

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

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UNITED STATES COAST GUARD

Complainant

vs.

MARK WILLIAM FISCHER

Respondent.

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Docket Number: CG S&R 04-0654  
CG Case No. 2247032

**ORDER**

**Issued: April 25, 2005**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

This Order is issued in accordance with 33 CFR 20.902 ( c ) in that the undersigned rendered his initial decision orally from the bench at the close of the hearing on April 19, 2005 in New York, NY.

Respondent *pro se* is charged with one count of Use of or Addiction to the Use of Dangerous Drugs in that his drug screen specimen tested positive for marijuana metabolites, in violation of 46 U.S.C. 7704( c ) and 46 CFR 5.35. In his timely answer to the Complaint, Respondent *pro se* admitted all factual allegations with the exception that the drug test was not a periodic test but was a pre-employment drug test. Further, Respondent *pro se* asserted as an affirmative defense that had been taking hemp seed oil along with other supplements to control his obesity and that he had no idea that one could test positive for marijuana metabolites by ingesting hemp seed oil.

The matter was assigned to the undersigned Administrative Law Judge on January 15, 2005 for adjudication and on January 24, 2005 the matter was set down for hearing to be held on April 19, 2005. The Coast Guard, through its Investigating Officer (I/O), LT Richard Gonzales, USCG, had previously offered Respondent a cure settlement but Respondent did not wish to enter into such an agreement claiming that the positive test result was due to ingestion of hemp seed oil and that he did not use marijuana. As the result of Respondent's inquiries to the undersigned's assistant and the fact that he chose to represent himself, the undersigned called for all to participate in a pre-hearing conference call during which the undersigned explained the

state of the law to Respondent *pro se* that if the Coast Guard proves its case at the hearing, the only sanction is revocation unless he provides satisfactory proof of cure. After the I/O provided Respondent with yet additional time to reconsider the Coast Guard's offer of a cure settlement, the Respondent advised that he still refuses a settlement and wishes to go forward with the hearing. A memorandum of that pre-hearing conference call is marked as ALJ - I.

At the hearing on April 19, 2005 in New York, NY, the Coast Guard was represented by the I/O, LT Richard Gonzalez, USCG and LT Robert D. Mutto, USCG. The Respondent deposited his Merchant Mariner's Document with the undersigned for the duration of the hearing. The Coast Guard's motion in the nature of amending the Complaint to reflect pre-employment drug test versus periodic drug test was granted and was made part of the record as ALJ - II. Prior to taking evidence, Respondent *pro se* motioned to have spectators who were sitting in the hearing room excluded because their facial expressions or reactions might unduly influence the Administrative Law Judge. The undersigned denied the motion holding that Coast Guard Suspension and Revocation hearings are open to the public, and, in the absence of security concerns, there is no good cause to clear the courtroom. Further, many of the spectators were Coast Guard military members and employees, all in civilian clothes, and were present to observe how the hearing process works.

Respondent also expressed concern that there was an armed guard present. The undersigned advised that security is a routine, but important consideration and that the other courtrooms in the same building as the Coast Guard Hearing Room also had armed Federal Marshals.

The Coast Guard offered stipulations previously agreed to with Respondent *pro se*. The stipulations were accepted and now re-marked as ALJ - III. The stipulations provide that the Respondent was the holder of a U.S. Merchant Mariner's Document bearing his Social Security account number, and that on November 8, 2004 he provided a urine sample for a pre-employment drug test. The sample was properly collected, transported, and subsequently determined to test positive for marijuana metabolites. Therefore, I found that the Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704.

The Coast Guard presented five witnesses, including Respondent, and five exhibits. Two witnesses, including Respondent, testified at the hearing in person, and three witnesses testified telephonically pursuant to the Coast Guard's Motion for Telephonic Testimony, ALJ - IV, and my Order Granting Coast Guard's Request for Telephonic Testimony, ALJ - V. The Coast Guard's five exhibits are so numbered and are included in the file under "Amended Exhibit List."

Respondent *pro se* testified under oath on his own behalf and offered one exhibit comprised of five pages and marked as Respondent's Exhibit "A." That exhibit contains abstracts of articles concerning hemp seed oil ingestion resulting in positive urine tests. The exhibit also contains summaries of articles discussing how a hemp seed oil ingestion defense in military courts martial resulted in an acquittal.

At the conclusion of the evidence, the undersigned asked the parties to conference in chambers. During the conference, and in an effort to continually explain to Respondent *pro se* the nature of the proceedings and his due process rights, I advise the parties that I find that the Coast Guard had proved its case. I reminded Respondent *pro se* of our discussions during the pre-hearing conference call that when an individual fails a chemical drug test for dangerous drugs, that individual is presumed to be a user of dangerous drugs. 46 CFR 16.201. That presumption can be rebutted as Respondent has attempted to do in asserting his affirmative defense of hemp seed oil ingestion. However, after hearing Respondent *pro se*'s testimony and reviewing his exhibits, I was not convinced that the mere assertion of hemp seed oil ingestion, absent additional evidence and expert testimony, was sufficiently convincing for me to find it was the sole cause of the positive drug test result, thereby excluding illegal drug use.

I explained that the articles concerning the hemp seed oil defense resulting in an acquittal dealt with raising "reasonable doubt" in a criminal proceeding. A criminal proceeding is much different from the instant proceedings in which the affirmative defense must be convincing enough to rebut the presumption of illegal drug use. In a drug charge criminal proceeding, there is no presumption of illegal drug use that the defendant must rebut. Therefore, I found that the presumption of illegal drug use still stands and by the preponderance of reliable, probative, and substantial evidence, the Coast Guard proved its case. I further explained that under 46 U.S.C. 7704( c ) I will have no choice but to revoke Respondent's document in the absence of cure as previously discussed in the pre-hearing teleconference. Respondent advised that he was not going to "cop a plea" and wanted to "get it over with."

The parties were informed that the usual procedure was thirty days after receipt of the hearing transcript they would have an opportunity to submit proposed findings and conclusions. I also advised the parties that as per 33 CFR 20.710(b) they could waive that right and the judge could issue an oral decision from the bench at the close of the hearing. That oral decision would be followed up with a written Order as per 33 CFR 20.902( c ). Both parties agreed to waive their right to submit post hearing findings and conclusions and both parties favored rendering an oral decision from the bench. The undersigned also agreed and stated that the foregoing discussion would be placed on the record upon return to the hearing room.

Upon return to the hearing room and when questioned, both parties restated the foregoing, waiving their right to submit post-hearing findings and requesting that the initial decision be rendered from the bench orally. I then announced my findings essentially restating the elements of the charge as listed in the Complaint and finding that the Coast Guard's witnesses were credible. I discussed the issue of presumption of dangerous drug use and why Respondent *pro se*'s hemp seed oil ingestion affirmative defense was not sufficient to rebut the presumption of dangerous drug use, previously noted above. As a conclusion of law, I found that by the preponderance of reliable, probative, and substantial evidence the Coast Guard proved that Respondent *pro se* violated 46 U.S.C. 7704( c ) and 46 CFR 5.35 and that under 46 U.S.C. 7704( c ) and the regulations, the only sanction is Revocation.

After rendering the oral decision from the bench, I tendered Respondent *pro se*'s Merchant Mariner's Document to the Coast Guard Investigating Officer and then closed the hearing.

**ORDER**

IT IS HEREBY ORDERED that Respondent's U.S. Merchant Mariner's Document bearing his Social Security account number, and now in the possession of the Coast Guard, is REVOKED.

IT IS FURTHER ORDERED that the effective date of REVOCATION is hearing date, April 19, 2005.

Done and dated April 25, 2005.  
New York, New York

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**WALTER J. BRUDZINSKI  
ADMINISTRATIVE LAW JUDGE  
U.S. COAST GUARD**

**ATTACHMENT A**

**NOTICE OF ADMINISTRATIVE APPEAL RIGHTS**

**33 CFR 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

**33 CFR 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

**33 CFR 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

- (i) Basis for the appeal;
  - (ii) Reasons supporting the appeal; and
  - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
- (1) The party has petitioned the Commandant in writing; and
  - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

**33 CFR 20.1004 Decisions on appeal.**

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

**ATTACHMENT B**

**WITNESS AND EXHIBIT LISTS**

**WITNESS LIST**

**COMPLAINANT'S WITNESSES**

1. Ms. Ada Stephens
2. Mr. Dave Wallner
3. Dr. Devin B. Edwards, M.D.
4. Dr. John Womack, M.D.
5. Mr. Mark W. Fischer, Respondent

**RESPONDENT'S WITNESSES**

1. Mr. Mark W. Fischer

**EXHIBIT LIST**

**COMPLAINANT'S EXHIBITS**

I/O Ex. 1 – Federal Drug Testing Custody and Control form for Specimen No. 3360442, signed by Respondent.

I/O Ex. 2 – Federal Drug Testing Custody and Control Form for Specimen No. 3360442 dated Nov. 12, 2004.

I/O Ex. 3 – First Advantage Corp. letter report dated Nov. 12, 2004, from Dr. John Womack, M.D., Medical Review Officer.

I/O Ex. 4 – Federal Drug Testing Custody and Control Form Specimen No. 3360442, collector copy.

I/O Ex. 5 – Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document submitted by Respondent, seeking endorsement of his MMD, to the Regional Exam Center, New York, NY on September 10, 2003.

## RESPONDENT'S EXHIBITS

Resp't Ex. A Assorted articles and abstracts dealing with hemp seed oil as a cause for positive test results and as a defense - comprised of 5 pages.

## JUDGE'S EXHIBITS

ALJ – I Memorandum Order of March 23, 2005 Pre-hearing Telephonic Conference, three pages.

ALJ – II Motion to Strike and Replace Single Word from Existing Complaint (Drug Use), one page.

ALJ – III Stipulations, one page.

ALJ – IV Motion for Telephonic Testimony for Drs. Womack and Edwards, as well as for Mr. Wallner, five pages.

ALJ – V Order Granting Coast Guard's Request for Telephonic Testimony



**CERTIFICATE OF SERVICE**

I, Shaniqua G. Jenkins, hereby certify that a true copy of the foregoing Order was sent to the below listed parties and to the ALJ Docketing Center by the means prescribed in Table 20.304(D) of Title 33 CFR as follows:

Coast Guard Activities New York  
Attn: LT Richard Gonzales, USCG  
LT Robert D. Mutto, USCG  
212 Coast Guard Drive  
Staten Island, NY 10305  
Phone: (718) 354-4224  
Telefax: (718) 354-4224  
(Via Telefax)

Mr. Mark w. Fischer  
8503 Tamarron Drive  
Plainsboro, NJ 08536  
(Via First Class Mail)

ALJ Docketing Center  
40 S. Gay Street, Room 412  
Baltimore, MD 21202  
Phone: (410) 962-7434  
Telefax: (410) 962-1746  
(Via Telefax)

Done and dated April 25, 2005  
New York, NY

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Shaniqua G. Jenkins  
Paralegal Specialist, Assistant to the  
Administrative Law Judge  
Phone: (212) 668-2970  
Telefax: (212) 825-1230