



16731

November 19, 2002

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RE: MV00000981
[REDACTED]
M/V [REDACTED]
WARNING

Dear Mr. [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case MV00000981, which includes your appeal on behalf of [REDACTED], operator of the M/V [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a WARNING for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC 2115	Failure to implement or conduct chemical testing for dangerous drugs or for evidence of alcohol.	WARNING

The violation is the result of [REDACTED]'s alleged failure to require drug and alcohol testing following two serious marine incidents that occurred aboard the M/V [REDACTED]. The first occurred on February 3, 2000, in the port of Zeebrugge, Belgium, while the second occurred on February 6, 2000, in the port of Bremenhaven, Germany.

On appeal, you contend that the penalty assessed by the Hearing Officer is "unwarranted and should be reversed." Although there were two separate serious marine incidents initially relied upon by the Coast Guard as supporting the charge, the Hearing Officer determined that there was insufficient evidence regarding the practicality of conducting a drug test following the February 3, 2000 incident. He, therefore, dismissed that aspect of the charge. Thus, this appeal is limited to your assertion that "[t]he Hearing Officer erred in finding a violation of the regulations by Captain [REDACTED] with respect to not administering a chemical test on the Chief Engineer the day after the [February 6, 2000] incident." To that end, you contend that, "[g]iven the circumstances surrounding the injury and the lack of immediate seriousness, Captain

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[REDACTED] made a good faith determination not to administer a chemical test, and whether it was practicable after the Chief Engineer's injury was diagnosed does not foreclose the inquiry nor eliminate the Captain's discretion in this regard." You conclude that "[s]ince the regulations were clearly intended to permit such exercise of good faith discretion by Masters, Captain [REDACTED]'s actions in this instance did not violate his duties as the marine employer to administer chemical tests." Your appeal is denied for the reasons described below.

As a preliminary matter, I believe a brief recitation of the facts is in order. As I have previously stated, the instant case is the result of two separate marine casualties that occurred aboard the M/V [REDACTED] in February 2000. The first marine casualty occurred on February 3, 2000, when the First Mate of the M/V [REDACTED], [REDACTED], suffered two lacerations of his index finger while he attempted to release a towline from the vessel at the Port of Zeebrugge, Belgium. Following the incident, the Master determined that Mr. [REDACTED] required immediate medical attention and arranged to have him airlifted to the nearest hospital. The second incident occurred on February 6, 2000, when the vessel's Chief Engineer, Mr. [REDACTED], injured his thumb while trying to install a new piston ring. Although Captain [REDACTED] immediately reported the injury, it did not initially appear that the Chief Engineer would be unfit for duty. On the day of the incident, Mr. [REDACTED] was taken to a nearby medical center where it was determined that he had broken his thumb. He returned to the vessel without being declared unfit for duty. The following day, February 7, 2000, Mr. [REDACTED] returned to the medical facility for further treatment and was subsequently declared unfit for duty. On February 9, 2000, he left the ship for the United States.

In essence, you contend that, in holding that Captain [REDACTED] violated Coast Guard regulations by failing to chemically test Chief Engineer [REDACTED] following the incident of February 6, 2000, the Coast Guard inappropriately questioned Captain [REDACTED]'s good faith determination that such testing was not required. In reaching this conclusion, you rely on 46 CFR 4.06-1(a) which states, in relevant part, that "[a]t the time of occurrence of a marine casualty...the marine employer shall make a timely, good faith determination as to whether the occurrence currently is, or is likely to become a serious marine incident." In so doing, you fail to grasp the full reach of the Coast Guard's regulations with respect to mandatory chemical testing.

Under the facts of the instant case, I do not find that Captain [REDACTED] was correct to conclude that chemical testing was not required following the chief engineer's injury. In relevant part, 46 CFR 4.03-2(a) states that a "serious marine incident" is "[a]ny marine casualty or accident...which results in...[a]n injury to a crewmember...which requires professional medical treatment beyond first aid, and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties." Your main assertion is that, because the Chief Engineer was not immediately declared unfit for duty, a serious marine incident did not occur and chemical testing was not required. I do not agree. Although Mr. [REDACTED] was not declared medically unfit for duty at the time of the incident, the vessel's logs evidence that following the incident of February 6, 2000, the Chief Engineer was taken ashore for medical treatment. The log further indicates that, although he was not declared "unfit" for duty at that time, X-Rays were taken that indicated that his thumb was broken. When the Chief Engineer returned to the vessel on the evening of February 6, 2000, he was on "restricted duty," awaiting the results of further tests. The next day, February 7, 2000,

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presumably upon receipt of further information, a medical doctor declared Mr. [REDACTED] “not fit for duty,” upon which, arrangements were made to return him to the United States.

Contrary to your assertions, I do not agree that a medical declaration of “unfitness” is required to render a marine casualty a serious marine incident requiring mandatory chemical testing. 46 CFR 4.03-2(a)(1) does not refer to a vessel’s crewmember being “unfit for duty,” but rather indicates that the crewmember simply is “**unfit to perform routine vessel duties.**” The record clearly evidences that the Chief Engineer suffered a broken thumb and was taken from the vessel to undergo professional medical treatment. At that time, it would have been impossible for him to perform his normal duties. Therefore, because the Chief Engineer received medical attention beyond mere first aid and because he was taken from the vessel and rendered unable to perform his regular duties, his injury was, by definition, a serious marine incident. Pursuant to 46 CFR 16.240, “[t]he marine employer shall ensure that all persons directly involved in a serious marine incident are chemically tested for evidence of dangerous drugs and alcohol in accordance with the requirements of 46 CFR 4.06.” Because Captain [REDACTED] made no attempt to ensure that chemical tests were performed on the Chief Engineer, a violation clearly occurred.

However, even if I agreed with you that Captain [REDACTED] was correct to conclude that chemical testing was not initially required, I, nonetheless, would find that a violation occurred. 46 CFR 4.06-1(b) states that “[w]hen a marine employer determines that a casualty or incident is, or is likely to become, a serious marine incident, the marine employer shall make all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for the evidence of drug and alcohol use.” Given the “is likely to become” language contained in the regulation, it is evident that the drafters meant to ensure that drug testing was likely to occur following a marine casualty. Under the facts of this case, even if I agreed that the Chief Engineer’s injury was not, initially, a serious marine incident, I would, nonetheless, find that it was an injury that was “likely to become” a serious marine incident. Therefore, per 46 CFR 4.06-2(b), chemical testing was required. As I have already stated, the record evidences that the Chief Engineer was sent to a professional medical facility on February 6, 2000. At a bare minimum, when Mr. [REDACTED] returned to the vessel later that evening and indicated that his thumb was broken, it should have been evident to Captain [REDACTED] that the injury had been elevated to the level of a serious marine incident requiring mandatory chemical testing. While I agree with the Hearing Officer that alcohol testing would have been ineffectual following the Chief Engineer’s return to the vessel, given the rapid rate at which the body metabolizes alcohol, I nonetheless, believe that chemical testing for the presence of dangerous drugs would still have produced relevant results irrespective of the time lapse. Furthermore, since it was readily apparent that the Chief Engineer would be returning to the medical facility the following day, there is simply no excuse for [REDACTED]’s failure to request that Mr. [REDACTED] undergo chemical tests. In any event, 46 CFR 16.101 makes clear that the purpose of the Coast Guard’s drug testing requirements is to “provide a means to minimize the use of intoxicants by merchant marine personnel and to promote a drug free and safe work environment.” I am simply not willing to view the Coast Guard’s mandatory chemical testing requirements so limitedly that I frustrate the overall purpose of those requirements. Therefore, I find the violation proved and will not dismiss the warning assessed by the Hearing Officer.

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Finally, you contend that “the Coast Guard failed to prove roughly 75% of its case in chief, yet the full penalty sought against Captain [REDACTED] was upheld notwithstanding his twenty-five year unblemished service record and his reasonable good faith judgment concerning testing of the Chief Engineer.” I do not agree. 33 CFR 1.07-65 makes clear that a decision to assess a civil penalty must be based upon substantial evidence in the record. For the reasons noted above, I find there is substantial evidence in the record to support the Hearing Officer’s conclusion that a violation occurred. Therefore, the Hearing Officer’s decision to assess a warning was neither arbitrary nor capricious and is hereby affirmed.

Sincerely,

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DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center