UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

WILLIAM D. VOORHEIS

Respondent.

Docket Number: CG S&R 04-0507
CG Case No. 2202334

DECISION AND ORDER

Issued: July 8, 2005

Issued by: James W. Lawson, Administrative Law Judge

Appearances:

For Complainant
Lt. Ian Bird and
MST1 Jacquelyn Plevniak
U.S. Coast Guard
2901 Turtle Creek Drive, Suite 200
Port Arthur, Texas 77642

For Respondent
William D. Voorheis, pro se

PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard ("Coast Guard" or "Agency") by its Investigating Officers (IOs), Port Arthur, Texas, initiated this administrative law hearing seeking revocation or suspension of the Coast Guard merchant mariner's document ("MMD") issued to Respondent William Voorheis. This action was brought pursuant to the legal authority contained in 46 U.S.C. 7704, and the proceedings were conducted in accordance with the procedural requirements of 5 U.S.C. 551-59, 46 Code of Federal Regulations ("CFR") Part 5, and 33 CFR Part 20.

On September 22, 2004, the Coast Guard filed a Complaint (hereinafter referred to as the "Complaint" or the "Original Complaint") against Respondent's Coast Guard issued merchant mariner's document alleging Respondent took a periodic drug test at the Beaumont Family Care Center that tested positive for amphetamines. Respondent filed an Answer on November 19, 2004 stating that the Answer was filed in Response to a Complaint issued by the MSO Port Arthur on October 29, 2004. IO Exhibit 2 is a Complaint (hereinafter referred to as the "Amended Complaint") dated October 29, 2004 alleging Respondent gave a periodic drug test in Houston, Texas. Although the certificate of service for the Amended Complaint indicates it was filed with the Coast Guard ALJ Docketing Center, the Docketing Center does not have a record of receiving the Amending Complaint.[1] The evidence before me does not indicate whether the Coast Guard neglected to file the Amended Complaint or whether the Amended Complaint was inadvertently misplaced by the Docketing Center.

The Coast Guard amended the Original Complaint, because it inadvertently alleged an

[1] The Amended Complaint was included as an exhibit with the Coast Guard's witness and exhibit list that was filed on January 24, 2005 in accordance with the discovery regulations in Subpart F of Title 33 of the Code of Federal Regulations, but there is no record that the Amended Complaint was filed on or about October 29, 2004.

incorrect location of the drug test collection in the Original Complaint. (Tr. at 7). The Original Complaint alleged Respondent's urine specimen was collected in Beaumont, Texas at the Beaumont Family Care Center. The Amended Complaint alleged a urine specimen was collected by U.S. Healthworks in Houston, Texas. I note that, under 33 CFR 20.303(c), the original of each filed document must be signed by the filing party, and the signature constitutes a certification by the signer that he/she has read the document and to the best of his/her ability believes the statements made in it are true and that he/she does not intend to cause delay. By filing a Complaint with factually incorrect allegations, the Coast Guard breached its duty of care required under 33 CFR 20.303(c). In the future, the Coast Guard should be more careful before inadvertently filing a Complaint with incorrect factual allegations. I also remind the Coast Guard the only information the ALJ knows about the case is that which is filed or presented before the ALJ.

In the Answer, Respondent admitted the jurisdictional allegations, denied the factual allegations, alleged the time limitations for service of the Complaint had expired, requested to be heard on the matter, and requested voluntary surrender. Since the Original Complaint requested the hearing take place in January 2004 which was before the Original Complaint was served on Respondent, I take Respondent's argument that the time limitation for service had passed to mean that the Complaint requested an impossible hearing date. In any event, I note that under 46 CFR 5.55(a)(1) there are no time limitations for an allegation of dangerous drug use. Therefore, the time limitation for service of the Complaint had not expired when the Complaint was served.

On February 8, 2005, a hearing was held in the above captioned administrative proceeding in Beaumont, Texas. At the hearing, two witnesses testified as part of the Coast Guard's case in chief. The Coast Guard offered eleven exhibits into evidence, and ten of those

exhibits were admitted into evidence. IO Exhibit 5 (the Federal Drug Testing Custody and Control Form filled out by the collector) was not admitted into evidence, because the collector did not testify.

Prior to the hearing, the Coast Guard filed a Motion for Telephonic Testimony requesting to allow three witnesses, including the collector, to testify at the hearing via telephone and that motion was granted in part but the request to allow the collector testify telephonically was denied. Subsequently, the Coast Guard filed a Motion for Reconsideration requesting the undersigned reconsider the denial of telephonic testimony, because the collector did not have transportation to travel to Beaumont, Texas and could not rearrange her schedule due to employment and family issues. During the telephone conference call with the parties discussing the Motion for Reconsideration, the Coast Guard indicated that the collector did not have transportation to attend the hearing in Beaumont and the collector's employer did not want to send her. The undersigned offered the Coast Guard the option of moving the hearing to Houston, Texas to allow its witness to attend the hearing, but the Coast Guard declined this offer and the Motion for Reconsideration was denied.

Under 33 CFR 20.707(a), the ALJ may order a witness's testimony to be taken by telephone conference call that allows each participate to listen to and speak to each other within the hearing of the ALJ, who will ensure the full identification of each so the reporter can create a proper record.

> The use of telephonic testimony promotes flexibility, judicial economy, and efficiency by expediting the proceedings when the prospective witnesses must travel long distances. By allowing telephonic testimony, merchant seamen who are subpoenaed as witnesses do not have to miss vessel departures. Additionally, telephonic testimony affords respondents immediate access to individuals who can provide testimony on their behalf, individuals who would normally be unable to do so because of commitments at sea. Unlike other profession, the merchant marine is one in which its members are routinely outside of the United States for extended periods, usually in excess of six months.

> Moreover, when merchant mariners return to shore, they may be outside the jurisdiction of the court and, therefore, beyond the subpoena power of the court. By allowing telephonic testimony, such problems are avoided for all parties concerned. (Citations omitted). Appeal Decision 2616 (BYRNES) (2000).

Additionally, the Commandant has stated that telephonic testimony is designed to expedite the hearing when prospective witnesses must travel long distances, and the Commandant has upheld the use of telephonic testimony when the witnesses were testifying from various cities around the United States. See Appeal Decision 2608 (SHEPHERD) (1999) ("The taking of telephonic testimony was more convenient and judicially efficient than requiring each witness to travel to Tampa for the hearing."); Appeal Decision 2538 (SMALLWOOD) (1992), appeal dismissed sub. nom. J.W. Kime v. Richard L. Smallwood, NTSB Order No. EM-167 (1992), motion for reconsideration denied, NTSB Order No. EM-170 (Telephonic testimony is designed to expedite the hearing when prospective witnesses must travel long distances.); Appeal Decision 2476 (BLAKE) (1988), aff'd sub nom. Commandant v. George Francis Blake, 6 N.T.S.B. 1645, NTSB Order No. EM-156 (1989) (Telephonic testimony is designed to expedite the proceedings when prospective witnesses must travel long distances, and these procedures are consistent with the Constitutional concept of due process and sufficiently protect Appellant's legitimate interests.).

However, in this case, the Coast Guard in the Complaint and the Amended Complaint proposed to locate this hearing in Beaumont, Texas knowing the drug test giving rise to this hearing occurred in Houston, Texas.[2] As the Coast Guard stated in the conference call on January 20, 2005 regarding the Motion for Telephonic Testimony, Beaumont, Texas is approximately an hour and a half from Houston, Texas. Further based on the record before me,

[2] Based on the allegations in the Original Complaint and the Coast Guard's proposed hearing location, the hearing was set for Beaumont, Texas for the convenience of the parties by order of December 22, 2004.

the facts of this case do not appear to have any connection with Beaumont, Texas nor does the record indicate why the Coast Guard sought to hold this hearing in Beaumont, Texas when this location was not convenient for its witnesses. In other words, the transportation problems the collector faced were caused by the Coast Guard seeking to have the hearing in a location that did not have any connection with the events or any other witnesses in this case. I also note that in the conference calls regarding the Motion for Telephonic Testimony and the Motion for Reconsideration Respondent indicated that he would have to travel five to seven hours to attend the hearing in Beaumont.

As for the collector's employer not wanting to send her to testify at the hearing, I note the record indicates that the employer does DOT drug tests as part of the employer's business and part of conducting DOT tests is testifying at hearings such as this one. I believe it would be bad precedent to hold that the Coast Guard's ability to have a collector testify on its behalf at the hearing depends on whether the collector's employer, who does DOT drug test collection as part of his/her business, wants to send the collector to testify. Additionally, I note the Coast Guard was unaware of any obligations the collector's employer may have had to send the collector to the hearing. (Tr. at 14-15).

As for Respondent's case, Respondent was the only witness to testify on his behalf, and he offered four exhibits that were admitted into evidence. At the conclusion of the hearing, the undersigned found the Coast Guard had made a prima facie case to the extent that the Coast Guard should retain possession of the document until a final decision could be issued in this case, and in accordance with 46 CFR 5.521(b) the undersigned directed the Coast Guard to retain possession of Respondent's merchant mariner's document. (Tr. at 95-98). On March 22, 2005,

the Coast Guard filed a post-hearing brief addressing Appeal Decision 2560 (CLIFTON) (1995) as per the undersigned's request.

FINDINGS OF FACT

1. Respondent holds a Coast Guard issued merchant mariner's document that expires on December 3, 2007. (IO Ex. 1).

2. On June 30, 2004, Respondent voluntarily went to U.S. Healthworks on his own time and gave a urine specimen for a drug test, so he could renew his benzene card issued by the Coast Guard. (Tr. at 49, 54; IO Ex. 6; IO Ex. 8). The benzene card requires a medical examination and a urine test for dangerous drugs. (Tr. at 55-56).

3. A split specimen was collected at U.S. Healthworks in Houston, Texas. (IO Ex. 6). Clinical Reference Laboratory in Lenexa, Kansas received Respondent's specimen on July 1, 2004 and conducted an initial and confirmation test of Respondent's urine specimen. (Tr. at 21; IO Ex. 8). Clinical Reference Laboratory is SAMHSA certified to perform drug tests in accordance with 49 CFR Part 40. (Tr. at 21; IO Ex. 8; IO Ex. 9). The specimen bottles arrived at the laboratory in a sealed bag with the paperwork inside the bag. (Tr. at 37). The seals on the bag and on the specimen bottle arrived at the laboratory intact. (Tr. at 37; IO Ex 8).

4. When the bag was opened the seals on the bottles were checked and the information on the seal was checked against the information on the paperwork. (Tr. at 37-38). The laboratory then put its own internal number (accession number or SID) on the paperwork and each bottle. (Tr. at 38). A bottle was then opened and a small amount poured into a test tube with the same internal bar code of the accession number on it. (Tr. at 38). This process was repeated with other specimens until the laboratory had a batch of specimens. (Tr. at 38). Once the laboratory had a batch of specimens, the specimens were transported to the screening department where the

specimen was put in an automated spectrophotometer. (Tr. at 38). The automated spectrophotometer read the bar code on the specimen, checked the computer for what type of specimen it was, who the client was, and then ran the test ordered by the computer. (Tr. at 38). The initial test of Respondent's specimen was positive for amphetamines. (IO Ex. 8).

5. When the initial test results are positive, an accessioner goes to the original bottle that was used to pour off the aliquot, the accessioner pours off a second aliquot, and transfers the aliquot to the confirmatory laboratory. (Tr. at 38-39). The transfers are accomplished via pass through windows and do not involve walking the specimens around hallways. (Tr. at 39). The confirmation laboratory receives the specimen and tests it by gas chromatography mass spectroscopy. (Tr. at 39). The certifying scientist reviewed both the screening data and the confirmation data of Respondent's sample for accuracy, checked the instruments for maintenance records, and checked for proper signatures and proper chains of custody. (Tr. at 39; IO Ex. 8). The gas chromatography mass spectroscopy test of Respondent's specimen resulted in 1325 ng/ml of amphetamine. (IO Ex. 8).

6. Dr. Charles Lovell, a certified Medical Review Officer, interviewed Respondent, and during the interview Respondent stated he was taking his wife's Asenlix. (Tr. at 19-21, 23). Asenlix metabolizes to amphetamine and will cause a positive result for amphetamine. (Tr. at 23-25). The Medical Review Officer determined Respondent's urine sample was positive for amphetamine and there was no legitimate medical explanation for the positive test result. (Tr. at 23). The MRO concluded that Respondent did not have a legitimate medical explanation[3], because the Department of Transportation test is whether he is taking a prescription for him by a

[3] I note that the MRO did not inquire about Respondent's weight or about how frequently he used Asenlix. (Tr. at 27-29). For a discussion of the factors for MROs to consider in whether use of a medication from a foreign country is a legitimate medical explanation see 65 FR 79496.

physician in the United States. If Respondent's physician thought he needed something to assist with weight loss, his physician could have prescribed something. (Tr. at 82).

7. The Medical Review Officer did not inform Respondent of his right to have the split specimen tested by another laboratory, because Respondent admitted taking medication for which he tested positive. (Tr. at 57, 83).

8. Respondent took Asenlix the day before and the day of the drug test. (Tr. at 49, 65). Clobenzorex is the active ingredient in Asenlix. (Tr. at 49). Asenlix is a diet pill Respondent's wife ordered over the internet from MyRxForLess on or about June 23, 2004 and received it through the mail. (Tr. at 49, 64; Resp't Ex. D). The Asenlix appeared to have been opened, resealed, and stamped by the Postal Inspector before it arrived at Respondent's residence. (Tr. at 71). The Asenlix box contained 60 capsules. (IO Ex. 10). Asenlix is not an approved medication in the United States. (Tr. at 81). Asenlix is only sold in Mexico for weight loss and is prohibited in the United States, because it is potentially addictive. (Tr. at 26, 85-86). The website said Respondent did not need a prescription for Asenlix, and the Asenlix box states that a prescription is necessary to sell Asenlix. (Tr. at 72; IO Ex. 10).

9. Respondent believed it was alright for him to use Asenlix, because the website said he did not need a prescription and the package appeared to have been inspected by the Postal Inspector. (Tr. at 71-72). Respondent believed if the Asenlix contained illegal drugs and it had been shipped through the mail, law enforcement would have intervened. (Tr. at 71). U.S. Customs allows U.S. residents entering through an international land border port to import Asenlix, without a prescription issued by a U.S. physician, in an amount that does not exceed 50 dosages. (IO Ex. 11).

10. Respondent did not know that Asenlix contained amphetamine and had never used Asenlix before this occasion. (Tr. at 50, 67, 84-85). After being told he tested positive for amphetamines, Respondent destroyed the Asenlix and has not used it since. (Tr. at 72). Except for this occasion, Respondent has never used dangerous drugs. (Tr. at 60, 72-73).

11. Respondent had a heart attack approximately six years ago. (Tr. at 53). Both Respondent and his wife were trying to lose weight and took Asenlix in an overzealous attempt to lose weight after trying everything else they could think of to lose weight. (Tr. at 67-68). Respondent was self-medicating with a drug not approved for use in the United States, and if Respondent's physician thought he needed something to assist with weight loss, his physician could have prescribed something. (Tr. at 82). Respondent weighs approximately 262 pounds and is approximately 6 feet tall. (IO Ex. 1).

12. The Asenlix packaging was written in Spanish, and Respondent does not read Spanish. (Tr. at 58). Respondent did not ask anyone to translate the label for him or ask a physician about Asenlix. (Tr. at 58). Respondent thought it would not hurt to take Asenlix, because everyone else was taking it. (Tr. at 67). Additionally, one of Respondent's friends who has had two heart attacks has taken Asenlix. (Tr. at 58). However, the warnings on the Asenlix box (as translated by the Coast Guard) state: (1) the medication is for the treatment of obesity; (2) Asenlix should not be administered to people with a cardio vascular disease, arterial hypertension, prior history of brain-vascular disease, nervous anorexia, depression, or mental agitation; (3) it should not be used by people who consume drugs and/or are suffering from alcoholism; (4) the recommended dose or duration should not be exceeded to avoid developing a tolerance, dependency on Asenlix, or arterial hypertension; (5) the adverse and secondary reactions include depression, nervousness, anxiety, insomnia, dizziness, headaches, increase in arterial pressure, fast or slow

heartbeat, palpitations, dry mouth, and constipation; (6) the presence of one or more of these adverse reactions requires immediate specialized medical attention; (7) the treatment with Asenlix should always be done under the strict control of an experienced medical doctor and should not be administered to senior citizens. (IO Ex. 8). The Asenlix box states that adults and children over the age of 12 should only take two capsules per day, and one capsule should be taken in the morning before breakfast and one at noon before lunch. (IO Ex. 10).

13. The Medical Review Officer did not offer to have the split specimen tested by another laboratory, because Respondent admitted taking medication for which he tested positive. (Tr. at 57, 83).

14. On or about September 24, 2004, Respondent received a Complaint from the Coast Guard alleging he was a holder of a merchant mariner's document and a user of dangerous drugs. (Tr. at 48). The Complaint alleged Respondent took a drug test in Beaumont, Texas at the Beaumont Family Care Center and stated that he needed to attend a hearing in January 2004. (Tr. at 48). Respondent did not know what to do when he received Complaint, so he mailed his MMD to the MSO at Port Arthur. (Tr. at 49). Respondent then received a telephone call from MST1 Plevniak asking why Respondent did not respond to the Complaint. (Tr. at 49). Respondent stated there was no way for him to respond, because January of 2004 had already passed and he did not take a drug test in Beaumont, Texas. (Tr. at 49).

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 allegations 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) (1998). 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 allegations 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 alleged.

Determining the weight of the evidence and making credibility determinations as to that evidence is within the sole purview of the ALJ. See Appeal Decision 2640 (PASSARO) (2003). Also, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence and findings do not need to be consistent with all of the evidence in record as long as there is sufficient evidence to reasonably justify the findings reached. Appeal Decision 2640 (PASSARO) (2003); Appeal Decision 2639 (HAUCK) (2003).

"Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing or using drugs from service in the United States merchant marine." Appeal Decision 2638 (PASQUARELLA) (2003). If it is shown at a hearing that a holder of a merchant mariner's document has been a user of a dangerous drug, the merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured. 46 U.S.C. 7704. If an individual fails a test for dangerous drugs under 46 CFR Part 16, the

individual will be presumed to be a user of dangerous drugs. 46 CFR 16.201(b); Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995). If the Coast Guard establishes a prima facie case of dangerous drug use, the burden to rebut the presumption shifts to the Respondent who must produce persuasive evidence. Appeal Decision 2632 (WHITE) (2002); Appeal Decision 2591 (WYNN) (1997); Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995). If the respondent produces no evidence in rebuttal, the Administrative Law Judge may find the allegation of dangerous drug use proved on the basis of the presumption alone. Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995). However, the presumption of dangerous drug use is not an irrebuttable presumption, and Respondent may rebut the presumption by producing evidence that (1) calls into question any elements of the prima facie case; (2) indicates an alternative medical explanation for the positive test result; or (3) indicates the use was not wrongful or not knowing. Appeal Decision 2560 (CLIFTON) (1995), appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton, NTSB Order No. EM-180 (1995).

The Coast Guard may establish a prima facie case of dangerous drug use by showing that (1) Respondent was tested for a dangerous drug[4], (2) Respondent tested positive for a dangerous

[4] Although the Complaint and the Amended Complaint allege Respondent was tested as part of periodic screening, the test in question may not have been required under 46 CFR 16.220(c). Section 16.220(c) provides that an applicant does not need to submit evidence of passing a chemical test for dangerous drugs if he/she provides satisfactory evidence that he/she has: (1) passed a chemical test for dangerous drugs required by 46 CFR Part 16 within the previous six months with no positive tests; or (2) during the previous 185 days been subject to a random drug testing program for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs required by 46 CFR Part 16. Prior to this case, Respondent had been employed by Kirby Inland Marine as a tankerman for approximately a year and a half. (Tr. at 47). I note Respondent's prior employment probably would have subjected him to random drug tests, and therefore it may not have been necessary for Respondent to submit to periodic drug testing.

drug, and (3) the test was conducted in accordance with 49 CFR Part 40. Appeal Decision 2332 (WHITE) (2002). In considering proof of these elements, minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Appeal Decision 2633 (MERRILL) (2002); Appeal Decision 2603 (HACKSTAFF) (1998). In Appeal Decision 2603 (HACKSTAFF) (1998), the Commandant discussed the elements of a prima facie case, but declined to assert how precisely the elements must be shown.

According to Appeal Decision 2603 (HACKSTAFF) (1998), the first prong of a prima facie case "necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample." Appeal Decision 2603 (HACKSTAFF) (1998). The second prong requires proof that Respondent tested positive for a dangerous drug, and this necessarily involves proof of the test results, proof of the MRO's status and qualifications, proof of the test results review by the MRO, and proof of his report of the results as positive. Appeal Decision 2603 (HACKSTAFF) (1998). The Commandant has also held that the Coast Guard has made a prima facie showing of the third 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, and proof of the qualifications of the laboratory. See Appeal Decision 2603 (HACKSTAFF) (1998).

I think this case is similar to HACKSTAFF, in which the Commandant held the Coast Guard failed to establish a prima facie case, because in HACKSTAFF there was no evidence that identifying the signature of the collector, no evidence the collector identified the donor, no

authentication of the collection form, and no testimony about sample collection at issue. Since the Coast Guard opted to proceed with its case without testimony from the collector, there was no authentication of the Federal Drug Testing Custody and Control Form, and therefore, without testimony from collector the first link in the chain of custody cannot be established. Although Respondent testified that he gave a urine specimen at U.S. Healthworks in Houston, Texas, there cannot be a showing that the specimen that tested positive for amphetamines was his without the first link in the chain of custody. Additionally without testimony from the collector, there is no evidence regarding the collection process. I also note that the Coast Guard did not offer a copy of any "DOT/USCG Periodic Drug Testing Form" (CG-719P)[5] filled out by Respondent and/or the MRO. Since the Coast Guard has failed to meet its burden of proof in establishing the first prong of the prima facie case, the Coast Guard is not entitled to rely on the presumption that Respondent is a user of dangerous drugs.

Further, the test was not conducted in accordance with 49 CFR Part 40, because the MRO failed to inform Respondent of his right to have the split specimen tested. Under 49 CFR 40.153(a), the MRO must notify the employee of his/her right to have the split specimen tested when the MRO verifies a drug test as positive. The requirement that the MRO notify Respondent of his right to have the split specimen tested is mandatory, and the MRO does not have the discretion to not inform Respondent of his right to have the split specimen tested simply because Respondent admits to taking a substance for which he tested positive. The MRO's failure to inform Respondent of his right to have the split specimen tested violated Respondent's due process rights and cannot be said to be a minor, technical violation of 49 CFR Part 40.

[5] I note form CG-719P provides "This form MAY be used to satisfy the requirements for 'Periodic Drug Testing' in accordance with Title 46 CFR 16.220. If you participate in USCG 'random or pre-employment drug test program,' this form may not be necessary." The form further provides for "Applicant Consent."

Therefore, the Coast Guard did not offer evidence establishing the third prong of the prima facie case.

Considering the totality of the circumstances in this case in which the collector failed to testify regarding the collection process, the Federal Drug Testing Custody and Control Form filled out by the collector could not be admitted into evidence, the Coast Guard failed to offer form CG-719P into evidence, and the fact that the MRO failed to inform Respondent of his right to have the split specimen tested, I find there are too many problems with the evidence surrounding the drug test to find that the burden has been met for the presumption to apply. Additionally, I note the procedural safeguards of the DOT drug testing program are particularly important when respondents are pro se.

Even though I find the Coast Guard failed to make a prima facie case, for the sake of argument I will examine Respondent's defenses. Respondent argues that in an attempt to lose weight he only took a diet pill that his wife ordered on-line without a prescription from Mexico, which metabolized into an amphetamine but he did not take an amphetamine. (Tr. at 49-50). A "dangerous drug" is defined as a narcotic drug, a controlled substance, or a controlled substance analog (as defined in 21 U.S.C. 802). 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 Subchapter I of Chapter 13 of Title 21 of the United States Code. 21 U.S.C. 802(6). Any material, compound, mixture, or preparation containing any quantity of amphetamine, its salts, optical isomers, and salts of its optical isomers is listed in Schedule III of Subchapter I of Chapter 13 of Title 21 of the United States Code. 21 U.S.C. 812. Drugs in Schedule III have a potential for abuse less than the drugs in Schedules I and II, have a currently accepted medical

use in the United States, and abuse of the drug(s) or substance(s) may lead to moderate or low physical dependence or high psychological dependence. 21 U.S.C. 812 (b)(3).

Although Respondent has argued that he did not take an amphetamine, the evidence in the record shows that Asenlix contains an amphetamine. When the MRO was asked whether Asenlix would metabolize into an amphetamine or was itself an amphetamine, the MRO said, "It's academic because it's the same thing." (Tr. at 25). Also, the MRO testified that Asenlix is a true positive for amphetamines not a false positive and that Asenlix is a controlled substance. (Tr. at 24, 81). Additionally, Respondent's Exhibit B lists the compound in Clobenzorex as 2-Chlorobenzyl-amphetamine. Therefore since Asenlix contains an amphetamine and any compound or mixture containing an amphetamine is a controlled substance, Asenlix is a dangerous drug within the meaning of 46 U.S.C. 7704(c).

Since Respondent admitted taking Asenlix, which I have found is a controlled substance, the next question becomes whether Respondent is a user of dangerous drugs within the meaning of 46 U.S.C. 7704(c). Respondent asserts that he believed Asenlix was a diet pill but did not know what Asenlix was. (Tr. at 50, 60-71). In CLIFTON, the Commandant stated that a presumption of drug use may be rebutted by showing the use was not knowing. Although I have found the Coast Guard failed to establish a prima facie case and the presumption does not apply, I am treating Respondent's argument of unknowing use as an affirmative defense. For this defense, the question is whether Respondent knowingly taking Asenlix, knowing the Asenlix came from Mexico, believing a prescription was not required for Asenlix, and believing the Asenlix to have been inspected by the Post Office as it came through the mail without knowing that Asenlix contains an amphetamine is unknowing use of a dangerous drug.

In the Coast Guard's Post-hearing brief, the Coast Guard argues that in Appeal Decision 2529 (WILLIAMS) (1991) the Commandant affirmed that inadvertent ingestion of a dangerous drug does not negate the results of a positive drug test. In WILLIAMS, the respondent attempted to rebut the presumption of dangerous drug use by claiming he inadvertently and mistakenly ingested brownies laced with marijuana. However, in support of his claim, the respondent only offered hearsay evidence, and the Commandant held the ALJ had the discretion to give the hearsay little weight. Therefore, WILLIAMS did not establish a broad rule that inadvertent ingestion is never a defense. Further, even if WILLIAMS established a broad rule that inadvertent ingestion of a controlled substance does not rebut the presumption, CLIFTON was decided after WILLIAMS and states a Respondent may rebut the presumption by showing the use was not knowingly. Since there does not appear to be an Appeal Decision directly on point, this will be a case of first impression.

In the case at hand, Respondent is credible and states he only made an honest mistake in an attempt to lose weight. (Tr. at 68). Regarding Respondent's knowledge about the Asenlix, Respondent stated that the website where the Asenlix was ordered stated Respondent did not need a prescription, a friend had used it without problems, and the Asenlix appeared to have been inspected by the Post Office as it was shipped through the mail. (Tr. at 58, 67, 71-72). Respondent believed that if the Asenlix contained any illegal drugs law enforcement would have intervened. (Tr. at 71). Additionally, the Asenlix instructions were written in Spanish and Respondent does not read Spanish and did not seek to have the instructions translated. (Tr. at 58). Also, from observing Respondent's body language and his forthright testimony at the hearing, I find Respondent did not actually know the Asenlix contained an amphetamine and he would not have used it had he known it contained an amphetamine. Under these circumstances, I

find Respondent unknowingly used a dangerous drug and therefore is not a user of dangerous drugs.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a holder of a Coast Guard issued merchant mariner's document and is not a user of dangerous drugs.

ORDER

IT IS HEREBY ORDERED that the allegations that Respondent is a user of dangerous drugs are found not proved and the Coast Guard is directed to return Respondent's merchant mariner's document to him.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A).

Done and dated July 8, 2005.
Baltimore, Maryland

JAMES W. LAWSON
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. Dr. Charles Lovell, M.D.	Medical Review Officer
2. Stanley C. Kammerer	Vice President and Director of Toxicology for Clinical Reference Laboratory

RESPONDENT'S WITNESSES

1. William D. Voorheis	Respondent

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

IO Ex. 1	Copy of Respondent's merchant mariner's document
IO Ex 2	Copy of Complaint served on October 29, 2004
IO Ex. 3	Copy of Respondent's Answer
IO Ex. 4	Letter dated August 10, 2004 from Kirby Corporation
IO Ex. 5	Copy of Federal Drug Testing Custody and Control Form
IO Ex. 6	Laboratory Copy of Federal Drug Testing Custody and Control Form
IO Ex. 7	MRO Report of positive drug test
IO Ex. 8	Clinical Reference Laboratory Litigation Package
IO Ex. 9	Copy of 69 FR 59604
IO Ex. 10	Copy of Asenlix box with translation
IO Ex. 11	Customs Directive dated December 15, 1999.

RESPONDENT'S EXHIBITS

Resp't Ex. A	Article titled "Amphetamine, clobenzorex, and 4-hydroxyclobenzorex levels following multidose administration of clobenzorex."
Resp't Ex. B	Article titled "A Procedure for the Identification and Quantitation of Clobenzorex."
Resp't Ex. C	Letter from Dr. Anil A. Dara, M.D.
Resp't Ex. D	Bank statement

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPLAINANT'S PROPOSED FINDINGS

1. At all times relevant, the Respondent, William D. Voorheis, was the holder of Merchant Mariner's Document (MMD) [number in original but redacted here for privacy concerns].

   ACCEPTED AND INCORPORATED

2. On June 30, 2004, William Voorheis participated in a periodic drug screen. U.S. Healthworks in Houston, Texas, collected the urine specimen. Clinical Reference Laboratory in Lenexa, Kansas, a Substance Abuse and Mental Health Services (SAMHSA) approved facility; using procedures outlined in 49 CFR Part 40 analyzed the urine specimen. That specimen subsequently tested positive for amphetamines, and was then confirmed positive by Charles Lovell, MD, MRO on July 6, 2004.

   REJECTED. The first link in chain of custody was not established, because the collector did not testify. Also, there was no evidence of Form CG-719P.

3. The Coast Guard proved that William D. Voorheis was properly tested for dangerous drugs, the results of that test were positive for amphetamines and the test was performed in accordance with 49 CFR Part 40. The Respondent provided no evidentiary reasons for testing positive for amphetamines. In the interest of public safety, the Coast Guard believes that revocation is the appropriate sanction.

   REJECTED. The first link in the chain of custody was not established, and the preponderance of the evidence does not show Respondent is a user of dangerous drugs.