

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
LICENSE NO. 796883	:	
and	:	NO. 2633
MERCHANT MARINER'S DOCUMENT	:	
No. REDACTED	:	
	:	
	:	
	:	
	:	
<u>Issued to: RANDAL D. MERRILL</u>	:	

This appeal is taken by the United States Coast Guard (Appellant) in accordance with 46 U.S.C. § 7702, 46 U.S.C. § 7704, 46 CFR § 5.701, and 33 CFR Part 20. By a Decision and Order dated November 1, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard at New Orleans, Louisiana dismissed Appellant's complaint against Randal D. Merrill (Respondent) after finding not proved a violation of use of a dangerous drug as set forth in 46 U.S.C. § 7704. The ALJ determined that Respondent's injury, discussed more fully below, could not be categorized as either a marine casualty or a serious marine incident and was, therefore, not within the scope of 46 CFR Part 16.¹ Accordingly, the ALJ determined that Respondent's employer lacked the authority to require Respondent to submit to a drug test. [Decision and Order (D&O) dated November 1, 2000, page 7] Although the hearing was completed and all evidence was

¹ 46 CFR 16.101 states that the regulations in Part 16 "...prescribe the minimum standards, procedures, and means to be used to test for the use of dangerous drugs." Under Part 16, drug testing is required in five circumstances: 1) Pre-employment testing (46 CFR §16.210); 2) Periodic testing (46 CFR §16.220); 3)

presented and placed in the record, the ALJ did not consider evidence of Respondent's positive test result after making his initial conclusion that Respondent's sample did not fall within the scope of the Coast Guard's drug testing regulations. Upon determining that "[t]he drug testing of Mr. Merrill on 11 November 1999 was not in accord with U.S. Coast Guard regulations for chemical testing of mariners as set forth in 46 CFR, Part 16" [D&O at 4], the ALJ summarily concluded his analysis and did not reach the penultimate issue of whether Respondent was a user of dangerous drugs.

PROCEDURAL HISTORY

The hearing in this matter commenced in New Orleans, Louisiana on April 11, 2000 and re-convened on April 13, 2000. Respondent elected to represent himself but was aided by his mother, Martha Anne Merrill, who acted as his non-professional counsel on the second day of testimony. At the hearing, Respondent admitted all jurisdictional allegations but denied the factual allegations of "Use of or Addiction to the Use of Dangerous Drugs." Appellant introduced into evidence the testimony of four (4) witnesses and eight (8) exhibits. While Respondent neither called witnesses nor introduced exhibits into evidence, he testified on his own behalf and actively cross-examined the Government's witnesses.

By Order dated November 1, 2000, the ALJ found the charge and specification not proved and dismissed the complaint. Appellant filed its notice of appeal on November 22, 2000, and requested 60-day extensions of time on December 27, 2000, and February 21, 2001. Appellant perfected its appeal by filing a brief on April 30, 2001, and amended its brief on May 1, 2001, within the filing requirements set forth at

Random testing (46 CFR §16.230); 4) Serious marine incident testing (46 CFR § 16.240); and, 5) Reasonable cause testing (46 CFR § 16.250).

33 CFR §20.1003. Therefore, this appeal is properly before me.

APPEARANCE: Troy G. Ingram, Attorney for Respondent, 2065 First Street, Suite 102, Slidell, Louisiana. The Investigating Officer was LT Sharif Abdrabbo, Marine Safety Office New Orleans, Louisiana.

FACTS

At all times relevant herein, Respondent held the license and merchant mariner's document captioned above, issued to him by the United States Coast Guard. Respondent's license authorizes him to serve as Master of steam motor vessels of not more than two hundred gross tons upon or near coastal waters. His license was issued on June 16, 1992, at Los Angeles, California.

On November 11, 1999, Respondent was in the process of reporting to duty when he parked his car in the Mobro Marine, Inc., parking area in Jacksonville, Florida. [Decision and Order (D&O) dated February 14, 2001, page 3] He subsequently cut his left hand as he was "...cutting...[his]...bags open from the flight from Seattle..." [Trial Record (Tr.) at 180] At the time of his injury, Mr. Merrill had not yet reported to work but was scheduled to work that day as an "at-the-bank" employee. [Tr. at 53]. In that capacity, he was not scheduled to work on a vessel in an "underway status" but rather, was working in a "non-specific position, essentially a caretaker status." [Tr. at 53-54] Upon cutting his hand, Mr. Merrill reported to the company's office and informed Mr. Paul Westcott of his injury. [Tr. at 180; D&O at 3].

Upon viewing Mr. Merrill's injury, Mr. Westcott offered to "take care of" Mr. Merrill's injury. [Tr. at 180] Mr. Merrill was informed that, if Mobro paid for his medical treatment, he would be required to submit to a urinalysis test. [Tr. at 70-71].

Mr. Westcott had concluded that, based on the circumstances of the incident, a urinalysis test was required under Federal regulation because he classified the test as a “post injury chemical tests.” [IO exhibit 2]

Mr. Merrill allowed Mobro to pay for his medical treatment and was transported to Magnolia Urgent Care Center in Green Cove Springs, Florida, where his wound was treated with 7 nylon skin sutures and where he submitted to a urinalysis test. [Tr. at 67; IO exhibit 5] Dr. William A. Jacobs, the Medical Review Officer (MRO) employed by Magnolia Urgent Care Center verified the report of Mr. Merrill’s urinalysis test and the chain of custody of his specimen. [Tr. at 112-118; IO exhibit 3]. The results of Mr. Merrill’s urinalysis test indicated that his urine had tested “positive” for the presence of cocaine metabolites. [IO exhibit 3] The MRO notified the Coast Guard of Mr. Merrill’s positive test result on December 29, 1999, following significant difficulty in contacting Mr. Merrill regarding the results. [Tr. at 155-161; IO exhibit 7] The instant charge and specification are based upon the MRO’s findings.

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ dismissing the complaint upon a determination that Mr. Merrill ‘s drug test was not in accordance with U.S. Coast Guard regulations for chemical testing of mariners as set forth in 46 CFR Part 16. Appellant sets forth the following bases of appeal:

- I. The ALJ erred by ruling that the rules of evidence governing Suspension & Revocation proceedings barred the admission of the urinalysis in this case.
- II. The ALJ erred by ruling that considerations of due process barred the admission of the urinalysis in this case.
- III. The ALJ erred by ruling that the urinalysis at issue in this case was the product of an illegal search and seizure in violation of the Fourth

Amendment of the U.S. Constitution, thus barring its admissibility in the hearing.

- IV. The ALJ erred by ruling that the urinalysis at issue in this case was fatally flawed, thus rendering it inadmissible.
- V. The ALJ erred in his factual determination that Respondent was ordered by his marine employer to take a drug test. In this case, Respondent voluntarily took the drug test in issue.
- VI. If the Respondent was ordered to take the drug test in issue, the ALJ erred by ruling that the marine employer did not have a valid basis for ordering the drug test under 46 CFR Part 16.

OPINION

I.

I will begin by concurrently discussing Appellant's first four bases of appeal. Appellant contends that Mr. Merrill's urinalysis was not admitted into evidence and, citing the rules of evidence, considerations of due process and the Fourth Amendment of the Constitution, asserts that the ALJ's failure to admit the urinalysis was in error. A thorough reading of the ALJ's D&O, however, reveals no such failure on the part of the ALJ. Indeed, the record clearly indicates that Respondent's urinalysis test results were admitted into evidence. [IO exhibits 2,3] The ALJ simply did not make a determination as to the meaning of those results. Therefore, it is incorrect to suggest that the evidence was not admitted.

II.

The ALJ erred in his factual determination that Respondent was ordered by his marine employer to take a drug test. In fact, Respondent voluntarily took the drug test in issue.

Appellant argues that, even if the urinalysis in issue was not within one of the five categories specifically delineated in 46 CFR Part 16, because the test was voluntarily taken, it is relevant, material and admissible in determining whether Mr. Merrill is a user of dangerous drugs. [Brief of Appellant, at 2] In relevant part, 46 U.S.C. § 7704(c)

makes clear that “[if] it is shown that a holder [of a Coast Guard license or merchant mariner’s document] has been a user of, or addicted to, a dangerous drug, the license...or merchant mariner’s document shall be revoked unless the holder provides satisfactory proof that the holder is cured.”

A review of the legislative history of the Coast Guard’s drug testing regulations, particularly those set out at 46 CFR Part 16, has great significance in analyzing the validity of Appellant’s claim. The legislative history of 46 CFR Part 16 states the intent of the Coast Guard’s drug and alcohol testing programs as follows:

...The regulations are intended to ensure that users of dangerous drugs are not issued licenses, certificates of registry, or merchant mariner’s documents, and are not accepted for employment on vessels engaged in commercial operations. Drug users and abusers will either be deterred from continued drug use or will be faced with sufficient probability of being identified in the workplace and precluded from employment in the industry when such use is detected through chemical testing...

[53 FR 47064, at 2] This view stems from the notion that “...it is beyond dispute that the public has an overriding interest in assuring that merchant vessel personnel performing duties which directly affect the safety of a vessel’s navigation or operations do so free from prohibited substances.” [*Id.*, at 4] Congress therefore concluded that “...[t]he impairing effects of drugs and the substantial risks to the public safety posed by merchant vessel personnel who use drugs underlies the compelling governmental interest in promulgating this rule.” [*Id.*, at 5] It is, therefore, readily apparent that the ultimate purpose of the Coast Guard’s drug testing regulations is to ensure that people holding merchant mariner’s licenses or documents do not use dangerous drugs. The ALJ’s ruling in this case, therefore, seems to be in opposition to the statutory intent of the Coast Guard’s regulations concerning drug use.

Citing my decision in *Jardin*, Appellant argues that even if Mr. Merrill's urinalysis was not conducted in accordance with 46 CFR Part 16, that fact, alone, does not preclude it from being used to determine that Mr. Merrill was a user of dangerous drugs. [See, Appellant's brief at 2.] In *Jardin*, I held that the revocation of a mariner's license or document can be predicated upon a voluntarily submitted urine sample that tests positive for the presence of a dangerous drug. Appeal Decision 2545 (JARDIN).

In *Jardin*, Mr. Mark A. Jardin was asked to submit to a drug test because his employer received information that Jardin may have used illicit drugs the evening before. Appeal Decision 2545 (JARDIN). Although Mr. Jardin contended that he might have been fired had he refused to submit to the drug test, I concluded that the test was a voluntary one. In so doing, I determined that "...[d]espite the conjectures and suggestions of Appellant's counsel in vigorous cross-examination...testimony was unshaken that Appellant voluntarily gave a specimen...." [*Id.*, at 4.] I also noted that Mr. Jardin, himself, had both voluntarily offered to provide his employer with a specimen (before being told he might lose his job) and that even after being told he might refuse the test, Mr. Jardin continued to cooperate with his employer. In essence, because I found Mr. Jardin's urinalysis to have been voluntary, I concluded that his arguments with respect to whether the requirements of 46 CFR Part 16 were met had no impact on the disposition of the case.

I note that the ALJ's D&O is silent on the issue of whether Respondent's urine specimen could be categorized as a voluntary donation as was the case in *Jardin*. If the ALJ determines that Mr. Merrill voluntarily submitted to a urinalysis test, that determination could dramatically alter the outcome of this case.

I have long held that, in Suspension and Revocation proceedings, the Coast Guard IO has the burden of proving all elements of the charge and specification in issue.

Appeal Decisions 2598 (CATTON); 2583 (WRIGHT). To prove the charge and specification in the instant case, the Coast Guard must make a *prima facie* case that Mr. Merrill used a dangerous drug. I have determined that a *prima facie* case of use of a dangerous drug is shown when (1) a party is tested for use of a dangerous drug, (2) test results show that a party has tested positive for the presence of a dangerous drug, and (3) the drug test is conducted in accordance with 49 CFR Part 40. Appeal Decisions 2584 (SHAKESPEARE); 2589 (MEYER); 2592 (MASON); 2603 (HACKSTAFF); 2598 (CATTON); 2583 (WRIGHT). In considering the proof of these elements, however, it must be kept in mind that 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. Appeal Decisions 2575 (WILLIAMS); 2522 (JENKINS); 2537 (CHATHAM); 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994); Appeal Decision 2546 (SWEENEY), *aff'd sub nom* NTSB Order No. EM-176 (1994).

I have previously held that the trier of fact is the judge of credibility and determines the weight to be given evidence. Appeal Decisions 2382 (NILSEN); 2365 (EASTMAN); 2302 (FRAPPIER); 2290 (DUGGINS); 2156 (EDWARDS); 2017 (TROCHE). In Appeal Decision 2296 (SABOWSKI), I stated:

The ALJ is not bound by the witnesses' opinions, but must make his own determinations based on the facts and the law. It is his function to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this manner is not subject to being reversed on appeal unless it is shown that the evidence upon which he relied is inherently incredible. (*citations omitted.*)

The record clearly indicates that the ALJ did not make a determination as to whether Mr. Merrill's drug test was voluntary. Pursuant to 33 CFR § 20.1004, when deciding a case on appeal, I may "...affirm, modify, or reverse the ALJ's decision or...[may]...remand the case for further proceedings." Given my authority and the fact that the ALJ did not make a determination as to the voluntariness of Mr. Merrill's urinalysis, I am remanding this case. The ALJ should determine whether Mr. Merrill voluntarily submitted to the relevant drug test and, if the ALJ finds in the affirmative, whether that determination would be sufficient to alter the outcome of this case. While the ALJ may hold further proceedings to assist in this determination, if he finds that the issue has sufficiently been developed in the record, he may determine whether Mr. Merrill voluntarily submitted to the relevant drug test absent further proceedings.

III.

If the ALJ finds that Mr. Merrill's drug test was voluntary, Appellant's final argument concerning a compulsory test would be irrelevant. Therefore, at this time, I decline to address the validity of Appellant's argument that the marine employer had a valid basis for requiring Mr. Merrill to submit to a drug test under 46 CFR Part 16.

CONCLUSION

The order of the Administrative Law Judge dated November 1, 2000, is VACATED. The case is REMANDED for further proceedings consistent with this decision.

ORDER

The Decision and Order of the Administrative Law Judge dated November 1, 2000, is REMANDED.

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T. J. BARRETT
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 3rd of September, 2002.