

UNITED STATES OF AMERICA

U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD,) Docket Number CG S&R 00-0249
)
vs.) Coast Guard Case No. PA00 000650
)
RICARDO A. SEBASTIAN,)
)
Respondent.)
_____)

DECISION AND ORDER

On April 5, 2000, a Complaint was filed charging Respondent, a holder of Merchant Mariner Document Number 576-35-1530, with violation of 46 USC § 7704(c) (use of or addiction to use of dangerous drugs) as a consequence of a March 19, 2000 random drug test from which the specimen provided by Respondent tested positive for amphetamines.

Respondent answered the complaint admitting holding the Merchant Mariner Document, that acting under authority of that document he served as a crewmember aboard the vessel S.S. Independence as required by law and regulation. He also admitted, he took a random drug test on March 19, 2000, that a urine specimen was provided on that date, that he signed a Department of Transportation Drug Testing Custody and Control Form, and that the specimen was analyzed by Quest Diagnostics using Enzyme Immunoassay and Gas Chromatography/Mass Spectrometry procedures approved by the DOT. However, he denied that the specimen tested positive for amphetamines, and further denied the Medical Review Officer determined that the test was valid. As a result of his denials he demanded a hearing.

On June 9, 2000 a hearing was held in Honolulu, Hawaii. At the hearing, the Coast Guard was represented by its investigating officer, and Respondent appeared *pro se* but was also assisted, with his permission, by his companion, Balarie Johnson.

The Coast Guard introduced twelve (12) exhibits, and presented two (2) witnesses. The first was Kenneth Kodama, Technical Manager, Quest Diagnostics who testified by telephone. The second witness was Dr. Glenn Furuya, Medical Review Officer, of Clinical Labs of Hawaii.

Respondent did not testify. However, he earlier provided to the Judge and the Coast Guard several documents in which he essentially asserted that he was not a user of dangerous drugs, that any positive test result for amphetamine was a consequence of ingestion of over the

counter medications for congestion due to a cold. At the hearing his representative Ms. Johnson reiterated that defense and added that he also had ingested Sudafed and over the counter decongestant, used her asthma inhaler, Albuterol, and took her prescribed antibiotic Entrex.

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 the 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 (MRO) 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 as positive by an 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 shown 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 that presumption. If the rebuttal fails then the Judge may find the charge proved solely on the basis of the presumption. See Commandant Decision on Appeal 2592 (Mason); 2584 (Shakespeare); 2560 (Clifton).

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 or 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.

Respondent admitted much of the first element. In particular, the specimen was assigned an appropriate identification number by the collector, Lulu Cowden, of Clinical Labs of Hawaii. The urine specimen was placed in an appropriate container and sealed with a tamperproof seal that bore Respondent's signature. (CG Exhibit F)

The second element involves proof of the test results. The initial screening test and scientific analyses indicated the presence of amphetamines and methamphetamines. Confirmation and additional analyses were done by gas chromatography/mass spectrometry test (GC/MS) in accordance with the guidelines established in 49 CFR 40.29(f). (CG Exhibit F) The test results were forwarded to the MRO, Dr. Glenn Furuya, of Clinical Labs of Hawaii, who reviewed the results and conducted a telephonic interview with Respondent on March 27, 2000. Thereafter, the MRO confirmed that the laboratory test results were positive. (CG Exhibit J)

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 test laboratory.

Respondent's urine specimen was collected by Lulu Cowden, of Clinical Labs of Hawaii. The urine specimen was placed in an appropriate container and sealed with a tamperproof seal that bore Respondent's signature. (CG Exhibit F) It was then transported to Quest Diagnostics by air courier. Upon receipt at the San Diego Laboratory, Respondent's specimen was taken to a high security accessioning room where the specimen container was inspected for any tampering or prior opening. The condition of the package is documented. The specimen number is noted and entered into the lab's computer system. The Respondent's specimen is maintained in secured storage during testing and following completion of testing. Each technician who access specimens document their activities on internal chain of custody forms. Upon completion of testing, specimens reported as positive, have their remaining portions stored in a secured frozen storage area. Each of these steps in the process are confirmed on pages 11 et seq. of CG Exhibit F.

Finally, the laboratory's qualifications were established by the testimony of Kenneth Kodama and Quest Diagnostic's listing as a laboratory meeting minimum standards to engage urine drug testing for federal agencies. (CG Exhibit E) (65 Fed Reg. No. 44, p. 11795, March 6, 2000).

After review of the credible testimony, as well as the documentary and scientific evidence of record, the court is satisfied that there has been compliance with the regulatory requirements and DOT guidelines for collecting, analyzing, testing and confirming the presence of prohibited substances (amphetamines and methamphetamines) in Respondent's urine. In this case, the scientific test results and MRO confirmation submitted by Coast Guard was essentially unchallenged and thus raises a presumption of Respondent's use of prohibited substances. 46 CFR Subpart B, 16.201(b). It was thus incumbent upon Respondent to overcome the presumption by showing that he was not a user of dangerous drugs.

Respondent was assisted at hearing by his companion, Balarie Johnson, who raised several possibilities that may have compromised Respondent's urine sample. Ms. Johnson stated that Respondent, feeling ill, inhaled her asthma medicine inhaler (Albuterol), as well as taking Sudafed and a prescribed drug, Entrex. The MRO was unaware of respondent's ingestion of any

of these substances.¹ However, upon questioning by the Court, he opined that none of them would explain the positive test results.

Nevertheless, the MRO did agree that because pseudoephedrine (Sudafed) has a chemical similarity to methamphetamine (*i.e.*, pseudoephedrine shares the same chemical structure as methamphetamine with an α -OH group) and the extremely harsh physical conditions that exist in the GC/MS process, that it would be appropriate to differentiate between the d- or l-methamphetamine or amphetamine.² Consequently, this Court ordered a retest of the specimen for that purpose.

A differentiation test was conducted and the results concluded that Sudafed could not be the cause of the positive amphetamine or methamphetamine results reported.

Based on the record before me, Respondent has failed to rebut the presumption arising from the positive drug test results.

I must therefore conclude that the charge of "Use of Addiction to the Use of Dangerous Drugs" by Respondent, is proved.

SANCTION

46 USC § 7704(c) provides that if it is shown that a holder of a document is a user of a dangerous drug, the merchant mariner's document shall be revoked. As a result, Respondent's Merchant Mariner's Document 576-35-1530, is hereby revoked.

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 A)

DATED: June 20, 2000.



EDWIN M. BLADEN
Administrative Law Judge

¹ CG Exhibit F at page 52 shows a methamphetamine test result of 2411.6 for sample number 161844505 which is respondent's specimen control number.

² See Medical Review Officer Manual for Federal Workplace Drug Testing Programs, Chapter 5, Part A, Amphetamines, paragraph 3, Interpreting Laboratory Results, subpart c discussing over the counter medications containing pseudoephedrine.