

Decision No. R04-1421-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 04G-458EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

MONUMENT LIMOUSINE SERVICE, L.L.C.,

RESPONDENT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
VACATING HEARING DATE, GIVING NOTICE
OF FILING OF MOTION, AND REQUIRING
FILING CONCERNING REPRESENTATION**

Mailed Date: December 2, 2004

I. STATEMENT

1. On September 3, 2004, Staff of the Commission (Staff) served on Monument Limousine Service, L.L.C. (Respondent), Civil Penalty Assessment Notice No. 71173 (CPAN). The CPAN alleges that Respondent committed 29 violations of Rule 4 *Code of Colorado Regulations* (CCR) 723-15-2.1, which incorporates by reference certain federal regulations. In particular, the CPAN alleges violations of 49 *Code of Federal Regulations* (CFR) §§ 395.8(a) (25 alleged violations) and 396.3(b)(2) (4 alleged violations). That CPAN commenced this proceeding.

2. On September 14, 2004, Respondent acknowledged its liability with respect to seven of the alleged violations by paying a civil penalty of \$700. Respondent's failure to acknowledge liability for, and to pay a civil penalty with respect to, the remaining 22 alleged violations put those allegations at issue.

3. On September 24, 2004, the Commission issued its Order Setting Hearing and Notice of Hearing. That Order established a hearing date of December 14, 2004, in this matter.

4. Staff and Respondent are the only two parties in this proceeding. Staff is represented by counsel. *See* Entry of Appearance and Notice Pursuant to Rule 9(d), dated October 5, 2004 and mailed to Respondent on that date.

5. Based on the information available from the Commission file in this matter, Respondent appears to be a limited liability company. As a limited liability company, Respondent appears to be an entity which can be sued in its own name and which can participate in an administrative proceeding in its own name. Section 7-80-104(1), C.R.S. (powers of a limited liability company). As a limited liability company, Respondent appears to be a legal entity and, therefore, a "person" as defined in § 40-16-101(6), C.R.S.

6. Rule 4 CCR 723-1-21(a) *requires* a party in a proceeding before the Commission to be represented by counsel *unless* one of the following exceptions applies: (a) the person is "an *individual* who is a party to [the] proceeding and who wishes to appear *pro se* [to represent] *only* his *individual* interest" (Rule 4 CCR 723-1-21(b)(1) (emphasis supplied)); or (b) the person appears "on behalf of a closely held corporation, [but] *only* as provided in § 13-1-127, C.R.S." (Rule 4 CCR 723-1-21(b)(2))¹ (emphasis supplied). The Commission recently had occasion to

¹ To the extent necessary, the Administrative Law Judge grants a variance to Rule 4 CCR 723-1-21(b)(2) so that the Rule is as broad in its reach as § 13-1-127, C.R.S.

emphasize the mandatory nature of this requirement and to determine that pleadings filed by, and appearances made by non-attorneys, which are not in compliance with Rule 4 CCR 723-1-21(a) are void and of no legal effect. *See, e.g.*, Decisions No. C04-1119 and No. C04-0884.

7. If Respondent can establish that it is an individual and will represent only the individual's interest in this matter, Respondent may proceed without counsel. If Respondent believes that it falls within this category, it will be ordered to file, on or before **December 17, 2004**, a verified (*i.e.*, sworn) filing that establishes the required elements.

8. If Respondent believes that it falls within the second category (that is, Respondent believes that it is a closely-held entity), § 13-1-127(2), C.R.S., controls. That section provides that an officer² may represent a closely held entity³ before an administrative agency *provided* two conditions are met: (1) the amount in controversy does not exceed \$10,000; *and* (2) the officer provides the agency with evidence, satisfactory to the agency, of the authority of the officer to represent the closely held entity.

9. Section 13-1-127(2.3), C.R.S., provides that:

each of the following persons 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:

- (a) An officer of a cooperative, corporation, or nonprofit corporation;
- (b) A general partner of a partnership or of a limited partnership;
- (c) A person in whom the management of a limited liability company is vested or reserved; and
- (d) A member of a limited partnership association.

² Section 13-1-127(a)(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.

³ A closely-held entity may have "no more than three owners." Section 13-1-127(1)(a), C.R.S.

10. In order for the Commission to determine whether Respondent may appear without counsel because it is a closely-held entity, Respondent must file, on or before **December 17, 2004**, a verified (*i.e.*, sworn) filing that: (a) establishes that Respondent is a closely held entity; (b) states whether the amount in controversy in this proceeding does or does not exceed \$10,000 and explains in detail the basis for the conclusion reached; (c) identifies the individual who will represent Respondent in this matter; (d) establishes that the identified individual is an officer of Respondent; and (e) if the identified individual does not meet the requirements of § 13-1-127(2.3), C.R.S., has appended to it a resolution from Respondent's Board of Directors that specifically authorizes the identified individual to represent Respondent in this matter.

11. Respondent must make either the filing described in ¶ 7 or the filing described in ¶ 10 if Respondent wishes to proceed *pro se* in this matter.

12. In the alternative, on or before **December 17, 2004**, Respondent may file a pleading stating that it will be represented in this proceeding by an attorney at law currently in good standing before the Supreme Court of the State of Colorado and identifying that counsel. The identified counsel must enter her/his appearance on or before **December 17, 2004**.

13. **Respondent is advised** that, if the ALJ determines that it must be represented by counsel in this matter and if Respondent fails to obtain counsel following such a determination, the motions and other filings made by Respondent in this proceeding since the matter became contested will be void. It will be as if those filings, including the Motion for Dismissal by Directed Verdict, were never made.

14. On November 30, 2004, Respondent mailed a copy of its Motion for Dismissal by Directed Verdict (Motion).⁴ The Certificate of Service shows that Respondent mailed the Motion only to Bruce N. Smith, Director of the Commission. There is no indication that Respondent mailed the Motion to Staff counsel, Mr. David Nocera. In addition, Respondent sent a letter dated November 30, 2004, to the ALJ. This letter accompanied the Motion sent to the ALJ. It is not clear whether the letter was sent to Bruce N. Smith.

15. Pursuant to Rule 4 CCR 723-1-22(b), Staff response to the Motion is due on or before 14 calendar days following the date on which it was mailed to (that is, served on) Staff. In this case Respondent did not send a copy of the Motion to Staff counsel and, therefore, did not serve the Motion on Staff. As a result, the time for Staff to file its response has not yet begun to run. A copy of the Motion is attached to this Order as Appendix A.⁵ Staff's 14-day response time will run from the date of this Order.

16. Contrary to Respondent's apparent understanding (*see* letter dated November 30, 2004), Rule 4 CCR 723-1-22(b), which governs filings in proceedings before the Commission, does not permit the filing of a reply in the absence of an order permitting such a filing.

17. The November 30, 2004 letter asks the ALJ to vacate the scheduled hearing. A request of this type -- indeed, any request that the ALJ or the Commission take action in this proceeding -- should be made in a written motion served on the other party and filed with the

⁴ The caption used by Respondent in this filing is incorrect as it identifies Respondent as "Al Malone & Alex Malone, d.b.a. Monument Limousine Service, L.L.C." As discussed above, the Respondent in this matter is Monument Limousine, LLC, and not the two individuals named in the Motion's caption. In future filings, Respondent must use the correct caption.

⁵ In the future, Respondent must comply with the filing and service requirements found in 4 CCR 723-1 (the Commission's Rules of Practice and Procedure). These Rules are available on the Commission's website (www.dora.state.co.us/puc) or in hard copy from the Commission.

Commission. The ALJ will not consider the request contained in the November 30, 2004 letter because it was made without notice to Staff and without being filed with the Commission.

18. Hearing in this matter is scheduled for December 14, 2004. The pending Motion raises the issue of the Commission's legal authority in this matter. In addition, the issue of whether Respondent may appear without counsel is pending.⁶ In view of this, the ALJ will vacate the hearing scheduled in this matter for December 14, 2004. If a hearing is necessary, a new hearing date will be established by subsequent Order.

II. **ORDER**

A. **It Is Ordered That:**

1. On or before December 17, 2004, Monument Limousine Service, L.L.C., shall make the filing described above in ¶ I.7, the filing described above in ¶ I.10, or the filing described above in ¶ I.12.

2. In the event Monument Limousine Service, L.L.C., elects to retain counsel (as permitted by ¶ I.12, above), counsel for Monument Limousine Service, L.L.C., shall enter an appearance in this proceeding on or before December 17, 2004.

3. To the extent necessary, a variance to Rule 4 *Code of Colorado Regulations* 723-1-21(b)(2) is granted to make that Rule as broad in its reach as § 13-1-127, C.R.S.

4. Staff of the Commission shall file its response to the Motion for Dismissal by Directed Verdict on or before the 14th calendar day following the date of this Order.

5. The hearing in this matter scheduled for December 14, 2004, is vacated.

⁶ Even if the filing pertaining to representation were due within the week (*i.e.*, on or before December 10, 2004), and assuming the ALJ determines that Respondent must have counsel in this matter, it is not reasonable to assume that Respondent's counsel would be prepared to proceed on the scheduled hearing date.

6. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge