

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

UNITED STATES COAST GUARD)	Docket No. CG S&R 00-372
)	Coast Guard No. PA00 001015
)	
v.)	
)	
PAUL D. CALIMER)	
Respondent.)	
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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, Paul D. Calimer was charged, by the Coast Guard, with being a user of a dangerous drug having tested positive for marijuana metabolite, after being selected for a random drug test by his employer, ICSAS owner of the M/V Westward Venture. Respondent has denied all allegations and raised affirmative factual and legal defenses.

Respondent's defenses are:

- (1) The Coast Guard lacks jurisdiction because he was not required to submit to a drug test since his maritime job was not safety related.¹
- (2) He unknowingly ingested marijuana.
- (3) Because the regulations exempt his position as a non-safety related one, the requirement that he take the drug test amounted to an unlawful search and seizure.²

A hearing on the complaint was commenced on August 16, 2000 in Seattle, Washington. After that hearing an Initial Decision and Order was rendered in which I found that Respondent had submitted sufficient proofs to rebut the presumption that he was a drug user.

As I observed in my previous ruling in the event of a successful rebuttal of the presumption the matter returns to the Coast Guard for them to present any proofs they may have to show that Respondent is a drug user as provided by 46 USC § 7704(c). See, Commandant Decision on Appeal 2560 (Clifton).

¹ This defense was dismissed in the initial decision and order

² This defense was also dismissed in the initial decision and order

Subsequently, on September 18, 2000 a continuation of the hearing in this matter was held in Seattle, Washington. On that date the Coast Guard submitted additional proofs. The parties were then afforded the opportunity to submit closing argument in support of their respective positions.

A transcript of the two hearings was prepared and I have now reviewed that transcript, the previous decision in this matter along with the closing arguments of the parties.

The Coast Guard contends that Respondent has actually failed to rebut the presumption of use because a closer examination of the circumstantial evidence demonstrates that the tea Respondent claims to have ingested did not, in fact, contain marijuana.

In my previous decision I relied upon the lack of contradiction to the circumstantial evidence of Respondent that the tea he consumed on board the Westward Venture contained marijuana. I relied on:

- (1) His testimony that he consumed this herbal tea on board the M/V Westward Venture, and the tea was provided by the Chief Cook, Dien Short, from a supply stored in a package on a shelf in the vessel's galley.
- (2) His testimony, after learning of the positive drug test, he met with CWO Gross of the Marine Safety Office in Seattle, WA telling him that he is not a user of marijuana and his of recently realized suspicion the herbal tea was the culprit. He told him he still had some of the loose tea.
- (3) His testimony that CWO Gross suggested the tea leaves be tested for the presence of marijuana and if tested positive, that would be the end of the matter.
- (4) Test results dated February 19, 1999 from a licensed laboratory in Seattle, WA showing a GC/MS test that the herbal tea contained 1650 parts per million of marijuana.
- (5) A receipt showing the payment for the GC/MS test.
- (6) The testimony of Dien Short that he had purchased loose leafed herbal tea in Washington stored it in the Galley, and brewed it and served it to Respondent and others.
- (7) I had no evidence showing Respondent contaminated the tealeaves, which he took to Analytical Chemistry, Inc. for testing.
- (8) Respondent's demeanor, even though filled with some anger for a 22 month delay in bringing this matter before this judge, did not compel me to conclude he was falsely stating the tea from the Galley of the Westward Venture was the same tea tested at Analytical Chemistry, Inc.
- (9) The Coast Guard had not corroborated the testimony of Dien Short regarding the test results for other crew members.

The Coast Guard now shows none of the other crewmembers tested positive for any of the five drugs in the normal screen. Exhibit CG-8. Of particular significance is the

fact the test record shows that crewmember Abdulla Fadel tested negative. Even Respondent says that Mr. Fadel drank the tea [Transcript August 16, 2000 at p. 113], and Dien Short testified that the tea was served to the two messmen (Calimer and Fadel) under his supervision. Transcript August 16, 2000 at p. 60.

The Coast Guard also point out that Respondent's claim he was served herbal tea from Hawaii by the Chief Cook, was contradicted by the cook. Dien Short said the tea was purchased at the Spice Market in Seattle, Washington, not in Hawaii, and was generic bulk tea. See Respondent's Exhibit A, page D-1 (written statement dated June 15, 2000); and Transcript August 16, 2000, Dien Short, at pp. 59-60, 67-68.

When confronted with the contradiction about the source of the tea, Respondent made no effort to refute Dien Short's testimony. See for example Transcript August 16, 2000 at page 142.

A closer examination of the record also shows that Respondent did not keep any of the tea leaves, or the plastic bag in which they were kept. See Transcript August 16, 2000, Paul Calimer, pp. 107, 119.

He said why should he keep something that would cause him to test positive. Transcript August 16, 2000 at p. 119. It makes no logical sense to discard that evidence, especially if he went to the trouble of having the tea leaves tested. It was evidence corroborative of his claims. His explanation lacks credibility. Looked at in a fresh light it suggests to me his motive was to obfuscate the truth.

If Respondent is to be believed, it is also impossible for Mr. Fadel to have tested negative for marijuana if he drank the same tea drunk by Respondent.

All of this suggests it is highly improbable the tea Respondent had tested is the same tea he drank on board the Westward Venture that fateful 10 days prior to the random drug test.

There is no motive for Dien Short to falsify his testimony regarding the source of the tea. Contrary to Respondent's claim it came from Hawaii, it came from Seattle, Washington. This contradiction, while not probative of whether the tea contained marijuana, is probative of Respondent's credibility. Respondent's comment about the geographic source of the tea was unnecessary, I had not relied upon it. But now, when confronted with this contradiction, I can only conclude that Respondent has not been wholly candid in his testimony.

Lastly, the Coast Guard points out the fact that the test results show a high concentration of marijuana metabolite in Respondent's urine. If so, he should have experienced the intoxicating effects of the drug. But, he made no mention of that in his testimony. Especially, if the drug was unknowingly consumed.

That is somewhat arcane. Respondent admits having used marijuana in the past. Transcript August 16, 2000 at pp.116-117. If he, to his surprise, consumed that much marijuana in the tea, as an experienced person, he would have known it at least by the time of the drug test, which was about 4:00 pm.³

From where the tea leaves that tested positive for marijuana came, I don't know. But, I now believe they did not come from the tea on board the Westward Venture. That being so, the GC/MS test provided by Respondent is not reliable evidence of the fact that the tea consumed by Respondent contained marijuana.

I must now conclude Respondent has failed to rebut the presumption of drug use.

I will thus rely on the presumption of drug use and find that Respondent is a drug user and his Merchant Mariner Document is hereby revoked as required by 46 USC § 7704(c).

Respondent is hereby directed to submit his document to the Marine Safety Office Puget Sound forthwith.

You have a right to appeal this decision and order. A copy of your rights to such appeal is attached. Your right to appeal has certain time limits and they must be strictly observed. (Attachment A)

DATED: November 14, 2000



Edwin M. Bladen
Administrative Law Judge

³ Oral ingestion of marijuana is quite different than smoking. Onset of psychoactive and other pharmacological effects is rapid after smoking, but much slower after oral doses. See, Adams, I.B. and Martin, B.R., "Cannabis: Pharmacology and Toxicology in Animals and Humans", Addition 91 (11):1585-1614, November 1996.