

UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD

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vs.

MERCHANT MARINER LICENSE

Issued to: GARY L. HENSLEY

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL  
NO. 2688

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter “D&O”) dated August 14, 2008, Coast Guard Administrative Law Judge (hereinafter “ALJ”) Bruce T. Smith dismissed the Coast Guard’s Complaint alleging *use of or addiction to the use of dangerous drugs* (for failure of a pre-employment drug test) against Gary L. Hensley (hereinafter “Respondent”). The ALJ dismissed the Coast Guard’s Complaint upon finding that “[t]he Coast Guard did not prove Respondent failed a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.” [D&O at 17] The Coast Guard appeals.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent with the Coast Guard ALJ Docketing Center on July 31, 2007. [D&O at 2] Respondent filed an Answer to the

Complaint on August 6, 2007.<sup>1</sup> [*Id.*; Answer at 1]

The hearing in the matter commenced on May 22, 2008, in New Orleans, Louisiana. The ALJ issued his D&O dismissing the Coast Guard's Complaint on August 14, 2008. Thereafter, on September 9, 2008, the Coast Guard filed its Notice of Appeal. The Coast Guard perfected its appeal by filing an Appellate Brief on October 14, 2008. Respondent filed a timely Reply Brief, after receiving a proper time extension from the ALJ, on December 1, 2008. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented, at the hearing and on the Reply Brief, by Les A. Martin, Esq., 3221 Behrman Place, Suite 105, New Orleans, Louisiana 70114. The Coast Guard Investigating Officers were LCDR Melissa J. Harper and MST1 Cynthia Dubach of U.S. Coast Guard Sector New Orleans, Louisiana. LCDR Harper filed the Appeal Brief for the Coast Guard.

#### FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued Merchant Mariner License. [D&O at 3]

On April 14, 2007, Respondent applied for a job with Florida Marine. [Transcript hereinafter "Tr." at 134-35] As a condition of employment with Florida Marine, Respondent was required to submit to a pre-employment drug test. [*Id.*] Respondent presented himself on April 16, 2007, at the Redi-Med Clinic and Occupational Health Services, in Mandeville, Louisiana, to provide a urine sample for

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<sup>1</sup> A review of the Certificate of Service portion of Respondent's Answer shows that he incorrectly dated the document as being filed on August 6, 2008. The ALJ repeated this error in his D&O. However, the ALJ Docketing Center stamped the document as being received in 2007. Because the record does not contain any evidence to suggest that Respondent's Answer was untimely, this decision concludes that the Answer was filed in 2007, rather than in 2008. The ALJ's error regarding the date was harmless.

pre-employment drug testing. [D&O at 3; Tr. at 31, 135-36; Coast Guard Exhibits 2 & 3] Ms. Mary Adkins, a properly trained and certified Department of Transportation (hereinafter "DOT") urine specimen collector and employee of the Redi-Med Clinic, collected a single urine sample from Respondent on April 16, 2007. [D&O at 3, 5; Tr. at 11-14, 36; Coast Guard Exhibit 1]

After Respondent provided his urine sample, Ms. Adkins performed an "instant drug test" on the sample. [D&O at 4, Tr. at 36-38] The "instant drug test" is less reliable than formal testing conducted by a DOT certified laboratory and is not part of the DOT-approved drug testing protocol. [D&O at 5; Tr. at 46, 116; Coast Guard Exhibit 4 at 38-39] The test is conducted by inserting a plastic card into a urine specimen cup for several seconds and then removing the card.<sup>2</sup> [D&O at 4; Tr. 36-38] In Respondent's case, the "instant drug test" showed that Respondent's urine sample was negative for a variety of drugs, including marijuana metabolites. [D&O at 5; Coast Guard Exhibit 3, at 14] Both parties stipulated that the instant test strip inserted into the specimen was sterile. [D&O at 14 footnote1; Tr. at 122-124; Coast Guard Exhibit 6]

Immediately after performing the "instant drug test" on Respondent's urine sample, Ms. Adkins divided Respondent's urine into two separate containers, thus providing a split sample for further testing. [D&O at 4; Tr. at 136] Ms. Adkins then sealed the containers holding Respondent's urine, bagged them, and shipped them to Kroll Laboratories, where DOT testing of Respondent's urine occurred. [D&O at 5; Tr. at 28-30; Coast Guard Exhibit 5] After tests revealed that Respondent's urine specimen was positive for the presence of marijuana metabolites, the Medical Review Officer



(hereinafter "MRO"), verified those results as positive for the presence of marijuana metabolites. [D&O at 6; Coast Guard Exhibit 4 at 6-13, 19, 31, 38-39] Shortly thereafter, the MRO's office contacted Respondent and informed him of the positive test result. [D&O at 6; Tr. at 137-38] In response, Respondent requested that his split sample be submitted for further testing. [D&O at 6; Tr. at 138] The split sample test yielded a positive result for marijuana metabolites. [D&O at 7; Tr. at 138-39; Coast Guard Exhibit 4 at 26]

The ALJ found that the insertion of the sterile, instant test strip used in this instance does not contaminate specimens with marijuana metabolite. [D&O at 5; Coast Guard Exhibits 6 & 7] However, the ALJ found that the insertion of the instant test strip into the specimen constituted a violation of DOT drug testing procedures. [D&O at 13] The ALJ also determined that the insertion of the instant strip violated the integrity of the specimen. [D&O at 14] The ALJ found Respondent's testimony that he had not used drugs in this instance credible, supported by the fact that the instant test yielded a negative result, that he had not previously failed a drug test in 23 years, and that he had passed multiple subsequent tests. [D&O at 16-17] Ultimately, the ALJ dismissed the Complaint after finding that "[t]he Coast Guard did not prove Respondent failed a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40." [D&O at 17]

#### BASES OF APPEAL

The Coast Guard raises the bases of appeal summarized below:

- I. *The ALJ erred in finding that insertion of the instant test strip invalidated the positive test results;*

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<sup>2</sup> The plastic card is referred to predominantly within the D&O as an "instant test strip" rather than an "instant test card".

- II. *The ALJ erred in giving undue weight to Respondent's past mariner history and subsequent test results;*
- III. *The ALJ's decision is against the overwhelming weight of the evidence.*

Given my determination as to the first issue raised in this appeal, discussion of the Coast Guard's second and third bases of appeal is neither necessary nor warranted. Accordingly, those issues will not be addressed herein.<sup>3</sup>

#### OPINION

Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence. The ALJ's findings of fact and determinations in this regard will not be disturbed and will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence. *See Appeal Decision 2541 (RAYMOND)* (citing *Appeal Decisions 2522 (JENKINS)*, *2492 (RATH)*, and *2333 (AYALA)*). The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. *Appeal Decisions 2395 (LAMBERT)* and *2282 (LITTLEFIELD)*.

#### I.

*The ALJ erred in finding that insertion of the instant test strip invalidated the positive test results.*

The Coast Guard contends that the ALJ erred in determining, as a matter of law, that insertion of any object into the sample violates the integrity of the sample. [Appeal Brief at 11] The Coast Guard asserts that this conclusion flies in the face of the parties'

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<sup>3</sup> The Coast Guard raised a fourth issue within its statement of the issues in its appeal brief but failed to address it within the body of the brief. Therefore, I did not consider that issue.

stipulation that instant test strips in this case are sterile, individually wrapped, and have no history of contaminating urine samples. [Id.]

A review of past Commandant Decisions on Appeal shows that the primary issue presented in this case – whether insertion of a sterile object into a urine sample violates the specimen’s integrity to such an extent that the drug test must be cancelled – is one of first impression. Prior Commandant Decisions on Appeal have stated that “[i]n the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40...[be]...followed to maintain the [drug testing] system.” See Appeal Decision 2631 (SENGEL) (unqualified collector without required training failed to positively identify each crewmember providing a sample, failed to collect social security numbers, improperly required crew members to certify samples before they were provided and then stated that it was his signature on a memorandum from the laboratory that attempted to correct the missing information on the Drug Testing Custody and Control Form (hereinafter “DTCCF”) when it was clear that it was not), citing Appeal Decisions 2621 (PERIMAN) (Respondent developed evidence primarily after the hearing of violations of the testing laboratory’s procedures identified by National Laboratory Certification Program, false testimony by lab’s director as to his credentials, misinformation about right to retest his split sample, and premature disposal of sample precluding further testing), and 2614 (WALLENSTEIN) (significant unresolved conflicting testimony as to whether collector’s actions violated chain of custody when he left improperly labeled specimens unattended after leaving to pursue employee who had failed to sign DTCCF, and when unable to catch him asked others to forge the absent employee’s signature). However, minor technical infractions of



the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. See Appeal Decisions 2575 (WILLIAMS) (collector's failure to prevent other individuals from entering the restroom during collection and lack of continued physical possession of the DTCCF were minor technical violations of drug testing regulations), 2546 (SWEENEY) (collector's failure to have Respondent initial specimen label and failure to allow Respondent to choose his specimen jar were minor technical violations of drug testing regulations) *aff'd sub nom* NTSB Order No. EM-176 (1994), 2541 (RAYMOND) (Respondent's failure to wash his hands prior to providing urine sample, the collector's failure to allow Respondent to choose his specimen jar, and the collector's failure to record the specimen temperature were minor technical violations of drug testing regulations) *aff'd sub nom* NTSB Order No. EM-175 (1994), 2537 (CHATHAM) (absence of information on DTCCF was minor technical violation of drug testing regulations), and 2522 (JENKINS) (Respondent's failure to wash hands prior to providing urine sample was minor technical violation of drug testing regulations); *Cf. Gallagher v. National Transportation Safety Bd.*, 953 F.2d 1214 (10th Cir. 1992) (holding that where there was no evidence that the integrity of a blood sample was actually compromised by a procedural error that occurred during sample collection, results derived from the sample could properly be relied upon to support the revocation of a pilot's airman certificate).

Prior to determining whether the ALJ erred in finding that the integrity of the specimen was violated, it is first necessary to determine whether a violation of the DOT drug testing regulations occurred. 49 C.F.R. §§ 40.65 and 40.71(b) outline the step by step items to be checked and procedures to be followed by the collector after the

employee submits the specimen. These procedures do not include the insertion of any object, including a sterile instant test strip, into the specimen. *See* 49 C.F.R. §§ 40.65 and 40.71(b) (§ 40.65(b) requires the temperature of the specimen be taken, which is done by using a test strip located on the outside of the collection container). There are provisions within 49 C.F.R. § 40.13(d) and 40.71(b)(8) that allow for additional testing of excess urine remaining within the collection container after the urine is poured into the split sample specimen bottles, if the test is part of a required DOT physical examination. In this instance the instant test strip was inserted into the collection container prior to the urine being poured into the split specimen bottles. [D&O at 4; Tr. at 136] Therefore, the ALJ was correct in determining that a violation of the DOT drug testing regulations occurred.

The issue then becomes whether these actions violated the integrity of the chain of custody or the integrity of the specimen. The ALJ concluded that the insertion of the instant test, which the parties stipulated was sterile, into the urine specimen prior to splitting the sample constituted a violation of the integrity of the sample. [D&O at 14] While there is no doubt that the insertion violated the testing procedures, there is no evidence in the record to support the ALJ's conclusion that the insertion actually violated the integrity of the specimen. The record is devoid of any hint or assertion that the insertion of the sterile strip caused the specimen to test positive for marijuana metabolites. Rather, the record shows not only that the parties to this action stipulated that the instant test was sterile, but also that the instant test, itself, has not been shown to contaminate urine specimens with marijuana metabolites. [D&O at 5, 14; Tr. at 122-124; Coast Guard Exhibits 6 & 7] Accordingly, the technical violation that occurred in this



case was harmless because there is no evidence to suggest that the integrity of Respondent's urine specimen or the chain of custody was adversely affected by the use of the instant test. Therefore, the ALJ's finding that the insertion of a sterile instant test strip constitutes a violation of the integrity of the specimen is without evidentiary support and cannot stand.

Although the collector's violation of the DOT drug testing regulations in this instance was harmless, this decision should not be read to encourage either the violation of the regulations contained in 49 C.F.R. Part 40 or that insertion of objects into urine specimens is encouraged. It is not. Rather, this decision is limited to instances where the impact of the insertion could not have caused a positive result. In the case at hand, the parties clearly stipulated that the strip was sterile and could not have caused a positive result.

#### CONCLUSION

The ALJ erred in holding that the integrity of Respondent's urine sample was compromised by the insertion of the sterile, instant test into Respondent's urine. Therefore, the Coast Guard's appeal is granted. Pursuant to 33 C.F.R. § 20.1004, on appeal, the decision of the ALJ may be affirmed, modified, reversed, or remanded for further proceedings. Given this authority and in consideration of the ALJ's legal errors, this case is being remanded. The ALJ should determine whether, in light of the fact that Respondent's urine sample was not compromised by the insertion of the instant drug test, the outcome of this case should be altered. While the ALJ may hold further proceedings to assist in this determination, if he finds that the relevant issues have sufficiently been developed in the record, he may determine those issues absent further proceedings.

ORDER

The order of the Administrative Law Judge dated August 14, 2008, is  
VACATED. The case is REMANDED for further proceedings consistent with this  
decision.

*Sally Brice-O'Hara*  
SALLY BRICE-O'HARA  
Vice Admiral, U. S. Coast Guard

Signed at Washington, D.C. this 14<sup>th</sup> day of June, 2010.