UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD	)	
	)	**Docket No. CG S&R 01-0151**
vs.	)	
	)	
JOEL A. WESTGATE,	)	
	)	
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

PROCEDURAL HISTORY

The Coast Guard has complained that Respondent the holder of a Merchant Mariners Document (Able Seaman, Wiper and Steward's Department) No. 535-68-2289 is a user of dangerous drugs within the meaning of 46 USC § 7704(c). This arises from a routine pre-employment drug test on December 19, 2000. The test was positive for the metabolite Tetrahydracannibinol (THC) for marijuana. The Coast Guard seeks the revocation of Respondent's license and document.

Respondent answered the complaint, admitted the jurisdictional allegations, but denied the factual allegation of the positive test. He did assert an affirmative defense contending that the collection procedures used by the collection facility were faulty resulting in a break in the chain of custody causing substantial doubt that the specimen tested was that supplied by the Respondent.

Respondent has also asserted, in the alternative, that even if he is shown to have been a user of dangerous drugs in the past, he is no longer a user and has provided satisfactory proof he is cured within the meaning of 46 USC § 7704(c)[1]. Thus, he says revocation of his license and document should not be ordered.

A hearing in this matter was held on June 12, 2001, July 31, 2001 and August 1, 2001. Nine witnesses testified and the Coast Guard presented 10 exhibits and Respondent

[1] 46 USC § 7704(c) provides as follows:
"If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

presented 10. Additionally, two deposition transcripts were admitted. The parties were afforded the opportunity to present written closing arguments, which were filed on September 19, 2001. Reply arguments were filed on October 30 and 31, 2001. This matter is now ripe for decision.

Jurisdiction is established in this matter by reason of Respondent's holding of a Merchant Mariner's document. See, 46 U.S.C. §7704(c); NTSB Order No. EM-31 (STUART); Commandant Decision on Appeal [CDOA] No. 2135 (Fossani).

PRELIMINARY DISCUSSION

In drug testing 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 a license or document holder is a user 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 urine 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 by a preponderance of the evidence. The elements of a case or 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 that (1) calls into question any of the elements of the prima facie case, (2) shows an alternative medical explanation for the positive test result, or (3) 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).

FINDING OF FACT AND DISCUSSION

The first element of presumptive proof 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 urine specimen throughout the chain of custody and testing process, and proof of the testing of that specimen.[2] This element involves the specimen collection procedures used by the collection facility.

Respondent's version of the collection procedures to which he was subject are as follows. On December 19, 2000 Respondent was taken by the Port Captain for American Marine Safety, Inc., along with two fellow mariners, to the PV Family & Immediate Medical Care facility in Palos Verdes PE, California for a pre-employment physical [Dep. TR Carl Page at p. 9; TR. 7/31/2001 at pp. 68, 70]. After waiting some period of time he was escorted by Gerrard Doyle to have his eyes examined, a chest x-ray and an EKG. Doyle then took him to a room that served as the urine collection station. Upon entering the room, Respondent observed a standard custody and control form was partially completed attributable to him, but without Respondent's or the employer's telephone number and he expressed concern [TR. 71-72; CG 8]. Respondent was told it was of no importance and was then told to, and he signed the custody and control form, as well as the specimen bottle labels, which were found on a clipboard. [TR. 72-73}. Respondent then retired into a toilet facility found an empty cup on the stool and filled it and returned to the room and handed it to Doyle who placed it on a counter along with other specimen bottles [TR. 74-76]. Doyle did not label the bottle or place it into a sealed envelope. From there Doyle took Respondent to another room for a hearing test. After returning from the hearing test the specimen bottle was bagged and sealed and placed in a locker or cupboard.

Gerrard Doyle the collector testified that the customary procedure is for the specimen bottle to be sitting on top of the stool in the lavatory [TR. 6/12/01 p. 37]. He also says there are several kits in the bathroom and the donor is to select any one of them [TR 6/12/01 p. 38]. Once the specimen is returned to him he pours the urine into another cup and has the donor sign the seal. He then places the seal over the cup and has the donor sign the chain of custody and control form. All of these are then put in a bag with another seal and returned to the bathroom, which has a *spot* in it for the bag [TR 6/12/01 p. 37].[3] The bag is then left for a courier to retrieve [TR. 37-38].

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[2] Since the drug test undertaken in this proceeding was on December 19, 2000 the applicable collection procedures discussed in this decision and order will be those found in 49 CFR Part 40 prior to their revision and amendment in 65 Fed. Reg. 644 (December 19, 2000). The amendments to 49 CFR part 40 are effective January 18, 2001. The revised 49 CFR Part 40 is effective August 1, 2001.

[3] See also TR. 8/1/01 at pages 52-53 [Court reading portion of Doyle Transcript to Ronald Springel, MD]

Doyle's testimony is inconsistent in several important respects with that of Carlos Castillo another collector for PV Family & Immediate Medical Care. Castillo described the collection site customary procedures used in the collection process as follows. See TR July 31, 2001 at pages 155-181.

First, Step 1 in the custody and control form (CCF) is filled out together with the donor including obtaining identification and social security number from the donor. [TR. 7/31/01 p. 163]. There is no testimony or evidence from Doyle regarding his obtaining identification information from the donor, because Doyle said the CCF is completed before the donor enters the room with information supplied by the union [TR. 6/12/01 p. 66].

Second, a drug testing collection kit is taken from a closet and is unwrapped. A collection cup is given to the donor who is then escorted to the lavatory, which is part of the same room [TR. 7/31/01 pp 161-162, 166].[4] Doyle said the kit is in the lavatory or a cup is waiting for the donor on the stool in the lavatory [TR. 6/12/01 p. 37].

Third, after filling the collection cup, the employee then exits the lavatory area and places the cup on the counter in the room. The technician then transfers the urine into a specimen bottle and seals are affixed. The donor then initials the seals affixed to the specimen bottle [TR. 7/31/01 pp. 168-169]. Doyle says on one hand, the specimen is returned to him and he pours the urine into another bottle or cup, on another hand the donor places the cup on the counter, then at yet a third version he says the donor pours the urine into another cup which is then sealed [TR. 6/12/01 pp 38-39, 40] and has the donor initial the tamper proof seals before they are attached to the specimen bottle [TR 6/12/01 pp 42-43, 50-51, 65].[5]

Based on these inconsistencies together with the manner in which Mr. Doyle testified[6], I have substantial doubt about the credibility and reliability of his testimony. I

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[4] 49 CFR § 40.23(b)(1) provides that if a separate collection container is used for urination the container is to be provided to the employee *still sealed in its wrapper, or unwrapped in the employee's presence.* Obviously Mr. Doyle was unfamiliar with this requirement. This lack of familiarity damages his credibility.

[5] See 49 CFR § 40.25 et. seq. which provides the collection site person is required to handle the specimen not the donor and it also required to affix the tamper proof seals to the specimen container.

[6] Witness Doyle's testimony was by telephone so I was unable to observe his mannerisms or to personally observe physical appearance while testifying. Nevertheless, his tone of voice and the hesitancy in which he answered some of the questions put to him by the investigating officer, Respondent's counsel and this judge suggest Doyle was curt and over confident in his answers. He treated his testimony as an unwelcome intrusion and reluctantly routine. He was hesitant in his answers suggestive to me, he was actually unsure of the procedures but related what he thought we wanted to hear or what he thought were the required procedures. Moreover, his choice of terminology for certain responses was arcane. For example, this so-called "spot" into which he places the specimen bag was most likely a secure refrigerator, which identity should have been natural and well known to him. I compared Mr. Doyle's testimony to that of Carlos Castillo [TR. 7/31/01], which helped me confirm my overall opinion, that Mr. Doyle's testimony was unreliable. As to the refrigerator see 49 CFR § 40.25, which details the requirement of secure storage while awaiting transportation to the testing laboratory including refrigeration. Mr. Doyle was unfamiliar with this requirement.

believe Respondent's testimony that he placed his specimen cup on the counter among other things on that counter. I am also persuaded that Doyle's compliance with collection procedures mandated by the DOT regulations is cavalier, inconsistent and non-compliant. I cannot find reliable and substantial evidence that Respondent's specimen is the same one ultimately transported to the laboratory for testing

I conclude Mr. Westgate's specimen cup was placed on the collection site's counter. The counter was cluttered with other items and as Mr. Westgate testified likely had other specimen containers on it as well. Whether these containers were of the type used in the drug testing process or used for other medical testing purposes is ambiguous.

In any event, the Coast Guard's Investigating Officer (IO) argues that Mr. Westgate's testimony in this important respect is mere speculation without substantiation. The IO also says Mr. Castillo's "testimony provides evidence about the collection procedures, which fills in the details confirming the validity of Mr. Westgate's drug test." See Coast Guard Rebuttal to Respondent's Closing Argument at page 13.

As I have related above, I do not agree with the IO in that respect. As I have discussed, Mr. Castillo's testimony actually contradicts that of Mr. Doyle.

Moreover, the IO's argument fails to understand that Respondent's testimony is entitled to as much consideration as that of any other witness. No more and no less. The IO has neither supplied to me any support, nor have I found any in the record, that Mr. Westgate's testimony is speculative. To the contrary, Mr. Westgate's testimony relates what he actually observed not what he thought took place. Additionally, the IO has not pointed to any evidence in the record, which would support a finding that Mr. Westgate's observations were either manufactured or fictional. I also have found none.

From all of this, I have considerable doubt concerning the integrity of the chain of custody. In sum, I find after consideration of the entire record, and the credibility of the witnesses, there is insufficient substantial, probative and reliable evidence, which leaves me with the firm conclusion that Respondent is the person tested for dangerous drugs.

CONCLUSION

The Coast Guard must establish the first element of a *prima facie* case by showing from substantial, reliable and probative evidence, that the Respondent was in fact the person tested for a dangerous drug. I have weighed the testimony of the respective witnesses, particularly Respondent, Carlos Castillo and Gerrard Doyle and examined the principal documents including the custody and control form and must conclude the Coast Guard has failed to prove by substantial, reliable and probative evidence the first element of a *prima facie* case. I have considerable doubt that Respondent was the person tested and it was his urine specimen found positive for tetrahydrocanninabionl. *See* CDOA 2421 (RADAR) and 2319 (PAVEIC).

The custody and control form identification data was not filled out in the presence and with the assistance of the donor-respondent. I do not find where he was asked for his identification to be certain he was the same person on the custody and control form that was used. The collection cup was not taken from a sealed kit in the presence of the Respondent and given to him for use. This omission corrupts the identity of the cup so that it is peculiarly identified with the donor-respondent. Instead a generic cup is waiting for Respondent on the toilet stool in the lavatory. When Respondent finishes filling the collection cup it is returned by him to the counter and placed among other similar cups on the counter. Its integrity is then compromised. Its peculiar identification with Respondent is lost. I am unable to find any evidence that the collection site person, Gerrard Doyle, picked up the cup peculiarly associated with Respondent and poured the contents into a specimen bottle which was sealed in the presence of Respondent. Respondent's testimony describing these events is credible and believable. Mr. Doyle's testimony as I have noted is not credible or reliable. Mr. Doyle's compliance with the procedures mandated by the DOT rules has been less than scrupulous. At a minimum it is most irregular.

For these reasons I find the first element of a presumptive case is not proven.

It is therefore unnecessary to address the remaining points and authorities presented by the Coast Guard and the Respondent.

The complaint of the Coast Guard is dismissed.

IT IS SO ORDERED.

Dated: November 15, 2001

Edwin M Bladen
Administrative Law Judge

CERTIFICATE OF MAILING

I hereby certify that I have sent the attached Decision and Order to the following persons as indicated:

Mr. Ron Kinsey
Telefax: 206-217-6213

Mr. Eric Dickman
Telefax: 206-246-0088

ALJ Docketing Center – telefax

Dated: November 15, 2001.

Mary Purfeerst
Legal Assistant to Administrative
Law Judge