

**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD**

UNITED STATES COAST GUARD)	
)	Docket No. CG S&R 01 0003
vs.)	
)	
LISA POLE,)	
)	
Respondent.)	
_____)	

**DECISION AND ORDER ON COAST GUARD'S
MOTION FOR SUMMARY DECISION**

The Coast Guard has filed a Motion for Revocation Order stating that the Respondent has failed to specifically deny any of the allegations in the complaint and therefore under 33 CFR § 20.308(c) the allegations are deemed admitted. I have treated the motion as one for summary decision under 33 CFR § 20.901.

Under the summary decision rule a party is entitled to a judgment as a matter of law where there is no genuine issue of material fact. The motion is ordinarily supported by affidavits and citations to record evidence including the pleadings which show that there is no genuine issue of material fact. The motion may not be filed later than fifteen days prior to trial. Trial in this matter was set for April 10, 2001. The Coast Guard's motion was filed on January 23, 2001 and is therefore timely filed.

The test for determining whether a motion for summary decision is to be granted is based on the filed documents, the material obtained from discovery, or matters officially noticed showing there is no genuine issue of material fact and the moving party is entitled to a summary decision as a matter of law. 33 CFR § 20.901(b).

In this case the sole evidence is the presumption created by rule that the failure to specifically deny an allegation it is deemed admitted. See 33 CFR § 20.308(c) [Answers]. Here Respondent has filed an answer but has not specifically denied any allegation in the complaint. Thus, it is claimed the Respondent has admitted to the alleged violations, which if true, entitle the Coast Guard to a judgment as a matter of law. When determining whether the moving party has proven the absence of a genuine material issue of fact, the facts asserted by the nonmoving party, if supported by evidentiary material, such as the answer to the complaint, the facts must be regarded as true. See Scott v. Plante, 532 F.2d 939 (3d Cir. 1976).

Respondent was served with this motion, and has failed to respond.

The following was alleged in the Coast Guard's complaint and are deemed admitted and true for the purposes of this motion.

Respondent is the holder of a Coast Guard issued credential or Merchant Mariner Document Number [REDACTED]. Respondent took a random drug test on June 1, 2000. An authorized collector of the Columbia Medical Center collected a urine specimen. Respondent signed a Federal Drug Testing Custody and Control Form. The urine specimen was collected and analyzed by Quest Diagnostics using procedures approved by the Department of Transportation. The specimen subsequently tested positive for cocaine metabolites.

Jurisdiction is established in this matter by reason of Respondent's licensure and deemed admission of jurisdiction. See, 46 U.S.C. §7704(c); NTSB Order No. EM-31 (STUART); Commandant Appeal Decision, No. 2135 (Fossani).

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 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 positive by a 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 proven 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 establishes 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 the presumption. If the rebuttal fails then this 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 Coast Guard's complaint has alleged each of the three elements necessary to show as a matter of law a *prima facie* case of use of a dangerous drug. The burden was shifted to Respondent who has failed to respond to this motion.

Based solely on these proofs the Coast Guard is entitled to a judgment as a matter of law.

46 USC § 7704 [c] provides if it is shown that a holder of a merchant mariners document has been a user of a dangerous drug, the merchant mariner's document of the holder shall be revoked. This judge has no discretion in the matter.

IT IS THEREFORE ORDERED, the Merchant Mariner Document *[REDACTED]* is hereby REVOKED.

DATED: February 5, 2001.

EDWIN M. BLADEN
Administrative Law Judge