

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

UNITED STATES COAST GUARD

Complainant

vs.

CARL LEE SIMPSON, III

Respondent.

Docket Number: CG S&R 07-0019
CG Case No. 2858523

DECISION AND ORDER

Issued: June 12, 2007

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant

LTJG Kenneth Scott
LT Jaime Salinas
U.S. Coast Guard
USCG Sector Hampton Roads
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Norfolk, VA 23510

For Respondent

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PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Carl Lee Simpson, III's (Respondent) Merchant Mariner's License (License) and Merchant Mariner's Document (MMD). This action is brought pursuant to the authority contained in 46 U.S.C. 7703, 7704(c) and its underlying regulations codified at 46 CFR Part 5, and 33 CFR Part 20.

On January 19, 2007, the Coast Guard temporarily suspended and took possession of Respondent's license and MMD because it found probable cause to believe he performed a safety sensitive function in violation of law or Federal regulation regarding the use of alcohol or a dangerous drug. Under 46 U.S.C. § 7702(d), the Coast Guard may temporarily suspend, and take possession for a period not more than 45 days, the license, certificate of registry, or merchant mariner's document held by an individual if there is probable cause to believe that the individual has, while acting under the authority of that license or document, performed the safety sensitive function in violation of law or Federal regulation regarding the use of alcohol or dangerous drug. Section 7702(d) further provides that "[i]f a license, certificate, or document is temporarily suspended under this section, an expedited hearing . . . shall be held within 30 days after the temporary suspension. . . ."

The Coast Guard's January 19, 2007 Complaint alleges that Respondent: (1) violated a law or regulation; (2) committed an act of negligence; and (3) is a user of or addicted to a dangerous drug. Specifically, the Coast Guard alleges that Respondent violated a law or regulation when Respondent offered cocaine to deckhand Tyler Mantay, consumed cocaine and alcohol in Mr. Mantay's presence, and operated the DONALD ADDISON while intoxicated. Furthermore, the Coast Guard alleges that Respondent committed an act of negligence because

he operated the DONALD ADDISON while intoxicated. Finally, the Coast Guard alleges that Respondent is a user of or addicted to dangerous drugs because he consumed cocaine. Cocaine is classified as a dangerous drug pursuant to 21 U.S.C. 804.

Instead of filing the Answer within 20 days as prescribed by 33 CFR 20.308(a), the procedure for expedited hearings requires the Respondent to enter an answer at the pre-hearing conference. 33 CFR 20.1202(2). Therefore, on January 24, 2007, the undersigned conducted a teleconference with the parties. During the teleconference Respondent, through counsel, entered a verbal answer to each of the allegations in the Complaint. In addition, dates were set for the hearing as well as dates for the parties to exchange exhibit and witness lists. Respondent subsequently submitted his written Answer to the Complaint on January 26, 2007. The Coast Guard and Respondent submitted Witness and Exhibit Lists on January 24, 2007 and January 26, 2007, respectively.

Respondent filed a Motion for Discontinuance of Expedited Hearing on February 9, 2007, stating he had not received Respondent's bank and telephone records and that the records are crucial to Respondent's defense. The Motion further stated that because Respondent's license remains in the Coast Guard's control, further delay will not cause prejudice to the government. A teleconference was held on February 12, 2007 concerning this Motion. During the teleconference, the parties agreed that even though Respondent waived his right to an expedited hearing, the Coast Guard could continue to hold Respondent's license until a decision and order was rendered. The undersigned granted Respondent's Motion for Discontinuance of Expedited Hearing.

Respondent submitted a Supplemental Witness and Exhibit List on February 26, 2007 and the Coast Guard filed its Motion to Oppose Supplemental Witness and Exhibit List on

February 27, 2007. The undersigned resolved both of these filings orally at the hearing due to the late filing.

The hearing commenced on February 28, 2007 in Norfolk, Virginia. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. 551-59, and Coast Guard procedural regulations set forth in 46 CFR Part 5 and 33 CFR Part 20. The Coast Guard moved for admission of twelve (12) exhibits and presented testimony of two (2) witnesses. Respondent moved for admission of five (5) exhibits and presented the testimony of three (3) witnesses. The list of witnesses and exhibits is contained in **Attachment A**.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, I find the Coast Guard proved that Respondent did violate a law or regulation, commit an act of negligence, and is a user of dangerous drugs, in violation of 46 U.S.C. 7703 and 7704(c).

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on December 8, 2006, Respondent Carl Lee Simpson, III, was a holder of a Coast Guard Merchant Mariner License and Merchant Mariner Document. (ALJ Ex. I; ALJ Ex II).
2. Donald Stevens had employed Respondent since September 2006. (Tr. 23).
3. Prior to becoming a captain for Mr. Stevens, Mr. Stevens required Respondent to submit to a drug test. (Tr. 24).
4. The drug test yielded an adulterated sample result. (Tr. 24-25, 161-62).

5. Respondent then submitted to a subsequent drug test which yielded a negative test result. (Tr. 25).
6. On December 8, 2006, Respondent served as Master of the uninspected towing vessel DONALD ADDISON. (Tr. 26).
7. Donald Stevens also employed Tyler Mantay as a deckhand aboard the DONALD ADDISON on December 8, 2006. (Tr. 26).
8. At approximately 7 p.m. on December 8, 2006, the DONALD ADDISON departed the small boat harbor in Newport News, Virginia to meet the WILLIAM POOLE on the east side of the Monitor-Merrimac Tunnel to receive a barge. It then proceeded to the Vulcan materials dock in Hampton, Virginia. (Tr. 73-74).
9. The trip from the east side of the Monitor-Merrimac Tunnel to the Vulcan materials dock takes approximately 1.5 to 2 hours. (Tr. 104).
10. After approximately forty-five (45) minutes, Mr. Mantay noticed that the DONALD ADDISON and its tow were not making as much progress as they should. (Tr. 74-75).
11. Mr. Mantay then looked off the stern of the DONALD ADDISON and noticed that the vessel was kicking up mud. (Tr. 75).
12. A vessel kicking up mud is unusual and indicates that it is navigating too far to one side of the channel. (Tr. 75, 106).
13. After noticing the mud, Mr. Mantay proceeded up to the wheelhouse to make sure everything was all right. (Tr. 76).

14. It is customary for a Master or operator to change gears to signal to the deckhand that help is needed. (Tr. 75). Respondent did not change gears during this trip to indicate he needed Mr. Mantay's help. (Id.)
15. When Mr. Mantay arrived at the wheelhouse, he asked Respondent "how's it going" and Respondent proceeded to ask Mr. Mantay if he "wanted to do a line." (Tr. 76).
16. Mr. Mantay "laughed it off" because he thought Respondent was joking and then observed Respondent proceed to sniff a white powdery substance through a bill of unknown monetary denomination. (Tr. 76-78).
17. Mr. Mantay has used cocaine in the past. (Tr. 110).
18. Mr. Mantay assumed that the white powdery substance ingested by Respondent was cocaine. (Tr. 78).
19. Respondent then took a beer out of his duffel bag and drank it quickly. (Tr. 79).
20. Mr. Mantay observed Respondent acting erratic. Respondent was jumpy and antsy, his hands were shaking, and he was clutching his chest while stating he felt like he was going to have a heart attack. Respondent was also speaking fast and disclosing various personal problems to Mr. Mantay. (Tr. 79-80).
21. Respondent also declared to Mr. Mantay that he was "f***ed up." (Tr. 86).
22. Mr. Mantay has observed others using cocaine and the effect the cocaine had on those individuals. (Tr. 110-14).
23. Mr. Mantay accurately described the effects cocaine can have on an individual who has snorted cocaine. (Tr. 79-81, IO Ex. 9).

24. Respondent asked Mr. Mantay to remain with him in the wheelhouse and Mr. Mantay obliged. (Tr. 80).
25. During the remainder of the trip to the Vulcan dock, Mr. Mantay observed Respondent snort “a line” of cocaine a total of four (4) to five (5) times. (Tr. 81).
26. As the DONALD ADDISON approached the Vulcan materials dock, Respondent asked Mr. Mantay to drive the DONALD ADDISON back to the small boat harbor at Newport News because he wanted to text message his girlfriend. (Tr. 87).
27. Mr. Mantay operated the DONALD ADDISON during the trip back to Newport News. (Tr. 85).
28. Mr. Mantay is not licensed to operate the DONALD ADDISON. (Tr. 86).
29. On the trip back, Respondent stated that he was getting tired and needed to wake up in order to drive home. (Tr. 90).
30. Mr. Mantay then observed Respondent take a pill bottle out of Respondent’s duffel bag and dump out several different pills, Respondent then took a small white pill, crushed it and snorted it up his nose. (Tr. 90).
31. After ingestion of the crushed pill, Respondent became alert and awake but still remained somewhat antsy. (Tr. 91).
32. Mr. Mantay contacted Donald Stevens, Respondent’s employer, when Mr. Mantay departed the boat dock. (Tr. 96). Mr. Stevens did not answer his phone so Mr. Mantay left a voicemail message. (Tr. 96).
33. Mr. Stevens called Mr. Mantay back the next evening and Mr. Mantay informed him of the previous night’s events. (Tr. 26-27, 96).

34. Mr. Stevens subsequently spoke with Respondent concerning the December 8, 2006 trip. (Tr. 27-28).
35. Respondent admitted to Mr. Stevens that he had taken drugs and drank alcohol on the boat but explained that he had never done “it” before and apologized. (Tr. 27-28).
36. Respondent then informed Mr. Stevens that he needed a few days to clean up before he could take a drug test. (Tr. 28-31).
37. Mr. Stevens informed Respondent that he would have to report the December 8, 2006 incident to the Coast Guard. (Tr. 28).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. Title 46 CFR 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. 7703 and 7704. Under 46 U.S.C. 7704(c), a Coast Guard issued license or certificate shall be revoked if the holder of that license or certificate has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. See also Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)). Furthermore, if a merchant mariner license holder commits an act of negligence, misconduct, or a violation of law or regulation in performing his duties related to the vessel, his license may be suspended or revoked. See 46 U.S.C. 7703(1) (B).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because he consumed cocaine while aboard the DONALD ADDISON. The Coast Guard also charged Respondent with negligence and violation of a law or regulation because he operated the DONALD ADDISON while intoxicated and consumed cocaine and alcohol in the presence of deckhand Tyler Mantay. The Coast Guard seeks revocation of Respondent's license in accordance with 46 CFR 5.569. For the reasons stated below, I find that the Coast Guard proved Respondent violated a law or regulation, committed an act of negligence, and is a user of or addicted to the use of a dangerous drug.

Burden of Proof

The Administrative Procedure Act, Title 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact 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)). Therefore, the Coast Guard Investigating Officer (IO) must prove by reliable, credible, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

The White Powdery Substance

Deckhand Tyler Mantay testified in great detail concerning the white powder Respondent snorted up his nose and Respondent's behavior after he consumed the powder. Mr. Mantay observed Respondent acting erratically. (Tr. 79-80). Respondent was jumpy and antsy, his hands were shaking, and he was clutching his chest while stating he felt like he was going to have a heart attack. Id. Respondent was also speaking fast and disclosing various personal problems to Mantay. (Tr. 80). I find Mr. Mantay's testimony credible. The Drug Identification Bible states that after ingesting cocaine a person may exhibit the following: release of social inhibitions, dilated pupils, increased blood pressure, rigid muscle tone, anxiety, restlessness, nasal redness, increased pulse rate, increased body temperature, teeth grinding, talkative, body tremors and runny nose. (See Exhibit 9). All of Respondent's behaviors, as described by Mr. Mantay, are consistent with cocaine use. Thus, I find that the white powdery substance Respondent snorted is cocaine.

Violation of Law or Regulation

Title 46 of the United States Code section 7703(1)(A) states that a license or merchant mariner's document may be suspended or revoked if the "holder when acting under the authority of that license, certificate, or document, has violated or fails to comply with this subtitle, a regulation prescribed under this subtitle, or any other law, or regulation intended to promote marine safety or to protect navigable waters." The Coast Guard charged Respondent with operating the DONALD ADDISON while under the influence of cocaine and alcohol. While on

board a vessel subject to inspection, a crewmember shall not be intoxicated at any time, or consume any intoxicant while on duty. 33 CFR § 95.045. The DONALD ADDISON, an uninspected towing vessel is a vessel subject to inspection per 46 U.S.C. 3301. Title 33 CFR § 95.020(c) states that an individual is under the influence of alcohol or drugs when “the individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person’s manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.”

Respondent consumed cocaine, an intoxicant, while serving as Master aboard the DONALD ADDISON. (Tr. 76-81). As a result of the cocaine consumption, Respondent became intoxicated and continued to operate the DONALD ADDISON despite displaying several of the intoxicating effects of cocaine. (Tr. 79-80). Mr. Mantay witnessed Respondent’s erratic behavior, including speaking rapidly, hands shaking, and clutching his chest claiming he felt like he was having a heart attack. *Id.* Furthermore, Respondent, in the presence of Mr. Mantay, consumed a beer while serving as captain of the DONALD ADDISON. (Tr. 79). In light of all these facts, I find Respondent did ingest alcohol and drugs and as a result of the alcohol and drug consumption became intoxicated while operating the DONALD ADDISON in violation of 33 CFR § 95.045.

Negligence

Negligence is defined as the “commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit.” 46 CFR § 5.29. In order to prove negligence the Coast Guard must “establish the standard of care which is relevant to the circumstances involved and to show how that standard has been breached by respondent.” Appeal Decision 2599 (GUEST) (1998). Title 46 CFR § 185.304 requires that a

“master shall operate the vessel keeping the safety of the passengers and crew foremost in mind.”

Respondent, as Master of the DONALD ADDISON, had a duty to keep the safety of his deckhand foremost in his mind. Respondent breached this duty in several ways: (1) when he ingested cocaine and alcohol while serving as Captain; (2) when he proceeded to navigate the DONALD ADDISON while displaying the intoxicating effects of the cocaine and alcohol; and (3) when he requested that Tyler Mantay, a person not licensed to drive the DONALD ADDISON, drive the DONALD ADDISON back to the small boat harbor in Newport News because Respondent was intoxicated and unable to operate the vessel. Through careful consideration of these facts, I find that Respondent had a duty to keep the safety of his crew foremost in his mind and breached this duty when he became intoxicated. Thus, I find that Respondent committed negligence.

User of a Dangerous Drug

Title 46 United States Code section 7704(c) states that “if it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner’s document shall be revoked.” A dangerous drug is defined as a narcotic drug, controlled substance, or a controlled substance analog. See 46 CFR 16.105. Cocaine is classified as a narcotic drug pursuant to 21 U.S.C. §802(17) (D), and therefore is a dangerous drug for the purposes of this hearing. Mr. Mantay observed Respondent consuming cocaine aboard the DONALD ADDISON. (Tr. 76-81). Furthermore, Mr. Mantay observed the intoxicating effects the drug had upon Respondent and his behavior. (Tr. 79-80). Through careful consideration of the record, I find the evidence shows Respondent is a user of the dangerous drug cocaine.

Respondent's Rebuttal

Respondent asserts he did not consume drugs or alcohol while aboard the DONALD ADDISON. (Tr. 152). Respondent explained that he was having ongoing pay disputes with Mr. Stevens. (Tr. 169-71). Respondent claims that his employer, Mr. Stevens, and Mr. Mantay conspired against him and created a story of cocaine use to "discredit" Respondent. (Tr. 184). Respondent theorized that Mr. Mantay helped Mr. Stevens fabricate a story about the events that transpired on December 8, 2006, because Mr. Mantay and Mr. Stevens were next-door neighbors and good friends. (Tr. 160, 184-85). I do not find Respondent's rebuttal plausible and thus do not find Respondent's testimony credible.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was acting under the authority of his license and document.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704(c), 46 CFR Part 5, 33 CFR Part 20, and the APA codified at 5 U.S.C. 551-59.
3. The white powdery substance Respondent consumed on December 8, 2006 was cocaine.
4. On December 8, 2006, Respondent consumed cocaine and alcohol while serving as Master aboard the DONALD ADDISON in violation of 46 CFR 5.35.
5. Respondent was intoxicated from consuming cocaine and alcohol.
6. Respondent operated the DONALD ADDISON while intoxicated in violation of 33 CFR 95.020(c).

7. Cocaine is classified as a dangerous drug according to 21 U.S.C. 804.
8. Respondent had a duty to operate the vessel keeping the safety of the passengers and crew foremost in mind.
9. Respondent endangered the life of his deckhand, Tyler Mantay by operating the DONALD ADDISON while intoxicated, thus Respondent committed an act of negligence pursuant to 46 CFR 5.29.
10. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent violated a law or regulation.
11. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent committed an act of negligence.
12. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 49 CFR 5.569 provides the Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

For sanction purposes, the charges of violation of a law or regulation and negligence are duplicative. The Table specifically provides a sanction of two (2) to four (4) months suspension for neglect of non-navigational safety related duties. However, when the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless cure is proven. See 46 U.S.C. 7704(c);

46 CFR 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of cure or substantial involvement in the cure process, an ALJ must revoke a respondent's license and document under 46 U.S.C. 7704(c). See also Appeal Decision 2634 (BARRETTA) (2002) and Appeal Decision 2583 (WRIGHT) (1997).

Here, the Coast Guard proved and the undersigned found that Respondent operated the DONALD ADDISON while intoxicated and placed his deckhand and barge in danger. Moreover, the Coast Guard proved and the undersigned found that Respondent used a dangerous drug. Neither Respondent nor Respondent's attorney presented any evidence that Respondent took any steps to participate in the cure process. Therefore, I am precluded from issuing an order less than **REVOCATION**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that all licenses, documents, and certificates issued by the United States Coast Guard, specifically license number 1108229 and merchant mariner document issued under Respondent's Social Security number, are **REVOKED**.

IT IS FURTHER ORDERED that since the Coast Guard took possession of Respondent's license and merchant mariner's document on January 19, 2007, the effective date of Revocation is January 19, 2007.

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 B**).

Done and dated June 12, 2007
New York, New York

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

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LIST

COMPLAINANT'S WITNESSES

1. Donald Summers Stevens – owner of DONALD ADDISON and Respondent's employer
2. Tyler Andrew Mantay - deckhand

RESPONDENT'S WITNESSES

1. Carl Lee Simpson, III
2. Tyler Andrew Mantay as an adverse witness
3. Adam Hobson - deckhand

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

- Gov't Ex. 1 - Certificate of Documentation for the DONALD ADDISON.
- Gov't Ex 2 - Letter that is kept on vessel concerning random drug testing.
- Gov't Ex. 3 - MRO Report coinciding with Respondent's Exhibit B.
- Gov't Ex. 4 - Photograph DONALD ADDISON's starboard side.
- Gov't Ex. 5 - Photograph of DONALD ADDISON's wheelhouse interior taken from outside entry door.
- Gov't Ex. 6 – Photograph of DONALD ADDISON's wheelhouse interior depicting the console and control throttles.
- Gov't Ex. 7 – Photograph of DONALD ADDISON's wheelhouse interior showing a close up view of the console's right side and the control throttles used by the operator.
- Gov't Ex 8 – DONALD ADDISON's Log Book.
- Gov't Ex. 9 - Drug Treatise for Cocaine Use (also known as the Drug Education Bible).

Gov't Ex. 10 - Unemployment Records from State of New Jersey.

Gov't Ex. 11 - Payroll information.

Gov't Ex. 12 - Refusal to test letter.

RESPONDENT'S EXHIBITS

Resp't Ex. A - Sprint Phone Records.

Resp't Ex. B - Federal Custody and Control Form.

Resp't Ex. C - Employer Drug Testing Summary Report dated 10/31/2006.

Resp't Ex. D - Employer Drug Testing Summary Report date 11/3/2006.

Resp't Ex. E – Respondent's Merchant Mariner License Application.

JUDGE'S EXHIBITS

ALJ Ex. I – Copy of Respondent's License, Number 1108229.

ALJ Ex. II – Copy of Respondent's MMD Number issued under his Social Security number.

ATTACHMENT B -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 C - RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPLAINANT'S PROPOSED FINDINGS

1. The Respondent, Carl Lee Simpson, III resides at 723 9th Street, Virginia Beach, VA 23451, (141:9).

ACCEPTED

2. The Respondent held, on December 8, 2006, the following U.S. Coast Guard-issued Merchant Mariner Credentials: Merchant Mariner's License number 1108229, and Merchant Mariner's Document (redacted Social Security number). (6:5, 6:9, 141:17).

ACCEPTED AND INCORPORATED

3. The Respondent served aboard the vessel DONALD ADDISON on December 8, 2006 by acting as Master as required by law. (20:16, 26:9, 73:4).

ACCEPTED IN PART AND REJECTED IN PART

Respondent did serve as Master aboard the DONALD ADDISON on December 8, 2006. However, there is no evidence to show that Respondent was required by law to serve aboard the DONALD ADDISON as master.

4. The DONALD ADDISON was underway during all pertinent times on December 8, 2006. (73:11).

ACCEPTED

5. There was probable cause to believe that the Respondent performed a safety sensitive function in violation of law by using alcohol and dangerous drugs while operating the DONALD ADDISON, as reported by Donald STEVENS to the Coast Guard on Monday, December 11, 2007. (31:11).

ACCEPTED BUT NOT INCORPORATED BECAUSE RESPONDENT WAIVED HIS RIGHT TO AN EXPEDITED HEARING

6. The Respondent submitted to a drug test, providing a urine sample on October 31, 2006 which returned a result of Invalid. (161:11).

ACCEPTED AND INCORPORATED

7. The Respondent was ordered to return to the testing facility for an observed collection on November 3, 2006, three days later. (162:21).
8. The observed collection returned a “Negative” result. (162:21).

ACCEPTED AND INCORPORATED

9. STEVENS was not aware that the Respondent intended to leave Skiffs Creek for other employment. (42:24).

REJECTED

No determination was made as to whether Mr. Stevens knew Respondent intended to leave Skiffs Creek for other employment.

10. Respondent worked during the day but returned to operate the tug in a second shift in the evening of December 8, 2006 in spite of the alleged dispute between STEVENS and the Respondent. (169:6).

ACCEPTED

11. Deckhand MANTAY approached the wheelhouse while the Respondent was operating the DONALD ADDISON to see if there was a problem. (57:14, 75:2).

ACCEPTED AND INCORPORATED

12. The Respondent offered MANTAY Cocaine. (76:23).

ACCEPTED AND INCORPORATED

13. MANTAY determined the powder to be Cocaine. (78:18).

ACCEPTED AND INCORPORATED

14. MANTAY observed the Respondent consume Cocaine, while controlling and directing the DONALD ADDISON, with a rolled up dollar bill by inhaling the powder through his nose at approximately 2045 - 2100. (77:4, 77:21).

ACCEPTED AND INCORPORATED

15. MANTAY observed the Respondent use Cocaine several other times while on the transit from Newport News, VA to Sunset Creek in Hampton, VA. (81:20).

ACCEPTED AND INCORPORATED

16. MANTAY explained his familiarity with Cocaine. (78:23).

ACCEPTED AND INCORPORATED

17. The Respondent stated that he was going to have a beer, and produced a bottle from his bag. (79:4, 83:13).

ACCEPTED AND INCORPORATED

18. MANTAY observed the Respondent consume the beer approximately 2-3 minutes after he arrived in the wheelhouse. (83:5, 83:21).

REJECTED

No determination was made as to the time Respondent consumed the beer.

19. MANTAY observed the Respondent's behavior and determined him to be acting very much intoxicated. (80:3, 84:15, 84:17).

ACCEPTED AND INCORPORATED

20. The Respondent stated to MANTAY a few times that he was f***ed up. (86:4).

ACCEPTED AND INCORPORATED

21. The Respondent stated to MANTAY that he felt as if he was going to have a heart attack. (44:23, 80:9, 120:3).

ACCEPTED AND INCORPORATED

22. The Respondent passed control of the tug to the unlicensed MANTAY. (44:24).

ACCEPTED AND INCORPORATED

23. MANTAY did not possess the abilities or qualifications to operate the DONALD ADDISON. (46:5).

ACCEPTED IN PART AND REJECTED IN PART

No determination was made about Mr. Mantay's abilities to operate the DONALD ADDISON.

24. MANTAY did not perceive his operation of the tug to be a training exercise. (86:22).

REJECTED

No determination was made as to whether Mr. Mantay perceived his operation of the tug to be a training exercise.

25. The Respondent ordered MANTAY to operate the tug during the return transit to Newport News. (87:22, 88:18).

ACCEPTED IN PART AND REJECTED IN PART

Mr. Mantay did not testify that he was ordered by Respondent to operate the tug, only that Respondent requested that he operate the tug.

26. MANTAY felt extremely scared by having to operate the tug at night while the Respondent was impaired. (80:15, 88:23, 89:13, 89:15).

REJECTED

No determination was made as to whether Mr. Mantay was scared or not.

27. The Respondent stated to MANTAY that he needed to wake up in order to drive home. (90:24).

ACCEPTED AND INCORPORATED

28. MANTAY observed the Respondent produced a non-descript pill bottle from his bag. (90:13).

ACCEPTED AND INCORPORATED

29. MANTAY observed the Respondent crush up a pill from the bottle and snort the pill by using the rolled-up dollar bill into his nostril. (90:19).

ACCEPTED AND INCORPORATED

30. MANTAY observed the further impairment of the Respondent that resulted from the consumption of the pill. (91:11).

ACCEPTED AND INCORPORATED

31. MANTAY told STEVENS on December 9, 2006, that the Respondent consumed Cocaine and Alcohol while operating the DONALD ADDISON. (26:17).

ACCEPTED AND INCORPORATED

32. STEVENS spoke with Respondent on December 10, 2006. (27:15, 49:18).

ACCEPTED

33. The Respondent admitted to STEVENS that he consumed the drug during the voyage of DONALD ADDISON on December 8, 2006. (28:14).

ACCEPTED AND INCORPORATED

34. The Respondent admitted to STEVENS that he used synthetic urine to pass the “pre-employment” test on October 31, 2006. (30:6).

**ACCEPTED ONLY ON THE ISSUE OF RESPONDENT’S CREDIBILITY;
OTHERWISE REJECTED.**

No determination was made as to whether Respondent used synthetic urine to pass the October 31, 2006 drug test.

35. The Respondent admitted to STEVENS that he had just done a couple of lines of cocaine prior to the conversation between them on the evening of December 9, 2006. (50:7).

ACCEPTED

36. The Respondent admitted to STEVENS that he wanted to kill himself. (50:18).

REJECTED

No determination was made as to whether Respondent wanted to kill himself.

37. The Respondent stated to STEVENS that he could pass any chemical test as long as he had three days to get clean. (31:17, 50:23, 60:2).

ACCEPTED AND INCORPORATED

38. STEVENS did not order the Respondent to submit to a Reasonable Cause drug test because of the Respondent’s admission to having used synthetic urine in the past. STEVENS stated that he thought that the drug test would be of no use. (59:21).

ACCEPTED

39. The DONALD ADDISON's log book was present on board the vessel on December 8, 2006. (56:19).

REJECTED

No determination was made concerning the DONALD ADDISON'S log book.

40. The Respondent did not make any entries into the log on December 8, 2006. (95:14).

REJECTED

No determination was made concerning the DONALD ADDISON'S log book.

41. MANTAY had not experienced any arguments or altercations with the Respondent. (97:6).

REJECTED

No determination was made as to whether Mr. Mantay or Respondent argued.

42. MANTAY had no reason to lie about the events or collude with STEVENS. (97:14, 98:3).

ACCEPTED

Mr. Mantay's testimony was found to be credible.

43. The respondent did not wish to have taxes taken out because of the unemployment benefit. (40:4, 42:3).

REJECTED

No determination was made as to whether Respondent wished to have taxes withheld because of unemployment benefits.

44. STEVENS stated that, to work with the Respondent, there would not be taxes taken out until the first of the year. (40:14, 61:21).

REJECTED

No determination was made concerning Respondent's wishes to have taxes withheld.

45. The Respondent did not want to receive a 1099 form for taxes. (41:4).

REJECTED

No determination was made concerning Respondent's tax forms.

RESPONDENT'S PROPOSED FINDINGS

1. That the Respondent is a resident of Virginia Beach, Virginia (T141).

ACCEPTED

2. That the Respondent holds the following Coast Guard issued credentials, which are Master of Steam or Motor Vessels Not More Than a 100 Gross Tons, Upon, Near Coastal Waters for Domestic Voyages Only, which contain two endorsements, Radar Observer and Master of Towing Vessels (T6).

ACCEPTED

3. That the Respondent acted under the authority of that license, Certificate of Document on December 8, 2006 by serving as Master aboard the vessel Donald Addison as required by law or regulation (T148).

ACCEPTED AND INCORPORATED

4. That on December 8, 2006, the Respondent received a barge from the WILLIAM POOLE and pushed said barge into Sunset Creek for delivery at Vulcan docks (T149, T158).

ACCEPTED AND INCORPORATED

5. That during the course of transit after receiving the barge, the Respondent was required to flip the barge around for delivery to Vulcan (T154, T157).

ACCEPTED

6. That the Respondent took the necessary action to flip the barge and deliver the same to the Vulcan dock without incident (T154, T155, T156).

ACCEPTED.

7. That the Respondent, during the course of his operation of the vessel, did not pull out any bag of cocaine from his belongings, did not use cocaine, did not snort any type of cocaine or any other substance, and did not drink any alcoholic beverages (T151, T152).

REJECTED

See Decision and Order.

8. That on December 8, 2006 the Respondent advised Mr. Donald Stevens that he would be leaving his employment (T147).

REJECTED

No determination was made as to whether Respondent advised Mr. Stevens that he would be leaving his employment.

9. That Adam Hobson was a former employee of Skips Creek Marine, who had known the Respondent for thirteen (13) years. During that time Hobson has never observed either during work or at any other time the Respondent use or abuse alcohol or any types of narcotics (T205, T206).

REJECTED

No determination was made concerning what Mr. Hobson observations of Respondent.

10. That Tyler Mantay was the deckhand on the Donald Addison on December 8, 2006 (T73).

ACCEPTED AND INCORPORATED

11. That Tyler Mantay testified that at least one window in the Wheel House was open by the air shifter (T 79) while Respondent testified that all the windows (6) were opened (T153).

ACCEPTED

12. Government Exhibit 9 is the Drug Education Bible offered by the government into evidence (T98).

ACCEPTED

13. That the said Drug Education Bible describes cocaine as a powder and that the powder is ingested by snorting it through the nostrils. The Drug Education Bible notes that “cocaine is prepared for snorting by placing the drug on a smooth surface such as a mirror. A razor blade, credit card or other edged object is used to chop the cocaine to a fine powder.” (T98).

ACCEPTED

14. That Tyler Mantay's identification of cocaine used by the Respondent in his testimony, T70 et seq, does not describe any type of action by the Respondent of preparing the cocaine for ingestion by chopping the cocaine to a fine powder.

ACCEPTED

Mr. Mantay did not testify that Respondent cut and chopped the cocaine into a fine powder prior ingestion.

15. That Tyler Mantay falsified his involvement with illegal drugs on his application for a Merchant Marine License, answering the question in the negative about whether or not he had ever used, was a user of or addicted to any dangerous drugs, including marijuana (T199, T200).

REJECTED.

No determination was made on whether Mr. Mantay falsified his involvement with illegal drugs on his application for a Merchant Marine License. Regardless, Mr. Mantay's testimony was found to be credible.

16. That Tyler Mantay falsified this information and lied on his application to receive a Merchant Marine License (T199, T200).

REJECTED

No determination was made on whether Mr. Mantay lied on his Merchant Mariner's application. Regardless, Mr. Mantay's testimony was found to be credible.

17. That the Respondent was able to navigate Sunset Creek, pushing the barge by multi-million dollar yachts and docking the barge at the Vulcan Dock, without any type of problem (T123, T124).

ACCEPTED IN PART AND REJECTED IN PART

No finding was made whether Respondent sustained a "problem" while navigating Sunset Creek. Whether Respondent sustained a "problem" as described is not probative on the issue of whether he violated a law or regulation, commit an act of negligence, and is a user of dangerous drugs as alleged in the Complaint.

18. That Tyler Mantay at T123, T124 describes the flawless operation of the Donald Addison by the Respondent.

ACCEPTED IN PART AND REJECTED IN PART

See response to #17 above. Further, Mr. Mantay did not use the term "flawless."

19. That Donnie Stevens received information from Tyler Mantay that he operated the vessel and that he was responsible for pushing the barge into Sunset Creek (T33), contrary to Mantay's testimony.

REJECTED

No determination was made as to whether Mr. Mantay specifically pushed the barge into Sunset Creek.

20. That Christopher Smith, the normal deckhand for the Respondent, never advised Donald Stevens of any drug or alcohol abuse that he observed by the Respondent (T39).

REJECTED

No determination was made as to whether Mr. Smith advised Mr. Stevens of Respondents drug habits.

21. That there were discussions between the Respondent and Donnie Stevens regarding the rate of pay to the Respondent and conversations regarding said rate of pay (T39, T40, T41, T42).

REJECTED

No determination was made as to whether Respondent and Mr. Stevens discussed Respondent's rate of pay.

22. That the Respondent had an ongoing dispute with the owner of the Donald Addison regarding his wages (T144, T145).

REJECTED

No determination was made as to whether there was an ongoing dispute between Mr. Stevens and Respondent concerning wages.

23. That the Respondent disputed the pay that he was to receive and further advised Donnie Stevens that he was leaving his employment as of December 8, 2006 (T145, T146).

REJECTED

No determination was made as to whether Respondent advised Mr. Stevens he would be leaving his employment.

24. That the Respondent never allowed Tyler Mantay to operate the Donald Addison (T158).

REJECTED

See Decision and Order.

25. That the Respondent and Donnie Stevens had heated discussions over monies owed to your Respondent (T165, T166).

REJECTED

No determination was made as to whether there were heated discussions over monies.

26. That the nature of the conversations between Donnie Stevens and the Respondent were about obtaining a check from Mr. Stevens and being advised by Mr. Stevens that if he saw the Respondent he would “punch me in my face” (T165, T166).

REJECTED.

No determine was made was about the above mention conversation.

CERTIFICATE OF SERVICE

I hereby certify that I have sent the foregoing Decision and Order to the following parties via Federal Express:

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I hereby certify that I have sent the foregoing Decision and Order to the following parties via facsimile:

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Done and dated June 12, 2007
New York, New York

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