

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04A-281CP-WAIVER

IN THE MATTER OF THE APPLICATION OF THE COLORADO SIGHTSEER, INC., FOR AN ORDER OF THE COMMISSION EXEMPTING DRIVER FRED W. HOPPE FROM THE VISUAL ACUITY REQUIREMENTS OF 49 C.F.R. 391.41(B)(10) AS INCORPORATED BY RULE 2 OF THE RULES REGULATING SAFETY FOR MOTOR VEHICLE CARRIERS AND ESTABLISHING CIVIL PENALTIES, 4 CCR 723-15.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
GRANTING WAIVER**

Mailed Date: June 15, 2004

Appearances:

Heath A. Fuehrer, President of the Colorado Sightseer, Inc.;

Fred W. Hoppe, Thornton, Colorado; and

Ted Barrett, Staff of the Public Utilities Commission.

I. STATEMENT

1. On June 1, 2004, the Colorado Sightseer, Inc. (Petitioner or Applicant), filed a Petition for a Waiver of Safety Regulations, requesting a waiver of the visual acuity requirements of 49 Code of Federal Regulations (C.F.R.) 391.41(B)(10) as incorporated by Rule 2 of the Rules Regulating Safety for Motor Vehicle Carriers and Establishing Civil Penalties, 4 *Code of Colorado Regulations* (CCR) 723-15.

2. The Commission scheduled this matter for hearing for June 11, 2004.

3. The hearing was held as scheduled. Testimony was received from Heath A. Fuehrer and Fred W. Hoppe. Administrative notice was taken of the Petition for Waiver of Safety Regulations, and attachments, filed on June 1, 2004, contained in the official file of the Commission. At the conclusion of the hearing, the matter was taken under advisement.

4. Pursuant to § 40-6-109, C.R.S., the record of the hearing and a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Based upon all the evidence of record, the following facts are found and conclusions drawn:

5. Applicant holds a certificate of public convenience and necessity, PUC No. 54166 from this Commission.

6. The Commission has jurisdiction over this matter.

7. Applicant filed this application for a waiver for driver, Fred W. Hoppe, requesting a waiver of the visual acuity requirements of 49 C.F.R. 391.41(B)(10) as incorporated by 4 CCR 723-15-2.

8. Fred W. Hoppe filed an application with Applicant for employment as a driver/guide with the company. Witness, Heath A. Fuehrer testified that Applicant would hire Mr. Hoppe if the Commission grants the requested waiver. Mr. Hoppe will operate Applicant's vans as part of his employment.

9. As part of the certification process for employment as a driver for Applicant, Mr. Hoppe went through a certification process. He has passed all phases of the certification, including a physical exam and driving test administered on May 24, 2004 by Ted W. Barrett of

the Staff of the Commission. It is the opinion of Mr. Barrett that Mr. Hoppe has the necessary driving skill to safely operate the commercial vans for Applicant. (*See* certification of road test contained in the application.)

10. Mr. Hoppe sustained an injury in 1979 while working on a farm in the San Luis Valley of Colorado. A piece of metal perforated Mr. Hoppe's retina of his left eye, which resulted in the total loss of vision in his left eye.

11. Dr. Mark L. Peters, an eye physician examined Mr. Hoppe on or about March 15, 2004. Dr. Peters states in a letter that is part of the application contained in the official file of the Commission that Mr. Hoppe lost the vision in his left eye, however, his right eye is normal with 20/20 visual acuity (as corrected by lenses).

12. A medical examination report and medical examiner's certificate is on file with the Commission as part of the application for a waiver. The medical examination report indicates that Mr. Hoppe passed his physical examination. The medical examiner's certificate accompanying the report indicates that the medical examiner finds that Mr. Hoppe is qualified in accordance with the Federal Motor Carrier Safety Regulations to drive a commercial vehicle provided that he obtains a vision waiver from this Commission and wears corrective lenses while driving.

13. Mr. Hoppe currently has a valid Colorado driver's license. He has driven vehicles including motorcycles for many years. His Colorado Motor Vehicle driving record indicates that there is only one violation of the Motor Vehicle Laws on Mr. Hoppe's driving record. The motor vehicle record attached to the application in the Commission's file indicates that Mr. Hoppe was charged and convicted of a moving traffic violation as a result of an accident that occurred in

Longmont, Colorado. There are no other violations on Mr. Hoppe's motor vehicle record. Mr. Hoppe testified that the accident was the only one in the last twenty years.

14. Mr. Hoppe is currently employed at Hertz Company (Hertz) as a driver at Denver International Airport. He has worked as a driver for Hertz for the last two and one half years driving two days a week. Mr. Hoppe testified that he has no problems with his vision and his depth perception is good except at very close quarters.

15. Rule 4 CCR 723-15-11 provides for a waiver from the Commission's Motor Vehicle Carrier Safety Rules. The rule states that "the Commission may grant a variance from Rules 723-15-1 through 723-15-10 for good cause shown if it finds that compliance is impossible, impracticable, or unreasonable, if such variance is not contrary to law." It is found and concluded that a waiver from the visual acuity requirements of 49 C.F.R. 391.41(B)(10) as incorporated by Rule 4 CCR 723-15-2 should be granted. Good cause has been shown by Applicant for the waiver, showing that compliance would be impracticable or unreasonable. It is also found that the public safety would not be adversely affected if the waiver were granted.

16. Pursuant to § 40-6-109(2), C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Colorado Sightseer, Inc., is granted a waiver of 49 Code of Federal Regulations 391.41(B)(10) as incorporated by 4 *Code of Colorado Regulations* 723-15-2 for a period of two years, expiring June 1, 2006. This waiver applies only to Fred W. Hoppe.

2. The Colorado Sightseer, Inc., shall notify the Commission of any change in the eyesight of Fred W. Hoppe that would impair his ability to safely operate a commercial vehicle within ten days of the date Colorado Sightseer, Inc., becomes aware of such change.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge