

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

FABIAN ZERINGUE, SR

Respondent.

Docket No. 02-0462

CG Case No. ES1647989

DECISION AND ORDER

Issued by: Archie R. Boggs, Administrative Law Judge

PRELIMINARY STATEMENT

This proceeding is brought pursuant to the authority contained in 5 USC 551-559; 46 USC Chapter 77; 46 CFR Parts 5; and 33 CFR Part 20.

Fabian Zeringue, Sr. was served with a Complaint by U.S. Coast Guard Investigating Officer on 19 July 2002. The Complaint alleges statutory authority as 46 USC 7702(d) and regulatory authority as 33 CFR part 20 subchapter L.

The factual allegations are as follows:

1. On June 29, 2002, the Respondent served as Master aboard the M/V Miss Lori when it was involved in a marine casualty.

2. The Respondent was ordered to take a post-casualty drug test on June 30, 2002.
3. The urine specimen was collected by CIBI and analyzed by One Source Laboratory using procedures approved by the Department of Transportation.
4. That specimen subsequently tested positive for cocaine.

Mr. Zeringue was represented by George F. Riess, attorney at law, 938 Lafayette Street, Suite 100, New Orleans, LA 70113-1067. He denied the factual allegations. He requested a hearing.

A hearing was held in accord with the request on 27 August and 24 September 2002 at the Marine Safety Office, 1615 Poydras Street, Suite 737, New Orleans. CWO David Cornett presented the case for the Coast Guard.

In support of the Complaint the Investigating Officer introduced in evidence the testimony of (1) Dennis A. Vallejo, Trace Marine Port Engineer; (2) Debbie Malone, urine collector, for Confidential Identification Bureau, Inc., Gretna, LA, who collected a urine specimen from Mr. Zeringue on 30 June 2002; (3) Dr. Stephen E. Harris, laboratory director for One Source Toxicology Laboratory, Houston, TX; and (4) Dr. Brian Heinen, Medical Review Office, Eunice, LA.

Mr. Zeringue testified in his own behalf and he called Tom Freijo, certifying scientist for One Source Toxicology, Deer Park, TX; and Patricia Pizzo, director of toxicology for Kroll Laboratory Specialists, Inc., Gretna, LA. (Ms. Pizzo ordinarily testifies as a witness for the Coast Guard.)

FINDINGS OF FACT

Both the Coast Guard and the Respondent submitted Proposed Findings of Fact and Conclusions of Law. The Coast Guard's Proposed Findings are accepted in part and rejected in part. The Respondent's Proposed Findings of Fact and Conclusions of Law, are accepted and adopted in toto as the Administrative Law Judge's Findings of Fact.

COAST GUARD'S PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

ACCEPTED

1. Respondent, Mr. Fabian F. Zeringue, Sr., is the holder of Coast Guard License number 962807 (2nd issue).

ACCEPTED

2. On June 29, 2002, at approximately 2200, Mr. Zeringue was acting under the authority of his Coast Guard license while serving as operator of UTV MISS LORI, when it was involved in a collision with a commercial shrimping vessel in the Intracoastal Waterway at mile marker 10, near the entrance to Bayou Bienvenue.

ACCEPTED

3. On June 30, 2002, approximately three hours after the marine casualty, Dennis Vallejo, Port Captain for Mr. Zeringue's employer, Trace Marine, instructed Mr. Zeringue to submit to a chemical test for dangerous drugs as soon as possible. This drug test was ordered in accordance with the regulations in 46 CFR Parts 4.06 and 16.240. The marine employer reported the marine casualty and the fact that a drug screen was performed on Forms CG-2692 and CG-2692A (introduced into evidence as IO Exhibit #1).

ACCEPTED

4. Mr. Zeringue reported to West Jefferson Memorial Hospital at approximately 1200 on June 30, 2002, to submit a urine specimen.

ACCEPTED

5. The urine specimen collector was Debbie Malone of Confidential I.D. Bureau, Inc. of Gretna, LA. When Ms. Malone asked Mr. Zeringue for a form of photo identification, he stated he had left it in his wallet in his car. Ms. Malone told Mr. Zeringue he could not

return to his car to get the photo I.D. because the testing process had already begun. Ms. Malone proceeded with the drug screening of Mr. Zeringue without obtaining a positive identification as required by 49 CFR Part 40.

NOT ACCEPTED.

The failure to obtain proper identification
on Mr. Zeringue is fatal.

No rulings are made on the remaining Proposed
Findings of fact due to the failure
of the collector to obtain proper identification in accord
with the regulations.

6. Except for her failure to obtain proper identification of Mr. Zeringue, Ms. Malone properly followed all Department of Transportation (DOT) drug testing procedures in 49 CFR Part 40 throughout the collection of Mr. Zeringue's urine specimen.
7. Upon providing the urine specimen, Mr. Zeringue signed his name in Step 5 of the Federal Drug Testing Custody and Control Form (which appears only on Copy 2, the Medical Review Officer copy of the form), attesting to the fact that the specimen was properly sealed in his presence and that the information on the specimen bottle and on the control form was correct. (The MRO copy of the Custody and Control Form was introduced into evidence as IO Exhibit #4). The collector, Ms. Malone, signed her name in Step 4 of the collector copy of the control form (Copy 3), attesting to the fact that the specimen was properly collected and released to a courier for delivery to the laboratory for analysis. (Copy 3 was introduced into evidence as IO Exhibit #2).
8. The urine specimen was delivered by courier to One Source Toxicology of Deer Park, TX for analysis. According to the Laboratory copy of the Custody and Control Form (introduced into evidence as IO Exhibit #3), the specimen was received at the laboratory on July 2, 2002. Receipt of the specimen was acknowledged by the signature of a One Source Toxicology laboratory accessioner, Ms. Renee Mosley, in Step 4 of the Custody and Control Form. Next to the words "Primary Specimen Bottle Seal Intact" Ms. Mosley checked the word "Yes" indicating that the integrity of the specimen bottle seal had not been compromised during its delivery from the collector to the lab.
9. The urine specimen was analyzed in accordance with DOT procedures and found to be positive for cocaine metabolites. The results of the specimen analysis were reviewed by Tom Freijo, Jr., a positive certifying scientist on July 3, 2002. Mr. Freijo is a night shift employee. The Laboratory copy of the Custody and Control Form which he signed on July 3 indicating he had reviewed the results of the positive test had been pre-stamped with the name of Mr. Steve Harris. Mr. Harris is another certifying scientist at One Source Toxicology, and is also the laboratory director. Mr. Freijo lined out the name of Mr. Harris on the form, signed his own name in the appropriate block, and printed his name to the left of the crossed-out name. Mr. Harris, who as laboratory director has final

review of all custody and control forms, signed his initials to the right of the crossed-out name indicating he had also reviewed the results.

10. The results of the positive drug test were reported by the laboratory to a Medical Review Officer (MRO), Dr. Brian M. Heinen, M.D., of Eunice, LA, on July 3, 2002 (report was introduced into evidence as IO Exhibit #5). On that same date, Dr. Heinen's MRO staff contacted the Respondent, Mr. Zeringue, and conducted a verification interview with him as required by DOT regulations, and using a worksheet internal to Dr. Heinen's office (worksheet introduced into evidence as IO Exhibit #6). Dr. Heinen's staff asked Mr. Zeringue if he had an explanation for the result of positive for cocaine. Mr. Zeringue stated he had taken "soma", a type of pain reliever. The MRO staff also asked Mr. Zeringue if he desired a split sample re-test and he declined. Dr. Heinen reviewed the results of the interview and indicated on the MRO verification worksheet that there was no other explanation for the positive result than that the Respondent had used cocaine.

11. Mr. Zeringue's employer, Trace Marine was notified of the positive result by the MRO. Trace Marine notified CG Marine Safety Office New Orleans of the positive result when they submitted Forms CG-2692 and CG-2692A (IO Exhibit #1).

12. Mr. Zeringue was served with a Complaint and Affidavit – Temporary Suspension form on July 19, 2002 and his license was seized by the Coast Guard under the authority of 46 USC 7702(d) and 33 CFR Part 20, Subpart L.

Rulings on the Respondent's Proposed Findings of Fact and Conclusions of Law.

**RESPONDENT'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

ACCEPTED

1. Respondent Fabian F. Zeringue, Sr., holder of Coast Guard License No. 962807, was serving as Master of UTV Miss Lori when that vessel was involved in a collision with a commercial shrimping vessel in the Intracoastal Waterway.

ACCEPTED

2. There is no indication from any source that Mr. Zeringue was in any way at fault in the collision; rather, every indication is that the collision resulted from the careless and reckless operation of the shrimping vessel by its crew.

ACCEPTED

3. Mr. Zeringue was interviewed after the accident by Coast Guard personnel, including C.W.O. Cornett, who found no indication of lack of sobriety or drug influence of Mr. Zeringue. His employer, Trace Marine, requested Mr. Zeringue after the accident to operate the vessel UTV Miss Lori to the Michoud docking facility, a trip of approximately one hour duration. That trip and the docking operation proceeded without incident.

ACCEPTED

4. Mr. Zeringue was ordered by his employer to report to West Jefferson Memorial Hospital within 24 hours of the June 29 collision, and he did so as instructed.

ACCEPTED

5. The urine specimen collector, Debbie Malone, commenced the collection procedure in violation of 49 C.F.R. Part 40, requiring photo identification of the person providing the specimen. Ms. Malone did ask Mr. Zeringue for a photo identification belatedly, at some point after commencement of collection of the specimen, and he responded that his photo identification was in his wallet in his car in the adjacent parking lot. Ms. Malone neglected and failed to request Mr. Zeringue to obtain the photo identification, with the explanation that the testing process, having already begun, could not be interrupted to conform with the mandatory positive identification requirements of 49 C.F.R. Part 40. The Hearing Examiner in brief examination of Ms. Malone asked why she could not have interrupted the collection process so that the photo identification could be obtained, but Ms. Malone was not forthcoming with any explanation.

ACCEPTED

6. The requirement of positive identification of 49 C.F.R. Part 40 is not discretionary, but is mandatory. Respondent's expert in drug analysis and specimen collection procedures, Ms. Pat Pizzo, testified, after having been duly qualified as an expert, that the positive identification requirement is mandatory in order to avoid misidentification of specimens. She testified, further, that the regulations governing collection procedures are designed to protect against confusion of specimens. She testified, further, that conformity with the positive identification requirement of 49 C.F.R. Part 40 is indispensable to the collection procedure.

ACCEPTED

7. The significance of this positive identification requirement is magnified by the testimony of Ms. Malone. When asked upon cross-examination to provide a description of Mr. Zeringue she described a man totally different than the Respondent. Mr. Zeringue is 5'8", bald (and was bald at the time of the collection) and weighs approximately 240 lbs. Ms. Malone described a man with long dark hair, one taller than Mr. Zeringue, and

one with a completely different build. Ms. Malone could have demurred and refused to attempt to provide a description, but, instead, she indicated that she collected the specimen from a man described as someone clearly other than Mr. Zeringue.

ACCEPTED

8. At hearing counsel for the Coast Guard argued that Respondent had failed to produce any evidence that the testing procedures beyond initial collection were in any way fatal to the accuracy and conclusion of the test of the specimen. The entire and only purpose of the rigorous specimen collection requirements is to insure proper and accurate identification of specimens to be tested, and the reason for such rigorous regulation is that no respondent is ever in a position to know anything about the specimen testing procedures and conclusions because he has no way of knowing whether they were followed. Hence, the indispensable significance of the mandatory requirement of positive identification at commencement of the specimen collection procedure.

ACCEPTED

9. The evidence taken as a whole, including the failure of the collector to establish a positive identification of Respondent and her description of a man obviously not the Respondent indicates that the specimen collected that was tested as positive was collected from someone other than Mr. Zeringue, perhaps another donor providing a specimen at the same time as Mr. Zeringue.

ACCEPTED

10. Mr. Zeringue testified that, although he used cocaine years ago and underwent therapy and drug rehabilitation, he has had no contact with that drug since and was not in any way under its influence at the time of the specimen collection. Cross-examination by the Coast Guard failed to impeach the sworn testimony of Mr. Zeringue.

ACCEPTED

11. Mr. Zeringue testified that his livelihood depends upon maintaining his license with the Coast Guard, and that he and his family are dependent upon the income he derives from his livelihood. To deprive him of his license will deprive him of the only occupation he knows. The gravity of this proceeding is not to be underestimated, because the Coast Guard has indicated its intention to deprive Mr. Zeringue of his livelihood for life. Accordingly, the requirements of the collection and testing regulations and procedures must be strictly adhered to, and this forum cannot ignore the mandatory provisions of those requirements.

ACCEPTED

12. Considering all of the facts and evidence adduced by the parties at hearing the Honorable Hearing Officer, Administrative Law Judge Archie Boggs, concludes that the

Coast Guard has not borne its burden of proving that the specimen collected and the test results therefrom are attributable to Respondent, Mr. Zeringue. As a result, the charges against him are dismissed and his license returned to him.

OPINION

The evidence clearly shows that the collector in this case did not follow the guidelines for the collection as provided for in the Code of Federal Regulations.

The expert witness called by the Respondent, Ms. Pizzo, who frequently testifies for the Coast Guard, clearly indicated that the mandatory collection guidelines were not followed.

Some of Ms. Pizzo's testimony follows:

“Q. All right. Would you, Ms. Pizzo, would you give us the Code of Federal Regulations requirements for the collection of urine samples.

A. The collection guidelines were published in 49 CFR Part 40, and the actual urine collections are in Subpart C beginning at 4061, which takes you through a step-by-step collection process. The same guidelines were also published in a publication called The Urine Specimen Collection Handbook for Federal Work Place Drug Testing Programs published by SAMHSA, which is Substance – I'm sorry, Substance Abuse Mental Health Services Administration, which is the agency that regulates laboratories that do drug screen testing under the federal guidelines.

Q. All right. And what are the steps?

A. Well, the steps, obviously the first thing you have to do is prepare the restroom area, and there are very detailed explanations as to what you have to do to go through the preparation. And then as a collector, you have very specific steps that you

must go through to make sure that you guarantee the integrity of the urine sample, and those steps include having the donor remove any exterior clothing, coats, things like that, to make sure they have no place to hide anything that could be used to adulterate the sample or bring in a clean sample.

Then you must require the employee to provide a positive I.D. such as a photo I.D. or be identified by a member of the agency requesting the testing or by a supervisory personnel. And if you cannot obtain a positive I.D., the fact that you do not have one must be noted on the remarks line, and then you must ask the individual to provide two other I.D.s such as a Social Security card, that will guarantee that you are in fact collecting the sample on the correct person.

Normally you ask the person to sign in on an entry log indicating the time that they arrived at the collection location. In the event that there is a problem with the collection, you have documentation of when they arrived.

After they've been properly identified, then you actually begin with the collection process itself where you instruct the individual to wash their hands, make sur that they either select a urine collection container or you provide them with several that they can choose from. Then you instruct them to go to the restroom and how to provide the sample and bring it back to the collector. And at that time the collector seals it in the individual's presence, has the individual donor sign the chain of custody document, and then places the chain and the sealed urine container into a shipping container, usually a plastic bag, two sided, to be provided to a testing laboratory.

Q. All right...Thank you. Do you have before you the collection and custody form that bears the designation 100156902?

A. Yes, sir, I have a copy of that document.

Q. All right. With reference to your testimony that a picture I.D. must be presented to the collector or in its absence there must be some notation made, do you see any such notation?

A. No, sir. On this form, there is no notation in the remarks line.

Q. All right. And that is required, that is a notation would be required under the CFR, correct?

A. Yes, sir.

Q. All right. Likewise, isn't a positive picture identification, isn't that a mandatory requirement?

A. Yes sir. The collector is supposed to ask for either a photo identification, a positive identification by an agency representative, or identification by, for instance, a supervisor or manager of the employee.

Q. All right. And in the absence of such an identification mandatory, the procedure and the protocol has not been followed and abided by, isn't that so?

A. Yes, sir, that's correct. Without photo identification and remarks on the chain of custody form, then the collection protocol has not been followed.

Q. What is the reason for that mandatory requirement of a photograph I.D.?

A. To properly identify the donor that's going to provide the sample is in fact the donor who is required to provide the sample. There have been cases where donors send other people to provide samples for them, and the requirement for the photo I.D. is to assure that you do in fact have the correct individual.

Q. Presume if you will that the collection of the sample was noted on the form

100156902 that we just spoke about, that that collection was noted to have been sealed, that is collected and sealed as of 12:36 p.m.

A. Yes, sir. That's indicated on the form under the collection information.

Q. Right. And presume further if you will that Mr. Zeringue actually provided the sample that he provided at noon or shortly before that. That gives rise, does it not, to a discrepancy that may bear upon whether or not the sample actually noted upon the form is actually the one that was given by Mr. Zeringue, isn't that so?

A. Well, if the donor indicates that he gave the sample prior to the time that the collector actually has indicated that they've collected, then yes, that would question the validity of the donor providing the same sample.

JUDGE BOGGS: Where did you get this form, Ms. Pizzo?

MS. PIZZO: This form was provided to me by Mr. Riess. It's a copy of the chain of custody document, the federal custody control document from One Source Toxicology, and the documents that were provided were the original chain of custody, the first page, the collector's copy, and the MRO's copy.

JUDGE BOGGS: Your laboratory didn't have anything to do with this collection?

MS. PIZZO: No, sir. We had nothing to do with this collection.

JUDGE BOGGS: All right.

MR. RIESS: Are you finished, Your Honor?

JUDGE BOGGS: Yes.

EXAMINATION BY MR. RIESS:

Q. Just a couple more questions, Ms. Pizzo. What is the underlying purpose of

having the very strict protocol for the collection of urine samples? What's the underlying purpose of all that?

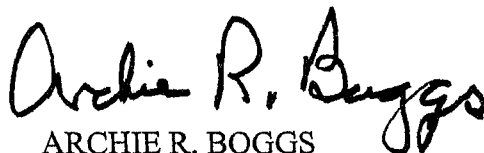
A. The weakest link in the entire urine testing program is in the collection of the sample and to assuring that the sample provided by the donor has been properly controlled and monitored so that the results once they're completed can be linked back to that donor without any question of validity as to whose sample it is. So the requirement for the photo I.D. was to assure that the donor who actually provided the sample was identified prior to the collection of the sample to make sure that there was an exact link from the donor to the urine container, the contents of the urine collection itself."

CONCLUSIONS OF LAW

The Complaint which alleges that Fabrian Zeringue, Sr. tested positive for cocaine as a result of a post casualty drug test on 30 June 2002 is not proved due to the failure of the collector to comply with the regulations.

ORDER

The Complaint is DISMISSED.



ARCHIE R. BOGGS
ADMINISTRATIVE LAW JUDGE

Date 17 March 2003
New Orleans, Louisiana..