

In the Matter of Merchant Mariner's Document No. Z-179802-D1
Issued to: ALBERT ADELMAN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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ALBERT ADELMAN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 22 May, 1952, an Examiner of the United States Coast Guard at San Francisco, California, revoked Merchant Mariner's Document No. 179802-D1 issued to Albert Adelman upon finding him guilty of physical incompetence based upon a specification alleging in substance that while serving as bedroom steward on board the American SS PRESIDENT WILSON under authority of the document above described, on or about 26 July, 1951, while said vessel was at sea, he was physically incompetent for the performance of his duties as a merchant seaman by reason of drug addiction.

At the beginning of the hearing on 14 September, 1951, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. The hearing was then adjourned until 11 October, 1951, in order to take depositions in Honolulu and to await the return of a material witness. Appellant repeatedly rejected the Examiner's offer to appoint counsel to represent Appellant at the taking of the depositions in Honolulu.

On 11 October, 1951, the depositions were not in the proper form and they were returned to be taken again. The medical doctor on the PRESIDENT WILSON, Dr. William Barna, was called as a witness by the Investigating Officer but upon objection by Appellant, the Examiner ruled that whatever transpired between the doctor and Appellant would be excluded as privileged communications between physician and patient. Dr. Barna was permitted to testify concerning a conversation between Appellant and two Customs Officers at Honolulu on 19 August, 1951. The doctor stated that while he was present on this date, Appellant had admitted previous use of narcotics but denied being a narcotics addict on 19 August, 1951. Dr. Barna expressed his opinion that the "use of narcotics might lead to addiction"; and that an addict would need narcotics every day in order not to suffer although he might still be able to do his work without the use of narcotics.

The hearing was reconvened on 7 January, 1952, and the Investigating Officer offered in evidence the properly prepared depositions of Customs Agent in Charge Francis X. Di Lucia and Deputy Collector of Customs Carl F. Eifler which had been taken at Honolulu on 18 and 23 October, 1951, respectively. When Appellant objected to the depositions being received in evidence, the Examiner continued the hearing in order to review the depositions and to appoint counsel to represent Appellant.

On 11 January, 1952, Appellant was represented by an attorney who made numerous objections to the two depositions which had been offered in evidence. The Examiner rejected certain portions of the depositions which were objected to on the grounds of privileged communications and hearsay. The balance of the depositions were received in evidence and they state that when Appellant was questioned on 19 August, 1951, he admitted: that he was a narcotics addict; that he had gone on this voyage to help cure himself of the habit; and that he had been using heroin until his supply was exhausted on 26 July, 1951.

The Investigating Officer then rested his case and the Examiner denied counsel's motion to dismiss on the ground that it had not been established that on or about 26 July, 1951, Appellant was physically incompetent for the performance of his duties as a merchant seaman by reason of drug addiction. The Examiner held

that narcotics addiction is inherently disqualifying as to the performance of duties by a seaman without a showing that he actually failed to do his work, and, therefore, a prima facie case had been made out against Appellant.

On the next day of the hearing which was 19 March, 1952, Appellant testified under oath in his own behalf. He stated that Dr. Barna was present during approximately five minutes of Appellant's interrogation by Customs Officers Di Lucia and Eifler which took place on the PRESIDENT WILSON at about 1400 or 1430 on 19 August, 1951, and lasted about an hour and a half; that this had been Appellant's first voyage since 1945 because of his five year penitentiary sentence in 1946; that Appellant told the two Customs Officers that he had used narcotics prior to going to the penitentiary in 1946 but not subsequent to that time; and that he did not tell the Customs men that he had "gone back on it again," used "narcotics * * * until 26 July 1951," or shipped on the PRESIDENT WILSON to "get away completely from the use of narcotics" (R.62).

On cross-examination based on the direct examination and without objection having been made on the ground of privileged communications, Appellant testified that he had been given hypodermic injections on two successive days by Dr. Barna after Appellant had gone to the doctor and told him that Appellant "couldn't sleep the previous night" to the first injection for some reason unknown to Appellant (R.65); that the doctor also had given Appellant penicillin tablets for his sore throat and cold (R.67); and that "we all had inoculations for something" (R.67). Upon questioning by the Investigating Officer as the result of Appellant having been treated with injections after only one sleepless night, Appellant stated that he could not remember in terms of hours, days, or weeks, how long he had been unable to sleep (R.69); and that there had been "no examination" by the doctor on the ship (R.70).

Appellant replied to the Examiner's questions by stating that he had cured himself of narcotics addiction without outside aid and that he had submitted to an examination at a Marine Hospital on 10 September, 1951, for narcotics addiction at the suggestion of, and pursuant to arrangements made by, the Investigating Officer. The medical report resulting from this examination merely states that

the conclusion of the examining physician, Dr. Robert B. Shelby, U.S.P.H.S., was that Appellant "is fit for sea duty"; but the report contains no facts upon which this conclusion was predicated. The medical report was offered in evidence by Appellant and received by the Examiner as part of the record. The date of the examination was the same as that on which the charge and specification were served upon Appellant.

After a seaman with whom Appellant had shipped subsequent to the time of the offense alleged had testified as to Appellant's good work on board ship and the fact that Dr. Barna had once given the witness two hypodermic injections for food poisoning, the Examiner stated that Appellant had waived his right to exclude the testimony of Dr. Barna and the Investigating Officer was given permission to recall the doctor.

On 8 April, 1952, Dr. Barna stated that he had treated Appellant with two injections of morphine and subsequent injections of dolophine in decreasing doses over a period of twelve days after Appellant had asked the doctor for assistance in breaking away from drugs. The doctor testified that Appellant's condition indicated that he had not used narcotics for four to six days prior to the commencement of the treatments; and that he considered Appellant to be well on the way to breaking away from the habit because an addict must be treated for a period of about four weeks to prevent physical suffering during the crucial withdrawal period when he is just beginning to break away from the narcotics habit. The Examiner denied counsel's motion to strike this testimony by Dr. Barna on the ground of privileged communications.

At the conclusion of the hearing on 22 May, 1952, having heard the argument of Appellant's counsel and after the Investigating Officer had waived argument, both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced his findings and concluded that the charge had been proved by proof of the specification. He entered the order revoking Appellant's Merchant Mariner's Document No. Z-179802-D1 and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that:

1. The part of the order which requires that Appellant's merchant mariner's document be deposited with the U. S. Coast Guard is not properly part of the Examiner's decision of 22 May, 1952, since this part of the order was added at a later date when the decision was served upon Appellant's counsel.
2. Despite a stipulation that the decision would not become final until served upon counsel for Appellant, the Coast Guard enforced the order by refusing to allow Appellant to sign articles aboard the PRESIDENT WILSON before service was made upon counsel.
3. The depositions should not have been admitted into evidence because the application to take these depositions was made orally and never reduced to writing as required by 46 C.F.R. 137.09-52(b).
4. The Examiner erred in not striking portions of Di Lucia's deposition which should have been limited strictly to what was said at the conference with Appellant. In view of the Examiner's statement that it would have been reversible error not to have appointed counsel for Appellant at a later time because of his inability to understand the problems in the case, it was reversible error not to have appointed counsel for Appellant at the taking of the depositions.
5. The Examiner erred in ruling that Appellant had waived the right to exclude the testimony of Dr. Barna concerning certain privileged communications between Appellant and the doctor. The basis for this action by the Examiner was the testimony of Appellant which appears at page 57 of the record; but this testimony was too vague to sufficiently identify the privileged communications, which Appellant attempted to exclude, as having occurred at the same time as when Dr. Barna was consulted by Appellant about his inability to sleep. Therefore, it was improper to have admitted the claimed privileged communications into evidence on the ground that Appellant had waived the privilege by testifying in

part concerning the specific consultation in issue.

6. The evidence does not support the charge. The Coast Guard's own testimony is contradictory. Dr. Barna testified that Appellant was not an addict and that he was physically competent; and Appellant denied addiction when interrogated by the two Customs Officers. Moreover, the U.S.P.H.S. reported after examination that Appellant was not an addict and he performed his duties satisfactorily on the voyage in question as well as subsequent voyages until 22 May, 1952.

APPEARANCES: Ernest Besig, Esquire, of San Francisco, California, of Counsel.

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

Between 14 July, 1951, and 24 August, 1951, inclusive, Appellant was serving as bedroom steward on board the American SS PRESIDENT WILSON and acting under authority of his Certificate of Service No. E-385673 and Merchant Mariner's Document No. Z-179802-D1 while the ship was on a foreign voyage out of San Francisco, California.

Appellant shipped on this voyage primarily for the purpose of trying to overcome his addiction to heroin which had begun originally at some time prior to his conviction in 1946 for a narcotics offense. This was Appellant's first voyage since before the conviction because he had been sentenced to five years in the penitentiary, had served three years and eight months of the sentence, and was then required to report monthly to a probation officer for the balance of the five year period.

Appellant used heroin while on this voyage on the PRESIDENT WILSON until his supply became exhausted on or about 26 July, 1951. As a result of this, Appellant consulted with the ship's doctor, Dr. William Barna, who gave Appellant hypodermic injections to enable him to sleep. Dr. Barna did not examine Appellant.

After the ship had returned to Honolulu from the Orient, Appellant was interrogated by Customs Agent in Charge Francis X. Di Lucia and Deputy Collector of Customs Carl F. Eifler on 19 August, 1951, about his use of narcotics. At first, Appellant denied that he was a narcotics addict but during the course of the conference he admitted to these two officers that he was an addict at the present time; and Appellant also told them that he had used heroin while on board the PRESIDENT WILSON.

On 10 September, 1951, Appellant submitted to an examination for heroin addiction at the U. S. Marine Hospital, San Francisco, and obtained an indorsement by the Senior Medical Officer in Charge of the U.S.P.H.S. Hospital, Dr. Robert B. Shelby, stating that Appellant "is fit for sea duty."

OPINION

Points 1 and 2 which are raised by Appellant in this appeal are considered to be completely without merit. The addition to the order of the statement that Appellant's document should be deposited with the Coast Guard did not change or add anything to the original order since the document became void when the order was effective. Any issue with respect to Point 2 became moot upon service of the decision on counsel for Appellant.

As stated in Point 3, the regulation concerning depositions was not strictly complied with insofar as the record indicates that the oral application to take depositions was not reduced to writing. But since the requirement to set forth the reasons for the depositions was orally complied with and because Appellant has not shown any prejudicial error in the failure to follow the regulation, I do not consider this to be reversible error.

Concerning Point 4, the Examiner did not admit in evidence any portions of the two depositions which were material to the specification except that which took place during the conference between Appellant and the two deponents. As mentioned above, Appellant repeatedly rejected the Examiner's offer to appoint counsel to represent Appellant at the taking of the depositions. Appellant's statement that "I will see that I am represented at the taking of the depositions" is in marked contrast to his later reply

that he would appreciate having counsel to represent him at the hearing. In view of Appellant's attitude in the former instance and the fact that the Examiner later excluded portions of the depositions which were objected to by counsel who had then been obtained to represent Appellant, he was not materially prejudiced by the absence of counsel at an earlier date.

Appellant contends in Point 5 that the Examiner improperly permitted Dr. Barna to testify concerning his treatment of Appellant as a result of the latter's request for assistance in overcoming his narcotics addiction. Since this testimony is not considered to be necessary for the disposition to be made of this case and because of the disagreement among authorities on this subject of the physician-patient privilege, Dr. Barna's testimony concerning Appellant's treatment and communications pertaining to narcotics was not considered in my above findings of fact.

Without relying upon Dr. Barna's testimony, I have arrived at the finding that Appellant's treatment by Dr. Barna resulted from Appellant's earlier use of narcotics. This finding is partially based upon the inference to be drawn, from the failure of Appellant to obtain testimony from Dr. Barna about his treatment of Appellant for his inability to sleep, that the latter treatment resulted from Appellant's use of narcotics. "The nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause." *2 Wigmore on Evidence, sec. 285.* This is the only logical conclusion when consideration is given to Appellant's testimony that he was treated with hypodermic injections by the doctor; his admitted prior addiction; his admission to the Customs Officers that he had run out of heroin about 26 July 1951; and the well known fact that physical illness results soon after a person stops using narcotics unless they use additional narcotics or a suitable substitute such as dolophine.

It is evident from the above, and Dr. Barna's general testimony that after the physical illness resulting from the withdrawal from narcotics has passed there remains a mental craving for drugs, that Appellant was a victim of narcotics addiction as alleged. Dr. Barna did not testify that Appellant was not an addict but that "I considered him at the beginning of the treatment well off on the road of breaking away" (R.88). The doctor answered

in the negative when Appellant asked if the doctor saw any sign that Appellant was incompetent and not on the job while he was working. But Dr. Barna also testified that he had not examined Appellant and that an addict might be able to do his work even without narcotics. As stated by the Examiner, a narcotics addict is considered to be incompetent for any work on board ship whether or not he actually fails to perform his duties properly. This is because of the great potential danger which an addict presents to the safety of life and property at sea since he might at any time resort to the use of narcotics and cause severe damage due to his unbalanced mental condition resulting from the use of such drugs.

Both of the Customs Officers stated in their depositions that Appellant had admitted using narcotics recently or on board the PRESIDENT WILSON. Appellant denies having made any such admissions. Ordinarily, the Examiner is the best judge as to the credibility of the witnesses and he rejected Appellant's denial. Since the Examiner was presented with a choice between accepting the testimony of two Customs Officers or that of an admitted former narcotics addict, it was perfectly logical for him to prefer the testimony of the former.

The medical report from the U.S.P.H.S. Hospital at San Francisco, California, is not sufficient to establish that Appellant has been completely cured from his addiction to narcotics; and only evidence of the latter type is an ample basis for allowing a seaman to again sail on American Merchant ships after he has once been found guilty, under these proceedings, of addiction to narcotics. The medical report contains the conclusions or opinions of the examining physician but it does not contain evidence or facts, upon which the conclusions are based, which are sufficient to overcome the evidence which leads to the contrary conclusion. It was because of such a medical report as this that I formerly reversed and dismissed an order of revocation for incompetence in [Appeal No. 558](#) when there was no evidence of incompetence other than the report of a Medical Board. The reverse situation is present in this case with respect to the proof of incompetence.

ORDER

The order of the Examiner dated at San Francisco on 22 May,

1952, is

AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 8th day of January, 1953.

***** END OF DECISION NO. 606 *****

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