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

UNITED STATES COAST GUARD
Complainant

vs

REGINALD ULYSSES TUBBS
Respondent

Docket Number CG S&R 02-0672
CG Case No. PA 1701243

DECISION AND ORDER

Issued: March 3, 2003

Issued by: Edwin M. Bladen, Administrative Law Judge

Introduction

Respondent is licensed as an Operator of an Uninspected Towing Vessels upon Western Rivers of the United States. While serving as an operator of the M/V BRUCE R BIRMINGHAM, he is alleged to have engaged in misconduct by providing an adulterated urine specimen during a random drug test evidenced by the specimen's abnormally low pH level. This charge is set forth in a single count complaint of the Coast Guard of November 5, 2002.

Thus, under the authority of 46 USC § 7703, 46 CFR § 5.27 and 5 USC §§ 556-558. this proceeding was brought by the Coast Guard seeking the revocation of Respondent's license.

Respondent answered the complaint admitting the jurisdictional allegations but denying the factual allegation of adulteration and a refusal to submit further contending there were improper federal sample collection and testing procedures. Respondent demanded a hearing.

A hearing on the complaint was held on December 20, 2002 at the Coast Guard Marine Safety Office, 225 Tully Street, Paducah, Kentucky.

The Coast Guard was represented by its Investigating Officer CWO Charles Rice. Respondent appeared *pro se.*

The Coast Guard offered Three witnesses and six exhibits identified as follows:

Witnesses:

1. John Crivello, Specimen Collector, Western Kentucky Drug Screen
2. S. A. Titone, Certifying Scientist, Advance Toxicology Network
3. Daniel C. Drew, MD, Medical Review Officer, Nationwide Medical Review

Exhibits:

1. CG-1 Copy of Vessel document for the M/V Bruce R. Birmingham
2. CG-2 Copy of Coast Guard License No. 884770 issued to Reginald Ulysses Tubbs dated March 8, 1999
3. CG-3 Federal Drug Testing Custody and Control Form for specimen ID No. 103066117
4. CG-4 Drug Litigation Package from Advanced Toxicology Network
5. CG-5 Medical Review Officer punch list and interview check list
6. CG-6 Vessel Log and work pay record for M/V BRUCE R BIRMINGHAM showing Mr. Tubbs working as the Operator of the vessel at time of collection of the urine specimen

All six exhibits were admitted into evidence.

Respondent represented himself and testified on his own behalf. He offered several exhibits listed as follows.

1. Exhibit A: Random Drug Test Donor Sign in Sheet
2. Exhibit B: Respondent's written outline of random drug screen events

At the conclusion of the hearing the parties were offered the opportunity to file proposed findings of fact and conclusions of law as authorized by the Administrative Procedures Act. Instead, the parties preferred to file closing arguments in the form of memoranda of fact and law.

The Coast Guard has filed its closing argument, but the Respondent has not filed or made any closing argument. Thus, based on the status of the record this matter is now ripe for decision.

Findings of Fact

On September 25, 2002, John Cirvello, a drug specimen collector employed by West Kentucky Drug and Alcohol Screen in Paducah, Kentucky [Transcript 16], boarded the tug BRUCE R BIRMINGHAM for the purpose of conducting some random drug tests among the nine crew members of that tug [Transcript p. 28]. Prior to boarding the vessel, Mr. Cirvello called the captain the tug, Respondent Tubbs, at 7:45 AM that morning to inform him of his intentions and Respondent told him where the tug could be

found on the Mississippi river [Transcript p. 29, 37]. Respondent was instructed not to tell anyone of the impending drug testing [Transcript p. 37].

Mr. Cirvello drove to the designated location, and upon arrival and boarding the vessel about 10:45 AM, was met by Respondent who together determined to use the Mate's stateroom as the collection site. Mr. Cirvello then set up the collection site which contained a very small lavatory [Transcript p. 29, 37-38]. He prepared the lavatory by placing bluing chemicals into the flush tank's water and removing various other items [Transcript p. 30]. Based on the timing of these events, Respondent had approximately three hours advance notice of the impending random drug screen.

The first person to be tested was Respondent who assisted Mr. Cirvello in completing the Respondent's Drug Testing Custody and Control Form with specimen ID number 103066117. [CG Exhibit 3]. Respondent also signed a "Random Drug Test Donor Sign in sheet" [Transcript p. 39-40; Respondent Exhibit A]. At that time, Respondent also signed the specimen bottle sealing labels which were appended together with the Custody and Control form. Mr. Cirvello then selected a sealed collection kit which he opened and handed a collection container to Respondent.

Upon instruction Respondent emptied his pockets [Transcript p. 44] and then entered the lavatory to void into the container provided by the collector. Respondent was instructed to place the urine specimen container on a shelf in the bathroom [Transcript p.45]. Respondent then left the area, and stood in the doorway of the stateroom talking to other crew members in the tug's galley [Transcript p. 120-121]. Respondent did not observe Mr. Cirvello, the collector, transfer his specimen from the collection container into the split specimen bottles or told to observe that transfer [Transcript p. 46]. Respondent, however, did later observe him seal the bottles with the sealing labels [Transcript p. 122]. The Drug Testing Custody and Control form does report that the specimen was checked for its temperature which was reported as normal. Respondent signed the Drug Testing Custody Control form's certification.

The split specimen bottles were later shipped to the Advanced Toxicology Network of Memphis, TN a certified testing laboratory [CG Exhibit 7 – 67 Fed Reg 56293-56295] for testing who received the package by Federal Express courier on September 26, 2002 [Exhibit 4 – Laboratory Litigation Package]. The specimen was then receipted and the specimen was then placed in temporary secure storage area for later retrieval and testing.

The specimen103066117 was later removed from temporary storage and alliquotted for screening and specimen validity tests [CG Exhibit 4]. The validity tests showed a creatinine level of 11.5, a specific gravity of 1.002, a pH reading of 2.9 and a nitrite level of 14.4. Because the pH level of the initial screening validity test was 2.9, the specimen was re-alliquotted for a confirmation pH validity test. The confirmation test using a pH meter showed a pH level of 2.6. [Exhibit 4]. These test results were reconfirmed by the certifying scientist S. A.Titone.

Respondent's Specimen 103066117 had a confirmed pH level of 2.6 and thus determined by the testing laboratory to be inconsistent with human urine, and by rule adulterated. And, because this same specimen had a creatinine level of 11.5 and a specific gravity level of 1.002 the laboratory also determined it to be diluted.

The adulteration report was then communicated to the Medical Review Officer, Dan Drew, MD on September 27, 2002 [CG Exhibit 5]. Dr. Drew interviewed Respondent confirming his identity and informing him of the results of the testing which showed an adulterated specimen. He then probed Respondent for any medical explanation for this result concluding there were none [CG Exhibit 5, page 2]. The MRO reported the test result as adulterated and thus a refusal to test.

In determining whether the pH level of Respondent's specimen was out of range for normal human urine, the testing laboratory utilized the specimen validity testing guidance issued by the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) found in Program Documents 35 and 37 [Transcript pp 64-66]. This laboratory had determined to do validity testing on all specimens provided to it [Transcript p. 65-66].

Discussion

This matter centers upon the allegation that Respondent's urine specimen had a pH of 2.6 as determined by the testing laboratory, Advanced Toxicology Network [CG Exhibit 4, page 14]. As such, the laboratory determined the Respondent's urine specimen was "adulterated" and the Medical Review Officer confirmed the laboratory report and thus reported the Respondent's specimen as adulterated [Transcript p. 73]. As a consequence under Coast Guard and Department of Transportation [DOT] regulations, a finding of "adulterated" results in a refusal to test which is then subject to sanctions.

The pH test is part of the validity testing conducted by certified laboratories as provided in 49 CFR §§ 40.89, 40.91, 40.93, 40.95. [1] In particular, § 40.91(b) requires the testing laboratory measure the pH of each primary urine specimen. A primary urine specimen is determined to be adulterated by using or applying "the criteria in current HHS [Health and Human Services] requirements or specimen validity guidance." 49 CFR § 40.95(b). The laboratory here used these criteria to make the adulteration determination. Normal human urine's pH content is between 4.5 and 8. Clearly, Respondent's urine pH test result shows it is highly acidic and inconsistent with normal human urine.

To reach the conclusion that a urine specimen is adulterated because its pH measurement is highly acidic or less than 4 is not set forth in any rule of the Coast Guard or the DOT. Such a conclusion can only be obtained by referring to the *specimen validity guidance* referred to in 49 CFR § 40.95(b).

The *specimen validity guidance* criteria consists of two program documents published by the Division of Workplace Programs, Substance Abuse and Mental Health Services Administration [SAMHSA], Department of Health and Human Services [HHS]. They are available to anyone who inquires and seeks copies. [2] The first of these is entitled National Laboratory Certification Program [NCLP] Program Document # 35, Notice to HHS Certified and *Applicant Laboratories, Subject*: *Guidance for Reporting Specimen Validity Test Results,* September 28, 1998. The second is NCLP Program Document # 37, July 28, 1999, Notice to HHS Certified Laboratories and Inspectors, *Subject: Specimen Validity Testing.* They may also be acquired by accessing the internet at the Uniform Resource Locator (URL) address: http://www.workplace.samhsa.gov/Drugtesting/analyticaltesting/SOSupdate1.html.

Both Program documents state that a specimen is defined to be adulterated if the pH is <3 or >11. [3] Since the Respondent's primary urine specimen was measured at 2.6 it is adulterated according to the *specimen validity guidance documents*. For measurement results see CG Exhibit 4, page 14

Essentially, these *specimen validity guidance* documents interpret the meaning and effect of a pH measurement as contemplated in the DOT rule, 49 CFR §§ 40.91, 40.95.

The Coast Guard has expressly adopted the Department of Transportation's drug testing rules and policies, which include the HHS specimen validity guidance documents. See 46 CFR § 16.113(a) [drug testing programs must be conducted in accordance with 49 CFR Part 40 Procedures for Transportation Workplace Testing Programs]

It is a cardinal principal of administrative law, founded on the need for orderly, uniform and predictable decision making, that this judge is bound to apply an agency's legislative or interpretive rules including its statement of policies. See, *Gray Lines Tour Co. of Southern Nevada v. ICC*, 824 F2d 811, 814 (9th Cir. 1987); *National Latino Media Coalition v. FCC*, 816 F.2d 785, 789 (DC Cir. 1987). I am thus bound to apply the DOT and HHS policies on specimen validity testing.

Applying the DOT policies and rules Respondent's urine specimen was adulterated because of the abnormally low pH level determined after two specimen validity tests.

Moreover, Respondent's urine specimen was also dilute because of the creatinine and specific gravity levels as shown in the validity tests.

According to the DOT regulation, 49 CFR § 40.191(b), if the MRO reports that the employee had a verified adulterated or substituted test result the employee is deemed to have refused to take a drug test. A refusal to test incurs the consequences or sanction established by the applicable agency, here the Coast Guard. 49 CFR § 40.191(c).

Respondent has thus violated a duly established rule regarding submission of specimens in a random drug testing program, and thus engaged in misconduct as defined in 46 CFR § 5.27, and 46 USC § 7703.

Conclusion and Order

Substantial, reliable and probative evidence exists in this record that Respondent's urine specimen was adulterated because of its highly acidic properties, that is, it was inconsistent with normal human urine, and thus under the rules constitutes a refusal to test subject to sanction. The charge of misconduct is proven. The Coast Guard requests that Respondent's license be revoked as a result.

The record here does not reflect that Respondent has any history of previous violations of the rules applicable to mariners. Of particular note there is no record evidence presented by the Coast Guard which suggests that Respondent is likely a threat to safety to life at sea or the welfare of mariners.

While the Coast Guard has requested Respondent's license be revoked, I find nothing in the record which justifies such a sanction. This is unlike the circumstances presented to the ALJ in *Appeal Decision 2578 (Callahan)* which involved serious misconduct beyond a refusal to submit. There the mariner was found to have disobeyed an order of the Master and departed vessel without being relieved all of which justified a revocation sanction. As noted in *Callahan* the sanction order imposed is "exclusively within the Administrative Law Judge's discretion . . . unless it is clearly excessive or an abuse of discretion." (Appeal Decision 2578 at p. 7)

I do not find any evidence which suggests that safety of life at sea or the welfare of individual seamen will be jeopardized were a sanction less than revocation imposed. While 46 CFR § 5.569(d) provides guidance to me of an appropriate order, I do agree that a suspension is appropriate.

Therefore, I will suspend Respondent's license for the period of nine (9) months, together with an additional one (1) year of probation. During the probation period Respondent shall be subjected to six (6) random drug tests administered in accordance with the DOT regulations. The Coast Guard MSO Paducah, KY shall determine the timing of such tests. Should any drug test result be reported as anything other than negative, then Respondent's license shall be revoked.

Service of this Decision upon the parties serves to notify them of their right to appeal as set forth in 33 CFR Subpart J, §20.1001. (Attachment A)

IT IS SO ORDERED.

Dated: March 3, 2003.

Edwin M. Bladen
Administrative Law Judge

Certificate of Service

I hereby certify that I have this day delivered foregoing Decision and Order upon the following parties and limited participants (or designated representatives) in this proceeding, at the address indicated as follows:

MSO Paducah
Attn: CWO Clarence Rice
Telefax: 270-442-1633

Reginald U. Tubbs
968 Buchanan
Kevil, KY 42053 (1st Class Mail)

ALJ Docket Center
Govt Overnight Federal Express w/case file & activity repot

Dated at Seattle, WA this 3rd day of March, 2003.

MARY RURFEERST
Legal Assistant to
Administrative Law Judge

[1] The pH of a liquid specimen, such as urine, is the measurement of that specimen's acidity or alkalinity. The lower the pH number the greater the acidity, the larger the pH number the more basic or alkaline the specimen. Thus, Respondent's urine specimen was determined to highly acidic.

[2] I was so informed by one of the Attorney-Advisors for the Coast Guard Administrative Law Judges.

[3] The symbol < means less than, and the symbol > means greater than.