Decision No. R16-1108

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16G-0642EC

COLORADO PUBLIC UTILITIES COMMISSION,

COMPLAINANT,

V.

PEACOCK LLC, DOING BUSINESS AS PEACOCK LIMOUSINE SERVICE,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN H. DENMAN DISMISSING COUNT 2 AND ASSESSING CIVIL PENALTY FOR COUNTS 1 AND 3

Mailed Date: December 5, 2016

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I. STATEMENT

A. Procedural history

1. On August 22, 2016, the Commission issued Civil Penalty Assessment Notice or Notice of Complaint to Appear (CPAN) No. 116001 and commenced this proceeding.[1]

2. During the Commission's weekly meeting held on September 21, 2016, this proceeding was referred to an Administrative Law Judge (ALJ) for disposition.

3. The CPAN identified the respondent, which holds PUC Permit No. LL-01761, as "Peacock d/b/a Peacock Limousine Service." Commission records, however, identified the entity holding PUC Permit No. LL-01761 as "Peacock LLC, doing business as Peacock Limousine Service." Therefore, Decision No. R16-0893-I (mailed on September 28, 2016) ordered that the CPAN and the caption of this proceeding be amended to correct the name of the respondent to Peacock LLC, doing business as Peacock Limousine Service (Respondent or Peacock LLC).

4. The CPAN cites Peacock LLC for three separate violations of rules of the Colorado Public Utilities Commission (Commission) in Aurora, Colorado on May 30, 2016:

(1) that Respondent violated Rule 6102(a)(1) of the Rules Regulating Transportation by Motor Vehicle, 4 *Code of Colorado Regulations* (CCR) 723-6 (2014), and 49 *Code of Federal Regulations* (C.F.R.) § 396.17(a) incorporated therein by reference, by "Operating a commercial motor vehicle not periodically inspected[,] (Unit #1);"

(2) that Respondent violated Rule 6102(a)(1) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, and 49 C.F.R. § 396.3(b)

[1] The CPAN is Hearing Exhibit No. 11.

incorporated therein by reference,[2] by "Failing to keep minimum records of inspections and vehicle maintenance[,] (Unit #1);" and

(3) that Respondent violated Rule 6105(i)(I) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, by "Requiring or permitting a driver to drive if the driver has not complied with the fingerprint requirements of §40-10.1-110 C.R.S. (Driver: Victor A. Joseph)."

For the first cited violation, the CPAN assessed a civil penalty of $1100.00, plus an additional 15 percent surcharge required by § 24-34-108, C.R.S., for a total of $1265.00. For the second cited violation, the CPAN assessed a civil penalty of $500.00, plus the additional 15 percent surcharge, for a total of $575.00. For the third cited violation, the CPAN assessed a civil penalty of $275.00, plus the additional 15 percent surcharge, for a total of $316.25. The total civil penalties assessed in the CPAN are $2,156.25, including the additional surcharges required by § 24-34-108, C.R.S. (Hearing Exhibit No. 11 at 1.)

5. The CPAN stated that, if the Respondent were to pay within ten calendar days, the first civil penalty would be reduced to $632.50, the second would be reduced to $287.50, and the third would be reduced to $158.13, for total reduced civil penalties of $1,078.13, including the 15 percent surcharges. The CPAN also stated that, if the Respondent did not pay within ten days, the Commission Staff would seek civil penalties in the full total amounts for the violations cited in the CPAN. The CPAN states further that payment of the assessment is an acknowledgment (*i.e.,* an admission) of liability for the violations cited. (Hearing Exhibit No. 11 at 3.)

6. The Respondent was served with the CPAN by certified mail on August 19, 2016. (Hearing Exhibit No. 12; Hearing Exhibit No. 13; and Hearing Exhibit No. 14.) On August 27, 2016, Respondent acknowledged that he had received the CPAN.

[2] Rule 6102(a)(I), 4 CCR 723-6, incorporates by reference 49 C.F.R. Part 396, including 49 CFR § 396.17(a) and 49 CFR § 396.3(b), which are cited in Counts 1 and 2 of the CPAN.

7. Within the ten-day time period stated in the CPAN, or by September 1, 2016, Respondent did not tender payment of the reduced amount of civil penalties, including surcharges, of $1,078.13.

8. The Commission scheduled a hearing for November 15, 2016 at 9:00 a.m. in a Commission hearing room.

9. On September 12, 2016, counsel for Trial Staff of the Commission (Staff) entered his appearance in this proceeding. Pursuant to Rule 1007(a) of the Rules of Practice and Procedure, 4 CCR 723-1, in that filing Staff counsel identified the testimonial (litigation) Staff and the advisory Staff in this proceeding.

10. Staff and Peacock LLC are the parties to this proceeding.

11. Decision No. R16-0893-I *inter alia* adopted a procedural schedule for pre-hearing filings by the Parties. On or before October 18, 2016, the Staff was ordered to file, and to serve on Respondent and its counsel or representative, its list of witnesses, a summary of its testimony of each witness, and copies of the exhibits it will present at the hearing. On or before October 28, 2016, Respondent was ordered to file, and to serve on Staff and its counsel, its list of witnesses, a summary of its testimony of each witness, and copies of the exhibits it will present at the hearing.

12. Staff timely filed and served on Respondent its list of witnesses, a summary of its testimony of each witness, and copies of the exhibits it will present at the hearing. Respondent, however, failed to make the ordered pre-hearing filing.

B. Representation of Respondent

13. Decision No. R16-0893-I found that Respondent is a limited liability company, but was not represented by an attorney in this proceeding.

14. Rule 1201(a) of the Rules of Practice and Procedure, 4 CCR 723-1 (2015), requires a party in a proceeding before the Commission to be represented by an attorney authorized to practice law in the State of Colorado. There are exceptions, however. Respondent has the burden to prove that it is entitled to proceed without an attorney. To prove in this proceeding that a non-attorney managing member[3] of Peacock LLC can represent its interests, under the criteria of Rule 1201(b)(II), 4 CCR 723-1, Respondent must show the Commission that: (1) it is a closely-held entity (that is, an entity with no more than three owners);[4] (2) no more than $15,000 is in controversy in this proceeding; and (3) the managing member has the authority to represent the interests of the limited liability company.[5]

15. Decision No. R16-0893-I, ¶ C.13 and Errata, Ordering Paragraph 2 at page 5, gave Peacock LLC the choice, no later than October 12, 2016, either to obtain legal counsel or to show cause why Rule 1201(b), 4 CCR 723-1, does not require it to be represented in this matter by an attorney at law currently in good standing before the Supreme Court of the State of Colorado. Decision No. R16-0893-I and an Errata were mailed to Peacock LLC at its address on file with the Commission on September 28, 2016, and Commission records show that this mailing was not returned to the Commission as undeliverable.

16. Peacock LLC failed to make the required show cause filing by October 12, 2016; nor did an attorney for Respondent file an entry of appearance by that deadline.

17. Decision No. R16-0893-I, ¶¶ C.14 and 15 at page 5, admonished Respondent that:

> 14. Peacock LLC is advised, and is on notice, that if it fails either to show cause or to have its attorney file an entry of appearance as required by this

[3] As pertinent here, § 13-1-127(2.3)(c), C.R.S., states that a "person in whom the management of a limited liability company is vested or reserved" 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[.]"

[4] Section 13-1-127(1)(a), C.R.S.

[5] Section 13-1-127(2.3)(c), C.R.S.

> Decision, the ALJ will issue a subsequent Decision that requires Peacock LLC to obtain counsel.
>
> 15. Peacock LLC is advised, and is on notice, that if the ALJ issues a subsequent Decision that requires Peacock LLC to obtain counsel, Peacock LLC will not be permitted to participate in this matter without an attorney.

18. Because Peacock LLC failed by October 12, 2016 to obtain counsel and to have counsel enter her/his appearance, or to make a filing showing that under Rule 1201(b), 4 CCR 723-1, an officer or manager of Peacock LLC can represent it in this proceeding, Decision No. R16-0973-I ordered Peacock LLC to obtain counsel to represent it. Decision No. R16-0973-I was mailed to Peacock LLC at its address on file with the Commission on October 20, 2016, and Commission records show that this mailing was not returned to the Commission as undeliverable.

19. October 28, 2016 was the deadline for Respondent's counsel to enter an appearance in this proceeding, but no attorney entered an appearance on behalf of Peacock LLC by that date.

20. At the hearing on November 15, 2016, Mr. Victor Joseph, who is not an attorney, appeared to represent Respondent. After the ALJ summarized the filing requirements imposed by the Commission on Peacock LLC by Decisions Nos. R16-0893-I and R16-0973-I, Mr. Joseph told the ALJ that, due to the death of his Mother, he had been in India since late August 2016, and he had only returned to Denver on Sunday, November 13, 2016. He is also the owner, managing member, and driver of Peacock LLC. Due to his extended absence from the United States, Mr. Joseph was unaware of Decisions Nos. R16-0893-I and R16-0973-I and the procedural requirements and deadlines imposed on Peacock LLC.

21. The ALJ finds that exigent circumstances exist due to the death of Mr. Joseph's Mother in India and his extended absence from the United States during the time Peacock LLC

was required to comply with deadlines in Decisions Nos. R16-0893-I and R16-0973-I. Good cause exists to excuse Mr. Joseph and Peacock LLC from compliance with the pre-hearing filing and representation show cause requirements and deadlines in Decisions Nos. R16-0893-I and R16-0973-I.

22. Nevertheless, in order for Mr. Joseph, a non-attorney, to represent Respondent in this proceeding, Peacock LLC was required to prove that it meets the criteria of Rule 1201(b)(II), 4 CCR 723-1, and is entitled to proceed in this case without an attorney. In a colloquy with the ALJ at the beginning of the hearing, Mr. Joseph satisfactorily established that: (1) Peacock LLC is a limited liability company with no more than three owners;[6] (2) the amount in controversy does not exceed $15,000; and (3) he is the managing member of Peacock LLC with the authority to represent the limited liability company.[7]

23. The ALJ finds that Peacock LLC has satisfied the criteria of Rule 1201(b)(II), 4 CCR 723-1, and that Mr. Victor Joseph, who is not an attorney licensed to practice law in the State of Colorado, may represent Peacock LLC in this proceeding.

C. The Evidentiary Hearing

24. Mr. Nate Riley, a Criminal Investigator with the Investigations and Compliance Unit of the Commission's Transportation Section, testified under oath on behalf of Staff. The Staff offered Hearing Exhibits Nos. 1 through 14, which were admitted into evidence. Mr. Riley also testified in rebuttal.

25. Mr. Victor Joseph testified under oath on behalf of Peacock LLC. Mr. Joseph offered Hearing Exhibits Nos. 15 through 18, which were admitted into evidence.

[6] Section 13-1-127(1)(a), C.R.S.

[7] Section 13-1-127(2.3)(c), C.R.S.

26. At the conclusion of the hearing, the ALJ closed the evidentiary record. Both the Staff and Mr. Joseph made oral closing statements. The ALJ then took the matter under advisement and adjourned the hearing.

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

II. FINDINGS, DISCUSSION, AND CONCLUSION

28. Respondent is a limited liability company and holds PUC Permit No. LL-01761. Pursuant to that authority, Respondent provides luxury limousine service in Colorado under the name Peacock Limousine Service.

29. As a provider of luxury limousine service, Respondent is a motor carrier of passengers subject to limited regulation by the Commission (§ 40-10.1-301 *et seq.*, C.R.S.), and Respondent may be assessed civil penalties for violations of Title 40, Article 10.1, C.R.S., or Commission rules. (Sections 40-7-112, 40-7-113, 40-7-116, and 40-10.1-304, C.R.S., and Rule 6106, 4 CCR 723-6.)

30. The CPAN was properly served on Respondent by certified mail, return receipt requested. (Hearing Exhibit No. 12; Hearing Exhibit No. 13; and Hearing Exhibit No. 14.) Respondent does not dispute service.

31. Respondent does not challenge the Commission's jurisdiction. The record establishes, and the ALJ finds, that the Commission has subject matter jurisdiction over this case and personal jurisdiction over Respondent.

32. Staff bears the burden of proof by a preponderance of the evidence. (Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500, 4 CCR 723-1.) The preponderance standard requires the evidence of the existence of a contested fact outweighs the

evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013). That is, the finder of fact must determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.[8] In this case, Staff must prove, by a preponderance of the evidence: (a) facts that support a finding that Respondent violated the federal and Commission Rule cited in Counts 1, 2, and 3 of the CPAN; and (b) facts that support the amount of the civil penalty that Staff asks that the Commission impose. (*See Colorado Public Utilities Commission v. Elvis Edwards, doing business as Papi Enterprise*, Decision No. R09-0548, ¶ II.25 at page 5, (mailed on May 22, 2009), Docket No. 08G-562EC.)

33. The ALJ has reviewed the testimony and the hearing exhibits introduced by the Parties during the hearing, as well as their closing arguments. In rendering this Recommended Decision, the ALJ has weighed all the evidence and evaluated the credibility of the witnesses and the hearing exhibits. (*See Durango Transportation, Inc. v. Colorado Public Util. Comm'n.*, 122 P.3d 244, 252 (Colo. 2005); *RAM Broadcasting of Colo., Inc. v. Public Util. Comm'n., Public Util. Comm'n.*, 702 P.2d 746, 750 (Colo. 1985).)

A. Count 1.

34. Mr. Riley testified that he conducted a Safety and Compliance Review (SCR) of Peacock LLC on June 13, 2016. Mr. Riley testified that all counts in the CPAN were cited for May 30, 2016, which was the last date a passenger was transported in the month of May 2016.

[8] Findings in Commission decisions must be supported by substantial evidence in the record. *Douglas County Bd. of Comm'rs. v. Public Util. Comm'n.*, 866 P.2d 919, 926 (Colo.1994). Proof of alleged unlawful conduct by a preponderance of the evidence 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 Util. Comm'n.*, 875 P.2d 1373, 1378 (Colo.1994).

Mr. Joseph was present at all times during the SCR and signed the SCR Final Report. (*See* Hearing Exhibit No. 7.)

35. Count 1 of the CPAN alleges that on May 30, 2016 Respondent violated 49 CFR § 396.17(a), as made applicable in Colorado by Rule 6102(a)(I), 4 CCR 723-6, by "Operating a commercial motor vehicle not periodically inspected (Unit #1)."[9]

36. Section 40-7-116(1)(a), C.R.S., which governs the issuance of CPANs, provides in part that: "When a person is cited for the violation, the person operating the motor vehicle involved shall be given notice of the violation in the form of a civil penalty assessment notice." Section 40-7-116(1)(b), C.R.S., then lists the required contents of the notice, including as relevant to this case:

> (I) The name and address of the person cited for the violation;
>
> (II) A citation to the specific statute or rule alleged to have been violated;
>
> (III) A brief description of the alleged violation, the date and approximate location of the alleged violation, and the maximum penalty amounts prescribed for the violation[.]

37. Federal regulation 49 CFR § 396.17(a), incorporated by reference into Rule 6102(a)(I), provides that: "Every commercial motor vehicle must be inspected as required by this section." The regulation then details what items the inspection must include. While the CPAN cites Respondent for violating 49 CFR § 396.17(a) and Rule 6102(a)(I), the description of the alleged conduct in violation of the rules states that Respondent was "Operating a commercial motor vehicle not periodically inspected (Unit #1)."[10] Staff's testimony in support of Count 1 of

[9] In Colorado, luxury limousines are commercial motor vehicles, pursuant to Rule 6101(b), 4 CCR 723-6.

[10] Rule 49 CFR § 396.17(c), *not* 49 CFR § 396.17(a), is the federal regulation prohibiting a motor carrier from using (*i.e.*, operating) a commercial motor vehicle, *inter alia* unless it has passed the required inspection during the preceding 12 months.

the CPAN (Hearing Exhibit No. 11) cited to 49 CFR § 396.17(a) and, for the description of the alleged violation, reiterated that that Respondent was "Operating a commercial motor vehicle not periodically inspected (Unit #1)."

38. The statutory or rule reference in a charging pleading is an immaterial part of the pleading, as long as the substantive description of the alleged unlawful conduct sufficiently informs the defendant of the charge he faces. (*Cervantes v. People*, 715 P.2d 783, 787 (Colo. 1986); *People v. Marion*, 182 Colo. 435, 514 P.2d 327 (Colo. 1973).) Staff chose to proceed in this case with the substantive description of the alleged violation in Count 1 both in the CPAN and at the hearing. Even if Count 1 incorrectly cited to the wrong subsection of the federal regulation,[11] the ALJ finds such an error to be immaterial. (*Cervantes v. People, supra; People v. Marion, supra.*) The substantive description of the conduct Staff cited in Count 1 ("Operating a commercial motor vehicle not periodically inspected (Unit #1))" was clearly stated, and it sufficiently informed Respondent of the alleged conduct leading to the citation it faced.

39. The ALJ next addresses whether Staff proved by a preponderance of evidence that Respondent committed the violation cited in Count 1. The testimony of Mr. Riley in support of Count 1 focused mainly on the alleged failure of Respondent to inspect its vehicles periodically. Mr. Riley's SCR Final Report cites Respondent for a violation of 49 CFR § 396.17(a), as follows: "You have failed to have your vehicles periodically inspected." (Hearing Exhibit No. 7

[11] It cannot be determined from the record that the citation to § 396.17(a), rather than § 396.17(c), was a typographical error. Staff did not make a motion to amend Count 1of the CPAN to change the citation to the federal regulation to § 396.17(c) or the description of the alleged violation. *See* § 40-7-116(2), C.R.S., which provides a process for amending CPANs prior to the hearing on the merits. However, "No such amendment shall be permitted if substantial rights of the person cited are prejudiced." *Id.* Moreover, as found in Paragraphs II.A.37-38, Staff reiterated during the hearing that its prosecution of Count 1 proceeded as cited in the CPAN.

at 2, Item 6.) The SCR Final Report also contains a notation under Item No. 6 stating, "Example: Unit #1 Date Driven: 5/30/2016." (*Id.*) Mr. Riley testified that, according to Respondent's hours of service records provided during the SCR, May 30, 2016 was the last date a passenger was transported in the month of May 2016.

40. The ALJ has reviewed all the evidence Staff adduced for Count 1 to determine whether reasonable inferences can be drawn to conclude that Staff proved the violation in Count 1 by a preponderance of the evidence. Reasonable inferences for this conclusion can be drawn from the entry in Item 6 of Hearing Exhibit No. 7 and Mr. Riley's testimony that he reviewed Respondent's hours of service records during the SCR and concluded that on May 30, 2016 Respondent transported a passenger in Unit #1, which had not been periodically inspected.[12] The ALJ finds that this evidence and the reasonable inferences drawn from the evidence are sufficient to prove it was more probable than not that, on May 30, 2016, Respondent was operating "a commercial motor vehicle not periodically inspected." The ALJ finds that the violation cited in Count 1 has been proven by a preponderance of the evidence.

41. The ALJ finds, therefore, that Respondent committed and is liable for the violation cited in Count 1 by "Operating a commercial motor vehicle not periodically inspected (Unit #1)." A civil penalty of $1100.00, plus an additional 15 percent surcharge, for the amount of $1265.00 will be assessed against Respondent for the violation cited in Count 1. Evidence in

[12] This was a close case on Count 1. But for the reasonable inferences the ALJ was able to draw from Staff's evidence, Staff would have failed to prove Count 1 by a preponderance of the evidence. The record would have greatly benefitted had Staff presented direct evidence through testimony: (1) identifying the year, make, model, and Vehicle Identification Number of the vehicle identified only as "Unit # 1;" (2) explaining what actual vehicle Respondent operated on May 30, 2016 to transport a passenger; and (3) confirming that the vehicle so identified had failed to be periodically inspected.

mitigation will be considered later in this Decision when the total civil penalty to be assessed will be discussed.

B. Count 2.

42. In Count 2, the CPAN alleges that, on May 30, 2016, Respondent violated 49 CFR § 396.3(b)(2), as made applicable in Colorado by Rule 6102(a)(I), 4 CCR 723-6, by "Failing to keep minimum records of inspections and vehicle maintenance (Unit #1)."

43. Federal regulation 49 CFR § 396.3(b), incorporated by reference into Rule 6102(a)(I), as relevant to this CPAN provides that: "Motor carriers, except for a private motor carrier of passengers (nonbusiness), must maintain, or cause to be maintained, records for each motor vehicle they control for 30 consecutive days." The regulation then lists four types of information and records the motor carrier must maintain. (49 CFR § 396.3(b)(1) – (4).)

44. Mr. Riley's SCR Final Report cited Respondent for a violation of 49 CFR § 396.3(b)(2) on May 30, 2016, as follows: "You have failed to maintain, for your vehicles, a means to indicate the nature and due date of the various inspection and maintenance operations to be performed." (Hearing Exhibit No. 7 at 2, Item 5.) Mr. Riley testified that in 2012 Respondent had been cited in CPAN 104852 for an identical violation of 49 CFR § 396.3(b)(2). (*See* Hearing Exhibit No. 8.)

45. In defense against Count 2, Mr. Joseph testified on behalf of Respondent that when Mr. Riley conducted the SCR, he had recently purchased another vehicle, which Mr. Joseph established was a 2012 GMC Yukon, Vehicle Identification (VIN) No. 1GKS2LE71CR164940. (Hearing Exhibits Nos. 16 and 18.) Mr. Riley did not testify that the 2012 GMC Yukon was the "Unit # 1" identified in Count 2, and his testimony did not identify any specific vehicles for which Respondent had failed to keep minimum records of

inspections and vehicle maintenance. The 2012 GMC Yukon was the only specific vehicle discussed by both Staff and Mr. Joseph in testimony relating to Count 2. For purposes of adjudicating Count 2 of the CPAN, the ALJ finds that the 2012 GMC Yukon was the motor vehicle whose records of inspections and maintenance the Staff alleged were not kept by Respondent when Staff conducted the SCR.

46. Respondent's evidence establishes that the 2012 GMC Yukon was purchased by Mr. Joseph on May 21, 2016. (Hearing Exhibit No. 16.)[13] Mr. Joseph testified that he inquired of Mr. Riley whether the newly acquired vehicle needed an annual inspection, but he got neither a yes or no answer. Mr. Joseph introduced Hearing Exhibits Nos. 15, 17, and 18 as evidence of Respondent's records of inspections and vehicle maintenance.[14]

47. Mr. Riley testified in rebuttal that, while he may have seen Hearing Exhibit No. 16 (the vehicle registration) at the time of the SCR, the documents in Hearing Exhibits Nos. 15, 17, and 18 were not provided to him by Respondent when he conducted the SCR.

48. As relevant to this CPAN, 49 CFR § 396.3(b) provides that: "Motor carriers . . . must maintain, or cause to be maintained, records *for each motor vehicle they control for 30 consecutive days.*" (Emphasis added.) In determining whether Respondent has violated 49 CFR § 396.3(b), as incorporated by reference into Rule 6102(a)(I), the threshold issue is how long did Respondent have the 2012 GMC Yukon under its control prior to the alleged violation on May 30, 2016. If the carrier had the motor vehicle in its control for at least 30 consecutive

[13] Hearing Exhibit No. 16 is a photocopy of two documents, (1) a temporary vehicle registration for the 2012 GMC Yukon, VIN # 1GKS2LE71CR164940, dated May 21, 2016; and (2) a roadside protection agreement for the GMC Yukon, dated May 21, 2016.

[14] Hearing Exhibit No. 15 is an undated Preventive Maintenance Plan for a GMC Yukon XL. Hearing Exhibit No. 17 is Peacock Limousine Service's Annual Vehicle Inspection Report dated November 12, 2016 for the 2012 GMC Yukon, and Hearing Exhibit No. 18 is an undated Maintenance Report indicating that a 2012 GMC, VIN No. 1GKS2LE71CR164940, received an oil change and a tire rotation on May 21, but no year was shown.

days, then the issue is whether the carrier has kept the required records of inspections and vehicle maintenance.

49. Substantial evidence in the record demonstrates that Respondent acquired the 2012 GMC Yukon on May 21, 2016 (Hearing Exhibit No. 16), that Count 2 of the CPAN and Mr. Riley's testimony alleged the violation of the rules occurred on May 30, 2016 (Hearing Exhibit No. 11), and that the SCR Final Report was dated June 13, 2016 (Hearing Exhibit No. 7).

50. The ALJ finds that Respondent acquired the 2012 GMC Yukon on May 21, 2016. Based on substantial evidence in the record, the ALJ finds that Respondent could have had the 2012 GMC Yukon under its control for only nine days prior to the date of the alleged violation on May 30, 2016.[15] Substantial evidence in the record establishes that, because Respondent did not have the 2012 GMC Yukon under its control for 30 consecutive days before the alleged violation, it was not possible for Respondent to have or to keep inspection and maintenance records for the 2012 GMC Yukon for 30 consecutive days. Thus, the Respondent could not have violated 49 CFR § 396.3(b) as alleged in Count 2.

51. The ALJ finds, therefore, that Staff failed to prove by a preponderance of evidence that Respondent committed the violation cited in Count 2 by "Failing to keep minimum records of inspections and vehicle maintenance (Unit #1)." Count 2 of the CPAN will be dismissed with prejudice. No civil penalty will be assessed against Respondent under Count 2.

[15] Respondent also had the 2012 GMC Yukon under its control for only 23 days prior to the June 13, 2016 SCR. The ALJ finds that the ending date of the 30 consecutive days for finding a violation of 49 CFR § 396.3(b) is the date of the alleged violation. Even if the date of the SCR were the relevant end-point date, which the ALJ does not find, both of these dates are less than 30 consecutive days in this proceeding.

C. Count 3.

52. In Count 3, the CPAN alleges that on May 30, 2016, Respondent violated Rule 6105(i)(I), 4 CCR 723-6, by "Requiring or permitting a driver to drive if the driver has not complied with the fingerprint requirements of §40-10.1-110 C.R.S. (Driver: Victor A. Joseph)."

53. Section 40-10.1-110(1), C.R.S., provides as relevant to this case that:

> An individual who wishes to drive . . . a motor vehicle for a motor carrier that is the holder of a permit to operate as a . . . luxury limousine . . . under part 3 of this article shall submit a set of his or her fingerprints to the commission.

The Commission is then required to submit the driver's fingerprints to the Colorado Bureau of Investigation to obtain a fingerprint-based criminal history record check. Pending results, the individual may continue driving motor vehicles for the carrier, subject to certain limitations not relevant here. Upon the Commission's receipt of the results of the criminal history record check, pursuant to § 40-10.1-110(2), C.R.S., the individual may resume driving motor vehicles for the carrier, "so long as the driving does not violate applicable law and does not occur while the individual has a criminal conviction that disqualifies him or her from driving a motor vehicle in accordance with [§ 40-10.1-110(2), C.R.S.]."

54. Rule 6105 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, implements § 40-10.1-110, C.R.S. Rule 6105(i)(I), 4 CCR 723-6, provides that: "A passenger carrier shall not permit a driver to drive for the passenger carrier if: (I) the driver has not complied with this rule and § 40-10.1-110, C.R.S."

55. Mr. Riley's SCR Final Report cited Respondent for a violation of Rule 6105(i)(I), 4 CCR 723-6, on May 30, 2016, as follows: "You have permitted drivers to drive who have not submitted their fingerprints for a background check. Example: Victor Asher Joseph Date Driven: May 30, 2016." (Hearing Exhibit No. 7 at 2, Item 4.) Mr. Riley testified that fingerprint

background checks go to driver safety and to ensuring that anyone transporting a member of the public has been thoroughly vetted.

56. Based on substantial evidence in the record, the ALJ finds that Staff has satisfied its burden to prove by a preponderance of evidence that Respondent committed and is liable for the violation cited in Count 3 by "Requiring or permitting a driver to drive if the driver has not complied with the fingerprint requirements of §40-10.1-110 C.R.S. (Driver: Victor A. Joseph)." The ALJ finds that the Respondent should be assessed a civil penalty for this violation in the amount of $275.00, plus an additional 15 percent surcharge, for a total penalty of $316.25.

D. Civil Penalty to be Assessed.

57. The civil penalty assessed for Count 1 is $1100.00, plus the additional 15 percent surcharge, for an amount of $1265.00. The civil penalty assessed for Count 3 is $275.00, plus the additional 15 percent surcharge, for an amount of $316.25. Hence, the total civil penalty cited for Respondent's violations of Counts 1 and 2 equals $1,581.25.

58. The ALJ must next determine whether any mitigating factors may impact the total amount of the civil penalty to be assessed. The factors that the Commission may consider when determining the amount of a civil penalty are found in Rule 1302(b), 4 CCR 723-1:

> (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.

59. As for Count 1, Staff cited Respondent for, and proved by a preponderance of the evidence, one instance of operating a commercial motor vehicle not periodically inspected. The record contains no evidence of a history of prior offences of Respondent operating a commercial motor vehicle not periodically inspected.[16] The ALJ finds that the nature, circumstances, and gravity of the violation under Count 1 are not especially egregious.

60. Related to mitigation Mr. Joseph testified that he had been in India for an extended period of time (from the end of August to mid-November 2016) related to the death of his Mother. He requested that the Commission reduce the total civil penalty and allow payments in installments of $200 per month, because he did not "have enough funds even to feed my family." The evidence shows that Peacock LLC is a small luxury limousine carrier with one vehicle and one driver. Moreover, Mr. Riley testified that Respondent had failed to renew its annual permit, which had been inactive since October 2016. This was likely due to Mr. Joseph's extended absence from the United States due to the death in his family, and Respondent could renew the annual permit by following Commission procedures. From the evidence of record, the ALJ finds three mitigating factors under Rule 1302(b) for Count 1: (1) Respondent's ability to

[16] While Respondent settled a 2012 CPAN by admitting two counts of failing to have vehicles periodically inspected (Hearing Exhibit No. 5), the CPAN in that proceeding did not allege – and Respondent did not admit – the same conduct found to be a violation in this proceeding of Count 1 – *i.e.*, operating a commercial motor vehicle not periodically inspected. Hence, that evidence does not support a finding of the aggravating factor of a history of prior offenses.

pay; (2) the size of Respondent's business; and (3) the effect of paying the total civil penalty on the Respondent's ability to continue in business.

61. Therefore, mitigation will be applied to the civil penalty to be assessed for Count 1 by suspending 50 percent of the total civil penalty for Count 1, to $632.50, as long as timely installment payments are made, pursuant to the order for installment payments entered below.

62. As for Count 3, Mr. Riley testified that Respondent's failure to submit Mr. Joseph's fingerprints for a background check was a repeat violation in that Respondent had failed to comply multiple times with the requirements pertaining to submitting fingerprints during the entire seven-year history of this carrier. (*See* Hearing Exhibits Nos. 8 and 9.) The ALJ finds that Respondent's history of failing to submit drivers' fingerprints for a background check constitutes multiple prior violations of Rule 6105(i)(I), 4 CCR 723-6. Significantly, the Staff did not cite more than one violation in the CPAN, even though multiple past citations could have been charged. For Count 2, the ALJ finds that this history of Respondent's past violations constitutes a significant aggravating factor under Rule 1302(b)(III).

63. Based on substantial evidence in the record, the ALJ finds that fingerprint background checks play a critically important role in ensuring the safety of the traveling public and the proper vetting of drivers for regulated motor carriers. The ALJ finds, therefore, that "the nature, circumstances, and gravity" of Respondent's multiple prior violations of Rule 6105(i)(I), 4 CCR 723-6, constitute an aggravating factor under Rule 1302(b)(I) for Count 2.

64. As mitigation, Mr. Riley testified that, after the SCR on June 13, 2016, Respondent did submit Mr. Joseph's fingerprints to the Commission for a background check, and as a result Mr. Joseph was qualified as a driver in late June 2016. Mr. Riley also testified that

Mr. Joseph's qualification as a driver for Respondent would carry forward.[17] The ALJ finds that the belated submission of Mr. Joseph's fingerprints is a good faith effort "to achieve compliance and to prevent future similar violations" and a mitigating factor under Rule 1302(b)(V) for Count 2.

65. After weighing the evidence of aggravating and mitigating factors under Rule 1302(b) for Count 3, the ALJ finds that the aggravating and mitigating factors balance each other out. Hence, the ALJ will impose on Respondent the total civil penalty assessment for Count 3 of $316.25 (*i.e.*, the $275.00 civil penalty plus an additional 15 percent surcharge).

66. Respondent's request to pay the civil penalty assessment in installments will be granted. The amount of civil penalties to be paid in installments equals $948.50 ($632.50 after suspending 50 percent of the total civil penalty for Count 1 plus $316.25 for Count 3), as long as timely installment payments are made until the amount of $948.50 is paid in full.

67. Respondent will pay the assessment in five installments of $189.75 each. Respondent will make each payment to the Commission. The first payment will be due within ten days after the date of a final Commission decision in this matter.[18] Each of the four remaining payments will be due every 30 days thereafter until the assessment of $948.50 is paid in full. If Respondent submits a payment by U.S. mail, the payment must be made by money order or check and the date of payment is the postmarked date.

[17] Mr. Riley testified that as of October 3, 2016 Respondent's permit was inactive, because Respondent failed to file an annual renewal application, which is required of all limited regulation carriers. (*See* Sections 40-10.1-302(1)(b) and 40-10.1-302(5), C.R.S.) Respondent could reactivate its permit by filing an annual renewal application and following Commission procedures for renewal. Once Respondent's permit is properly renewed, Mr. Joseph would be a qualified driver for Respondent.

[18] As used in this Decision, "a final Commission decision" means the date on which this Recommended Decision becomes the decision of the Commission, which is 21 days after the mailed date if no exceptions are filed. Section 40-6-109(2), C.R.S. If exceptions are filed, that date will be the mailed date of the Commission's decision on exceptions.

68. The failure of Respondent to make the required installment payments on time shall result in the automatic loss of the suspension of 50 percent of the civil penalty for Count 1 and imposition of the full civil penalty assessments for Counts 1 and 3 of $1,581.25 ($1,265.00 for Count 1 plus $316.25 for Count 3). The full amount of $1,581.25 will become due and payable immediately on Respondent's failure to make a timely payment, less any prior payments made.

69. The ALJ strongly encourages Respondent to renew its permit, if it has not already renewed, so Respondent can begin earning revenue to pay the civil penalty assessed in this Decision. The ALJ also strongly encourages Respondent in the future to comply fully with the laws of the State of Colorado, the rules and regulations of the Commission, and the rules and regulations of the Colorado State Patrol.

E. Staff's Request for a Cease and Desist Order.

70. Finally, in testimony Staff asked the ALJ to issue a cease and desist order "in regards to ensuring that respondent gets these issues corrected."[19] The request will be denied. Staff did not, either in testimony or closing argument, articulate clearly and specifically from what conduct Respondent should be ordered to cease and desist. Based on the meager testimony on this request, the ALJ concludes that Staff has asked that Respondent be ordered to cease and desist from violating the Commission rules cited in this CPAN. That would be redundant of the obligations to which every motor carrier commits when applying for and receiving Commission authorities or permits. For example, when Respondent applied for its Limited Regulation Carrier Permit on September 9, 2011, Mr. Joseph on behalf of Respondent verified that, "The applicant

[19] The Commission may issue a cease and desist order pursuant to Rule 6008(c) of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6, as relevant to the instant case, for "(I) a violation of, or failure to comply with, any statute, order, or rule concerning a motor carrier. . . . "

is familiar with and will comply with the applicable PUC's Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6." (Hearing Exhibit No. 1 at 3.) Permit No. LL-01761, issued to Respondent on September 21, 2011, states: "Full compliance with the laws of the State of Colorado, the rules and regulations of the Commission, and the rules and regulations of the Colorado State Patrol is required under this permit." (Hearing Exhibit No. 2.)

71. Without substantial evidence in the record articulating clearly and specifically from what conduct Staff requests Respondent should be ordered to cease and desist, as well as the compelling reasons such conduct warrants issuing a cease and desist order, the ALJ will decline to issue the requested cease and desist order.

III. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, Peacock LLC, doing business as Peacock Limousine Service (Respondent), is assessed a civil penalty in the amount of $1,100.00 in connection with Count 1 of Civil Penalty Assessment Notice No. 116001, with the additional 15 percent surcharge required by § 24-34-108, C.R.S., for a total penalty amount of $1,265.00. As a result of mitigating factors found by the Administrative Law Judge, 50 percent of the total civil penalty for Count 1 will be suspended, to $632.50, as long as timely installment payments are made pursuant to the order entered in this Decision for installment payments.

2. Consistent with the discussion above, Count 2 of Civil Penalty Assessment Notice No. 116001 is dismissed.

3. Consistent with the discussion above, Respondent, is assessed a civil penalty in the amount of $275.00 in connection with Count 3 of Civil Penalty Assessment Notice

No. 116001, with the additional 15 percent surcharge required by § 24-34-108, C.R.S., for a total penalty amount of $316.25.

4. Respondent shall pay to the Commission the total assessed civil penalty of $948.50 in five installments of $189.75 each. Respondent shall make each payment to the Commission. The first payment shall be due within ten days after the date of a final Commission decision in this matter. Each of the four remaining payments shall be due every 30 days thereafter until the assessment of $948.50 is paid in full. If Respondent submits a payment by U.S. mail, the payment must be made by money order or check and the date of payment is the postmarked date.

5. Respondent shall comply with this Decision and make the required installment payments on time. Respondent's failure to make timely installment payments shall result in the automatic loss of the suspension of 50 percent of the civil penalty for Count 1 and shall result in Respondent being liable for the full assessment of $1,581.25, less any payments made pursuant to this Decision. If this Ordering Paragraph No. 5 is invoked, the full assessment of $1,581.25, less any payments already made, shall be due and payable immediately.

6. The request of Trial Staff of the Commission for the issuance of a cease and desist order is denied.

7. 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.

8. 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.

9. 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.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director