UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
	:	ON APPEAL
vs.	:	
	:	NO. 2635
MERCHANT MARINER'S DOCUMENT NO. XXX-XX-XXXX	:	
LICENSE NO. 8311351	:	
Issued to: Donald W. Sinclair, III	:	

This appeal is taken in accordance with 46 U.S.C. 7702, 46 U.S.C. 7704(c), 46 C.F.R. 5.701, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (D&O) dated February 14, 2001, an Administrative Law Judge (ALJ) of the United States Coast Guard at Houston, Texas, revoked Respondent's above captioned merchant mariner's document and license upon finding proved a charge of use of a dangerous drug. The ALJ stayed his order contingent upon a showing by the Respondent that he had enrolled to enter or had entered a certified drug rehabilitation program to complete the steps necessary to prove cure, as required by 46 U.S.C. 7704(c) and Appeal Decision 2546 (SWEENEY). Respondent was required to do this within thirty days of receipt of the ALJ's D&O. The thirty day period expired with Respondent failing to enroll in a drug rehabilitation program resulting in revocation of the above captioned merchant mariner document and license.

The single specification supporting the charge of use of a dangerous drug alleged that on March 20, 2000, Respondent had marijuana metabolites present in his body as was revealed through a post accident drug test. The hearing was held on August 23, 2000, in Houston, Texas, where Respondent appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced into evidence the testimony of six witnesses and twenty-nine exhibits. Respondent introduced into evidence his own testimony, the testimony of four additional witnesses, and seventeen exhibits. The ALJ's D&O was served on Respondent on February 14, 2001, and Respondent requested a continuance that was granted on April 10, 2001. Respondent filed his appeal on April 18, 2001, in a timely manner consistent with the ALJ's instructions. This appeal is properly before me.

APPEARANCES: Truett B. Akin, IV, Attorney, 440 Louisiana, Suite 1600, Houston, Texas 77002, for Appellant. The Coast Guard Investigating Officer was Lieutenant Derek A. D'Orazio and the Coast Guard Senior Investigating Officer was Lieutenant Commander Elmer Emeric, both stationed at Marine Safety Office Houston/ Galveston, Texas at 9640 Clinton Drive, Houston, Texas 77029.

FACTS

At all relevant times, Respondent held the above captioned merchant mariner document and license. On March 20, 2000, Respondent served as a deputy pilot and completed a qualification requirement for the Houston Pilots' Association by piloting the TMM OAXACA. The Association's master and senior pilot, Captain Robert Bratcher, supervised him. After piloting the TMM OAXACA outbound from Barber's Cut down

the Houston Ship Channel and into the Gulf of Mexico, Respondent and Captain Bratcher disembarked the TMM OAXACA to return home. After Respondent and Captain Bratcher left the TMM OAXACA, Captain Bratcher received a report that the vessel had run aground after they had left the TMM OAXACA. When he learned of the reported grounding, Captain Bratcher, on March 20, 2000, informed Respondent by telephone that he was going to investigate the grounding of the TMM OAXACA. Captain Bratcher later informed Respondent that the TMM OAXACA was no longer aground but underway and proceeding outbound. Unsure whether the TMM OAXACA had actually run aground and whether she had sustained damages, both Captain Bratcher and Respondent decided as a precautionary measure to take a chemical drug test by submitting a urine sample. Captain Bratcher did not direct that Respondent submit to urinalysis testing.

On March 20, 2000, Mr. Perry Porter collected a urine sample from Respondent at Marine Medical Inc., the designated collection facility for the Houston Pilots' Association. Mr. Porter, as part of his normal routine, had Respondent submit his urine and fill out the Drug Testing Custody and Control Form (DTCCF). In addition, because Respondent's urine sample was collected as a Department of Transportation split specimen analysis, Mr. Porter provided Respondent with two clean split specimen bottles for the collection of Respondent's urine sample. Upon receipt of Respondent's urine specimen, Mr. Porter sealed both of Respondent's specimen containers ("A" and "B" containers) in Respondent's presence. Mr. Porter then placed the two sealed split "A" and "B" urine containers into a plastic bag that he sealed in Respondent's presence. Respondent signed the DTCCF in Mr. Porter's presence signifying that the "A" and "B"

split specimen containers were sealed and dated in his presence at the date and time of the collection.

After Respondent provided the urine samples and certified they were his, the specimens were sent to Quest Diagnostics, Inc. where, upon receipt, an internal chain of custody and numbering system was established. The Respondent's "A" split specimen was initially tested on March 21, 2000, by immunoassay screening analysis and tested positive for the presence of marijuana metabolites. Thereafter, a second and more specific gas chromatography/mass spectrometry (GC/MS) test was conducted on March 23, 2000, which confirmed the initial test. The results were then forwarded to the Medical Review Officer (MRO), Dr. Suzanne Sergile, M.D., who interviewed Respondent and concluded that, despite Respondent's denial of use, there was no reasonable medical explanation for the presence of marijuana metabolites in Respondent's body. Respondent then requested that a second laboratory, LabOne, Inc., perform an additional analysis of Appellant's "B" split specimen. The GC/MS of the B specimen confirmed the positive test result of Quest Diagnostics, Inc. and Respondent was notified by Dr. Sergile that his third test result also screened positive for marijuana metabolites. Not finding an otherwise acceptable medical explanation for the presence of marijuana metabolites in Respondent's samples, the MRO verified the test as positive.

On his own initiative, Respondent then submitted another urine sample on March 23, 2000, at Marine Medical Inc., and also submitted hair samples on April 7 and April 20, 2000, at Drug Screens, Etc., for testing. These samples tested negative for the presence of illegal substances.

The record indicates that the TMM OAXACA grounded but that the grounding did not result in injuries, damage to the vessel, or pollution. A report of casualty was apparently not made to the Coast Guard in accordance with 46 C.F.R. 4.05.

Although the chain of custody was not contested by Respondent in his appeal, a review of the record reveals that Respondent's sample was properly collected, tested, and analyzed.

BASIS OF APPEAL

Respondent argues that the ALJ erred in determining that this matter was within his jurisdiction pursuant to 46 C.F.R. Parts 5 and 16, and 49 C.F.R. Part 40. Respondent asserts that since he voluntarily submitted his urine on March 20, 2000, he cannot be presumed to be a user of a dangerous drug pursuant to 46 C.F.R. 16.201(b) because that section only provides for chemical drug testing in pre-employment, periodic, random, post-serious marine incident, and reasonable cause situations. Respondent argues therefore that since his test of March 20, 2000, was not subject to 46 C.F.R. Part 16, it does not have to be conducted in accordance with 49 C.F.R. Part 40 which prohibits an MRO from considering subsequent chemical test results.

Stated succinctly, Respondent argues that since his sample was provided on a voluntary rather than a mandatory basis, the prohibition contained in 49 C.F.R. 40.33(b) against considering subsequent, other negative test results does not apply. [*See* Respondent's Brief at 2] 49 C.F.R. 40.33(b)(3) stated, in applicable part: "the MRO shall

not, however, consider the results or (of sic) urine samples that are not obtained or processed in accordance with this part."[1]

OPINION

I.

I must first address the issue of whether the March 20, 2000, test was voluntary or instead conducted pursuant to a requirement set out at 46 C.F.R. Part 16.

Under the provisions of 46 C.F.R. 16.240, a mariner involved in a "serious marine incident" is required to take a chemical drug test. A serious marine incident is defined, in applicable part, at 46 C.F.R. 4.03-2 as a casualty including "damage to property…in excess of $100,000." A marine employer must determine if a casualty is, or is likely to become, a serious marine incident for purposes of requiring the chemical test of those aboard the vessel. 46 C.F.R. 4.06-1(b). If a mariner fails such a post casualty chemical test, he is presumed to be a user of a dangerous drug. 46 C.F.R. 16.201, Appeal Decisions 2584 (SHAKESPEARE), 2529 (WILLIAMS).

This was not a serious marine incident requiring by regulation that a chemical test be conducted. Since the grounding did not rise to the level of a serious marine incident and the mariner employer did not direct him to provide a urine sample after the grounding of the TMM OAXACA, the Respondent was not required to submit a urine sample on March 20, 2000. However, a reading of the D&O at pages 8-9 and page 60

[1] At the time of this writing, 49 C.F.R. 40.33(b)(3) has been replaced by 49 C.F.R. 40.151(a)(2001). The new regulation retains the substance of the former regulation and instructs MROs to "not consider any evidence from tests of urine samples or other body fluids (e.g., blood or hair samples) that are not collected or tested in accordance with this part. For example, if an employee tells you he went to his own physician, provided the urine specimen, sent it to a laboratory, and received a negative test result or DNA test result questioning the identity of his DOT specimen, you are required to ignore the result"

I will continue to refer to 49 C.F.R. 40.33(b)(3) throughout this Appeal Decision since that regulation was in effect at all times relative to this case. The regulatory revision does not alter the analysis or result of this Appeal Decision.

shows that Respondent made an independent decision based on his own free will to take a drug test that subsequently showed that Respondent had marijuana metabolites in his body. The ALJ himself found that the Respondent took the test on that date as a "precautionary measure." [D&O pages 8-9] I agree with Respondent's assertion that the test of March 20, 2000, was "non-mandatory or voluntary." [*See* Respondent Brief at 3]

I have held that revocation of a mariner's license can be predicated upon a voluntarily submitted urine sample testing positive for an illegal drug. Appeal Decision 2545 (JARDIN). In Jardin, I found that the Coast Guard could rely on a voluntary test for suspension and revocation proceedings. I find the Jardin analysis is equally applicable in this case. Respondent's voluntary sample can be used as the basis for a charge of use of a dangerous drug.

II.

Having established that the March 20, 2000, test was admissible, I must next determine whether the ALJ did not, as Respondent alleges, review the results of subsequent testing done on urine submitted on March 23, 2000, and hair samples submitted on April 7 and 20, 2000, and whether the ALJ committed error in that respect.

Dr. Eric Comstock, a board certified medical toxicologist, testified at the hearing that the human body continuously and gradually flushes drugs out of its system. Dr. Comstock testified that that process could explain the negative test result of the urine sample provided on March 23, 2000. [Tr. at 739] Dr. Comstock also testified that the hair sample submitted on April 7, 2000, was not useful since Respondent's hair at that time had not grown sufficiently to correspond to the period surrounding the use of marijuana on or about March 20, 2000. [Tr. at 742, 744, 745, and 787] Dr. Comstock

further stated that the hair submitted on April 20, 2000, was not analyzed by the confirmatory and more specific GC/MS test. [Tr. at 799] Dr. Comstock also stated that hair testing to detect illegal drug use is not approved by the Food and Drug Administration and is not recognized under the Department of Transportation drug-testing program. [Tr. at 791] Finally, Dr. Comstock testified that 49 C.F.R. 40.33(b)(3), in pertinent part provides that: "the MRO shall not … consider the results of urine samples that are not obtained or processed in accordance with this part [49 C.F.R. Part 40]." [D&O page 37]

The ALJ did consider the results of the three subsequent tests. He gave them their appropriate weight and determined, based on a reading of 49 C.F.R. 40.33(b)(3) and Dr. Comstock's testimony, that they could not be used to cancel or negate the positive test result of the urine sample submitted on March 20, 2000. [D&O pages 54, 56-57]

The ALJ found that the urine sample submitted on March 23, 2000 could not be used because it was not probative or reliable. [D&O pages 54-55] I concur.

Next, the ALJ found that the "Respondent's April 7, 2000, first hair analysis drug test [was] totally irrelevant and disregarded in this case." [D&O page 55]. I concur.

The ALJ then found that the test result of the second hair sample submitted on April 20, 2000, was unreliable in the scientific community. [D&O page 37] I concur. The ALJ did find that the test results of the hair sample submitted on April 20, 2000, were "relevant to this proceeding in consideration of the record as a whole to ascertain the credibility and weight to be given to the testimony of the Respondent and his witnesses and the Investigating Officers' witnesses and all exhibits." [D&O page 58] I concur.

The ALJ found that the three subsequent tests of Respondent's urine and hair did not disprove that on March 20, 2000, there were marijuana metabolites in Respondent's urine. [D&O page 37] Moreover, the ALJ found that the positive urinalysis test results of the urine submitted on March 20, 2000, established a *prima facie* case that Respondent used a dangerous drug. [D&O pages 45-46] This created a presumption that Respondent used a dangerous drug and the ALJ found that Respondent's evidence did not rebut the strong evidence presented by the Coast Guard. [D&O page 46]

I will reverse the decision of the ALJ only if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff* NTSB Order No. EM- 182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). Findings 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 Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSEN), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD) and 2614 (WALLENSTEIN). The standard of proof for suspension and revocation proceedings is that the ALJ findings must be supported by reliable, probative, and substantial evidence. 46 CFR 5.63, Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF), 2575 (WILLIAMS).

Respondent's argument that subsequent negative test results should have been considered in determining whether he tested positive for marijuana on March 20, 2000, is without merit. The ALJ did consider all three subsequent test results but found them

unusable, irrelevant, or unreliable. The findings of the ALJ are supported by reliable, probative, and substantial evidence in the record.

Sufficient evidence exists in the record to support the determination by the ALJ that the Coast Guard had proven the specification of use of a dangerous drug. The decision of the ALJ was therefore not arbitrary, capricious, clearly erroneous, or contrary to law.

CONCLUSION

The findings of the ALJ are supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Administrative Law Judge's Decision and Order dated February 14, 2001, is AFFIRMED.

//S//
T. J. BARRETT
Vice Admiral
Vice Commandant

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