

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT  
Issued to: David M. JUSTICE 249-94-6976

DECISION OF THE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2489

David M. JUSTICE

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

By his order dated 30 June 1988, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, revoked Appellant's Merchant Mariner's Document and License upon finding proved the charge of misconduct. The misconduct charge was supported by one specification which was found proved. The specification found proved alleged that Appellant, while serving under the authority of the captioned documents, on board the S/S SEA-LAND PACIFIC on or about 21 April 1988, did wrongfully have in his possession controlled substances, as defined in 21 U.S.C. 812 and 21 C.F.R. 1308.14, to wit, Diazepam and Seconal.

The hearing was held at Long Beach, California on 15 June 1988. Appellant appeared at the hearing and was represented by professional counsel. Appellant entered, in accordance with 46 C.F.R. 5.527(a), an answer of denial to the charge and specification.

The Investigating Officer introduced six exhibits into evidence and called two witnesses.

Appellant introduced one exhibit into evidence and testified in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved, and entered a written order revoking Appellant's license and document.

The complete Decision and Order was served on Appellant on 5 July 1988. Notice of Appeal was timely filed on 2 August 1988. Following

the receipt of the transcript of the proceedings, Appellant's brief was timely received on 6 December 1988. Accordingly, this matter is properly before the Commandant for disposition.

#### FINDINGS OF FACT

At all times relevant, Appellant was serving as Third Assistant Engineer aboard the S/S SEA-LAND PACIFIC, a merchant vessel of the United States, under the authority of his above-captioned document and license. Appellant's license authorized him to serve as Third Assistant Engineer of steam and motor vessels of any horsepower. On 26 April 1988, the S/S SEA-LAND PACIFIC was dockside at Long Beach, California. While so berthed, the vessel's master requested a Customs Service enforcement boarding to inspect the vessel for contraband. A general search of the vessel was subsequently conducted that same day. During the course of the inspection, a Customs Service enforcement agent discovered four blue pills and one red capsule in Appellant's clothing, hanging in his stateroom closet. These pills and capsules were subsequently tested by laboratory analysis. The tests confirmed that the blue pills were Diazepam (Valium) and the red capsule was Seconal. Diazepam and Seconal are respectively Schedule IV and Schedule II controlled substances under 21 U.S.C. 812, and 21 C.F.R. 1308.14.

The Appellant paid an administrative civil penalty to Customs for simple possession of contraband, under the provisions of 21 U.S.C. 844.

#### BASES OF APPEAL

The Appellant asserts that he did not possess the controlled substances with requisite knowledge of illegality or specific intent to violate the law.

Appearance by: Clark Arestei, 5900 Wilshire Blvd. 26th floor, Los Angeles, CA;

Appeal by: Stuart Feldman, 216 King Street, Office 2000, Charleston, SC 29402.

#### OPINION

##### I

Precedent establishes that a finding of wrongful possession

depends upon there being an un rebutted prima facie case made out against the Appellant. Usually (as in this case) the finding flows from the proof of physical possession by the Appellant. See, Appeal Decision 1906 (HERNANDEZ); Appeal Decision 2109 (SMITH). The Administrative Law Judge is free to reject Appellant's claim of lack of knowledge. Appeal Decision 2384 (WILLIAMS). However, the Administrative Law Judge is also required to make a specific finding as to the credibility of the Appellant's testimony that he did not know the nature of the drugs found in his possession. See, Appeal Decision 1165 (REDMAN). A finding as to credibility is a specific function with which an Administrative Law Judge is tasked. Appeal Decision 2156 (EDWARDS); Appeal Decision 2116 (BAGGETT); Appeal Decision 2472 (GARDNER). However, in this case, the Administrative Law Judge failed to make this requisite finding.

In the instant case, while the Administrative Law Judge's failure to render findings on the issue of credibility constitutes error, it is not reversible error. No testimony other than Appellant's, and no conflicting evidence, other than the location where the pills were found and their chemical composition, is reflected in the record. Considering the totality of the record, the proper disposition is to remand the case for appropriate findings on credibility.

### CONCLUSION

Having reviewed the entire record, I find that the hearing was conducted in accordance with the requirements of applicable regulations with the exception that the Administrative Law Judge failed to issue specific findings regarding the credibility of Appellant's testimony and whether the Appellant possessed a prescription for the controlled substances found in his possession.

### ORDER

The Administrative Law Judge's decision is SET ASIDE, his order VACATED, and the case REMANDED with instructions to issue specific findings regarding the credibility of Appellant's testimony and whether Appellant possessed a prescription for the controlled substances found in his possession.

CLYDE T. LUSK, JR  
Vice Admiral, U.S. Coast Guard  
Vice Commandant

Signed at Washington D.C., this 22nd day of August, 1989.

## 12. ADMINISTRATIVE LAW JUDGES

- .01 Evidence, credibility of determined by ALJ
- .29 ALJ decision upheld, unless clearly erroneous
- .29 ALJ required to make specific finding as to credibility of Appellant's testimony

## 5. EVIDENCE

- .18 ALJ determination upheld unless clearly erroneous

## CITATIONS

Appeal Decisions cited: 1906 (HERNANDEZ), 2109 (SMITH), 2384 (WILLIAMS), 2156 (EDWARDS), 2116 (BAGGETT), 2472 (GARDNER), 1165 (REDMAN)

NTSB Cases Cited: None.

Federal Cases Cited: None.

Statutes Cited: 21 USC 812, 21 USC 844, 46 USC 7702.

Regulations Cited: 21 CFR 1308.14, 46 CFR 5.527(a), 21 CFR 1308.14, 46 CFR 5.701.

\*\*\*\*\* END OF DECISION NO. 2489 \*\*\*\*\*