

tested positive for a controlled substance. Respondent responded in a timely manner and notified the Agency of its intent to submit evidence without an oral hearing. .

II. ARGUMENT

A. The Respondent Admits the Factual Allegations Alleged in the Notice of Claim and Is Liable for The Charge Alleged

Section 382.215 provides that “[n]o employer having actual knowledge that a driver has tested positive for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.” 49 C.F.R. §382.215. In response to the violation of 49 C.F.R.. §382.215 alleged in the Notice of Claim, Respondent acknowledges that the driver in question received a random controlled substance test on October 29, 2002. The driver was then allowed to continue delivery of the load which he had been dispatched. Respondent also acknowledged that the result of the driver’s controlled substance test was positive, and that it received the result on November 1, 2002. Respondent notes that the driver was “loaded with a load scheduled for delivery and there was no way of stopping him from loading the load as it was on the truck already and he was in route.” Respondents Reply, p. 1.

Respondent’s reply to the allegations alleged in the Notice of Claim constitutes an admission. Respondent very clearly acknowledges allowing its driver to continue to operate a commercial motor vehicle even after the positive controlled substance test results had been received. Respondent contends that its violation of §382.215 was unintentional. However, simply because Respondent’s violation of the Federal Motor Carrier Safety Regulations was the result of inaction, rather than an affirmative act, does not make it any less liable for the violation. Respondent’s arguments ignore the express

language of the regulation, which not only prohibits using a driver to perform a safety sensitive function, but also from using a driver to continue to perform such a function.

In its explanation of why the violation occurred, Respondent does not indicate that any attempts were made to contact its driver before the delivery of the load. Instead, Respondent simply laments that it had no way to “make him [the driver] relinquish his equipment to another driver hundreds of miles from home in order to get the load delivered or unloaded without allowing him to drive after we have been notified that he has confirmed positive on a random drug test.” *Id.* Moreover, Respondent contends that “[I]f we had terminated his lease while in route with a load on his truck there would have definitely been a situation of liability.” *Id.* Respondent’s statements indicate that allowing the driver to continue to drive was not merely inadvertent or unavoidable, but a conscious decision. Although Respondent asserts “we would never intentionally jeopardize our company by allowing a driver to work here that does drugs,” that is precisely what Respondent allowed to happen.

Finally, Respondent notes that the driver in question was an owner-operator, and that it therefore had less control over the driver. However, it has been well established that employees are liable for the actions of its employees, including owner operators. In the Matter of Robert Andrews dba Andrews Trucking, Docket No. FMCSA-2001-10847, Order on Reconsideration, November 20, 2001. Thus, based upon Respondents admission, the Field Administrator has established that Respondent used a driver known to have tested positive for a controlled substance, as alleged in the Notice of Claim, and the Field Administrator is entitled to a Final Order.

B. The Civil Penalty Assessed is Appropriate and Calculated to Achieve Compliance

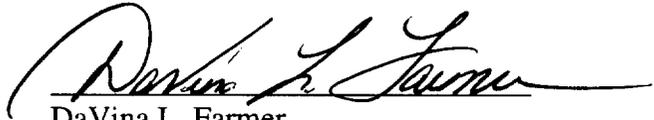
In response to the penalty assessed in the Notice of Claim, Respondent argues that the circumstances of the violation should be considered in mitigation of the penalty amount. However, it is the circumstances of the violation that demonstrate why mitigation of the penalty is not warranted. Respondent clearly establishes that it was aware of its obligations under the regulations, but chose not to comply. Respondent's decision to allow a driver known to have tested positive for a controlled substance to continue to operate a commercial motor vehicle is the very act that 49 C.F.R. §382.215 seeks to prevent. In its reply, Respondent expresses concern over liability for the load being delivered, but does not in any way address the potential consequences of a positive driver operating a commercial motor vehicle. Respondent's Reply, p.1.

As demonstrated above, Respondent is liable for the violation alleged in the Notice of Claim. Additionally, while Respondent acknowledged its violation, and indicated that it would take steps to prevent future occurrences, it never addressed, in any way, steps that it had taken, or would take, to correct the problem identified. In fact, Respondent has not submitted any evidence that would warrant mitigation of the penalty assessed.

III. CONCLUSION

Therefore, for all of the above reasons, the Field Administrator is entitled to a Final Order finding the facts to be as alleged in the Notice of Claim and ordering the respondent to pay the penalty of \$6,260.00, as assessed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "DaVina L. Farmer", written over a horizontal line.

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CERTIFICATE OF SERVICE

Case No. FMCSA-2003-14805

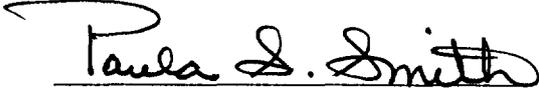
This is to certify that on May 15, 2003, the undersigned mailed a copy of the "Field Administrator's Memorandum in Support of Final Order" to the persons listed below:

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