

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

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Complainant

vs.

PAUL B. MCMILLAN

Respondent.

Docket Number CG S&R 02-0577
CG Case No. 1670363

DECISION AND ORDER

Issued: November 24, 2003

Issued by: Thomas E. McElligott, Administrative Law Judge

Appearance:

Lieutenant Derek A. D'Orazio, Attorney, and Senior Investigating Officer; and Senior Chief John I. Brown, Marine Science Technician, Investigating Officer, both Investigating Officers stationed at the Marine Safety Office for the ports of Houston to Galveston, 9640 Clinton Drive, Houston, Texas 77029.

For the Coast Guard

Paul B. McMillan, pro se.

For the Respondent

PRELIMINARY STATEMENT

This is a hearing before an Administrative Law Judge brought under 46 U.S.C. 7704(c) and 46 CFR 5.35.¹ The Complaint alleged Respondent was a holder of a Merchant Mariner Document (MMD) and a user of dangerous drugs.² On September 13, 2002, the Investigating Officer served the Complaint on Respondent by certified mail, return receipt requested. In the Complaint, the Coast Guard sought revocation of Respondent's Merchant Mariner's Document issued by the U.S. Coast Guard in accordance with 46 U.S.C. 7704.

In the Answer, Respondent denied the jurisdictional and factual allegations. Additionally, Respondent's answer asserted that on July 14, 2002 he was involved in a four-wheeler accident that required him to have minor surgery in which he received Lidocain and Marcaine, which caused a positive drug test result. The Respondent attached five (5) pages of medical records from the Kingwood Medical Center to his answer. Respondent also stated that he wanted a hearing before an Administrative Law Judge on these matters.

The matter proceeded to hearing on March 12, 2003, in Houston, Texas, before Administrative Law Judge Thomas E. P. McElligott. Investigating Officer Senior Chief John I. Brown represented the Coast Guard. The Respondent was pro se. At the hearing, eleven (11) exhibits were admitted into evidence at the Coast Guard's request and three

¹ During the pendency of this case, the U.S. Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of HR 5005 Section 1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the agency.

² It should be noted that the number on Respondent's Merchant Mariner's Document is different than the number the Coast Guard alleges in its Complaint. Although failure to list a correct Merchant Mariner Document may potentially subject a complaint to a motion for dismissal in the pre-hearing stage, at this stage the error is harmless, because the Respondent had a chance to dispute evidence at the hearing and a copy of Respondent's actual Merchant Mariner's Document was admitted into evidence at the hearing.

(3) witnesses testified for the Coast Guard. The Respondent did not introduce any exhibits into evidence or have any witnesses testify on his behalf. The Administrative Law Judge introduced one exhibit into evidence on his own.

FINDINGS OF FACT

1. On July 14, 2002, Respondent received treatment from the Kingwood Medical Center for injuries from a four-wheeler accident. (IO Ex. 6).
2. Respondent was given Lidocain and Marcaine injections on July 14, 2002.
3. On August 9, 2002, the Respondent held a Coast Guard issued MMD. (IO Ex. 3). The Respondent's MMD gives his full name as Paul Bryan McMillan. His MMD contains his left thumbprint and expires on November 1, 2004. It states he was found qualified for Ordinary Seaman, Wiper, Steward's Department Food Handler and Tankerman-"PIC (DL)". (IO Ex. 3).
4. Respondent took a pre-employment drug test on Friday, August 9, 2002. (IO Ex. 10).
5. Ms. Katrina Jefferson, of Concentra Medical Centers collected Respondent's urine specimen. She is a Medical Assistant and Supervisor with two and one-half (2 ½) years of training and urine collection experience.
6. Ms. Jefferson took a split urine sample in two (2) bottles from Respondent.
7. The Respondent and Ms. Jefferson signed a "Federal Drug Testing Custody and Control Form" (Custody and Control Form) on Friday, August 9, 2002. (IO Ex. 4).
8. The Custody and Control Form listed Respondent's Specimen Identification (Specimen Id.) number as 103038170. (IO Ex. 4).

9. On August 9, 2002, Ms. Jefferson released Respondent's urine sample to Advanced Toxicology (the laboratory). (IO Ex. 4 & 10).
10. The laboratory received the Respondents urine specimen on August 9, 2002 with the primary specimen bottle seal intact. (IO Ex. 10).
11. The urine specimen was analyzed by Advanced Toxicology Network, a U.S. Department of Health and Human Services certified laboratory. (IO Ex. 10). The laboratory performed an initial screen and a confirmation test on Respondent's urine sample. (IO Ex. 10).
12. The Respondent's urine specimen tested positive for cocaine metabolite. (IO Ex. 10). The laboratory conducted a confirmation test on Specimen Id. Number 103038170 and detected 626 ng/ml of Benzoylcegonine in Respondent's urine sample. (IO Ex. 10).
13. Choice Point Medical Review Officers (MROs) interviewed the Respondent regarding his positive drug test and verified the test results. Choice Point Medical Review Officers employs ten MROs but operates as a single MRO to avoid delays in getting reports to employers. (IO Ex. 5).
14. The MROs reviewed Respondent's medical records from Kingwood Medical Center and found that Respondent was not given cocaine at any time in the Kingwood Medical Center.
15. Usually large amounts of cocaine completely flush out of the human body within one (1) week. After that, a person who takes no more cocaine will test below the positive cut off concentration in 49 CFR 40.87 and will therefore test in the negative range or clear.

16. There is no cocaine in Lidocain or Marcaine that would have caused Respondent to test positive twenty-six (26) days later for cocaine use.
17. Respondent's marine employer, Blessey Marine Services, Inc., notified the Coast Guard Marine Safety Office (MSO) for the port of Houston to Galveston that Respondent's urine sample given on August 9, 2002 tested positive for cocaine.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was a holder of a Merchant Mariner's Document on August 9, 2002.
2. The Complaint alleging "Use of a dangerous drug", namely cocaine, in violation of 46 U.S.C. 7704(c), is found proved by a preponderance of the reliable and probative evidence.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-559, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if upon consideration of the record as a whole the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of showing something by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers

Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (Citing In re Winship, 397 U.S. 358, 371-372 (1970). (Harlan, J., concurring) (brackets in original)). Under Coast Guard regulations, the Coast Guard bears the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Coast Guard must prove with reliable and probative evidence that Respondent more likely than not committed the violation charged.

Title 46 U.S.C. 7704(c) provides a license, certificate of registry, or merchant mariner document shall be revoked if the holder has been shown to be a user of or addicted to a dangerous drug unless the holder proves cure. An individual will be presumed to be a user of dangerous drugs if the individual fails a chemical test for dangerous drugs. 46 CFR 16.201(b); Appeal Decision 2529 (WILLIAMS) (1991). The Coast Guard may establish a prima facie case by showing (1) the Respondent was tested for a dangerous drug, (2) the Respondent tested positive for a dangerous drug, and (3) the drug test was conducted in accordance with 46 CFR Part 16. Appeal Decision 2584 (SHAKESPEARE) (1997).

As the evidence in the record shows the Respondent was a holder of a Merchant Mariner Document, the next question is whether the Coast Guard has made a prima facie case that Respondent was a user of dangerous drugs under 46 U.S.C. 7704(c). (IO Ex. 3).

A. Respondent was tested for dangerous drugs.

The evidence shows on August 9, 2002 the Respondent gave a urine specimen for a pre-employment drug test. (IO Ex. 4 & 10). Additionally, the evidence demonstrates an unbroken chain of custody of Respondent's urine sample from the time Respondent gave his urine sample through all phases of testing. Respondent's urine sample was

collected by Ms. Jefferson, Ms. Jefferson released the urine sample to the laboratory, the urine sample arrived at the lab with the primary specimen bottle seal intact, and the laboratory performed an initial and a confirmation test on Respondent's urine sample. (IO Ex. 10). As the Coast Guard introduced evidence that Respondent took a pre-employment drug test on August 9, 2002 and his urine sample subsequently tested for dangerous drugs, the Coast Guard has made a prima facie showing of this element.

B. Respondent tested positive for a dangerous drug

Based on the evidence, Respondent's urine sample tested positive for a dangerous drug. A "dangerous drug" is "a narcotic drug, controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970). 46 U.S.C. 2101(8a). A "controlled substance" is defined as a "drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. 802. Cocaine is listed in schedule II of the controlled substances schedules. 21 U.S.C. 812(c). Since cocaine is included in schedule II of the controlled substances schedules, cocaine is a dangerous drug within the meaning of 46 U.S.C. 7704(c).

Respondent's urine sample was confirmed to contain 626 ng/ml of Benzoyllecgonine. (IO Ex. 10). As the laboratory is required under 49 CFR 40.87(a & c) to report a confirmed concentration of Benzoyllecgonine greater than 150 ng/ml as a positive result for cocaine and the MROs verified the certified laboratory's findings, the Coast Guard has made a prima facie showing that Respondent tested positive for a dangerous drug. (IO Ex. 5).

C. The drug test was conducted in accordance with 46 CFR Part 16.

Under 46 CFR 16.201(a) chemical testing of personnel under Subpart B of Part 16 of Title 46 of the CFR must be conducted in accordance with the procedures detailed in 49 CFR part 40. The Commandant has held that the Coast Guard has made a prima facie showing of this element when the Coast Guard introduced evidence involving the collection process, the chain of custody, how the specimen was handled and shipped to the testing facility, proof of the qualifications of the laboratory. Appeal Decision 2632 (WHITE) (2002). The evidence in the record demonstrates that Respondent's urine sample was collected by a trained collector, a split sample was collected, there was an unbroken chain of custody, the laboratory performing the initial and confirmation tests was certified by the Department of Health and Human Services, and the MROs verified the test results. (IO Ex. 5, 10). Therefore, the Coast Guard has made a prima facie showing that the drug test was conducted in accordance with 49 CFR part 40.

Once the Coast Guard establishes a prima facie case, the burden then shifts to the Respondent to produce persuasive evidence to rebut the presumption Respondent is a user of dangerous drugs. Appeal Decision 2584 (SHAKESPEARE) (1997) (citing Appeal Decision 2379 (DRUM) (1985) (When a vessel strikes a fixed object a presumption of negligence establishes a prima facie case of negligence, and Respondent then has the burden of rebutting that presumption)). If the Respondent does not produce any persuasive rebuttal evidence, the ALJ may find the charges proved based solely on the presumption. Appeal Decision 2584 (SHAKESPEARE) (1997) (citing Appeal Decision 2266 (BRENNER) (1981) (Unrebutted presumption of negligence sufficient to

find charge of negligence proved) and Appeal Decision 2174 (TINGLEY) (1980) (ALJ could rely solely on the un rebutted presumption of negligence)).

To rebut the Coast Guard's prima facie case, the Respondent has argued that he tested positive for cocaine, because he was given Lidocain and Marcaine for minor surgery he had on July 14, 2002 as a result of a four-wheeler accident. However, there is no evidence in the record to support a claim that Lidocain and Marcaine given to a person could cause a person to test positive for cocaine 26 days after the person was given Lidocain and Marcaine. In fact, the evidence was that Lidocain and Marcaine do not contain cocaine and would not cause Respondent to test positive for cocaine 26 days after receiving Lidocain and Marcaine. The evidence also showed that Respondent did not receive cocaine during his treatment at the Kingwood Medical Center, and even if Respondent had received cocaine on July 14, 2002 as part of his treatment, it would not have been present in Respondent's urine 26 days later. As Respondent has not offered any evidence to rebut the Coast Guard's prima facie case, the Coast Guard has proved by a preponderance of reliable and probative evidence the Respondent is a user of dangerous drugs under 46 U.S.C. 7704(c).

The only remaining issue is the sanction.

SANCTION

Title 46 U.S.C. 7704(c) requires revocation of a license, certificate of registry, or merchant mariner's document if the holder is a user of or addicted to dangerous drugs unless the holder provides satisfactory proof of cure. Cure is a two step process that requires the Respondent to have successfully: (1) completed a bona fide drug abuse rehabilitation program and (2) demonstrated complete non-association with drugs for one


year after successful completion of the rehabilitation program. Appeal Decision 2535 (SWEENEY) (1992). An ALJ may continue a hearing if the Respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an accepted rehabilitation program. Appeal Decision 2535 (SWEENEY) (1992). As the Respondent did not offer any evidence of substantial involvement in the cure process, the appropriate sanction is revocation of his Merchant Mariner's Document.

ADVICES

The Respondent is advised of his right to appeal in accordance with Subpart J of 33 CFR Part 20, which is enclosed herein.

ORDER

Based upon the facts, the applicable law and consideration of the entire record, Respondent's U.S. Coast Guard issued Merchant Mariner's Document is hereby REVOKED. This includes all duplicates of that document and any other U.S. Coast Guard Merchant Mariner's Licenses or Documents issued to Respondent that have not expired. The Respondent's U.S. Merchant Mariner's Document is to be immediately delivered by hand or mail to the Senior Investigating Officer or an Investigating Officer of the U.S. Coast Guard, Marine Safety Office Houston-Galveston, 9640 Clinton Drive, Houston, Texas 77029.


Thomas E. P. McElligott
U.S. Administrative Law Judge

Done and dated on November 24, 2003
Houston, Texas