

Decision No. R19-0881

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19G-0438HHG

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

MR. OSCAR RAMIREZ, DOING BUSINESS AS ELEVATED MOVES LLC,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING MOTION TO AMEND
CPAN, AMENDING CAPTION,
ASSESSING CIVIL PENALTY, AND
GRANTING CEASE AND DESIST ORDER**

Mailed Date: October 30, 2019

TABLE OF CONTENTS

I. STATEMENT.....	2
A. Procedural History.....	2
B. Staff’s Motion to Amend the CPAN.	7
III. FINDINGS OF FACT.	14
IV. <u>DISCUSSION AND CONCLUSIONS</u>	17
A. Jurisdiction.	17
B. Violations and Civil Penalty Assessment.....	19
C. Cease and Desist Order.	22
V. ORDER.....	24
A. The Commission Orders That:	24

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 (Elevated Moves).

2. 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.

3. The CPAN cited Elevated Moves 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 cited Elevated Moves 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.”³

4. 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

¹ Section 40-10.1-107(1), C.R.S., is quoted in the discussion of “Applicable Law” in Section II of this Decision *infra*.

² Section 40-10.1-502(1)(a), C.R.S., is quoted in the discussion of “Applicable Law” in Section II *infra*.

³ Hearing Exhibit 9 at page 1.

additional 15 percent surcharge, for a total penalty of \$1,265.00. The total amount of civil penalties assessed by the CPAN, including surcharges, was \$13,915.00.⁴

5. The CPAN stated that, if the Commission were to receive payment from Elevated Moves 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 stated that, if the Commission did not receive payment within ten days, Staff would seek civil penalties in the full total amounts stated in the CPAN for the cited violations. Further, the CPAN states that payment of the civil penalty assessment would be an acknowledgment (*i.e.*, an admission) by Elevated Moves of liability for the violations cited.⁵

6. Mr. Lloyd E. Swint of Staff affirmed that, on August 8, 2019, he served the CPAN on Elevated Moves by certified U.S. mail, return receipt requested.⁶

7. Decision No. R19-0726-I (mailed on August 30, 2019) set a hearing on this CPAN for October 8, 2019 at 9:30 a.m. in a Commission hearing room. The Decision also adopted the following procedural deadlines:

- (1) No later than September 12, 2019, Elevated Moves was ordered either to obtain counsel to represent it, or to file an affidavit showing cause why Rule 1201(a) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, did not require it to be represented in this matter by an attorney currently in good standing before the Supreme Court of the State of Colorado;
- (2) Staff was ordered to file, and to serve on Elevated Moves (and its counsel if counsel had 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;

⁴ Hearing Exhibit 9 at page 1.

⁵ *Id.* at page 3.

⁶ *Id.* at page 2; *see also* Hearing Exhibit 10.

- (3) Elevated Moves was 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 (its prehearing disclosures); and
- (4) If the Parties had negotiated stipulations and/or a settlement agreement, they must be filed no later than October 2, 2019.⁷

8. On September 10, 2019, Staff filed its Notice of Intervention as of Right by Staff, Entry of Appearance and Notice Pursuant to Rule 1007(a) and Rule 1401 (Notice of Intervention).⁸

9. The Commission served Decision No. R19-0726-I on August 30, 2019 on Staff through the E-filing System, and on Elevated Moves by U.S. Mail at 1925 Dolores Way, Carbondale, Colorado 81623-2235. That mailing was not returned to the Commission as undeliverable. Upon learning that Staff had served its Notice of Intervention on Mr. Oscar Ramirez, the owner of Elevated Moves, at oscar@elevatedmoves.com, the ALJ caused Decision No. R19-0726-I to be served on Mr. Ramirez at that email address on September 10, 2019.

10. The ALJ’s review of the Commission’s file in this Proceeding revealed that Elevated Moves failed, by September 12, 2019, either to have counsel enter an appearance on its behalf or to file the show cause affidavit required by Decision No. R19-0726-I.⁹

⁷ The Commission served Decision No. R19-0726-I on August 30, 2019 on the Staff through the E-filing System, and on Elevated Moves by U.S. Mail at 1925 Dolores Way, Carbondale, Colorado 81623-2235. The Decision was also served on September 10, 2019 by e-mail to Mr. Oscar Ramirez at oscar@elevatedmoves.com. Mr. Ramirez is the owner of Elevated Moves.

⁸ Staff’s Notice of Intervention stated the caption as, “Public Utilities Commission of the State of Colorado, Complainant v. Mr. Oscar Ramirez DBA Elevated Moves, LLC, Respondent.”

⁹ Decision No. R19-0726-I, ¶ 20 at page 6, warned Respondent, as follows: **“Elevated Moves is advised that its failure to make the [show cause affidavit] filing ..., 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.”** (Emphasis in the original.)

11. On September 13, 2019, Staff filed, and served on Mr. Ramirez, Staff's List of Witnesses and Exhibits, consisting of a list of two witnesses, detailed summaries of the testimony of each witness, and copies of ten exhibits that Staff intended to offer into evidence at the hearing.¹⁰

12. On September 23, 2019, Staff filed a Motion to Amend the Procedural Schedule (Motion for Continuance),¹¹ asking that the hearing be continued due to Staff counsel's pre-existing all-day hearing on October 8, 2019 before the Colorado Racing Commission. The Motion for Continuance indicated that Staff's counsel attempted to confer with Mr. Ramirez about the requested continuance and alternative dates by email on September 18, 2019 and by telephone (*i.e.*, by voice mail) on the morning of September 20, 2019, but he received no responses either to his email or voice mail. Staff asserted that no prejudice will inure to Elevated Moves because the continuance will give Mr. Ramirez more time to prepare for hearing.¹²

13. By Decision No. R19-0790-I (mailed on September 24, 2019), the ALJ granted the Motion for Continuance, finding that Staff had shown good cause to continue the hearing and that Elevated Moves would not be prejudiced because Mr. Ramirez would have more time to prepare for the hearing. The hearing was rescheduled to October 22, 2019 at 9:30 a.m. at the Commission. Decision No. R19-0790-I also extended the deadline to October 8, 2019, for Elevated Moves to file, and to serve on Staff and its counsel, its list of its witnesses, detailed

¹⁰ Staff's List of Witnesses and Exhibits also stated the caption as, "Public Utilities Commission of the State of Colorado, Complainant v. Mr. Oscar Ramirez DBA Elevated Moves, LLC, Respondent."

¹¹ Staff's Motion for Continuance also stated the caption as, "Public Utilities Commission of the State of Colorado, Complainant v. Mr. Oscar Ramirez DBA Elevated Moves, LLC, Respondent."

¹² Motion for Continuance, ¶¶ 1 through 5 at pages 1 and 2.

summaries of the testimony of each witness, and copies of the exhibits that it intended to offer into evidence at the hearing.¹³

14. The Commission served Decision No. R19-0790-I on September 24, 2019 on Staff through the E-filing System, on Mr. Ramirez and Elevated Moves by U.S. Mail at 17 Redstone Drive, New Castle, Colorado 81647, and on Elevated Moves by U.S. Mail at 1925 Dolores Way, Carbondale, Colorado 81623-2235. Neither mailing to Mr. Ramirez or Elevated Moves was returned to the Commission as undeliverable.

15. The ALJ's review of the Commission's file in this Proceeding revealed that Elevated Moves failed to make the required filing by October 8, 2019.

16. The hearing was called to order on October 22, 2019 at 9:30 a.m. The ALJ recessed the evidentiary portion of the hearing until 9:45 a.m. to give Mr. Ramirez more time to appear, but neither Mr. Ramirez nor any representative of Elevated Moves appeared for the hearing. Staff presented its case-in-chief through the testimony of Criminal Investigator Lloyd Swint, who sponsored nine exhibits that were admitted into evidence. Mr. Swint testified that Mr. Ramirez and his moving company, Elevated Moves LLC, had violated the Colorado statutes charged in the CPAN. He requested that the remedies sought by Staff be assessed against both Mr. Ramirez and Elevated Moves.

17. As relief in this proceeding, Mr. Swint testified that Staff seeks an assessment of the maximum civil penalties against Mr. Ramirez and Elevated Moves in the total amount of \$13,915.00, including the 15 percent surcharges. Staff also seeks an order that Mr. Ramirez and Elevated Moves cease and desist from operating, offering to operate, or advertising its services

¹³ Decision No. R19-0790-I, ¶¶ 8, 10, and 11 at pages 3 and 4; Ordering Paragraph Nos. 1, 4, and 6 at pages 4 and 5. If Staff believed that its caption was more correct, the ALJ invited Staff to file a motion to amend the caption. *Id.*, Fn. 3 at page 3.

as a mover in intrastate commerce in Colorado without a valid permit issued by the Commission and without having proof of financial responsibility on file with the Commission.

B. Staff's Motion to Amend the CPAN.

18. On the afternoon of October 22, 2019, Staff filed a Motion to Amend the CPAN Pursuant to C.R.C.P. 15(c) (Motion to Amend) from "Public Utilities Commission of the State of Colorado, Complainant v. Elevated Moves, Respondent" to the following: "Public Utilities Commission of the State of Colorado, Complainant v. Mr. Oscar Ramirez DBA Elevated Moves, LLC, Respondent." Staff served Mr. Ramirez with the Motion to Amend and the Amended CPAN (Exhibit A) by U.S. Mail at 17 Redstone Drive, New Castle, Colorado 81647, and by email at Oscar@elevatedmoves.com.

19. Staff requested that response time be waived, pursuant to Rule 1400(b), 4 CCR 723-1. However, the ALJ shortened response time to seven days, or no later than October 29, 2019, in order to give Mr. Oscar Ramirez, the owner of Elevated Moves an opportunity to respond if he wished.¹⁴

20. Mr. Ramirez failed to file any response to Staff's Motion to Amend.

21. Rule 1400(d) of the Rules of Practice and Procedure, 4 CCR 723-1, states that, "The Commission may deem a failure to file a response as a confession of the motion." Mr. Ramirez's failure to respond to the Motion to Amend constitutes a confession of the motion and the relief requested.

¹⁴ Decision No. R19-0862-I (mailed on October 23, 2019), ¶¶ 8 and 9 at page 3 and Ordering Paragraph No. 1 at page 3.

22. When an amendment to a complaint changes the defendant named in the complaint, the amended complaint relates back to the date of the original complaint when the new defendant:

(1) [h]as received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.¹⁵

23. In Colorado, an ALJ has the discretion to determine, under Rule 15(b), whether to grant a motion to amend in administrative proceedings. Rule 15(b) authorizes a party to amend the pleadings to conform to the evidence if a claim has been tried by implied consent.¹⁶

24. Rule 15(a), C.R.C.P., provides in pertinent part that, “a party may amend his pleading only by leave of court ...; and leave shall be freely given when justice so requires.” Rule 15(a) reflects a liberal policy of amendment and encourages trial courts to look favorably on a request to amend. A court, or an ALJ, may permit amendments to pleadings at any stage of litigation, so long as undue delay does not result and the other parties will not be prejudiced by the amendments.¹⁷ A court, or an ALJ, should grant a motion to amend the pleadings after trial when no reasonable doubt exists that the issue has been intentionally and actually tried.¹⁸

¹⁵ See Rule 15(c), Colorado Rules of Civil Procedure (C.R.C.P.); *Currier v. Sutherland*, 218 P.3d 709, 715–16 (Colo. 2009).

¹⁶ *Colorado State Bd. of Dental Examiners v. Norton*, 9 P.3d 1182, 1184 (Colo. App. 2000).

¹⁷ *Nelson v. Elway*, 971 P.2d 245, 248 (Colo. App. 1999).

¹⁸ *Bittle v. CAM-Colorado, LLC*, 318 P.3d 65, 74 (Colo. App. 2012). In that case, the court held that, “Where a party fails to object to the presentation of evidence concerning the issue, it cannot later complain of failure to amend the pleadings.” *Id.* In the instant Proceeding, after actual notice of the rescheduled hearing date, Mr. Ramirez failed to appear for hearing and thereby gave implied consent to the issues, including his liability for violating §§ 40-10.1-107(1) and § 40-10.1-502(1)(a), C.R.S.

25. The ALJ finds that, after Staff filed the original CPAN, and through the evidence adduced during the hearing before the ALJ on October 22, 2019, Staff concluded that Oscar A. Ramirez was an additional party liable for the violations alleged in the CPAN. In the Motion to Amend, Staff asserted that bringing the CPAN solely against Elevated Moves was a mistake due to excusable neglect on the part of Staff.¹⁹ In every prehearing pleading filed in this Proceeding, Staff used a caption that stated that “Mr. Oscar A. Ramirez, DBA Elevated Moves LLC,” was the Respondent. Hence, after Staff intervened, Staff and its counsel believed, mistakenly, that Mr. Ramirez, doing business as Elevated Moves LLC, was the Respondent who committed the violations of §§ 40-10.1-107(1) and § 40-10.1-502(1)(a), C.R.S., alleged in the original CPAN.

26. Mr. Ramirez, the owner of Elevated Moves LLC, was served with the original CPAN, as well as Staff’s list of witnesses, summaries of testimony, and copies of Staff’s hearing exhibits. At the October 22, 2019 hearing, counsel for Staff recounted his telephone conversation with Mr. Ramirez during which counsel informed Mr. Ramirez of Staff’s planned request to reschedule the hearing. Mr. Ramirez was also served with all the decisions issued by the ALJ in this proceeding, including Decision Nos. R19-0726-I and R19-0790-I, which gave him actual notice of the requirement and deadlines for filing his prehearing disclosures and of the original and rescheduled hearing dates. Nevertheless, in spite of this actual notice, Mr. Ramirez filed nothing with the Commission and failed to appear at the hearing to defend against the charges in the CPAN.

27. The ALJ finds and concludes that Mr. Ramirez received actual notice of the original CPAN, of the requirement and deadlines for filing his prehearing disclosures,

¹⁹ Motion to Amend at pages 1 and 2.

and of the original and rescheduled hearing dates. The Commission has provided Mr. Ramirez with every opportunity to defend against the charges in the CPAN through the prehearing filing of witnesses, testimony summaries, and exhibits in his defense. Having received actual notice of the institution of the CPAN, of his filing requirements, and of the October 22, 2019 hearing date, the ALJ finds and concludes that Mr. Ramirez gave his implied consent to the hearing on the issues, including his alleged liability for violating §§ 40-10.1-107(1) and § 40-10.1-502(1)(a), C.R.S. Mr. Ramirez was not prejudiced in being able to maintain his defense on the merits; instead he chose not to file prehearing disclosures or to appear at the hearing to defend against the violations alleged in the CPAN. Because the caption of the original CPAN differed from the captions on Staff's pleadings filed and served on him, Mr. Ramirez knew or should have known that, but for Staff's mistake concerning the identity of the proper party, the CPAN would have been brought against him, doing business as Elevated Moves LLC.

28. Moreover, at the October 22, 2019 hearing, Investigator Lloyd Swint testified regarding his conversations with Mr. Ramirez, when Mr. Ramirez represented himself as the man at Elevated Moves in charge of setting up the move for Investigator Swint's *alias persona*. The contract submitted to Investigator Swint by Mr. Ramirez (Hearing Exhibit 7) listed Mr. Ramirez as the owner of Elevated Moves. It is clear from the evidence adduced at the hearing that Mr. Ramirez is the owner and operator of Elevated Moves. The ALJ finds and concludes that no reasonable doubt exists that the issue of Mr. Ramirez's liability for the violations alleged in the CPAN has been intentionally and actually tried.

29. The ALJ finds and concludes that Staff's failure to amend the CPAN and caption to include Mr. Ramirez constitutes excusable neglect. The ALJ finds and concludes that Staff

has shown good cause to amend the CPAN and the caption. The Amended CPAN changes only the identity of the Respondent; the statutory violations alleged are the same as the original CPAN. The Amended CPAN assesses 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 Amended CPAN assesses 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 Amended CPAN, including surcharges, are \$13,915.00.²⁰

30. Staff served the Amended CPAN on Mr. Ramirez on October 22, 2019 by U.S. Mail at 17 Redstone Drive, New Castle, Colorado 81647 and by email at:

Oscar@elevatedmoves.com.

31. The Motion to Amend will be granted. The CPAN shall be amended as proposed by Staff in Exhibit A to its Motion to Amend. Henceforth, the caption appearing on page one of this Decision shall be used in this Proceeding.

32. Pursuant to Rule 1501(c) of the Rules of Practice and Procedure, 4 CCR 723-1, the ALJ takes administrative notice of the Amended CPAN (Exhibit A to the Motion to Amend), which shall be admitted into evidence as Hearing Exhibit 9A.

33. Staff and Mr. Ramirez, doing business as Elevated Moves LLC (Mr. Ramirez), are the Parties to this Proceeding.

II. APPLICABLE LAW

34. As relevant to this case, § 40-7-116(1)(a), C.R.S., provides that: “Investigative personnel of the commission . . . have the authority to issue civil penalty assessments for the violations enumerated in sections 40-7-112 and 40-7-113.”

²⁰ Hearing Exhibit 9A, Amended CPAN at page 1.

35. Section 40-10.1-502(1)(a), C.R.S., provides 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.”

36. Section 40-10.1-101(12), C.R.S., defines “mover” as follows: “‘Mover’ means a motor carrier that provides the transportation or shipment of household goods.”

37. Section 40-10.1-101(10), C.R.S., defines “motor carrier” as follows:

“Motor carrier” means any person owning, controlling, operating, or managing a motor vehicle that provides transportation in intrastate commerce pursuant to this article; except that the term does not include a transportation network company ... or a transportation network company driver....

38. Section 40-10.1-107(1), C.R.S., provides 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.

39. As relevant to this case, § 40-7-112(1)(a), C.R.S., provides that: “A person who operates or offers to operate as a motor carrier as defined in section 40-10.1-101; ... is subject to civil penalties as provided in this section and sections 40-7-113 to 40-7-116, in addition to any other sanctions that may be imposed pursuant to law.”

40. As relevant to this case, § 40-7-113(1), C.R.S., provides that:

In addition to any other penalty otherwise authorized by law and except as otherwise provided in subsections (3) and (4) of this section [related to enhanced civil penalties for multiple violations], any person who violates article 10.1 or 10.5 of this title 40 or any rule promulgated by the commission pursuant to article 10.1 or 10.5, which article or rule is applicable to the person, may be subject to fines as specified in the following paragraphs:

- (a) Any person who fails to carry the insurance required by law may be assessed a civil penalty of not more than eleven thousand dollars.

- (b) Any person who violates section ... 40-10.1-502 (1)(a) ... may be assessed a civil penalty of not more than one thousand one hundred dollars.

41. Section 40-10.1-112, C.R.S., relating to cease and desist orders, provides that:

- (1) Except as specified in subsection (3) of this section [relating to summary suspensions of certificates and permits], the commission, at any time, by order duly entered, after hearing upon notice to the motor carrier and upon proof of violation, may issue an order to cease and desist ... for the following reasons:

- (a) [a] violation of this article [10.1] ...; ...

- (2) ... Upon proof of violation, the commission may issue an order to cease and desist ... or ... assess civil penalties as provided in article 7 of this title [40], or take any other action within the commission’s authority.

42. Staff bears the burden of proof in this Proceeding. In adjudicatory proceedings before the Commission, the State Administrative Procedure Act imposes the burden of proof upon “the proponent of an order.”²¹ In a hearing on a CPAN, the Commission has the burden of demonstrating a violation by a preponderance of the evidence.²² Since Staff prosecutes CPANs on behalf of the Commission and is the proponent in this Proceeding, Staff has the burden of proof to prove the violations alleged in the Amended CPAN.²³

43. In satisfying its burden of proof, Staff must prove by a preponderance of the evidence the elements of the violations cited in the CPAN and the amount of the civil penalties requested.²⁴ The preponderance standard requires that evidence of the existence of a contested fact outweighs the evidence to the contrary.²⁵ That is, as the finder of fact, the ALJ must

²¹ Section 24-4-105(7), C.R.S.

²² Section 40-7-116(1)(d)(II), C.R.S.

²³ See Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1: “The burden of proof and the initial burden of going forward shall be on the party that is the proponent of a decision . . . The proponent of the order is that party commencing a proceeding....”

²⁴ See §§ 13-25-127(1) and 24-4-105(7), C.R.S.; Rule 1500, 4 CCR 723-1; *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1058 (Colo. 1992).

²⁵ *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013).

determine whether the existence of a contested fact is more probable than its non-existence.²⁶ Staff has met this burden of proof when the evidence, on the whole, slightly tips in favor of Staff.²⁷

44. The burden of proving an affirmative defense rests on the respondent asserting the defense in a Commission CPAN proceeding. The defense must be proven by a preponderance of the evidence.²⁸ In a formal complaint, civil penalty assessment, and show cause proceedings before the Commission, the respondent has the burden to prove the defenses it raises by a preponderance of the evidence.²⁹

45. In this Proceeding, Staff bears the ultimate burden of proof to prove by a preponderance of the evidence both the alleged violations by Mr. Ramirez and any civil penalties or other remedies that may be warranted.³⁰

III. FINDINGS OF FACT.

46. On July 17, 2019, Mr. Ramirez held no Commission Permit authorizing him to operate, to offer to operate, or to advertise his services as a mover in intrastate commerce within the State of Colorado. Oscar A. Ramirez, 17 Redstone Drive, New Castle, Colorado 81647 is an owner, the managing member, and the registered agent for service of process for Elevated Moves.³¹

²⁶ *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

²⁷ 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).

²⁸ *Western Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057-1059 (Colo. 1992).

²⁹ See *Public Utilities Comm'n. 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.

³⁰ *Western Distributing Co. v. Diodosio*, *supra*.

³¹ Hearing Exhibit 8.

47. Criminal Investigator Lloyd Swint received a complaint from a licensed moving company in Carbondale, Colorado about the possible unregulated moving activities of Mr. Ramirez. Mr. Swint then conducted an investigation of Mr. Ramirez and Elevated Moves.³² He discovered a previous investigation in 2018, conducted by former Criminal Investigator Michael McClintock, into intrastate moves by Elevated Moves allegedly operating without a Commission-issued permit. Mr. Swint discovered a Violations Warning Letter sent to Mr. Ramirez and Elevated Moves on October 23, 2018. The Violations Warning Letter advised Mr. Ramirez that Staff had evidence Elevated Moves was violating § 40-10.1-107(1), C.R.S., and § 40-10.1-502(1)(a), C.R.S., by operating as an intrastate household goods (HHG) mover in Colorado without a Commission permit.³³ The Violations Warning Letter was served on Elevated Moves by U.S. Certified Mail at 17 Redstone Drive, New Castle, Colorado 81647 and at 1925 Dolores Way Carbondale, Colorado 81623.³⁴ There is no evidence that the Violations Warning Letter was returned as undeliverable, or that Mr. Ramirez did not receive it.

48. In his 2019 investigation, Mr. Swint determined from Commission records that Mr. Ramirez did not hold a current HHG mover's permit from the Commission. Although in May of 2017 Mr. Ramirez applied for an HHG mover's permit, Mr. Swint determined that Mr. Ramirez did not follow through with the application. Mr. Swint also discovered numerous Facebook advertisements, posted after the October 23, 2018 Violations Warning Letter, offering Elevated Moves' services as an intrastate mover. From these postings, Mr. Swint concluded that Elevated Moves was still advertising and operating in Colorado as an unlicensed mover.

³² Hearing Exhibit 2.

³³ The Amended CPAN charges Mr. Ramirez with violating the same Colorado statutes.

³⁴ Hearing Exhibit 3.

Mr. Swint also obtained contact information (*i.e.*, telephone number and email address) for Mr. Ramirez from these postings.³⁵

49. Using his investigative alias of Tony Missler, Investigator Swint contacted Mr. Ramirez by text message on June 17, 2019 to ask for a quote for a proposed move.³⁶ In a series of emails exchanged from June 17 through July 17, 2019, Mr. Ramirez responded to Tony Missler regarding the proposed move of furniture from six hotel rooms in Glenwood Springs, Colorado.³⁷ The email from Mr. Ramirez dated July 17, 2019 attached a proposed contract for the move, signed by Mr. Ramirez, and included a price quote for the move to Elevated Moves' Colorado storage facility and for storage, totaling \$1572.00.³⁸ From these emails and the proposed contract signed by Mr. Ramirez, Investigator Swint determined that Mr. Ramirez was offering to provide and providing moving services in Colorado.

50. Investigator Swint served the original CPAN³⁹ on Mr. Ramirez and Elevated Moves by Certified U.S. Mail, return receipt requested, on August 8, 2019 at 17 Redstone Drive, New Castle, Colorado 81647.⁴⁰

51. Mr. Swint recommended that the ALJ assess the full civil penalties, plus surcharges, on Mr. Ramirez for his violation of §§ 40-10.1-107(1) and 40-10.1-502(1)(a), C.R.S., on July 17, 2019 in Carbondale, Colorado. As aggravating circumstances, Mr. Swint first referred to the October 23, 2018 Violations Warning Letter, related to another incident, sent to

³⁵ Hearing Exhibit 4.

³⁶ Hearing Exhibit 5.

³⁷ Hearing Exhibit 6.

³⁸ Hearing Exhibit 7.

³⁹ Hearing Exhibit 9.

⁴⁰ Hearing Exhibit 10. The CPAN was also served on Mr. Ramirez and Elevated Moves by Certified U.S. Mail on August 8, 2019 at 1925 Dolores Way Carbondale, Colorado 81623-2235 and at 111 Emma Road, Apt. 114, Basalt, Colorado 81621-9419. Hearing Exhibit 10 shows delivery at the New Castle address, but there is no evidence regarding delivery at the Carbondale or Basalt addresses.

Mr. Ramirez by the Transportation Staff warning about his violations of the same statutes for operating as an intrastate mover without a Commission permit and without maintaining the required proof of financial responsibility. Second, Mr. Swint described a report from another then-unlicensed Colorado mover who Mr. Ramirez attempted to persuade to join forces with him in a moving company. (Subsequent to this report, that mover has obtained a mover's permit and filed proof of insurance with the Commission.)

52. Mr. Swint knew of no mitigating circumstances.

53. Mr. Swint also recommended that the ALJ issue a cease and desist order to prohibit Mr. Ramirez from operating, advertising, or offering to operate as an intrastate mover in Colorado unless he obtains a valid mover's permit from the Commission and files the required evidence of financial responsibility with the Commission.

54. The ALJ finds that on July 17, 2019, Mr. Ramirez was advertising, offering to operate, and operating as a mover without a valid mover's permit.

55. According to Investigator Swint, unlicensed intrastate movers can cause several harms to consumers, including unprofessional conduct, misleading consumers about prices and services, demanding a higher price to finish the move than the price quoted, theft of property, and damages to property.

IV. DISCUSSION AND CONCLUSIONS

A. Jurisdiction.

56. The Commission has subject matter jurisdiction over this Proceeding, pursuant to §§ 40-7-112(1)(a), 40-7-113, 40-7-116, 40-10.1-107(1), and 40-10.1-502(1)(a), C.R.S.

57. The Commission has personal jurisdiction over Mr. Ramirez. The original CPAN No. 123654, including notice of the alleged violations and civil penalties in Counts 1 and

2, was served on Mr. Ramirez on August 8, 2019 by Certified U.S. Mail. He also was served with timely and adequate notice of the rescheduled evidentiary hearing for October 22, 2019 by the Commission's mailing of Decision No. R19-0790-I on September 24, 2019.

58. On September 13, 2019, Staff served on Mr. Ramirez its List of Witnesses and Exhibits, listing two witnesses, detailed summaries of the testimony of each witness, and copies of ten exhibits that Staff intended to offer into evidence at the hearing. Because, in every prehearing pleading filed in this Proceeding, Staff used the caption "Mr. Oscar A. Ramirez, DBA Elevated Moves LLC," as the Respondent, the ALJ finds and concludes that Mr. Ramirez had actual, timely, and adequate notice that his conduct and alleged violations of the cited statutes were the subject-matter of the CPAN.

59. The ALJ finds and concludes that the Commission provided to Mr. Ramirez a full, fair, and meaningful opportunity at the hearing to confront and to cross-examine Staff's witness, Mr. Swint, and to present a defense against the violations alleged in the CPAN.

60. Based on the record as a whole including the representations of Staff's counsel, the ALJ concludes that Mr. Ramirez has received actual notice of the October 22, 2019 hearing. The ALJ further concludes that Mr. Ramirez neither contacted the ALJ, the Commission, Staff, or Staff's counsel regarding his intent to appear, or not appear, at the hearing. Nor did Mr. Ramirez file a motion for a continuance or any other pleading in this matter. Accordingly, the ALJ finds and concludes that Mr. Ramirez had a full, fair, and meaningful opportunity to appear at the October 22, 2019 hearing, to confront and to cross-examine Staff's witness, Mr. Swint, and to present a defense against the violations alleged in the CPAN.

61. Mr. Ramirez did not appear for the October 22, 2019 hearing. By failing to appear for the hearing, the ALJ finds and concludes that Mr. Ramirez chose not to avail

himself of these full, fair, and meaningful opportunities to test Staff's case-in-chief through cross-examination of Mr. Swint or to present a defense against the violations alleged in the CPAN.

B. Violations and Civil Penalty Assessment.

62. Substantial evidence in the record as a whole establishes by a preponderance of the evidence that on July 17, 2019, in Carbondale, Colorado, Mr. Ramirez advertised, offered to operate, and operated as an HHG mover in intrastate commerce without first having obtained a valid permit issued by the Commission. The ALJ finds and concludes that, by this conduct, Mr. Ramirez violated § 40-10.1-502(1)(a), C.R.S., on July 17, 2019, in Carbondale, Colorado.

63. Substantial evidence in the record as a whole establishes by a preponderance of the evidence that on July 17, 2019, in Carbondale, Colorado, Mr. Ramirez failed to maintain and to cause to be filed with the Commission evidence of financial responsibility in sums as required. The ALJ finds and concludes that, by this conduct, Mr. Ramirez violated § 40-10.1-107(1), C.R.S., on July 17, 2019, in Carbondale, Colorado.

64. The ALJ finds and concludes that Staff proved by a preponderance of the evidence in the record as a whole that Mr. Ramirez violated §§ 40-10.1-502(1)(a) and 40-10.1-107(1), C.R.S., on July 17, 2019, in Carbondale, Colorado.

65. Having found that Respondent violated §§ 40-10.1-502(1)(a) and 40-10.1-107(1), C.R.S., it is necessary for the ALJ to determine the appropriate amount of civil penalty to be assessed for these violations.

66. When violations of Colorado statutes or Commission rules have been proven in a Civil Penalty Assessment proceeding, Rule 1302(b) of the Rules of Practice and Procedure,

4 CCR 723-1, provides that the Commission will consider evidence of any aggravating and mitigating circumstances surrounding the violations, as follows:

- (b) The Commission may impose a civil penalty, when provided by law. The Commission will consider 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 respondent's business; and
 - (VIII) such other factors as equity and fairness may require.

67. Decision No. R19-0790-I gave Mr. Ramirez actual, proper, and adequate notice of the October 22, 2019 hearing, consistent with the foregoing discussion. However, Mr. Ramirez then failed to appear at the hearing on October 22, 2019 to confront and to challenge Staff's evidence against him or to present his defense against Staff's evidence of alleged violations. The ALJ concludes that this failure constitutes an aggravating factor.

68. The evidence shows a history of one prior investigation regarding Mr. Ramirez's alleged violations of §§ 40-10.1-502(1)(a) and 40-10.1-107(1), C.R.S., which is a second aggravating factor. On October 23, 2018, Staff had sent to Mr. Ramirez a Violation Warning Letter concerning Elevated Moves' providing HHG moving services in Colorado without a valid Commission permit and without having proof of insurance on file with the Commission.

69. According to Mr. Swint, another then-unlicensed Colorado mover reported to the Commission that Mr. Ramirez attempted to persuade him to join forces with Ramirez in a

moving company. A reasonable inference to draw from this evidence is that the joint moving venture would also be an unlicensed intrastate moving company with no proof of insurance on file with the Commission. This report is evidence of a third aggravating factor.

70. Mr. Ramirez failed to appear for the hearing, and thus presented no evidence to refute the aggravating factors or to support any mitigating factors. There was no evidence that Mr. Ramirez made any effort, after receiving the October 23, 2018 Violation Warning Letter, to attempt to resolve the violations alleged in the Violation Warning Letter or to comply with Colorado law and Commission rules. Mr. Swint knew of no mitigating factors.

71. There was no evidence, and thus no findings are made, regarding the other factors listed in Rule 1302(b).

72. Based on an evaluation of evidence in the record, and after considering the factors listed in Rule 1302(b) recited above, the ALJ concludes that evidence of aggravating circumstances far outweigh any mitigating circumstances.

73. The Commission performs an important health, safety, and welfare function by assuring that movers have valid permits and maintain current insurance coverages to protect the public who seek the services of movers. Mr. Ramirez has disregarded the protections of the public afforded by Colorado law and by the Commission. The ALJ concludes that the nature, aggravating circumstances, and gravity of the violations by Mr. Ramirez warrant assessment of the maximum civil penalties sought in the Amended CPAN.

74. At hearing, Staff asked for an assessment of the total civil penalty sought in the CPAN of \$12,100.00, plus the 15 percent in surcharges of \$1,815.00, for a total civil penalty of \$13,915.00. An assessment will be ordered of the total civil penalties in the amount of \$13,915.00, including the 15 percent surcharges.

75. Mr. Ramirez will be ordered to pay the full civil penalty in full within 30 days of the effective date of this Decision.

76. Mr. Ramirez is advised that his failure to pay the civil penalty in full by the deadline imposed in this Decision may result in Mr. Ramirez; any other owners, principals, officers, members, partners, or directors; and any other entity owned or operated by Mr. Ramirez or other owners, principals, officers, members, partners, or directors of Elevated Moves being disqualified from obtaining an HHG mover permit for a period of 36 months after the date on which the civil penalty payment was due.⁴¹ Mr. Ramirez is further advised that his continued violation of §§ 40-10.1-502(1)(a) and 40-10.1-107(1), C.R.S., could result in every officer, agent, or employee of Mr. Ramirez or Elevated Moves being charged by the State of Colorado with a Class 2 misdemeanor, punishable by imprisonment of 3 to 12 months, or fines of \$250.00 to \$1,000.00, or both. Each day of a continuing violation of §§ 40-10.1-502(1)(a) or 40-10.1-107(1), C.R.S., will constitute a separate offense.⁴²

C. Cease and Desist Order.

77. Staff also seeks an order that Mr. Ramirez cease and desist from operating, advertising, or offering to operate as an intrastate mover in Colorado without a valid permit issued by the Commission and without maintaining and having on file with the Commission evidence of financial responsibility in the amounts required.⁴³

78. The gravity to the public and to consumers of Mr. Ramirez's violations, for providing unauthorized moving services in Colorado without a valid permit and for failing to

⁴¹ See § 40-10.1-508(1), C.R.S.

⁴² See § 40-10.1-114, C.R.S.

⁴³ See Rule 6008 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6 (2019).

maintain and to have on file with the Commission evidence of financial responsibility, as required by § 40-10.1-107(1), C.R.S., is significant and cannot be overstated.

79. The heart of the Commission's permitting and financial responsibility regulations for HHG movers is the protection of consumers of moving services, who are entitled to rely upon the belief that the movers they hire to move their personal belongings follow Colorado law and the Commission's rules. Moreover, there is a significant risk that unlicensed intrastate movers, like Mr. Ramirez, can cause harm to Colorado consumers, including but not limited to unprofessional conduct, misleading consumers about prices and services, demanding a higher price to finish the move than the price quoted, theft of property, and damages to property.

80. After a hearing for which Mr. Ramirez had received actual, meaningful, and adequate notice, the ALJ has concluded that Mr. Ramirez has violated §§ 40-10.1-502(1)(a) and 40-10.1-107(1), C.R.S. Based on substantial evidence in the record as a whole, proving Mr. Ramirez's violations and the aggravating factors found in this Decision, the ALJ further finds and concludes that entry of a cease and desist order is appropriate. Mr. Ramirez will be ordered to cease and desist from operating, advertising, or offering to operate as an intrastate mover in Colorado without a valid permit issued by the Commission and from failing to have on file with the Commission proof of financial responsibility in the amounts required for HHG movers by Rule 6008 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6 (2019).

81. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding and recommends that the Commission enter the following order.

V. ORDER**A. The Commission Orders That:**

1. Mr. Oscar Ramirez, doing business as Elevated Moves LLC (Mr. Ramirez), is herewith assessed a civil penalty in the amount of \$12,100.00, plus 15 percent in statutory surcharges of \$1,815.00, for a total civil penalty assessment of \$13,915.00.

2. Mr. Ramirez shall pay to the Commission the total civil penalty of \$13,915.00, within 30 calendar days from the effective date of this Decision. If Mr. Ramirez submits a payment by U.S. mail, the payment must be made by money order or certified check and the date of payment shall be the postmarked date.

3. Mr. Ramirez shall comply with this Decision and make the required civil penalty payment on time. The failure of Mr. Ramirez to pay the civil penalty by the deadline in this Decision shall constitute a separate violation of this Decision. The failure of Mr. Ramirez to pay the civil penalty by the deadline may result in Mr. Ramirez, and any other owners, principals, officers, members, partners, and directors of Elevated Moves LLC, or of any other entity owned by any of them, being disqualified from obtaining or renewing a household goods mover permit for a period of 36 months after the date on which the civil penalty payment was due and not paid, pursuant to § 40-10.1-508, C.R.S.

4. Mr. Ramirez is hereby ordered to cease and desist, as of the effective date of this Decision, from operating, advertising, or offering to operate as an intrastate mover in Colorado without a valid permit issued by the Commission and from failing to have on file with the Commission proof of financial responsibility in the amounts required for household goods movers by Rule 6008 of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* 723-6 (2019).

5. Proceeding No. 19G-0438HHG is closed.
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 § 40-6-106, 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 Recommended 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