

[Service Date September 14, 2006]

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Penalty Assessment) DOCKET TE-061099
Against)
) ORDER 01
ALBERT G. FLOCK D/B/A CLASSIC)
LIMOUSINE)
) ORDER DENYING MITIGATION
in the Amount of \$1,000.00)
)
.....)

1 **Penalty:** On July 5, 2006, the Washington Utilities and Transportation Commission (Commission) assessed a penalty in the amount of \$1000 against Albert G. Flick d/b/a Classic Limousine (Classic Limousine) for alleged violations of Revised Code of Washington (RCW) 81.04.530 and 49 Code of Federal Regulations (CFR) § 382,301(A), which require that, prior to the first time a driver performs safety-sensitive functions for an employer, the driver undergo testing for controlled substances.

2 **Factual Basis:** On May 24, 2006, the Motor Carrier Safety Section Staff (Staff) conducted a carrier review of Classic Limousine’s terminal safety records and equipment and found that Classic Limousine had not received negative pre-employment controlled substance test results for two drivers who were operating company vehicles. One driver was hired on September 22, 2006. This driver made his first trip on October 1, 2005, but was not tested for controlled substances until April 21, 2006. The second driver was hired on May 24, 2005, and made his first trip on May 29, 2005. He was not tested for controlled substances until April 17, 2006.

3 **Petition for Mitigation:** On July 27, 2006, Classic Limousine filed a petition for mitigation and waived a hearing. Classic Limousine asserted that the two drivers identified in the penalty assessment are friends who serve as intermittent drivers to assist Classic Limousine on an as-needed basis. Classic Limousine asserted these individual are very qualified individuals, not “flakes off the street.” Classic Limousine stated that it would comply with the controlled substance testing requirements if the individuals were unknown at the time of hire.

- 4 **Answer:** On August 4, 2006, Commission staff responded to the petition for mitigation. Staff contended that the fact that the two drivers in question are intermittent drivers does not excuse Classic Limousine from ensuring that drivers undergo controlled substance testing. Staff asserted that the testing requirements apply to all persons who operate commercial motor vehicles and all employers of such persons. Staff also argued that the fact that the drivers are known to Classic Limousine to be qualified and reliable individuals does not excuse the testing requirement. Moreover, Staff asserted that the fact that drivers hired in the future will be required to provide a drug test does not excuse the behavior.
- 5 **Commission Decision:** The Commission denies the petition. The applicable portion of CFR §383.301(a) provides, in pertinent part, that “. . . a driver **shall** undergo testing for alcohol and controlled substances as a condition **prior** to being used”¹ to perform safety-sensitive functions. This regulation is mandatory, not discretionary. It does not permit an employer to excuse an employee from the testing requirement if that individual is a friend otherwise known to be qualified and reliable. Simply put, the testing must be performed on all employees.² Moreover, the timing of the testing requirement is critical. The testing must occur prior to a driver being used for safety-sensitive functions. The facts are not in dispute. The first driver was hired on September 22, 2005, and began performing safety-sensitive functions (operating a limousine) on October 1, 2005. However, he did not undergo controlled substance testing for more than six months. The second instance is even more egregious. The second driver was hired on May 24, 2005, and commenced driving limousine on May 29, 2005. However, this driver did not undergo testing for almost a year.
- 6 The performance of controlled substance testing is not a ministerial function. It is an integral part of providing commercial motor carrier service in a safe and responsible manner. Commercial motor carriers must conduct their business in a way that protects the public. The public includes not only those individuals who choose to avail themselves of limousine service but also the members of the public who may be traversing public roadways at the same time as the commercial motor carriers.

¹ Emphasis supplied.

² There are exceptions to the regulation in 49 CFR §382.301(c) that are not applicable to the facts in this case.

Failing to provide appropriate controlled substance testing is a serious violation. As such, it is appropriate to assess a penalty in the amount of \$1,000.

7 It is so ordered.

DATED at Olympia, Washington, and effective September 13, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

CAROLE J. WASHBURN
Executive Secretary

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.