



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
C-2015-2464291

August 25, 2016

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation
and Enforcement v. Capital City Cab Service Inc.
Docket No. C-2015-2464291
I&E Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Exceptions of the Bureau of Investigation and Enforcement in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "S M Wimer".

Stephanie M. Wimer
Prosecutor

Enclosure

cc: As per Certificate of Service
Honorable Steven K. Haas
ra-OSA@pa.gov

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility
Commission, Bureau of Investigation
and Enforcement,

Complainant

v.

Capital City Cab Service Inc.,
Respondent

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Docket No. C-2015-2464291

EXCEPTIONS OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT

Stephanie M. Wimer
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Dated: August 25, 2016

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I. INTRODUCTION

The Bureau of Investigation and Enforcement (I&E), pursuant to 52 Pa. Code § 5.533, through its prosecuting attorneys, hereby files Exceptions to the Initial Decision (ID) of Administrative Law Judge (ALJ) Steven K. Haas, which was issued on August 5, 2016 in the above-referenced proceeding. In the ID, ALJ Haas dismissed I&E's Complaint alleging that Capital City Cab Service Inc. (Respondent) refused to provide taxicab service to a customer because the length of the trip was too short of a distance and therefore would not have been an economically worthwhile endeavor for the driver. Instead, the ALJ concluded that Respondent's driver refused to provide the trip for a legitimate purpose in that the driver already had another passenger who was entering the cab.¹ The ALJ determined that I&E presented no evidence to rebut Respondent's testimony that another passenger was already entering the vehicle and therefore found that I&E did not carry its burden in proving by a preponderance of the evidence that a violation of Section 29.313(a) of the Pennsylvania Public Utility Commission's (Commission or PUC) regulations, 52 Pa. Code § 29.313(a), occurred.²

Respectfully, it is the position of I&E that the ALJ disregarded substantial record evidence that, in fact, directly refutes Respondent's incredible and unreliable claim that another passenger was already entering the vehicle. Further, the ALJ inconsistently assigned the burden of proof to both parties in the ID³ and erred by determining that I&E did not meet the *minimal* evidentiary standard of preponderance of the evidence when

¹ Finding of Fact No. 17.

² ID at 6; Conclusion of Law No. 8.

³ ID at 4-5; Conclusion of Law No. 2 and ID at 6; Conclusion of Law No. 8.

I&E’s testimonial, photographic and documentary evidence all demonstrate that it is much more probable than not that Respondent violated the Commission’s regulations.

A. BACKGROUND

Mr. David DeKok, who is a journalist, and his minor child arrived at the Amtrak Station in Harrisburg during the late night hours of January 25, 2015 and sought a taxi to their nearby home in Shipoke.⁴ They returned from visiting New York City where Mr. DeKok’s daughter had been auditioning for college theater programs.⁵ While their home is only eight-tenths or nine-tenths of a mile away from the station, it was late at night, the weather was cold, they had luggage, and thus preferred not to walk.⁶

Around 11:35 PM, Mr. DeKok approached the last cab in the queue of the cab area that is outside of the Amtrak Station because the cab was the only one “that did not already have another passenger waiting to get in.”⁷ When Mr. DeKok attempted to take a ride in the cab, the driver, Mr. Saleh Elazouni, asked where he was going.⁸ Mr. DeKok responded, “Shipoke, by the Comfort Inn.”⁹ Mr. Elazouni indicated that he did not want to go there and when questioned why, Mr. Elazouni stated that it was “too short a distance.”¹⁰

Mr. DeKok then testified on the record as follows:

“After he refused to take me and I challenged him on that, I said he was breaking the law as I understood it, and I photographed the PUC

⁴ N.T. at 8-9.

⁵ N.T. at 8.

⁶ N.T. at 9.

⁷ N.T. at 8-9.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

registration number on the cab, and then I got a picture from the side of him, and then he loaded another passenger into his cab right at that time.”

N.T. at 10 (emphasis added).

I&E Exhibit No. 1 consists of a compilation of two photographs that were taken by Mr. DeKok. When asked during direct examination when the photographs were taken, Mr. DeKok responded, “Right after he had refused us service.”¹¹ One photograph shows Respondent’s PUC Certificate of Public Convenience number as well as the number of the taxicab. The other photograph portrays Mr. Elazouni standing at the driver’s side door of cab. The photographs **do not** show Mr. Elazouni loading other passengers into the vehicle. The photographs **do not** show other passengers inside of the vehicle. The photographs **do not show** anyone conversing with Mr. Elazouni and no one else is depicted in the immediate vicinity of Mr. Elazouni or the vehicle. The photographs **do not show** any passengers entering the cab or near the cab.

After Mr. DeKok took the photographs, he observed Mr. Elazouni ultimately accepting other passengers instead of driving Mr. DeKok and his daughter to Shipoke.¹² The ninth entry on I&E Exhibit No. 2, which is the log sheet corresponding to the taxicab and date in question, shows that Mr. Elazouni transported passengers to New Cumberland, PA with service beginning at 11:40 PM on January 25, 2015, which is approximately five minutes after Mr. DeKok testified that he had requested taxi service from Mr. Elazouni.

¹¹ N.T. at 11.

¹² N.T. at 10.

Yet, against I&E's photographic, documentary and testimonial evidence, the ALJ erroneously concluded that the driver, Mr. Elazouni, *had already been engaged* by another passenger when Mr. DeKok approached the vehicle.¹³ The ALJ's conclusion appears to be based upon Mr. Elazouni's incredible oral testimony that was inconsistent with Respondent's Answer, as well as the testimony and exhibits presented by the Complainant.

In its Answer to I&E's Complaint, Respondent failed to raise any claim that its driver had been engaged by another passenger. Rather, Respondent defended against the allegation that Mr. Elazouni refused to provide service by stating that "Elazouni, who was at the rear of the line at the cab stand at the Harrisburg Transportation Center, merely directed Mr. DeKok to the front of the queue, as is the rule and custom at the Transportation Center."¹⁴

Respondent's opening statement during the evidentiary hearing held in this matter conveyed its understanding of the policy of the Harrisburg Transportation Center related to the taxi queue (first in line receives the business) and contained no reference to another passenger other than Mr. DeKok engaging Mr. Elazouni.¹⁵ Respondent's cross examination of both of I&E's witnesses, Mr. DeKok and Enforcement Officer Timothy Troxell, is devoid of any reference to another passenger being engaged by Mr. Elazouni or in the taxicab.

¹³ ID at 6; Finding of Fact 17.

¹⁴ Paragraph 3 of Respondent's Answer.

¹⁵ N.T. at 6-7.

Yet, when Mr. Elazouni took the stand after the conclusion of I&E's case-in-chief, he offered for the very first time a dubious claim that he had given business to another passenger prior to speaking to Mr. DeKok.¹⁶ Mr. Elazouni's testimony also raised for the first time that Mr. DeKok was angry and belligerent,¹⁷ and that other drivers located in the front of the taxi queue had refused service to Mr. DeKok due to the short distance of his destination, Shipoke.¹⁸

When asked by Respondent's counsel whether the cabs located at the front of the queue were "tied up," Mr. Elazouni did not respond by indicating that they were occupied.¹⁹ Instead, Mr. Elazouni repeatedly indicated that the other cab drivers had refused Mr. DeKok service, but not him.²⁰

If Mr. Elazouni's testimony were true - that another passenger was loading into the vehicle - then the passenger would have been depicted in I&E Exhibit No. 1. Further, Mr. Elazouni's testimony contradicts the position of Respondent's claim regarding the policy of the Harrisburg Transportation Center (first in line receives the business). Logic dictates that if taxicabs appearing in the queue in front of Mr. Elazouni's cab were unoccupied and had refused Mr. DeKok service due to the short distance of his destination, then Mr. Elazouni would not have had a passenger loading into his vehicle since the vehicles in front of him were unoccupied.

Despite the inconsistent claims and contradictions offered by Respondent, and against the testimonial, photographic and documentary evidence submitted by I&E, the

¹⁶ N.T. at 35.

¹⁷ *Id.*

¹⁸ N.T. at 33.

¹⁹ *Id.*

²⁰ *Id.*

ALJ erroneously concluded that Respondent was engaged by another passenger thereby properly rebuffing Mr. DeKok's request for service.

B. SCOPE OF REVIEW

The Commission has the power to disregard and supersede the decision of an administrative law judge. Section 335(a) of the Public Utility Code (Code) states that, "On review of the initial decision, the commission has all the powers which it would have in making the initial decision" 66 Pa.C.S. § 335(a). The Commonwealth Court has determined that, "A broader grant of power to the Commission in the disposition of initial decisions in cases it chooses to review can scarcely be imagined." *G.G. & C. Bus Co. v. Pa. Pub. Util. Comm'n*, 400 A.2d 941, 944 (Pa. Cmwlth 1979). *See also City of Philadelphia v. Pa. Pub. Util. Comm'n*, 458 A.2d 1026 (Pa. Cmwlth. 1983). Thus, under this broad scope of review, the Commission may substitute its own findings of fact and conclusions of law as it sees fit based upon the evidence and record before it. Given that the instant ID overlooks substantial testimonial, documentary and photographic evidence submitted by I&E and misconstrues the testimony of I&E's witness, the Commission should exercise its powers under Section 335 of the Code and wholly reject the ID.

II. EXCEPTIONS

A. EXCEPTION NO. 1: The ALJ Erred In Determining That I&E Failed To Prove By A Preponderance Of The Evidence That Respondent Unlawfully Refused To Provide Service To A Customer.

In the ID, the ALJ reached inconsistent conclusions relating to the party who has the responsibility of bearing the burden of proof. On one hand, the ALJ determined in Conclusion of Law No. 2 that the burden of proof belongs to Respondent to show that it

did not violate Section 29.313(a) of the Commission’s regulations, which provides, “[a] driver of a call or demand vehicle shall, at all times when on duty and not engaged, furnish trip service to an orderly person for lawful purposes.” 52 Pa. Code § 29.313(a).²¹

Specifically, Conclusion of Law No. 2 provides as follows:

2. In proceedings involving an allegation that a public utility violated a lawful determination or order of the Commission, the burden of proof is on the utility to show that the determination or order has been complied with. 52 Pa. Code § 315(b). Additionally, where, upon motion of the Commission involving the service or facilities of a public utility, the burden of proof is likewise upon the utility to show that its service and facilities are adequate, efficient, safe and reasonable. 52 Pa. Code § 315(c).

ID at 7; Conclusion of Law No. 2.

The ALJ also stated in the ID that “the burden of proof in this proceeding is upon the Respondent to prove its case by a preponderance of the evidence.”²²

On the other hand, the ALJ inexplicably shifted the burden of proof to I&E in the ID. Conclusion of Law No. 8 provides that “The Complainant failed to prove, by a preponderance of the evidence, that the Complainant illegally refused to provide service to a passenger who requested service.”²³ Additionally, the ID provides as follows: “. . . I cannot conclude that I&E proved, by a preponderance of the evidence, that Mr. Elazouni illegally refused to provide service.”²⁴ The ID further states, “For these reasons, I do not believe the Complainant proved, by a preponderance of the evidence, that the Respondent

²¹ ID at 4-5; Conclusion of Law No. 2.

²² ID at 5.

²³ ID at 8; Conclusion of Law No. 8.

²⁴ ID at 6.

illegally refused to provide service.”²⁵ Thus, the ID is clearly erroneous due to its inconsistent application regarding the burden of proof.

In either case, I&E should be found to prevail. If I&E bears the burden of proof in this proceeding, then I&E handily sustained its burden. As noted above, the applicable burden of proof standard is a preponderance of the evidence. A preponderance of the evidence is the lowest evidentiary standard and is tantamount to being “more probable than not.” *Commonwealth of Pa. v. Doranzo*, 529 A.2d 6, 8 (Pa. Super. 1987). Proof by the preponderance of the evidence is often described as a weighing of the evidence and a determination based upon which way the imaginary scales are tipped. *Id.* With a preponderance of the evidence standard, the scale is tipped even when 50.01% of the evidence weighs in favor of a party. Thus, I&E was required to present evidence even by the smallest amount than that presented by Respondent. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

The substantial evidence submitted by I&E makes it far more probable that Mr. Elazouni was not engaged by another passenger and refused to provide service to Mr. DeKok without a legitimate reason. I&E presented the testimony of two witnesses and seven exhibits, compared to the testimony of Respondent’s sole witness which is riddled with inconsistencies.

While the testimony of Mr. DeKok and Mr. Elazouni conflicted, the photographic and documentary evidence submitted by I&E simply demonstrates that Mr. DeKok’s version of the events was truthful and tips the mythical scales in I&E’s favor. I&E

²⁵ ID at 7. *See also* Conclusion of Law No. 8.

Exhibit No. 1 consists of photographs taken by Mr. DeKok right after he was refused service²⁶ and they do not depict another passenger loading or entering Mr. Elazouni's taxicab. Indeed, no passenger is depicted in the vicinity of the taxicab. I&E Exhibit No. 2 constitutes the applicable trip log sheet, which shows that Mr. Elazouni accepted a fare with a destination of New Cumberland approximately five minutes after Mr. DeKok was refused service for requesting a ride to a closer destination. Thus, I&E's evidence tips the scales heavily in its direction and compels a determination in I&E's favor.

Further, the Commission's decision must be supported by substantial evidence. 2 Pa.C.S. § 704. Substantial evidence is more than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC*, 413 A. 2d 1037 (Pa. 1980). I&E's testimonial, documentary and photographic evidence are far more substantial than Respondent's unsupported claim that its driver was engaged by another passenger, a claim which appears to have been spontaneously created by Respondent's witness on the stand during the hearing.

B. EXCEPTION NO. 2: The Initial Decision Disregards Substantial Record Evidence Submitted By I&E And Misconstrues The Testimony Of I&E's Witness.

On the other hand, if Respondent maintained the burden of proof, then it failed to meet that burden when weighed against the case presented by I&E. The testimony of the parties conflicted during the evidentiary hearing that was held in this matter. For example, Mr. Elazouni raised for the first time at hearing a claim that Mr. DeKok was

²⁶ NT at 11.

angry when he approached Mr. Elazouni for a ride on January 25, 2015.²⁷ However, I&E Enforcement Officer Troxell testified that when he interviewed Mr. Elazouni about the incident, Mr. Elazouni made no such claim.²⁸ Likewise, Respondent's Answer to I&E's Complaint fails to raise any defense that Mr. DeKok did not behave in an orderly manner. Mr. DeKok himself testified that he was cordial when he approached Mr. Elazouni and only became understandably upset after he was refused service.²⁹

In addition to the above-described discrepancy, Respondent's own version of the events contains inherent defects. In its Answer to the Complaint, Respondent initially defended against the allegations by asserting that Mr. Elazouni refused to serve Mr. DeKok because taxicabs appearing in the front of the queue were unoccupied and were required to be loaded first.³⁰ Respondent then changed its entire defense at hearing by claiming that another passenger had already been engaged by Mr. Elazouni when Mr. DeKok approached, and asserted that the unoccupied taxicabs appearing in the front of the queue had refused to serve Mr. DeKok.³¹ As noted above, if the taxicabs appearing at the front of the queue were unoccupied, then Mr. Elazouni would not have been loading a passenger into his taxicab according to Respondent's own interpretation of the taxi policy at the Harrisburg Transportation Center (first in line receives the business).

Despite the diametrically opposed testimony and the inconsistencies of Respondent's multiple defenses, the ALJ made no credibility finding to resolve the conflicts and did not focus on any factual issue other than Mr. Elazouni's unsubstantiated

²⁷ N.T. at 33.

²⁸ N.T. at 20.

²⁹ N.T. at 13.

³⁰ See Answer of Capital City Cab Service Inc.

³¹ N.T. at 33.

claim that he was engaged by another passenger. The ALJ then erred by misconstruing Mr. DeKok's testimony to lend support to Mr. Elazouni's testimony.

Specifically, the ALJ found that "Dekok testified that another passenger was loaded into Mr. Elazouni's vehicle when he was talking to Mr. Elazouni and taking pictures of him and the vehicle."³² This is simply not true and the record does not support the finding. Mr. DeKok actually testified as follows:

"After he refused to take me and I challenged him on that, I said he was breaking the law as I understood it, and I photographed the PUC registration number on the cab, and then I got a picture from the side of him, and then he loaded another passenger into his cab right at that time."

N.T. at 10 (emphasis added).

Mr. DeKok's testimony is clear: Mr. Elazouni accepted another passenger *after* he refused to serve Mr. DeKok. I&E Exhibit No. 1 corroborates Mr. DeKok's testimony. No passenger is present in the taxicab or is depicted loading into the taxicab. In addition, the ALJ overlooked and gave no weight to I&E Exhibit No. 2, which demonstrates that Mr. Elazouni accepted a fare with a destination of New Cumberland approximately five minutes after Mr. DeKok requested a ride.³³

I&E Exhibit Nos. 1 and 2 constitute substantial evidence that corroborate Mr. DeKok's testimony and should have adequately resolved the conflicting testimony in I&E's favor. However, Mr. DeKok's testimony, as well as I&E Exhibit Nos. 1 and 2, were capriciously disregarded. A capricious disregard occurs when the fact-finder

³² ID at 6.

³³ N.T. at 9.

deliberately ignores relevant, competent evidence. *Capasso v. Workers' Comp. Appeal Bd. (RACS Assocs., Inc.)*, 851 A.2d 997 (Pa. Cmwlth. 2004). The ALJ erred by accepting Respondent's completely unsupported and inconsistent claim that another passenger had engaged Mr. Elazouni.

The ALJ also overlooked evidence presented by I&E demonstrating that the Commission previously imposed a civil penalty in the amount of \$500 upon Respondent for violating 52 Pa. Code § 29.313(a) by refusing to provide service to a passenger, which suggests a propensity to commit the violation alleged here.³⁴ Additionally, the ALJ disregarded that Mr. DeKok took time out of his busy schedule to testify at the hearing without any apparent motivation other than to convey his experience with Respondent's service. On the other hand, Mr. Elazouni has an inherent incentive to protect his livelihood. Mr. DeKok's testimony is simply more reliable. Therefore, the ID errs by completely ignoring and capriciously disregarding the substantial evidence presented by I&E.

³⁴ I&E Exhibit No. 4, Item No. 29, *Pa. Pub. Util. Comm'n, Bureau of Transp. and Safety v. Capital City Cab Serv. Inc.*, Docket No. A-00113875C0203 (Secretarial Letter issued February 28, 2003).

III. CONCLUSION

For the reasons set forth above, the Bureau of Investigation and Enforcement respectfully requests that the Commission grant the Exceptions, reverse the Initial Decision of the Administrative Law Judge, sustain the Complaint, impose a civil penalty in the amount of Five Hundred Dollars (\$500) and grant other relief as deemed appropriate.

Respectfully submitted,



Stephanie M. Wimer
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Deputy Chief Prosecutor
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Dated: August 25, 2016

