it will be part of the record of this Proceeding. One copy is for the ALJ, the second copy is for the opposing counsel or party, and the third copy is for the party offering the exhibit.

28. If any hearing exhibit is longer than two pages, the Party offering the exhibit shall sequentially number each page of the exhibit.

29. Any Party wishing to make an oral closing statement at the hearing may do so immediately following the close of the evidence (*i.e.*, after presentation of the evidence near the end of the hearing).

30. After scheduling the hearing, the ALJ will not consider future requests to reschedule the hearing, unless there is a showing of good cause. If a Party is unable to attend the hearing, they shall file a motion for a continuance no later than October 2, 2019. The motion shall state the reason they are unable to attend, state good cause for a continuance, and state dates they will be available for a rescheduled hearing.

D. Additional Advisements

31. Staff bears the burden of proof by a preponderance of the evidence to prove the essential elements of the violations by Respondent charged in the CPAN. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500, 4 CCR 723-1. 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.⁷

⁷ Proof by a preponderance of the evidence of unlawful conduct constitutes substantial evidence to support the Commission's decision in a CPAN proceeding. Substantial evidence is more than a scintilla, and it must do more than create a suspicion of the existence of the fact to be established. *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373, 1378 (Colo. 1994).

32. The burden of proving an affirmative defense rests on the defendant (or the Respondent in this Proceeding) asserting the defense. The defense must be proven by a preponderance of the evidence. *Western Distributing Co. v. Diodoso*, 841 P.2d 1053, 1057-1059 (Colo. 1992). In this civil penalty assessment proceeding before the Commission, the Respondent has the burden to prove the defenses it raises, if any, by a preponderance of the evidence. *See Public Utilities Commission v. Trans Shuttle, Inc.*, Decision No. R01-881 (Mailed Date of August 29, 2001) ¶ III.C, p. 9, in Docket No. 01G-218CP; *see generally* Rule 1302 of the Rules of Practice and Procedure, 4 CCR 723-1. In this Proceeding, Staff bears the ultimate burden of proof to prove by a preponderance of the evidence both the alleged violations by Respondent and any civil penalties or other remedies that may be warranted. *Western Distributing Co. v. Diodoso, supra*.

33. **The Parties are advised and on notice** that this proceeding is governed by the Rules of Practice and Procedure found at 4 CCR 723-1, Part 1. The ALJ expects the Parties to comply with these rules. The Rules of Practice and Procedure are available on the Commission's website (<http://www.dora.colorado.gov/puc>), as well as in hard copy from the Commission upon request.

34. **The Parties are advised and are on notice** that the Commission has an E-Filings System available. One may learn about -- and if one wishes to do so, may register to use -- that system at <http://www.dora.colorado.gov/puc>.

35. **The Parties are advised and are on notice** that they are each responsible for filing pleadings and other documents with the Commission. Pursuant to Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1, a filing is made when the Commission receives the document. Thus, if a document is placed in the mail on the date on which the document is to

be filed, the document is not filed with the Commission in a timely manner. Pleadings and other documents are filed with the Commission either by using the E-filings System or by filing a paper document, including the original and three copies. Emailing pleadings and other documents to the ALJ, the Director of the Commission, the Commissioners, or other employees of the Commission **does not** constitute proper filing under Rule 1204, 4 CCR 723-1.

36. **Each Party is specifically advised** that all filings with the Commission must also be served upon the other Party in accordance with Rule 1205, 4 CCR 723-1.

37. **Each party is specifically advised** that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, the Party responding to a motion (*i.e.*, the Party that did not file the motion) has the procedural right to file a written response to the filed motion no later than 14 days after service of the motion, unless the time for filing a response is shortened by a separate order from the ALJ.

38. Rule 1405 of the Rules of Practice and Procedure, 4 CCR 723-1, shall apply to discovery procedures and deadlines in this proceeding.

II. **ORDER**

A. **It Is Ordered That:**

1. An evidentiary hearing in this Proceeding is scheduled as follows:

DATE: October 8, 2019
TIME: 9:30 a.m.
PLACE: Commission Hearing Room
 1560 Broadway, Suite 250
 Denver, Colorado

2. At the above date, time, and place you will be given the opportunity to present evidence and to be heard, consistent with the requirements advisements stated in this Decision.

3. Elevated Moves must choose either to obtain legal counsel or to make a show cause filing that comports with Paragraph Nos. I.B.11 through 20 above.

4. If Elevated Moves elects to obtain legal counsel, then legal counsel shall enter an appearance in this proceeding on or before September 12, 2019.

5. If Elevated Moves elects to file a show cause affidavit, then on or before September 12, 2019, it shall show cause why it is not required to be represented by legal counsel. The show cause filing shall satisfy the requirements in Paragraph Nos. I.B.11 through 20 above.

6. Trial Staff of the Colorado Public Utilities Commission (Staff) shall file on or before September 13, 2019, and serve on Elevated Moves (and its counsel if counsel has entered an appearance), a list of its witnesses, detailed summaries of the testimony of each of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing.

7. On or before September 27, 2019, Elevated Moves shall file, and serve on Staff and its counsel, a list of its witnesses, detailed summaries of the testimony of each of its witnesses, and copies of the exhibits that it intends to offer into evidence at the hearing.

8. The Parties shall file any stipulations or a settlement agreement no later than October 2, 2019.

9. The Parties shall comply with the requirements and advisements established in this Decision and shall make the filings as required by this Decision.

10. This Decision shall be effective immediately.

(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