

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

UNITED STATES COAST GUARD

Complainant

vs.

MICHAEL AARON FRANKS

Respondent

Docket Number 2011-0198
Enforcement Activity No. 4001926

DECISION AND ORDER

Issued: November 16, 2011

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

**CWO Christian Menefee
LT Christopher Jones
Sector Houston/Galveston**

For the Coast Guard

Michael Aaron Franks, *Pro se*

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) instituted this suspension and revocation proceeding seeking revocation of Respondent Michael Aaron Franks' Merchant Mariner's License Number 1504793. This action is brought pursuant to the authority contained in 46 U.S.C. § 7704(c) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On May 5, 2011, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7704(c), alleging one count of Use of, or Addiction to the Use of Dangerous Drugs pursuant to 46 C.F.R. § 5.35. Specifically, the Coast Guard alleges that on October 25, 2010, Respondent took a periodic drug test which yielded a positive result for cocaine metabolites. Respondent filed his Answer on May 10, 2011, denying the jurisdictional and factual allegations, and requesting a hearing.¹ On May 25, 2011, the Chief Administrative Law Judge referred this case to the undersigned for hearing and disposition.

A hearing on this matter was held on October 17, 2011 in Houston, Texas. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-59, and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Chief Warrant Officer Christian Menefee and Lieutenant Christopher Jones represented the Coast Guard; Respondent appeared *pro se*. The Coast Guard offered eight (8) exhibits and presented testimony of five (5) witnesses. Respondent offered one (1) exhibit and presented testimony of one (1) witness. The list of witnesses and exhibits is contained in Attachment A. Both the Coast Guard and Respondent presented closing arguments at the conclusion of the hearing. (Tr. at 187-190).

¹ Respondent marked that he denied both the jurisdictional and factual allegations, but did not specifically list which allegations he denied.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, the undersigned finds the charge that Respondent was a user of dangerous drugs in violation of 46 U.S.C. § 7704(c) **NOT PROVED**.

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 was a holder of Merchant Mariners License No. 1504793. (Tr. at 134-35).
2. Kirby Inland Marine (Kirby) employed Respondent at all relevant times mentioned herein. (Tr. at 13, 135).
3. Kirby required Respondent to take a drug test on October 25, 2010. (Tr. at 13, 23, 38-39).
4. Respondent submitted to a urinalysis on October 25, 2010. (Tr. at 23).
5. Stephen Carroll, an employee of International Drug Detection (IDD), collected a split sample of Respondent's urine on October 25, 2010 aboard the vessel DELOS CASE. (Tr. at 19, 23, CG Ex. 1).
6. Mr. Carroll is a qualified urine collector pursuant to 49 C.F.R. Part 40. (Tr. at 18, 20).
7. As Respondent's initial sample was not quite to the fill line, Mr. Carroll allowed Respondent to provide additional urine into the same container. (Tr. at 149, 171-72).
8. Respondent and Respondent's former co-worker, Luke Allen, testified that Mr. Carroll poured the specimen back and forth between two bottles prior to sealing the bottles. (Tr. at 149, 172).
9. Respondent testified that Mr. Carroll was in a hurry and failed to tape the water sources, put blue dye in the toilet, or check for adulterants. (Tr. at 147, 181).
10. Respondent signed the Federal Custody and Control Form (CCF) certifying that Mr. Carroll sealed both specimen bottles in his presence. (CG Ex. 1, Tr. at 149-50).
11. Mr. Carroll packaged Respondent's specimen in accordance with DOT standards and sent the specimen to Alere Toxicology Service (Alere) for testing. (Tr. at 40, CG Ex. 1).
12. Alere is a Substance Abuse and Mental Health Services Administration (SAMHSA) and DOT-certified laboratory. (Tr. at 55, CG Ex. 10).

13. Alere processed Respondent's sample in accordance with 49 C.F.R. Part 40. (Tr. at 53, 57, CG Ex. 6).
14. On October 27, 2010, Alere conducted an immunoassay screen on an aliquot from Respondent's urine specimen. (Tr. at 59, 72-73, CG Ex. 6).
15. The initial immunoassay screen tested positive for cocaine metabolites. (Tr. at 72-73, CG Ex. 6).
16. Alere subsequently performed a gas chromatography mass spectrometry (GCMS) test on Respondent's urine sample which yielded a cocaine metabolite concentration of 1,321 nanograms per milliliter. (Tr. at 65, CG Ex. 6).
17. As the confirmatory test cutoff for cocaine metabolite concentration is 100 nanograms per milliliter, Respondent's sample was positive for cocaine metabolites. (Tr. at 67-68).
18. No substance other than cocaine will yield a positive result for cocaine metabolites on a GCMS test. (Tr. at 74, CG Ex. 6).
19. On November 3, 2010, Dr. Dash certified that Respondent's specimen was positive for cocaine metabolites. (CG Ex. 2).
20. Someone from the office of Medical Review Officer (MRO) Dr. Neil Dash spoke with Respondent on November 3, 2010 and inquired whether there was any legitimate medical reason for the presence of cocaine metabolites in Respondent's system; Respondent could provide no such reason. (Tr. at 120-21, 128, 130-31, CG Ex. 3).
21. Respondent requested the split specimen be tested for confirmation. (Tr. at 128, CG Ex. 3).
22. Laboratory Corporation of America (Lab Corp) received the split specimen on November 5, 2010. (Tr. at 85, CG Ex. 7).
23. Lab Corp is a SAMHSA certified laboratory. (CG Ex. 10).
24. Lab Corp conducted the confirmatory test in accordance with 49 C.F.R. Part 40. (Tr. at 81, 86-87, 88, 90-92).
25. Lab Corp tested the specimen for cocaine metabolites by performing a GCMS test on Bottle B of Respondent's urine specimen. (Tr. at 86-89, CG Ex. 7).
26. Lab Corp's GCMS confirmatory test yielded a result of 1,560 nanograms per milliliter, a positive result for cocaine metabolites. (Tr. at 88, CG Ex. 7).
27. On November 18, 2010, someone from Dr. Dash's office advised Respondent that the split specimen, tested by Lab Corp, was positive for cocaine metabolites. (Tr. at 130-31, CG Ex. 3).

28. On November 18, 2010, Dr. Dash certified that Respondent's split specimen was positive for cocaine metabolites. (CG Ex. 2).

DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges have the authority to revoke a mariner's license, certificate or document for violations arising under 46 U.S.C. § 7704. See 46 C.F.R. § 5.19(b). Under 7704(c), a Coast Guard issued license, certificate or document shall be revoked if the holder of that license or certificate has been a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. See also Appeal Decision 2634 (BARETTA) (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)).

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 the use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16.

Additionally, the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 C.F.R. Part 40 and 46 C.F.R. 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 C.F.R. § 16.201(b). However, in order to establish the 46 C.F.R. § 16.201(b) presumption, the Coast Guard must prove (1) that the respondent was the person who was tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent's urine tested positive for cocaine metabolites in an October 25, 2010 drug test. The Coast Guard seeks revocation of Respondent's license in accordance with 46 C.F.R. § 5.569.

Burden of Proof

The Administrative Procedure Act (APA), Title 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before Administrative Law Judges. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. 33 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). See also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer (IO) must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of a Dangerous Drug

The Coast Guard bears the burden of proof and must prove the allegations by a preponderance of the evidence to prevail. 33 C.F.R. §§ 20.701, 20.702(a). In a drug case based solely on urinalysis test results, a prima facie case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs; 2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16.² Appeal Decision 2603 (HACKSTAFF) (1998). See also Appeal Decision 2653 (ZERINGUE) (2002). For the reasons outlined below, the undersigned finds that while the Coast Guard proved the first two elements, the Coast Guard failed to prove that the test was conducted in accordance with 46 C.F.R. Part 16. Accordingly, the undersigned finds that the Coast Guard has failed to make a prima facie case of use of a dangerous drug.

In the instant case, the Coast Guard has shown that on October 25, 2010, Respondent took a urine test conducted in accordance with 49 C.F.R. Part 40. Respondent's urine sample was collected by Stephen Carroll, a DOT-certified collector. (Tr. at 18, 20). Mr. Carroll capped and sealed the specimen bottles in front of Respondent and shipped them to Alere in accordance with DOT testing procedures. (Tr. at 40, 149-50).

Alere initially analyzed Respondent's specimen via immunoassay and determined Respondent's urine to be positive for cocaine metabolites. (Tr. at 59, 72-73, CG Ex. 6). Subsequently, Alere performed a GCMS test on Respondent's sample which yielded a cocaine metabolite concentration of 1,321 nanograms per milliliter. (Tr. at 65, CG Ex. 6). The confirmation test cutoff for cocaine metabolite is 100 nanograms per milliliter. Accordingly, Respondent's urine sample was positive for cocaine metabolites. (Tr. at 67-68, 49 C.F.R. § 40.87).

² 46 C.F.R. Part 16 requires, in part, that chemical testing of personnel be conducted in accordance with the procedures detailed in 49 C.F.R. Part 40.

When contacted by the MRO's office, Respondent could provide no medical reason for his positive test result, and requested that the split sample be tested for confirmation. (See Tr. at 128). Subsequently, Lab Corp performed a GCMS confirmatory test on Bottle B of Respondent's sample. (Tr. at 86-89). Lab Corp's confirmatory test yielded a result of 1,560 nanograms per milliliter of cocaine metabolites. (Tr. at 88, CG Ex. 7). Dr. Dash, the MRO, received and verified Respondent's positive laboratory results. (CG Ex. 2).

Ultimately, two (2) certified laboratories, performing a total of three (3) DOT drug tests and the MRO determined that there were positive findings of cocaine use by Respondent.

While the Coast Guard has proven the first two elements of a prima facie case, the Coast Guard has failed to prove the third requisite element, namely, that the test was conducted in accordance with 46 C.F.R. Part 16. 46 C.F.R. Part 16, subpart B specifies five circumstances under which a marine employee is subject to drug testing: (1) Pre-employment testing; (2) Periodic testing; (3) Random testing; (4) Testing following a serious marine accident; and (5) Testing following reasonable cause. 46 C.F.R. §§ 16.210, 16.220, 16.230, 16.240, and 16.250. Here, the Coast Guard specifically alleged that Respondent failed a periodic drug test.

Coast Guard regulations on "Periodic testing requirements" provide that "...[A]n applicant must pass a chemical test for dangerous drugs for- (1) An original issuance of a license, COR, MMD, or MMC; (2) The first issuance, raise of grade, or renewal of an officer endorsement on a merchant mariner credential; (3) A raise of grade of a license or COR; (4) The first endorsement as an able seaman, lifeboatman, qualified member of the engine department, or tankerman; or (5) A reissuance of a credential with a new expiration date. The applicant must provide the results of the test to the Coast Guard Regional Examination Center (REC) at the time of submitting an application. The test results must be completed and dated not more than 185 days before submission of the application." 46 C.F.R. § 16.220(a). However, an applicant need not submit evidence of passing a chemical test if the applicant provides "satisfactory evidence"

that he or she has “(1) Passed a chemical test for dangerous drugs required by this part within the previous six months with no subsequent positive chemical tests during the remainder of the 6-month period; or (2) During the previous 185 days been subject to a random testing program required by § 16.230 for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs required by this part.” 46 C.F.R. § 16.220(c).

Put simply, the record is devoid of any evidence tending to show why Respondent was asked to submit to a periodic drug test. Aside from the Coast Guard and the collector flatly asserting that the test was periodic in nature, the Coast Guard presented no evidence to explain how Respondent’s drug test fell under one of the delineated reasons for a periodic drug test pursuant to 46 C.F.R. § 16.220(a). (Tr. at 13, 38-39). The Coast Guard proffered nothing related to any change in licensing status on part of the Respondent. Nothing in the record suggests that Respondent applied for the original issuance of a license, COR, MMD, or MMC; the first issuance, raise of grade, or renewal of an officer endorsement on a merchant mariner credential; a raise of grade of his license or COR; a first endorsement as an able seaman, lifeboatman, qualified member of the engine department or tankerman; or the reissuance of a credential with a new expiration date. Further, the Coast Guard offered no evidence related to Kirby’s drug testing policy or Respondent’s acquiescence to such policy. The only evidence in the record in any way related to a periodic test was the Collector’s vague explanation of his general understanding of the difference between a random and periodic test.³ (Tr. at 38, 186).

At the hearing, Respondent himself questioned the authenticity of the “periodic” nature of the drug test; the Coast Guard offered nothing in response. During his testimony, Respondent explained that, at the time of the test he thought to himself, “Well, this is odd. I’m the only one

³ “...[W]hen a random would come up at Kirby, most cases a random would come up, meaning a boat would come up, you would go to that motor vessel, and a random would mean that you would drug test the whole vessel, every person on the vessel. A periodic test was a test that we would do where Kirby was specifically drug-testing certain people, and it could be anywhere from, you know, the whole boat to a few people on the boat.” (Tr. at 38).

getting a drug test on the boat after complaining about [being required to work in excess of twelve hours a day].”⁴ (Tr. at 144-45). In his closing statements, Respondent re-asserted his confusion about why he was ordered to submit to a drug test, noting, “[i]t was stated that this was a periodic drug test, it was not a random; therefore, somebody ordered this drug test.” (Tr. at 183).

Further, when questioned by the undersigned, it was clear that Respondent had recently been subjected to a random urinalysis program and therefore may not have been required to submit to the periodic test had the test been ordered for one of the proper delineated purposes. (Tr. at 141, 186-87). See 46 C.F.R. § 16.220(c)(2).

Although the undersigned has found that Respondent had a positive urinalysis for cocaine metabolites, a finding which presents serious safety concerns, absent a showing of how or why Respondent’s drug test was periodic in nature, the undersigned cannot find the charge proved. If nothing more than the stark assertion of the type of test taken was required, the rationale behind the delineation of five separate acceptable types of tests to which marine employees are subject, and the specific requirements of each type of test, would be moot. 46 C.F.R. §§ 16.210, 16.220, 16.230, 16.240, and 16.250. Notably, this absence of proof on part of the Coast Guard also presents Fourth Amendment concerns. See generally Skinner v. Railway Labor Executives’ Assoc., 489 U.S. 602 (1989).

Given all the above, even though the undersigned finds that Respondent was tested for dangerous drugs and the test yielded a positive result, the undersigned finds that the Coast Guard has failed to prove use of, or addiction to the use of dangerous drugs pursuant to 46 C.F.R. § 5.35 by a preponderance of the evidence.⁵

⁴ To be clear, the undersigned is not finding that Respondent was improperly singled-out for testing. Respondent’s specific assertions at the hearing are discussed merely to show that Respondent himself twice asserted that even he was uncertain as to why a periodic test had been administered in the first place.

⁵ For the record, the undersigned notes that Respondent alleged various violations of 49 C.F.R. Part 40 during the collection procedure. These allegations include his being allowed to void twice into the same container, the

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner License 1504793.
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 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-59.
3. Respondent underwent a October 25, 2010 urinalysis which followed the guidelines set for drug testing by the Department of Transportation in 49 C.F.R. Part 40 and 46 C.F.R. § 5.35.
4. Respondent's October 25, 2010 drug test was positive for cocaine metabolites.
5. The Coast Guard failed to prove that the test was conducted in accordance with 46 C.F.R. Part 16.
6. Because of the Coast Guard's failure to prove the test was conducted in accordance with 46 C.F.R. Part 16 the Coast Guard did **NOT PROVE** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.

ORDER

IT IS HEREBY ORDERED that Respondent's Merchant Mariner's License Number 1504793 shall be returned to Respondent. The matter is hereby **DISMISSED WITH PREJUDICE**.

collector's pouring the specimen back and forth between two containers, failure to tape the water sources, and failure to put blue dye in the toilet or check for adulterants. (Tr. at 147, 149). The undersigned notes that none of Respondent's allegations of error rise to the level of "fatal" such that the test should be invalidated. See 49 C.F.R. § 40.199. Coast Guard case law has held that minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. See Appeal Decisions 2668 (MERRILL) (2007); 2575 WILLIAMS) (1996); 2546 (SWEENEY) (1992); aff'd NTSB Order No. EM-176 (1994); 2541 (RAYMOND) (1992), aff'd NTSB Order No. EM-175 (1994); 2537 (CHATHAM) (1992); 2522 (JENKINS) (1991).

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 C.F.R. §§ 20.1001 – 20.1004. A copy of 33 C.F.R. §§ 20.1001 – 20.1004 is provided as **Attachment B**.

Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date:

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Stephen Carroll
2. Susan Bybee
3. Robert Grzeskiewicz
4. Dr. Neil J. Dash
5. Michael Franks

RESPONDENT'S WITNESSES

1. Luke Allen

EXHIBIT LIST

COAST GUARD'S EXHIBITS

- | | |
|-----------|--|
| CG Ex. 1 | Federal Drug Testing Custody and Control Form Collector Copy |
| CG Ex. 2 | Federal Drug Testing Custody and Control Form MRO Copy |
| CG Ex. 3 | MRO Interview Notes |
| CG Ex. 4 | MRO Positive Test Results Letter- Initial Test |
| CG Ex. 5 | MRO Positive Test Results Letter- Split Specimen |
| CG Ex. 6 | Alere Litigation Package |
| CG Ex. 7 | Lab Corp Litigation Package |
| CG Ex. 8 | NOT OFFERED AT THE HEARING |
| CG Ex. 9 | NOT OFFERED AT THE HEARING |
| CG Ex. 10 | List of SAMHSA Approved Laboratories |

RESPONDENT'S EXHIBITS

- Resp. Ex. A Respondent's Proposed Witness List

ATTACHMENT B

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
 - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
 - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If

the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.