UNITED STATES OF AMERICA

U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD,	)	Docket Number CG S&R 00 0245
	)	
vs.	)	Coast Guard Case No. PA00 000666
	)	
FREDERICK A. BAKER,	)	
	)	
Respondent.	)	

DECISION AND ORDER

On April 5, 2000, a Complaint was filed charging Respondent, a holder of License No. 819632 and Merchant Mariner Document Number 212-98-3488, with violation of 46 USC §7704(c) (user of or addiction to use of dangerous drugs) as a consequence of a March 15, 2000 pre-employment drug test from which the specimen provided by Respondent tested positive for cannibinoids.

Respondent answered the complaint by not admitting jurisdictional allegations or factual allegations; Respondent also declined to assert any affirmative defenses and only requested to be heard on the proposed order.

On May 4, 2000, a hearing was held in Seattle, Washington. At the hearing, the Coast Guard was represented by its investigating officer, and Respondent appeared and was represented by counsel, Mr. Thomas M. Geisness. At the commencement of hearing, counsel for Respondent requested a continuance of the hearing in order to more fully prepare and present Respondent's defense. The court ordered that the case would go forward and offered Respondent a continuance of the hearing, after Coast Guard's *prima facie* case was presented.

Coast Guard presented its case and the court heard testimony from Mike Blevins, Collector at Virginia Mason Clinic; Dr. Arthur M. Zebelman of Drug Proof Laboratories and Dr. James E. Manning, the Medical Review Officer at Virginia Mason Occupational Medicine. The Coast Guard submitted nine (9) exhibits and all were admitted.

By agreement of the parties, the matter was continued to Monday, July 10, 2000 at which time the hearing was reconvened. Dr. James Manning was called for cross-examination and upon questioning by Respondent's counsel, stated that the quantitative amount (179 ng/ml) found in Respondent's urine constituted a "fairly high" reading, and constituted a positive drug test.

Respondent testified, that he has been a merchant seaman for nineteen (19) years; that he is currently on disability, and is receiving benefits as a result of a February 9, 1999 marine incident that disabled him from working at sea and that he has been undergoing psychiatric treatment for post traumatic syndrome and taking prescription drugs. He did not, however, admit to being a user of dangerous drugs, i.e. marijuana, and stated that he, too, was "perplexed" as to how this substance was found in his urine sample.

In these cases, the Coast Guard must prove its case against the mariner charged on the basis of reliable, probative and substantial evidence. 46 CFR §5.63. This substantial evidence standard has been determined to be the equivalent of the preponderance of the evidence standard. See Commandant Decision on Appeal 2472 (Gardner) and *Steadman v. United States*, 450 US 91 (1981) which concluded that the preponderance of the evidence standard shall be applied in administrative hearings governed by the Administrative Procedures Act, such as this hearing.

For some time now, the Coast Guard has brought cases charging use of a dangerous drug under 46 USC §7704(c) based solely upon the results of chemical testing by urinalysis. 46 CFR §16.201(b) provides that one who fails a chemical test for drugs under that part will be presumed to be a user of dangerous drugs. In turn, 46 CFR §16.105 defines "fail a chemical test for dangerous drugs" to mean that a Medical Review Officer (MRO) reports as "positive" the results of a chemical test conducted under 49 CFR §40. In other words, 46 CFR §16 establishes a regulatory presumption on which the Coast Guard may rely, provided the Coast Guard can satisfactorily show that a 49 CFR §40 chemical test of a merchant mariner's sample or specimen was reported as positive by an MRO. This presumption, however, does not dispense with the obligation to establish the presumption by the same standard of proof, i.e., the elements of the case must be shown by a preponderance of the evidence. The elements of a case of presumptive use are as follows:

First, the Respondent was the person who was tested for dangerous drugs. Second, the Respondent failed the test. Third, the test was conducted in accordance with 46 CFR Part 16. Proof of these three elements established a *prima facie* case of use of a dangerous drug (i.e. presumption of drug use) which then shifts the burden of going forward with the evidence to the Respondent to rebut that presumption. If the rebuttal fails, then the Judge may find the charge proved solely on the basis of the presumption. See Commandant Decision on Appeal 2592 (Mason); 2584 (Shakespeare); 2560 (Clifton).

The first element is to show that the Respondent was the person who was tested for dangerous drugs. This involves the proof of identity of the person providing the specimen. Also, proof of a link between the Respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample, and which identified the sample throughout the chain of custody and testing process, and proof of the testing of that sample.

The specimen was assigned an appropriate identification number (572132) by the collector, Mike Blevins of Virginia Mason Clinic in Seattle, Washington. The urine specimen was placed in an appropriate container and sealed with a tamperproof seal that bore Respondent's signature. (CG Exhibit 1). Respondent signed the custody and control form acknowledging his

supplying of the specimen, that it was placed in a tamper proof container in his presence and that the information contained on the bottle is correct. CG Exhibit 4.

The second element involves proof of the test results. The initial screening test and scientific analyses indicated the present of cannabinoids. Conformation and additional analyses were done by gas chromatography/mass spectrometry test (GC/MS) in accordance with the guidelines established in 49 CFR 40.29(f). (CG Exhibit 5) The test results were forwarded to the MRO, Dr. James E. Manning of Virginia Mason Occupational Medicine, who reviewed the results and conducted a telephonic interview with Respondent on March 20, 2000. Thereafter, the MRO confirmed that the laboratory test results were positive. (CG Exhibits 6, 7)

The third element is to show that the test was conducted in accordance with 46 CFR Part 16. This necessarily involves proof of the collection process, proof of the chain of custody, proof of how the specimen was handled and shipped to the testing facility and proof of the qualification of the test laboratory.

Respondent's urine specimen was collected by Mike Blevins of Virginia Mason Clinic. The urine specimen was placed in an appropriate container and sealed with a tamperproof seal that bore Respondent's signature. (CG Exhibit 4) It was then transported to Drug Proof Laboratories by ground courier. Upon receipt at the Seattle, Washington laboratory, Respondent's specimen was taken to a high security accessioning room where the specimen container was inspected for any tampering or prior opening. The condition of the package is documented. The specimen number is noted and entered into the lab's computer system. The Respondent's specimen is maintained in secured storage during testing and following completion of testing. Each technician who access specimens, document their activities on internal chain of custody forms. Upon completion of testing, specimens reported as positive, have their remaining portions stored in a secured frozen storage area.

Finally, the laboratory's qualifications were established by the testimony of Dr. Arthur M. Zebelman of Drug Proof laboratories.

After review of the credible testimony, as well as the documentary and scientific evidence of record, this Judge is satisfied that there has been compliance with the regulatory requirements and DOT guidelines for collecting, analyzing, testing and confirming the presence of prohibited substances (cannabinoids) in Respondent's urine. In this case, the scientific test results and MRO confirmation submitted by Coast Guard was essentially unchallenged and thus raises a presumption of Respondent's use of prohibited substances. 46 CFR Subpart B, 16.201(b). It was thus incumbent upon Respondent to overcome the presumption by showing that he was not a user of dangerous drugs.

Based on the record before me, Respondent has failed to rebut the presumption arising from the positive drug test results. Respondent's request for a second continuance to arrange for the testimony of Respondent's psychiatrist to demonstrate his living habits and thus to rebut the presumption that he is a user was denied for the following reasons.

Respondent was represented by professional counsel and had ample opportunity from May 4, 2000 to July 10, 2000 (the first continuance) to seek a professional medical evaluation and opinion prior to the hearing on July 10, 2000, as well as develop a defense based on such evaluation. Respondent was asked if such an evaluation had been performed by his psychiatrist. He said none had been done. See, Commandant Decision on Appeal No. 2526 (Wilcox).

I must therefor conclude that the charge of "User of Dangerous Drugs" by Respondent, is proved.

SANCTION

46 USC §7704(c) provides that if it is shown that a holder of a document is a user of a dangerous drug, the merchant mariner's document shall be revoked. This statutory language does not afford this judge any discretion. As a result, Respondent's License No. 819632 and Merchant Mariner's Document No. 212-98-3488, are hereby revoked. Respondent has submitted that license and document to the judge at the conclusion of the hearing and they will be turned over to the Coast Guard with this written decision.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

DATED: July 11, 2000.

EDWIN M. BLADEN
Administrative Law Judge