[Service Date June 21, 2006]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Penalty Assessment Against	)	DOCKET TE-060395
	)	ORDER 01
KELLEY'S TRANSPORTATION, INC.,	)	
	)	INITIAL ORDER
In the Amount of $1,500.	)	DENYING MITIGATION
. . . . .	)	

1 ***Synopsis:*** *The Commission denies Kelley's request for mitigation of a $1,500 penalty assessment for failure to have a controlled substances and alcohol testing program in place.*

2 This matter involves a $1,500 penalty that the Commission assessed against Kelley's Transportation, Inc., (Kelley) on March 31, 2006 under RCW 81.04.530.[1] Kelley petitioned on May 2, 2006, for mitigation of the penalty, but did not request a hearing on its petition. We review the petition on the basis of the pleadings and parties' written statements.

I. BACKGROUND

3 Kelley operates in Washington as a charter passenger carrier under Permit No. CH-395. Kelley, and its predecessor company, Checker Transportation have had a WUTC license for approximately 10 years.[2] Kelley currently operates four 16-passenger vehicles, classified as commercial motor vehicles under federal rules.[3]

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[1] RCW 81.04.530 requires a "person or employer operating as a motor carrier" to comply with the regulations in 49 CFR Part 382 regarding controlled substances and alcohol use and testing and calls for a person or employer not in compliance with the testing requirements to be liable to a penalty of up to $1,500.

[2] Request for mitigation, April 29, 2006.

[3] CFR 49.383.5 defines a commercial motor vehicle as "a motor vehicle …used in commerce to transport passengers or property if the motor vehicle…(c) is designed to transport 16 or more passengers, including the driver."

Kelley uses three drivers with a Class B Commercial Driver's License and one driver with a Class A Commercial Driver's License to operate these 16-passenger vans.[4]

4 On March 7, 2006, Commission staff conducted a compliance review and safety inspection of Kelley and produced a compliance review report.[5] Staff's compliance review alleged that Kelley's drivers are operating without a controlled substances (drug) and alcohol testing program in violation of RCW 81.04.530.[6] Based on its review, Staff recommended imposition of a $1,500 penalty on Kelley.[7]

5 On May 2, 2006, Kelley filed a request for mitigation of the $1,500 penalty. Kelley claims that its predecessor company, Checker Transportation had a drug and alcohol testing procedure in place for its employees.[8] However, Kelley asserts that it does not now have any employees, only independent contractors. Kelley argues that it is not required to have a testing program, because 49 CFR 382.115 applies only to "all domestic-domiciled employers" and the term "employers" assumes that the testing requirement applies to employees of those employers. Kelley asserts that all the drivers of its vehicles are independent contractors, not Kelley employee, and that they all have their own full-time jobs outside of the company.[9] Nevertheless, Kelley states that it has re-established an account with a medical provider to perform random, pre-employment, post-accident and reasonable suspicion tests.[10]

6 On May 22, 2006, Staff responded to Kelley's request for mitigation, recommending that the Commission deny it. Staff states that the federal requirement for drug and alcohol testing[11] applies to every person and to all employers of such persons who operate a commercial vehicle in any state. Staff contends that since each of the Kelley's vehicles is a commercial motor vehicle, Kelley and its drivers are subject to the drug and alcohol testing regulations.

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[4] Staff response to request for mitigation, Declaration of Leon Macomber (Macomber Declaration), Attachment A.
[5] Macomber Declaration, ¶ 8.
[6] *Id*., RCW 81.04.530 adopts by reference Title 49, Code of Federal Regulations (CFR) 382.115(a), requiring transportation companies to implement a controlled substances and alcohol testing program.
[7] Staff response to request for mitigation, Declaration of Sheri Hoyt.
[8] Request for mitigation, p. 1 and Exhibit A to Request.
[9] *Id*.
[10] *Id*., p. 2, Exhibit C to Request.
[11] 49 CFR 382.103(a)

7 Staff further argues that definition of "employee" in the federal regulations includes independent contractors and that, alternatively, under the state of Washington regulations, Kelley's drivers do not qualify as independent contractors.

II. DISCUSSION AND DECISION

8 We conclude from our review of the applicable federal and state regulations that we must deny Kelley's request for mitigation. Subpart A of 49 CFR 390 provides rules and definitions of general applicability to commercial motor vehicle operations, including those in 49 CFR 382.[12] The definitions of employee and employer are stated as follows:

> *Employee* means any individual, other than an employer, who is employed by an employer and who in the course of his or her employment directly affects commercial motor vehicle safety. Such term includes a driver of a commercial motor vehicle (including an independent contractor while in the course of operating a commercial motor vehicle), a mechanic, and a freight handler. Such term does not include an employee of the United States, any State, any political subdivision of a State, or any agency established under a compact between States and approved by the Congress of the United States who is acting within the course of such employment.
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> *Employer* means any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such terms does not include the United States, any State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

The definition of employee explicitly includes "an independent contractor while in the course of operating a commercial motor vehicle." The definition of employer includes anyone "engaged in a business affecting interstate commerce *who owns or leases a commercial motor vehicle in connection with that business.*" (emphasis added).

[12] 49 CFR 390.3(a).

9 Under these definitions, Kelley cannot avoid its drug and alcohol testing obligation merely by claiming it has no employees. The independent contractors Kelley uses to conduct its business are operating Kelley's commercial motor vehicles and are subject to state and federal regulations regarding alcohol and drug testing.

10 In addition, under Washington motor vehicle regulation of vehicles and drivers, WAC 480-30-213 states:

> (1) The vehicles operated by a passenger transportation company must be owned by or leased to the certificate holder.
> *(2) The driver of a vehicle operated by a passenger transportation company must be the certificate holder or an employee of the certificate holder. (*emphasis added).

Under this rule, each of Kelley's drivers must individually possess a certificate of authority to operate or must be a Kelley employee, with Kelley as the certificate holder. Kelley fails to show that its drivers individually possess the required certificates of authority, and therefore we must regard those drivers as employees of Kelley for purposes of enforcing the drug and alcohol testing law.

11 Finally, the Commission is charged with regulating passenger charter transportation in the public interest.[13] The public interest dictates that where passenger safety and the safety of the driving public are at issue, the Commission act to ensure that the requirement for drug and alcohol testing be rigorously enforced. The fact that Kelley immediately re-instituted a drug and alcohol testing policy upon receipt of the penalty assessment, while heartening, does not negate the fact that the company allowed this crucial means of protecting the public to lapse. We deny the request for mitigation.

[13] RCW 81.70.010.

III. INITIAL ORDER

12 Kelley's application for mitigation is denied. The full $1,500 penalty for violation of the controlled substances and alcohol testing requirement in RCW 81.04.530 is due and payable.

DATED at Olympia, Washington, and effective June 21, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

THEODORA M. MACE
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a *Petition to Reopen* a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and sufficient cause. No Answer to a Petition to Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an initial order will become final without further Commission action if no party seeks

administrative review of the initial order and if the Commission fails to exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record, with proof of service as required by WAC 480-07-150(8) and (9). An Original and twelve copies of any Petition or Answer must be filed by mail delivery to:

Attn: Carole J. Washburn, Executive Secretary
Washington Utilities and Transportation Commission
P.O. Box 47250
Olympia Washington 98504-7250.