

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In the Matter of:

**DANIEL COBB DBA COBB'S
COACHES,
(U.S. DOT No. 1820707)**

Respondent.

**Docket No. FMCSA-2009-0037¹
(Western Service Center)**

FINAL ORDER

1. *Background*

On November 19, 2008, the Field Administrator for the Western Service Center of the Federal Motor Carrier Safety Administration (FMCSA) (Claimant) issued a Notice of Claim (NOC) to Daniel Cobb dba Cobb's Coaches (Respondent), proposing a civil penalty of \$5,850. The NOC, which was based on an October 14, 2008 compliance review, charged Respondent with: (1) two violations of 49 CFR 382.301(a), using a driver before the motor carrier has received a negative pre-employment controlled substances test result, with a proposed civil penalty of \$400 per count; (2) one violation of 49 CFR 382.305(i)(2), failing to ensure that each driver selected for random alcohol and controlled substances testing has an equal chance of being selected each time selections are made, with a proposed civil penalty of \$400; (3) two violations of 49 CFR 383.23(a), operating a commercial motor vehicle without a valid commercial driver's license, with a proposed civil penalty of \$900 per count; and (4) one violation of 49 CFR

¹ The prior case number was CA-2009-0040-US0848.

383.23(a), operating a commercial motor vehicle without a valid commercial driver's license, with a proposed civil penalty of \$3,750.²

In a reply served December 16, 2008, Respondent contested the violations, but did not request a particular form of administrative adjudication, as required by 49 CFR 386.14(b).³ Respondent claimed that the drivers involved in the violations were independent drivers and not employees of Cobb's Coaches. Charlena Cobb, who submitted the reply on behalf of Respondent, stated that: "It is my understanding that Daniel E. Cobb, Sr., was in semi-retirement and maintained one bus of his personal use and piece milled (sic) out the remainder of his business to independent drivers." Ms. Cobb further stated that "Cobb (sic) Coaches did provide access to bus rentals, with established routes for a weekly or monthly fee." She attached a copy of a blank contract between Cobb's Coaches and the drivers, which she created in January 2008. The contract identifies the drivers as independent contractors who are not entitled to any benefits generally available to employees.

Claimant, contending that Respondent waived his right to a formal hearing, served his Submission of Evidence on February 10, 2009. Because Respondent enclosed written evidence with his reply and did not request a formal or informal hearing, his reply to the NOC will be treated as a *de facto* election of administrative adjudication by submission of written evidence

² See Attachment A to Field Administrator's Submission of Evidence Pursuant to 49 CFR 386.16(a) (Claimant's Submission of Evidence). Although violations (3) and (4) both involve 49 CFR 383.23(a), they are listed separately in the NOC because the transportation involved in violation (4) resulted in a multiple fatality crash, thus increasing the amount of the penalty proposed for that violation.

³ See Attachment C to Claimant's Submission of Evidence.

without hearing under § 386.14(d)(1)(iii)(A).⁴ Claimant's Submission of Evidence was timely filed under 49 CFR 386.16(a)(1).

Claimant argued that Respondent was responsible for regulatory compliance by his contracted drivers, that Claimant established the violations by a preponderance of the evidence, and that the civil penalty was correctly calculated in accordance with the applicable statutory requirements. Respondent did not respond to Claimant's Submission of Evidence.

2. Decision

When a respondent contests alleged violations through submission of evidence and argument without a hearing, the claimant has the burden to demonstrate by a preponderance of the evidence that the respondent violated the regulations as charged.⁵ To establish by a preponderance of the evidence means that something is more likely so than not.⁶

A. The Violations

1. 49 CFR 382.301(a)

Section 382.301(a) states:

“Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for controlled substances as a condition prior to being used, unless the employer uses the exception in paragraph (b) of this section. No employer shall allow a driver, who the employer intends to hire or

⁴ See *In the Matter of All Star Trucking & Hauling, LLC*, Docket No. FMCSA-2006-24089, Order on Request for Extension of Time and Motion for More Definite Statement, Mar. 17, 2006; and *In the Matter of Bybee Transport, Inc.*, Docket No. FMCSA-2006-24810, Final Order, Mar. 24, 2009, at 2.

⁵ See *In the Matter of R & R Express, Inc. dba KDK Transport, Inc.*, Docket No. FHWA-97-2425, Final Order: Decision on Review, Sept, 23, 1997, note 5, at 9, citing *United States v. Steadman*, 450 U.S. 91, at 95-104 (1981), *reh. denied*, 451 U.S. 933 (1981).

⁶ See *In the Matter of Commodity Carriers, Inc.*, Docket No. FMCSA-2001-8676, Final Order: Decision on Petition for Safety Rating Review, June 30, 2004, note 23, at 11, citing *Blossom v. CSX Transp. Inc.*, 13 F.3d 1477, 1482 (11th Cir. 1994).

use, to perform safety-sensitive functions unless the employer has received a controlled substances test result from the MRO or C/TPA indicating a verified negative test result for that driver.”

The NOC alleged that on or about September 11, 2008 and October 5, 2008, respectively, Respondent’s drivers Ronnie Wilson and Quintin Joey Watts drove commercial motor vehicles (CMVs) in commerce before Respondent received negative pre-employment controlled substances test results for these drivers. In support of these allegations, Claimant submitted the Declaration of Safety Investigator (SI) Afshin Coleman, who conducted the October 14, 2008 compliance review of Respondent.⁷ SI Coleman asserted that the compliance review was initiated due to a crash involving Respondent that resulted in nine fatalities and 30 injuries.⁸ Media reports concerning the crash identified, Mr. Watts, who was driving the bus, as Daniel Cobb’s stepson.⁹

SI Coleman determined that Respondent is an intrastate carrier transporting passengers to casinos within California. Daniel R. Cobb operates the business out of his residence and parks his buses at a rental facility in Sacramento, California. He provides transportation in vehicles designed to transport 16 or more passengers, and is thus subject to the alcohol and controlled substance testing requirements of 49 CFR Part 382.¹⁰ SI Coleman established the September 11, 2008 trip by reviewing a trip envelope in Respondent’s files that showed Ronnie Wilson

⁷ See Attachment D to Claimant’s Submission of Evidence.

⁸ A Cobb’s Coach bus carrying 43 passengers en route to a casino drove into a ditch on a rural road south of the casino. See Attachment D to Claimant’s Submission of Evidence, Exhibit 1.

⁹ *Id.*

¹⁰ See 49 CFR 382.103(a)(1) and 49 CFR §§ 383.3(a) and 383.5.

transported 26 passengers in Bus 2048 on that date.¹¹ He established the October 5, 2008 trip by reviewing media reports of the fatal crash occurring on that date.

SI Coleman obtained pre-employment drug testing documents from Respondent's files that indicated Ronnie Wilson was not pre-employment tested until September 16, 2008, five days after the September 11, 2008 trip.¹² SI Coleman also interviewed Martha Tapia of Saint Joseph's Medical Center (Occupational Health Center) on October 13 and 14, 2008. Ms. Tapia stated that Respondent had been enrolled with Saint Joseph's for random and pre-employment drug testing since November 2003, and that Daniel Cobb was the only driver in the random testing pool for Cobb's Coaches. However, three other drivers were pre-employment tested in 2007 and 2008, including Ronnie Wilson on September 16, 2008. Quinton Joey Watts was not among these drivers.¹³ Respondent was unable to provide any evidence of pre-employment drug testing for Mr. Watts.

In his Reply to the NOC, Respondent did not deny that Mr. Watts and Mr. Wilson were driving a Cobb's Coach bus on the dates alleged in the NOC, nor did he deny that both drivers did not undergo pre-employment drug testing before operating a CMV on those dates. He claimed, however, that he was not responsible for drug testing these drivers because the drivers were independent contractors and not Respondent's employees. Respondent is wrong.

Part 382 applies to every person and to all employers of such persons who operate a

¹¹ See Attachment D to Claimant's Submission of Evidence, Exhibit 3.

¹² See Attachment D to Claimant's Submission of Evidence, Exhibit 4. A negative test result was verified by the Medical Review Officer on September 18, 2008. The Drug Testing Result Report was sent to "Cobb Bus Service."

¹³ See Attachment D to Claimant's Submission of Evidence, Exhibit 5. The other two drivers were identified as Glen Hanible and Bernice Quinones.

commercial motor vehicle (CMV) in commerce in any State, and is subject to the commercial driver's license requirements of 49 CFR Part 383.¹⁴ Section 382.107 defines "Employer" as a person or entity employing one or more employees that is subject to DOT agency regulations requiring compliance with Part 382. While this definition does not shed light on whether a driver who leases vehicles is considered an employee, the definitions in Part 383 are more illuminating. Section 383.5 defines "Employee" as "any operator of a commercial vehicle, including...leased drivers and independent owner-operator contractors (while in the course of operating a commercial motor vehicle) who are either directly employed by or under lease to an employer." Section 383.5 defines "Employer" as "any person...who owns or leases a commercial motor vehicle or assigns employees to operate such a vehicle."

Accordingly, drivers Wilson and Watt are considered employees under the definitions in Parts 382 and 383 because they operated CMVs in commerce and were under lease to Respondent.¹⁵ Respondent is considered an employer under the definition in Part 383 because he owned or leased CMVs. It also appears that he assigned drivers to operate these vehicles, based on the statement in his reply to the NOC that he operated along established routes. Finally, the fact that Respondent received Ronnie Wilson's September 16, 2008 pre-employment test results from the Saint Joseph's Medical Center (Occupational Health Center) indicates that Respondent considered himself Mr. Wilson's employer and responsible for pre-employment drug testing (albeit after Mr. Wilson had already driven a CMV for Cobb's Coaches). Inasmuch as Respondent asserted that all its drivers operated under the same independent contractor leasing agreement, Mr. Watts, who was not pre-employment tested for controlled substances, was also

¹⁴ See 49 CFR 382.103(a)(1).

¹⁵ See *In the Matter of Class A Leasing, Inc.*, Docket No. FMCSA-2005-22868, Final Order, Feb 8, 2006; and *In the Matter of R.W. Bozel Transfer, Inc.*, 58 Fed. Reg. 16916 (March 1, 1993).

Respondent's employee. I conclude, therefore, that Claimant established two violations of 49 CFR 382.301(a) by a preponderance of the evidence.

2. 49 CFR 382.305(i)(2)

Section 382.305(i)(2) states that "each driver selected for random alcohol and controlled substances testing under the selection process used, shall have an equal chance of being tested each time selections are made." SI Coleman determined that Daniel Cobb was the only driver included in Respondent's random testing pool.¹⁶ SI Coleman documented that Bernice Quinones transported 55 passengers for Respondent on July 29, 2008.¹⁷ Because Ms. Quinones was not in the random testing pool, she had no chance of being selected for random drug testing. I conclude, therefore, that Claimant established one violation of 49 CFR 382.305(i)(2) by a preponderance of the evidence.

3. 49 CFR 383.23(a)

Section 383.23(a) prohibits operation of a CMV in commerce unless the driver possesses a valid commercial driver's license (CDL). Under 49 CFR 383.3(a), the rules in Part 383 apply to every person who operates a CMV in interstate, intrastate, and foreign commerce and to all employers of such persons. SI Coleman determined that Bernice Quinones did not have a valid CDL when she operated a CMV for Respondent on July 29, 2008, because her medical certificate had expired on June 19, 2008. Her State of California Department of Motor Vehicles (DMV) driving record stated: "Not valid for commercial operation/current medical exam required."¹⁸

¹⁶ See Attachment D to Claimant's Submission of Evidence, Exhibit 5.

¹⁷ See Attachment D to Claimant's Submission of Evidence, Exhibit 6.

¹⁸ See Attachment D to Claimant's Submission of Evidence, Exhibit 10.

SI Coleman also determined that Ronnie Wilson was also driving with an invalid CDL when he transported passengers for Respondent in a CMV on September 11, 2008. A copy of the California DMV report for Mr. Wilson stated that his medical certificate expired on September 18, 1993, and that his license was not valid for commercial operation because a current medical report was required.¹⁹

The evidence shows that Quinton Joey Watts, the driver involved in the October 5, 2008 crash, was also driving with an invalid CDL at that time. The California DMV driving report for Mr. Watts indicates that his license did not have a passenger endorsement.²⁰ I conclude, therefore, that Claimant established three violations of 49 CFR 383.23(a) by a preponderance of the evidence.

B. 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)²¹ and attached a copy of the Uniform Fine Assessment (UFA) worksheet that was used to calculate the penalty.²² 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

¹⁹ See Attachment D to Claimant's Submission of Evidence, Exhibit 11.

²⁰ See Attachment D to Claimant's Submission of Evidence, Exhibit 12.

²¹ 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.

²² See Attachment B to Claimant's Submission of Evidence.

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.²³

The UFA worksheet contains a gross revenue cap of \$160. 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),²⁴ and that this cap moderates fines for small carriers through the first and second civil penalties.²⁵ 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). However, SBREFA does not require a reduction in the penalty if the violations pose serious health, safety, or environmental threats or the motor carrier is not making a good faith effort to comply.²⁶ Moreover, § 521(b)(2)(D) also requires consideration of such other matters as justice and public safety may require in determining the penalty and provides that in each case the assessment shall be calculated to induce further compliance.

On October 5, 2008, Quinton Joey Watts, who had not undergone pre-employment drug testing and was not licensed to drive a passenger-carrying CMV, drove off the road into a ditch, resulting in nine fatalities and multiple injuries. Justice and public safety require assessment of a

²³ 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.

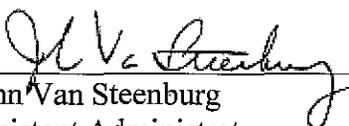
²⁴ P.L. 104-121 (Mar. 29, 1996), codified at 5 U.S.C. § 601, note.

²⁵ 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 nine drivers, operates four power units, and had gross revenues of \$75,000, which clearly indicates that he is a small carrier.

²⁶ See *In the Matter of R & M Transportation, LLC*, Docket No. FMCSA-2007-27886, Final Agency Order on Submission of Evidence, Nov. 29, 2011.

civil penalty substantially greater than the gross revenue cap of \$160 under these circumstances; such a small amount would be insufficient to induce further compliance. The UFA worksheet recommended the maximum penalty of \$3,750²⁷ for the violation of § 383.23(a) involving Mr. Watts because of the severe impact on public safety caused by this violation. I agree that the circumstances in this case warrant imposition of a civil penalty that exceeds the gross penalty cap.

THEREFORE, *It is Hereby Ordered That* Respondent pay to the Field Administrator for the Western Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$5,850 for six 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 Western Field Administrator at the address shown in the Certificate of Service.²⁸



John Van Steenburg
Assistant Administrator
Federal Motor Carrier Safety Administration

1/23/14

Date

²⁷ See Appendix B to 49 CFR Part 386, paragraph (b).

²⁸ 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.

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