UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 599185 DOCUMENT NO. (REDACTED) Issued to: James C. GEORGE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2527

James C. GEORGE

This appeal has been taken *in* accordance with 46 U.S.C. 7702 and 46 C.F.R. 5.701.

By an order dated 14 November 1990, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida revoked Appellant's Merchant Mariner's License and Document for use of a dangerous drug. Appellant was charged with the use of dangerous drugs supported by a single specification alleging that Appellant, while the holder of the above-captioned document, did wrongfully use cocaine as evidenced in a urine specimen collected on 14 August 1989 which subsequently tested as positive for the presence of cocaine metabolite. The hearing was held on 11, 12 and 26 April 1990 at Miami, Florida. Appellant appeared at the hearings and was represented by professional counsel with the exception that Appellant was absent from part of the hearing on 11 April 1989. At his request, the hearing continued in *absentia* with Appellant represented by his counsel.

The Investigating Officer presented 17 exhibits, including the deposition of one witness, which were admitted into evidence and introduced the testimony of three witnesses. Appellant presented 17 exhibits which were admitted into evidence, introduced the testimony of two witnesses, and testified in his own behalf. Appellant entered the answer of deny to the charge and specification.

The Administrative Law Judge's written Order was issued on 14 November 1990. Appellant filed his notice of appeal on 7 December 1990 within the time period prescribed in 46 C.F.R. 5.703. Following receipt of the transcript of the proceedings on 31 December 1990, Appellant timely filed a supporting brief on 19 February 1991, having received an extension of the filing deadline. Accordingly, this matter is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of the above-captioned document and license issued to him by the Coast

Guard on 29 December 1988 at Boston, Massachusetts which qualifies him to serve as First Assistant Engineer of steam vessels of any horsepower and Second Assistant Engineer of motor vessels of any horsepower.

On 10 August 1989, Appellant reported to Examination Management Services, Inc. (EMSI), Burlington, Massachusetts to submit a urine specimen pursuant to a pre-employment testing arrangement with the Masters, Mates and Pilots Association. Appellant submitted a urine specimen which he gave to the collection supervisor. In Appellant's presence, the supervisor assigned an accession number to the container and closed the container with a tamper-proof seal that bore the same accession number.

Appellant executed his signature to a certification stating: "I certify that I have provided my urine specimen to the collector which is now contained in the collection bottle marked with the identification number identical to the number in block (a) of this form. The bottle was sealed with a tamper-proof seal in my presence with the identification number affixed."

The urine specimen was shipped by courier to the Nichols Institute Substance Abuse Testing facility (NISAT) which received it on 12 August 1989. The screening test and confirmation analysis indicated the presence of benzoylecgonine (cocaine metabolite). The confirmation analysis was done by gas chromotography/mass spectrometry in accordance with the guidelines established in 49 C.F.R. 40.29(f). The test results were forwarded to Greystone Health Sciences Corporation (Greystone), the medical review authority. A licensed physician reviewed the results and conducted an interview by telephone with Appellant. On 21 August 1989, Greystone confirmed the NISAT's test results.

Appearance: Allan M. Elster, P.A., 17971 Biscayne Blvd., Suite 204, N. Miami Beach, FL 33160.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge erred in finding that proper, regulatory procedures were complied with regarding the collection and processing of Appellant's urine specimen;

2. The Administrative Law Judge erred in finding that a proper chain of custody was maintained regarding Appellant's urine specimen;

3. The Administrative Law Judge erred in discounting any credible explanation for the positive drug test result submitted by Appellant.

OPINION

I

Appellant asserts that the Administrative Law Judge erred in

finding that the required handling and processing procedures were complied with. Specifically, Appellant asserts that the collection supervisor failed to seal and initial the specimen container in his presence on 10 August 1989. I do not agree.

The only evidence that the specimen container was not sealed in Appellant's presence was Appellant's testimony. [TR 169-172]. However, there is substantial evidence to the contrary. NISAT's Drug Testing Custody and Control Form, Accession No. DOT 0002069 clearly reflects that a urine specimen was taken from Appellant on 10 August 1989. Significantly, Appellant affixed his signature to the bottom of that form certifying:

> . . . that I have provided my urine specimen to the collector which is now contained in the collection bottle marked with the identification number identical to the number in block 1(a) of this form. *The bottle was sealed with a tamper-proof seal in my presence with the identification number affixed*. [I.O. EXHIBIT 5a] (emphasis supplied)

EMSI's collection supervisor, while not specifically recalling Appellant, testified that the procedures used in collecting and handling the urine specimens were consistent with regulatory requirements, including the requirement to seal the container in Appellant's presence. [TR 42-48]. This witness provided further evidence that the specimen's integrity had been maintained. [TR 53-53, 97]. This testimony was corroborated by another employee of EMSI who verified that the specimen containers were sealed in the presence of the individual providing the specimen. [TR 109].

The findings of the Administrative Law Judge will not be disturbed unless they are inherently incredible. Appeal Decisions 2522 (JENKINS); 2506 (SYVERSTEN); 2492 (RATH); 2378 (CALICCHIO); 2333 (AYALA); 2302 (FRAPPIER). The Administrative Law Judge is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. Appeal Decisions 2522 (JENKINS) 2519 (JEPSON); 2516 (ESTRADA); 2503 (MOULDS); 2492 (RATH). Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2522 (JENKINS); 2519 (JEPSON); 2506 (SYVERSTEN); 2424 (CAVANAUGH) and 2282 (LITTLEFIELD).

In the case herein, there is substantial evidence upon which the Administrative Law Judge based his finding that EMSI had complied with regulations regarding the collection and processing of specimens. The testimony of EMSI's employees and most importantly, Appellant's own written certification, provide substantial evidence upon which the Administrative Law Judge could rely. Accordingly, that finding, based on such evidence, will not be disturbed.

II

Appellant asserts that the Administrative Law Judge erred in finding that a proper chain of custody had been maintained

regarding Appellant's urine specimen. Specifically, Appellant asserts that the Investigating Officer failed to call *every* individual who handled Appellant's specimen. Appellant urges that the testimony of each handler is required to prove the chain of custody and that without the testimony of such witnesses, the Administrative Law Judge could *no*t reasonably find that a proper chain of custody had been maintained. I do not agree.

I concur with the Administrative Law Judge [Decision and Order 18, 19] that there was no obligation on the part of the Investigating Officer to call every individual who handled the urine specimen in order to prove a proper chain of custody. All of the pertinent documentation regarding Appellant's specimen was properly authenticated and admitted into evidence. [I.O EXHIBITS 5-7, 9, and 10-15].

The documentation pertaining to the chain of custody of evidence is authenticated and essentially undisputed by other evidence. In addition to this evidence, the collection supervisor, a NISAT employee who processed Appellant's specimen and the president of Greystone testified regarding the collection procedures. Also, the Medical Review Officer testified by deposition regarding Appellant's case.

The testimony of these witnesses fully corroborates the documentary evidence and supports the integrity of the chain of custody. The testimony of these witnesses sufficiently identifies the documentary evidence as having been made within the regular course of collection, processing and testing operations of EMSI and NISAT.

A case relied upon by Appellant where the documentary evidence was deemed hearsay, insufficient to support a finding of proved, is clearly distinguishable. In that case (dismissed at the hearing level), no witnesses testified to corroborate and verify that the documentation was made in the normal course of the collection, processing and testing regime. Accordingly, the documentary evidence was considered insufficient to independently support a finding of proved.

The sufficiency of the chain of custody goes only to the weight of the evidence. Appeal Decision 2467 (BLAKE), *affd sub nom Commandant v. Blake*, NTSB Order No. EM-156 (1990); *U.S. v. Shackleford*, 738 F.2d 776 (11th Cir. 1984); *U.S. v. Lopez*, 758 F.2d 1517 (11th Cir. 1985); *U.S. v. Wheeler*, 800 F.2d 100 (7th Cir. 1986). The evidence fails to demonstrate any disruptions or irregularities in the chain of custody. The Administrative Law Judge is vested with full discretion to weigh that evidence and determine that a proper chain of custody was maintained.

The Administrative Law Judge will only be reversed if the findings are arbitrary, capricious, clearly erroneous or unsupport by law. Appeal Decisions 2504 (GRACE); 2482 (WATSON); 2474 (CARMIENKE); 2390 (PURSER); 2344 (KOHAJDA); 2340 (JAFFE); 2333 (AYALA).

It is also noted that the Administrative Law Judge conscientiously provided Appellant full access to relevant

witnesses involved in the handling or processing of Appellant's urine specimen. [TR 390, 394, 404-410]. Accordingly, Appellant's access to witnesses or evidence was not diminished.

Based on the foregoing, I find Appellant's assertion without merit.

III

Appellant asserts that the Administrative Law Judge erred in "discounting any credible explanation for the positive result." Appellant urges that evidence was presented that he was employed in a bar frequented by drug users and he could have "inadvertently ingested cocaine." Additionally, Appellant urges that evidence was presented that his urine tested negative for cocaine metabolite in a test conducted 18 days later. Appellant asserts that the Administrative Law Judge summarily rejected these facts in reaching his findings. I do not agree.

Appellant presented only the *possibility* that he could have accidentally ingested cocaine at his place of employment. Appellant presented no substantial or persuasive evidence that the cocaine metabolite was accidentally introduced into his system from an extrinsic source. Mere supposition or speculation unfounded in fact will not serve to vitiate a certified laboratory analysis, conducted in accordance with applicable regulations. *Appeal* Decision 2522 (JENKINS).

Appellant's reliance on a second drug test that was conducted 18 days later after the urine test in issue, is irrelevant. The record reflects that cocaine metabolite remains in an individual's urine only for 72 hours following cocaine ingestion. [I.O. EXHIBIT 16, p. 22].

Finally, Appellant asserts *inter alia* that the Administrative Law Judge could have found Appellant to be a "first time user" and issued a sanction less than revocation. I do not agree.

When a charge of possession or use of a dangerous drug is found proved and no satisfactory evidence of cure exists in the record, revocation is mandatory. 46 U.S.C. 7704; 46 C.F.R. 5.59; Appeal Decisions 2518 (HENNARD); 2476 (BLAKE), *supra*. Furthermore, the experimentation exception relates exclusively to *marijuana*, not to other dangerous drugs. 46 C.F.R. 5.59(a). In the case herein, the drug in issue is cocaine and Appellant did not provide any satisfactory evidence of cure. Accordingly, the order of revocation was mandatory.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law and regulations.

ORDER

The decision and order of the Administrative Law Judge dated 14 November 1990 at Jacksonville, Florida is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this *10th* day of *May*, 1991.

***** END OF DECISION NO. 2527 *****

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