UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

v.

MICHAEL J. THOMAS

Respondent

Docket No: 08-0554
CG Enforcement Activity No: 3384226

DECISION AND ORDER

Date Issued: October 2, 2009

Issued by: HON. BRUCE TUCKER SMITH
Administrative Law Judge

Appearances:

For Complainant

Gary F. Ball, Esq.
USCG National Maritime Center, Suspension & Revocation Center of Expertise

LT Tim Tilghman
USCG Marine Safety Unit Galveston

For Respondent

Barry Evans, Esq.

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II. PRELIMINARY STATEMENT

On December 23, 2008, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Michael J. Thomas (Respondent) alleging violations of 46 U.S.C. §7703(1)(B) and 46 C.F.R. §5.27. More specifically, the Coast Guard's Complaint averred Respondent failed to submit to a post-casualty chemical test. The Complaint seeks revocation of Respondent's Merchant Mariner's License ("MML") and Merchant Mariner's Document ("MMD").

The instant matter arises out of a Serious Marine Incident (SMI), as defined by 46 C.F.R. §4.03-2, which occurred near mile marker 343 on the Gulf Intracoastal Waterway on December 8, 2008, at approximately 5:35 pm CST, when the uninspected tow vessel (UTV) M/V MISS SALLY collided with the barge Horizon 3038 being pushed by the UTV JACK R. BINION. (ALJ Ex. II).

The ALJ Docketing Center received Respondent's Answer on January 8, 2009, wherein Respondent generally denied the Complaint's factual and jurisdictional allegations. Respondent further defended by asserting alternatively that he was unable to submit to the chemical test or that his employer's actions or inactions precluded the collection of a specimen sufficient for chemical testing. The Respondent requested a hearing before an Administrative Law Judge.

The Coast Guard brought this action pursuant to the legal authority of 46 U.S.C. §7703, and the proceedings were conducted in accordance with the procedural requirements of 5 U.S.C. §551-59, 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On July 21, 2009, this matter came on for hearing in Houston, Texas, with the Coast Guard represented by Gary Ball, Esq. and LT Tim Tilghman. Respondent appeared in person and through counsel, Barry Evans, Esq.

Both parties appeared and presented their respective cases and rested. Five (5) witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered six (6) exhibits into evidence, all of which where admitted. Respondent testified on his own behalf and called one (1) witness. Respondent offered thirteen (13) exhibits into evidence, all of which were admitted. The court called one (1) witness and ordered the production of three items of evidence on its own motion. These were admitted as ALJ exhibits.[1]

On August 7, 2009 the undersigned conducted a recorded telephone conference with counsel for the respective parties and asked for additional documentary evidence. The undersigned also placed on the record the substance of an incident that occurred during a recess in the July 21, 2009, hearing in Houston, Texas, wherein it was alleged that Respondent had made certain threatening remarks against those persons participating in the investigation and hearing.

On August 21, 2009, the undersigned reconvened the hearing, telephonically, to hear the testimony of an additional witness.

At the conclusion of the August 21, 2009 hearing, the undersigned informed the parties that each would be entitled to make their respective closing arguments in writing

[1] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

via post-hearing briefs. The parties submitted written post-hearing briefs and arguments; thereafter the court closed the administrative record.

III. 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 Respondent Michael J. Thomas was the holder of Coast Guard-issued Merchant Mariner's License (MML) and a Merchant Mariner's Document (MMD) (hereinafter, collectively referred to as Coast Guard-issued credentials). (CG Ex. 8).

2. Respondent was acting under the authority of his Coast Guard-issued credentials while operating the M/V MISS SALLY on or about December 8-9, 2008; as well as when he was directed to submit to a post-casualty chemical test and when participating in an ongoing Coast Guard investigation.

3. On or about December 8-9, 2008, Respondent was employed as a contract labor trip pilot aboard the M/V MISS SALLY. (Tr. Vol. I at 65; Vol. II at 34; IO Ex. 5).

4. The M/V MISS SALLY is a tug boat owned by The TUG MISS SALLY, LLC. Breathwit Marine Contractors, LTD. operates the M/V MISS SALLY pursuant to a charter agreement with The TUG MISS SALLY, LLC. (Tr. Vol. II at 9-11; 16-17).

5. Breathwit Marine Contractors, LTD. is a business entity located in or near Dickinson, Texas. (Tr. Vol. I at 17).

6. At approximately 5:53 pm, on or about December 8, 2008, the M/V MISS SALLY was involved in a SMI as defined by 46 C.F.R.§4.03-2, in that the M/V MISS SALLY collided with a barge under tow. (Tr. Vol. I at 24; 213-215; ALJ Ex. II).

7. Monetary damages to the M/V MISS SALLY exceeded $120,000.00. (Tr. Vol. II at 39-40).

8. At the time of the collision between the vessels, the combined closing speeds of the M/V MISS SALLY and the barge under tow was approximately 10 – 12 MPH. (Tr. Vol. II at 47-48).

9. At the time of the collision, Respondent was in control of and in the pilot house of the M/V MISS SALLY. (Tr. Vol. II at 50-51).

10. The force of the collision caused Respondent's body to be thrown onto the console of the vessel, impacting with the vessel's controls and resulting in bodily injury to Respondent. (Tr. Vol. II at 50-51; 53).

11. After the collision between the M/V MISS SALLY and the barge, the M/V MISS SALLY was towed to port facilities at Kirby Towing for temporary mooring. (Tr. Vol. II at 61-62).

12. The M/V Miss Sally was later towed to the Breathwit Marine Contractors, LTD. shipyard in San Leon, Texas. The M/V MISS SALLY arrived at the Breathwit shipyard at approximately 1:30 am on December 9, 2008. (Tr. Vol. II at 62-64**)**.

13. The M/V MISS SALLY was manned by two individuals, Respondent and a deckhand, as she was towed to the Breathwit shipyard. (Tr. Vol. I at 26-27; Tr. Vol. II at 64).

14. Breathwit Marine Personnel Manager Greg Berry (Berry) met the M/V MISS SALLY at the Breathwit shipyard at approximately 1:30 am on December 9, 2008. Berry boarded the M/V MISS SALLY and spoke with Respondent. (Tr. Vol. I at 26; Vol. II at 64).

15. At approximately 1:30 am on December 9, 2008, Berry informed Respondent that he would be required to submit to a post-casualty chemical test later that morning. (Tr. Vol. I at 28; Vol. II at 64-65).

16. At approximately 1:30 am on December 9, 2008, Respondent told Berry that he would submit to a post-casualty chemical test later in the morning of December 9, 2008. (Tr. Vol. I at 28; Vol. II at 65).

17. Respondent did not request medical assistance for his injuries because he did not want to leave his personal belongings unattended, which were aboard the M/V MISS SALLY. (Tr. Vol. I at 29; Vol. II at 65).

18. During the 1:30 am, December 9, 2008 conversation, Respondent submitted to a blood alcohol test performed by Greg Berry. Respondent "passed" that test; the test did not indicate the presence of alcohol in Respondent's blood or breath. (Tr. Vol. I at 27; Vol. II at 64).

19. Drug Screens, Etc., is a Texas City, Texas, business entity that provides a mobile specimen collection service available 24-hours per day. (Tr. Vol. I p. 86-88).

20. Although Drug Screens, Etc., was potentially available at 1:30 a.m. on December 9, 2008, no employee of Breathwit Marine Contractors, LTD. or The TUG MISS SALLY, LLC, requested such service. (Tr. Vol. I at p. 30; 88).

21. After arriving at the Breathwit shipyard in San Leon, Texas, and speaking with Berry, at approximately 1:30 a.m. on December 9, 2008, Respondent spent the remainder of the night aboard the M/V MISS SALLY. (Tr. Vol. II at 66).

22. Respondent had been living aboard the M/V MISS SALLY as a temporary residence from the time of Hurricane Ike (September 13, 2008) until December 9, 2008, as a matter of accommodation by his employer Breathwit Marine Contractors, LTD and/or The TUG MISS SALLY, LLC. (Tr. Vol. II at 33; 65).

23. Breathwit Marine Contractors, LTD. and/or The TUG MISS SALLY, LLC ensured that a copy of the Breathwit drug policy was posted aboard the M/V MISS SALLY and that Breathwit Marine Contractors, LTD. and/or The TUG MISS SALLY, LLC had possession of, and complied with, the procedures and policies set forth in a Coast Guard publication entitled "Marine Employers Drug Testing Guidance (What Marine Employers Need to Know About Drug Testing), dated June 2005. (Tr. Vol. I at 21); (CG Ex. 1); (Resp. Ex. I).

24. At approximately 7:30 am on December 9, 2008, aboard the M/V MISS SALLY, Respondent and Berry had a second conversation regarding the necessity of Respondent submitting to a post-casualty drug test. The second conversation between Respondent and Berry was witnessed by Wes Newman, port captain for Breathwit Marine Contractors, LTD. (Tr. Vol. I at 32-37; Vol. II at 67).

25. During the course of the 7:30 am conversation on December 9, 2008, Respondent was told to provide a urine specimen for testing a medical facility where Respondent could have also received medical attention for his injuries. (Tr. Vol. I at p. 33-35).

26. During the course of the 7:30 am conversation between Respondent and Berry on December 9, 2008, Respondent resisted requests that he immediately submit to a post-casualty drug test. Instead of submitting to the post-casualty drug test at that time, Respondent told Berry that: 1) he wanted to go to a hotel and take a shower; 2) he wanted to see a doctor; 3) he needed to remove his personal belongings from the M/V MISS SALLY to a hotel room. (Tr. Vol. I at 32-37; 188; Vol. II at 67-70).

27. During the 7:30 am conversation between Respondent and Mr. Greg Berry, Respondent refused to submit to a post-casualty drug test. (Tr. Vol. I at 32-37).

28. After the 7:30 am conversation between Respondent and Berry on December 9, 2008, Respondent was approached by MSSE2 Lindell Gentry, III, a United States Coast Guard Chief Warrant Officer 2 (CWO2 Gentry), on or near the Breathwit Marine shipyard in San Leon, Texas. (Tr. Vol. I at 40-41; 185-193).

29. CWO2 Gentry suggested Respondent comply with Berry's order that Respondent submit to a post-casualty chemical test by providing a body-fluid specimen at the Calder Urgent Care Clinic for testing. (Tr. Vol. I at 185-193).

30. Respondent was angry and verbally abusive to the Coast Guard officer and reiterated his refusal to submit to a post-casualty drug test. (Tr. Vol. I at 189-190).

31. Breathwit Marine Contractors, LTD. completed a Form CG-2692B indicating Respondent had refused to submit to a post-casualty drug test. (CG Ex. 3).

32. Respondent is covered by a private health insurance policy, provided by his wife's employer, the US Postal Service. (Tr. Vol. II at 109).

33. At some time after 7:30 am on the morning of December 9, 2008, Respondent drove his personal vehicle to a local motel, where he met his estranged wife. Thereafter, his wife took several photographs of Respondent's body with her cellular telephone. (Resp. Ex. G; O1-4; Tr. Vol. II at 51; 74).

34. Some time after checking into the local hotel, Respondent telephoned Berry, personnel manager of Breathwit Marine. (Tr. Vol. II at 74).

35. On the afternoon of December 9, 2008, Respondent drove his personal vehicle from his motel to a service station in Kemah, Texas. Respondent was met at the service station by John Neuman, a driver/employee of Breathwit Marine Contractors, LTD. Respondent and Neuman departed the service station, in their respective vehicles, and drove to Calder Urgent Care. (Tr. Vol. II at 75).

36. Prior to departing the service station, Neuman observed Respondent exit his vehicle and walk into the service station/convenience store without any assistance. (Tr. Vol. I at 161).

37. Calder Urgent Care, located in League City, Texas, performs routine medical services on a walk-in basis and also provides urine or other body-fluid collection services for marine post-casualty testing. (Tr. Vol. I at 34-35).

38. Upon Respondent and Neuman's arrival at Calder Urgent Care, Respondent refused to exit his vehicle and enter the facility, indicating he was in too much pain. (Tr. Vol. I at 162-163).

39. Respondent declined an offer by Calder Urgent Care personnel to assist him into the facility via wheelchair. (Tr. Vol. I at 164-165).

40. Thereafter, Respondent and Neuman, in their respective vehicles, drove approximately 20 minutes to Christus, St. John Hospital in Nassau Bay, Texas. (Tr. Vol. I at 166-167).

41. Upon arriving at Christus, St. John Hospital, at 5:38 p.m. on December 9, 2008, Respondent exited his vehicle and walked, unassisted, approximately 25 to 30 yards into the emergency room. (Tr. Vol. I at 166-168).

42. Respondent remained at Christus, St. John Hospital until 11:37 pm on December 9, 2008. (Resp. Ex. C).

43. Neuman, a driver employed by Breathwit Marine Contractors, LTD. accompanied Respondent throughout his approximately six-hour presence in the Christus, St. John Hospital emergency room. (Tr. Vol. I at 168-180).

44. That while he accompanied Respondent in the Christus, St. John Hospital emergency room, Neuman possessed a cellular telephone and had telephone access to Berry, Personnel Manager for Breathwit Marine Contractors, LTD. (Tr. Vol. I at 176).

45. During his six-hour presence at the Christus, St. John Hospital emergency room, no one demanded or forced Respondent to provide a body-fluid specimen for post-casualty chemical testing. (Tr. Vol. I at 176).

46. No body-fluid specimen was taken from Respondent's body for post-casualty chemical testing during his six-hour presence in the Christus, St. John Hospital emergency room. (Resp. Ex. C).

47. On or about and after December 8-9, 2008, Respondent did not provide a post-casualty body fluid specimen for chemical testing. (Tr. Vol. I at 17-237).

V. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea and to maintain standards of competence and conduct. *See* 46 U.S.C. §7701; 46 C.F.R. §5.5. Title 46 Code of Federal Regulations section 5.19 gives an Administrative Law Judge (ALJ) the authority to conduct hearings and to suspend or revoke a license or certificate for violations arising under 46 U.S.C. §§7703 and/or 7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. *See* Appeal Decision No. 2640 (PASSARO) (2003).[2] Additionally, 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 the record as long as there is sufficient evidence to reasonably justify the findings reached. *Id*.; Appeal Decision No. 2639 (HAUCK) (2003).

B. Burden of Proof

In this case, like any Suspension and Revocation case, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703(2), and the implementing regulations, 46 C.F.R. Part 10, Subpart B. The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges. 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). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)).

Therefore, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violation charged.

C. Acting Under the Authority of a License, Certificate or Document

"The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them." Appeal Decision 2620 (COX) (2001) quoting Appeal Decision 2025 (ARMSTRONG) (1975). Where an Administrative forum acts without jurisdiction its orders are void. Id. Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decision 2677 (WALKER) (2008) citing Appeal Decisions 2104 (BENSON) (1977); 2094 (MILLER) (1977); 2090 (LONGINO) (1977); 2069 (STEELE) (1976); and 2025 (ARMSTRONG) (1975). *See*, Appeal

[2] Pursuant to 46 C.F.R. § 5.65, "[t]he decisions of the Commandant in cases of appeal… are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges."

Decision 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER) (1986). *See also*, Appeal Decision 2025 (ARMSTRONG) (1975) (stating "jurisdiction must be affirmatively shown and will not be presumed.")

The Coast Guard charged Respondent with Misconduct under 46 C.F.R. §5.27. The Complaint alleges that on or about December 8-9, 2008, Respondent refused to submit to a chemical drug test following a SMI as required by 46 C.F.R. §4.06-5(a). The applicable federal jurisdictional statute provides, "A license, certificate of registry, or merchant mariner's document . . . may be suspended or revoked if the holder (1) when acting under the authority of that license, certificate, or document (B) has committed an act of misconduct." 46 U.S.C. §7703(1)(B). It is abundantly clear that to establish jurisdiction in a Misconduct case, the action (or inaction) constituting the alleged Misconduct must be proven to have occurred while the mariner was "acting under the authority" of his merchant mariner credential.

The term "acting under the authority" is defined at 46 C.F.R. §5.57 and states, *inter alia*, "[a] person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is (1) [r]equired by law or regulation; or (2) [r]equired by an employer as a condition for employment." If neither one of these two criteria is met, then the Coast Guard has no jurisdiction to pursue a Suspension and Revocation proceeding. Appeal Decision 2620 COX (2001).

Whether Respondent was acting under the authority of his license at all relevant times was not a point of contention at any time during the case. The weight of the

evidence clearly proves that Respondent was serving aboard the M/V MISS SALLY as a pilot on or about December 8-9, 2008, during the occurrence of a SMI and immediately thereafter--the time of the alleged Misconduct. With respect to the subsequent Coast Guard investigation regarding the origin of the license in question, the court finds that Respondent's participation therein and statements given in connection thereto are within the scope of official matters regarding the license, certificate or document. *See* 46 C.F.R. §5.57(b). Respondent is therefore found to have been acting under the authority of his Coast Guard-issued credentials at all relevant times.

D. Misconduct

As discussed *infra*, the Coast Guard established by a preponderance of reliable, probative and credible evidence that Respondent committed Misconduct by refusing to submit to a post-casualty drug test.

Title 46 C.F.R. §5.27 defines Misconduct as:

> [H]uman behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required.

The determination of whether a mariner has "refused" a drug test begins with a reading of 49 C.F.R. §40.191(a), which defines a refusal to take a Department of Transportation (DOT) drug test thusly:

> (a) As an employee, you have refused to take a drug test if you:
>
> (1) Fail to appear for any test (except for a pre-employment test) within a reasonable time, **as determined by the employer**, consistent with applicable DOT agency regulations, after being directed to do so by the employer.

(emphasis added).

The "applicable DOT agency regulations" mentioned in 49 C.F.R. §40.191(a) are set forth in 46 C.F.R. Subpart 4.06 and entitled "Mandatory Chemical Testing Following Serious Marine Incidents Involving Vessels in Commercial Service." Of particular importance are those sections setting forth the responsibilities of the marine employer, §4.06-1; the requirements for alcohol and drug testing following a SMI, §4.06-3; and the responsibilities of the individual directly involved in the SMI, §4.06-5.

Responsibilities of Marine Employer:

It is incumbent upon "the marine employer [to] make a timely, good faith determination as to whether the occurrence currently is, or is likely to become, a [SMI]." 46 C.F.R. §4.06-1(a) Upon "determin[ing] that a casualty or incident is, or is likely to become, a [SMI], the marine employer shall take all practicable steps to have each individual engaged or employed on board the vessel who is directly involved in the incident chemically tested for evidence of drug and alcohol use." 46 C.F.R. § 4.06-1(b).

Importantly, 46 C.F.R. §4.06-3(b)(i) requires the marine employer to ensure collection of drug test specimens from each person involved within thirty-two hours of the SMI, unless safety considerations dictate otherwise.

Responsibilities of Marine Employee:

Once the marine employer has determined the marine casualty is, or is likely to become, a SMI ***and*** directed the individuals involved therein to submit to a chemical drug and alcohol test, the onus shifts to the marine employee. More specifically, "[a]ny individual engaged or employed on board a vessel who is determined to be directly involved in an SMI must provide a blood, breath, saliva, or urine specimen for chemical

testing **when directed to do so by the marine employer** or a law enforcement officer." 46 C.F.R. §4.06-5(a)(a) (emphasis added).

The phrase "when directed to do so" in 46 C.F.R. §4.06-5 is interpreted by this court to mean "immediately" unless safety concerns otherwise exist.[3] Further, the court reads the Subpart 4.06 *in para materia* as obliging the marine employer to arrange for drug and alcohol testing at a reasonable test time, date and location, as determined by the circumstances.

An individual mariner's responsibility to provide a specimen, under 46 C.F.R. §4.06-5(a), however, is distinct and separate from the marine employer's responsibility to ensure that post-casualty chemical testing is completed within 32 hours after the occurrence of an SMI. 46 C.F.R. §4.06-3(b)(i). The 32-hour rule is the outside limit for an employer to ensure testing occurs: it does NOT confer upon a mariner the right to wait until the 32d hour. The mariner must submit a specimen when ordered to do so—immediately, taking into account the circumstances.

Plainly, 49 C.F.R. §40.191(a)(1) establishes a mariner's obligation to submit to a post-casualty chemical test within a reasonable time after being ordered to do so by his employer.

A mariner's failure to comply with an employer's (or Coast Guard) direction to submit to post-casualty chemical testing, within a reasonable time under the circumstances, constitutes a violation of 46 C.F.R. §4.06-5(a); 49 C.F.R. §40191(a)(1), and, thus, Misconduct. See generally Duchek v. National Transp. Safety Bd., 364 F.3d 311 (C.A.D.C. 2004).

[3] See 46 C.F.R. § 4.06-3(a)(ii);(b)(ii) regarding time limitations for alcohol and drug testing in the event of safety concerns.

Vital to enforcement of these regulations is proof that a marine employer (or Coast Guard) actually gave the mariner an appropriate order to provide a specimen for testing. Because the Commandant's Decisions on Appeal (CDOA) do little to answer to the question, "What constitutes an appropriate order?" the court turns to military jurisprudence for guidance. Military law is replete with precedent regarding the enforceability of orders, such as the one at issue, here. In military law, it is well established that to be enforceable, orders must be legal, clear, specific and constitute a narrowly drawn mandate to do a thing or to refrain from doing a thing. See U.S. v. Deisher, 61 M.J. 313 (C.A.A.F. 2005); U.S. v. Moore, 58 M.J. (CMA 2003); U.S. v. Womack, 29 M.J. 88 (C.M.A. 1989); U.S. v. Schwartz, 61 M.J. 567 (N.M. Ct. Crim. App. 2005).

Accordingly, it is against the foregoing standards that the parties' conduct is examined.

The facts at issue herein reveal three important conversations between Respondent and his marine employers and the Coast Guard, following the occurrence of a SMI on or about December 8, 2008.

The facts of the SMI are not in dispute. In short, on December 8, 2008, Respondent was at the helm of M/V MISS SALLY, a tow boat owned by Breathwit Marine Contractors, LTD. (Breathwit Marine or Breathwit) and/or a business entity known as The TUG MISS SALLY, LLC, when that vessel collided with a barge under tow. (Tr. Vol. I at 24-25). The combined closing speed of the two vessels was approximately 10-12 MPH. (Tr. Vol. II at 47-48). At the time of the collision, Respondent piloted the M/V MISS SALLY from the wheelhouse and the force of the

collision propelled him onto the console. (Tr. Vol. II at 50-51) (Resp. Ex. N1). The force of the collision caused damage to the starboard-side knee and deck plating of the M/V MISS SALLY. (Tr. Vol. II at 39-40; Resp. Ex. N). The M/V MISS SALLY sustained in excess of $120,000.00 in damages. (Tr. Vol. II at 39-40).

The cause of the SMI is not at issue in these proceedings.

After the collision, the M/V MISS SALLY was disabled and subsequently towed to Kirby Marine and, thereafter, to the Breathwit yard. (Tr. Vol. II at 61-62).

The disabled M/V MISS SALLY arrived at the Breathwit shipyard at approximately 1:30 am on December 9, 2008. (Tr. Vol. I at 26). Breathwit Marine Personnel Manager Greg Berry (Berry) boarded the M/V MISS SALLY upon its arrival and spoke with Respondent. (Tr. Vol. I at 26-29; Vol. II at 64). Facts elicited at the hearing revealed two conversations between Respondent and Berry: the first conversation occurring at approximately 1:30 am on December 9, 2008, and the second conversation occurring at approximately 7:30 am on December 9, 2008. A third conversation, between Respondent and a Coast Guard official is also noteworthy. Resolution of the instant charges results from a close examination of those conversations and Respondent's subsequent behavior.

The 1:30 am Conversation

The initial conversation between Berry and Respondent occurred at approximately 1:30 a.m. on December 9, 2008, just after the M/V MISS SALLY docked at the Breathwit yard. The parties are in accord that Respondent was in a certain degree of physical discomfort at that time. (Tr. Vol. I at 27-29; Vol. II at 63-65). During that

conversation, Berry asked for—and Respondent consented to—an alcohol breathalyzer test, which Respondent "passed." (Tr. Vol. I at 27; Vol. II at 64).

Berry next informed Respondent that he would have to submit to a "urinalysis drug screen." (Tr. Vol. I at p. 28) Berry testified, "[Respondent] kind of argued with it for a little bit, but then he agreed to it." (Tr. Vol. I at 28; Vol. II at 65).

Berry testified it was possible for Drug Screens, Etc., an industry-recognized specimen-collection service, to have come to the Breathwit ship yard and obtained a specimen from Respondent -- even at 1:30 am on December 9, 2008. (Tr. Vol. I at 88). Respondent testified that had Breathwit called Drug Screens, Etc. to come obtain a specimen at the yard at 1:30 am on the morning of December 9, 2008—he would have provided a urine specimen. (Tr. Vol. II at 68). However, Berry did not call Drug Screens, Etc. to come collect a body fluid specimen from Respondent at 1:30 am on December 9, 2009.

At the conclusion of the 1:30 am conversation, Berry told Respondent that he would be taken to a facility for a urine sample to be collected at 7:30 a.m. on December 9, 2008. (Tr. Vol. I at 28-29).

Following the 1:30 a.m. conversation, Respondent spent the remainder of the night of December 8, 2008 aboard the M/V MISS SALLY. (Tr. Vol. II at 66). He did not, apparently, leave the vessel or the Breathwit yard until the next day, although his truck was parked near the docked vessel. Had he chosen to leave, he could have done so.

The 7:30 am Conversation

Prior to meeting with Respondent, Berry received instructions from Walt Breathwit, president of Breathwit Marine Contractors, LTD, that Respondent was to

submit to a drug screen immediately. (Tr. Vol. I at 31-32). Berry arrived at the Breathwit shipyard at approximately 7:30 am, December 9, 2008, and immediately proceeded to the M/V MISS SALLY. While walking to the M/V MISS SALLY, Berry observed Breathwit Port Captain Wes Neuman also walking toward the M/V MISS SALLY. (Tr. Vol. I at p. 32). Berry requested that Neuman accompany him aboard the vessel as a witness to his guidance to Respondent that he submit to a drug test. (Tr. Vol. I at 32).

Upon boarding the M/V MISS SALLY, Berry and Neuman located Respondent in the wheelhouse, seated in the captain's chair. (Tr. Vol. I at 32). At the hearing, Berry testified to the conversation he had with Respondent:

> Q. In as much detail as you can recall about your conversation, tell me the give and take between you and Mr. Thomas at that point.
>
> A. At that point, I, you know, informed Mr. Thomas I needed to get a UA done on him right away. He pretty much argued, said he was not going to take one at that point, that he had to go take a shower. I informed Mr. Thomas that we did have showers available both on another vessel that was at the shipyard, and we also have showers in our – in our offices that were available.
>
> * * *
> Q. Okay. And what was – please continue with what your conversation was between you and Mr. Thomas.
>
> A. Mr. Thomas said, you know, I don't want to take the drug test right now. I want to go to a hotel room and I need to take a shower, I haven't taken a shower in three days. I told Mr. Thomas that we needed to get a UA immediately. I informed him that he could – at that point Mr. Thomas said, I'd like to see a doctor. I informed Mr. Thomas the we can take him to a facility that both has a doctor and a urinalysis drug screen capability.
>
> * * *
> Q. And what is that facility?
>
> A. Calder Urgent Care.
>
> Q. Okay. And have you used Calder Urgent Care to do drug screens for injured workers in the past?

A. Yes, sir.

Q. Okay. And for a worker at Breathwit, if you know, would it be common knowledge that Calder does drug testing?

A. Yes, sir.

* * *

Q. Okay. What was the rest of your conversation with Mr. Thomas?

A. I continued – you know, Mr. Thomas was refusing and I continued to ask him, you know, Mr. Thomas to take a UA, and he kept refusing. Mr. Breathwit at that time – I believe Mr. Breathwit gave me a phone call and asked if he was on his way to the UA. I informed him that he wasn't. He said at that point we needed to contact the U.S. Coast Guard and specifically Mr. Ray Gentry to see if he can persuade Mr. Thomas to take a drug test.

(Tr. Vol. I at 33-35) (emphasis added).

Respondent's own testimonial account of that conversation is in substantial accord. Respondent testified:

Q. Let's get back to what Greg Berry told you. Let's – 7:30, 8:00 in that vicinity, does that sound reasonable?

A. Reasonable.

* * *

Q. Okay. What did Greg Berry tell you?

A. That Walt Breathwit wanted me to have a immediate drug test [sic].

Q. What was your – what was your thoughts?

A. I made the comment I was told by Greg Berry I had 24 hours to have a drug test.

Q. Did you refuse to take a drug test?

A. No.

Q. Did you tell them – or what did you tell them you wanted to do?

A. I told them as soon as I can get my stuff off the boat, get checked into a hotel, get a shower, I will gladly get a drug test.

(Tr. Vol. II at 67-68) (emphasis added).

From the foregoing, it is apparent that Respondent did not comply with Berry's direction that he immediately submit to a drug test at Calder Urgent Care. Respondent clearly balked at Berry's unambiguous directions, expressing instead his desire to remove his belongings from the M/V MISS SALLY, find a hotel room where he could shower, go to a doctor and then agree to provide a specimen later. Moreover, Respondent's assertion that he "had 24 hours to have a drug test" is simply wrong—in light of the clear mandate of 46 C.F.R. §4.06-5(a).

What is, perhaps, most illustrative is the absence of any claim by Respondent that he was in immediate need of medical attention.

Respondent's Conversation with CWO2 Gentry

The testimony also revealed that Coast Guard Chief Warrant Officer 2 Lindell "Ray" Gentry (CWO2 Gentry), along with Coast Guard Petty Officer Michael Curran (PO Curran), arrived at the Breathwit shipyard at approximately 9:00 a.m. on December 9, 2008, at Berry's request. (Tr. Vol. I 38-40; 184). Upon arriving at the Breathwit shipyard, CWO2 Gentry saw Respondent sitting in his truck behind the closed Breathwit shipyard access gate (Tr. Vol. I at 185). CWO2 Gentry then approached Respondent's vehicle and identified himself as a Coast Guard officer (Tr. Vol. I at 187). CWO2 Gentry asked whether Respondent understood that he had been directed by his marine employer to submit to a drug test. According to CWO2 Gentry, Respondent stated, "Yeah, it's not going to happen right now." (Tr. Vol. I at 188). Despite multiple urgings by CWO2

Gentry to Respondent to submit to the drug test as directed by his marine employer, Respondent refused. (Tr. Vol. I at 188-189). Throughout the course of CWO2 Gentry's conversation with Respondent, Respondent never complained about pain. CWO2 Gentry testified that although Respondent stated he was "bumped and bruised", Respondent's primary focus was taking a shower, resting and relaxing. (Tr. Vol. I at 190). CWO2 Gentry testified that he told Respondent that Calder Urgent Care could provide both a physical examination/treatment and a post-casualty drug test. (Tr. Vol. I at 190-192). Respondent balked again. During his conversation with CWO2 Gentry, Respondent repeated his desire to find a hotel room, take a shower, and rest and relax before submitting to a chemical test. (Tr. Vol. I at 190-192).

Interestingly, Respondent characterized his conversation with CWO2 Gentry as an "immediate…attack." (Tr. Vol. II at 73). But equally noteworthy is the absence of any statement by Respondent to CWO2 Gentry that his pain was so severe as to preclude a drug test—or even rational, civil discourse. (Tr. Vol. II at 72-74).

Both Berry and CWO2 Gentry testified that Calder Urgent Care provides medical care and specimen collection for chemical testing, a fact apparently known to all Breathwit employees. (Tr. Vol. I at 33-35; 190-192). Hence, it is more likely than not that Respondent wanted to avoid the Calder facility because he feared his urine would he collected and tested.

E. Analysis

Resolution of the instant charge turns upon the reasonableness of Breathwit's and/or the Coast Guard's directions to Respondent, and Respondent's response. Otherwise stated, in order to succeed in its case against Respondent, the Coast Guard

must prove that Breathwit, gave Respondent a clear, specific and narrowly drawn mandate to provide a urine specimen.

Respondent's Exhibit F, the Marine Employers Drug Testing Guidance, at 26, expresses a preference that "Testing in a post accident environment is generally conducted at the site…".[4] However, there is no regulatory requirement that mandates on-site testing and Breathwit was not legally obliged to test Respondent at its yard.

Here, Berry's direction to Respondent that he provide a urine specimen at Calder Urgent Care given at approximately 7:30 am on December 9, 2008, was clear, specific and constituted a narrowly drawn mandate to do the thing that the employer desired. Both Berry's and Respondent's testimonies are in substantial accord: at approximately 7:30 am on the morning of December 9, 2008, Berry told Respondent that he needed to provide a urine specimen. Berry clearly told Respondent he could be taken to Calder Urgent Care where Respondent could be provided medical attention and a urine specimen could be obtained. (Tr. Vol. I at 34-35). Respondent plainly refused that order.

It is equally true that CWO2 Gentry reiterated Berry's direction to Respondent that he immediately submit a urine specimen for testing at the Calder facility. While it is true that CWO2 Gentry did not specifically articulate a time for a test to Respondent, his advice to Respondent—given on the heels of Berry's specific direction—underscores the fact that Respondent was properly apprised of his obligation, and the availability of appropriate medical services at Calder Urgent Care.

[4] The Guidance is somewhat confusing. At p. 26, instructions are given to marine employers on how to conduct post-SMI testing. Paragraph 2 seems to express a preference that post-SMI testing be conducted at a DOT-approved collection site but paragraph 3 seems contradictory; indicating that post-SMI testing is to be done at the accident site or in a hospital. Moreover, paragraph 6 seems to require post-SMI testing be completed not more than 24 hours after the accident—but 46 C.F.R. §4.06-3(b) clearly says such testing must be accomplished within 32 hours.

Although Respondent artfully avoided uttering a blanket refusal, his actions and obfuscations following the SMI clearly constituted a refusal to comply with Berry's order. Respondent's effort to place conditions on the timing of his testing also constituted a refusal to comply. Moreover, his assertion that he "had 24 hours to take a drug test" is not supported by the law: time limits defined by the regulations guide the marine employer—not the marine employee.

I find that Berry's order was conveyed in a clear and unmistakable manner. I further find that the order was clear, specific and constituted a narrowly drawn mandate to go to Calder Urgent Care and to receive medical attention and to provide a urine specimen for testing. I find that CWO2 Gentry reiterated and underscored that order to Respondent. Respondent was, therefore, obligated to follow that order if reasonably able to do so, absent impossibility of performance or a superseding action or inaction on the part of another.

Therefore, it is now appropriate to undertake a review of Respondent's affirmative defenses, those that were actually raised or fairly suggested by the evidence.

F. Respondent's Affirmative Defenses

1. Impossibility

Respondent essentially suggests he was either physically or mentally unable to comply with the direction given to him on December 9, 2008, that he provide a specimen for post-casualty chemical testing.

Medical records introduced into evidence (Resp. Ex. A, C, and E; ALJ Ex. I), together with Respondent's photographs (Resp. Ex. F, G, and O 1-4), certainly support Respondent's testimony that he was in some degree of physical discomfort from the time

the M/V MISS SALLY docked at the Breathwit yard, at approximately 1:30 am on December 9, 2008, until the time he presented to the Christus, St. John Hospital (hospital) at approximately 5:30 pm on December 9, 2008.

The undersigned finds it noteworthy that Respondent possesses his own, independent medical insurance coverage. (Tr. Vol. II at 109). Equally noteworthy is the fact that Respondent owns his own truck. In short, were he in disabling pain or had he been motivated to seek medical care, he could have done so at any time after the M/V MISS SALLY docked at Breathwit. He did not do so.

The facts further reveal that during the afternoon of December 9, 2008, Respondent drove himself to Calder Urgent Care, where he was met by John Neuman, (Neuman) a Breathwit employee. (Tr. Vol. II at 75). Calder Urgent Care is located in League City, Texas. As indicated, *supra*, Calder Urgent Care performs routine medical services on a walk-in basis and also provides urine or other body-fluid collection services for marine post-casualty testing. (Tr. Vol. I at 34-35; 161).

When Respondent and Neuman arrived, separately, at Calder Urgent Care, Respondent refused to get out of his truck, indicating he was in too much pain to get out and walk into the Calder facility. (Tr. Vol. I at 162-163). Personnel at Calder Urgent Care even offered to provide a wheelchair to Respondent to assist him into the facility. Curiously, Respondent declined. (Tr. Vol. I at 164-165).

The events at the Calder facility stand in marked contrast to Neuman's personal observations of Respondent only minutes before, where Neuman had seen Respondent at a service station in Kemah, Texas. There, Neuman had personally observed Respondent

get out of his truck and walk into the convenience store and return to his truck without assistance. (Tr. Vol. I at 161).

The facts further reveal that after Respondent's refusal to get out of his truck and enter the Calder clinic, he then drove himself to the Christus, St. John Hospital emergency room, a drive of some twenty minutes away. (Tr. Vol. I at 166-167).

Neuman, who accompanied Respondent, but in his own vehicle, testified that he observed Respondent arrive at the hospital, park his truck, and walk twenty-five to thirty yards from his truck to the emergency room without assistance. (Tr. Vol. I at 166-168).

Respondent's actions are inconsistent with his testimony, and undercut his allegation of disabling pain while at the Calder parking lot.

Respondent's emergency room medical records, generated during his six-hour emergency room visit, are even more enlightening. (Resp. Ex. C).

Page 4 of Respondent's Exhibit C reveals that upon his arrival at the emergency room, Respondent was reported as "neurologically intact" and alert and aware of his circumstances. He was apparently able to hear and respond to all of the physician's questions. He was described as "ambulatory" – meaning he was able to walk under his own power without assistance.

Page 6 of the same Exhibit reveals Respondent was able to complete the form in his own handwriting and that he made no complaint of an injury to his head.

Page 7 of the same Exhibit reveals Respondent complained of chest pain and shortness of breath only. Page 9 of the same Exhibit reveals Respondent did not complain of any head injury, nor did he complain of an injury to his genitalia. He described his chief complaints as chest and abdominal pains. He described his pain as

only “moderate” and not “severe.” He did not indicate he had suffered a blow to his head. Moreover, the examining physician indicated that Respondent presented with no evidence of head trauma and that he was only in “mild” distress. Again, the examining physician noted that, neurologically and psychologically, Respondent was “oriented x 3.”

Further review of Respondent’s Exhibit C reveals a glaring inconsistency in his assertions to hospital personnel. Noteworthy is page 4, wherein the records reveal Respondent was interviewed by emergency room triage personnel at approximately “1817” or 6:17 pm, on December 9, 2009. At that time, Respondent indicated to hospital personnel that his pain measured “8” on a scale of 1 to 10, with “10” described as the “worst pain imaginable.” Yet page 10 of the same exhibit, which reflects Respondent’s condition upon discharge from the emergency room, reveals Respondent described his pain as only “0-1” on the scale – only five hours later…and after no apparent ingestion of medication or other medical procedures.

Taken collectively, I interpret the hospital records to reveal that while Respondent may have been in some degree of pain (ranging all the way from severe to minimal in only a six-hour period -- approximately 24 hours after the collision) he was neurologically intact; was able to reason; was able to respond appropriately to questions and directions; and was able to comprehend the nature and consequences of directions and choices given to him. Further, it is apparent that he was physically able to drive a truck, to walk unassisted, to undress himself and to assist in being photographed at a motel.

Respondent's refusal to get out of his truck at the Calder clinic—a facility that known as a urine specimen collection facility—is suggestive of his desire to avoid testing.

I note that in his testimony, Respondent said that after the collision and up to and including the time of his confrontation with Berry, he had both pain and blood in his urine. (Tr. Vol. II at 71). However, Respondent's testimonial claim that he had blood in his urine is contradicted by an earlier statement he made to urologist Dr. Larry Lipschultz during the course of an independent medical examination. According to Dr. Lipschultz's report, Respondent "denied ever having gross bleeding with urination (hematuria)…" (ALJ Ex. I).

Respondent had his own truck. He had his own medical insurance. Query: if he was in intractable pain, with blood in his urine—why did he not drive himself to an emergency room after 1:30 am on December 9, 2008? Instead, he chose to spend the night on the M/V MISS SALLY, without medical attention or medication. Moreover, he never asked his employer to take him to an emergency room or a physician at any time after he docked at 1:30 am on December 9, 2008. Hence, the suggestion that his pain was severe enough to preclude a drug test after 7:30 am on December 9, 2008, is unsupportable.

Oddly, his alleged pain seems to have waned at interesting times throughout the events of December 8-9.

Respondent was later examined by his family physician, Dr. Presley Joe Mock, Jr., M.D., on December 10, 2008. (Tr. Vol. III at 7). The December 10th examination was the first time Dr. Mock had examined Respondent after the December 8 collision.

During his December 10 examination by Dr. Mock, Respondent did not complain of headache, dizziness, loss of consciousness, interruption of thought or logic, or emotional trauma. Moreover, Dr. Mock's objective physical examination did not reveal evidence of any external trauma to Respondent's head or contrecoup, beyond non-focal tenderness. (Tr. Vol III at 9; 13-14). Respondent's only subjective complaints and Dr. Mock's only objective findings related to bruises, contusions and other internal injuries to Respondent's abdomen. (Tr. Vol. III at 9-10).

While it is true that subsequent medical evaluation revealed Respondent suffered a lacerated spleen, symptoms of that injury were apparently absent on December 8-9, 2008. Respondent's physical actions on those days—including driving his truck, walking, going to a motel, being photographed, etc., belie a claim of disabling pain which would have precluded chemical testing. Respondent's refusal of a wheelchair at the Calder facility underscores this incongruity. Recall that when he was at the hospital, Respondent described his abdominal pain as only "moderate" when he arrived and virtually non-existent when he departed.

Dr. Mock specifically testified that Respondent "absolutely refused to consider being tested for PTSD [post traumatic stress disorder]." (Tr. Vol. III at 14). This fact further vitiates any claim that Respondent's mental process was eroded by his injuries.

Respondent's Exhibit A is a letter dated May 11, 2009 and written by Dr. Mock to Respondent's counsel, Barry Evans, Esq. That letter contains several conclusions by Dr. Mock concerning Respondent's physical and mental health during the two days prior to his December 10th examination. During his testimony, Dr. Mock admitted that he had no "physical basis" for his opinions that on December 9, 2009, Respondent "was suffering

from loss of memory" such that he was precluded from completing drug testing. (Tr. Vol. III at 20).

Moreover, Respondent's medical file reflecting the December 10 examination reflects Respondent "Denies convulsions or seizures, tremors, paralysis and head injury." (Resp. Ex. A). The same exhibit reveals that Respondent's "HEENT" [head, ear, eyes, nose, throat} examination was "Normocephalic, atraumatic w/full facial movements." The undersigned interprets this to mean Respondent's head and all major organs of his head were in a normal condition and without significant abnormalities and free from injury. (Resp. Ex. A).

Respondent's medical records generated by Dr. Mock do recite a "chronic diagnosis" of "Prolonged posttraumatic stress disorder" – yet Dr. Mock admitted that this his knowledge, no "…health care provider…doctor…therapist…psychologist, neuropsychologist, or psychiatrist" has ever tested Respondent to determine whether Respondent's cognitive abilities were measurably impaired following the December 8 collision. (Tr. Vol. III at 20).

I regard the conclusions in Dr. Mock's May 11th letter as unsupported by objective medical evidence but are, instead, based upon Respondent's subjective complaints, coupled with Dr. Mock's sympathetic suppositions.

Hence, there is no objective medical reason why Respondent was physically or mentally unable to comply with orders given to him by his employer and the Coast Guard to submit to post-casualty chemical testing on the morning of December 9, 2008.

2. Employer's Failure to Ensure Collection

Respondent's post-hearing brief argues that Respondent was "under the care, custody and control" of a Breathwit corporate representative during the afternoon and evening of December 9, 2008, and, essentially, that Breathwit was obligated to ensure Respondent provide a urine specimen for testing at that time.

This argument ignores Respondent's refusal to provide a urine specimen during and after the 7:30 am conversations with Berry, the Coast Guard, and his feigned inability to get out of his truck and enter the Calder Urgent Care facility on the afternoon of December 9, 2008. Respondent's failure to comply with his employer's direction to be tested was complete at those moments—regardless of subsequent events, personalities, or motivations.

Moreover, Respondent incorrectly characterizes Breathwit's "care, custody and control" over his person the afternoon and evening of December 9, 2008. No such physical, custodial, or *in loco parentis* relationship existed between Respondent and his employer. There simply was no "care, custody or control" exerted over Respondent. Respondent's departure to an area motel and his insistence that he drive himself to both Calder Urgent Care and the Christus hospital are illustrative.

While it is true that 46 C.F.R. §4.06-1(b) says a marine employer shall take "all practical steps" to ensure mariners are tested, the law does NOT require the employer to pursue the employee at <u>every</u> turn, to physically restrain or repeatedly demand compliance.[5] Accordingly, Breathwit was not obligated to contact Drug Screens, Etc., at 1:30 am on December 9, 2008 to collect Respondent's urine specimen. Neither was

[5] "No individual may be compelled to provide specimens for alcohol and drug testing. . . . However, refusal to provide specimens is a violation of this subpart." 46 C.F.R. §4.06-5(d).

Breathwit obliged to demand Respondent's specimen during the afternoon and evening of December 9 at the Christus, St. John Hospital. Respondent's suggestion that Breathwit was somehow obliged to ensure a specimen was collected at the hospital the evening of December 9, 2008 is plainly erroneous. Even though Breathwit assumed financial responsibility for Respondent's treatment, Breathwit could not physically restrain Respondent nor force him to submit to a urine or blood test nor order health care providers there to involuntarily take a specimen for testing. 46 C.F.R. §4.06-5(d).

To reiterate: Respondent's refusal to provide a urine specimen immediately after the 7:30 am conversations with Berry and CWO2 Gentry and his subsequent refusal to enter the Calder Urgent Care facility—rendered his misconduct complete. Subsequent actions or inactions by Breathwit are irrelevant.

Absent a physical or legal inability, an employee must submit a body-fluid specimen to an appropriate collection facility, immediately, when directed to do so by the employer. The law simply does not require an employer to accommodate the wishes of the employee. Plainly stated, the employee must submit when told to do so. The timing of the specimen collection is not tested on a scale of convenience to the mariner.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. §7703 (2); 46 C.F.R. Parts 5 and 10; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§551-59.

2. At all relevant times mentioned herein, and specifically on December 8-9, 2008, Respondent Michael J. Thomas, was the holder of Coast Guard Issued License.

3. At all relevant times mentioned herein, and specifically on December 8-9, 2008, Respondent Michael J. Thomas, was employed as a contract trip pilot

by The TUG MISS SALLY, LLC and/or Breathwit Marine Contractors, LTD.

4. Respondent Michael J. Thomas was involved in a Serious Marine Incident (SMI), as defined by 46 C.F.R. §4.03-2, on December 8, 2008, while serving aboard the M/V MISS SALLY.

5. At all relevant times mentioned herein, and specifically on December 8-9, 2008, the actions and directions taken by Breathwit Marine Contractors Personnel Manager Greg Berry relating to the December 8, 2008, SMI were on the behalf of The TUG MISS SALLY, LLC and/or Breathwit Marine Contractors, LTD.

6. At all relevant times mentioned herein, and specifically on December 8-9, 2008, The TUG MISS SALLY, LLC and/or Breathwit Marine Contractors were marine employer(s) as defined by 46 C.F.R. §4.03-45.

7. Respondent was directed by his marine employer to submit to a post-SMI chemical drug test as required by 46 C.F.R. §4.06-1(b), in a clear, unmistakable and unambiguous manner.

8. Respondent failed to provide a urine sample/specimen post-SMI as required by 46 C.F.R. §4.06-5.

9. The Coast Guard PROVED by a preponderance of reliable, probative, and credible evidence that Respondent committed misconduct by failing to submit to a drug screen after being directed to do so by his marine employer.

10. Respondent DID NOT PROVE it was impossible for him, either physically or mentally, to provide a urine specimen on or after December 9, 2008.

11. Respondent DID NOT PROVE that his failure to submit to a post-SMI chemical test was the fault of his marine employer or any third party.

V. CONCLUSION

For the foregoing reasons, I find the Coast Guard has PROVED its allegations that Respondent failed to submit to a post-casualty chemical test on or about December 9, 2008. Moreover, I find that Respondent DID NOT PROVE he was either mentally or physically unable to comply with his employer's orders to submit to a post-casualty

chemical test on or about December 8-9, 2008, or that his employer's actions or inactions intervened to precluded his testing.

VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. § 5.567; Appeal Decision 2362 (ARNOLD) (1984). The selection of an appropriate sanction is the responsibility of the ALJ. 46 C.F.R. §5.569(a). The nature of this administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." Appeal Decision 1106 (LABELLE) (1959); 46 U.S.C. §7701. These proceedings are remedial, not penal in nature, and "are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. §5.5. As discussed *supra*, Respondent committed Misconduct while acting under the authority of his document by failing to submit to post casualty chemical testing as required by 46 C.F.R. §4.06-5(a).

The Complaint seeks revocation of the Respondent's Coast Guard-issued credentials pursuant to 46 U.S.C. §7703. That Code section provides in relevant part:

> A license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder -
>
> > (1) When acting under the authority of that license, certificate, or document--
> >
> > > (B) has committed an act of misconduct.

(emphasis added).

Title 46 C.F.R. §5.569 provides the Table of 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. 46 C.F.R. §5.569(d); Appeal

Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174. With the exception of wrongful possession, use, sale, or association with dangerous drugs, revocation is not a mandatory sanction for Misconduct. *Allen v. Shae,* NTSB Order No. EM-204 (2008). In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by the respondent; respondent's prior records; and evidence of mitigation or aggravation.[6] *See* 46 C.F.R. §5.569(b)(1)-(3).

Remedial Action: In the instance matter, Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. *See* 33 C.F.R. §5.569(b)(1).

Respondent's Prior Records: The undersigned notes that the Respondent does lawfully hold a Master of Towing Vessels license (Issue Number 6) which, per the evidence adduced in the hearing, has never been the subject of previous disciplinary action. *See* 33 C.F.R. §5.569(b)(2). He has served as a merchant mariner for 30 years.

Mitigation or Aggravation: Respondent presented no witnesses or evidence in mitigation of his actions...except for the implicit understanding that he was, in all probability, in some degree of pain or discomfort following the incident that occurred on or about December 8, 2008. Since his physical and/or emotional condition did not rise to the level of a legal defense to his actions (*i.e.*, impossibility, *see supra*), I can only afford his condition some weight in mitigation of his actions. *See,* 33 C.F.R. §5.569(b)(3).

By contrast, the Coast Guard presented matters in aggravation that would support revocation. Specifically, the Coast Guard proved Respondent's duplicitous behavior

[6] In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action brought against a mariner for refusal to submit to a drug test, the NTSB expressed its preference that the Coast Guard affirmatively prove

relative to the required drug testing. I point with particularity the events on the afternoon and evening of December 9, 2008. At one moment, Respondent could drive his truck, walk unassisted, go to a motel and be photographed. At the next, he claimed his pain was too great to even get out of his truck and obtain medical attention—yet within an hour, he could again drive and again walk unassisted. The evidence strongly suggests Respondent intentionally avoided complying with his employer's order.

"Of paramount concern is the safety of life at sea and the welfare of individual seamen." Appeal Decision 2624 (MOORE) (2005) citing Appeal Decision 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976). Refusal to submit to a post incident chemical test raises a serious doubt about a mariner's ability to perform safely and competently in the future. "Past Commandant Decisions on Appeal have articulated a clear rationale as to why revocation of a mariner's credential is appropriate in cases involving the mariner's refusal to submit to a required drug test: 'if mariners could refuse to submit to chemical testing and face a lesser Order, it is difficult to imagine why anyone that may have used drugs would ever consent to be tested.'" Appeal Decision 2624 (MOORE) (2005) citing and quoting Appeal Decisions 2578 (CALLAHAN) (1996) and 2624 (DOWNS) (2001).

WHEREFORE,

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specific factors in aggravation in order to depart from the guidance provided in 46 CFR Table 5.569.

VII. ORDER

IT IS HEREBY ORDERED, that all elements of the Complaint filed against Michael J. Thomas on December 23, 2008, are found **PROVED**.

IT IS FURTHER ORDERED, that the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to Michael J. Thomas are **REVOKED OUTRIGHT**.

IT IS FURTHER ORDERED, that Michael J. Thomas is to immediately tender his valid Coast Guard-issued Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials to the Marine Safety Unit Galveston, 3101 FM 2004, Texas City, Texas.

I**T IS FURTHER ORDERED**, that Michael J. Thomas is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Document or Merchant Mariner's License issued by the U.S. Coast Guard.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 CF.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and dated this the 2d day of October, 2009,
at New Orleans, Louisiana.

_____

HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

ATTACHMENT A_ – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Drug and Alcohol Policy
2. U.S. Coast Guard Form 2692
3. U.S. Coast Guard Form 2692B
5. Paycheck Stubs for Michael Thomas
6. Test Results for Morgan Whittington

COAST GUARD WITNESSES

1. Greg Berry, Breathwit Marine Contractors, LTD.
2. Wes Newman, Breathwit Marine Contractors, LTD.
3. John Neuman
4. CWO2 Ray Gentry, United States Coast Guard
5. PO Michael Curran, United States Coast Guard

RESPONDENT EXHIBITS

A. Letter from Dr. Mock to Barry Evans

B. Typewritten Statements

C. Medical Records from Christus, St. John

E. Report from Dr. Wolffe

F. Color Photograph

G. Color Photograph

I. Marine Employer's Drug Testing Guidance

J. Drug and Alcohol Policy

N. Color Photograph

N1. Color Photograph

O1. Color Photograph

O2. Color Photograph

O3. Color Photograph

O4. Color Photograph

RESPONDENT WITNESSES

1. Walt Breathwit, Breathwit Marine Contractors, LTD.

2. Michael J. Thomas

ALJ EXHIBITS

I. Correspondence by Larry J. Lipshultz, M.D., dated May 19, 2009, regarding Michael Thomas

II. United States Coast Guard Report of Investigation into the Circumstances Surrounding the Incident Involving Collision UTV MISS SALLY ICW MM 343

III. Sabine Surveyors, LTD., damage survey of the pushboat MISS SALLY dated July 27, 2009

ALJ WITNESS LIST

1. P.J. Mock, Jr., M.D.