UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	VICE COMMANDANT
LICENSE NO. 852819	:	
	:	ON APPEAL NO. 2621
Issued to: Gregory L. Periman	:	

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.[1] By an order dated March 26, 1999, an Administrative Law Judge (ALJ) of the United States Coast Guard at Norfolk, Virginia revoked Appellant's above-captioned license upon finding proved a charge of *use of a dangerous drug*, based upon a positive urinalysis.

This remands the case for consideration of evidence for the most part developed by Mr. Periman after the hearing as to (1) violations noted by the National Laboratory Certification Program in the procedure used in testing the Appellant's sample; (2) false testimony by the Director of Lab Operations (no longer employed at the lab) about his credentials; (3) misinformation provided to appellant about his right to have another lab retest his sample; and, (4) premature disposal of appellant's sample, precluding further testing.

PROCEDURAL HISTORY

The hearing was held on January 7, 1999, in St. Louis, Missouri and by telephone on March 15, 1999. Appellant appeared without an attorney and entered a response denying the charge and specification. The Coast Guard Investigating Officer introduced

[1] Since the time of Appellant's hearing before the Administrative Law Judge, the procedural regulations for Coast Guard suspension and revocation hearings have been amended. *See* 64 Fed. Reg. 28075 (May 24, 1999), 46 C.F.R. Part 5 (1999 edition), 33 C.F.R. Part 20 (2000 edition). As Appellant's hearing occurred prior to the change in the regulations, this appeal is based on the procedural rules in place at the time of the hearing. Any reference in this opinion to the regulations contained in 46 C.F.R. Part 5 (§§ 5.1 – 5.905) is a reference to 46 C.F.R. Part 5 (1998 edition).

into evidence the testimony of four witnesses and twelve exhibits. Appellant introduced into evidence the testimony of one witness, nine exhibits and his own testimony.

The ALJ's Decision and Order (D&O) was served on Appellant on March 26, 1999. Appellant filed a notice of appeal on April 19, 1999, and received a copy of the transcript on or about August 23, 1999. Appellant filed his first brief on appeal on March 10, 2000; he was permitted to file a supplemental brief on May 28, 2000. This matter is properly before me.

APPEARANCE: Appellant represented himself. The United States Coast Guard Investigating Officer was Lieutenant Christopher O'Neil.

FACTS

At all times relevant, Appellant was the holder of the above captioned license. On August 21, 1998, Appellant was serving as the Pilot aboard the tug STEVE T. At 0345, Appellant notified his employer that the tug allided with the Chester Piers at Milepost 110 on the Upper Mississippi River. Appellant's employer instructed him to submit to a chemical test for dangerous drugs when the tug reached St. Louis. After Appellant arrived in St. Louis, he proceeded to Barnes Memorial Hospital for his drug test and provided a urine sample. (The regulations now require collection of two samples). 49 C.F.R. § 40.71 (65 Fed. Reg. 79538).

The person collecting Appellant's urine sample was a certified drug alcohol technician employed by Clinical Collection Management. The Federal Custody and Control Form (CCF) was completed and signed by both the Appellant and the Collector. The Collector forwarded Appellant's sample to the laboratory for testing.

On August 25, 1998, a U.S. Department of Health and Human Service (DHHS) certified drug testing laboratory, Lab One, Inc., received Appellant's urine sample for testing. The laboratory tested the urine sample using Gas Chromatography/Mass Spectrometry and determined that Appellant's urine sample was positive for marijuana. The laboratory forwarded the results of the positive test to the qualified Medical Review Officer (MRO), Ashokkumar B. Patel, M.D.

The MRO received documentation from the laboratory concerning Appellant's specimen. On August 28, 1998, the MRO interviewed Appellant by telephone and then certified that Appellant's test was positive for marijuana. Dr. Patel testified that he

incorrectly advised Appellant to ask his employer to seek a retest when 49 CFR 40.33(e) required that the MRO order a retest when requested to do so by the subject.

On January 7, 1999, Mr. Allan Earl Davis testified for the Government at Appellant's hearing. Mr. Davis, then Director of Laboratory Operations at Lab One, testified that he had served as the chief pathologist for the Armed Forces Medical Examiner's Office from 1984 to 1988, and testified about his lab's procedures.

After the hearing, Appellant convinced DHHS to review the testing of his sample. The National Laboratory Certification Program reported to DHHS that Lab One, Inc. had violated two of the lab's own procedures when testing Appellant's sample. The report, dated May 23, 2000, was brought to the Coast Guard's attention when Appellant appended it to his supplemental brief filed on May 28, 2000. Appellant also stated in his supplemental brief that the remainder of his sample had been prematurely destroyed by Lab One, Inc. in apparent violation of 49 CFR 40.29(h) requiring retention of the sample pending resolution of legal proceedings. Finally, Appellant stated that the witness, who had testified about lab procedures, was no longer employed at Lab One, Inc. because he was found to have misrepresented his qualification.

BASES OF APPEAL

This appeal has been taken from the Order imposed by the ALJ. From Appellant's brief and supplemental brief, I have discerned the following bases of appeal. Any other issues that might be contained in Appellant's filings are either cumulative of those listed below, or are inappropriate for resolution in this forum. 46 C.F.R. § 5.701. Those I have deemed ripe for review are:

1. Whether the ALJ erred in determining that the Coast Guard had established a *prima facie* case of use of a dangerous drug.
2. Whether numerous alleged errors in the drug testing process, either singly or cumulatively, are sufficient to rebut the presumption raised by establishment of a *prima facie* case that Appellant is a user of dangerous drugs.

OPINION

I

Appellant claims the Coast Guard failed to establish a *prima facie* case for use of a dangerous drug. In merchant mariner licensing suspension and revocation proceedings, a *prima facie* case is established if the Coast Guard produces sufficient proof to the stage where it will support a finding that a charge is proved if evidence to the contrary is disregarded. *See e.g.*, Askin v. Firestone Tire and Rubber Co., 600 F. Supp. 751 (E.D. Ky. 1985). The Coast Guard carries the burden of establishing a *prima facie* case of use of a dangerous drug. Appeal Decisions 2379 (DRUM) and 2282 (LITTLEFIELD). In this type of case, a *prima facie* case is established by showing that Appellant: 1) was tested for a dangerous drug; 2) that he tested positive for a dangerous drug; and 3) that the test was conducted in accordance with 46 C.F.R. Part 16. If a *prima facie* case is established, the Coast Guard raises a presumption that the charge of use of a dangerous drug is proved. Appeal Decision 2584 (SHAKESPEARE). The burden then shifts to the Respondent/Appellant, who must produce persuasive evidence to rebut the presumption. Appeal Decision 2379 (DRUM). If such persuasive rebuttal evidence is not produced, the ALJ may, on the basis of the presumption alone, find the charge proved. Appeal Decisions 2266 (BRENNER) and 2174 (TINGLEY).

The ALJ is in the best position to weigh the testimony of witnesses and other evidence to determine if the Coast Guard has presented a *prima facie* case and to determine if Appellant has appropriately rebutted the Coast Guard's evidence. Appeal Decisions 2421 (RADER) and 2319 (PAVELIC). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS) and 2474 (CARMIENKE).

The ALJ determined that Appellant was tested for dangerous drugs (D&O at 4-6); that Appellant tested positive for a dangerous drug (D&O at 6-7); and that the test was conducted in accordance with 46 C.F.R. Part 16 (D&O at 10-11). Based on these determinations, the ALJ concluded that the Coast Guard had established a *prima facie* case. D&O at 12, Supplemental Transcript at 27. The record before me contains ample evidence supporting that conclusion. Furthermore, given the state of the record at the time he issued his D&O, the ALJ's findings and decision are not arbitrary, capricious,

clearly erroneous or based on inherently incredible evidence. I find that the Coast Guard established a *prima facie* case. I will not disturb the findings of the ALJ in that regard.

II

The ALJ found that Appellant did not rebut the presumption raised by the Coast Guard after the *prima facie* case was established. D&O at 12. The burden of rebutting the presumption lies with the Appellant. Appeal Decisions 2592 (MASON) and 2379 (DRUM).

Appellant raises three issues to rebut the presumption raised by the Coast Guard's *prima facie* case. After reviewing the record, and Appellant's briefs, I am unable to determine if the presumption has been rebutted. Additional proceedings are required.

The Commandant has well established authority to remand a case for further proceedings. 46 C.F.R. § 5.705(a). Furthermore, the Commandant may order the ALJ to reopen former proceedings for further proceedings. 46 C.F.R. § 5.709(a). In accordance with 46 C.F.R. §§ 5.601 and 5.603, a Coast Guard administrative hearing may be reopened on the basis of newly discovered evidence. The basic requirements to reopen a hearing are that Appellant fully describe the newly discovered evidence and provide an explanation why Appellant, with due diligence, could not have discovered such new evidence prior to the completion of the hearing. 46 C.F.R. § 5.603(a), Appeal Decision 2533 (ORTIZ).

First, Appellant claims the MRO failed to inform Appellant that he could request a retest of his urine sample in accordance with 49 C.F.R. § 40.33(e). [2] Based on the record, it is not clear whether the MRO's guidance to the Appellant about a re-test complies with this provision. At the hearing, the following exchange occurred:

> IO: So you have there then, it says Advil and then the next entry is positive marijuana, and then I'm sorry, you say advised of what?
>
> MRO: That he [Appellant] can request a split specimen to be tested with his company.

2 49 C.F.R. § 40.33(e). In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee's having been informed of a positive test, the Medical Review Officer shall direct, in writing, a reanalysis of the original sample.

> IO: Did he say that he wanted that done?
>
> MRO: He did not indicate anything because it is up to him to make that decision and communicate it with his employer.

TR at 144.

It appears that the MRO told the Appellant that he could request a re-test only through his employer, but the extent of the MRO's advice on this issue is not clear. TR at 144-146 and IO 12. Based on the plain language of the regulation, it is clear that Appellant is not required to seek a re-test only through his employer. 49 C.F.R. § 40.33(e). Rather, an employee should request a re-test through the MRO. *Id*. Because the record is not clear, I am remanding this issue to the ALJ for further proceedings.

Second, Appellant claims a critical Government witness destroyed his credibility by lying about his professional and academic credentials. Specifically, Appellant challenges the credibility of the laboratory representative, Mr. Allan Earl Davis, who testified for the Government. As an attachment to his appellate brief, Appellant submitted a letter signed by Dr. Jerry Spencer, M.D., J.D. of the Armed Forces Institute of Pathology, dated February 14, 2000. Appellant's Exhibit A-2. The letter calls into question the testimony and credentials of Mr. Davis, specifically, Mr. Davis' statement that he served as the chief pathologist for the Armed Forces Medical Examiners Office from 1984 to 1988. TR at 85. Appellant also submitted a letter dated February 21, 2000, from the North Carolina Central University Registrar that calls into question Mr. Davis' academic credentials. Appellant's Exhibit A-1.

Mr. Davis was the only witness to testify for the Government about laboratory procedures in the drug lab that processed Appellant's urine sample. In reaching his decision, the ALJ stated that in "[r]eviewing the testimony of Mr. Davis and the evidence, I am convinced that a proper chemical analysis was made of Mr. Periman's urine sample and that the positive result for marijuana metabolites is correct and supported by the evidence." D&O at 10-11. However, Exhibits A-1 and A-2 were not available to either the Appellant or the ALJ at the time of Appellant's hearing, and it is unclear what effect the allegations of fabricated credentials, if true, would have had on the ALJ's conclusions. I have determined that Appellant's exhibits A-1 and A-2 describe

newly discovered evidence as defined in 46 C.F.R § 5.603(a), and, as such, serve as one basis for remanding this case for further proceedings.

Third, Appellant has produced new evidence about the procedures used by Lab One, Inc. in testing his sample. At Appellant's behest, on May 24, 2000, the Coast Guard received a report from Dr. Walter Vogel, Ph.D of the Division of Workplace Programs, Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, (the DHHS report) concerning Appellant's urine sample. The DHHS report states on page three that, "The specimen identified by CCF number 06233431[this number matches Appellant's CCF number] appeared to contain THCA at a concentration of 67 ng/ml. It is unclear if the analysis of control materials included with this specimen met the laboratory's acceptance criteria as stated in the SOP. The forensic defensibility of the result may be arguable." The report further states, "The documents provided by the laboratory included a letter from the Coast Guard dated 17 September 1998 requesting copies of Bottle A and B CCF's for administrative hearing. Internal custody forms appear to document the disposal of the specimen "A" and "B" bottle on 1 September 1999."

The DHHS report was not available at the time of the Appellant's hearing, but, if the allegations in the report are true, they raise significant issues about the integrity of the drug testing system in place during Appellant's test. *See e.g.* Appeal Decision 2614 WALLENSTIEN. The issues raised include questions about the laboratory's testing procedures and whether the laboratory disposed of the Appellant's sample prematurely in violation of 49 C.F.R. § 40.29(h).

The ALJ did not have the opportunity to review and weigh the DHHS report before deciding this case. It is clear that due diligence on the part of the Appellant would not have led to the discovery of such evidence prior to the completion of the hearing. The laboratory held most of the evidence at issue in the DHHS report, and it took some time for this information to come to light. Furthermore, there is a serious question about whether this information would have come to light at all, if the allegations regarding the credibility of the Government's chief witness are true. I have determined that the DHHS report constitutes newly discovered evidence that requires additional proceedings to be fully developed and considered

Pursuant to 46 C.F.R. § 5.603, the Investigating Officer, through his Commanding Officer, submitted comments concerning these developments. Letter from Commanding Officer, USCG Marine Safety Office St. Louis to Commandant (G-LMI) (July 7, 2000) *as amended by* letter from LT C.T. O'Neil, USCG to Commandant (G-LMI) (July 31, 2000). The Investigating Officer urges, if the hearing is reopened, that any evidence received be limited only to the question of Mr. Davis' credentials.

Appellant has repeatedly indicated to my staff that he objects to reopening this case and instead would like me to decide the matter based on the current record. Letters from Mr. G. T. Periman to Commandant (G-LMI) (July 23, 2000, August 1, 2000, August 18, 2000).

The Secretary of Transportation has delegated to the Commandant general superintendence of the merchant marine of the United States and of merchant marine personnel. 46 U.S.C. § 2103, 49 C.F.R. § 1.46. Included within those duties is the requirement to enforce the merchant marine personnel drug testing laws and to carry out correctly and uniformly administer the merchant marine personnel drug-testing program. *Id.*, 46 U.S.C. Subtitle II, Part E.

In the interest of justice, and the integrity of the entire drug testing system, I remand this matter back to the ALJ and reopen the former proceedings for further proceedings, on an expedited basis, consistent with this decision. Appeal Decision 2614 (WALLENSTEIN).

ORDER

The case is REMANDED for further proceedings in accordance with the following instructions:

> The ALJ shall withdraw the original decision dated March 26, 1999, and issue a new decision based on the record of the original hearing and any new evidence received, consistent with this opinion. 46 C.F.R. § 5.605(e). A copy of this decision, along with any new evidence received at the hearing shall be appended

to the original hearing record. I note that a "reopened" hearing is not a hearing *de novo*. Appeal Decision 2263 (HESTER).

T. H. COLLINS
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 22 day of January, 2001.