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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
&	:	NO. 2690
MERCHANT MARINER DOCUMENT	:	
	:	
	:	
Issued to: MICHAEL J. THOMAS	:	

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 October 2, 2009, Coast Guard Administrative Law Judge (hereinafter "ALJ") Bruce T. Smith revoked the Merchant Mariner Credentials of Mr. Michael J. Thomas (hereinafter "Respondent") upon finding the Coast Guard's Complaint alleging *misconduct* proved. The Complaint alleged that Respondent committed an act of *misconduct* by refusing to submit to a post-casualty drug test ordered by Respondent's marine employer.

FACTS AND PROCEDURAL HISTORY

At all times relevant herein, Respondent was the holder of the Coast Guard issued Merchant Mariner Credentials at issue in this proceeding. [D&O at 5, 32]

On December 8-9, 2008, Respondent was employed as a contract trip pilot by the TUG MISS SALLY, LLC and/or Breathwit Marine Contractors, LTD (hereinafter "Breathwit"). [D&O at 5, 32-33] At approximately 5:53 p.m., on December 8, 2008, the M/V MISS SALLY, while under the operation and control of Respondent, collided, head-

on, with the barge HORIZON 3038 near mile marker 343 on the Gulf Intracoastal Waterway. [D&O at 3, 5, 6] The collision, which resulted in damage to the M/V MISS SALLY in excess of $120,000.00, was a Serious Marine Incident (hereinafter "SMI") as defined by 46 C.F.R. § 4.03-2. [D&O at 3, 5, 33] During the collision, Respondent was thrown onto the vessel's console where he impacted with the vessel's controls. [D&O at 6; Transcript of the Proceedings (hereinafter "Tr.") Volume (hereinafter "Vol.") II at 50-51, 53] This resulted in bodily injury to Respondent. [*Id.*]

After the collision, the M/V MISS SALLY was towed to the Breathwit Marine Contractors, Ltd. Shipyard in San Leon, Texas. [D&O at 6; Tr. Vol. II at 62-64] Mr. Greg Berry, Personnel Manager for Breathwit, met the M/V SALLY at the shipyard at approximately 1:30 a.m. on December 9, 2008. [D&O at 6; Tr. Vol. I at 26; Tr. Vol. II at 64] Mr. Berry informed Respondent that he would have to submit to a post-casualty urinalysis test later that morning; Respondent agreed to submit to the test. [D&O at 6; Tr. Vol. I at 28; Tr. Vol. II at 65]

Mr. Berry returned to the M/V MISS SALLY later that morning at 7:30 a.m. [D&O at 7] At that time, he and Respondent had a further conversation regarding the need for Respondent to submit to post-casualty drug testing. [D&O at 7; Tr. Vol. I at 32-37] During this conversation, Respondent resisted requests to immediately submit to post-casualty drug testing. [*Id.*] Instead of submitting to the requested and mandated post-casualty drug test, Respondent informed Mr. Berry that he wanted to go to a hotel and take a shower, that he wanted to see a doctor, and that he needed to remove his personal belongings from the M/V MISS SALLY. [D&O at 7; Tr. Vol. I at 32-37, 188; Tr. Vol. II at 67-70] During the conversation, Respondent ultimately refused to present

himself at the location chosen for submission of a urinalysis sample for post-casualty drug testing. [D&O at 8; Tr. Vol. I at 32-37]

After the 7:30 a.m. conversation between Respondent and Mr. Berry, Respondent was approached by MSSE2 Lindell Gentry, III, a United States Coast Guard Chief Warrant Officer 2, while he was still at the Breathwit Marine Shipyard at approximately 9:00 a.m. [D&O at 8; Tr. Vol. I at 40-41, 185-193] CWO2 Gentry urged Respondent to comply with Mr. Berry's order and go to Calder Urgent Care Clinic, a League City, Texas medical center that is capable of providing emergency medical services while simultaneously performing drug testing services, for testing. [D&O at 8-9; Tr. Vol. I at 34-35, 185-193] During this conversation, Respondent reiterated his refusal to submit to a post-casualty drug test at that time. [D&O at 8; Tr. Vol. I at 189-190] Sometime after 7:30 a.m., Respondent drove his personal vehicle to a local motel where he met his estranged wife who took several photographs of his injuries with her cellular telephone. [D&O at 8; Respondent's Exhibit G; Tr. Vol. II at 51, 74]

On the afternoon of December 9, 2008, Respondent drove his personal vehicle from his motel to a service station in Kemah, Texas. [D&O at 8; Tr. Vol. II at 75] Mr. John Neuman, a driver and employee of Breathwit, met Respondent at the service station and subsequently followed him to Calder Urgent Care. [*Id.*] Prior to departing the service station, Mr. Neuman observed Respondent exit his vehicle and walk into the service station without any assistance. [D&O at 8; Tr. Vol. I at 161] Mr. Neuman followed Respondent to Calder Urgent Care Center and when the two arrived there, Respondent asserted that he was in too much pain to exit his vehicle. [D&O at 9; Tr. Vol. I at 162-163] Shortly thereafter, Respondent refused an offer by Calder Urgent Care

personnel to assist him into the medical center by wheelchair. [D&O at 9; Tr. Vol. I at 164-165] Thereafter, Respondent, who was still being followed by Mr. Neuman, drove approximately 20 minutes to Christus St. John Hospital in Nassau Bay, Texas. [D&O at 9; Tr. Vol. I at 166-167] Upon arriving at the Christus St. John Hospital at approximately 5:38 p.m., Respondent exited his vehicle and walked, unassisted, approximately 25 to 30 yards into the emergency room. [D&O at 9; Tr. Vol. I at 179-180] Respondent remained at Christus St. John Hospital, accompanied by Mr. Neuman, until 11:37 p.m. on December 9, 2008. [D&O at 9; Tr. Vol. I at 168-180; Respondent's Exhibit C] During Respondent's 6 hour stay at the hospital, no one demanded or forced Respondent to provide a urine sample for post-casualty drug testing and no sample was taken from Respondent during his hospital stay. [D&O at 9; Tr. Vol. I at 176; Respondent's Exhibit C] Respondent did not provide a urine sample for post-casualty drug testing on December 8-9, 2008. [D&O at 10; Tr. Vol. I at 17-237]

The Coast Guard filed its Complaint against Respondent's Merchant Mariner Credentials with the Coast Guard ALJ Docketing Center on December 23, 2008. [D&O at 3] Respondent filed an Answer to the Complaint, generally denying all jurisdictional and factual allegations, on January 8, 2009. [*Id.*]

The hearing in the matter commenced on July 21, 2009, in Houston, Texas. During the hearing, the Coast Guard offered the testimony of five witnesses and entered six exhibits into the record. Respondent testified on his own behalf, offered the testimony of one other witness, and entered thirteen exhibits into the record. The ALJ called one witness and ordered the production of three exhibits into the record on his own motion. The hearing was reconvened telephonically on August 21, 2009, to hear the

testimony of one additional witness. At the close of the August 21, 2009, hearing, the ALJ informed the parties that they would have the opportunity to submit closing arguments and post-hearing briefs in writing. Both parties submitted written post-hearing briefs and arguments and the record was closed. [D&O at 4-5]

The ALJ issued his D&O finding the *misconduct* charge proved and ordering the revocation of Respondent's Merchant Mariner Credentials on October 2, 2009. [D&O at 33] On October 28, 2009, Respondent filed his Notice of Appeal in the matter. Respondent perfected his appeal by filing an Appellate Brief on December 1, 2009. The Coast Guard filed a timely Reply Brief on January 5, 2010. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented, at the hearing and on the Reply Brief, by Barry Evans, Attorney at Law, 550 Egret Bay Boulevard, League City, Texas 77573. The Coast Guard was represented by Mr. Gary Ball of the USCG National Maritime Center and Investigating Officer LT Tim Tilghman of USCG Marine Safety Unit Galveston, Texas.

BASES OF APPEAL

Respondent raises the following bases of appeal:

I. *The evidence is insufficient to sustain the allegations of refusal to submit to a drug tests because...[Respondent]...reported for a drug test within hours of being directed to do so by his employer.*

II. *The evidence is insufficient to sustain the allegations of refusal to submit to a drug test because...[Respondent's]...employer did not meet the regulatory guidelines for post incident drug testing.*

III. *In the alternative, the order of revocation is excessive and harsh and should be reevaluated.*

OPINION

Standard of Review

On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion. *See* 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001. "Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence." Appeal Decision 2685 (MATT). "The ALJ is the arbiter of facts" and it is "his duty to evaluate the testimony and evidence presented at the hearing." Appeal Decision 2610 (BENNETT). Under governing precedent, "the findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." Appeal Decision 2610 (BENNETT) *citing* Appeal Decisions 2557 (FRANCIS), 2452 (MORGANDE) and 2332 (LORENZ). The "[f]indings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding." Appeal Decision 2639 (HAUCK) *citing* Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2506 (SYVERTSEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD), and 2614 (WALLENSTEIN).

I.

The evidence is insufficient to sustain the allegations of refusal to submit to a drug tests because...[Respondent]...reported for a drug test within hours of being directed to do so by his employer.

In the case at hand, Respondent does not deny that the M/V MISS SALLY was involved in a SMI on December 8, 2008, that Respondent, who was acting as the operator

of the vessel, was required to submit to post-casualty drug testing as a result of his involvement in the SMI, or that he refused to submit to chemical testing prior to his arrival at Christus St. John Hospital. Instead, Respondent avers that while he was "[a]t Christus St. John Hospital... [he]... followed the instructions of medical personnel and was willing and able to provide a urine specimen for drug screening had one been requested" at that time. [Respondent's Appeal Brief at 3]

As the ALJ correctly stated in his D&O, 49 C.F.R. § 40.191(a) defines "refusal to take a Department of Transportation Drug test" as follows:

> (a) As an employee, you have refused to take a drug test if you:
>
> > (1) Fail to appear for any test...within a reasonable time, **as determined by the employer**, consistent with applicable DOT agency regulations, after being directed to do so by the employer.

[D&O at 13] (emphasis in original). As the ALJ further concluded "[a]n individual mariner's responsibility to provide a specimen, under 46 C.F.R. 4.06-5(a)...is distinct and separate from the marine employer's responsibility to ensure that post-casualty chemical testing is completed within 32 hours after the occurrence of an SMI." D&O at 15, *citing* 46 C.F.R. § 4.06-3(b)(i). "The 32-hour rule is the outside limit for an employer to ensure testing occurs: it does NOT confer upon a mariner the right to wait until the 32nd hour. The mariner must submit a specimen when ordered to do so—immediately, taking into account the circumstances." [D&O at 15]

In this case, the ALJ found that Respondent refused to submit to a post-casualty chemical test following conversations at 7:30 a.m. (with Mr. Berry) and 9:00 a.m. (with CWO2 Gentry) on December 9, 2008, and when Respondent refused to enter Calder Urgent Care Center (stating he was in too much pain to get out of his truck). [D&O at

23-24] In so concluding, the ALJ considered the evidence contained in the record, including the testimony of the witnesses presented during the hearing and the exhibits presented therein. The ALJ's finding that Respondent refused to submit to chemical testing long before he entered the waiting room at the Christus St. John Hospital is consistent with the evidence contained in the record and is not arbitrary or capricious or based on inherently incredible evidence. As the ALJ noted in his D&O "[a]lthough Respondent artfully avoided uttering a blanket refusal, his actions and obfuscations following the SMI clearly constituted a refusal to comply" with his employer's direction to undergo chemical testing. [D&O at 24] As a result, the ALJ found that although "Respondent was directed by his marine employer to submit to a post-SMI chemical drug test…in a clear, unmistakable and unambiguous manner," "Respondent failed to provide a urine sample/specimen post-SMI as required by 46 C.F.R. § 4.06-5." [D&O at 33] The ALJ's finding is consistent with the law and is not an abuse of his discretion. Accordingly, Respondent's first basis of appeal is not persuasive.

II.

The evidence is insufficient to sustain the allegations of refusal to submit to a drug test because…[Respondent's]…employer did not meet the regulatory guidelines for post incident drug testing.

Citing 46 C.F.R. § 4.06-1(b), which mandates that a marine employer "take all practicable steps to have each individual engaged or employed on board a vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use," Respondent next contends that the ALJ erred in finding the misconduct charge proved because Breathwit did not "take all practicable steps necessary" to ensure that Respondent was drug tested. [Respondent's Appeal Brief at 4] Respondent specifically

contends that "[d]espite being at the hospital for over 5½ hours, his employer failed to request a standard drug screen." [*Id.*]

A review of the records shows that Respondent raised this issue in his post hearing brief and that the ALJ addressed the issue in his D&O. To that end, the ALJ stated as follows:

> While it is true that 46 C.F.R. § 4.06-1(b) says a marine employer shall take "all practical steps" to ensure mariners are tested, the law does NOT require the employer to pursue the employee at every turn, to physically restrain or repeatedly demand compliance. Accordingly, Breathwit was not obligated to contact Drug Screens, Etc., at 1:30 a.m. on December 9 2008 to collect Respondent's urine specimen. Neither was Breathwit obliged to demand Respondent specimen during the afternoon and evening of December 9 at the Christus St. Johns Hospital. Respondent's suggestion that Breathwit was somehow obliged to ensure a specimen was collected at the hospital the evening of December 9, 2008 is plainly erroneous. Even though Breathwit assumed financial responsibility for Respondent's treatment, Breathwit could not physically restrain Respondent nor force him to submit a urine or blood test nor order health care providers there to involuntarily take a specimen for testing.

[D&O at 31-32] (emphasis in original)(footnotes and internal citations omitted). Respondent reasserts the issue on appeal. A review of the record indicates sufficient evidence to support the ALJ's conclusion that Respondent refused to submit to a drug test BEFORE he arrived at Christus St. John Hospital and that Respondent's marine employer complied with the applicable regulations in attempting to have Respondent drug tested. The ALJ's conclusions as to Respondent's second argument were consistent with applicable law and were neither arbitrary nor capricious. Accordingly, Respondent's second basis of appeal is not persuasive.

III.

In the alternative, the order of revocation is excessive and harsh and should be reevaluated.

Prior Commandant Decisions on Appeal have held that "[i]n Coast Guard suspension and revocation cases, the sanction imposed in a particular case is exclusively within the authority and discretion of the ALJ." Appeal Decision 2680 (McCARTHY), *citing* 46 C.F.R. § 5.569(a) and Appeal Decisions 2622 (NITKIN), 2618 (SINN), 2609 (DOMANGUE), 2543 (SHORT) and 1998 (LEBOEUF). "While the ALJ may look to the Suggested Range of an Appropriate Order Table, 46 C.F.R. Table 5.569, for information and guidance with respect to a particular violation, he is not required to do so, and he may increase or decrease the suggested sanction as he sees fit." Appeal Decision 2654 (HOWELL) *citing* 46 C.F.R. § 5.569 and Appeal Decisions 2640 (PASSARO) and 2618 (SINN). It has further been held that "[a]n order imposed at the conclusion of a case will only be modified on appeal if that order is clearly excessive or an abuse of discretion." Appeal Decision 2622 (NITKIN) *quoting* Appeal Decision 2618 (SINN).

In this case, the record shows that the ALJ carefully considered the issue of sanction. To that end, the ALJ stated as follows with regard to the sanction imposed in the case:

> Respondent presented no witnesses or evidence in mitigation of his actions...except for the implicit understanding that he was, in all probability, in some degree of pain or discomfort following the incident that occurred on or about December 8, 2008. Since his physical and/or emotional condition did not rise to the level of a legal defense to his actions...I can only afford his condition some weight in mitigation of his actions.
>
> By contrast, the Coast Guard presented matters in aggravation that would support revocation. Specifically the Coast Guard proved Respondent's duplicitous behavior relative to required drug testing. I point with particularity [to] the events on the afternoon and evening of December 9, 2008. At one moment, Respondent could drive his truck, walk, unassisted, go to a motel and be photographed. At the next, he claimed his pain was

> too great to even get out of his truck and obtain medical attention—yet within an hour, he could again drive and again walk unassisted. The evidence strongly suggests Respondent intentionally avoided complying with his employer's order.
>
> "Of paramount concern is the safety of life at sea and the welfare of individual seamen." Refusal to submit to a post incident chemical test raises serious doubt about a mariner's ability to perform safely and competently in the future. "Past Commandant Decisions on Appeal have articulated a clear rationale as to why revocation of a mariner's credential is appropriate in cases involving the mariner's refusal to submit to a required drug test: 'if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.'"

[D&O at 35-36] (internal citations omitted) (emphasis in original)

Therefore, the record shows that the ALJ carefully considered the aggravating and mitigating evidence presented in the case and concluded that revocation was the appropriate sanction. Although the sanction imposed is beyond that articulated in the Coast Guard's Table of Appropriate Orders, given the evidence in aggravation, I do not find it to be either excessive or involving an abuse of the ALJ's discretion. Accordingly, Respondent's final argument is wholly unpersuasive.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision to Revoke Respondent's Merchant Mariner Credentials was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Because competent, substantial, reliable, and probative evidence exists to support the ALJ's decision, Respondent's appeal arguments are without merit.

ORDER

The order of the Administrative Law Judge dated October 2, 2009, is AFFIRMED.

Sally Brice-O'Hara
VADM, U.S.C.G.
Vice Commandant

Signed at Washington, D.C. this 13th day of December, 2010.