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 DOCUMENT and MERCHANT MARINER LICENSE	:	NO. 2675
Issued to: HOWARD C. MILLS	:	

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 27, 2004, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard dismissed a Complaint against Mr. Howard C. Mills' (hereinafter "Respondent") merchant mariner license and document upon finding the charges of *violation of law or regulation* and *misconduct* not proved.

PROCEDURAL HISTORY

The Coast Guard filed its original Complaint against Respondent with the Coast Guard ALJ Docketing Center on May 13, 2004. [D&O at 2] On June 7, 2004, the Coast Guard filed an Amended Complaint (hereinafter "Complaint") which specifically amended the factual allegations for the *violation of law or regulation* charge with the ALJ Docketing Center. [*Id.*] Respondent's reply to the Complaint was received by the ALJ Docketing Center on the same day. [Answer] In his Answer, although Respondent failed

to address the jurisdictional allegations, he expressly denied the factual allegations and requested a hearing in the matter. [*Id.*]

The hearing in the matter was initially scheduled for August 17, 2004; however, pursuant to Respondent's request, the ALJ issued a continuance, setting the hearing date for September 30, 2004. [ALJ Scheduling Order dated June 30, 2004; ALJ Notice of Continuance dated July 21, 2004]

The hearing in the matter convened in Morgan City, Louisiana, on September 30, 2004. Respondent appeared personally and elected to represent himself. At the hearing, Respondent admitted all jurisdictional allegations, but denied that he had been drunk or incapacitated in any way, related to the *violation of law or regulation* charge, or that he had refused to submit a urine sample for drug testing, which related to the *misconduct* charge. The Coast Guard introduced the testimony of two witnesses and entered nine exhibits into the record during the hearing. Although Respondent did not call any witnesses or submit any exhibits, he testified on his own behalf and actively cross-examined the Coast Guard's witnesses.

At the close of the hearing, the ALJ informed the Coast Guard that it would have ten days to prepare a document that would "clarify their pleadings as to what laws or regulations they think…[Respondent]…has violated." [Transcript Record (hereinafter "TR") at 109] The Coast Guard submitted its clarifying document on October 15, 2004. [D&O at 2] Thereafter, on October 27, 2004, the ALJ issued her D&O dismissing the Coast Guard's Complaint against Respondent and removing it from the docket.

On November 2, 2004, the Coast Guard filed its Notice of Appeal in the matter. The Coast Guard perfected its appeal by filing its Appellate Brief on December 22, 2004. Therefore, this appeal is properly before me.

APPEARANCES: Respondent appeared *pro se*. The Coast Guard was represented by Lieutenant Kathryn A. Kulaga and Chief Warrant Officer Jason A. Boyer of U.S. Coast Guard Marine Safety Office, Morgan City, Louisiana.

FACTS

On February 16, 2004, Respondent was acting under the authority of his Merchant Mariner credentials when he reported for duty, as Chief Engineer, aboard the M/V CARL F. THORNE, a vessel subject to Coast Guard inspection. [D&O at 3 & 5] At that time, Respondent was employed by the vessel's owner, Tidewater Marine Services (hereinafter "Tidewater"), an "offshore supply boat company" that used the vessel to provide services, including the carrying of supplies, to oil rigs. [TR at 17; IO Exhibit 3]

On February 16, 2004, Tidewater's operations managers were informed that because the vessel was going to "pick up a job" with Exxon, all of its crewmembers would be required to submit to "pre-access" drug and alcohol testing. [TR at 18-19] To conduct the testing, Tidewater's Safety Captain, Mr. Mark Dawson, who was responsible for assisting with drug screening and escorting third party vendors aboard Tidewater's vessels, and Mr. David Fournier, an employee of SECON (the company hired by Tidewater for administering Tidewater's drug screening program) boarded the CARL F. THORNE. [D&O at 2-3; TR at 18-22, 38-39] Messrs Dawson and Fournier boarded the vessel at approximately 3:00 p.m. and understood that their sole purpose in so doing was

to conduct "pre-access" chemical testing of the CARL F. THORNE's crewmembers. [D&O at 7; TR at 18-22, 38-39]

Upon boarding the vessel, Mr. Dawson informed the ship's Captain that he and Mr. Fournier where onboard to conduct the drug and alcohol testing customarily required prior to engaging in work with Exxon. [D&O at 8; TR at 21] In response, the vessel's Captain "rousted" the crew and instructed them to convene in the galley so that they could all be administered drug and alcohol tests. [*Id.*] Although Mr. Dawson remained in the galley while the crewmembers were tested, he was not responsible for conducting any of the tests and did not actively observe their administration. [D&O at 8; TR at 21-23] Mr. Fournier was responsible for administering all of the tests required by Exxon on February 16, 2004. [TR at 44-46; D&O & 9]

To conduct the requisite tests, Mr. Fournier collected a urine sample from, and administered a blood alcohol test (hereinafter "BAT") to, each of the CARL F. THORNE's crewmembers. [D&O at 9; TR at 53, 65] Respondent was the last crewmember to undergo chemical testing on February 16, 2004. [TR at 72] When Respondent was first asked to provide a urine sample, he was unable to provide a sufficient quantity of urine for testing. [D&O at 3] Respondent's first sample measured less than 45 mL and was discarded as invalid. [TR at 56, 67-68] Respondent was the only crewmember unable to provide a urine sample of sufficient quantity. [TR at 21] Moreover, when Mr. Fournier administered a BAT to Respondent, the machine registered a result of 0.175 g/210L.[1] [D&O at 3; IO Exhibit 8] Fifteen minutes later, when Mr.

[1] The record does not include a complete explanation of breath testing procedures or how to interpret the results. The ALJ cited to 33 C.F.R. § 95.010, noting that the standard unit of measurement for such tests in terms of grams of alcohol per 210 liters of breath. [D&O at 3, n.1] *See* 33 C.F.R. § 95.010 (Definition: "Alcohol concentration").

Fournier administered the confirmation test to Respondent, the test registered a result of 0.158 g/210L. [*Id.*] Based on these test results, Respondent was advised that he had failed the alcohol test and would be required to leave the vessel. [D&O at 8; TR at 23-24] Respondent then went to his stateroom to wait for a vehicle to arrive to transport him and his belongings away from the vessel. [TR at 92-92] Respondent did not provide a second urine sample. [D&O at 9; TR at 25]

BASES OF APPEAL

This appeal is taken from the ALJ's D&O which dismissed the Coast Guard's Complaint upon finding that the record contained insufficient evidence to support a conclusion that Respondent had either committed a *violation of law or regulation* or *misconduct*. The Coast Guard has raised and discussed numerous issues on appeal which I have consolidated and will address in the following:

I. *The ALJ erred by ruling that the Coast Guard failed to prove that Respondent was intoxicated when he reported for duty aboard the M/V CARL F. THORNE; and,*

II. *The ALJ erred by ruling that the Coast Guard failed to prove the Respondent refused to submit to a drug test.*

Opinion

I.

The ALJ erred by ruling that the Coast Guard failed to prove that Respondent was intoxicated when he reported for duty aboard the M/V CARL F. THORNE.

The Coast Guard first argues that the ALJ committed error by ruling that the Coast Guard failed to prove that Respondent was intoxicated on the day in question. [Coast Guard Appellate Brief (hereinafter "Appellate Brief") at 1 & 3] Particularly, the Coast Guard insists that the ALJ improperly discounted the testimony of the alcohol

breath test collector as to the veracity of the alcohol tests and the effect of the Respondent's use of mouthwash prior to the tests, thereby leading the ALJ to determine that the tests were invalid. [*Id.*] Related to that finding, the Coast Guard takes issue with the failure of the ALJ to ask the Coast Guard for the calibration tests for the alcohol testing device, which would have further bolstered the accuracy of the tests. [*Id.* at 4] Finally, the Coast Guard noted that "[s]hould the ALJ have felt a factor [sic] needing clarification during the hearing, she could clarify that factor at that time, rather than surprising the Coast Guard with a D&O that states multiple times" that the Coast Guard failed to prove its case. [*Id.*]

Applicable Coast Guard regulations prohibit a merchant mariner, such as the Respondent in this case, from operating a vessel (including being a crewmember), other than a recreational vessel, with an alcohol concentration of .04 percent or higher, or, if "the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation." 33 C.F.R. §§ 95.020(b) & (c); *See*, also, Appeal Decision 2551 (LEVENE). The regulations further provide:

> Acceptable evidence of when a vessel operator is under the influence of alcohol or a dangerous drug includes, but is not limited to:
> (a) Personal observation of an individual's manner, disposition, speech, muscular movement, general appearance, or behavior, or,
> (b) A chemical test.

33 C.F.R. § 95.030. A "chemical test" is defined as "a test which analyzes an individual's breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use." 33 C.F.R. § 95.010.

In order to prove Respondent was intoxicated, or under the influence of alcohol, the Coast Guard called the SECON collector who measured Respondent's alcohol level using a breathalyzer, and introduced a document from SECON as an exhibit on which the results of the breathalyzer were recorded. [D&O at 9-13; Investigating Officer's (hereinafter "IO") Exhibit 8] The breathalyzer indicated a reading of .175 g/210L for the first test and .158 g/210L for the second test. [IO Exhibit 8]

After introducing a Certificate of Training showing the SECON collector was certified in specimen collection procedures, the Coast Guard IO questioned the collector regarding the calibration of the breathalyzer machine. [TR at 38-42; IO Exhibit 6] The collector testified that the machine was calibrated, that it is checked weekly, and that a safety officer for SECON does a complete calibration every six months. [TR at 42-43] The collector elaborated that after the machine returns a reading of alcohol above .02, it is again subjected to calibration once the collector returns to the home office. [*Id.* at 43] The collector further testified that he had the records for the calibration with him and offered them to the IO for introduction into evidence if he wanted. [*Id.* at 44] The IO did not further question the collector regarding calibration, nor ask the collector for any calibration documents for entry into the record.

Next, the SECON collector testified that the initial breathalyzer test result from Respondent was positive for alcohol, which necessitated the blanking out of the breathalyzer machine, therefore triggering a mandatory 15 minute waiting period before the device could be utilized and the second confirmation test administered. [TR at 47-53] The second test was administered, and once again the Respondent tested positive for alcohol. [*Id.*; IO Exhibit 8] Subsequent to this testimony, the ALJ admitted the "Breath

Alcohol Testing Form" as IO Exhibit 8 and gave notice to the Coast Guard that she would "need some more information so I can judge the validity of the test results that are indicated on [the] form...." [TR at 50] The Coast Guard IO affirmatively acknowledged the direction from the ALJ, however, the Coast Guard did not conduct any further examination of the SECON collector regarding the validity of the tests other than asking the SECON collector to recite the results of the breathalyzer tests that were indicated on IO Exhibit 8. [TR at 50-53] The ALJ noted that the Coast Guard did not seek any testimony from the collector "about the calibration supposedly done at the office after the positive test...." [D&O at 9]

Findings of fact will not be disturbed on appeal unless inherently incredible. Appeal Decisions 2395 (LAMBERT), 2357 (GEESE), 2333 (AYALA), 2302 (FRAPPIER). "It is the function of the Administrative Law Judge to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the Administrative Law Judge, and will not be set aside unless it is shown that the evidence he relied upon is inherently incredible." Appeal Decision 2357 (GEESE). "The trier of fact, by virtue of his unique opportunity to observe witnesses and weigh their testimony, is assigned the duty of assessing the evidence adduced and making credibility determinations. Appeal Decision 2279 (LEWIS). His conclusions on the weight to be given any particular evidence and ultimate findings of fact deserve a degree of deference. Appeal Decision 2214 (CHRISTENSEN)." Appeal Decision 2654 (HOWELL).

The ALJ engaged in a significant discussion in the D&O regarding the credibility of the SECON collector as it related to his recollection of events, demeanor before the

ALJ, his level of knowledge and experience related to conducting alcohol breathalyzer testing, and whether the breathalyzer machine was properly calibrated. [D&O 9-13] In particular, the ALJ found that the collector demonstrated a tenuous demeanor while testifying, and that he was "not able to recall the specifics of other procedures or conversation [sic] that occurred that day ([i]n fact, he responded that he "did not know" the answer to questions along those lines on at least twenty-three occasions)." [D&O at 12-13] In addition, the ALJ noted that the collector did not recall smelling the odor of alcohol on the Respondent's breath, neither did he notice any other overt signs of intoxication such as glassy eyes or slurred speech. [TR at 69; D&O & 17] Moreover, the ALJ noted that the Respondent, who testified that he was not intoxicated at the time and had used mouthwash prior to the breathalyzer tests, provided the most credible version of events that took place onboard the vessel that day. [TR at 93, 107; D&O at 12-13] Finally, the ALJ was not satisfied that sufficient evidence was presented for her to determine that the breathalyzer machine was properly calibrated. [D&O at 4, 9]

The ALJ determined that the Respondent was not intoxicated at the time of the breathalyzer test and reasoned as follows:

> If the Respondent was almost two times over the legal limit established by the State of Lousiana as a level of "intoxicated",[sic] then why didn't any person observe overt signs of intoxication? Where is the evidence that the Respondent's manner, speech, muscular movement, general appearance, or behavior was that of an intoxicated person?[D&O footnote 5] The testimony in the record that establishes the Respondent did not appear intoxicated puts the lie to the test results....I cannot overlook these conflicts as they go to an ultimate finding of fact and conclusion of law. Clearly, the burden is on the USCG to present evidence that overcomes these conflicts. And, the record as a whole indicates the USCG failed to resolve these conflicts in their presentation of evidence. I am not

> persuaded to accept these test results as evidence of intoxication when there is (1) no evidence in the record that the machine was operating properly, (2) the tester was inexperienced and did not appear to remember the events of the day; rather he appeared to base his testimony on what the procedures called for, rather than what actually took place; and, (3) abundant conflict between the test results and the eye witness testimony of Respondent's appearance on February 16, 2004.
>
> [D&O footnote 5] When there is a high alcohol content detected in the breath, one would expect to see overt signs of intoxication, as in Appeal Decision 2609 (DOMANGUE) (1999). While some variances between individuals is not unusual, in this case, the indication of intoxication between the chemical test results versus the testimony about Respondent's appearance and his ingestion of alcohol (which ended some 12 hours before the testing) is diametrically opposed, calling into question the chemical test results.

[D&O at 17] The ALJ perceived conflicts in the testimony and determined that certain issues were unresolved. [*Id.*] Even though I may have decided differently, as has been stated previously:

> While there may be some conflicts in the evidence presented, I will not substitute my judgment for that of the Administrative Law Judge. It has been consistently held that it is a function and responsibility of the Administrative Law Judge to observe the demeanor of the witnesses and evaluate the credibility of their testimony; see for example, Decision on Appeal No. 2017. Unless Appellant sets forth some reason to justify a determination that the Administrative Law Judge's findings are in error, I will not substitute my judgment for that of the Administrative Law Judge. A mere conflict in testimony is not sufficient.

Appeal Decision 2226 (DAVIS). In addition, the findings of the ALJ will be upheld so long as they are buttressed by substantial evidence, that is, "evidence which a reasoning mind would accept as sufficient to support a particular conclusion.... consist[ing] of more than a mere scintilla of evidence but may be somewhat less than a preponderance." [*Id.*

quoting Laws v. Celebrezze, 368 F.2d 640 (4th Cir. 1966)] It is apparent from the record that the ALJ's findings that the Respondent was not intoxicated and that the results of the breathalyzer were not fully reliable is supported by substantial evidence and will not be disturbed.

II.

The ALJ erred by ruling that the Coast Guard failed to prove the Respondent refused to submit to a drug test.

The Coast Guard's Complaint charged Respondent with misconduct for refusing to submit to a "pre-access" drug screen that was required by Tidewater. [Complaint at 2] In order for this type of refusal to be construed as misconduct, the "pre-access" drug testing requirement must be "a formal duly established rule" which can be "found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources." 46 C.F.R. § 5.27. Although there was disagreement in the record whether the drug test at issue in this case was in fact properly established company policy that could constitute "a formal duly established rule," the ALJ assumed (to the benefit of the Coast Guard) that it was properly established company policy and then proceeded to evaluate the merits of the purported refusal. [D&O at 19]

The ALJ's determination that Respondent did not refuse a drug test is at the heart of this basis of appeal. There are numerous Coast Guard drug testing requirements for merchant mariners in 46 C.F.R. Part 16, including pre-employment, post–casualty, random, and reasonable cause drug testing. These types of testing represent the "minimum standards, procedures, and means to be used to test for the use of dangerous drugs." 46 C.F.R. § 16.101(b). Therefore, a marine employer may require further drug

testing, such as in this case, where Tidewater required "pre-access" drug testing prior to engaging in operations with Exxon. [D&O at 18-19] For the purposes of this appeal, I will assume, as did the ALJ, that Tidewater's requirement for "pre-access" drug testing prior to engaging in operations with Exxon is a legitimate additional form of drug testing and "a formal duly established rule." [*Id.*] & 46 C.F.R. § 5.27.

As the ALJ ultimately concluded, the regulations in 46 C.F.R. Part 16 establish the minimum drug testing requirements and incorporate the Department of Transportation's (hereinafter "DOT) testing procedures delineated in 49 C.F.R. Part 40, therefore, Tidewater's pre-access drug screen, in order to serve as a basis for a claim against a merchant mariner credential, must be conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. [D&O at 15 & 20] As a consequence, in order to show that Respondent refused to submit to a drug test, the Coast Guard must establish that the Respondent refused a drug test within the meaning of 49 C.F.R. § 40.191, as specifically incorporated by 46 C.F.R. § 16.105. The regulations describe several scenarios which may constitute a refusal. 49 C.F.R. § 40.191. Even though the ALJ generically determined that Respondent did not refuse the drug test, there are essentially only two pertinent regulatory refusal considerations relevant to this case, which are whether Respondent: (1) "[failed] to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure," and (2) he "[failed] to undergo a medical examination or evaluation, as directed by the [Medical Review Officer] as part of the verification process, or as directed by the [Designated Employer Representative] under § 40.193(d)." 49 C.F.R. §§ 40.191(a)(5) & (7).

Respondent provided an insufficient amount of urine for the drug testing; only producing 30mL of urine whereas the minimum amount for a valid test is 45mL. [TR at 22, 54 & 56; IO Exhibit 8; D&O at 5 & 19] When there is an insufficient amount of urine produced, 49 C.F.R. § 40.193 outlines a series of requirements that are placed on the collector, the Designated Employer Representative (hereinafter "DER"), the Medical Review Officer (hereinafter "MRO"), and the "referral physician" before Respondent's failure to provide a sufficient sample may be deemed a "refusal." In this regard, the conduct of the collector and the DER are at issue. 49 C.F.R. § 40.193.

When Respondent provided an insufficient amount of urine for a sample, the collector was subsequently required by the regulations to discard the insufficient specimen, urge the Respondent to drink up to 40 ounces of fluid dispersed over a reasonable amount of time, inform Respondent that he has up to three hours to provide an adequate specimen, and then document and inform the Respondent of the time at which the three hour period begins and ends. 49 C.F.R. §§ 40.193(b)(1) & (2). The relevant times for the three hour period are to be documented on the DOT Custody Control Form. IO Exhibit 9 is the form that was used to record this information for Respondent's sample. The form indicates that the first attempt to collect a sample occurred at 4:25 PM and further indicates that the "[Respondent] refused at 7:30 PM." [IO Exhibit 9] There is no data recorded on the form that explicitly memorializes that the Respondent was informed of when the three hour period begins and ends. In addition, as the ALJ noted, there is significant conflicting testimony in the record concerning whether Respondent was told that he could drink up to 40 ounces of fluid and that he had up to three hours to

provide another sample. [TR 25, 27-30, 54-55, 59-61, 64, 68, 70, 76, 83-85, 92-93, 95-96, 103, & 106; D&O at 10-11]

In addition, the ALJ discussed a significant discrepancy regarding whether Respondent was directed, as required by regulation, to seek a medical evaluation by the DER, which in this case was Mr. Dawson, regarding any potential inability to provide an adequate sample. [TR at 18, 34 & 78; D&O at 7] In particular, the regulations require:

> As the DER, when the collector informs you that the employee has not provided a sufficient amount of urine....*you must*, after consulting with the MRO, direct the employee to obtain, within five days, an evaluation from a licensed physician, acceptable to the MRO, who has expertise in the medical issues raised by the employee's failure to provide a sufficient specimen. (emphasis added)

49 C.F.R. § 40.193(c). During the hearing, the ALJ questioned the DER regarding what the Respondent was told:

> ALJ: Did you or anyone in your presence ever inform Mr. Mills of his rights to a get a doctor's exam for a medical reason—
>
> DER: No ma'am.
>
> ALJ: --for giving an insufficient sample?
>
> DER: No ma'am, I was not aware of his rights. Like I said before, I have no formal training for this.
>
> ALJ: Have you become aware of those rights since February 16th?
>
> DER: No ma'am.
>
> ALJ: Do you know what the regulations say about a person who can't give a sufficient sample?
>
> DER: No ma'am.

[TR at 34] In addition, the collector testified that he never informed the Respondent of these rights. [TR at 78] Therefore, the ALJ's ultimate conclusion that Respondent did not refuse a drug test because it was never shown that he "[failed] to provide a sufficient amount of urine when directed, and it has been determined, through a required medical evaluation, that there was no adequate medical explanation for the failure," and that he "[failed] to undergo a medical examination or evaluation, as directed by the MRO as part of the verification process, or as directed by the DER under § 40.193(d)," as required in the regulations, is supported by substantial and credible evidence in the record. [D&O at 221-22] & 49 C.F.R. §§ 40.191(a)(5) & (7).

Given the broad inconsistencies in the record regarding whether Respondent was actually informed of his rights in the drug testing process as required in the regulations and discussed *supra*, it was reasonable for the ALJ to conclude that the Respondent did not refuse a drug test as prescribed in 49 C.F.R. § 40.191, thus not constituting misconduct. The Coast Guard's second issue on appeal is denied and the finding of the ALJ in this regard will not be disturbed. Appeal Decisions 2654 (HOWELL), 2395 (LAMBERT), 2357 (GEESE), 2333 (AYALA), 2302 (FRAPPIER), 2226 (DAVIS) and 2214 (CHRISTENSEN).

CONCLUSION

The findings of the ALJ had a legally substantial basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. I find the Coast Guard's bases of appeal without merit.

ORDER

The order of the ALJ, dated at New Orleans, Louisiana, on October 27, 2004, is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28 of February, 2008.