UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	)	Docket No. CG S&R 99-0012
	)	Coast Guard No. PA99001775
v.	)	
TOMMY A WHITE, Respondent.	)	

DECISION AND ORDER

This proceeding is brought pursuant to the authority contained in 46 USC § 7704; 5 USC §§ 551-559; 46 CFR Parts 5 and 16, and 49 CFR Part 40.

Respondent, Tommy White was charged, by the Coast Guard, with being a user of a dangerous drug having tested positive for cocaine metabolite, after having been selected for a random drug test by his employer, the Alaska Marine highway System.

Respondent has, by his attorney, answered the complaint where he:
(1) admitted the jurisdictional allegations;
(2) admitted he took a random drug test on July 22, 1999;
(3) admitted the urine specimen was collected at the Ketchikan General Hospital;
(4) admitted he signed a drug testing custody and control form;
(5) admitted that the specimen tested positive for cocaine metabolite.

Respondent denied that cocaine caused the positive result, denied that Northwest Toxicology analyzed the specimen, affirmatively claimed that the specimen was contaminated, and the positive result was a "false" positive. He reserved the right to assert other affirmative defenses, which he did at the hearing claiming the positive test result could only be explained by the fact he had consumed Health Inca Tea the morning of the test.

A hearing on the complaint was commenced on January 27, 2000 in Juneau, Alaska. Due to severe weather conditions the hearing reporter was unable to record the testimony and the Coast Guard supplied a substitute, who recorded the telephonic testimony of the witnesses. Respondent testified in person at the hearing.

It was later learned that the recorded telephonic testimony was not suitable for transcription and thus was lost.[1] After consultation with the parties this Judge determined that the matter would be reheard.

Thus, on May 17 and May 25, 2000 the hearing was reconvened and Respondent personally testified a second time and all other witnesses testified by telephone. A complete transcript of all testimony was made. Six witnesses including Respondent testified, and eleven exhibits were received into evidence. The parties were afforded the right to provide written closing arguments. The Coast Guard requested an extension of 30 days to submit closing argument which was granted. Both Coast Guard and Respondent have submitted a closing argument. Consequently, after consideration of the full record, consisting of the exhibits, testimony of the witnesses including a transcript of proceedings, and the Coast Guard's written closing arguments, the following constitutes the decision in this matter.

Respondent holds a Merchant Mariners Document No. ***[REDACTED]*** issued to him by the Coast Guard on December 22, 1998. It qualifies him to serve as an Oiler, Lifeboatman, Ordinary Seaman and Steward's Department. Jurisdiction is established in this matter by reason of Respondent's licensure and his admission of jurisdiction. See, 46 U.S.C. §7704(c); NTSB Order No. EM-31 (STUART)**;** Commandant Appeal Decision, No. 2135 (Fossani).

PRELIMINARY DISCUSSION

In these cases the Coast Guard must prove its case against the mariner charged on the basis of reliable, probative and substantial evidence. 46 CFR § 5.63. This substantial evidence standard has been determined to be the equivalent of the preponderance of the evidence standard. See Commandant Decision on Appeal 2472 (Gardner) and *Steadman v. United States,* 450 US 91 (1981) which concluded that the preponderance of evidence standard shall be applied in administrative hearings governed by the Administrative Procedures Act, such as this hearing.

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

[1] Respondent's recorded testimony was suitable for transcription. References in this Decision and Order to the Transcripts of both hearings will include the dates of those hearings.

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).

To rebut the presumption, Respondent may produce evidence (1) that calls into question any of the elements of the prima facie case, (2) that shows an alternative medical explanation for the positive test result, or (3) that demonstrates the use was not wrongful or knowing. If this evidence is sufficient to rebut the original presumption, then the burden of presenting evidence returns to the Coast Guard. The Coast Guard at all times retains the burden of proof. See, Commandant Decision on Appeal 2560 (Clifton).

FACTUAL FINDINGS

The first element is to show that the respondent was the person who was tested for dangerous drugs. This involves the proof of identity of the person providing the specimen. Also proof of a link between the Respondent and the sample number of Drug Testing Custody and Control number which is assigned to the sample, and which identifies the sample throughout the chain of custody and testing process, and proof of the testing of that sample.

On July 22, 1999, while employed as an Oiler aboard the M/V Aurora of the Alaska Marine Highway System, Respondent, a member of the crew, was selected for a random drug test. However, he was away at a dental appointment. After the appointment, he did submit his urine specimen at the Ketchikan General Hospital, an alternate approved collection facility. It was placed in an appropriate container and sealed with a tamper proof seal that bore Respondent's signature. Respondent also signed the customary custody and control form showing specimen ID No. 036490000324. Thus, Respondent admits much of this element. He says he signed the form which contained the control number and the specimen was placed in the tamper proof container with the appropriate seal. He is the person tested for dangerous drugs.

The second element involves proof of the test results. The result of the initial screening showed positive for cocaine metabolites and that result is reported on the same custody and control form showing the same ID number 036490000324. IO Exhibit No. 4. The MRO verified and reported the results as positive. IO Exhibit No. 7.

The third element is to show that the test was conducted in accordance with 46 CFR Part 16. This necessarily involves proof of the collection process, proof of the chain

of custody, proof of how the specimen was handled and shipped to the testing facility and proof of the qualification of the laboratory.

The specimen was collected by Greg J. Karlik at the Ketchikan General Hospital on July 22, 1999 at 1650 PM. Mr. Karlik placed the specimen in a tamper proof container sealed it and Respondent initialed the seal. Tr. p. 61. The packaged specimen was sent to the Northwest Toxicology Drug Laboratory in Salt Lake City Utah for analysis. The laboratory is listed as one which is currently certified to meet standards of Subpart C of the Mandatory Guidelines for Federal Workplace Drug Testing programs (59 FR 29916, 29925). IO Exhibit No. 2. [Current Listing in 64 FR 36707-36709].

Upon arrival at the laboratory, a sample processor (specially designated person) assumes custody of the specimen. This person then performs a check to assure that seals are intact, the identification number on the custody and control form match the number on the specimen container, the chain of custody has been annotated, and there is sufficient volume in the container for all testing. The specimen containers remain in a limited access area throughout the entire time the testing is being conducted. Once this check is made it is assigned a unique "accession number", which was annotated on the laboratory's testing documents.

Initial testing was conducted by Immunoassay and later confirmed by Chromatography/Mass Spectrometry. The initial test showed positive and the confirmation GC/MS test was positive for the metabolite Benzoylecgonine at a level of 1965 nanograms per milliliter (ng/ml). The measured metabolite concentration was greater than 150 ng/ml, which is the minimum concentration required under the regulations.

From the foregoing I must conclude that the Coast Guard has established each of the required three elements of a prima facie case of use of a dangerous drug, *i.e.*, the presumption of drug use by Respondent.

RESPONDENT'S REBUTTAL

Respondent seeks to rebut this presumption by showing that he unknowingly ingested Peruvian or Inca Health Tea the morning of the test, which he claims had a sufficient quantity of cocaine to produce the resulting test level of 1965 ng/ml.[2]

Respondent's rebuttal evidence consists of:

(1) his testimony that he purchased the tea in a small shop in Florida, about two years prior to July, 1999 when he was visiting family,

[2] It appears Respondent has abandoned his plead affirmative defenses that his urine specimen was contaminated and the test result was a false positive. See Respondent's Closing Argument. Additionally, Respondent argues that the regulatory presumption discussed *supra* is unconstitutional in general and as applied in this case. Also see, Respondent's Closing Argument pp. 10-11. An Administrative Law Judge is limited in his jurisdiction. Consideration of and decision on constitutional questions is not included within that jurisdiction. Commandant Decision on Appeal No. 2560 (Clifton). Therefore, this Decision and Order does not address either of the plead defenses or Respondent's constitutional theory and argument.

(2) his expert, Dr. James M. Cholakis' testimony that Peruvian or Inca Tea can cause a positive cocaine metabolite test result at the level shown for Respondent, [3]
(3) Respondent's test result in relation to the other test results reported at the same time show his to be on the significantly low end and consistent with the drinking of tea containing a small amount of cocaine,
(4) his test level, 1965 ng/ml is much smaller in comparison to the levels reported in scientific literature for persons drinking only one cup of such tea (*e.g.*, 4000 ng/ml range),[4]
(5) his previous drug screen tests always reported negative results consistent with a non-user,
(6) his co-workers testimony that he did not exhibit any of the classic characteristics or signs of a cocaine user,
(7) his own physician examination of his nostrils shows the absence of any indicia of a cocaine user
(8) the Medical Review Officer, Dr. Mary Ann DeMers failed to inquire of Respondent about consumption of Peruvian or Inca tea thus failing to comply with the MRO procedures in these cases.
(9) Four years earlier the Drug Enforcement Administration reported Peruvian Tea containing coca leaves was being openly sold in South Florida, and consumption of such tea could cause a person to test positive in a drug test.

Respondent says he is a tea drinker and a collector of unusual objects and artwork often looking for such in flea markets. In one such store he spotted a display stacked with small wooden boxes, which contained tea bags. The boxes were displayed under a sign with the words "Inca Health Tea" or "Health Inca Tea". The boxes had the words "Mate de coca" written or printed on them.

When Respondent testified in January, 2000 (the first hearing) he said that he did not know what he purchased was Inca Tea. Tr. 1/20/00 pp. 31-32, 40. He thought the word "coca" referred to chocolate. Tr. 1/20/00 p. 39. He also said he had purchased Inca Tea in the past. Tr 1/20/00 p. 33.

At the hearing May 17, 2000 (second hearing) Respondent testified as follows:

---

[3] Inca Tea is a common occurrence in many South American countries. The tea is often packaged in individual servings as tea bags, which contain approximately 1 gram of plant material. The consumption of coca or Inca tea leads to ingestion of cocaine and other alkaloids. See, Jenkins, Llosa, Montoyha and Cone, "Identification and Quantitation of Alkaloids in Coca Tea", *Forensic Science International*, February 9, 1996, pp. 179-189. As a result, Inca Tea has been the subject of much publicity over the past years. Congress recognizing its importation into the United States and the resulting consumption of cocaine, included coca leaves as a Schedule II narcotic drug. See 21 USC § 812. The statutory inclusion excepted coca leaves and extracts of coca leaves from which cocaine ecgonine and derivatives of ecgonine or their salts had been removed. Thus, so-called Health Inca Tea with the tealeaves de-cocainized is not an unlawful narcotic drug.

[4] Respondent's own expert, Dr. Cholakis , however, testified that a1965 ng/ml level also consistent with a person who uses cocaine. TR 5/17/00 at p. 82.

Q. Okay. And did you consume any tea that morning before going to report to work on the vessel?
A. Yes, I did. I had an English muffin for breakfast. And when I reached in to my tea thing, here, you know, the little container, when I pulled it out, I had one string that was hanging off which had a small lemon on it and *the other three were Inca tea bags. Because of the wheat-straw color I knew what they were, because they are not the same as any other tea bags I have.* And I dropped them into a Pyrex pot, about yea big, and put water in it and boiled it up. An I probably drank maybe half of the pot before I left. I was up at 6:00 a.m. I didn't have to be there for awhile so -- (TR 5/17/00 p. 100 lines 12-25, p. 101 lines 1-2) [emphasis supplied]

These inconsistent responses have raised some doubt of the credibility of Respondent's claim, that while he knew he purchased Peruvian or Inca Health Tea, he did not know the tea contains cocaine.

I must conclude that Respondent had purchased Peruvian or Inca Health Tea in the past, was familiar with it, at least by the color of the tea bags, and thus knew he purchased Inca HealthTea in Florida, and probably consumed Inca Health Tea the morning of the random drug test. See, TR 1/20/00, at p. 33; TR 5/17/00 at pp. 100-101, 139 ff.

He has insisted, however, that he did not understand that Inca Tea contained cocaine. He says he didn't know that until he had the results of research done by him and others, as well as being informed of that by Dr. Cholakis. See, TR 5/17/00 at p 140, TR 5/17/00 at pp. 32-33.

When this defense was raised the Coast Guard requested permission to do an ION Scan of the box which Respondent claimed contained the Inca Tea purchased in Florida.[5] Presumably, if the box tested positive for cocaine alkaloid, arguably, that would have corroborated Respondent's theory he unknowingly ingested cocaine laced tea.

The ION scan test showed that the box was negative for coca leaf alkaloid. IO Exhibit 10. Respondent did not contest the reliability of the Ionscan test. The Coast Guard's expert, Commander Peter J. Brown, testified that the Ionscan devise uses "ion mobility spectrometry," also known as "Plasma Chromatography" to detect a variety of different substances. It is used by the Coast Guard to detect drugs, but it can be programmed to detect up to 30 different illegal drug compounds, and is sensitive to one billionth of a gram. TR 5/17/00 pp. 33, 36.

Respondent argued that if the tea bags were wrapped in plastic in the box the coca leaf would not be detectable. TR 5/17/00 pp 50, 97. LCDR Brown testified that would

[5] Respondent has not challenged the admissibility of the Ionscan test evidence.

not prevent its detection because the principle of Ionscan technology is to detect residue transferred to a surface by airflow or static electricity. But, he also testified cocaine alkaloids disappear rapidly, but the residue a leaf would leave on a surface it came into contact with would linger for several years, at least two years. See, TR 5/17/00 44-45, 53-54. From this I cannot conclude one way or the other whether the coca leaf had touched the box at some point in its packaging, or whether the plastic wrap would have hindered its detection on the surface of the box.

There are few reported cases[6] dealing with Ionscan technology.[7] According to Commander Brown, the Federal Aviation Administration uses it at airports to detect explosives. TR 5/17/00 p. 34. I have been given no reason to doubt the reliability of the testing results. Accordingly, the result in this case was admitted. And, it is probative of the validity of the theory of rebuttal advanced by Respondent.

Respondent's evidence however, even if I reject the negative Ionscan result, presents only a possibility that the tea leaves involved here actually contained cocaine. Dr. Cholakis's testimony merely assumes the Inca Tea actually contained cocaine. There is a lack of substantial, reliable and probative evidence, that the tea Respondent drank contained cocaine. Respondent has not presented any other substantial, reliable or probative evidence, that the cocaine metabolite was accidentally or unknowingly introduced into his system from some other extrinsic source.

When all of Respondent's evidence is considered, at most, it is as consistent with Respondent having drunk de-cocainized tea, which tea was lawfully sold and consumed during the time he says he bought it in Florida. See, Note 3 supra.

In sum, I must conclude that Respondent has failed to rebut the *prima facie* case of the Coast Guard. There is no reliable, probative or substantial evidence presented by

---

[6] See, *Mitchell v. Florida*, 675 S.2d 162 (Fla. App. 1966) [result used only for probable cause to conduct larger search]; *Enzenwa v. Gallen*, 906 F.Supp 978 (M.D. Pa, 1995) [brief discussion holding reliability not dispositive of issue in case]; *United States v. Lee, 25 F.3d 997 (11th Cir. 1994)[remanding to trial court to apply Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S.Ct. 2786, 125 Led2d 469 (1993) to ascertain reliability]; *United States v. $94,010.00 U.S. Currency, 1998 U.S. Dist. Lexis 13544, August 24, 1998 Opinion filed for electronic publication only.[mentions Ionscan, does not discuss reliability or admissibility]*.

[7] The primary users appear to be law enforcement, and military organizations including the Coast Guard. Originally, many of the detectors were used in applications such as detection of humans and human activity in the jungles of Vietnam or the detection of chemical warfare agent vapors including nerve gases and blister agents. See, *Ion Mobility Spectrometry*, by Gary A. Eiceman and Zeev Karpas, New Mexico State University. The authors argue that it would be erroneous to conclude that principles of Ion Mobility Spectrometry (IMS) are either unreliable, unproven or without practical precedent and theoretical reference. They continue that the development of IMS has been surrounded by advances in related technologies in ion-molecule chemistry and there now exists 25 years of experiences with modern analytical ion mobility spectrometry.

Respondent that shows that Respondent unknowingly ingested a substance containing cocaine. See, Commandant Decision on Appeal 2527 (George) rejecting a similar rebuttal theory for the same reasons.

CONCLUSION

Because Respondent has failed to rebut the *prima facie* case of the Coast Guard, I find the charge proved solely on the basis of the presumption. See, Commandant Decision on Appeal 2592 (Mason) 2584 (Shakespeare); 2560 (Clifton).

SANCTION

46 USC § 7704 [c] provides if it is shown that a holder 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.

Accordingly, Respondent's Document No. ***[REDACTED]*** is hereby REVOKED.

Respondent is directed to immediately hand over his document to the nearest Marine Safety Office of the United States Coast Guard.

Service of this Decision upon you serves to notify you of your right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment I)

Dated: September 5, 2000

_____

Edwin M. Bladen
Administrative Law Judge