

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission	:	
Bureau of Investigation & Enforcement	:	
	:	
v.	:	C-2019-3015168
	:	
Sugarcreek Towing & Recovery, LLC	:	

INITIAL DECISION

Before
Dennis J. Buckley
Administrative Law Judge

INTRODUCTION

This Initial Decision sustains in part and denies in part a formal Complaint filed by the Commission’s Bureau of Investigation and Enforcement (BIE) against Sugarcreek Towing & Recovery, LLC (Sugarcreek or Respondent), imposes a \$500 civil penalty on the Respondent for failure to maintain proof of insurance, and directs cancellation of the Certificate of Public Convenience held by Respondent at A-8916766 for failure to maintain evidence of current insurance on file with the Commission.

HISTORY OF THE PROCEEDING

On December 30, 2019, BIE filed a formal Complaint against Respondent alleging that it had failed to maintain evidence of insurance on file with the Commission in violation of the Public Utility Code (Code) at 66 Pa. C.S. § 512, and the regulations of the Commission at 52 Pa. Code §§ 32.2(c), 32.11(a) and 32.12(a) or 32.13(a). BIE stated that absent the filing of an Answer, the payment of a civil penalty of \$500, or the filing within twenty (20)

days of proof of insurance, that the Commission should cancel Respondent's certificate of public convenience, assess a \$500 civil penalty, impose an additional penalty should cancellation occur, and order such other remedy as might be appropriate.

On December 30, 2019, the Complaint was served on Respondent by the Secretary of the Commission.¹

On January 23, 2020, Respondent filed an Answer to the Complaint stating that Sugarcreek Towing & Recovery, LLC ceased towing operations on March 29, 2019, and all operations on April 19, 2019.²

On November 10, 2020, a hearing Notice was issued for a telephonic hearing to convene on December 22, 2020.

On November 30, 2020, a prehearing Order was issued.

On December 22, 2020, a telephonic hearing in this matter was held. BIE Assistant Counsel Matthew C. Fallings, Esquire, appeared and presented the case for BIE. No one appeared on behalf of Respondent. There had been some email exchanges and conversations between counsel for BIE, Attorney Fallings, and the principle of Respondent, Kristopher Lowry, prior to the scheduling of the hearing, and in fact Attorney Fallings stated that a settlement in principle had been reached in this matter. As only a verbal agreement had been reached, and with the failure of any representative for Respondent to appear, BIE proceeded with its case. The procedure for filing of exhibits being at issue at the time due to the pandemic, the record was held open to afford counsel for BIE the opportunity to file the exhibits received into the record at hearing: BIE Exhibit 1, a Form H; BIE Exhibit 2, a Form K (Cancellation of Motor Carrier Insurance); BIE Exhibit 3, a Notice of Suspension of Operating Authority; BIE Exhibit 4, an

¹ On December 30, 2019, Respondent through its principle requested cancellation of its authority but to date has not filed the document necessary to effectuate that request.

² On January 24, 2020, Respondent sent an email to BIE subsequently filed by the Secretary's Office as, "External Second Response to the Complaint," but which is, in fact, a number of questions and allegations irrelevant to the resolution of the BIE Complaint.

Insurance Form E (Proof of Motor Carrier Insurance); BIE Exhibit 5, a Notice of Cancellation of Motor Carrier Insurance Policy; and, BIE Form 6, a Notice of Suspension of Property Operating Authority. This filing was accomplished on December 22, 2020. BIE also presented the testimony of Elizabeth Plantz, a Compliance Supervisor of the Commission's Bureau of Technical Utility Services, Motor Carrier Division.

To date no representative of Respondent has entered an appearance, nor has the principle of Respondent contacted the Office of Administrative Law Judge (OALJ) relative to Respondent's failure to appear at the hearing.

On January 14, 2021, a 17-page transcript and the six BIE Exhibits were filed with the Secretary of the Commission by the court reporter. They constitute the record in this case.

On March 25, 2021, no Settlement Agreement having been filed by the parties in this matter, an Order was issued closing the record in this case.

This Initial Decision sustains the BIE Complaint, in part, imposes a civil penalty of \$500 on Respondent, and directs cancellation of Respondent's Certificate of Public Convenience for failure to maintain proof of insurance with the Commission.

FINDINGS OF FACT

1. The Complainant in this proceeding is the Commission's Bureau of Investigation and Enforcement.
2. The Respondent in this proceeding is Sugarcreek Towing & Recovery, LLC, the holder of a Certificate of Public Convenience from the Commission at A-8916766.
3. On December 30, 2019, Complainant filed a formal Complaint against Respondent.

4. On January 23, 2020, Respondent filed an Answer to the Complaint.
5. On November 10, 2020, a hearing Notice was issued for a telephonic hearing to convene on December 22, 2020.
6. On November 30, 2020, a prehearing Order was sent to the parties which set forth procedural requirements associated with the initial hearing.
7. Both the prehearing Order and the hearing Notice warned the parties that they may lose the case if they did not take part in the hearing and present evidence on the issues raised.
8. The hearing Notice and the prehearing Order were e-served on the Respondent.
9. The hearing Notice and prehearing Order sent to Respondent were not returned as undeliverable.
10. An evidentiary hearing in this case convened on December 22, 2020, but no representative of the Respondent appeared.
11. At the time of the hearing in this matter, Respondent had been engaged in the business of towing salvage vehicles, emergency vehicles, and vehicles to and from auction sites for compensation. Tr. at 7.
12. Respondent's motor carrier liability insurance lapsed on December 19, 2019. Tr. at 12-13, BIE Exhibit 5.
13. Respondent failed to file proof of insurance with the Commission after December 19, 2019. Tr. at 14.

DISCUSSION

As the proponent of a Commission order, BIE has the burden of proof in this case. 66 Pa.C.S.A. § 332(a).

To establish a sufficient case and satisfy the burden of proof, BIE must show that Sugarcreek is responsible or accountable for the problem described in the Complaint. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa. PUC 196 (1990), *Feinstein v. Phila. Suburban Water Co.*, 50 Pa. PUC 300 (1976). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 134 Pa.Cmwlth. 218, 578 A.2d 600 (1990), *app. den.*, 529 Pa. 654, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). BIE must initially produce sufficient credible evidence to establish a prima facie case in order that it not lose summarily. *Morrissey v. Dep't of Highways*, 424 Pa. 87, 225 A.2d 895 (1967). If it does so, the burden of going forward with evidence shifts to Sugarcreek to produce credible evidence of at least co-equal weight. This burden of going forward with evidence may shift back and forth between the parties, but the ultimate burden of persuasion remains with BIE. *Milkie v. Pa. Pub. Util. Comm'n*, 768 A.2d 1217 (Pa.Cmwlth. 2001).

Additionally, any finding of fact necessary to support the Commission's adjudication must be based upon substantial evidence. *Edan Transp. Corp. v. Pa. Pub. Util. Comm'n*, 154 Pa.Cmwlth. 21, 623 A.2d 6 (1993); *Mill v. Pa. Pub. Util. Comm'n*, 67 Pa.Cmwlth. 597, 447 A.2d 1100 (1982); 2 Pa.C.S. § 704. Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Bethenergy Mines, Inc. v. Workmen's Comp. Appeal Bd.*, 531 Pa. 287, 612 A.2d 434 (1992). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. v. Pa. Pub. Util. Comm'n*, 489 Pa. 109, 413 A.2d 1037 (1980); *Erie Resistor Corp. v. Unemployment Comp. Bd. of Review*, 194 Pa.Super. 278, 166 A.2d 96 (1960); *Murphy v. Pa. Dep't of Pub. Welfare*, 85 Pa.Cmwlth. 23, 480 A.2d 382 (1984).

In its Complaint, BIE alleged that Sugarcreek had failed to maintain evidence of insurance on file with the Commission in violation of the Code at 66 Pa. C.S. § 512, and the regulations of the Commission at 52 Pa. Code §§ 32.2(c), 32.11(a) and 32.12(a) or 32.13(a). BIE stated that absent the filing of an Answer, the payment of a civil penalty of \$500, or the filing within twenty (20) days of proof of insurance, that the Commission should cancel Respondent's certificate of public convenience, assess a \$500 civil penalty and impose an additional penalty should cancellation occur, and order such other remedy as might be appropriate.

Section 512 of the Code, 66 Pa. C.S. § 512 states, in pertinent part:

§ 512. Power of commission to require insurance.

The commission may, as to motor carriers, prescribe, by regulation or order, such requirements as it may deem necessary for the protection of persons or property of their patrons and the public, including the filing of surety bonds, the carrying of insurance, or the qualifications and conditions under which such carriers may act as self-insurers with respect to such matters. . . .

66 Pa. C.S. § 512.

The regulation of the Commission at 52 Pa. Code § 32.2(c) relative to proof of insurance filings states:

§ 32.2. Insurance forms and procedures.

(c) *Filing and copies.* An original of each certificate of insurance, surety bond and notice of cancellation shall be filed with the Commission. An approved copy will be returned to sender if a self-addressed, stamped envelope is enclosed with the filing.

52 Pa. Code § 32.2(c).

The regulation of the Commission at 52 Pa. Code § 32.12(a) relative to insurance for property and household goods carriers states, in pertinent part:

§ 32.12. Property carrier and household goods in use carrier insurance.

(a) No common carrier or contract carrier of property or household goods in use may engage in intrastate commerce and no certificate will be issued, or remain in force, except as provided in § 32.15 (relating to applications to self-insure), until there has been filed with and approved by the Commission, a certificate of insurance by an insurer authorized to do business in this Commonwealth, to provide for the payment of valid accident claims against the insured for bodily injury to or the death of persons, or the loss or damage to property of others resulting from the operation, maintenance or use of a motor vehicle in the insured authorized service. . . .

52 Pa. Code § 32.12(a).

The regulation of the Commission at 52 Pa. Code § 32.13(a) relative to cargo liability insurance states:

§ 32.13. Cargo liability insurance.

(a) A common carrier of property or household goods in use by motor vehicle shall file with the Commission, in addition to the public liability and property damage certificate of insurance required under § 32.12 (relating to property carrier and household goods in use carrier insurance), certificates of insurance in an amount satisfactory to the Commission, but not less than \$5,000, to provide payment for loss or damage to cargo carried on a motor vehicle. No motor vehicle may be operated unless the insurance policy or other approved method of protection is in effect at the time of operation. This section may not be modified or abrogated by tariff filings. The Commission may approve another method of cargo protection in specific cases.

52 Pa. Code § 32.13(a).

BIE has met its burden of proof by establishing that Sugarcreek violated these provisions of the law through the credible testimony of its witness, Ms. Plantz, and through its

documentary evidence, BIE Exhibits 1-6, which demonstrate that Respondent has not maintained proof of insurance with the Commission. Tr. at 7, 12-14.

This case is somewhat unusual in that a settlement in principle had been agreed to by the parties immediately prior to the evidentiary hearing; however, when no representative for the Respondent appeared, BIE proceeded with its case. That was appropriate, and this decision is based on the evidence of record, not solely on Respondent's failure to appear. But Respondent did not appear despite receiving Notice of the hearing and having been told by Counsel for BIE that BIE would attend the hearing prepared to proceed with its case.

Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied when the parties are provided with notice and an opportunity to be heard. *Id.*

As stated, above, a call-in, telephonic hearing in this case was held on December 22, 2020, at 10:00 a.m. BIE Assistant Counsel Matthew C. Fallings, Esquire, appeared and presented the case for BIE. No one appeared on behalf of Respondent. Again, to date, no representative of Respondent has entered an appearance, nor has Respondent contacted the OALJ relative to Respondent's failure to appear at hearing.

Commission regulations address circumstances when a party fails to appear in a proceeding. The Commission's regulation at 52 Pa. Code § 5.245 provides:

§ 5.245. Failure to appear, proceed or maintain order in proceedings.

(a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:

- (1) Be deemed to have waived the opportunity to participate in the conference or hearing.

(2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.

(3) Not be permitted to recall witnesses who were excused for further examination.

52 Pa.Code § 5.245(a).

The hearing Notice and the prehearing Order were e-served on the Respondent. The hearing Notice and prehearing Order were not returned to the Commission as undeliverable. The principle of Respondent was also verbally advised by Counsel for BIE that the hearing would take place. Tr. at p. 4. Accordingly, it must be presumed that these documents sent to Respondent in the ordinary course of business were received. *Zirkel v. Phila. Gas Works*, Docket No. C-2016-2561176 (Opinion and Order entered January 27, 2017); *Morella v. PECO Energy Co.*, Docket No. C-2016-2553416 (Opinion and Order entered November 16, 2016). As noted above, the prehearing Order stated that the parties may lose the case if they fail to appear and present evidence on the issues raised.

No request for a postponement or continuance of the hearing was received by my office. Respondent had notice of the hearing and an opportunity to be heard in this proceeding but chose not to appear. Therefore, the Respondent's due process rights have been fully protected. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); *See also*, 52 Pa.Code § 5.245(a).

By failing to appear, Respondent presented no mitigating or extenuating evidence with respect to the level of the civil penalty requested by BIE. The Commission, through its regulations, has provided guidance on assessing the amount of a civil penalty.

As a result of the violations of the statute and Commission regulations requiring proof of insurance, a civil penalty is warranted in this case. The imposition and quantification of a civil penalty is based on the Commission's regulation at 52 Pa. Code § 69.1201, *Factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and Commission regulations—statement of policy*. That regulation states that the

Commission will consider specific factors and standards in evaluating litigated cases involving violations of the Public Utility Code and the regulations of the Commission. The ten factors that the Commission will consider in determining if a fine for violating a Commission order, regulation or statute is appropriate are the following:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201(c).

In this case, the conduct at issue was of a serious nature. Uninsured vehicles of any kind pose a threat to the welfare of the public. Uninsured commercial vehicles are a public menace. 52 Pa. Code § 69.1201(c)(1). The record does not establish the occurrence of consequences of a serious nature, such as uncompensated personal injury or property damage. 52 Pa. Code § 69.1201(c)(2). It is unclear whether the conduct was intentional or negligent. 52 Pa. Code § 69.1201(c)(3). There is no evidence that Respondent has made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. 52 Pa. Code § 69.1201(c)(4). The record does not establish that anyone was affected by the violation. 52 Pa. Code § 69.1201(c)(5). This appears to have been an isolated incident. 52 Pa. Code § 69.1201(c)(6). An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty. There is no evidence that Respondent acted in bad faith. 52 Pa. Code § 69.1201(c)(7). The amount of the civil penalty is less a deterrent than it is an incentive to review procedure and to conform with the requirements of the law. 52 Pa. Code § 69.1201(c)(8). There is no progression of similar cases that would suggest a different result. 52 Pa. Code § 69.1201(c)(9). The problem would seem to be susceptible to simple corrective action going forward that would serve the interests of Respondent and the public. 52 Pa. Code § 69.1201(c)(10).

BIE has met its burden of proof, and the Complaint at this docket is sustained except as to the allegation of a violation of 52 Pa. Code § 32.11(a) which is applicable to passenger carrier insurance. That count of the Complaint is denied as irrelevant and legally insufficient. Consistent with the foregoing analysis and in consideration of BIE's request, the imposition of a civil penalty of \$500 for this one-time occurrence is appropriate. Further, BIE's Complaint is sustained with respect to Respondent's failure to maintain evidence of insurance, and Respondent's Certificate of Public Convenience must, therefore, be cancelled.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. §§ 512, 701.

2. Section 332(a) of the Public Utility Code provides that the party seeking relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).

3. "Burden of proof" means a duty to establish a fact by a preponderance of the evidence, or evidence more convincing, by even the smallest degree, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 54, 70 A.2d 854 (1950).

4. Administrative agencies, such as the Commission, are required to provide due process to the parties appearing before them. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa.Cmwlth. 1984). This due process requirement is satisfied when the parties are provided with notice and an opportunity to be heard. *Id.*

5. After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will: 1) be deemed to have waived the opportunity to participate in the conference or hearing; 2) not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing; and 3) not be permitted to recall witnesses who were excused for further examination. 52 Pa.Code § 5.245(a).

6. It is the duty of a party to apprise the Commission promptly of changes to the party's current address. 52 Pa.Code § 1.53(d).

7. Respondent's due process rights have been fully protected. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Order entered October 25, 1993); *See also*, 52 Pa.Code § 5.245(a).

8. It is the responsibility of a certificate holder to coordinate with its insurance carrier to see that the documents verifying proof of adequate insurance are filed with the Commission. 52 Pa. Code § 32.2(c).

9. The Commission may, as to motor carriers, prescribe, by regulation or order, such requirements as it may deem necessary for the protection of persons or property of their patrons and the public, including the filing of surety bonds, the carrying of insurance, or the qualifications and conditions under which such carriers may act as self-insurers with respect to such matters. 66 Pa. C.S. § 512.

10. An original of each certificate of insurance, surety bond and notice of cancellation shall be filed with the Commission. An approved copy will be returned to sender if a self-addressed, stamped envelope is enclosed with the filing. 52 Pa. Code § 32.2(c).

11. No common carrier or contract carrier of property or household goods in use may engage in intrastate commerce and no certificate will be issued, or remain in force, except as provided in 52 Pa. Code § 32.15 (relating to applications to self-insure), until there has been filed with and approved by the Commission, a certificate of insurance by an insurer authorized to do business in this Commonwealth, to provide for the payment of valid accident claims against the insured for bodily injury to or the death of persons, or the loss or damage to property of others resulting from the operation, maintenance or use of a motor vehicle in the insured authorized service. 52 Pa. Code § 32.12(a).

12. A common carrier of property by motor vehicle shall file with the Commission, in addition to the public liability and property damage certificate of insurance required by 52 Pa. Code § 32.12 (relating to property carrier insurance), certificates of insurance in an amount satisfactory to the Commission, but not less than \$5,000 to provide payment for loss or damage to cargo carried on a motor vehicle. No motor vehicle may be operated unless the insurance policy or other approved method of protection is in effect at the time of operation. 52 Pa. Code § 32.13(a).

ORDER

THEREFORE;

IT IS ORDERED:

1. That the formal Complaint filed by the Commission's Bureau of Investigation and Enforcement at Docket No. C-2019-3015168 is sustained except as to the allegation of a violation of 52 Pa. Code § 32.11(a) which is applicable to passenger carrier insurance and which is denied as irrelevant and legally insufficient.

2. That Sugarcreek Towing and Recovery, LLC pay a civil penalty of \$500 by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from entry of the Final Commission Order to:

Secretary
Pennsylvania Public Utility Commission
400 North Street
Harrisburg, PA 17120

3. That the Certificate of Public Convenience held by respondent at A-8916766 be cancelled for failure to maintain evidence of current insurance on file with the Commission.

4. That this case be marked closed.

Dated: August 27, 2021

/s/
Dennis J. Buckley
Administrative Law Judge