

Decision No. R04-0511

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-104EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

PHIL STUBBS, DOING BUSINESS AS AAA STRONGMAN MOVING,
DOING BUSINESS AS IRON MAN MOVING,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ASSESSING CIVIL PENALTY**

Mailed Date: May 17, 2004

Appearances:

Tony Munoz, Compliance Investigator, for Staff of the
Commission; and

No appearance by or on behalf of Respondent Phil Stubbs, doing
business as AAA Strongman Moving and doing business as Iron
Man Moving.

I. STATEMENT

1. The issuance of Civil Penalty Assessment Notice No. 28516 (the CPAN) commenced this proceeding. The CPAN alleges that, on February 28, 2004, Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving (Respondent), violated § 40-14-103(1), C.R.S., and Rule 4 *Code of Colorado Regulations* (CCR) 723-35-

6616(a)(I) [sic]¹ and violated § 40-14-104(1), C.R.S., and Rule 4 CCR 723-35-6608(a)(I) [sic].² See Hearing Exhibit E. Commission Staff (Staff) seeks a civil penalty in the amount of \$12,100, which is the maximum penalty for these alleged violations.

2. On March 18, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing establishing a hearing date of April 16, 2004, at 9:00 a.m., in this docket. The Commission served a copy of this Order on Respondent.

3. At the assigned place and time the undersigned Administrative Law Judge (ALJ) called the matter for hearing. Mr. Tony Munoz, a Commission Compliance Investigator, testified on behalf of Staff. Respondent did not appear, and no representative of Respondent appeared.³ During the course of the hearing, Hearing Exhibits A through E were identified and admitted into evidence.

4. At the conclusion of the hearing, the evidentiary record was closed. The ALJ took the matter under advisement.

5. In accordance with § 40-6-109, C.R.S., the undersigned ALJ now transmits to the Commission the record and hearing exhibits in this proceeding along with a written recommended decision.

¹ This citation contains a typographical error. The correct reference is Rule 4 CCR 723-35-6610(a)(I).

² This citation contains a typographical error. The correct reference is Rule 4 CCR 723-35-6607(a)(I).

³ Later in the day of the hearing and after the conclusion of the hearing, Ms. Michele Gronewold of Staff contacted the ALJ to inform her that, after the hearing was over, Respondent had contacted Ms. Gronewold by telephone to request a continuance of the hearing. After consultation with the ALJ, Ms. Gronewold informed Respondent that the hearing had been held and that he would need to file a motion for a new hearing. Respondent did not file such a motion.

II. FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS

6. The CPAN in this proceeding alleges one violation of § 40-14-103(1), C.R.S., and Rule 4 CCR 723-35-6610(a)(I) and one violation of § 40-14-104(1), C.R.S., and Rule 4 CCR 723-35-6607. Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving, is the Respondent.

7. Respondent had actual knowledge of the hearing date. *See* ¶ I.2 and note 3, *supra*. Respondent did not appear at the hearing, did not contact the Commission in advance of the hearing to request a change in the hearing date, and has not explained his failure to appear.

8. The facts as found in this Decision are based on Staff's testimony at hearing and on the Hearing Exhibits. The facts are undisputed and unrebutted.

9. The ALJ finds the following facts:

a. In the Qwest Dex yellow pages for Grand Junction, Colorado, Respondent had an advertisement under the "Movers" listings. The advertisement was under the name Iron Man Moving, listed the telephone number as 234-1945, and stated "Serving All of Colorado" and "Residential" and "Give Us a Call to Help You with All of Your Moving Needs." This advertisement was in the Qwest Dex edition for "use through April 2004." The listing directs interested persons to "Call Dan or Phil." *See* Hearing Exhibit D. The Qwest Dex in which Respondent's listing was published was in use throughout the period relevant to this proceeding.

b. In the Mesa County Telephone Directory yellow pages for calendar year 2004, Respondent had an advertisement under the "Movers" listings. The advertisement was under the name Strongman Moving, listed the telephone numbers as 970-234-1945 and 970-234-1971, and stated "Local Moves [and] Out of Town Moves" and "Serving the Greater Western

Slope” and “Commercial & Residential.” *See* Hearing Exhibit C. There is no contact person named in the advertisement. The telephone number 970-234-1945 is the same as the telephone number listed in the Qwest Dex advertisement for Iron Man Moving. The Mesa County Telephone Directory yellow pages in which Respondent’s listing was published was in use throughout the period relevant to this proceeding.

c. As part of a Commission compliance program to inform movers of household goods of their obligation to be registered with the Commission and to have the statutorily-required levels of insurance in effect, Compliance Investigator Munoz telephoned companies and individuals listed under “Movers” in telephone books. Compliance Investigator Munoz contacted companies and individuals who, although advertising themselves as movers of residential or household property, were not registered with the Commission as movers. One such individual was Respondent, and Compliance Investigator Munoz contacted Respondent at the 970-234-1945 telephone number listed in the two yellow pages advertisements.

d. On January 15, 2004, Compliance Investigator Munoz spoke by telephone with Respondent and discussed with him the registration and insurance requirements. Compliance Investigator Munoz told Respondent that he could not operate as a mover of household goods unless and until he was registered with the Commission, had the required insurance, and had proof of insurance on file with the Commission. According to Compliance Investigator Munoz, Respondent had no questions about, and understood, the requirements and the fact that he could not operate as a mover of household goods until the requirements were met.

e, On February 12, 2004,⁴ Phil Stubbs gave to Ms. Sharon Hytman an Invoice containing an estimate for moving (*i.e.*, transporting) Ms. Hytman's personal property from New Castle, Colorado, to Grand Junction, Colorado. *See* Hearing Exhibit A. Ms. Hytman gave Mr. Stubbs an "earnest payment" of \$175 on February 12, 2004; the total estimated cost of the move was "not to exceed \$350." *Id.*

f. On February 27, 2004, pursuant to the agreement evidenced by the Invoice (*see* Hearing Exhibit A), Respondent's driver picked up the shipment of Ms. Hytman's personal property at New Castle, Colorado. The driver loaded her property into a U-Haul truck. On February 28, 2004, the shipment of Ms. Hytman's personal property arrived at Grand Junction, Colorado.⁵

g. Administrative notice is taken of the fact that, in order to go by motor vehicle from New Castle, Colorado, to Grand Junction, Colorado, one must travel on at least one road, street, or highway that is a "public highway," as that term is defined in § 40-14-102(11), C.R.S.

h. The transportation of Ms. Hytman's personal property occurred in intrastate commerce in that the transportation occurred solely within Colorado.

⁴ The date of the Invoice is not clear from Hearing Exhibit A. Given that the Invoice refers to the payment of "earnest money," which the ALJ finds to mean a down payment; given that the transportation occurred on February 27 and 28, 2004; and in light of Staff testimony as to the date of the Invoice, the ALJ finds that the Invoice date is February 12, 2004.

⁵ Compliance Investigator Munoz testified as to his conversations with Ms. Hytman from whom this information was obtained. Although this testimony is hearsay, the ALJ finds it credible and reliable in light of the supporting and consistent documentary evidence presented. *See, e.g.*, Hearing Exhibits A (invoice for moving services), B (U-Haul contract dated February 27, 2004, for rental of moving truck; contract shows 970-234-1945 as the telephone number of the person renting the truck), and C and D (yellow pages advertisements showing 970-234-1945 as the telephone number for Respondent).

i. On March 3, 2004, Compliance Investigator Munoz received the oral complaint from Ms. Hytman which commenced the investigation which led to the issuance of the CPAN. According to the complaint, Respondent damaged Ms. Hytman's property when the property was thrown from the truck at the delivery location.

j. On March 6, 2004, Compliance Investigator Munoz conducted an on-premises inspection of Respondent's principal place of business. During that inspection Compliance Investigator Munoz asked Respondent to produce evidence of insurance (*e.g.*, insurance policy, surety policy, or certificate of self-insurance). Respondent did not produce any evidence of insurance.⁶

k. During the March 6, 2004, inspection Compliance Investigator Munoz served the CPAN on Respondent personally; and Respondent signed the CPAN, thus acknowledging receipt. *See* Hearing Exhibit E at 1, 2.

l. Respondent was not registered with the Commission as a mover of household goods at any time during 2004 to the date of the hearing in this matter.

m. Respondent did not have proof of insurance on file with the Commission at any time during 2004 to the date of the hearing in this matter.

10. The facts establish the Commission's jurisdiction in this proceeding. The Commission has subject matter jurisdiction over this matter and has personal jurisdiction over the Respondent.

⁶ The failure to produce evidence of insurance refutes completely the unsubstantiated claim in the yellow pages advertisements that Respondent is "fully insured[.]" *See* Hearing Exhibits C and D. Even assuming the claim is accurate (the record here shows that it is not), there is no evidence that Respondent carried insurance coverage of the type and in the amount required by the statute. "Fully insured," as used in the advertisements, is undefined.

11. Section 40-14-103(1), C.R.S., provides, in relevant part, that “[n]o person shall *operate, offer, or advertise* services as a mover upon the public highways of this state in intrastate commerce without first being registered with the commission” (emphasis supplied). *See also* Rule 4 CCR 723-35-6610(a)(I) (same). Section 40-14-102(2), C.R.S., in relevant part, defines “advertise” to mean “advise, announce, give notice of, publish, or call attention to by use of any ... written ... statement made in a newspaper or other publication[.]” Section 40-14-102(9), C.R.S., defines “mover” as “any person who engages in the transportation or shipment of household goods in intrastate commerce for compensation upon the public highways of this state by use of a motor vehicle.”⁷

12. Section 40-14-104(1), C.R.S., requires, in pertinent part, that

[e]very mover shall maintain motor vehicle liability and general liability insurance, a surety bond, or a certificate of self-insurance issued pursuant to section 42-7-501, C.R.S. ... Such liability insurance or surety bond shall be in the minimum amount of seven hundred fifty thousand dollars; except that a mover using only motor vehicles with a gross vehicle weight rating less than ten thousand pounds shall maintain insurance in the amount of at least three hundred thousand dollars combined single limit liability.

13. Rule 4 CCR 723-35-6607(a)(I) is to the same effect as § 40-14-104(1), C.R.S. The amounts of motor vehicle liability coverage required are also specified in Rule 4 CCR 723-35-6607(b)(I).

⁷ The term “household goods” is defined in § 40-14-102(7), C.R.S., to include, *inter alia*, “personal effects and property used or to be used in a dwelling.” “Compensation,” as defined in § 40-14-102(4), C.R.S., includes money received and money to be charged or received. “Public highway,” as defined in § 40-14-102(11), C.R.S., includes every highway over which the public generally has a right to travel. “Motor vehicle,” as defined in § 40-14-102(8), C.R.S., includes a truck.

14. In this case Staff bears the burden of proof by a preponderance of the evidence. *See* Rule 4 CCR 723-1-82(a). Staff has met this burden of proof with respect to the two violations alleged in the CPAN.

15. Based on the evidence presented, the ALJ finds and concludes that, on February 28, 2004, Respondent violated § 40-14-103(1), C.R.S., by operating as a mover on the public highways of Colorado in intrastate commerce without being registered with the Commission.⁸ He violated Rule 4 CCR 723-35-6610(a)(I) by this same behavior. Because the statutory violation and the rule violation are based on the same conduct, the ALJ finds that, in this case, a penalty should be assessed only for the statutory violation.⁹ For that violation, the maximum civil penalty is \$1,100. *See* § 40-7-113(1)(f.5), C.R.S.; Rule 4 CCR 723-35-6624(b)(I).

16. Based on the evidence presented, the ALJ finds and concludes that, on January 28, 2004, Respondent violated § 40-14-104(1), C.R.S., by failing to have in effect in the required amounts the required “motor vehicle liability and general liability insurance, a surety bond, or a certificate of self-insurance issued pursuant to section 42-7-501, C.R.S.” He violated Rule 4 CCR 723-35-6607(a)(I) by this same behavior. Because the statutory violation and the rule violation are based on the same conduct, the ALJ finds that, in this case, a penalty should be

⁸ Based on the documentary evidence, the ALJ finds that Respondent violated § 40-14-103(1), C.R.S., and Rule 4 CCR 723-35-6610(a)(I) on February 12, 2004 (the date of the Invoice, *see* Hearing Exhibit A) by *offering* his services as a mover when he was not registered with the Commission.

In addition, and based on the documentary evidence, it appears that, throughout 2004 to at least the date of the hearing (a period which includes February 28, 2004), Respondent also violated § 40-14-103(1), C.R.S., and Rule 4 CCR 723-35-6610(a)(I) by *advertising* his services as a mover when he was not registered with the Commission. *See* Hearing Exhibits C and D. This advertising-based violation appears to be of a duration considerably longer than the one day violation alleged in the CPAN as Count 1.

⁹ At hearing Staff agreed. In addition, assessing the civil penalty only on the statutory violation avoids any notice issue which may have arisen from the typographical error in the CPAN. *See* note 1, *supra*.

assessed only for the statutory violation.¹⁰ For that violation, the maximum civil penalty is \$11,000. *See* § 40-7-113(1)(a), C.R.S.; Rule 4 CCR 723-35-6624(a).

17. Having found that Respondent violated the statutory provisions as alleged, it is necessary to determine the amount of the civil penalty to be assessed for these violations. In the CPAN, Staff seeks a civil penalty of \$12,100.

18. Based on the findings of fact and discussion above, the ALJ finds and concludes that \$12,100 is the appropriate civil penalty to be assessed in this case. In making this determination, the ALJ began with the maximum civil penalty for these violations (*i.e.*, \$12,100); considered Commission guidance provided in previous civil penalty cases; considered the factors in aggravation and in mitigation; considered the purposes of civil penalties; and considered the range of civil penalty assessments found to be reasonable in other cases.

19. Among the aggravating factors which the ALJ considered are:

(a) Respondent's violations were knowing, and Staff had attempted to bring Respondent into compliance but to no avail.

(b) The violations are serious. First, Respondent operated without the statutorily-required insurance, thus stripping the public of the protection which would have been afforded had he had the insurance. Second, because Respondent operated without being registered with the Commission, the Commission was hampered in performing its statutory duties of assuring compliance with statutory and rule requirements governing, *e.g.*, payment of annual fees, disclosure of information to shippers, contracting with shippers, and insurance.

¹⁰ At hearing Staff agreed. In addition, assessing the civil penalty only on the statutory violation avoids any notice issue which may have arisen from the typographical error in the CPAN. *See* note 2, *supra*.

(c) The CPAN addresses only one day (*i.e.*, February 28, 2004) out of the period during which Respondent advertised in two yellow pages as a mover; offered, and took money for, his services as a mover; and did not have the required insurance.

20. Respondent did not appear. As a result, no evidence was presented in mitigation in this case.

21. The ALJ finds that a civil penalty in the amount of \$12,100 achieves the following purposes underlying civil penalty assessments: (a) deterring future violations, whether by other similarly-situated carriers and by the Respondent; (b) motivating Respondent to come into compliance with the law;¹¹ and (c) punishing Respondent for the past illegal and knowing behavior. Assessing a civil penalty of a significant amount underscores the seriousness of the violations which occurred and should act as a deterrent. The civil penalty and CPAN also trigger increased civil penalties in the event Respondent violates these provisions in the future. *See* §§ 40-7-113(3) and 113(4), C.R.S.

22. Pursuant to § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

¹¹ Staff argued that compliance benefits the public, *inter alia*, by removing unfair competition from the marketplace. There is, according to Staff, considerable competition among and between movers of household goods in Colorado. Staff stated that securing the statutorily-mandated insurance is a considerable expense and that, by not carrying the required insurance, Respondent did not incur that expense; could quote lower prices for his services; and, thus, had an unfair advantage over his competitors who did carry the required insurance. Staff concluded that Respondent's coming into compliance with the insurance requirements will remove that unfair advantage and, thereby, encourage competition on a "level playing field." The ALJ agrees but did not rely on this argument in determining the amount of the civil penalty in this case because, as the ALJ understands the argument as presented in this proceeding, the argument appears to rely on elements or considerations of economic regulation, an area into which the Commission may not venture with respect to carriers of household goods. *See, e.g.*, § 40-14-101, C.R.S. This is not to say that, in a future proceeding, Staff may not present the argument for consideration.

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

1. Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving, on January 28, 2004, violated § 40-14-103(1), C.R.S.

2. Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving, on January 28, 2004, violated § 40-14-104(1), C.R.S.

3. A civil penalty is assessed against Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving, in the amount of \$12,100.

4. Within ten days of the date on which this Recommended Decision becomes the Decision of the Commission, Phil Stubbs, doing business as AAA Strongman Moving and doing business as Iron Man Moving, shall pay a civil penalty in the amount of \$12,100 to the Commission.

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 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.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge