

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
	:	
	:	ON APPEAL
vs.	:	
	:	NO. 2637
	:	
	:	
MERCHANT MARINER DOCUMENT	:	
<u>Issued to: Edwin Turbeville</u>	:	

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 January 22, 2002, an Administrative Law Judge (ALJ) of the United States Coast Guard at Baltimore, Maryland, revoked Respondent's above captioned merchant mariner's document upon finding proved a charge of use of a dangerous drug.

The single specification supporting the charge of use of a dangerous drug alleged that on March 22, 2001, Respondent had marijuana metabolites present in his body as was revealed through a random drug test. The hearing was held on October 30, 2001, in Baltimore, Maryland, where Respondent appeared with counsel and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced three witnesses and five exhibits. Respondent introduced into evidence his own testimony, the testimony of three additional witnesses, and seven exhibits. A joint stipulation of fact was introduced. The ALJ's D&O was served on Respondent on

January 24, 2002, and Respondent filed a notice of appeal on February 14, 2002.

Respondent filed his appeal on March 25, 2002, in a timely manner. This appeal is properly before me.

APPEARANCES: John A. Bourgeois, Esq., Kramon & Graham, One South Street, Suite 2600, Baltimore, MD, 21202. The Coast Guard Investigating Officers were LCDR Mark E. Hammond, USCG, and BM1 James Gilchrist, USCG, stationed at Coast Guard Activities Baltimore, 2401 Hawkins Point Road, Baltimore, MD, 21226.

FACTS

At all relevant times, Respondent held the above captioned merchant mariner's document.

Respondent was subject to, and participated in, a random urinalysis test on March 22, 2001, aboard the M/V DELAWARE BAY, while the vessel was moored at Port Newark, NJ. [Joint Exhibit 1] The vessel had just completed a three-month voyage with Respondent as a member of the crew on March 22, 2001. [Tr. at 159; D&O at 14]

On March 22, 2001, Ms. Phyllis Cheezun of Riverview Paramedical collected a urine sample from Respondent aboard M/V DELAWARE BAY [Joint Exhibit 1] Ms. Cheezun had Respondent submit his urine and fill out the Federal Drug Testing Custody and Control Form (FDTCCF). [Joint Exhibit 1] By signing this form, Respondent certified that his specimen had not been adulterated and that his specimen bottle had been sealed with a tamperproof seal. [Joint Exhibit 1] Respondent's specimen was properly prepared for shipment and shipped to the lab, Quest Diagnostics, Inc., for

analysis. [Joint Exhibit 1] Respondent's specimen was received at the Quest Diagnostics lab in San Diego, CA, intact and with no evidence of tampering. [Joint Exhibit 1]

Respondent's specimen was initially tested on March 23, 2001, by immunoassay screening analysis and tested positive for the presence of marijuana metabolites. [Tr. at 71; IO Exhibit 2] Thereafter, a second and more specific gas chromatography/mass spectrometry (GC/MS) test was conducted on March 24, 2001, which confirmed the initial test. [Tr. at 92; IO Exhibit 2].

The results were then forwarded to the Medical Review Officer (MRO), Dr. Timothy J. McCormick. Dr. McCormick interviewed Respondent on April 3, 2001, to determine whether a legitimate excuse or explanation existed to account for the positive drug test results. [Tr. at 39] Dr. McCormick identified himself as the MRO for the marine employer and asked Respondent if he could provide an explanation for the test results. [Tr. at 40]

Respondent told Dr. McCormick that he had taken various over the counter medications for fatigue and sinus problems. [Tr. at 41] Respondent also told the MRO that he was taking a number of supplements such as St. John's wort, garlic, ginseng, and ginkgo biloba. [Tr. at 42] Respondent did not mention to the MRO that he was taking any hemp products. [Tr. at 43]

Respondent requested on April 3, 2001, that his sample of March 22, 2001, be retested. [Tr. at 43] The MRO had the sample of March 21, 2001, retested at American Medical Laboratories in Chantilly, VA. [Tr. at 44] American Medical Laboratories reported a positive test result for the presence of marijuana metabolites on the aliquot of the sample submitted on March 22, 2001. [Tr. at 44; Joint Exhibit 1; IO Exhibit 3]

Dr. McCormick concluded that there was no legitimate medical explanation for the presence of marijuana metabolites in Respondent's body. [Tr. at 45]

A review of the record reveals that Respondent's sample was properly collected, tested, and analyzed.

BASIS OF APPEAL

- I. *The ALJ erred in concluding that the Coast Guard was entitled to a presumption that Mr. Turbeville Used Drugs;*
- II. *The ALJ erred as a matter of law when he concluded that Mr. Turbeville had failed to meet or rebut the presumption, improperly shifting to Mr. Turbeville the burden of production and persuasion;*
- III. *The ALJ made numerous errors which affected his ultimate findings and conclusions:*
 1. *The quantities of hemp product on board;*
 2. *Mr. Turbeville's credibility;*
 3. *Ms. Stupski's testimony;*
 4. *Support for Dr. Simon's opinions;*
 5. *The ALJ misinterpreted Dr. Simon's testimony regarding hemp and positive drug tests.*

OPINION

- I. *The ALJ erred in concluding that the Coast Guard was entitled to a presumption that Mr. Turbeville used drugs.*

Respondent contends that the evidence showed that he had tested positive for marijuana but not that he had used drugs or was addicted to drugs. Respondent contends that the testing laboratory failed to comply with the chain of custody requirements, that his sample was improperly handled, and that the testing was not conducted on a properly calibrated instrument.

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). The ALJ is vested with broad discretion regarding the credibility of witnesses and in resolving inconsistencies in the evidence since the ALJ is in the best position to evaluate such evidence. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH) 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 C.F.R. §5.63, Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF), 2575 (WILLIAMS).

A license or merchant mariner's document issued by the Coast Guard must be revoked if it is shown that the holder has been a user of a dangerous drug.

46 U.S.C. §7704(c). If a mariner fails a drug test, he is presumed to be a user of a dangerous drug. 46 C.F.R. §16.201(b); Appeal Decisions 2584 (SHAKESPEARE), 2529 (WILLIAMS). To prove use of a dangerous drug, the Coast Guard must establish a *prima facie* case of use of a dangerous drug by the mariner.

46 C.F.R. §5.539; Appeal Decisions 2584 (SHAKESPEARE), 2379 (DRUM),

2282 (LITTLEFIELD), 2589 (MEYER), 2592 (MASON), 2529 (WILLIAMS),
2583 (WRIGHT).

For the presumption to arise, the Coast Guard must prove: (1) that the Respondent was the person who was chemically tested for dangerous drugs; (2) that Respondent failed the chemical test for dangerous drugs; and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF); Appeal Decision 2592 (MASON) ; Appeal Decision 2589 (MEYER).

Relying upon the Joint Stipulation, the testimony of Mr. James Callies, the Scientific Director of Quest, and the testimony of Dr. McCormick, the ALJ found that the chain of custody had not been broken, that Respondent's urine sample was properly handled, and that Department of Transportation regulations had been satisfied. [D&O at 10-12]

The ALJ found that Respondent was chemically tested for dangerous drugs for urine he submitted on March 22, 2001. [D&O at 3-5] The ALJ found that Respondent failed the chemical test for dangerous drugs by testing positive for the presence of marijuana metabolite. [D&O at 5] The ALJ made specific factual findings concerning the collection, identification, shipment, and testing of Respondent's urine. [D&O at 3-5] These specific factual findings reveal that the requirements of 46 C.F.R. Part 16 were satisfied.

Respondent's argument that the test was not conducted on a properly calibrated instrument is without foundation based on the record. Mr. Callies testified without objection by Respondent concerning the quality control calibration procedures for the testing instrument used in Respondent's case. [Tr. at 91] In addition, the litigation

package prepared by Quest was admitted into evidence without objection. [IO Exhibit 2; Tr. at 84]

Sufficient evidence exists to support the findings of the ALJ that the Coast Guard had established a *prima facie* case of drug use by Respondent, and the presumption attached.

II. The ALJ erred when he concluded that Mr. Turbeville had failed to meet or rebut the presumption, improperly shifting to Mr. Turbeville the burden of production and persuasion.

Respondent contends that if the positive drug test gives rise to a presumption of drug use, it merely shifts the burden of production to Respondent to produce some evidence contrary to the presumed fact. Respondent contends that the ALJ improperly shifted both the burden of production and the burden of persuasion upon Respondent as this had the improper effect of shifting the burden of proof away from the Coast Guard.

Respondent argues that he met his burden of coming forward by showing his use of large quantities of hemp oil. Respondent argues that he therefore met his burden of production as he produced evidence to rebut the presumption. Respondent contends that once he rebutted the presumption, the Coast Guard failed to adduce evidence to prove the charge.

I disagree.

Subpart G of Title 33 C.F.R. governs the standard of proof, the burden of proof, and presumptions. The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence. *See* 46 C.F.R. §20.701. Except for an affirmative defense, ...the Coast Guard bears the burden of proof. 33 C.F.R.

§20.702 (emphasis added). In each administrative hearing, a presumption imposes on the party against whom it lies the burden of going forward with evidence to rebut or meet the presumption. 33 C.F.R. §20.703(a). The presumption does not shift the burden of proof. 33 C.F.R. §20.703(b).

The ALJ determined that Respondent raised an affirmative defense by arguing that his prior use of hemp seed products caused the positive test results for marijuana, in accordance with his pre-hearing notice. [D&O at 10] During the hearing, Respondent testified that he had used hemp oil products extensively aboard M/V DELAWARE BAY prior to submitting his sample for testing. [Tr. at 159] He also testified that the hemp oil products could have caused the positive test result. [Tr. at 195] This determination by the ALJ was neither referenced nor objected to in Respondent's brief.

By raising an affirmative defense, Respondent bore the burden of proof once the Coast Guard had established its presumption pursuant to 33 C.F.R. §20.701 and 33 C.F.R. §702(a). The ALJ found that Respondent failed to rebut the presumption that he was a drug user. [D&O at 8] The ALJ found Respondent's testimony to be misleading, inaccurate, self-serving, and not credible. [D&O at 15-16] The ALJ also found Dr. Robert K. Simon's testimony on Respondent's behalf to be of little weight. [D&O at 14] The ALJ further found that another witness for Respondent, Ms. Donna Stupski, lacked personal knowledge about his possible use of hemp oil prior to the drug testing.

Sufficient evidence exists to support the findings of the ALJ that Respondent failed to rebut the presumption that Respondent had used a dangerous drug.

III. ALJ made numerous errors which affected his ultimate findings and conclusions:

- 1. The quantities of hemp product on board;*
- 2. Mr. Turbeville's credibility see pp 15-16 of D&O;*
- 3. Ms. Stupski's testimony;*
- 4. Support for Dr. Simon's opinions;*
- 5. The ALJ misinterpreted Dr. Simon's testimony regarding hemp and Positive drug tests.*

Respondent argues that the ALJ erroneously considered the above cited points in an objective and impartial manner and this led to the conclusion by the ALJ that Respondent failed to rebut the presumption that he had used a dangerous drug.

As noted, the ALJ is vested with broad discretion regarding the credibility of witnesses and in resolving inconsistencies in the evidence since the ALJ is in the best position to evaluate the evidence. The ALJ in this case did weigh all the evidence presented and did not abuse his discretion in his findings.

When considering the defense of hemp oil ingestion in a case alleging use of marijuana, the ALJ can properly take into account the overall credibility of Respondent and whether evidence exists to corroborate his assertion. Appeal Decision 2626 (DRESSER).

The ALJ considered the quantities of hemp oil products Respondent claimed to have had aboard M/V DELAWARE BAY during and immediately after the voyage that ended on March 22, 2001. [D&O at 15]. The ALJ considered the credibility of Respondent's testimony. [D&O at 14-16] The ALJ considered the testimony of Ms. Stupski. [Tr. at 14]. The ALJ considered the testimony of Dr. Simon. [D&O at 14]

The ALJ, as noted, found Respondent's testimony to be misleading,

inaccurate, self-serving and not credible. This finding was based in part upon the testimony of Dr. McCormick regarding the failure of Respondent to mention the use of hemp oil products when attempting to explain the positive test result. [D&O at 16] While Respondent disputed the testimony of Dr. McCormick in his brief [Respondent's Appellate Brief at 9], he neither assigned this as an error nor did he offer any support for the assertion. Similarly, Respondent did not assign as error the finding by the ALJ that Respondent failed to present a corroborating witness concerning his use of hemp oil products while aboard M/V DELAWARE BAY. [D&O at 16]

Respondent's arguments are without merit. The findings of the ALJ are supported by reliable, probative, and substantial evidence in the record. The findings of the ALJ were also supported by evidence that Respondent did not assign as error. The findings of the ALJ were not arbitrary, clearly erroneous or based upon inherently incredible evidence.

CONCLUSION

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

ORDER

The Administrative Law Judge's Decision and Order of January 22, 2002, is
AFFIRMED.

//S//
THOMAS J. BARRETT

Signed at Washington, D.C., this 6TH day of March, 2003.