

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

UNITED STATES COAST GUARD

Complainant

vs.

BRUCE ALLEN SPENCE

Respondent.

Docket Number CG S&R 03-0128
CG Case No. 1487596

DECISION AND ORDER

Issued: July 6, 2004

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

Lieutenant Boris K. Towns and
Lieutenant Junior Grade Robert S. Butts
U.S. Coast Guard
Marine Safety Office
800 David Drive
Morgan City, LA 70380-1304

For the Coast Guard

Robert K. Lansden, Esq.
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P.O. Box 473
Ponchatoula, LA 70454

For Respondent

PRELIMINARY STATEMENT

On February 19, 2003, the Coast Guard filed a Complaint against Respondent's license alleging Respondent committed a Violation of Law or Regulation and two acts of Misconduct. The Violation of Law charge alleged Respondent was intoxicated while assigned as Master aboard the M/V COMMANDER. The Misconduct charges alleged Respondent refused to take a random drug test and a confirmation blood alcohol test.

The jurisdictional allegations in the Complaint listed Respondent's address, license number, and stated Respondent acted under the authority of his license by "serving as Master aboard the vessel M/V COMMANDER as required by law or regulation." In the Complaint, the Coast Guard sought revocation of Respondent's license. Respondent filed an Answer on March 27, 2003 admitting the jurisdictional allegations but denying the factual allegations. The Answer also asserted the following affirmative defenses: (1) the documentation required by "CFR 4.06-5" was not completed; (2) the service of the Complaint was untimely since the Coast Guard waited over one year to charge Respondent; and (3) Respondent acted according to law and ordinary seamen practice.

The hearing was originally scheduled for April 30, 2003 and was rescheduled several times before it commenced on January 27, 2004 at 9:30 a.m. in Morgan City, Louisiana. At the hearing, nine (9) Coast Guard exhibits were admitted into evidence and four (4) witnesses testified as part of the Coast Guard's case. Respondent objected to the validity of IO Exhibit 8, and the undersigned Administrative Law Judge reserved ruling on IO Exhibit 8. (Tr. Vol. 1 at 250-252). In addition, seven (7) Respondent exhibits were admitted into evidence and four (4) witnesses testified as part of Respondent's case. The hearing concluded on January 28, 2004, and Respondent's license was returned to him. (Tr. Vol. 2 at 171-172). After receiving

Respondent's Exhibits H and I on February 7, 2004, those documents were admitted into evidence since both sides had an opportunity at the hearing to question a witness about these documents.

Upon consideration of Respondent's objections to IO Exhibit 8 and the testimony at the hearing, IO Exhibit 8 is admitted into evidence.

FINDINGS OF FACT

1. Respondent holds a Coast Guard issued license, number 895367, authorizing him to serve as Master of steam or motor vessels of not more than 100 gross tons upon near coastal waters. (IO Ex. 1). Respondent's license was issued on January 22, 2001 and expires on January 22, 2006. (IO Ex. 1).
2. Respondent is on the fifth issue of his Coast Guard license and has no previous violations of Coast Guard law and regulations. (Tr. Vol. 2 at 5).
3. Respondent admitted to acting under the authority of his license by serving aboard the M/V COMMANDER as required by law or regulation. (Tr. Vol. 1 at 8-12).
4. On September 11, 2001, Gulf Tran employed Respondent as the Master of the M/V COMMANDER. (Tr. Vol. 1 at 44, 48; Tr. Vol. 2 at 40). Gulf Tran is a service company that rents and operates vessels for offshore oil rigs and other customers. (Tr. Vol. 1 at 40-42). The crews of Gulf Tran's vessels are paid by Gulf Tran but directed by the customer chartering the vessel. (Tr. Vol. 1 at 82). If Respondent as Master of the COMMANDER has any problems, such as the conditions are too rough offshore, he calls Gulf Tran and Gulf Tran deals with the customer. (Tr. Vol. 2 at 44-45).
5. At the time of the incident, Gulf Tran had a master service contract with Linder Oil Company. (Tr. Vol. 2 at 40-41; Resp't Ex. I). The contract provided that from time to time

Linder Oil may request Gulf Tran to perform work within the scope of Gulf Tran's usual business. (Resp't Ex. I). The master service contract also provided that the contract "is not intended nor shall it be construed to obligate LOCAP [Linder Oil Company] to award any specific work to Contractor [Gulf Tran], LOCAP at all time retaining the right to award such work as it deems appropriate, if any...this contract shall become effective and operative when Contractor [Gulf Tran] first commences the performance of any job or the rendering of any particular service." (Resp't Ex. I). The contract also provided that neither Gulf Tran nor Gulf Tran's principals, partners, employees or subcontractors are servants, agents, or employees of Linder Oil Company. (Resp't Ex. I).

6. The master service contract was implemented with purchase orders or verbal communications. (Tr. Vol. 2 at 147).

7. Linder Oil Company did not have authority to order the captain of the M/V COMMANDER to do something nor did it have the authority to hire and/or fire the master of the M/V COMMANDER. (Tr. Vol. 2 at 154).

8. In September of 2001, Linder Oil Company was a small, independent oil and gas exploration company that did not employ any field or field management personnel as direct employees. (Tr. Vol. 1 at 150-151; Tr. Vol. 2 at 137, 142). Linder Oil Company contracts with Eagle Consulting and Eagle Consulting then contracts with people to do the work. (Tr. Vol. 1 at 150-151).

9. At the time of the incident in question, Eagle Consulting was the company in charge of managing Linder Oil Company's day-to-day field operations on the oil platforms. (Tr. Vol. 1 at 121, 150-151; Tr. Vol. 2 at 137-138, 141-142, 150). Eagle Consulting determined when and how the vessels that Linder Oil Company had contracted for with Gulf Tran were used even

though the contracts for the vessels were with Linder Oil Company and Linder Oil Company paid for the vessels. (Tr. Vol. 2 at 141-143, 149 152-153). The arrangement worked through purchase orders and verbal communications to implement the master service contract. (Tr. Vol. 2 at 147). Mike Luke with Eagle Consulting would contract with the vessels and the contract would be with and paid by Linder Oil Company. (Tr. Vol. 2 at 142-143).

10. Eagle Consulting's duties also included drug and alcohol testing for what Linder Oil perceived its obligations to be under the rules and regulations. (Tr. Vol. 2 at 138-140).

11. The master service contract between Linder Oil Company and Eagle Consulting contained the same language as the master service agreement between Linder Oil Company and Gulf Tran and provided that Eagle Consulting was an independent contractor and neither Eagle Consulting nor Eagle Consulting's "principals, partners, employees, or subcontractors are servants, agents, or employees of Linder." (Resp't Ex. I, H).

12. On September 11, 2001, Respondent Bruce Allen Spence was the first captain of the M/V COMMANDER, and Captain Cliff Fulton was the second captain. (Tr. Vol. 2 at 10-11).

14. The M/V COMMANDER is a 95 gross ton passenger vessel. (Resp. Ex. A, B). The Certificate of Inspection requires the vessel to be manned by a master, mate, and two deckhands, but if the vessel is away from shore side dock for not more than twelve hours, the crew may be reduced to one master and two deckhands. (Resp. Ex. A, B). On September 11, 2001, the M/V COMMANDER with a crew of four people was offshore serving wells near the East Cameron 23 oil platform. (Tr. Vol. 2 at 10-11).

15. On the evening of September 11, 2001, the plant foreman for Linder Oil Company ordered the M/V COMMANDER to return to shore, and on September 12, 2001, the vessel arrived at Crane Brothers' Dock in Grand Cheniere, Louisiana. (Tr. Vol. 2 at 10-12; Tr. Vol. 2 at

41-42). At this point, Respondent had been on the vessel for close to a month and had one more week until his hitch was finished. (Tr. Vol. 2 at 13, 56, 64-65). The M/V COMMANDER's crew was not scheduled to be changed until the following week. (Tr. Vol. 2 at 64).

14. On the night of September 12, 2002, Respondent went ashore and had a few beers before returning to the vessel to sleep. (Tr. Vol. 2 at 20-21).

15. On September 12, 2001, Eagle Consulting called Mr. J.L. Harrell (a sub-contractor for Eagle Consulting) and told him to be at the dock before 4:00 a.m. on September 13, 2001 for drug testing that was to occur at 5:00 a.m. (Tr. Vol. 1 at 114-115, 121, 134; Tr. Vol. 2 at 149). Eagle Consulting ordered a drug test for the crew on the M/V COMMANDER and East Cameron 23. Mr. Harrell was to serve as Eagle Consulting's representative at the test. (Tr. Vol. 1 at 112-113, 123).

16. Gulf Tran had its own drug testing program, and on September 13, 2001, Gulf Tran had scheduled a drug test for the M/V HUNTER. (Tr. Vol. 1 at 40-41, 51-53; IO Ex. 5). Under Gulf Tran's company policy employees were subject to random drug and alcohol screenings by both Gulf Tran and companies employing their vessels. (Tr. Vol. 1 at 97; IO Ex. 5). Gulf Tran did not order the drug test on the M/V COMMANDER. (Tr. Vol. 1 at 40-41).

17. On September 13, 2001, the M/V COMMANDER was chartered by Linder Oil Company to do a crew change and grocery run. (Tr. Vol. 1 at 40 - 41, 97, 115, 145). The M/V COMMANDER was going to take a new crew out to the East Cameron 23 oil platform and return the crew that was already at the platform to shore. (Tr. Vol. 1 at 145, 147, 155-157). The oil platform crews are changed every seven days. (Tr. Vol. 1 at 155).

18. The M/V COMMANDER was scheduled to set sail around 5:30 a.m. on September 13, 2001 but did not sail until two days later. (Tr. Vol. 1 at 145-146).

19. On September 13, 2001, Multi-Management Systems, Incorporated (MMSI) employed Mr. Wade Savoy as a collector. (Tr.Vol. 1 at 162-163). On March 19, 2001, Mr. Savoy completed and passed a seven day training program for DOT drug and alcohol collections. (Tr. Vol. 1 at 164-166; IO Ex. 7). The training program involved reading books, watching videos, taking a test after each chapter, and taking a final exam. (Tr. Vol. 1 at 165, 208-209). Also, Mr. Wade Savoy was required to perform a hundred supervised collections before going into the field on his own. (Tr. Vol. 1 at 243-244). Mr. Savoy has not received error correction training. (Tr. Vol. 1 at 210).

20. At 12:30 a.m. on September 13, 2001, Mr. Savoy received a phone call at home informing him that he needed to do a random alcohol and drug screen for Eagle Consulting. He was instructed to go to Crane Brothers' Dock in Grand Cheniere and test all the employees on the vessel. (Tr. Vol. at 167-169).

21. Mr. Savoy arrived at Crane Brothers' Dock at 5:00 a.m. and was greeted by Mr. Harrell. (Tr. Vol. 1 at 115, 123, 169-170). Mr. Savoy and Mr. Harrell boarded the M/V COMMANDER and met some people on the back deck. (Tr. Vol. 1 at 170-171). Mr. Harrell informed the people on the back deck that drug and alcohol tests would be performed. (Tr. Vol. 1 at 171).

22. On the morning of September 13, 2001, Captain Cliff Fulton woke up Respondent and told Respondent that some people were on the vessel. (Tr. Vol. 2 at 22). Respondent then got up and met Mr. Harrell while taking his bags from the second deck to the back deck. (Tr. Vol. 2 at 22). Mr. Harrell informed Respondent that he was going to take a drug test since he was on the vessel. (Tr. Vol. 2 at 22-23). At the time, Respondent did not know Mr. Harrell worked for Eagle Consulting. (Tr. Vol. 2 at 23).

23. After talking with the people on the back deck, Mr. Savoy set up at a table in the galley near the restroom, secured the restroom, got his paperwork in place, and then began testing. (Tr. Vol. 1 at 171, 173; Tr. Vol. 2 at 24-25). Mr. Harrell was trying to keep track of the people on the vessel and ensure no one got off the vessel. (Tr. Vol. 1 at 173-174). However, two people left the vessel when they learned of the test. (Tr. Vol. 1 at 174-175).

24. At the time of the test, Gulf Tran had four employees on board and all were asked to participate in the test. (Tr. Vol. 1 at 43-44). Gulf Tran's four employees and the passengers that were on board the vessel for the offshore crew change were tested. (Tr. Vol. 1 at 64). Mr. Savoy tested a total of 23 people. (Tr. Vol. 1 at 221). Mr. Savoy conducted the alcohol test first. (Tr. Vol. 1 at 177). For the alcohol test, Mr. Savoy used a calibrated BAT breathalyzer. (Tr. Vol. 1 at 181, 186, 223).

25. When a vessel crewmember or offshore worker's turn to test came, the crewmember showed Mr. Savoy his/her identification and was then given an alcohol form to fill out his/her name, date of birth, and social security number. (Tr. Vol. 176, 179-180). After the form was completed, the crewmember was first given a non-DOT alcohol test, and if the individual blew 0.04 or greater, then Mr. Savoy would perform a DOT alcohol test. (Tr. Vol. 1 at 178, 180).

26. For the non-DOT alcohol tests, a mouthpiece was put into the breathalyzer and individuals would blow into the mouthpiece until it clicked, and then the breathalyzer would provide a digital reading. (Tr. Vol. 1 at 180-181). If someone blows .04 or greater, the hand held breathalyzer is connected to a machine to do a DOT alcohol test. (Tr. Vol. 1 at 216, 224, 233-234). To take a DOT test, the person blows into the mouthpiece, and if he/she blows .04 or greater, the machine locks down for 15 minutes to ensure there is no alcohol in the machine that would cause a false reading. (Tr. Vol. 1 at 188, 234-235). After 15 minutes, the person tested

blows into the mouthpiece one more time, and then two minutes later, the machine asks for a calibration check. (Tr. Vol. 1 at 188-189). Once the calibration check is complete, the machine provides a printout of the alcohol levels, the person's social security number, and calibration date for the DOT test. (Tr. Vol. 1 at 188-189, 233-234). A non-DOT alcohol test does not provide a print out like the DOT alcohol test. (Tr. Vol. 1 at 197).

27. Respondent was the second person tested. (Tr. Vol. 1 at 126-128; Tr. Vol. 2 at 67).

During the testing process, Mr. Savoy smelled alcohol on the breath of Respondent and one other person. (Tr. Vol. 1 at 182-184). When Mr. Savoy told Mr. Harrell he smelled alcohol on their breath, Mr. J.L. Harrell told Mr. Savoy to continue the drug testing. (Tr. Vol. 1 at 184, 219).

28. On September 13, 2001 at 5:15 a.m., Mr. Savoy gave Respondent a non-DOT alcohol test that resulted in a blood alcohol content of .176. (Tr. Vol. 1 at 191, 245; Tr. Vol. 2 at 67; IO Ex.

8). Mr. Savoy showed Respondent the digital results of his non-DOT breathalyzer. (Tr. Vol. 1 at 238-239). Thereafter, Respondent refused to take a DOT alcohol and drug test. (Tr. Vol. 1 at 196-199, 202; IO Ex. 9; IO Ex. 10). The non-DOT and DOT alcohol tests would not have rendered different results. (Tr. Vol. 1 at 197).

29. On September 13, 2001, Mr. Kelly Loupe, the safety manager for Gulf Tran, was on the vessel next to the M/V COMMANDER when one of the COMMANDER's deck hands came over to the vessel and told Mr. Loupe that there was a problem on board the COMMANDER. (Tr. Vol. 1 at 40, 43, 45, 64, 72). The deckhand told Mr. Loupe that one of the Captains on the M/V COMMANDER refused a drug screen after testing positive for alcohol and the other Captain refused a second drug screen after his first sample was reported as being cold. (Tr. Vol. 1 at 72-73). Mr. Loupe went to the COMMANDER and learned that the customer announced a

drug screen and Gulf Tran's four crewmembers and the offshore crewmembers that were going to serve on the East Cameron 23 oil platform had been tested. (Tr. Vol. 1 at 63-65).

30. Once on board the COMMANDER, Mr. Loupe tried to understand what was happening and spoke with Respondent, Captain Fulton, and the collector. (Tr. Vol. 1 at 66, 71).

Respondent and Captain Fulton both advised Mr. Loupe that they had quit. (Tr. Vol. 1 at 63).

However, Respondent did not notify Mr. Loupe that he quit until after he refused the drug test.

(Tr. Vol. 1 at 60). Nonetheless, Respondent was relieved of his duties because he tested positive for alcohol. (Tr. Vol. 1 at 67-68).

31. Respondent worked a lot of straight time in which he would be on the vessel for two months at a time, sometimes three months. (Tr. Vol. 1 at 61-63). If Respondent wanted to get off the vessel, he was required to give the personnel manager seven days notice before a crew change, so Gulf Tran could find a replacement. (Tr. Vol. 1 at 61-63). Respondent did not give Gulf Tran seven days notice before quitting. (Tr. Vol. 1 at 63).

ULTIMATE FINDINGS OF FACT/CONCLUSIONS OF LAW

1. The Coast Guard proved by a preponderance of evidence that Respondent was acting under the authority of his license when he committed a violation of law under 46 U.S.C. 7703(1)(A) when he was intoxicated while onboard the M/V COMMANDER, an inspected vessel.

2. The Coast Guard proved by a preponderance of evidence that Respondent was acting under the authority of his license when he committed acts of Misconduct by refusing to take an alcohol confirmation test and by refusing to take a random drug test administered by his marine employer.

DISCUSSION

The Administrative Procedure Act (APA), 5 U.S.C. 551-59, 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 proving a claim 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, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Under Coast Guard procedural 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 violations charged.

A. Violation of Law

Title 46 U.S.C. 7703(1)(A) provides that a license, certificate of registry, or merchant mariner’s document may be suspended or revoked if the holder when acting under the authority of that license, certificate, or document violates or fails to comply with Subtitle II of Title 46 of the United States Code, a regulation prescribed under Subtitle II of Title 46 of the United States Code, or any other law or regulation intended to promote marine safety or to protect navigable waters. Title 33 CFR 95.045(b) provides that a crewmember shall not be intoxicated while on

board a vessel inspected or subject to inspection under Chapter 33 of Title 46 of the United States Code. So in order to prevail, the Coast Guard must prove: (1) Respondent was a holder acting under the authority of his license, (2) Respondent violated 33 CFR 95.045(b), and (3) Title 33 CFR 95.045(b) was prescribed under Subtitle II of Title 46 of the U.S. Code or was intended to promote marine safety.

The first element of the Violation of Law offense requires Respondent to have been acting under the authority of his license at the time of the violation. A person employed in the service of a vessel is considered to be acting under the authority of his/her license, certificate, or MMD when the holding of that license, certificate, or MMD is required by law, regulation, or by the employer as a condition of employment. 46 CFR 5.57(a). If law, regulation, or condition of his employment did not require the Respondent to have a license, then the Coast Guard does not have jurisdiction under 46 CFR 5.57(a). Appeal Decision 2620 (COX) (2001). Therefore, the Coast Guard must prove that (1) Respondent was employed in the service of a vessel when he committed the violation of law and (2) Respondent's license was required by law, regulation, or as a condition of his employment.

As stated above, the first prong of "acting under the authority" requires the Coast Guard to prove Respondent was employed in the service of a vessel. Employed in the service of a vessel does not require respondent to have boarded the vessel. See Appeal Decision 2615 (DALE) (2000) (Respondent was acting under the authority of his MMD when his employer had assigned him to a vessel, but Respondent had not boarded.). Since Respondent had been on the M/V COMMANDER for close to a month and had one more week until his hitch was finished, he was employed in the service of the vessel. (Tr. Vol. 2 at 13, 56, 64-65). The remaining

question for this issue is whether law, regulation, or condition of employment required Respondent's license.

To find that a law or regulation required Respondent to hold a license, the vessel's certificate of inspection or a description of the vessel must be admitted into evidence. Appeal Decision 2283 (FUEHR) (1982). For vessels inspected under 46 U.S.C. 3301, the certificate of inspection specifies the minimum complement of officers and crew necessary for the safe operation of the vessel, and no vessel may be operated unless it has in its service and on board the complement required by the certificate of inspection. 46 CFR 15.501(a); 46 CFR 15.515(a). In this case, Respondent's license was required by 46 CFR 15.501(a) and 46 CFR 15.515(a) in order for him to serve aboard the M/V COMMANDER as a master, because the vessel's certificate of inspection required the vessel to be manned by a licensed master. (Tr. Vol. 1 at 44, 48; Tr. Vol. 2 at 10-11; Resp. Ex. B). Based on the evidence in the record, the Coast Guard proved by a preponderance of reliable and probative evidence that Respondent was acting under the authority of this license.

The second element of the Violation of Law charge requires proof that Respondent was a crewmember intoxicated while on board a vessel inspected or subject to inspection under Chapter 33 of Title 46 of the United States Code. Since Respondent was a licensed master and the M/V COMMANDER was issued a Certificate of Inspection under 46 U.S.C. 3309, Respondent was a crewmember on board an inspected vessel. (Resp't Ex. B; IO Ex. 1). The remaining question for this element is whether Respondent was intoxicated.

Title 33 CFR 95.020(b) provides that an individual is under the influence of alcohol¹ when the individual is operating a vessel other than a recreational vessel and has an alcohol

¹ "Under the influence" is defined as "impaired or intoxicated by a drug or alcohol as a matter of law." 33 CFR 95.010.

concentration of .04 percent or more in their blood. A person is considered to be operating a vessel when the person is a crewmember, including a licensed individual, of a non-recreational vessel. 33 CFR 95.015(b). Since Respondent was a licensed master on a non-recreational vessel, he is considered to be operating the vessel and he is subject to the standard in 33 CFR 95.020(b). (IO Ex. 1; Resp't Ex. B; Tr. Vol. 2 at 10-11, 21-22). Since Respondent had a blood alcohol content of .176, he was intoxicated within the meaning of 33 CFR 95.015(b).

The third element is a matter of law. Section 2302(c) in Subtitle II of Title 46 of the United States Code provides that an individual operating a vessel while under the influence of alcohol, as determined by regulations establishing standards for "under the influence", is liable to the United States government for a civil penalty of not more than \$5,000. Since 46 U.S.C. 2302 is listed as the statutory authority for regulations in 33 CFR Part 95, 33 CFR 95.045 is a regulation prescribed under Subtitle II of Title 46 of the United States Code.

In consideration of the above, the Coast Guard proved by a preponderance of reliable and probative evidence that Respondent was intoxicated while on aboard the M/V COMMANDER in violation of 33 CFR 95.045(b), a regulation prescribed under Subtitle II of Title 46 of the United States Code.

B. Misconduct

The Coast Guard also alleged two counts of Misconduct. The first Misconduct count alleged Respondent committed Misconduct by refusing to submit to a confirmation blood alcohol test. The second Misconduct count alleged Respondent refused to submit to a random drug screen ordered by Eagle Consulting.

Title 46 U.S.C. 7703(1)(B) partly provides that a license, certificate of registry, or merchant mariner's document (MMD) may be suspended or revoked if the holder when acting

under the authority of that license, certificate, or document commits an act of Misconduct.²

Misconduct is partly defined as human behavior that violates some formal, duly established rule, and such rules are found in statutes, regulations, the common law, the general maritime law, a ship's order or regulation, shipping articles, and similar sources. 46 CFR 5.27.

1. The refusal to submit to a confirmation blood alcohol test

For the first Misconduct charge, the formal, duly established rule is a regulation prohibiting employees from refusing to take an alcohol test. Under 49 CFR 40.261(a)(3), an employee refuses to take an alcohol test if the employee fails to provide an adequate amount of saliva or breath for any alcohol test required under 49 CFR Part 40 or DOT agency regulations. Title 49 CFR 40.247(b) requires a confirmation test if a screening test results in an alcohol concentration higher than 0.02. Since the non-DOT alcohol test resulted in a blood alcohol content of .176, Respondent was required to take a confirmation test. (Tr. Vol. 1 at 245; IO Ex. 8). Respondent's failure to take the DOT alcohol test violated 49 CFR 40.261(a)(3).

2. Refusal to submit to a random drug screen

For this charge, the formal, duly established rule is a regulation prohibiting employees from refusing to take a random drug test. An employee refuses to take a drug test when he/she fails to provide a urine specimen for any drug test required under 49 CFR Part 40 or DOT agency regulations. 49 CFR 40.191(b). Under Coast Guard regulations, marine employers are required to administer random drug tests of crewmembers that occupy a position or perform the duties and functions of a position required by the vessel's Certificate of Inspection. 46 CFR

² Since I have already found Respondent was acting under the authority of his license, the discussion above will not be repeated here.

16.230(a)(1). The term “marine employer” is defined as “ the owner, managing operator, charter, agent, master, or person in charge of a vessel, other than a recreational vessel.” 46 CFR 16.105.

At the hearing, the Coast Guard cited to the definition of “marine employer” in 46 CFR 4.03-45. (Tr. Vol. 2 at 132). However, the definition in 46 CFR 4.03-45 applies to 46 CFR Part 4, which deals with Marine Casualties. Since this case involves a refusal to take a drug test required under 46 CFR 16.230 and does not involve a marine casualty, the definition of “marine employer” in 46 CFR 16.105 applies. However, this error is harmless, because the two definitions are identical and the issue actually litigated by the parties was whether Respondent refused a random drug test given by his marine employer. See Appeal Decision 2599 (GUEST) (1998) (A specification that referenced a regulation pertaining to cargo vessels when the specification should have referenced a regulation pertaining to tank vessels was not reversible error, because the wording of the regulations was identical and respondent understood the substance of the charge was his failure to maintain the lifeboats on his vessel.).

Since the evidence in the record shows Linder Oil Company chartered the M/V COMMANDER, Linder Oil Company was a “marine employer” within the meaning of 46 CFR 16.105 and under 46 CFR 16.230 was required to administer random drug tests. (Tr. Vol 1 at 40-41, 97). However, at the time of the incident in question, Linder Oil Company did not employ any field personnel and instead contracted with Eagle Consulting to provide those services. (Tr. Vol. 1 at 150-151; Tr. Vol. 2 at 137, 142). When Eagle Consulting ordered the random drug test, Eagle Consulting was acting in place of Linder Oil Company, who as previously stated had an obligation to administer random drug tests to Gulf Tran’s crewmembers on the M/V COMMANDER. (Tr. Vol. at 167-169). Since the preponderance of the evidence shows

Respondent violated 49 CFR 40.191(b) by refusing to take the random drug test, he committed an act of Misconduct.

C. Respondent's defenses

Respondent asserted the following defenses: (1) the required documentation was not carried out under "CFR 4.06-5;" (2) the service of the Complaint was untimely; (3) Respondent quit the vessel at the dock; (4) Respondent was more credible than the Coast Guard's witnesses; (4) no weight should be given to the Coast Guard's witnesses; (5) the collector was not credible or competent to do drug tests; and (6) Eagle Consulting was not Respondent's marine employer and had no right to test. (Tr. Vol. 2 at 164-171; Respondent's Answer).

1. No required documentation

Since Respondent did not indicate to which Title of the CFR he was referring, it is assumed that Respondent was referring to 46 CFR 4.06-5(b). Title 46 CFR 4.06-5(b) provides that if an individual involved in a serious marine incident refuses to provide blood, breath, or urine specimens the refusal shall be noted on Form CG-2692B and in the vessel's official log book if one is required. However, this case involves a refusal to take a random drug and alcohol test and does not involve a serious marine incident. Therefore, 46 CFR 4.06-5(b) is not applicable.

2. Time limitation

Respondent asserted a defense that the Complaint was untimely. However for the reasons discussed below, this defense does not help Respondent. Title 46 CFR 5.55(a)(3) provides that a complaint for an act or offense not otherwise provided for shall be served within 3 years after the commission of the act or offense alleged in the complaint. Title 46 CFR

5.55(a)(2) provides that a complaint for misconduct based on offenses listed in 46 CFR 5.59(a) and 46 CFR 5.61(a) shall be served on a license, certificate, or document holder within 5 years after the offense alleged in the complaint. The offenses listed in part 5.59(a) include wrongful possession, use, sale, or association with dangerous drugs. Title 46 CFR 5.61(a) includes the following acts: (1) assault with a dangerous weapon; (2) misconduct resulting in loss of life or serious injury; (3) rape or sexual molestation; (4) murder or attempted murder; (5) mutiny; (6) perversion; (7) sabotage; (8) smuggling of aliens; (9) incompetence; (10) interference with a master, ship's officer, or government official in performance of official duties; (11) wrongful destruction of a ship's property.

Since the Misconduct charges in this case are not included in 46 CFR 5.59(a) or 46 CFR 5.61(a) and the Violation of Law charge is an offense not otherwise provided for, the time limitation applicable to the claims in this case is three years. As the Complaint alleges the incidents occurred on September 13, 2001 and the Complaint was served on Respondent on February 18, 2003, the Complaint was served on Respondent approximately a year and a half after the incident and was therefore timely.

3. Witness credibility

I reject Respondent's arguments that he quit the vessel at the dock and that he and his witnesses were more credible than the Coast Guard's witnesses. The Administrative Law Judge is vested with broad discretion to determine witness credibility and resolve inconsistencies in the evidence, and the findings of the Administrative Law Judge are not required to be consistent with all the evidence in the record as long as there is sufficient evidence to justify the finding. Appeal Decision 2639 (HAUCK) (2003). In this case, I find the testimony of the Coast Guard's witnesses are more credible than Respondent and his witnesses, because the Coast Guard's

witnesses do not have an interest in the outcome of this administrative proceeding. Since Respondent and his family members have an interest in the outcome of this proceeding, their testimony does not carry as much weight as that given to the witnesses who testified for the Coast Guard.

4. Mr. Savoy was not a competent collector.

Respondent argues that Mr. Savoy was not a competent collector, because he did not receive error correction training. (Tr. Vol. at 168). Collectors are required to undergo error correction training if they make a mistake that causes a drug or alcohol test to be cancelled. 49 CFR 40.33(f); 49 CFR 40.3. Since “error correction training” is required if the collector makes a mistake that causes the test to be cancelled, the absence of “error correction training” indicates Mr. Savoy was competent to perform DOT drug and alcohol tests. I find Mr. Savoy was a competent DOT drug and alcohol test collector because of his training and experience. (Tr. Vol. 1 at 164-166, 208-209, 243-244; IO Ex. 7).

5. Eagle Consulting was not Respondent’s employer

Since I have determined that Linder Oil Company chartered the M/V COMMANDER and Eagle Consulting acted on Linder Oil Company’s behalf, Eagle Consulting was Respondent’s “marine employer” and had an obligation to give Respondent a random drug test. Therefore, Respondent’s defense is rejected.

SANCTION

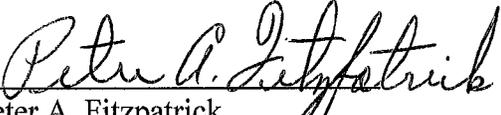
The Coast Guard argues that under Appeal Decision 2578 (CALLAHAN) (1996) (“Refusal to submit to a post incident chemical test raises a serious doubt about a mariner’s

ability to perform safely and competently in the future...if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.”) revocation is the appropriate sanction when a mariner refuses to take a drug or alcohol test. (Tr. Vo. 2 at 161-163).

Upon consideration of the above, I find that a mariner’s refusal to take a chemical test for drugs and alcohol when ordered to do so by his marine employer, as part of the required Coast Guard drug testing program, must result in the revocation of that individual’s Coast Guard issued license and/or document regardless of the type of test involved (post accident, pre-employment, random, probable cause, or periodic). There can be no distinction between the type of DOT drug test involved and the sanction issued. Each type of test is an integral part of the Congressional and Coast Guard’s effort to root out substance abuse in the merchant marine. All refusals raise the specter of the mariner’s illicit drug use and place in doubt the ability of a mariner to safely carry out his/her duties and responsibilities on the vessel. Therefore, revocation is the appropriate sanction.

ORDER

IT IS HEREBY ORDERED that the captioned Respondent's U.S. Coast Guard issued License is revoked, and Respondent is directed to immediately return his License to the Coast Guard Marine Safety Office in Morgan City, Louisiana.


Peter A. Fitzpatrick
Administrative Law Judge

Done and dated on this 6th day of July, 2004
Norfolk, Virginia