

Rec'd 9/20/17
(16145) RELJ

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Wayne's Automotive Center, Inc.,)
)
Petitioner,)
)
vs.)
)
South Carolina Department of)
Public Safety,)
)
Respondent.)
_____)

Docket No. 16-ALJ-30-0410-CC

FINAL ORDER

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SC Court of Appeals

This case comes before the Administrative Law Court ("ALC" or "Court") on the appeal of Wayne's Automotive Center, Inc., ("Petitioner") for a contested case hearing to challenge a violation found and a penalty imposed by the South Carolina Department of Public Safety ("Respondent" or "Department"). See S.C. Code Ann. § 1-23-600 (Supp. 2016) and § 1-23-505 (Supp. 2016). Respondent determined that the recovery charges invoiced by Petitioner for a specific incident were unreasonable and suspended Petitioner from its rotation call list for one hundred and twenty (120) days.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and passed upon their credibility, taking into consideration each party's burden of proof, the Court makes the following findings of fact by a preponderance of the evidence.

Petitioner applied to be included on the 2016 Wrecker Rotation Schedule. Petitioner was approved and recommended for the rotation list. The 2016 Wrecker Rotation Fee Schedule does not set a fee for special operations in Class C tows. These are described in 2 S.C. Code Ann. Regs. 38-600 (E)(3) (2011) as heavy duty tows for vehicles in excess of seventeen thousand (17,000) pounds. The Fee Schedule also notes that "a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job." Proof of these costs must be provided by including an itemized invoice or receipt from the provider with the towing bill. A standard Class C tow is approved for \$436.00 per hour. Special operations for a Class B

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SC ADMIN. LAW COURT

tow sets an hourly rate of \$174.00.¹ The schedule also allows a separate invoice if additional services are performed, such as hazardous waste cleanup or transportation of vehicle, cargo, or occupants.

On February 9, 2016, the South Carolina Highway Patrol placed a routine rotation call to Petitioner's Aiken location for a Class C wrecker to tow an overturned tractor-trailer on the I-20 bridge over the Savannah River near the South Carolina/Georgia border.² The tractor-trailer belonged to J.H.O.C., Inc., d/b/a Premier Transportation ("Premier") and contained a customer's shipment of dogfood. Between 2:00 A.M. and 4:30 A.M. Petitioner sent individuals to the scene and began to dispatch trucks and equipment including apparatus for traffic control such as digital signs and cones. Between noon and 2:00 P.M., the interstate and the bridge were reopened to traffic. The cargo recovery and removal continued into the evening. Petitioner's records show that its vehicles finished at the scene around 11:38 P.M. Petitioner's operations manager disputed the accuracy of this record and contended that vehicles and workers remained engaged until a later time. In any event, the Court has no basis to reject Petitioner's claim that some vehicles and workers were involved in the recovery for approximately twenty-one (21) hours.

On February 19, 2016, Lieutenant King, the wrecker coordinator for Troop 7 (Aiken County), received a complaint about Petitioner's tow bill for the accident. He obtained copies of the tow bill from Robert Watson, President of Recovery Resolution Specialists, and from Jeff Corbett, Petitioner's owner. After reviewing the bill, King spoke with Corbett and explained the problems he found with the bill. On March 4, 2016, he reported to Captain Grice, his troop commander, identifying charges on the bill he thought were unreasonable and recommended that Petitioner be permanently removed from the wrecker rotation list.

King's report identified three individuals whose labor was billed at \$175.00 an hour, three whose labor was billed at \$150.00 an hour, and one whose labor was billed at \$85.00 an hour. A

¹ What that rate is supposed to cover or supply is not specified.

² S.C. Code Ann. Regs. 38-600 (F)(2)(a)(1) (2011) defines a "standard tow ... as responding to the scene, hooking up the vehicle, performing a general clean up if the call involves responding to a collision scene...." Section (F)(2)(a)(2) defines "special operations" as "involving the process of uprighting an overturned vehicle or returning a vehicle to a normal position on the roadway which requires the use of auxiliary equipment due to the size or location of the vehicle and/or the recovery of a load which has spilled, or the off-loading and reloading of a load from an overturned vehicle performed to right the vehicle."

reasonable rate, in his opinion, would have been \$50.00 an hour for the first six and \$35.00 an hour for the seventh. He identified another worker billed at \$90.00 and six others billed at \$50.00 an hour. He stated that \$25.00 an hour would have been reasonable for all. Three other workers were paid \$1,000.00 to transfer and repack cargo but should have been paid a total of \$75.00. King thought another item for repacking and reloading was duplicative and should have been removed. Finally, he stated that he directed Petitioner to release the cargo. The cargo was not picked up until the final bill was paid (by check received March 7, 2016). Respondent did not see or consider until much later the invoice eventually paid.³ King is not an expert in towing rates.

Petitioner's operations manager, Sherry Corbett, is the majority owner of Spill Containment Incident Management ("SCIM") that provided communication equipment and a truck with cleanup supplies used at the accident scene.⁴ In addition, labor was obtained from Vern's Wrecker and Recovery ("Vern's"). Equipment and labor from SCIM and Vern's was "marked up" from its actual cost allegedly to cover Petitioner's liability, taxes, and insurance expenses. Equipment invoices included an operator for the equipment. These operators were also included in labor charged for recovery technicians.

Petitioner issued a number of invoices to Premier for its services: one consisting of four separate invoices totaling \$67,912.69; a single invoice for \$69,017.19; another single invoice for \$64,783.19; and a last invoice for \$48,633.19, that Premier paid by check received March 7, 2016. Petitioner explained that the invoices were adjusted as it learned that some items were not needed, that air bags damaged in lifting the trailer could be repaired, and that other items should be deducted. Even after these adjustments, the invoice, as paid, contained labor charges that were duplicated as operators included in equipment charges, and additions to the actual charges billed by subcontractors who provided labor and equipment. These "third party" charges were not supported by bills or receipts attached to the invoice.

On a number of occasions, Petitioner was asked to release the cargo. These requests were made by Robert Watson, who was retained by Sentry Insurance, the insurer of Premier's rig. Mr. Watson

³ According to the Notice of Disciplinary Action Decision, Respondent received this invoice on July 1, 2016. The Department reviewed this invoice but concluded that it did "not cure the impropriety of the charges" first invoiced.

⁴ SCIM is owned by Sherry Corbett (51%) and Jeff Corbett (49%).

began his involvement in the case on February 14, 2016. He reviewed the invoice and asked for the cargo's return by telephone and email. Travelers Insurance insured the cargo, and its agent contacted Petitioner on February 18, 2016, and authorized Petitioner to deal with Mr. Watson. The cargo was picked up on March 7, 2016.

CONCLUSIONS OF LAW

Petitioner asserts that the accident occurred in Georgia and is subject to Georgia law or is preempted by Federal law. This case arises within a South Carolina regulatory scheme in which a South Carolina business participating in that regulatory scheme was summoned by the South Carolina Highway Patrol to perform services subject to the administration of that regulatory scheme. Under these circumstances, South Carolina jurisdiction is proper.

Petitioner also contends that by paying the final invoice, Premier has settled any complaints it might have about the items included in the bill and the recovery of the cargo. Petitioner also argues that Mr. Watson had no authority to make the allegations that triggered the Respondent's involvement and the resulting disciplinary action. The Court disagrees.

The regulation provides for complaints and disciplinary procedures: "Complaints from or about wrecker services regarding an incident involving the Highway Patrol or its operation of the wrecker lists must be received within thirty days of the alleged incident." 2 S.C. Code Ann. Regs. 38-600(D)(1) (2011). The regulation sets up two classes of complaints "from or about wrecker services." A complaint from a wrecker service must deal with the Highway Patrol's operation of the wrecker lists. A complaint "about wrecker services" would involve problems arising from wrecker services furnished to individuals or businesses or invoices for such services. Once the complaint is lodged, Respondent must perform its investigatory duties until the complaint is resolved.⁵

To be on the rotation list, a wrecker service must meet the qualifications set forth in 2 S.C. Code Ann. Regs. 38-600(B) and (C) (2011). In addition, Section 38-600 (F) requires that each application must include proposed fees for each wrecker class and, for each class, fees for standard

⁵ Resolution depends on the nature of the complaint. A complaint about a bill could be resolved by a revised bill.

towing, special operations, and storage. The Troop commander for each wrecker zone reviews the fees for validity and reasonableness before approving a service for the rotation list.

Charges for services furnished through Respondent's wrecker rotation list are subject to the regulations:

Fees charged for rotation list calls shall be reasonable and not in excess of those rates charged for similar services provided in response to requests initiated by any other public agency or private person.

2 S.C. Code Ann. Regs. 38-600(F)(2) (2011).

This subsection creates a correlation between the fees set by the annual Wrecker Rotation Fee Schedule and the overall charges for services performed. The schedule, to which Petitioner is subject, sets an hourly amount for a Class C Standard Tow at \$436.00 an hour. No fee is set for Special Operations. However, the following explanation is included in the Fee Schedule:

Although no Special Operations fee is set for Class C tows, a wrecker service may recover the actual cost of rented/subcontracted equipment or labor necessary to accomplish the job. Proof of these actual costs in the form of an itemized invoice or receipt from the third part providing such equipment or labor must accompany the tow bill.

Respondent, therefore, has the authority to investigate complaints and to determine whether a tow bill is proper and reasonable. However, special operations may require additional labor and equipment that could be provided without obtaining them from third parties. Reasonable costs might be added that could be in excess of the \$174.00 an hour allowed for Class B tows.

Petitioner contends that Robert Watson is not authorized to dispute or complain about services provided. The truck's owner, its insurer, and the cargo's insurer authorized Petitioner to deal with Mr. Watson. Therefore, Petitioner's argument has no merit.

Petitioner also complains about the Department's failure to refer the case to an Advisory Committee. S.C. Code Ann. Regs. 38-600(D)(5) mandates the creation of an Advisory Committee. "to review ... complaints specific to the terms and conditions of this regulation." Petitioner complains that Respondent violated the regulation by not creating this Advisory Committee. However, the review referenced could only occur "upon request by the Department." Furthermore, its review would be limited to "specific issues raised in a complaint or appeal," and its

“recommendations regarding the validity of the complaint as well as a fair and reasonable resolution” cannot “supercede [sic] Department of Public Safety policy.” Hence, while the Department may have erred in failing to create an Advisory Committee, it is not obligated to use the committee or to follow its recommendations. In any event, the contested case hearing and its *de novo* review has cured any procedural or due process violations. *Unisys Corp. v. South Carolina Budget & Control Board*, 346 S.C. 158, 551 S.E.2d 263 (2001). Therefore, this error, if it is an error, is harmless.

Petitioner contends that, because the Fee Schedule sets no fees for Class C Special Operations and S.C. Code Ann. Regs. 38-600(C)(15) requires submission of a single bill, its combined invoice (as revised) complies with the Fee Schedule and the regulations. The Court disagrees.

One bill is required to be submitted to the owner or operator. The Fee Schedule allows the towing company to include in its bill and recover the actual cost of rented or subcontracted equipment or labor. However, these costs must be substantiated by including with the single towing bill an itemized invoice or receipt from the third party that furnished such equipment or labor.

Petitioner contends that its revised charges itemized on the final bill, which Premier paid, were reasonable. Respondent evaluated and imposed a suspension based on Petitioner’s initial bill. Petitioner complied with many of the concerns identified by Lt. King. Although Petitioner rejected Lt. King’s evaluation of its initial bill, Petitioner submitted a final, revised bill to Premier on the same day King made his formal report.

Respondent points out that there were at least four invoices submitted. The focus of its investigation was the second invoice submitted for the amount of \$69,017.19. Respondent contends that this Invoice to Premier was unreasonable. Respondent relies on S.C. Code Ann. Regs. 38-600(F)(2), which states as follows:

Fees charged for rotation list calls shall be reasonable and not in excess of those rates charged for similar services provided in response to requests initiated by any other public agency or private persons.

Since King advised Petitioner to revise its bill to correct the issues he identified, Petitioner could reasonably believe revision was required and would be acceptable. In continuing its investigation,

Respondent must take revision into account and evaluate the final bill. As this lengthy process concluded, Premier ultimately paid \$48,622.19, the amount specified in the final bill.

Petitioner prepared and submitted revised bills as directed; therefore, it cannot be held responsible for alleged violations that it subsequently corrected.⁶ If Petitioner has disregarded the Wrecker Rotation Fee Schedule or the Wrecker Rotation Regulation, the violations must be based on specific abuses that remain in this final invoice.

Respondent disputes that the tow/recovery required twenty-one (21) hours. The testimony and evidence supports the conclusion that Petitioner had equipment and workers either on the scene or relocating cargo for storage between 2:00 A.M. and 11:38 P.M. on February 9, 2016. The final invoice shows one large wrecker (to rotate to an upright position the tractor and trailer and to remove the trailer), communication equipment (owned by SCIM), and four workers billed for twenty-one hours. One of these workers should not have been billed separately from the wrecker. The invoice detail supports the use of this wrecker from 2:00 A.M. to 11:00 P.M. or twenty-one hours. Another heavy-duty truck (Class C) used for winching both tractor and trailer and to remove the tractor was billed for twelve (12) hours. The worker assigned to this unit was also billed for eight (8) hours of labor.

The Response Unit, which transported cleaning supplies and equipment to the accident scene was billed for twenty (20) hours. This unit was identified as the property of SCIM. Traffic control devices and equipment including digital signs and arrows, a high intensity sign used on both east and west lanes, and 48 traffic cones were used for twenty (20) hours. Some of these items were owned by Petitioner, some were contracted from a third party. Labor obtained from a third party (Vern's Wrecker & Recovery) was billed at \$1,000.00. No invoices were attached supporting the cost of equipment and labor obtained from other businesses.

⁶ Can one be punished for saying that he will not correct an error when he ultimately does correct it before he is aware that he has been punished? *Cf. Matthew 21:28-31.*

The invoice that was the subject of the investigation also included a cost to replace airbags (used to help raise overturned vehicles or trailers). The final invoice did not include the cost of airbags.⁷ In addition, the initial invoice included labor charges which Respondent (through Lieutenant King) objected to as unreasonable. The final invoice reduced labor charges from \$18,665.00 to \$14,815.00 by reducing some labor rates and eliminating one duplication and two workers.⁸

Respondent also objected to charges for the communications equipment and the Response Unit supplied by SCIM. Respondent's analysis of these charges suggests that they are unreasonable based on the acquisition costs of the items. This analysis also applied to the traffic cones. The Court finds the analysis to be flawed. The communications units, three of which were on the scene for twenty-one hours, were billed at approximately \$28.00 an hour. While this rate may be high, it is not so high as to be unreasonable. The Response Unit used a truck purchased for \$4,516.00. There was no evidence presented to establish any cost for refurbishing it and stocking it with equipment and supplies for containing and cleaning up hazardous waste (fuel and lubricants from the wrecked tractor). Assuming that the hourly rate (\$175.00) includes an operator and accounts for consumable supplies, the billed cost is not unreasonable.⁹ Finally, the traffic cones were billed at \$700.00 (reduced from \$1,000.00). To account for this sum, forty-eight (48) cones were used for twenty (20) hours at \$0.75 per cone per hour. There is no evidence that fewer cones should have been used or that seventy-five (75) cents is an unreasonable hourly rate for a traffic cone at an accident site.

Finally, we come to a knotty and contentious issue. Respondent argues that Petitioner did not comply with state law when it did not release the cargo. S.C. Code Ann. § 56-5-5635(F) provides as follows:

After the vehicle is in the possession of the proprietor, owner, or operator of the towing company, storage facility, garage, or repair shop, the owner of the vehicle as demonstrated by providing a certificate of registration has one opportunity to remove from the vehicle any personal property not attached to the vehicle. The proprietor, owner, or operator of the towing company, storage facility, garage, or

⁷ The testimony showed that Petitioner discovered that the airbags could be repaired and removed all costs associated with the airbags from the final invoice.

⁸ The labor charges include \$1,000.00 for the labor supplied by Vern's for which Respondent introduced an exhibit showing \$720.00 as the actual cost.

⁹ Allowed costs for Special Operations in a Class B tow, as indicated above, are \$174.00 an hour; it is reasonable to assume that a Class C operation would be more expensive.

repair shop must release any personal property that does not belong to the owner of the vehicle to the owner of the personal property.

Personal property, as used in this subsection, refers to "personal items such as medicines, medical equipment, keys, clothing, and tools of the trade, child restraint systems and perishable items" that belong to the owner of the vehicle. S.C. Code Ann. Regs. 38-600(C)(6). The statute also requires that "personal property that does not belong to the owner of the vehicle" must be released to the owner of the personal property. Petitioner contends that this subsection must be read to apply only to personal items as illustrated in the regulation and not to cargo or commercial property. The Court disagrees with Petitioner's classification.

Personal property is "all property that is not real property." *Colonial Life and Acc. Ins. Co. v. South Carolina Tax Comm'n*, 233 S.C. 129, 250, 103 S.E.2d 908, 918 (1958). Therefore, Petitioner's attempt to carve out a separate category for cargo as distinct from real or personal property fails. On the other hand, the statutory requirement that personal property must be released to its owner does not eliminate Petitioner's problem. Who owns the in-transit dog food: the supplier who has sold the product, but not delivered it; the buyer who has not taken possession; the company who insures Premier's truck; the company who insures the cargo itself?

Given this complexity, Petitioner is justified in holding the cargo until its owner, the owner's designee, or the owner's insurer is prepared to take possession. In this case, Premier, as the transporter, furnished a trailer, paid its bill, and arranged to complete delivery of the cargo. Although the process took longer than it should have, Respondent's directive to release the cargo without resolving the ownership issue left Petitioner in a legal limbo. The closing sentence of S.C. Code Ann. Regs. 38-600(C)(6) refers to alternatives if the owner is not available to sign a release. By paying the tow and recovery invoice, Premier stepped back into its status prior to the accident. It recovered the cargo and reassumed its obligation to deliver it.

While several of the issues are resolved in Petitioner's favor, there remain regulatory violations that are common to the invoice Respondent investigated and the final invoice for which Petitioner is held responsible.

Although Petitioner addressed some of the labor cost issues, the final bill retains "double billing" for individuals whose labor should have been included in the hourly rate for the heavy-duty wreckers (the Rotator and the Class C Heavy Duty Truck). In addition, Petitioner admitted "marking up" rental/subcontracted equipment and labor. A wrecker service may recover only the actual cost of such equipment or labor and must prove these actual costs by attaching an itemized invoice or receipt from the provider(s) to the invoice presented. Petitioner, by increasing these costs on its invoice and by failing to attach proof of the costs, violated the Wrecker Rotation Fee Schedule.

Other than these specific violations, the Court concludes that Petitioner's general rates conformed to the Schedule, that it performed Special Operations, including off-loading and reloading of a load, as defined in the Schedule and in S.C. Code Ann. Regs. 38-600(F)(2)(a)(2) for the time specified in its invoice, and that it secured the cargo until it could be picked up for delivery.

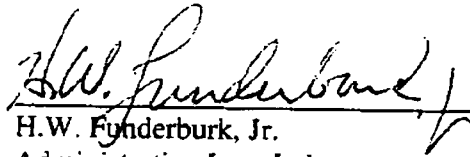
Petitioner violated its obligations under S.C. Code Ann. Regs. 38-600 and the Schedule by double billing for labor, overcharging for rented/subcontracted equipment and labor, and failing to prove the actual cost of rented/subcontracted equipment and labor by not attaching itemized invoices or receipts to its tow bill. These violations warrant a suspension and removal of Petitioner from the Wrecker Rotation list for a period of sixty (60) days. These days must be days during which Petitioner would be otherwise qualified for and approved to be on the Wrecker Rotation List.

Based upon the Findings of Fact and Conclusions of Law above, it is hereby

ORDERED that Petitioner is Suspended and Removed from the Wrecker Rotation List for a period of sixty (60) days and that these days must be days during which Petitioner would be otherwise qualified for and approved to be on the Wrecker Rotation List.

AND IT IS SO ORDERED.

September 19, 2017
Columbia, South Carolina


H.W. Fynderburk, Jr.
Administrative Law Judge

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CERTIFICATE OF SERVICE

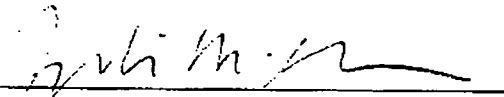
I, Julia M. Miller, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

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Columbia, S.C.



Julia M. Miller
Judicial Law Clerk

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