UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	ON APPEAL
	:	NO. 2662
MERCHANT MARINER DOCUMENT	:	
Issued to: WILLIAM VOORHEIS	:	

This appeal is taken in accordance with 46 USC § 7701 *et seq.*, 46 CFR Part 5, and the procedures in 33 CFR Part 20.

By a Decision and Order (hereinafter "D&O") dated July 8, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Baltimore, Maryland ordered the Coast Guard to return the merchant mariner document of Mr. William Voorheis (hereinafter "Respondent") upon finding a charge of *use of or addiction to the use of dangerous drugs* not proved.

The specification found not proved alleged that Respondent tested positive for amphetamine as part of a periodic drug screening conducted on June 30, 2004.

PROCEDURAL HISTORY

On September 22, 2004, the Coast Guard filed a Complaint against Respondent. [D&O at 2] The Complaint, alleging *use of or addiction to the use of dangerous drugs*, stated that Respondent's urine sample, submitted during a periodic drug test, tested positive for amphetamine. Notably, the factual allegations of the Complaint specifically

stated that Respondent's urine sample was collected by the Beaumont Family Care Center. Subsequently, on October 29, 2004, the Coast Guard issued an amended Complaint against Respondent alleging the same offense. [D&O at 2; Investigating Officer (hereinafter "IO") Exhibit 2] Although the amended complaint was substantially similar to the original one, the Complaint's second factual allegation was changed to state that Respondent's urine specimen was collected by U.S. Healthworks, Houston, Texas, not the Beaumont Family Care Center as was originally alleged. [D&O at 2-3; IO Exhibit 2] Respondent filed his Answer to the Complaint on November 19, 2004. [D&O at 3] Respondent admitted all jurisdictional allegations, denied all factual allegations and requested a hearing before an ALJ. [*Id.*]

On January 12, 2005, prior to any hearing, the Coast Guard filed a Motion for Telephonic Testimony with the ALJ. [D&O at 4] The Motion requested permission to call three witnesses: (1) Dr. Charles Lovell, the Medical Review Officer (hereinafter "MRO") in Phoenix, Arizona; (2) Dr. Stanley C. Kammerer, the Vice President and director of the Clinical Reference Laboratory in Lenexa, Kansas; and (3) Ms. Karen Evans, the urine specimen collector (hereinafter "collector") in Houston, Texas. [D&O at 4] On January 26, 2005, the ALJ issued an "Order Granting in Part/Denying in part Complainant's Motion for Telephonic Testimony." Via that Order, the ALJ granted the Coast Guard's request to allow the MRO and Dr. Kammerer to testify by telephone but denied the Coast Guard's request with respect to the specimen collector. [*Id.*]

On January 27, 2005, the Coast Guard filed a "Motion for Reconsideration for Telephonic Testimony." In that Motion, the Coast Guard stated that the specimen collector did not have transportation and could not rearrange her schedule to appear at the

hearing due to personal and employment issues. [D&O at 4] The ALJ scheduled a conference call to allow the parties to discuss the Coast Guard's Motion for Reconsideration on February 2, 2005. [*Id.*] At the close of the call, the ALJ offered the Coast Guard the option of moving the hearing to Houston, Texas, to allow the specimen collector to attend the hearing. [*Id.*] The Coast Guard declined the ALJ's offer and its Motion for Reconsideration was denied. [*Id.*]

The hearing in the matter commenced in Beaumont, Texas, on February 8, 2005. [D&O at 3] Respondent appeared *pro se*. At the hearing, the Coast Guard introduced into evidence the testimony of two witnesses and offered eleven exhibits for admission to the record. [D&O at 3-4] The ALJ admitted ten of the proffered Coast Guard exhibits into evidence, but did not admit IO Exhibit 5, the Federal Drug Testing Custody and Control Form (hereinafter "DTCCF"), because the collector did not testify at the hearing. [*Id.*] Respondent testified on his own behalf and offered four exhibits that were admitted into the record. [D&O at 6]

The ALJ issued the D&O in the matter on July 8, 2005. Thereafter, on July 19, 2005, the Coast Guard filed its Notice of Appeal with the ALJ Docketing Center. The Coast Guard perfected its appeal by filing its Appellate Brief on August 15, 2005. Therefore, this appeal is properly before me.

APPEARANCE: Respondent appeared *pro se*. The Coast Guard was represented by LT Ian Bird and MST1 Jacquelyn Plevniak, USCG, of U.S. Coast Guard Marine Safety Office Port Arthur, Texas.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner document at issue in these proceedings. [D&O at 7; IO Exhibit 1]

On June 30, 2004, Respondent submitted a urine sample for periodic drug testing in conjunction with the renewal of his Coast Guard issued benzene card. [D&O at 7; Transcript Record (hereinafter "Tr.") at 49, IO Exhibits 6 and 8] Respondent's specimen was collected at U.S. Healthworks in Houston, Texas, and sent to a certified testing laboratory in Lenexa, Kansas for analysis. [D&O at 7; Tr. at 21; IO Exhibits 6, 8, 9] Respondent's specimen subsequently tested positive for amphetamine. [D&O at 8; Tr. at 39; IO Exhibit 8]

After Respondent's specimen was found to be positive for amphetamines, Dr. Charles Lovell, a certified MRO, interviewed Respondent. [D&O at 8] During the interview, Respondent admitted to taking Asenlix, a weight loss drug purchased by his wife. [D&O at 8; Tr. at 19-21, 23] Asenlix metabolizes to amphetamine and will cause a positive result for amphetamine in a drug test. [D&O at 8; Tr. at 23-25] The MRO determined that the Respondent's urine was positive for amphetamine and that he had not provided a legitimate medical explanation for the positive test result. [D&O at 8; Tr. at 23] The MRO testified that if Respondent needed a medication for weight loss, a physician could have prescribed a medication that would not result in a positive drug test result. [D&O at 9; Tr. at 82]

Respondent took Asenlix the day before and the day of the drug test. [D&O at 9; Tr. at 49,65] Asenlix is not an approved medication in the United States. [D&O at 9; Tr. at 81] The Respondent's wife ordered the medication via the internet, and Respondent

did not believe he needed a prescription for the medication. [D&O at 9; Tr. at 72] Respondent testified that he took Asenlix for weight loss. [D&O at 10; Tr. at 67-68] Since his heart attack in 1999, Respondent has not been successful in losing weight. [*Id.*] Respondent testified that he did not think Asenlix was illegal and added that the package the drug came in appeared to have been inspected by the United States Postal Service. [D&O at 9; Tr. at 72] Respondent testified that he did not know Asenlix contained amphetamine and had not taken Asenlix before this occasion. [D&O at 10; Tr. at 50, 67, 84-85]

The Asenlix labeling was written in Spanish and the Respondent did not attempt to have the label translated because he knew other people who were taking the medication for weight loss. [D&O at 10; Tr. at 67] The Coast Guard had the label from the Asenlix bottle translated and the relevant portions indicate:

> (1) the medication is for the treatment of obesity;
> (2) Asenlix should not be administered to people with a cardio vascular disease, arterial hypertension, prior history of brain-vascular disease, nervous anorexia, depression, or mental agitation;
> (3) it should not be used by people who consume drugs and/or are suffering from alcoholism;
> (4) the recommended dose or duration should not be exceeded to avoid developing a tolerance, dependency on Asenlix, or arterial hypertension;
> (5) the adverse and secondary reactions include depression, nervousness, anxiety, insomnia, dizziness, headaches, increase in arterial pressure, fast or slow heartbeat, palpitations, dry mouth, and constipation;
> (6) the presence of one or more of these adverse reactions requires immediate specialized medical attention;
> (7) the treatment with Asenlix should always be done under the strict control of an experienced medical doctor and should not be administered to senior citizens.

[D&O at 10-11; IO Exhibit 8] Respondent testified that immediately after he was notified that he tested positive for amphetamine, he destroyed the Asenlix and has not used it since. [D&O at 10; Tr. 72]

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding *not* proved the charge of *use of or addiction to the use of dangerous drugs.* On appeal, the Coast Guard raises the bases of appeal summarized below:

I. The ALJ erred by denying the Coast Guard's motions to allow the collector to testify telephonically;

II. The ALJ erred by finding that the Coast Guard failed to establish a prima facie case of drug use; and

III. After the Coast Guard established a prima facie case for use of or addiction to the use of dangerous drugs, the Respondent failed to provide evidence to overcome the presumption of drug use.

OPINION

I.

The ALJ erred by denying the Coast Guard's motions to allow the collector to testify telephonically.

On appeal, the Coast Guard argues that it "made every effort within reason to ensure that the collector could testify" and, in so stating, implies that the ALJ erred in refusing to allow the collector to testify via telephone when two of the Coast Guard's other witnesses were allowed to testify in that manner. [Coast Guard Appellate Brief at 2] I disagree.

In relevant part, 33 C.F.R. § 20.707 states:

> The ALJ **may** order the taking of the testimony of a witness by telephonic conference call. A person presenting evidence may by motion ask for the taking of testimony by this means. The arrangement of the call must let

> each participant listen to and speak to each other within the hearing of the ALJ, who will ensure the full identification of each so the reporter can create a proper record. (Emphasis added)

In this case, the record shows that, in accordance with 33 C.F.R. § 20.707, the Coast Guard filed a written motion for telephonic testimony prior to the hearing. [D&O at 4] Following receipt of the Coast Guard's motion, a conference call was ordered on January 20, 2005, to address the issues associated with allowing the Coast Guard's witnesses to testify by telephone. Respondent did not specifically object to any of the witnesses testifying telephonically and desired to "get the hearing over with." [Pre-Hearing Teleconference Transcript on the Motion at 5] The record shows that the ALJ allowed two of the Coast Guard's witnesses to testify via telephone because they "would have to travel long distances to attend the hearing." [Order granting in Part/Denying in Part Complainant's Motion for Telephonic Testimony at 1] However, the ALJ denied the Coast Guard's request with respect to the collector because she "is located in relative close proximity to the hearing, part of her testimony may involve identification of Respondent, and there is no evidence in the record that her attendance at the hearing would cause undue burden on herself or her employer." [*Id.*] In his D&O, the ALJ further noted that the Coast Guard, itself, elected to have the hearing held in Beaumont, Texas, even though that location was inconvenient to the Coast Guard's witnesses and that the Coast Guard declined the ALJ's offer to relocate the hearing to Houston, Texas to better accommodate the persons attending the hearing. [D&O at 5-6]

Ultimately, the collector did not attend the hearing and, as a result, was not called to testify for the Coast Guard. Both during the hearing and on appeal, the Coast Guard argues that it took every reasonable effort to ensure that the collector would testify;

however, the Coast Guard stated that it could not provide transportation to the witness. [Coast Guard Appeal Brief at 3; Tr. at 13][1]

It is well-settled that I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). The purpose of telephonic testimony is to ensure judicial economy, prevent burdensome and undue witness travel and to ensure an orderly process for eliciting witness testimony. Appeal Decisions 2657 (BARNETT) and 2538 (SMALLWOOD). That said, telephonic testimony is not a wholesale substitute for the appearance of witnesses at suspension and revocation hearings. [*Id.*] The ALJ does not have to allow every witness to testify telephonically; rather, the ALJ has discretion whether to allow a witness to testify via telephone. *See* 33 C.F.R. 20.707. The record shows that, in this case, although the ALJ allowed the telephonic testimony of two witnesses who were far removed geographically from the hearing location, he found that it was not unduly burdensome to require the specimen collector, whose testimony was important in identifying the person who submitted a urine sample for testing and thus establishing the first element of a *prima facie* case of drug use, to testify in person at the hearing. [D&O at 4-6] Although telephonic testimony of a specimen collector is

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[1] It is worth noting that the Coast Guard could have avoided its problems in securing the collector's attendance at the hearing. When the Coast Guard learned of the collector's reluctance to attend the hearing, it could have sought issuance of a subpoena requiring the collector to testify at the hearing. Assuming, *arguendo*, that the ALJ would have issued such a subpoena in this case, the issuance of the subpoena would allow transportation costs, fees and mileage to have been paid to the witness following her attendance at the hearing. *See* 28 U.S.C. § 1821; 46 C.F.R. 5.401.

certainly permissible in these proceedings, given the discretion afforded the ALJ under 33 C.F.R. § 20.707, I do not find the ALJ's decision to disallow the telephonic testimony of the specimen collector in this particular case, to be arbitrary, capricious, clearly erroneous, or an abuse of his authority. As such, I do not find the Coast Guard's first basis of appeal persuasive.

II.

The ALJ erred by finding that the Coast Guard failed to establish a prima facie case of drug use.

A mariner credential issued by the Coast Guard must be revoked if it is shown that the holder has been a user of dangerous drugs. 46 U.S.C. § 7704(c). Pursuant to Coast Guard regulation, if a mariner fails a drug test, he is presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b); Appeal Decisions 2657 (BARNETT), 2584 (SHAKESPEARE) and 2529 (WILLIAMS). To prove use of a dangerous drug, the Coast Guard must establish a *prima facie* case of drug use by the mariner. *See* Appeal Decisions 2657 (BARNETT), 2592 (MASON), 2589 (MEYER), 2584 (SHAKESPEARE), 2583 (WRIGHT), 2282 (LITTLEFIELD), 2379 (DRUM) and 2529 (WILLIAMS).

In a drug case based solely upon urinalysis test results, a *prima facie* case of use of a dangerous drug is shown when three elements are proved: (1) that a party is tested for use of a dangerous drug; (2) that test results show that the party tested positive for the presence of a dangerous drug; and (3) that the drug test is conducted in accordance with the procedures set forth in 49 C.F.R. Part 40. Appeal Decisions 2657 (BARNETT), 2632 (WHITE), 2603 (HACKSTAFF), 2598 (CATTON), 2592 (MASON), 2589 (MEYER),

2584 (SHAKESPEARE), and 2583 (WRIGHT). In considering the proof of these elements, it must be kept in mind that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decisions 2575 (WILLIAMS), 2522 (JENKINS), 2537 (CHATHAM); 2541 (RAYMOND), *aff'd sub nom* NTSB Order No. EM-175 (1994), 2546 (SWEENEY), *aff'd sub nom* NTSB Order No. EM-176 (1994). Furthermore, if Respondent produces no evidence in rebuttal to proof of the three elements, "the ALJ may find the charge proved on the basis of the presumption [of drug use] alone." Appeal Decision 2603 (HACKSTAFF); *see* 33 C.F.R. § 20.703 (a presumption in a Coast Guard administrative hearing imposes on the party against whom it lies the burden of going forward with evidence to rebut or meet the presumption, but does "not shift the burden of proof in the sense of the risk of non-persuasion").

On appeal, the Coast Guard argues that it "did establish the three…elements of the presumption" and asserts that "Respondent never called into question the results of the test, nor did he deny that he had submitted a urine sample on June 30, 2004 for the purposes of a periodic drug screening." [Coast Guard Appeal Brief at 1-2] The Coast Guard further argues that "Respondent admitted to ingesting Asenlix" and that documentation was presented at the hearing to show that "Asenlix contains amphetamines…a controlled substance." [Coast Guard Appeal Brief at 2]

In his D&O, the ALJ found that "the Coast Guard failed to meet its burden of proof in establishing the first prong of the *prima facie* case." [D&O at 13-15] Addressing the issue, the ALJ stated as follows:

> Since the Coast Guard opted to proceed with its case without testimony from the collector, there was no authentication of the…[DTCCF]...and, therefore, without testimony from [the] collector the first link in the chain of custody cannot be established. Although Respondent testified that he gave a urine specimen at U.S. Healthworks in Houston, Texas, there cannot be a showing that the specimen that tested positive for amphetamines was his without the first link in the chain of custody. Additionally, without testimony from the collector, there is no evidence regarding the collection process.

[D&O at 15] As a result, the ALJ concluded that "the Coast Guard is not entitled to rely on the presumption that Respondent is a user of dangerous drugs." [*Id.*] Absent the operation of the presumption, and given Respondent's testimony at the hearing indicating that he unknowingly ingested amphetamines, the ALJ found insufficient evidence in the record to support a conclusion that Respondent was a user of dangerous drugs and ordered the return of Respondent's merchant mariner document. [D&O at 18-19]

Past Commandant Decisions on Appeal show that proof of the first element of a *prima facie* case—that Respondent was tested for use of a dangerous drug—"involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number…which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of the sample." Appeal Decision 2603 (HACKSTAFF); *See also* Appeal Decision 2657 (BARNETT). The record shows that the Coast Guard attempted to provide this evidence through the testimony of the specimen collector, Ms. Evans, and through the admission of the DTCCF into the record. As has already been discussed, Ms. Evans did not testify at the Hearing. Irrespective of that fact, the Coast Guard attempted to admit the DTCCF into the record at the hearing as IO Exhibit 5. Respondent objected, stating "[i]f she [the collector] can't be present, how do I know she signed it?" [Tr. at 18] The ALJ found

Respondent's objection persuasive and refused to admit the DTCCF into the record. [Tr. at 88] Without the admission of either the DTCCF or the collector's testimony, the ALJ found insufficient evidence in the record to support a conclusion that the Coast Guard established a *prima facie* case of drug use on the part of Respondent. Given the evidence contained in the record, I do not find that the ALJ was either arbitrary or capricious or that he abused his discretion in so finding.

The admissibility of evidence in suspension and revocations proceedings is discussed at 33 C.F.R. § 20.802. Though the regulation makes clear that the ALJ "may admit any relevant oral, documentary, or demonstrative evidence, unless privileged" it does not require that the ALJ admit all evidence proffered. Indeed, 33 C.F.R. § 20.802(b) makes clear that:

> The ALJ may exclude evidence if its probative value is substantially outweighed by the danger of prejudice, by confusion of the issues, or by reasonable concern for undue delay, waste of time, or needless presentation of cumulative evidence.

In this case, the ALJ refused to admit the DTCCF into evidence because "without testimony from the collector, there was no authentication" of the document and, as a result, the document was highly prejudicial. [D&O at 15] Because it is the sole purview of the ALJ to determine the weight of the evidence presented and to make credibility determinations, I do not find that the ALJ erred in determining that the DTCCF, absent authentication, was not credible. *See* Appeal Decisions 2156 (EDWARDS), 2116 (BAGGETT) and 2472 (GARDNER). Accordingly, the Coast Guard's assertion that it established a *prima facie* case of drug use is not persuasive.

III.

After the Coast Guard established a prima facie case for use of or addiction to the use of dangerous drugs, the Respondent failed to provide evidence to overcome the presumption.

Given my determination that the ALJ did not err in finding that the Coast Guard failed to establish a *prima facie* case of drug use in this case, a presumption that Respondent was a user of dangerous drugs did not arise. As such, the Coast Guard's arguments with respect to the evidence that Respondent provided to rebut the presumption of drug use are wholly lacking in merit.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find the Coast Guard's bases of appeal to be without merit.

ORDER

The order of the ALJ, dated at Baltimore, Maryland, on July 8, 2005, is **AFFIRMED.**

Signed at Washington, D.C. this 19th of January, 2007.

V. S. Crea
Vice Admiral, U.S. Coast Guard
Vice Commandant