

Decision No. R04-1013

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-245EC

PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO,

COMPLAINANT,

V.

MICHAEL FORTUNA, DOING BUSINESS AS A COMFORTABLE RIDE,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
ASSESSING CIVIL PENALTY**

Mailed Date: August 26, 2004

I. STATEMENT

1. This is a civil penalty assessment proceeding brought by the Staff of the Colorado Public Utilities Commission (Staff) against the Respondent, Michael Fortuna, doing business as A Comfortable Ride (Fortuna).

2. In Civil Penalty Assessment Notice (CPAN) No. 28562, Staff alleges that on March 25, 2004, Fortuna violated § 40-16-103, C.R.S. (offering or providing transportation services without being registered with the Commission) (Count 1), and § 40-16-104, C.R.S. (providing transportation services without the proper insurance) (Count 2). CPAN No. 28562 seeks imposition of a civil penalty in the total amount of \$12,100.00 for these alleged violations.

3. On June 2, 2004, the Commission issued an Order setting this matter for hearing on July 21, 2004, in Denver, Colorado. However, the hearing was continued to August 25, 2004, at Staff's request. *See*, Decision No. R04-0839-I.

4. The undersigned Administrative Law Judge (ALJ) called the matter for hearing at the assigned time and place. Staff appeared through its legal counsel. Fortuna did not appear.

5. During the course of the hearing testimony was received in support of Staff's case from Mr. John Opeka, a Commission Compliance Investigator, and Ms. Denise Fazio.¹ Exhibits 2 through 5 were identified, offered, and admitted into evidence. Administrative notice was taken of Exhibit 1. At the conclusion of the hearing the ALJ took the matter under advisement.

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

II. FINDINGS OF FACT

7. Ms. Fazio is an employee of Amgen in Longmont, Colorado. In mid-March of this year she began the process of locating ground transportation between the Amgen facility in Longmont (Longmont) and Denver International Airport (DIA) in connection with an upcoming business trip. She located an advertisement placed by Fortuna in the Airline Transportation section of the local Yellow Pages that offered such a service. She contacted Fortuna at the telephone number listed in the Yellow Pages advertisement on or about March 22, 2004, and arranged for round-trip ground transportation service from Longmont to DIA on March 25, 2004,

¹ Ms. Fazio testified via telephone. *See*, Decision No. R04-0990-I.

and for return service from DIA back to Longmont on April 2, 2004. At that time she allowed Fortuna to charge her American Express credit card the total amount of the quoted fare, \$110.00.²

8. On March 25, 2004, Fortuna picked Ms. Fazio up in Longmont and transported her to DIA in a white stretch Lincoln Town Car (Fortuna vehicle). Ms. Fazio gave Fortuna an \$11.00 tip upon arrival at DIA. When Ms. Fazio returned to DIA from her business trip on April 2, 2004, Fortuna failed to appear at DIA to transport her back to Longmont as previously arranged. As a result of this failure, Ms. Fazio prepared a written complaint against Fortuna and gave it to the appropriate DIA personnel. *See*, Exhibit 1.

9. On April 7, 2004, Ms. Fazio's complaint was forwarded to the Commission and was assigned to Mr. Opeka for investigation. Initially, he reviewed the Commission's records and determined that Fortuna's previous registration as a luxury limousine operator under luxury limousine registration no. LL-613 had been revoked in December 2001 as a result of Fortuna's failure to maintain the proper public liability insurance as required by §§ 40-16-103 and 40-16-104, C.R.S. Mr. Opeka also determined that LL-613 had never been reinstated and that Fortuna had never re-registered as a luxury limousine operator. Accordingly, Mr. Opeka concluded that Fortuna was not registered with the Commission as a luxury limousine operator on March 25, 2004, nor did he have the required evidence of public liability insurance on file with the Commission on that date.

10. On May 4, 2004, Mr. Opeka went to the address previously provided to the Commission by Fortuna where he observed the Fortuna vehicle. At that time he took several photographs of it and made a note of the license plate number. *See*, Exhibits 2, 3 and 4. On May 5, 2004, he forwarded the photographs to Ms. Fazio who confirmed that the Fortuna vehicle

² Ms. Fazio's American Express card was subsequently credited with at least a portion of this fare.

was used to transport her to DIA on March 25, 2004.³ Mr. Opeka provided the license plate number on the Fortuna vehicle to another member of the Commission's Enforcement Staff who requested that the Department of Motor Vehicles conduct an ownership search. This search established that Fortuna owned the Fortuna vehicle.

11. Mr. Opeka prepared CPAN No. 28562 on the basis of the above-described investigation and personally served a copy of the same on Fortuna on May 17, 2004. *See*, Exhibit 5. None of the \$12,100.00 penalty referred to in CPAN No. 28562 had been paid by Fortuna as of the date of the hearing.

III. DISCUSSION

12. Section 40-16-103, C.R.S., provides that no motor vehicle carrier exempt from regulation as a public utility (Exempt Carrier) may offer transportation services unless it is registered with the Commission. As part of the registration process, the Exempt Carrier must, among other things, submit proof that it has in place the insurance coverage required by § 40-16-104, C.R.S. That statute requires that Exempt Carriers maintain a general liability insurance policy in certain specified minimum amounts and also maintain adequate written documentation with the Commission that such insurance is in place. *See*, §§ 40-16-104(1) and (2), C.R.S.

13. An Exempt Carrier's failure to comply with the registration requirement imposed by § 40-16-103, C.R.S., subjects it to a civil penalty of not more than \$1,100.00 for each day's violation. *See*, §§ 40-7-113 (1)(f) and 40-7-115, C.R.S. An Exempt Carrier's failure to comply with the insurance requirement imposed by § 40-16-104, C.R.S., subjects it to a civil penalty of not more than \$11,000.00 for each day's violation. *See*, §§ 40-7-113 (1)(a) and 40-7-115, C.R.S.

³ At the hearing Ms. Fazio reviewed the subject photographs and again confirmed that the Fortuna vehicle was used to transport her to DIA on March 25, 2004.

14. The statutory definition of Exempt Carrier includes “luxury limousine services.” *See*, § 40-16-101(4), C.R.S. That term is defined as “...a specialized, luxurious transportation service provided on a prearranged, charter basis.” *See*, § 40-16-101(3.3), C.R.S. *See also*, § 40-16-101(3)(a), C.R.S., which, in pertinent part, defines a “luxury limousine” as “...a chauffeur-driven, luxury motor vehicle with a rear seating capacity of three or more, for hire on a prearranged charter basis to transport passengers in luxury limousine service....”

15. The evidence establishes that Fortuna provided luxury limousine services within the meaning of the statutes referred to above on the date encompassed by CPAN No. 28562. The Fortuna vehicle qualifies as a “luxury limousine” since, as described in Exhibits 2 through 4, it is a “stretch” vehicle and is equipped with a television, one of the luxury features distinguishing a luxury limousine. *See*, 4 *Code of Colorado Regulations* (CCR) 723-33-9. The service actually provided by Fortuna to Ms. Fazio satisfies the definition of luxury limousine service since it was rendered on a prearranged, charter basis with the Fortuna vehicle, a luxury limousine. Therefore, Fortuna was, on the date in question, subject to the registration and insurance requirements set forth in §§ 40-16-103 and 40-16-104, C.R.S.

16. Commission enforcement personnel have authority to issue CPANs under § 40-7-116, C.R.S. That statute provides that the Commission has the burden of demonstrating a violation by a preponderance of the evidence.

17. The testimony and exhibits admitted into evidence at the hearing conclusively establish that Fortuna provided luxury limousine services on March 25, 2004, when he transported Ms. Fazio from Longmont to DIA over the public highways of this state for compensation. Mr. Opeka’s undisputed testimony establishes that Fortuna was not registered with the Commission as a luxury limousine carrier on that date. Nor did he have the necessary

proof of insurance on file with the Commission on that date. Therefore, Fortuna has violated §§ 40-16-103 and 40-16-104, C.R.S., as alleged in Counts 1 and 2 of CPAN No. 28562.

18. Section 40-7-113, C.R.S., authorizes the Commission to assess civil penalties for the involved violations of “not more than” \$1,100.00 for each violation of § 40-16-103, C.R.S., and “not more than” \$11,000.00 for each violation of § 40-16-104, C.R.S.⁴ Therefore, it has the ability to consider aggravating or mitigating circumstances surrounding particular violations in order to fashion a penalty assessment that promotes the underlying purpose of such assessments. These include, among others, deterring future violations, motivating a carrier to come into compliance with the law, and punishing a carrier for prior, illegal behavior.

19. Based on the findings of fact and discussion above, the ALJ finds that the maximum civil penalty should be assessed in this case. Fortuna did not appear at the hearing to defend the subject charges or to present any mitigating evidence. Therefore, the evidence presented by Staff has not been disputed. As a result of Fortuna’s prior registration as a luxury limousine operator it can reasonably be assumed that he was aware of both the registration requirement and the requirement that he have evidence of public liability insurance on file with the Commission prior to rendering compensated luxury limousine services. Notwithstanding this knowledge, he continued to provide these services. This warrants imposition of the maximum penalty allowed by law.

IV. CONCLUSIONS

20. Staff has sustained its burden of proving the allegations contained in Counts 1 and 2 of CPAN No. 28562 by a preponderance of the evidence as required by § 40-7-116, C.R.S.

⁴ The Colorado Legislature has recently increased the civil penalty for violating § 40-16-104, C.R.S., from \$400.00 per violation to \$11,000.00 per violation thus underscoring the seriousness of this offense.

21. Fortuna should be assessed the maximum civil penalty for the above-described violations due to the aggravating factors discussed above.

V. ORDER

A. The Commission Orders That:

1. Respondent, Michael Fortuna, doing business as A Comfortable Ride, is assessed a civil penalty in the amount of \$1,100.00 in connection with Count 1 of Civil Penalty Assessment Notice No. 28562 and \$11,000.00 in connection with Count 2 of Civil Penalty Assessment Notice No. 28562. He shall pay the total assessed penalty of \$12,100.00 within ten days of the effective date of this Order.

2. 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.

3. 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.

4. 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