

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**DKRR, INC., DBA FIVE STAR  
LIMOUSINE SERVICES,  
(U.S. DOT No. 1786338)**

**Respondent.**

**Docket No. FMCSA-2013-0003<sup>1</sup>  
(Western Service Center)**

**FINAL ORDER**

**1. *Background***

On November 19, 2012, the Washington Division Administrator of the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Claim (NOC) to DKRR, Inc., dba Five Star Limousine Services (Respondent), proposing a civil penalty of \$59,030. The NOC, which was based on an October 17, 2012 compliance review, 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 \$910; (2) one violation of 49 CFR 387.37(a), knowingly allowing, permitting, or authorizing an employee to operate a commercial motor vehicle during a period in which the driver did not have a valid Commercial Driver's License with the proper class or endorsements, with a proposed penalty of \$400; (3) one violation of 49 CFR 387.31(a), operating a passenger-carrying vehicle without having in effect the required minimum levels of financial responsibility, with a proposed civil penalty of \$16,000; (4) one violation of 49 CFR 387.31(d), failing to maintain at principal place of business required proof

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<sup>1</sup> The prior case number was WA-2013-0006-US1438.

of financial responsibility, with a proposed civil penalty of \$16,000; (5) one violation of 49 CFR 391.45(a)/391.11(a), using a driver not medically examined and certified, with a proposed civil penalty of \$11,000; (6) one violation of 49 CFR 391.51(a), failing to maintain a driver qualification file on each driver employed, with a proposed civil penalty of \$1,000; (7) one violation of 49 CFR 395.8(a), failing to require a driver to make a record of duty status, with a proposed civil penalty of \$720; (8) one violation of 49 CFR 396.3(b), failing to keep minimum records of inspection and vehicle maintenance, with a proposed civil penalty of \$1,000; (9) one violation of 49 CFR 396.11(a), failing to require a driver to prepare a driver vehicle inspection report, with a proposed civil penalty of \$1,000; and (10) one violation of 49 CFR 396.17(a), using a commercial motor vehicle not periodically inspected, with a proposed civil penalty of \$11,000.<sup>2</sup> The maximum available penalty was proposed for violations (3), (4), (5), (6), (8), (9), and (10) in accordance with § 222 of the Motor Carrier Safety Improvement Act of 1999 (MCSIA).<sup>3</sup>

On December 21, 2012, Respondent submitted a motion to dismiss the case for failure to properly serve the NOC on Respondent in accordance with 49 CFR 386.6. Respondent argued that the NOC was not served on its correct business address, causing prejudicial delay. Respondent submitted a printout showing that its business address, as registered with the Oregon Secretary of State, is 1521 N. Jantzen, #154, Portland, Oregon 97213. The NOC was mailed to 6919 NE Hwy 99, Vancouver, Washington 98655.

On December 22, 2012, Respondent served a Reply to the NOC (Reply). Respondent denied nine of the alleged violations and stated that it lacked sufficient

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<sup>2</sup> See Attachment A to Regional Field Administrator's Response to Motion to Dismiss (Claimant's Response to Motion to Dismiss).

<sup>3</sup> See Pub. L. 106-159, 113 Stat. 1769 (Dec. 9, 1999), codified at 49 U.S.C. § 521, note.

knowledge to admit or deny violation (5). Respondent requested a formal hearing.

On February 20, 2013, the Regional Field Administrator for FMCSA's Western Service Center (Claimant) served two documents: (1) a Response to the Motion to Dismiss; and (2) a Notice of Objection to Respondent's Request for Formal Hearing. In his Response to the Motion to Dismiss, Claimant contended that the NOC was properly served on Respondent's principal business address, as reported to FMCSA on Respondent's most recent Form MCS-150, Motor Carrier Identification Report, dated October 22, 2012.<sup>4</sup> Claimant argued that Respondent did not specify how it was prejudiced by any delay or request an extension of the time to reply. In his Objection to Respondent's Request for Formal Hearing, Claimant asserted that Respondent failed to allege any material issues of fact that would warrant a formal hearing.

On April 17, 2013, Claimant served a Motion for Final Agency Order and Memorandum of Law (Motion for Final Order). In the Motion for Final Order, Claimant stated that he no longer wished to pursue alleged violation (2) of the NOC, thus reducing the proposed civil penalty from \$59,030 to \$58,630. Claimant further stated that the October 17, 2012 compliance review of Respondent was conducted following a fatal crash in which an 11-year old child was killed after falling out of an emergency window of a party bus operated by Respondent, which rolled over the child.<sup>5</sup> Claimant submitted evidence regarding the nine remaining violations alleged in the NOC and 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

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<sup>4</sup> See Attachment C to Claimant's Response to Motion to Dismiss.

<sup>5</sup> See Attachment D to Motion for Final Order, Declaration of FMCSA Safety Investigator Donald Ross, ¶ 2.

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. Motion to Dismiss*

Respondent's Motion to Dismiss is denied. Although Respondent relied on 49 CFR 386.6 as the basis for its motion, it did not cite any provision of that section indicating that service of an NOC on a carrier's principal place of business is improper. Although 49 CFR 386.6(f) establishes a presumption of valid service if a document is served where a party customarily receives mail—which would be the Portland, Oregon address in this case—there is nothing in this paragraph stating that service is deficient if the document is mailed to the carrier's principal business address instead. In fact, service of Agency documents at a carrier's principal place of business, where the compliance review was conducted, is also presumed to be valid.<sup>6</sup> Respondent did not indicate how long receipt of the NOC was delayed by service of the NOC on its principal business address and did not demonstrate how it was prejudiced by this alleged delay. Moreover, as Claimant points out, Respondent could have requested an extension of time to file its Reply.<sup>7</sup>

### *B. Request for Hearing*

Respondent, in its Reply, failed to allege that there were material facts in dispute and

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<sup>6</sup> See *In the Matter of Randolph Jones dba Jones Trucking Co.*, Docket No. FMCSA-2008-0157, Final Order, Nov. 15, 2012, at 5.

<sup>7</sup> It should be noted that Respondent did, in fact, timely reply to the NOC, although that Reply was fairly brief and was essentially a general denial of the allegations in the NOC. Respondent also had the opportunity to more fully present its case by responding to the Motion for Final Order, but failed to do so.

failed to subsequently submit evidence demonstrating material facts in dispute.<sup>8</sup> Once Claimant opposed its hearing request, Respondent was obligated to provide evidence to support its denials of the allegations by submitting an affidavit or other appropriate evidence.<sup>9</sup> Because it failed to do so, its Reply must be treated as an unsubstantiated allegation insufficient to establish a material fact in dispute warranting an oral hearing.

### C. *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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

### D. *The Violations*

Of the nine remaining violations alleged in the NOC, the Reply denied eight of them and stated that it lacked sufficient information to admit or deny the ninth. Under 49 CFR

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<sup>8</sup> 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).

<sup>9</sup> *Id.*

<sup>10</sup> 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).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

386.14(d)(1)(i), any allegation in the claim not specifically denied in the reply is deemed admitted, and a mere general denial allegation is insufficient. This subparagraph further provides that a statement that the party is without sufficient knowledge or information to admit or deny will have the effect of a denial.

Although Respondent denied each violation separately, it provided no basis for these denials. To conclude that Respondent's Reply was anything other than a general denial would exalt form over substance. Where a Respondent admits, or fails to deny, the violations, the Claimant is not required to submit evidence establishing the violations.<sup>13</sup> I find that Respondent's Reply was a general denial and that the allegations in the NOC, therefore, were admitted. Claimant has made a *prima facie* case establishing the nine remaining violations charged in the NOC.

#### E. *The Civil Penalty*

Section 222 of MCSIA directs the Secretary of Transportation to "assess the maximum civil penalty for each violation by any person who is found to have committed a pattern of violations of critical or acute regulations, or to have previously committed the same or a related violation of critical or acute regulations." Claimant asserted that seven of the nine alleged violations were subject to the maximum penalty provisions of § 222 of MCSIA.

Under the Agency's policy for implementing § 222 of MCSIA, the Agency will impose the maximum penalty for a violation when the Agency discovers two or more acute and/or critical violations in each of three or more different regulatory parts, *i.e.*, a minimum of six acute

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<sup>13</sup> See *Executive Express Trucking Inc.*, Docket No. FHWA-1997-2499, Final Order, Sept. 14, 1999, citing *In the Matter of Lakeview Farms, Inc.*, Docket No. R3-91-157, 58 Fed. Reg. 62481, 63482, Final Order, Feb. 8, 1993.

and/or critical violations.<sup>14</sup> The policy also requires previous contact with FMCSA or a State motor carrier enforcement agency before assessing the maximum penalty following a subsequent compliance review.<sup>15</sup> In this case, Respondent was charged, and admitted to, an acute and critical violation of part 387, two critical violations of part 391, and three critical violations of part 396. Claimant provided evidence of a previous contact with a State motor carrier enforcement agency by submitting a copy of a New Entrant Safety Audit of Respondent conducted by the Washington State Patrol on April 8, 2009.<sup>16</sup> I conclude, therefore, that Claimant established that the conditions for assessing the maximum penalties for seven of the nine violations under § 222 of MCSIA were satisfied.

With respect to the violations of §§ 382.115(a) and 395.8(a), which are not subject to § 222 of MCSIA, Claimant contended that the proposed penalty for these violations was calculated to induce further compliance while taking into account the factors required by 49 U.S.C. § 521(b)(2)(D)<sup>17</sup> and attached a copy of the Uniform Fine Assessment (UFA) worksheet that was used to calculate the penalties.<sup>18</sup> The UFA is software designed to implement a uniform and fair application of penalties by devising a formula for determining the penalty based on

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<sup>14</sup> See *Supplemental Policy on Assessing Maximum Fines under the Motor Carrier Safety Improvement Act of 1999 (MCSIA) Section 222*, 74 Fed. Reg. 14184 (Mar.30, 2009). The list of critical and acute violations is set forth in Appendix B to 49 CFR Part 385, section VII.

<sup>15</sup> Previous contact includes a new Entrant Safety Audit. See 74 Fed. Reg. 14184, 14185 (Mar. 30, 2009).

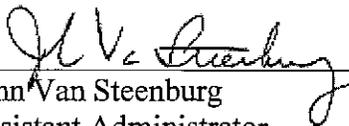
<sup>16</sup> See Attachment F to Motion for Final Order.

<sup>17</sup> 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, effect on ability to continue to do business, and such other factors as justice and public safety may require.

<sup>18</sup> See Attachment E to Motion for Final Order.

consideration of the 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.<sup>19</sup> Respondent did not take issue with the penalty calculation. In the absence of any evidence the penalty calculation was either improper or inappropriate, the penalty assessment will be upheld.<sup>20</sup>

THEREFORE, *It is Hereby Ordered That* Respondent pay to the Regional Field Administrator for the Western Service Center, within 30 days of the service date of this Final Order, a total civil penalty of \$58,630 for nine 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 Regional Field Administrator at the address shown in the Certificate of Service.<sup>21</sup>

  
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John Van Steenburg  
Assistant Administrator  
Federal Motor Carrier Safety Administration

2/3/14

Date

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<sup>19</sup> 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.

<sup>20</sup> See *In the Matter of Baker-Lewis Trucking, Inc.*, Docket No. FMCSA-2002-13749, Final Order, Nov. 15, 2004.

<sup>21</sup> 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 3<sup>rd</sup> day of February, 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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