

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

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Complainant

vs.

RAYMOND PETER SALIS

Respondent.

Docket Number: CG S&R 08-0426
CG Case No. 3334930

MEMORANDUM AND ORDER OF BENCH DECISION

Issued: November 7, 2008

Issued by: Walter J. Brudzinski, Administrative Law Judge

Procedure

This Decision and Order is issued in accordance with 33 CFR 20.710 and 20.902(c) in that the undersigned rendered his decision and order orally from the bench at the close of hearing on November 5, 2008 in Tampa, Florida. Finding that Respondent and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard and that the Coast Guard proved the charge alleged in the Complaint, the undersigned suspended Respondent's Merchant Mariner's Document for a period of eighteen (18) months at the close of the hearing.

The Complaint charged Respondent with Misconduct for refusing his employer's order to take a second, post accident chemical test for dangerous drugs in violation of 46

U.S.C. § 7703 (1) (B) and 46 CFR 5.27 because the first test's results reported as negative diluted. The Coast Guard proposed Revocation of Respondent's Merchant Mariner's Document. In his timely Answer to the Complaint, Respondent admitted to all jurisdictional allegations, denied the factual allegations, and requested a hearing be held on November 5, 2008 in Tampa, Florida.

The matter was assigned to the undersigned on October 28, 2008 and the hearing scheduled for November 5, 2008 in Tampa, Florida.

Hearing

At the hearing, Investigating Officers CWO Richard E. Dixon, USCG and LT Christian J. Barger, USCG represented the Coast Guard. YNI Katherine M. Hayes, USCG served as Bailiff. Kevin McLaughlin, Esquire represented the Respondent. The Coast Guard presented the telephonic testimony of three (3) witnesses and introduced nine (9) exhibits. Respondent testified in his own behalf and introduced seven (7) exhibits.

The Coast Guard's witnesses and exhibits proved by the preponderance of the evidence that Respondent committed Misconduct by refusing to take a chemical retest for dangerous drugs when ordered to do so.

Sanction

Title 46 U.S.C. 7703 (1) (B) provides that a merchant mariner's credentials may be revoked or suspended if the holder, when acting under the authority of that credential has committed an act of misconduct or negligence. Title 46 CFR Table 5.569 provides a range from 12 to 24 months suspension for refusal to take a chemical drug test. Although the evidence showed Respondent had been warned of the consequences for his refusal to

take a retest, the undersigned found no evidence of drug use or deception. Therefore, I suspended Respondent's Document for a period of eighteen (18) months.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Raymond Peter Salis' Merchant Mariner's Document, now in the Coast Guard's possession, is **SUSPENDED** for a period of eighteen (18) months effective November 5, 2008.

IT IS FURTHER ORDERED that service of this Order on the parties and their representatives serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004, Attachment A. If the parties intend to appeal, they shall file notice thirty (30) days or less after the date of this Order and shall serve a copy of it to the other party and to the undersigned.

Done and dated November 7, 2008
New York, New York

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

ATTACHMENT A

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD SUBPART J - APPEALS

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 Sec. 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 LIST

Coast Guard Witnesses:

1. Mr. Jay Ougel – Safety manager, L&M Botruc Rental, Inc.
2. Ms. Paula Fabrizi – Nurse Supervisor, Patients First
3. Dr. Dan Peters, M.D., Medical Review Officer, Patients First

Coast Guard Exhibits:

1. L&M Botruc Rental, Inc. signed employee statement, 1 page
2. L&M Botruc Rental, Inc. Operations and Safety manual, 11 pages
3. Signed acknowledgement of “read” safety policy, 1 page
4. Signature page, Operations and Safety manual, 1 page
5. Signature of Understanding, L&M Botruc Rental, Inc. Drug and Alcohol Testing, 1 page
6. Federal Drug Testing Custody and Control Form from Quest Labs, signed by respondent, 1 page
7. L&M Botruc Rental, Inc., letter advising Coast Guard of diluted test, 1 page
8. Nurse’s hand written statement of events, 1 page
9. Patients First Drug Screen Report, 1 page

Respondent’s Witnesses:

1. Raymond Peter Salis, Respondent

Respondent’s Exhibits:

1. Letter from Chief Engineer, William Osborn, 1 page
2. Letter from Captain Anthony Guidry, 1 page
3. Letter from Fellow Seaman, Jeffrey E. Evans, 1 page
4. Letter from fellow Seaman, Dewayne Robinson, 1 page
5. Letter from Captain Kenneth Wood, 1 page
6. Letter from Fellow Seaman, Perry Rebichaux, 3 pages
7. Letter from Captain Glynn Metcalf, 1 page