UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
	:	
	:	NO. 2696
MERCHANT MARINER LICENSE	:	
	:	
	:	
Issued to: BRANDON SCOTT CORSE	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Default Order dated October 15, 2010, Bruce T. Smith, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard, revoked the Merchant Mariner License of Mr. Brandon Scott Corse (hereinafter "Respondent") upon a finding of default in a proceeding that alleged, as the basis for revocation, *use of or addiction to the use of dangerous drugs*. The Complaint alleged that on January 23, 2010, Respondent submitted to a reasonable suspicion drug test and provided a urine sample that tested positive for the presence of marijuana metabolites.

PROCEDURAL HISTORY

Because this case stems from a Default Order, it is useful to provide a detailed procedural history. The record shows that the case progressed as follows:

- **February 12, 2010**—the Coast Guard filed a Complaint against Respondent's Merchant Mariner License alleging, based on a positive test result, that Respondent was a user of, or was addicted to the use of, dangerous drugs [Complaint at 2]

- **March 8, 2010**—Complaint received at Respondent's address of record [Return of Service for Complaint at 3]

- **March 28, 2010**—Respondent's Answer due (no Answer was received)

- **April 2, 2010**—the Coast Guard filed a Motion for Default Order [Motion for Default Order at 1]

- **April 22, 2010**—Respondent's Response to the Coast Guard's Motion for Default Order due (no response received)

- **May 6, 2010**—ALJ issues Order Denying Motion for Default due to the fact that the Coast Guard failed to provide proof of service of the Motion for Default on Respondent with its motion for default [Order Denying Motion for Default at 1]

- **June 2, 2010**—Coast Guard files a second motion for Default Order

- **June 3, 2010**—ALJ issues Scheduling Order setting pre-hearing conference for June 16, 2010 [Scheduling Order—Pre-Hearing Conference at 1]

- **June 16, 2010**—Pre-Hearing Conference held, by telephone, with Coast Guard and Respondent, appearing *pro se*, in attendance; Respondent stated that he was unable to complete the Answer form since he could not understand the Complaint or how to respond to it [Pre-Hearing Memorandum & Order dated August 23, 2010, at n. 1]

- **June 22, 2010**—Respondent's Response to the Second Motion for Default Order due (no response received)

- **August 5, 2010**—ALJ issues Scheduling Order setting a second pre-hearing conference for August 19, 2010

- **August 19, 2010**—Second Pre-Hearing Conference held, by telephone, with Coast Guard and Respondent in attendance; Respondent's failure to file responsive pleadings is discussed and Respondent is told that he has until September 3, 2010, to file his Answer in the matter [Default Order at 1-2]

- **August 23, 2010**—ALJ issues Pre-Hearing Memorandum & Order establishing the discovery schedule for the matter ["Pre-Hearing Memorandum & Order at 2]

- **September 3, 2010**—Respondent's Answer due per direction of the presiding ALJ (no Answer received)

- **September 23, 2010**—Coast Guard files a third Motion for Default Order

- **September 29, 2010**—ALJ issues Scheduling Order setting a pre-hearing conference for October 7, 2010

- **October 7, 2010**—Pre-Hearing conference held, by telephone, with Coast Guard and Respondent in attendance; Respondent's failure to file his Answer was discussed; Respondent stated that he "hadn't had time," "never received an Answer form," and "lost the Answer form" [Default Order at 2]

- **October 13, 2010**—Respondent's Response to the third Motion for Default Order due (no response received)

- **October 15, 2010**—Default Order issued by ALJ [Default Order at 4]

- **October 22, 2010**—Respondent files his Notice of Appeal

Coast Guard regulations require that an individual applying for an appeal submit both a Notice of Appeal and an Appellate Brief. 33 C.F.R. §§ 20.1001, 20.1003. Although Respondent failed to file an Appellate Brief in this case, given the lengthy nature of Respondent's Notice of Appeal, it will be treated as both a Notice of Appeal and Appellate Brief. Therefore, this appeal is properly before me. Respondent appears *pro se*.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard-issued Merchant Mariner License at issue in this proceeding.

Because a hearing never occurred in the matter, the facts supporting the ALJ's default order of revocation were developed solely via the Coast Guard Complaint. The Complaint alleges as follows:

1. On 01/23/2010 Respondent took a reasonable suspicion/cause drug test.
2. A urine specimen was collected by Savannah Robin of Heinen Medical Review.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.
4. The urine specimen was analyzed by CLINICAL REFERENCE LABORATORY, Lenexa, KS 66215 using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for marijuana metabolites, as determined by the Medical Review Officer, BRIAN (MRO) HEINEN.
6. Based on the above, the Respondent is a user of or addicted to the use of dangerous drugs.

[Complaint at 2]

BASES OF APPEAL

This appeal has been taken from the Default Order imposed by the ALJ finding the allegations set forth in the Complaint proved and ordering the revocation of Respondent's Merchant Mariner License.

Respondent states that at some point during his employment with Laffettee Work Boat Rentals, a deckhand threw two empty packs of cigarettes in the wheel house trash can. The following day, when another Captain found the cigarette packs in the trash, the Captain called the Company and told them that Respondent was smoking "weed" aboard the vessel. Respondent denies this. He states that he was given a two-minute test and he was told that he failed the test. He denies that he failed. He states that he was fired; he further states that he took a privately administered drug test the following morning and passed.

Respondent states that he "didn't understand the Answer Sheet" that the Coast Guard sent him. Apparently referring to the June 16, 2010, pre-hearing conference, Respondent says that when he asked the ALJ for help with it, the ALJ assigned another date, apparently the pre-hearing conference of August 19, 2010. Respondent says he was

then told that they couldn't find anyone to help him with his case.[1] At some point thereafter, Respondent lost his house and during his move, Respondent lost the Answer form that had been provided to him. While Respondent acknowledges that the Coast Guard sent him another Answer form, he asserts that he could not go get it because he had broken his foot and did not have a car, apparently because it had been repossessed.

From Respondent's story, I discern the following issues:

I. *Whether the ALJ was correct to issue a default order in the case;*

II. *If so, whether Respondent has provided good cause to support the setting aside of the Default Order.*

Though not raised by Respondent's filing, I will consider:

III. *Whether the findings and order of revocation are supported by the record.*

OPINION

I.

Whether the ALJ was correct to issue a default order in the case.

When a default order is issued, the decision is reviewed for abuse of discretion, "keeping in mind the federal policy favoring trial over default judgment." *Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C. Cir. 1995). The standard of review for abuse of discretion is highly deferential:

> A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion ... [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions, is without evidentiary support.

[1] During the initial pre-hearing conference held on June 16, 2010, when Respondent indicated that he was unable to complete his Answer form, the ALJ offered to make requests on Respondent's behalf to secure *pro bono* representation. [Pre-Hearing Memorandum and Order dated August 23, 2010, at 1] Although Respondent accepted the ALJ's offer, the ALJ was ultimately unable to procure *pro bono* services for Respondent. [*Id.*]

Appeal Decision 2692 (CHRISTIAN) (citing Appeal Decision 2610 (BENNETT) (quoting 5 Am. Jur. 2d Appellate Review § 695 (1997))).

Coast Guard regulations allow an ALJ to issue a default order when a Respondent fails to either file an Answer in a case or appear at a scheduled hearing or conference. 33 C.F.R. § 20.310; *see also* Appeal Decisions 2665 (DUBROC) and 2647 (BROWN).

As noted in the Procedural History portion of this decision, Respondent was afforded numerous opportunities to file his Answer in this case—he could have answered the Complaint or filed his Answer in response to the Coast Guard's motions for default—and he did not do so. Moreover, the record shows that the ALJ took extraordinary steps to explain the Answer process to Respondent more than once. Under these circumstances, the ALJ did not abuse his discretion in issuing a Default Order in the case.

II.

Whether Respondent has provided good cause to support the setting aside of the default order.

33 C.F.R. § 20.310(e) states: "For good cause shown, the ALJ may set aside a finding of default." Neither the applicable regulations nor prior Commandant Decisions on Appeal state what constitutes "good cause" to set aside a Default Order in these proceedings. I look to Federal Rules of Civil Procedure and case law interpreting those Rules for guidance on the issue.[2]

Federal Rule of Civil Procedure 55(c) governs default in the federal courts. Rule 55(c) states: "The court may set aside an entry of default for good cause, and it may set

[2] 33 C.F.R. § 20.103(c) states: "Absent a specific provision in this part, the Federal Rules of Civil Procedure control." It follows that it is appropriate to look to federal cases interpreting the default provisions of the Federal Rules of Civil Procedure for guidance on interpreting the default provisions of 33 C.F.R. Part 20.

aside a default judgment under Rule 60(b)."[3] The federal courts have stated that good cause is "a mutable standard, varying from situation to situation. It is also a liberal one—but not so elastic as to be devoid of substance." *Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion,* 88 F.3d 948, 951 (11th Cir. 1996) (quoting *Coon v. Grenier*, 867 F.2d 73, 76 (1st Cir. 1989)) (internal quotations omitted). The principal factors that should be considered when determining whether to set aside a default under Rule 55(c) or a default judgment under Rule 60(b) are: (1) whether the default was culpable; (2) whether setting it aside would prejudice the adversary; and (3) whether the defaulting party presents a meritorious defense. *See, e.g., Compania Interamericana Export-Import, S.A. v. Compania Dominicana de Aviacion,* 88 F.3d 948, 951 (11th Cir. 1996); *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290, 292 (6th Cir. 1992); *U.S. v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984); *Jackson v. Beech*, 636 F.2d 831, 836 (D.C. Cir. 1980).

Chief among these factors is whether a meritorious defense has been raised. *See, e.g., Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir. 1984) ("The threshold issue in opening a default judgment is whether a meritorious defense has been asserted."); *Consolidated Masonry & Fireproofing, Inc. v. Wagman Construction Corp.*, 383 F.2d 249, 251 (4th Cir. 1967) ("Generally a default should be set aside where the moving party acts with reasonable promptness and alleges a meritorious defense."); *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970) ("[T]he trial court ought not reopen a default judgment simply because a request is made by the defaulting party; rather, that party must show that there was good reason for the default and that he has a meritorious defense to the action.")

[3] The test for setting aside an entry of default, governed by Rule 55(c), is the same as the test for setting aside a default judgment, governed by Rule 60(b), but the "good cause" test of Rule 55(c) is applied more liberally. *U.S. v. DiMucci*, 879 F.2d 1488, 1495 (7th Cir. 1989). Issuance of a default order in this case is more akin to a default judgment than to an entry of default.

"A meritorious defense requires a proffer of evidence which would permit a finding for the defaulting party or which would establish a valid counterclaim." *Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp.*, 843 F.2d 808, 812 (4th Cir. 1988). "The showing of a meritorious defense is accomplished when 'allegations of defendant's answer, if established at trial, would constitute a complete defense to the action.'" *U.S. v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984) (quoting *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 244 (3d Cir. 1951)). However, a bald allegation, without the support of facts underlying the defense, will not sustain the burden of the defaulting party to show cause why a default judgment should be set aside; "the trial court must have before it more than mere allegations that a defense exists." *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970).

As a defense, Respondent says he was told that he failed what he characterizes as a two-minute test, which Respondent contends he didn't fail, and Respondent further states that he took a drug test the following day at a clinic and passed it. Even if Respondent's assertions are accepted as true, he has not alleged sufficient facts to establish a defense. Respondent claims to have passed an initial two-minute test, but he does not explain how he determined that he passed this test.[4] Similarly, Respondent claims to have passed a subsequent test, but he provides no information as to the type of test he took, the protocol under which the test was administered, or the standards for determining whether he passed or failed the test.[5] In short, Respondent has not shown that he has a meritorious defense.

Another factor worth examining in this case is whether Respondent was culpable in the default. "Generally a party's conduct will be considered culpable only if the party defaulted willfully or has no excuse for the default." *U.S. v. Timbers Preserve, Routt*

[4] The two-minute test that Respondent refers to cannot be the drug test upon which the Coast Guard based its Complaint. Results for a test that would qualify as a basis for revocation would not have been immediately available to Respondent because the analysis is conducted by an outside laboratory (in this case located in Kansas whereas Respondent's employer was apparently located in Louisiana) and, if positive, reviewed by a Medical Review Officer, all of which would have taken several days.

[5] It is by no means certain that even if Respondent provided such information, it would establish a meritorious defense.

County, Colo., 999 F.2d 452, 454 (10th Cir. 1993). Put another way, the question is "whether there was excusable conduct or some other compelling reason for relief." *Id.* at 455 (citing *Pelican Prod. Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990)). To be deemed culpable for the default, a party "must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on judicial proceedings." *Thompson v. Am. Home Assur. Co*, 95 F.3d 429, 433 (6th Cir. 1996). Moreover, "the defendant's conduct is culpable if he has received actual or constructive notice of the filing of the action and intentionally failed to answer." *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392 (9th Cir. 1989).

In this case, Respondent says he did not file his Answer because he did not understand the answer process and, alternatively, that he lost his Answer form. As has already been discussed, the record shows that the ALJ explained the answer process to Respondent during more than one of the pre-hearing conferences held in this matter. His excuses—that he did not understand the answer process and that he lost the answer form—are not excuses that the law recognizes. The record shows Respondent had actual notice of the proceedings, he was aware that he was required to file an Answer, and he did not do so for reasons that do not rise to the level of a creditable excuse. Respondent's failure to answer was culpable.[6]

[6] The record shows that, in effect, the ALJ considered Respondent's culpability in deciding whether to grant the Coast Guard's Motion for Default Order. The ALJ concluded, "Respondent's reasons . . . fail to persuade the court that a denial should be entered" against the Coast Guard's third and final Motion for Default Order. [Default Order at 2-3]

Because Respondent has not raised a meritorious defense and also because he was culpable in the default, good cause has not been shown to set aside the ALJ's Default Order.

III.

Whether the findings and order of revocation are supported by the record

After finding Respondent in default, the ALJ ordered the revocation of Respondent's Merchant Mariner License.

In Coast Guard Suspension and Revocation proceedings, "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." 46 U.S.C. § 7704. By being in default, Respondent is deemed to have admitted all facts alleged in the Complaint. 33 C.F.R. § 20.310(c). Thus, by defaulting, Respondent has admitted that he provided a urine sample that tested positive for the presence of marijuana metabolites.[7] In Coast Guard Suspension and Revocation cases, an individual who fails a chemical test for dangerous drugs is presumed to be a user of dangerous drugs. 46 C.F.R. § 16.201(b). The term "dangerous drug" "means a narcotic drug, a controlled substance, or a controlled-substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. 802))." 46 C.F.R. § 16.105. Marijuana is a schedule I controlled substance under the Comprehensive Drug Abuse and Control Act of 1970. 21 U.S.C. § 812(c) Schedule I (c)(10); *see also* 21 C.F.R. § 1308.11(d)(23). Therefore, because Respondent "failed a chemical test for dangerous drugs," as defined in 46 C.F.R.

[7] Respondent had the opportunity to present a defense, but by his own failure to take the opportunity, Respondent barred himself from raising any defense in this case.

§ 16.105, he is presumed to be a user of dangerous drugs and revocation of his Merchant Mariner License is appropriate.

CONCLUSION

The ALJ's decision to issue a Default Order was not an abuse of discretion. Moreover, Respondent has not shown good cause to support the setting aside of the ALJ's Default Order. The sanction of revocation ordered by the ALJ is not excessive. There is no reason to disturb the ALJ's Order.

ORDER

The order of the ALJ, dated October 15, 2010, is **AFFIRMED.**

Sally Brice-O'Hara

Signed at Washington, D.C. this 18th day of July, 2011.