

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA,)	
UNITED STATES COAST GUARD,)	Docket Number CG S&R 99-0001
)	
)	Coast Guard Case No.
vs.)	PA99001107
)	
DAVID W. WISEMAN,)	
)	
Respondent.)	DECISION AND ORDER

PRELIMINARY STATEMENT

This proceeding was commenced by the United States Coast Guard under its authority contained in 46 USC 7701-7705; 5 USC 551-559 (Administrative Procedures Act) and 46 CFR 5.27 (Misconduct) and 46 CFR 5.33 (Violation of Law or Regulation).

The Coast Guard asserted that jurisdiction was proper based on the facts that Respondent resided at 334 152nd Place, Calumet City, IL 60409, held a Merchant Mariner Document (MMD) Number 313-64-9208, and while acting under that document on May 27, 1999 served as an ordinary seaman aboard the vessel NICHOLE S as required by law or regulation.

Specifically the Complaint alleged as follows:

Misconduct: On 27 May 1999 to 01 June 1999 while on board the NICHOLE S and at his residence, the Respondent wrongfully and repeatedly disobeyed company directions and policy to undergo chemical testing after sustaining an injury aboard the vessel NICHOLE S.

Violation of Law or Regulation: On 27 May 1999 to 01 June 1999 while onboard the NICHOLE S and at his residence, the Respondent violated Title 46 Code of Federal Regulations 4.06 by failing to submit to post accident drug testing after a serious marine incident. This regulation was intended to promote marine safety or protect navigable waters.

Respondent was served with the Complaint setting forth these allegations a proposal that the Respondent's Merchant Mariner's Document (MMD) be revoked.

Respondent answered the Complaint, admitting all jurisdictional allegations and denying all factual allegations.

A hearing was held in Chicago, Illinois on July 27, 1999 at which the reporter was sworn (Exhibit A), and testimony of three witnesses was heard. The Respondent deposited his MMD with the Coast Guard.

The parties were afforded the opportunity to submit proposed findings of facts and conclusions of law, which has been done.

Admitted into evidence at the hearing were two exhibits: Coast Guard Exhibit 1 - Report of Marine Accident and Coast Guard Exhibit 2 - Medical Records of David Wiseman.

FINDINGS OF FACT

While working on the vessel NICHOLE S, Respondent David Wiseman sustained a serious and painful injury to his left hand which required medical treatment beyond first aid. Mr. Wiseman was released from duty to seek medical care and reported to Saint Margaret Mercy Healthcare Center in Hammond, Indiana.

As part of the medical treatment, Respondent provided a urine sample and blood was drawn. There is some discussion of Respondent's occupation and mention of the obligation to undergo a drug test as a result of a marine accident. Respondent believed that the urine and blood specimens were to be used for both medical diagnostic and drug testing purposes. No chemical testing for dangerous drugs following the requirements of 49 CFR 40 were conducted.

The marine employer, Marine Management, Inc. has a contract with this facility for doing drug testing as required from time to time under the applicable regulations.

After release from the medical facility, Respondent was contacted by his employer informing him that he needed to give a urine specimen for drug testing. Respondent responded that he had already given a specimen and assumed a test was made. He was told no test was done, and that he needed to give another specimen. Respondent refused.

CONTENTIONS OF THE PARTIES

The Coast Guard argues that Respondent had a duty to provide a urine specimen as a result of a serious marine incident, which is defined to include a personal injury on board a licensed vessel. Even though Respondent provided both urine and blood specimens in the course of medical treatment, no actual drug test in conformity with the applicable regulation was ever done.

And when informed of his obligation, both orally and in writing, Respondent refused to provide the specimen.

The Coast Guard contends this latter refusal after oral and written orders constitutes Misconduct and Violation of Regulation.

Respondent claims that he was in technical compliance with regulations requiring the providing of urine specimens for drug testing.

He also points out that there is considerable doubt of the credibility of John Selvick's testimony that he telephonically ordered Respondent, at his home on May 28, 1999, to take a drug test. Respondent claims he was still in the hospital and could not have received the telephonic order.

DECISION AND ORDER

The principal questions before me are: First, did Respondent knowingly refuse to undergo a drug test as a consequence of a serious marine incident after being ordered to do so; Second, was Respondent in technical compliance with the drug test regulation? In other words, does the provision of blood and urine specimens in connection with diagnostic testing coupled with the belief that such specimens would be used to test for illegal drugs constitute a defense which absolves the Respondent?

The gravamen of the first specification is centered on the refusal to submit to a drug test after being expressly ordered to do so. There is no doubt that Respondent provided both a blood and urine specimen at the time of treatment for his injury. There is also no doubt that no drug test was done which complied with the regulatory requirements for such tests.¹ Also, there is no doubt that Respondent was ordered by his employer to provide additional or supplemental specimens for a drug test. And, there is no doubt that Respondent refused to comply with those orders.²

Respondent's defense is that he acted in good faith when he provided blood and urine specimens in the context of both diagnostic procedures and discussions about drug testing. To later require additional specimens was unnecessary.

¹ See, 46 CFR 4.06 -1 et. seq. (Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service).

² Respondent's own testimony confirms the fact he was ordered and refused. His main theory is that such additional specimen was unnecessary, and all he was required to do was submit the first time, which he did.

Even if we were to ignore the testimony of John Selvick, as Respondent has urged, never the less, there is uncontroverted testimony which shows that Respondent was directed to submit a specimen for a drug test shortly after release from the medical facility. One such order was given in writing.³

Respondent's own testimony confirmed the refusal to submit a specimen after release from the hospital relying on the belief that a specimen was earlier provided, regardless of the clinic's failure to perform a test.

The Coast Guard contends that the failure to comply with either the verbal or written order constitutes Misconduct as defined in 46 CFR 5.27. That regulation provides in relevant part:

“. . . human behavior which violates some formal, duly established rule. . . found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. . . .”

Respondent's obligation arose under 46 CFR 4.06-5 which provides:

“(a) Any individual engaged or employed on board a vessel who is determined to be directly involved in a serious marine incident shall provide blood, breath, or urine specimens for chemical tests required by §4.06-10 when directed to do so by the marine employer”

Is the claim of good faith a viable defense here?⁴ I think not. Respondent's belief, held in good faith or not, was shattered when the marine employer demanded he submit another specimen after he was released from the medical facility. That order was bottomed on Respondent's regulatory obligations to submit such a specimen and the marine employer's obligation to facilitate that effort

The relevant regulation refers to specimen in the plural. Obviously, the drafters of the regulation intended that more than one specimen may be needed to fulfill the testing requirement. So, even if Respondent had provided a specimen upon entry into the facility, he remained obligated to provide additional specimens as necessary. This he failed to do. This failure to provide additional specimens obviates the technical compliance defense.

³ Respondent did not seriously contest whether he received a written order to provide a specimen after discharge from the medical facility.

⁴ I combine under the title “good faith” the defenses raised that Respondent believed he had complied and actually complied by providing blood and urine specimens regardless of whether the medical facility did collect or perform the drug test required under regulation.

Accordingly, I find that the charges of Misconduct and Violation of Regulation are proved by reliable, probative and substantial evidence.

ORDER

Respondent having been found to have engaged in misconduct and violating regulatory requirements, the penalty needs to be considered.

The evidence presented suggested that Respondent is not a drug user. This is the first incident in which he has been involved, there being no prior charges. Understandably, Respondent was in great pain and under considerable stress. His thinking at that time was likely not so clear to fully understand and appreciate the significance of the differences between diagnostic and drug testing specimens and procedures.

Yet when time passed, he was confronted with the facts and direction to provide the specimens, but he refused.

Given those circumstances, the Coast Guard's request for revocation is too harsh. I find that Respondent's MMD is suspended outright for one year to commence on the date Respondent was injured, subject to the following condition that Respondent shall be subjected to a randomly selected time and date for a drug screening or testing. Failure to provide a specimen as requested shall constitute grounds for revocation.

Respondent has turned his MMD into this administrative court and it has been turned over to the Coast Guard for safe keeping. The MMD shall be returned to Respondent upon the passage of the suspension period and compliance with the condition.



EDWIN M. BLADEN
Administrative Law Judge

Dated: August 27, 1999.