



STATE OF WASHINGTON
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION
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October 22, 2012

David W. Danner, Executive Director and Secretary
Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
P. O. Box 47250
Olympia, Washington 98504-7250

RE: *Washington Utilities and Transportation Commission v. BML Investments, LLC d/b/a
Wenatchee Valley Shuttle*
Commission Staff's Response to Application for Mitigation of Penalties
Docket TC-121565

Dear Mr. Danner:

On October 4, 2012, the Washington Utilities and Transportation Commission (commission) issued Penalty Assessment TC-121565 against BML Investments, LLC d/b/a Wenatchee Valley Shuttle (BML Investments) in the amount of \$2,000 for 13 violations of Commission Order 01 in Docket TC-121120 – Order Suspending Certificate C-64605 and seven violations of Washington Administrative Code (WAC) 480-30-221, Vehicle and driver safety requirements, which requires passenger transportation companies to comply with Title 49, Code of Federal Regulations (CFR), including Part 391, which governs qualification of drivers.

On October 12, 2012, BML Investments filed with the commission its request for mitigation (Mitigation Request). BML Investments admitted the alleged violations, but asked that the penalty amount be reduced.

Violations of Commission Order

BML Investments does not dispute that the violations occurred. However, in its Mitigation Request, the company disputes the suspension of its certificate in Docket TC-121120 because it claims to have submitted the required insurance information in a timely manner. The appropriate avenue for BML Investments to dispute the circumstances surrounding the suspension would have been to request administrative review of the commission's July 2, 2012, suspension order.



BML investments did not request administrative review and the commission's order became final. However, I will address the specific points related to the suspension.

After receiving the information referenced in the Mitigation Request from BML Investments' insurance agent, commission staff sent BML Investments an "Insurance Binder Notification" letter on April 25, 2012.¹ The letter clearly explained that the commission had received an insurance binder that was valid for up to 60 days. BML Investments had to file a Form E insurance certificate within those 60 days or the company's permit would be suspended. The letter also explained how BML Investments could dispute such a suspension.

When the commission did not receive the Form E certificate, it suspended BML Investments' authority on July 2, 2012.² The commission's suspension order clearly directed the company to cease all operations associated with certificate C-64605 until the commission received proof of liability and property damage insurance and entered an order lifting the suspension and authorizing BML Investments to resume operations. BML Investments did not request administrative review of the order.

BML Investments submitted the required Form E insurance certificate on July 17, 2012. The commission lifted the suspension the same day.³ Between the date the commission suspended the company's authority and the date the commission lifted the suspension, BML Investments provided regulated passenger transportation on 13 occasions.

The commission regulates passenger transportation companies to ensure the protection of the traveling public. Without proof that BML Investments had the required liability and property damage insurance coverage, the commission was unable to ensure that the traveling public was protected; therefore, the commission suspended BML Investments' certificate. BML operated during the suspension period in violation of the commission's order, without having provided proof of the required insurance coverage. Staff does not support mitigation of these penalties.

Safety Violations

In its Mitigation Request, BML Investments states that it was unaware that all of its drivers needed a medical card.

The commission's rules governing safety requirements for passenger transportation, which adopt certain federal safety regulations, are designed to protect the health and safety of the traveling public. Regulated passenger transportation companies are responsible for fully understanding and complying with all federal and state laws and rules related to passenger transportation.

¹ April 25, 2012, Insurance binder notification letter at Attachment A.

² Commission Order 01 – Docket TC-121120 at Attachment B.

³ Commission Order 02 – Docket TC-121120 at Attachment C.

When BML Investments first applied for an auto transportation certificate in April 2012, commission staff sent the company a copy of the laws and rules related to auto transportation along with a copy of the commission's safety manual, "Your Guide to Achieving a Satisfactory Safety Record." The commission distributes the laws, rules and the manual to assist carriers in understanding applicable rules and preparing for safety compliance reviews.

Motor Carrier Safety Inspector Rick Smith first met with BML Investments on April 17, 2012, prior to the commission granting the company authority as an auto transportation provider. At that time, Mr. Smith provided company staff with a second copy of the safety manual.

During the September 5, 2012 compliance review, Mr. Lott assured Mr. Smith that he had read the safety manual several times and had two copies visible on his desk. The safety manual clearly explains that drivers of commercial motor vehicles must pass a medical examination conducted by a licensed health care professional. A driver must be issued a medical examiner's certificate, which must be carried at all times and must be renewed every two years.⁴

Commission staff has provided more than adequate information and assistance to BML Investments on how to comply with federal and state laws and rules. During compliance reviews, commission staff conducts an in-depth examination of the motor carrier's compliance with regulations that the Federal Motor Carrier Safety Administration has identified as "critical." Using a driver not medically examined and certified is considered a critical violation.⁵ Critical violations are generally indicative of breakdowns in a carrier's management controls. Patterns of non-compliance with critical regulations are quantitatively linked to inadequate safety management controls and usually higher-than-average accident rates.⁶

Though the company states that it has improved its safety practices related to driver medical certifications, commission staff remains concerned. On October 9, 2012, after the commission assessed the penalty against BML Investments, commission staff found a BML Investments driver conducting regulated operations at SeaTac Airport without proof of medical certification in his possession. The Commercial Vehicle Safety Alliance (CVSA) identifies violations that render commercial motor vehicle operators unqualified to drive or out-of-service.⁷ During roadside enforcement, such as this destination check at the airport, when commission staff finds that a driver is operating a passenger-carrying vehicle without possessing a valid medical certificate, the violation is considered severe enough that the driver is declared out-of-service. BML Investments' driver was placed out of service for this violation. Commission staff is dealing with this new safety violation as a separate matter.

⁴ Declaration of Rick Smith at Attachment D.

⁵ Code of Federal Regulations, Appendix B to Part 385—Explanation of safety rating process at Attachment E.

⁶ *Id.*

⁷ CVSA Policy Statement and driver medical/physical requirements violations at Attachment F.

Staff does not support mitigation of the assessed penalties. RCW 81.04.405 allows penalties of one hundred dollars for every violation, and in the case of a continuing violation, every day's continuance is deemed a separate and distinct violation. BML Investments' seven drivers transported passengers a total of 114 times without medical certification. The commission could have assessed a large penalty for these violations. However, the commission chose to assess one penalty for each driver who drove without medical certification instead of assessing penalties for each trip conducted. Staff believes the commission has already substantially mitigated this penalty.

First-time Paperwork Violations

In its Mitigation Request, BML Investments implies that under the Administrative Procedures Act (APA), the commission can waive any fines, civil penalties or administrative sanctions for first time paperwork violations by a small business.

In RCW 34.05.110, a "paperwork violation" is defined as the violation of any statutory or regulatory requirement that mandates the collection of information by an agency, or the collection, posting, or retention of information by a small business. A "first-time paperwork violation" means the first instance of a particular or substantially similar paperwork violation.

The statute provides that agencies will waive any fines, civil penalties, or administrative sanctions for first-time paperwork violations by a small business, except when:

“(a) The agency head determines that the effect of the violation or waiver presents a direct danger to the public health...or causes serious harm to the public interest;”⁸

For the reasons set forth above, staff believes that the violations for which the commission assessed penalties constitute a direct danger to the public health and harm to the public interest.

The statute also provides an exception when:

(c) The violation is of a requirement concerning the assessment, collection, or administration of any ... insurance rate or form filing;”⁹

Staff believes this exception applies to BML Investments' failure to timely file the Form E insurance certificate.

8 RCW 34.05.110(4)(a).

9 RCW 34.05.110(4)(c).

General Compliance

BML Investments received an unsatisfactory safety rating during the most recent compliance review. An unsatisfactory safety rating means a motor carrier does not have adequate safety management controls in place to ensure compliance with safety fitness standards.¹⁰

It is the policy of the Transportation Safety section to recommend that the commission assess penalties for any violations related to keeping the public safe from unqualified drivers, such as drivers who drive without current medical certification. While staff did not recommend penalties for the other 377 violations found during the compliance review, staff sent the company a letter outlining its serious concerns with BML Investments' compliance history.¹¹

Commission staff will conduct a follow-up review within 120 days to determine if the company's safety management program has improved. If staff finds repeat critical violations or if BML Investments receives a conditional or unsatisfactory safety rating at the re-check inspection, staff will recommend the commission take additional enforcement action against BML Investments, up to and including additional penalties and possible suspension of the company's operating authority.

Staff recommends the Mitigation Request be denied.

If you have any questions, please contact Betty Young, Compliance Investigator, Transportation Safety, at 360-664-1202, or by e-mail at byoung@utc.wa.gov.

Sincerely,



David Pratt
Assistant Director, Transportation Safety

Enclosures

10 49 CFR Part 385—Safety Fitness Procedures – 385.3 – Definitions and acronyms, at Attachment G.

11 Commission staff's October 4, 2012, compliance letter to BML Investments at Attachment H.