UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

GARY LEE HENSLEY

Respondent

Docket Number CG S&R 07-0380
CG Enforcement Activity No: 3012036

DECISION AND ORDER

Issued: August 14, 2008

Issued by: Bruce T. Smith, Administrative Law Judge

Appearances:

Investigating Officer:

LCDR Melissa J. Harper
MST1 Cynthia H. Dubach
Coast Guard Sector New Orleans

For Respondent:

Les A. Martin, Esq.

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Gary Lee Hensley's (Respondent) Merchant Mariner's License Number: 925398. This action was brought pursuant to the authority contained in 46 U.S.C. §7704(c) and its underlying regulations codified at 46 CFR Part 5.

The Coast Guard issued a Complaint on July 31, 2007, charging Respondent with use of or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges Respondent took a pre-employment drug test on April 16, 2007 and subsequently tested positive for marijuana metabolite. Respondent filed his Answer on August 6, 2008, admitting all jurisdictional allegations and denying factual allegations 2, 3, 4, and 5.

The hearing commenced in New Orleans, Louisiana on May 22, 2008, at 9:00 a.m. (CST); LCDR Melissa Harper and MST1 Cynthia Dubach represented the Coast Guard. Les A. Martin, Esquire appeared on behalf of Respondent. At the hearing the Coast Guard introduced seven (7) exhibits into evidence; all were admitted. Respondent, through counsel, introduced two (2) exhibits into evidence; both were admitted. Three (3) witnesses testified at the hearing, two (2) on behalf of the Coast Guard and one (1) on behalf of Respondent.

The Coast Guard and Respondent submitted post hearing briefs on June 2 and 9, 2008, respectively, including each parties' proposed findings of fact and conclusions of law. The Coast Guard submitted a post hearing reply brief on June 12, 2008.

FINDINGS OF FACT

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

1. At all relevant times mentioned herein and specifically on April 16, 2007, Respondent, Gary Lee Hensley, was the holder of Coast Guard Merchant Mariner License Number 925398. (Complaint; See Transcript Generally).
2. Respondent has held a Coast Guard issued license since 1985. (Tr. at 132).
3. Throughout Respondent's career as a mariner, he has taken numerous drug tests and never failed a drug test. (Tr. at 132-133, 139, 147-148).
4. Florida Marine ordered Respondent to take a pre-employment drug test. (Tr. at 132-136).
5. Respondent presented himself on April 16, 2007, at the Redi-Med Clinic and Occupational Health Services, in Mandeville, Louisiana, for the purpose of providing a urine sample for a pre-employment drug test. (Tr. at 31; CG Ex. 2, 3).
6. Mary Adkins, a properly trained and certified as a urine specimen collector, per Department of Transportation (DOT) regulations and employee of Redi-Med Clinic, collected a urine sample from Respondent for the purposes of performing a pre-employment urinalysis drug test by a certified laboratory. (Tr. at 11-14, 22; CG Ex. 1).
7. Apart from the information contained on the Custody Control Form (CCF) generated at the time of Respondent's April 16, 2007, visit to Redi-Med, Mary

Adkins has no independent recollection of the events and circumstances pertaining to Respondent's presence at Redi-Med. (Tr. at 17, 33). However, I find that Ms. Adkins' recollection was sufficiently refreshed from referring to that document.

8. The following facts pertain to the collection of Respondent's April 16, 2007 urine specimen:

    a. First, Ms. Adkins asked Respondent for his Social Security Number as a form of identification. (Tr. at 20).

    b. Then, Ms. Adkins referred to the mariner's employer form to verify the type of drug test that needed to be reformed. (Tr. at 21).

    c. After this verification, Respondent went into a bathroom, provided a urine specimen, and presented the specimen to Ms. Adkins. (Tr. at 22).

    d. Ms. Adkins verified Respondent's urine specimen was in the correct temperature range and recorded the specimen was within the normal range on the CCF. (Tr. at 22-23).

    e. Ms. Adkins performed an "instant drug test" on Respondent's sample by inserting a plastic card into Respondent's specimen cup for several seconds and then removing the card. (Tr. at 36-38).

    f. Immediately <u>after</u> performing the "instant drug screen" on Respondent's sample, Ms. Adkins divided Respondent's urine sample into two (2) separate containers called a split sample. (Tr. at 136).

g. Ms. Adkins, then sealed the containers, bagged them, and shipped them to Kroll Laboratories to perform the DOT drug test. (Tr. at 28-30; CG Ex. 5).

h. The "instant drug test" is not a part of the DOT-approved drug testing protocol. (Tr. at 46; CG Ex. 4 at 38-39).

9. Respondent provided and Ms. Adkins collected only one (1) urine specimen on April 16, 2007. (Tr. at 36).

10. The "instant test strip" is the iScreen test strip manufactured by Innovacon, it is a "dip card panel," which is a plastic device inserted into urine specimens. The iScreen contains scientifically appropriate biological and chemical technologies to detect the presence of certain drugs in human body fluids and does not contaminate urine specimens with marijuana metabolite (THC). (CG Ex. 6, 7).

11. Results of "instant drug testing" are less reliable that formal testing performed at a DOT certified laboratory. (Tr. at 116).

12. The "instant drug test" performed on Respondent's urine sample yielded a negative test result for a variety of drugs, including THC. (CG Ex. 3 at 14).

13. Mary Adkins recorded the negative test results for nine (9) different drugs on a separate document, entitled "Instant Technologies, Inc. Initial Drug Screen Result Form." (Tr. at 38; CG Ex. 3 at 14).

14. Ms. Adkins, through her DOT drug test training, knew not to perform any test on a DOT urine specimen or place any foreign object into a DOT urine specimen. (Tr. at 47-48).

15. Ms. Adkins performed the instant drug screen on Respondent's DOT urine specimen because her manager Tina Gerard and Dr. Mohammed Yousef, a physician at the Redi-Med Clinic, ordered instant drug screens to be performed on all mariners' specimens before he notifies the mariners' employer that the mariner "passed" the physical examination. (Tr. at 47, 107).
16. Dr. Yousef also directly and indirectly supervises Ms. Adkins in her duties as a urine specimen collector. (Tr. at 101).
17. Dr. Yousef testified that an "instant drug test" should not be performed on a DOT urine specimen. (Tr. at 103-104).
18. Dr. Juan (John) Garcia, the Medical Review Officer (MRO) in this case, confirmed that an "instant drug test" is not part of DOT drug testing protocol. (CG Ex. 4 at 38-39).
19. Soon after April 16, 2007, Dr. Yousef and the Redi-Med Clinic ceased performing "instant drug tests" on DOT urine samples; any "instant drug testing" was, thereafter, performed on a separate sample. (Tr. at 104).
20. Dr. Garcia, the MRO, reviewed the Kroll Laboratory drug test results from Respondents urine specimen. (CG Ex. 4 at 6-13, 31).
21. Dr. Garcia verified Respondent's urine specimen tested positive for marijuana metabolite (THC). (CG Ex. 4 at 19).
22. Dr. Garcia's office contacted Respondent and informed him of the positive test result for marijuana metabolite. (Tr. at 137-138). In response, Respondent requested his split sample be submitted for testing. (Tr. at 138).
23. The split sample was tested at One Source Laboratories. (CG Ex. 4 at 26).

24. The split sample test yielded a positive result for marijuana metabolite. (CG Ex. 4 at 26; Tr. at 138-139).

25. Since the April 16, 2007, pre-employment drug test, Respondent has participated in and passed sixteen (16) drug tests. (Tr. at 141).

26. An "instant drug test" is not part of the DOT drug testing protocol. (CG Ex. 4 at 38-39)

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. §7704. Under section 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)(1992)).

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize use of dangerous drugs by merchant mariners. See 46 CFR Part 16. Here, the type of drug test was a pre-employment drug test. Marine employers shall not employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs. 46 CFR §16.210(a). Additionally,

the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 CFR Part 40 and 46 CFR Part 16. If an employee fails a chemical test by testing positive for a dangerous drug, the individual is then presumed to be a user of dangerous drugs. 46 CFR §16.201(b); see also Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for marijuana metabolite in a pre-employment drug test taken on April 16, 2007. The Coast Guard seeks revocation of Respondent's license in accordance with 46 CFR §5.569.

For the reasons stated below, I find the Coast Guard has not proved Respondent is a user of or addicted to the use of a dangerous drug.

Burden of Proof

The United States Administrative Procedure Act (APA), 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 imposition of 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 Investigating Officer, to prove 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). 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 must prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violation charged.

Prima Facie Case of Use of a Dangerous Drug

The Coast Guard must establish a prima facie case in order to prove that a merchant mariner is a user of or addicted to dangerous drugs. Appeal Decision 2603 (HACKSTAFF) (1998). In order to establish a prima facie case the Coast Guard must first show Respondent took a drug test under 46 CFR Part 16. Id. Next, the Coast Guard is required to illustrate that Respondent tested positive for dangerous drugs; that the test was performed by a certified laboratory; and that a MRO certified the positive test results. Id. Finally, the Coast Guard must prove the drug test was conducted in compliance with 46 CFR Part 16. Id. Once the Coast Guard establishes a prima facie case that a given respondent is a user of or addicted to dangerous drugs, the respondent must then present persuasive evidence to rebut the presumption of the positive drug test result. Id. If the respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997).

Recent Commandant Decisions on Appeal (CDOA) have identified slightly different factors used by the Coast Guard to establish a prima facie case. The recent

CDOA's state the Coast Guard must prove the drug test was conducted in compliance with 49 CFR Part 40 instead of 46 CFR Part 16. See Appeal Decision 2662 (VOORHEIS) (2007); Appeal Decision 2657 (BARNETT) (2006); Appeal Decision 2632 (WHITE) (2002). Title 46 Code of Federal Regulations Part 16, Chemical Testing, specifically requires all chemical tests required by Part 16 must be conducted in accordance with 49 CFR Part 40, Procedures for Transportation Workplace Testing Programs. Since 49 CFR Part 40 is exclusive to 46 CFR Part 16, it is proper to read both 46 CFR Part 16 and 49 CFR Part 40 together to determine whether the chemical test was performed properly. Therefore, I believe that the law requires the Coast Guard to prove the drug test was conducted in compliance with 46 CFR Part 16 and 49 CFR Part 40 in order to establish a prima facie case of drug use.

i. Respondent took a drug test under 46 CFR Part 16.

Respondent presented himself for a pre-employment drug test at Redi-Med Clinic in Mandeville, Louisiana on April 16, 2007, at the request of Florida Marine. (Tr. at 31; CG Ex. 2, 3). Mary Adkins, a properly trained DOT certified specimen collector, acted as the collector for Respondent's April 16, 2007, pre-employment drug test. (Tr. at 14; CG Ex. 1). Respondent provided one urine sample to Ms. Adkins, who verified the sample was within the correct temperature range and then proceeded to perform an unauthorized "instant test" on the Respondent's urine sample. (Tr. at 22-38, 135). After performing this "instant test" on Respondent's sample, Ms. Adkins then split Respondent's sample into two (2) specimens, sealed the split specimens and properly shipped them to the DOT-approved Kroll Laboratories for formal testing. (Tr. at 136; CG Ex. 5).

The regulations provide that a pre-employment drug test is a 46 CFR Part 16 drug test. Respondent stated, and Ms. Adkins confirmed, that Respondent submitted a urine specimen for a pre-employment drug test—and after the unauthorized "instant test" was performed, Respondent's sample was sent to a DOT-approved laboratory for testing. Therefore, I find Respondent did participate in a 46 CFR Part 16 drug test.

ii. Respondent's specimen tested positive for dangerous drugs; that the test was performed by a certified laboratory; and that a MRO certified the positive test results.

Respondent's specimen was sent to Kroll Laboratories for DOT testing and Respondent's specimen yielded a positive result for marijuana metabolite. (CG Ex. 4 at 19). Respondent's positive results were sent to Dr. Garcia, the Medical Review Officer (MRO), so that Dr. Garcia could review the results and inform Respondent of his failed drug test. (CG Ex. 4 at 6-19, 31).

Dr. Garcia then contacted Respondent and informed him that his urine specimen yielded a positive result for marijuana. (Tr. at 137-138). Upon notification of the positive test result, Respondent requested his urine be re-tested. (Tr. at 138). Accordingly, Dr. Garcia submitted a split sample from Respondent's original sample for testing at "One Source" laboratories. (CG Ex. 4 at 26).

Dr. Garcia verified the test result from the test performed on Respondent's split sample was also positive for marijuana metabolite. (CG Ex. 4 at 26). In light of the aforementioned facts, I find that Respondent's specimen tested positive for dangerous drugs, the test was performed by a certified laboratory and that a MRO certified the positive test results.

iii. The drug test was not conducted in accordance with 46 CFR Part 16.

Title 46 Code of Federal Regulations Section 16.201 states that all chemical testing must be conducted in accordance with 49 CFR Part 40. Respondent submitted a pre-employment urine sample as required by 46 CFR Part 16. In order for Respondent's drug test to be conducted in accordance with 46 CFR Part 16, Respondent's urine specimen must have been tested in accordance with the testing requirements found in 49 CFR Part 40.

It is well-settled Coast Guard law that minor technical violations 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). Here, Ms. Adkins inserted an "iScreen instant drug test" strip into Respondent's specimen before she split that sample and shipped the vials to Kroll Laboratories. (Interestingly, the results of that "instant test" were negative for the presence of THC or any other illicit substance.)

The insertion of the instant drug test is not part of the DOT drug testing regulations and procedures. (Tr. at 36-38, 46). Therefore, the issue at hand is whether the insertion of an iScreen instant test into Respondent's sample violated the integrity of the specimen and thus is a violation of 49 CFR Part 40 so severe it cannot be corrected.

Title 49 CFR § 40.13(c) states that no other tests shall be performed on a DOT urine specimen other then those specifically authorized by Part 40 or other DOT agency regulations. The single exception to §40.13(c) is when a DOT drug test collection is conducted as part of a physical exam, it is permissible to conduct medical tests related to the physical exam on "**any urine remaining in the collection container after the drug**

test urine specimens have been sealed into the specimen bottles." 49 CFR § 40.13(d) [emphasis added]. An iScreen instant drug test is not authorized by Part 40 or any other DOT regulation but may be allowed under 49 CFR § 40.13(d) — if those procedures are followed.

If the iScreen instant drug screen was conducted during the course of a DOT required physical exam it may fall under the exception contained in 40 CFR § 40.13(d). However, this issue is moot because Ms. Adkins failed to follow the specific instructions concerning the performance of additional medical tests on DOT urine specimens. Ms. Adkins inserted an iScreen instant drug test in Respondent's sole urine specimen prior to splitting the sample into two (2) containers and sealing those containers. (Tr. at 36-37). Therefore, Ms. Adkins directly violated 49 CFR § 40.13(d), regardless of whether the test performed was indeed a medical test conducted during the course of a DOT required physical exam.

In light of the requirement that no other test should be performed on a DOT specimen and Ms. Adkins insertion of an instant test strip into Respondent's DOT specimen prior to it being split and sealed, it must be determined whether this violation of the regulations is a mere technical violation or a more severe violation that would invalidate the positive test result.

"A cancelled test is defined as a drug or alcohol test that has a problem identified that cannot be or has not been corrected, or which this part otherwise requires to be cancelled. A cancelled test is neither a positive nor a negative test." 49 CFR § 40.3. The insertion of any object into a DOT urine specimen prior to the sample being split into two (2) vials and sealed constitutes a "problem" with the DOT test that cannot be corrected

unless a mariner submits an additional urine sample, because the integrity of the sample has been compromised. Respondent only submitted one (1) urine specimen on April 16, 2007. (Tr. at 36). Therefore, there was no way for the MRO to correct the problem with the test by the time he received the test results. The only way to correct the problem with Respondent's urine specimen is to cancel the drug test.

The purpose of the regulations contained in 49 CFR Part 40 is to insure all specimens are collected in a way to ensure the integrity of a mariner's sample while yielding a reliable test result. Part 40 contains numerous safeguards to achieve this purpose. One requirement is that the temperature gage remains attached to the outside of the specimen cup. The importance of not inserting any foreign object into a urine specimen is underscored by the fact that a collector may not even insert a sterile thermometer into the sample. No foreign objects, regardless of there sterility, should be inserted into a DOT urine specimen.[1] To allow otherwise would undercut the integrity and reliability of the DOT drug-testing procedures.

Ms. Adkins clear disregard for the collection procedures contained in 49 CFR Part 40 resulted in the submission of a urine specimen to Kroll Laboratories that contained a "problem" which should have caused the entire drug test to be cancelled. Respondent should have been asked to submit an additional sample so that the iScreen instant drug test could have been performed on the additional sample, not the DOT urine specimen. Since no additional urine was collected from Respondent and Ms. Adkins inserted the iScreen instant drug test into the specimen prior to its spilt and sealing in proper DOT vials, Respondent's drug test should have been categorized as a cancelled test. Thus, I

[1] The parties agree, through stipulations, that the iScreen instant test dipped into Respondent's specimen was sterile. (Tr. at 122; CG Ex. 7).

find the results of Respondent's April 16, 2007, pre-employment drug test are void as the test should have been cancelled due to a problem with the sample which could only be fixed by Respondent providing another specimen.

Assuming, *arguendo,* that the Coast Guard had established all three required elements, Respondent could, nevertheless, effectively rebut any presumption of drug use by reliance upon the "negative" test result obtained by the iScreen "instant test."[2] The Coast Guard cannot be heard to alternatively argue that, on the one hand, the instant test was without consequence—and, on the other, argue that the result ought be ignored.

In its post-hearing brief, the Coast Guard argues that Respondent's drug test was part of a "physical examination required by DOT agency regulations" described in 49 CFR § 40.13(d). Even assuming the Coast Guard's assertion is valid and the instant drug test was performed as part of a physical examination, Ms. Adkins failed to follows the instructions provided in 49 CFR §§ 40.13(d) and 40.71(b)(8).

Title 49 CFR §§ 40.13(d) specifically states the only exception to performing any tests on a DOT sample is when a DOT drug test collection is conducted as part of a physical exam, the medical test is related to the physical exam and the test must be performed on ***urine remaining in the collection container after the drug test urine specimens have been sealed into the specimen bottles***. Not only is this rule stated in 49 CFR § 40.13(d), but it is also reiterated in 49 CFR § 40.71(b)(8). This subsection directs the collector to discard any urine left in the collection container after the specimen is split with the lone exception that a collector may use excess urine to conduct clinical tests if

[2] It is noted that the undersigned interprets 49 CFR § 40.13(e) – Employer Responsibilities – no one is permitted to disregard the results of a DOT test based upon the results of a non-DOT test, as being directed at employers and does not limit the ALJ from accepting evidence to rebut the presumption of drug use.

the collection was conducted in conjunction with a physical examination required by DOT regulations. 49 CFR § 40.71(b)(8).

Ms. Adkins plainly failed to follow the specific instructions of both regulatory provisions. She impermissibly inserted the non-DOT "instant test" strip into the Respondent's sole sample before she split the samples into separate containers. (Tr. at 36-38, 47, 136; CG Ex. 3 at 14). Thus, she placed the test strip into the only sample before it was divided into separate containers in violation of 49 CFR §§ 40.13(d) and 40.71(b)(8). Therefore, assuming the "instant test" was performed as part of a "physical exam required by a DOT agency," Ms. Adkins still failed to follow very specific DOT regulations concerning conducting additional medical tests on DOT samples enacted to prevent the contamination of urine samples sent for DOT drug testing.

Respondent's Credibility

Respondent testified about the circumstances surrounding his April 16, 2007, pre-employment drug test and his career as a mariner. Respondent has held a Coast Guard issued license since 1985. (Tr. at 132). During the past twenty three (23) years Respondent has taken numerous drug tests and never failed a drug test. (Tr. at 139, 147-148). Respondent has also participated in and passed sixteen (16) drug tests. (Tr. at 141).

Another factor that adds to Respondent's credibility is the instant drug test performed on Respondent's April 16, 2007 urine specimen yielded a negative result. (CG Ex. 3 at 14). These test results corroborate Respondent's assertion that he is not a user of drugs because the test was performed by the Redi-Med Clinic in accordance with

their own internal practices and polices, not at the request of Respondent. (Tr. at 47, 107). Therefore, the instant drug test results ultimately add to Respondent's credibility.

Respondent presented himself at hearing as an honest upstanding mariner who had not possessed or used drugs since the late nineteen-seventies. The Coast Guard did not present any evidence to contradict Respondent's statements. Respondent's credible testimony presented at trial, combined with his numerous prior negative drug tests, (including the April 16, 2007 "instant test") cause me to believe Respondent did not use marijuana as alleged by the Coast Guard.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein and specifically on April 16, 2007, Respondent, Gary Lee Hensley, was the holder of Coast Guard Merchant Mariner License Number 925398.
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 Parts 5 and 16; 33 CFR Part 20; and the APA codified at 5 U.S.C. §§551-59.
3. The Coast Guard did not prove Respondent failed a pre-employment drug test conducted in accordance with 46 CFR Part 16 and 49 CFR Part 40.

ORDER

IT IS HEREBY ORDERED that all allegations against Respondent Gary Lee Hensley are DISMISSED with prejudice.

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.

BRUCE T. SMITH
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

Done and dated August 14, 2008
New Orleans, Louisiana

Appeal Rights

§ 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.

§ 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.

§ 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.

§ 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.

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.

Certificate of Service

I hereby certify that I have this day served the foregoing document(s) upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated by Facsimile:

LCDR Melissa A. Harper
PO Cynthia Dubach
USCG Sector New Orleans
1615 Poydras St., Ste. 700
New Orleans, LA 70112
Fax: 504-589-4244

Les A. Martin, Esquire
Respondent's Counsel
322 Behrman Pl., Ste. 105
New Orleans, LA 70114
Fax: 504-361-4752

Done and dated this ____ of August, 2008 at
Baltimore, Maryland

Lauren Meus
Paralegal Specialist