

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**AMERICA'S PRESTIGE
TRANSPORTATION, LLC, DBA APT,
(U.S. DOT No. 1674105)**

Respondent.

**Docket No. FMCSA-2008-0375¹
(Eastern Service Center)**

FINAL ORDER

1. *Background*

On August 29, 2008, the New Jersey Division Administrator, Federal Motor Carrier Safety Administration (FMCSA), issued a Notice of Claim (NOC) to America's Prestige Transportation, LLC, dba APT (Respondent), proposing a civil penalty of \$2,000. The NOC, which was based on a compliance review conducted on August 18, 2008, charged Respondent with: (1) one violation of 49 CFR 382.115(a), failing to implement an alcohol and/or controlled substances testing program, with a proposed civil penalty of \$1,360; and (2) one violation of 49 CFR 391.51(b)(7), failing to maintain a medical examiner's certificate in a driver's qualification file, with a proposed civil penalty of \$640.

Respondent served a timely reply to the NOC (Reply) in which it denied the alleged § 391.51(b)(7) violation and requested a formal hearing with respect to that violation. Respondent did not dispute the alleged § 382.115(a) violation, but presented evidence of corrective action after the compliance review in order to mitigate the penalty. Because he

¹ The prior case number was NJ-2008-0258-US1080.

believed the Reply was inadequate, the Field Administrator for FMCSA's Eastern Service Center (Claimant) filed a Motion to Enter a Default Final Order under 49 CFR 386.14.

On August 8, 2012, I entered an Order Denying Motion for Default, finding that Respondent's Reply indicated that Respondent intended to participate in these proceedings and, consequently, did not warrant a finding of default. The Order directed Claimant to serve his objection or consent to Respondent's request for hearing within 60 days of the service date of the August 8, 2012 Order.

In response to the Order, Claimant served his Objection to Request for Hearing and Motion for Final Order (Motion for Final Order) on October 11, 2012. In his motion, Claimant argued that: (1) there were no material facts in dispute; (2) the evidence submitted in support of the motion established a *prima facie* case for each of the violations charged; and (3) the proposed civil penalty was calculated in accordance with applicable statutory requirements. Respondent did not reply to the Motion for Final Order.

2. Decision

A. Request for Hearing

Although Respondent alleged in its Reply that there were material facts in dispute, it failed to meet its burden of establishing a material factual dispute by submitting probative evidence supporting this allegation.² Once Claimant opposed its hearing request, Respondent was obligated to provide evidence to support its allegations that it complied with the regulations by submitting an affidavit or other appropriate evidence.³ Because it failed to do so, its Reply

² See *In the Matter of American Diversified Construction, Inc.*, Docket No. 90-TN-043-SA, 58 Fed. Reg. 16951, at 16952, Mar. 31, 1993 (Final Order, May 12, 1992).

³ *Id.*

must be treated as an unsubstantiated allegation insufficient to establish a material fact in dispute warranting an oral hearing. Therefore, Respondent's request for oral hearing is denied.

B. Motion for Final Order

A motion for final order is analogous to a motion for summary judgment. The moving party, therefore, bears the burden of clearly establishing that there is no genuine issue of material fact, and it is entitled to a judgment as a matter of law.⁴ All inferences must be drawn in favor of the non-moving party, Respondent in this case. Notwithstanding Respondent's failure to show any material facts in dispute, Claimant must establish a *prima facie* case; in other words, he must present evidence clearly establishing all essential elements of his claim.⁵ If Claimant makes a *prima facie* case and Respondent fails to produce evidence rebutting the *prima facie* case, the motion for final order will be granted.⁶

C. The Violations

1. Section 382.115(a)

Section 382.115(a) requires domestic-domiciled employers to implement the requirements of Part 382 on the date the employer begins commercial motor vehicle operations. Claimant did not present any evidence regarding this alleged violation because Respondent did not dispute the violation in its Reply.⁷ Because Respondent's Reply admitted the facts alleged in

⁴ See *In re Forsyth Milk Hauling Co., Inc.*, Docket No. R3-90-037, 58 Fed. Reg. 16916, at 16983, Mar. 31, 1993 (Order, Dec. 5, 1991).

⁵ *Id.*

⁶ *Id.*

⁷ The Reply, however, attached a copy of a certificate of participation in a controlled substances program administered by Nationwide Testing Association, Inc., starting August 18, 2008.

the NOC regarding this alleged violation by not denying them,⁸ it was unnecessary for Claimant to provide any evidence to establish a *prima facie* case that the violation occurred.⁹

2. Section 391.51(b)(7)

Section 391.51(b)(7) requires that each driver qualification file include a medical examiner's certificate, as required by 49 CFR 391.43(g), or a legible copy of the certificate. In support of this alleged violation, Claimant submitted the Affidavit of FMCSA Safety Investigator (SI) Gordon McCutcheon, who conducted the August 18, 2008 compliance review of Respondent.¹⁰ During this compliance review, SI McCutcheon requested a copy of the medical examiner's certificate for Carlos Nunez, who drove a commercial motor vehicle for Respondent from Wilmington, Delaware to New London, Connecticut on or about May 5, 2008.¹¹ According to SI McCutcheon, Respondent could not produce a copy of a current medical examiner's certificate for Mr. Nunez. Jessica Chau, Respondent's President, admitted the violation in a signed statement dated August 18, 2008.¹²

In its Reply, Respondent stated that it was erroneously cited for this violation and attached a copy of what purports to be Mr. Nunez's Medical Examiner's Certificate, which it claimed was given to SI McCutcheon during the compliance review. This Certificate contains only three pieces of information: (1) Mr. Nunez's name; (2) a telephone number; and (3) an

⁸ See 49 CFR 386.14(d)(1) ("Any allegation in the claim not specifically denied in the reply is deemed admitted.")

⁹ See *In re Executive Express Trucking, Inc.*, Docket No. FHWA-1997-2499, Final Order (Sept. 14, 1999), citing *In re Lakeview Farms, Inc.*, Docket No. R3-91-157, 58 Fed. Reg. 62481, 63482, Final Order (Feb. 3, 1993).

¹⁰ See Attachment 1 to the Motion for Final Order.

¹¹ See Attachment 1 to the Motion for Final Order, Exhibit D.

¹² See Attachment 1 to the Motion for Final Order, Exhibit E.

expiration date of April 30, 2009. The back of the certificate is stamped with the name U.S. Healthworks, 606 Dowd Ave., Elizabeth, NJ 07201. The spaces for the driver's name and expiration date are blank.

Claimant did not address Respondent's claim that this card was given to SI McCutcheon during the compliance review. This certificate, however, does not comply with 49 CFR 391.43(g) because it is not signed and dated by a medical examiner and does not contain the necessary certification that the driver is physically qualified. It is doubtful that a medical examiner would issue such a certificate and, given Ms. Chau's signed statement that Respondent did not have a medical examiner's certificate for Mr. Nunez, it is more likely that Respondent entered his name and an expiration date on a blank form after the compliance review. I conclude, therefore, that Claimant established a *prima facie* case that Respondent violated 49 CFR 391.51(b)(7).

D. The Civil Penalty

Claimant contended that the proposed penalty was calculated to induce further compliance while taking into account the factors required by 49 U.S.C. § 521(b)(2)(D)¹³ and attached a copy of the Uniform Fine Assessment (UFA) worksheet that was used to calculate the penalty.¹⁴ The UFA is software designed to implement a uniform and fair application of penalties by devising a formula for determining the penalty based on consideration of the

¹³ These factors include the nature, circumstances, extent and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require.

¹⁴ See Attachment 1 to the Motion for Final Order, Exhibit F.

specific statutory factors referenced in 49 U.S.C. § 521(b)(2)(D). The correct use of UFA algorithms is presumed to meet statutory requirements.¹⁵

The UFA worksheet contains a gross revenue cap of \$80. In *Pioneer Drum & Bugle Corps & Color Guard, Inc.*, I noted that the gross revenue cap in the UFA calculation is intended to take into account the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), and that this cap moderates fines for small carriers through the first and second civil penalties.¹⁶ In essence, the gross revenue cap directly relates to the Agency's obligation to consider the effect of a civil penalty on the ability of a carrier to remain in business in accordance with § 521(b)(2)(D). I recently stated that although the Agency's current policy is to propose a penalty that is equal to the UFA-calculated penalty in cases where the gross revenue cap is \$2,000 or less,¹⁷ the policy is effective only for Notices of Claim issued on or after November 17, 2011.¹⁸ The Notice of Claim in the instant matter was issued on August 29, 2008; thus the new policy does not apply. Consequently, I am reducing the civil penalty to \$80, consistent with the gross revenue cap.

THEREFORE, *It is Hereby Ordered That* Respondent pay to the Field Administrator for the Eastern Service Center, within 30 days of the service date of this Final Order, a total civil

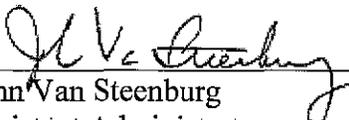
¹⁵ See *In the Matter of Alfred Chew & Martha Chew, and Alfred & Martha Chew d/b/a Alfred & Martha Chew Trucking*, Docket No. FHWA-1996-5323, Final Order, Feb. 7, 1996.

¹⁶ See *Pioneer Drum & Bugle Corps & Color Guard, Inc.*, Docket No. FMCSA-2008-0012, Final Order, Oct. 3, 2011, citing *In the Matter of Paul Michels*, Docket No. FMCSA-2000-7960, Final Order on Reconsideration, Jan. 10, 2002, at 2. The UFA worksheet states that Respondent employs one driver, operates one power unit, and had gross revenues of \$29,748, which clearly indicates that it is a small carrier.

¹⁷ See *Civil Penalty Calculation Methodology*, 76 Fed. Reg. 71431 (Nov. 17, 2011).

¹⁸ See *In the Matter of Tacede Express*, Docket No. FMCSA-2008-0365, Final Order as to Civil Penalty, June 5, 2013.

penalty of \$80 for two violations of the Federal Motor Carrier Safety Regulations. Payment may be made electronically through the Federal Motor Carrier Safety Administration's registration site at <http://safersys.org/> by selecting "Online Fine Payment" under the "FMCSA Services" category. In the alternative, payment by cashier's check, certified check, or money order should be remitted to the Eastern Regional Field Administrator at the address shown in the Certificate of Service.¹⁹



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14
Date

¹⁹ Pursuant to 49 CFR 386.64, a petition for reconsideration may be submitted within 20 days of the issuance of this Final Order.

CERTIFICATE OF SERVICE

This is to certify that on this 24 day of January, 2014, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

Jessica Chau, President
America's Prestige Transportation, LLC
1 Eldridge Drive
Robbinsville, NJ 08691

One Copy
U.S. Mail

Anthony G. Lardieri, Esq.
Trial Attorney
Office of Chief Counsel (MC-CCE)
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
Electronic Mail/U.S. Mail

Curtis I. Thomas, Regional Field Administrator
Eastern Service Center
Federal Motor Carrier Safety Administration
802 Cromwell Park Drive, Suite N
Glen Burnie, MD 21061

One Copy
U.S. Mail

Docket Operations
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Room W12-140
Washington, DC 20590

Original
Personal Delivery

Jannie Miller