

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

UNITED STATES COAST GUARD
Complainant

vs.

JUSTIN SCOTT ROBERTS
Respondent

Docket Number 2011-0300
Enforcement Activity No. 4048000

DECISION AND ORDER

Date Issued: January 09, 2012

Issued by: Hon. Bruce Tucker Smith
Administrative Law Judge

Appearances:

For the Coast Guard;

CWO Quinn D. Quaglino, IO
LT Parris Stratton, IO
U.S. Coast Guard Sector New Orleans

For the Respondent;

Justin Scott Roberts, *Pro se*

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector New Orleans (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Justin Scott Robert's (Respondent) Coast Guard-issued Merchant Mariner's Credential (MMC). The instant action is brought pursuant to the legal authority codified at 46 USC §7703(1)(B) and 46 CFR §5.27 (Misconduct).

On June 30, 2011, the Coast Guard filed an original Complaint alleging that on May 26, 2011, Respondent was directed by his then employer, John W. Stone Oil Distributor, LLC to submit to a reasonable cause drug test by providing a urine specimen. The Coast Guard further alleged Respondent failed to provide the requisite amount of urine, as specified by 49 CFR Part 40, and that Respondent was not afflicted with any valid medical condition that would warrant his inability to produce urine. According to the Coast Guard's specifications, "Respondent's failure to provide a specimen of adequate quantity without a valid medical condition is a 'refusal to test' by 49 CFR [§]40.191(a)(5). 'Refusal to test' is an act of Misconduct. . . ." Based upon the foregoing allegations, the Coast Guard sought revocation of Respondent's credential as an appropriate sanction.

On November 9, 2011, this matter came on for hearing in New Orleans, Louisiana, in the ALJ Courtroom, Hale Boggs Federal Building. The proceeding was conducted in accordance with the Administrative Procedure Act (APA), as amended and codified at 5 USC §§551-59, and the Coast Guard procedural regulations set forth at 33 CFR Part 20. Coast Guard Investigating Officers (IOs) CWO Quinn D. Quaglino and LT Parris Stratton appeared on behalf of the Coast Guard; Respondent appeared on his own behalf.¹

Both parties appeared, presented their respective cases, and rested. Seven witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered 33 exhibits into evidence, 22 of

¹ The court would note that its staff attempted to communicate with Respondent on numerous occasions before the hearing; however, Respondent failed to return court staff's messages. Notably, court staff sought to provide Respondent with the opportunity to engage pro bono, i.e. free, legal counsel. Despite court staff's multiple offers, Respondent failed to take advantage of this opportunity.

which were admitted. Respondent testified on his own behalf and offered two exhibits into evidence, both of which were admitted.²

The parties were afforded the opportunity to make closing arguments; thereafter, the court closed the administrative record.

II. FINDINGS OF FACT/CONCLUSIONS OF LAW

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, including party stipulations.

1. At all relevant times mentioned herein, Respondent Justin Scott Roberts was the holder of, and acting under the authority of, a Coast Guard-issued Merchant Mariner's Credential (credential). (CG Ex. 1).
2. On or about May 26, 2011, Respondent Justin Scott Roberts was employed by, and was on duty on behalf of, John W. Stone Oil Distributor, LLC as a Tankerman. (CG Ex. 18).
3. At all relevant times mentioned herein, John W. Stone Oil Distributor, LLC was a marine employer. 46 CFR §16.105.
4. As a "marine employer" John W. Stone Oil Distributor, LLC was obliged to "require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a credential issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs." 46 CFR §16.250(a).
5. John W. Stone Oil Distributor, LLC's decision to drug test Respondent Justin Scott Roberts was "based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance indicators of probable use." This belief was based upon the observations of the individual by two John W. Stone Oil Distributor, LLC employees, Ben A. Sasso and Chester "Chip" Brewer 46 CFR §16.250(b). (Tr. at 125 – 150).
6. On or about May 26, 2011, two John W. Stone Oil Distributor, LLC employees, Ben A. Sasso and Chester "Chip" Brewer, personally observed Respondent Justin Scott Roberts "talking faster than normal . . . excited" and acting "very hyper," which was

² Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Coast Guard Exhibits are as follows: Coast Guard followed by the exhibit number (i.e., 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.).

atypical of the behavior they normally witnessed of Respondent Justin Scott Roberts. (Tr. at 125, 150).

7. On or about May 26, 2011, two John W. Stone Oil Distributor, LLC employees, Ben A. Sasso and Chester "Chip" Brewer, personally observed that two of the water tanks that Respondent was charged with maintaining were filled to the point of overflowing such that they could not approach the dock. (Tr. at 121, 149).
8. Respondent's marine employer, John W. Stone Oil Distributor, LLC, possessed a reasonable and articulable belief that Respondent has used a dangerous drug(s) on or about May 26, 2011. This belief was based on direct, personal observation, by through the persons of Ben A. Sasso and Chester "Chip" Brewer, of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use by Respondent Justin Scott Roberts.
9. On or about May 26, 2011, Respondent Justin Scott Roberts was properly directed by his marine employer, John W. Stone Oil Distributor, LLC, to submit to a reasonable cause or reasonable suspicion drug test on the basis of two eyewitness accounts, by Ben A. Sasso and Chester "Chip" Brewer. (Tr. 173-174; CG Ex. 14, 29, 30).
10. On or about May 26, 2011, Respondent Justin Scott Roberts was permitted to drink up to forty ounces of liquid in order to stimulate his ability to produce a quantity of urine sufficient for testing. (Tr. at 185-86; CG Ex. 31, 32).
11. On or about May 26, 2011, Respondent Justin Scott Roberts was afforded four opportunities to submit a urine specimen to Glen Zetsch, a duly qualified and certified collection agent. (Tr. 185-87; CG Ex. 14, 31, 32).
12. On or about May 26, 2011, Respondent Justin Scott Roberts was unable to produce any urine during four separate attempts to do so within the allotted time. (Tr. 185-87; CG Ex. 31, 32).
13. As a marine employee, Respondent Justin Scott Roberts is deemed to have "refused to take a drug test" because of his failure to provide a urine specimen and/or failure to provide a sufficient specimen of urine without an adequate medical explanation for such failure. 49 CFR § 40.191(a)(5).
14. Use of over-the-counter decongestants was not an acceptable medical reason for Respondent Justin Scott Roberts' inability to produce urine pursuant to the American Association of Medical Review Officers/ DOT guidelines. (Tr. at 212-213).
15. Respondent Justin Scott Roberts failed to provide an adequate medical explanation for his inability to submit to chemical testing on May 26, 2011. (Tr. at 196-214; CG Ex. 33).
16. By virtue of Respondent's refusal to submit a urine specimen when lawfully directed by his marine employer, Respondent committed an act of Misconduct. 46 CFR §5.27.

III. SUMMARY OF DECISION

The instant matter is governed by the interplay of 46 USC §7703(1)(B), 46 CFR §5.27 (Misconduct) and 46 CFR Part 16, Subpart B. The statute provides that a mariner's document may be suspended or revoked if that mariner has committed an act of Misconduct. The regulation, in turn, defines "Misconduct" as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations It is an act which is forbidden or a failure to do that which is required." 46 CFR §5.27. Herein, Respondent is charged with refusing to test, an act of Misconduct, as a result of his alleged inability to produce a urine specimen for a reasonable suspicion drug test on May 26, 2011, which was lawfully ordered by his maritime employer pursuant to 46 CFR §16.250.

For the reasons discussed herein, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Justin Scott Roberts committed an act of Misconduct by his refusal to submit a urine specimen in response to his marine employer's lawful directive without an adequate medical explanation for such inability.

IV. DISCUSSION

A. General

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 USC §7701. Pursuant to 46 CFR §5.19, an ALJ holds the authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 USC §7703.

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 2640 (PASSARO) (2003).³ Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not

³ Pursuant to 46 CFR §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."

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 2639 (HAUCK) (2003).

B. Jurisdiction

“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.” Appeal Decision 2025 (ARMSTRONG) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decisions 2620 (Cox) (2001); 2425 (BUTTNER) (1986); 2025 (ARMSTRONG) (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

In the instant case, the Coast Guard proved that at all relevant times mentioned herein Respondent Justin Scott Roberts was the holder of a Coast Guard-issued Merchant Mariner’s Credential (credential) and that he was acting under the authority of that credential when he was directed to submit to a reasonable suspicion drug test by his marine employer.

C. Burden of Proof

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 USC §7703, and the implementing regulations, 46 CFR Part 5; Part 10, Subpart B; 33 CFR Part 20. The Administrative Procedure Act (APA), 5 USC §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States ALJs. 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. See 5 USC §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in

asserting his affirmative defense by a preponderance of the evidence. 33 CFR §§20.701, 20.702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988) (citing Steadman v. SEC, 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 & 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)).

D. Discussion of the Evidence

1. Marine Employer Had Reasonable Cause to Require Respondent to Submit to Chemical Testing

Pursuant to 46 CFR §16.250(a), a “marine employer shall require any crewmember engaged or employed on board a vessel owned in the United States that is required by law or regulation to engage, employ or be operated by an individual holding a credential issued under this subchapter, who is reasonably suspected of using a dangerous drug to be chemically tested for dangerous drugs.”

There is no dispute herein that John W. Stone Oil Distributor, LLC is a “marine employer” as that term is defined at 46 CFR §16.105. Similarly, there is no dispute herein that on May 26, 2011, Respondent was a crewmember, specifically a Tankerman, assigned to the S-24 (vessel identification number 642522), an inspected tank barge. Further there is no dispute herein that Respondent held a Merchant Mariner’s Credential (credential) as required to work as a Tankerman aboard the S-24.

A marine employer’s decision to conduct a reasonable suspicion or reasonable cause drug test “must be based on a reasonable and articulable belief that the individual has used a dangerous drug based on direct observation of specific, contemporaneous physical, behavioral, or performance

indicators of probable use. Where practicable, this belief should be based on the observation of the individual by two persons in supervisory positions.” 46 CFR §16.250(b).

The court finds the testimonies of Ben A. Sasso and Chester “Chip” Brewer particularly persuasive, inasmuch as both personally witnessed Respondent’s behavior and mannerisms on May 26, 2011. The testimony of Chester “Chip” Brewer, head of safety and security for Respondent’s marine employer was of exceptional value to the court. (Tr. at 144). Brewer’s prior work experience included multiple positions within uniformed law enforcement, including his service on a drug task force. (Id.). Brewer’s educational background includes in excess of 160 hours of education and training in observation of individuals under the influence of drugs. (Tr. at 167-168). In addition to his education and training, Brewer has first-hand experience as a law enforcement officer interacting and observing individuals under the influence of both legal and illegal substances. (Tr. at 168). Thus, Brewer’s observations and testimony were of particular value to the court.

Both Sasso and Brewer testified that on May 26, 2011, they were present at a John W. Stone Oil Distributor, LLC facility in Davant, Louisiana. Both men testified that they each observed Respondent, “talking faster than normal . . . excited” and “very hyper,” which was atypical of the behavior they normally witnessed of Respondent. (Tr. at 125, 150).

Additionally, Sasso and Brewer testified that upon their arrival to the facility, two of the water tanks that Respondent was charged with maintaining, were filled to the point of overflowing such that the men could not approach the dock.⁴ The flooded tanks strongly suggest Respondent’s inattentiveness to the matters under his care.

Both witnesses also described Respondent’s bizarre behavior involving his incessant and inappropriate use of bug spray. (Tr. at 150 – 151, 125 – 126).

⁴ Brewer further testified he found Respondent’s behavior to be out of character given, “the water overflowing, the way [Respondent] was acting . . . , wouldn’t make eye contact with me that much, very, very nervous, very hyper and [the two different barrels of oil for a customer].” (Tr. at 153).

Brewer testified that he based his decision to direct Respondent to submit to a reasonable suspicion drug test upon the totality of Respondent's actions. (Tr. at 171, 173). In accordance with 46 CFR §16.250(c), Brewer, on behalf of the marine employer, then properly directed Respondent to submit to drug testing and informed him that he needed to submit a specimen within the next three hours. (Tr. at 173-174).

In Suspension and Revocation administrative matters, “the determination as to whether reasonable suspicion or reasonable cause exists to support a request for the administration of chemical testing [of a marine employee] is a factual determination [to be] made by the ALJ based upon all the evidence available.” Appeal Decision 2672 MARSHALL (2007) (citing Appeal Decisions 2625 ROBERTSON (2002); 2624 DOWNS (2001)).

“Articulating precisely what ‘reasonable suspicion’ . . . mean[s] is not possible. [It is a] commonsense, nontechnical conception[] that deal[s] with ‘the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.’” Ornelas v. U.S., 517 U.S. 690, 696 (1996) (quoting Illinois v. Gates, 462 U.S. 213, 231(1983) (internal citations omitted)). Reasonable suspicion is a “fluid concept . . . that takes [its] substantive content from the particular context . . . in which [it is] being assessed. Id. (citing Gates, supra at 232.)

Therefore, based upon all of the available evidence and circumstances, the court specifically finds that Respondent's marine employer, through the direct, personal observations of Messrs. Sasso and Brewer, had reasonable cause to direct Respondent to submit to chemical testing and so ordered him to comply.

2. Respondent's Refusal to Test

Pursuant to 49 CFR § 40.191, a marine employee is deemed to have “refused to take a drug test” for a variety of reasons, including failure to provide a urine specimen and/or failure to provide a sufficient specimen of urine without an adequate medical explanation for such failure.

Glenn Sidney Zetsch, a certified Department of Transportation collector and employed by West Jeff Industrial Medicine Professional Drug Screening, testified that on May 26, 2011, he was called to conduct a reasonable suspicion drug test at the John W. Stone Oil Distributors, LLC facility in Davant, Louisiana. (Tr. 178-185). Zetsch testified that he arrived at the Davant facility at approximately 2:15 p.m., whereupon he witnessed Brewer direct Respondent to submit to a drug screen. Upon entering the outbuilding aboard the dock, Respondent told Zetsch “I just went to the bathroom. So, it’s going to be awhile.” (Tr. at 185). Zetsch explained to Respondent that he could drink up to forty ounces of water, but that Respondent needed to at least make an attempt at providing a urine specimen.

The facts reveal that after drinking water, Respondent made four unsuccessful attempts to provide a urine specimen within the allotted three hours. (Tr. at 186-187).

Respondent questioned Zetsch about the consequences of his inability to produce a specimen. Zetsch responded, telling Respondent that he would need a valid medical reason, approved by a Medical Review Officer (MRO), explaining why he was unable to urinate. (Tr. 186).

The Respondent then replied, “my wife said she thought I got a medical problem, I think I got a medical problem.” However, Respondent did not elaborate on his alleged medical problem. (Tr. at 193). The court also notes Zetsch testified that he observed Respondent to be “very jittery” throughout his encounter with Respondent. (Tr. at 190).

It is undisputed that Respondent failed to provide a urine specimen when directed. (Tr. at 188; see Complaint and Answer).

Accordingly, Respondent is deemed to have “refused” to take the requested drug test.

3. No Adequate Medical Reason Exists to Support Respondent’s Failure to Provide a Urine Specimen on May 26, 2011

Respondent contends he was unable to comply with his marine employer’s lawful order, because of the side-effects of over-the-counter sinus medications he had taken. (Tr. at 223-24). In support of his contention, Respondent produced a letter from a Dr. Imseis. (Resp. Ex. A). In that letter, Dr. Imseis

generally opined that over-the-counter decongestants could render a person unable to urinate. Dr. Imseis did NOT say that over-the-counter decongestants rendered Respondent unable to provide a urine specimen. Dr. Imseis' letter is noteworthy, because there is no indication Dr. Imseis ever conducted a medical examination of Respondent or performed any tests to determine whether such medications had any effect on Respondent. The court regards Dr. Imseis' letter to be a general expression of the potential impact of over-the-counter decongestants on the general human population—and not a specific medical opinion concerning this Respondent.

By contrast, the Coast Guard presented the testimony of Brian Michael Bourgeios, M.D., a certified Medical Review Officer (MRO). Dr. Bourgeios was asked to review Dr. Imseis' suggestion that Respondent's inability to provide a specimen was due to ingestion of over-the-counter decongestants.

Dr. Bourgeios found Dr. Imseis' assessment to be medically unacceptable. According to Dr. Bourgeios' testimony, "medications are not going to produce sufficient physiologic changes that you cannot provide 45 cc's, which is a small volume, after three hours, and at a 1.2-liter challenge." (Tr. at 201). Dr. Bourgeios further testified that there was no medical foundation or support for the belief that "over-the-counter decongestants would produce a severe urinary retention syndrome to the point where you couldn't void after a fluid challenge for three hours." (Tr. 212).

Moreover, Dr. Bourgeios testified that use of over-the-counter decongestants was not an acceptable excuse for inability to produce urine pursuant to the American Association of Medical Review Officers/DOT guidelines. (Tr. at 212-213).

The court specifically finds Dr. Bourgeios more credible than Dr. Imseis in regard to the medical facts and circumstances of this case.

Accordingly, the court finds Dr. Imseis' letter (Resp. Ex. A), to be of no probative value. According to Respondent's own testimony, Dr. Imseis did not perform a physical examination nor did he perform any sort of lab work that would support a finding that Respondent's failure to provide a urine

specimen was caused by ingestion of over-the-counter decongestant medication. (Tr. at 223-224). The MRO also noted that Dr. Imseis' opinion was lacking in medical support. (Tr. at 199, 212-213).

In further support of his defense that over-the-counter medicines caused his inability to urinate, Respondent offered pages one and three from a four-page Internet website, "drugs.com," regarding "Advil Cold and Sinus" medications. (Resp. Ex. B).

The court finds that Respondent's own Exhibit B impugns both his affirmative defense and his credibility.

The facts reveal that Respondent was given a lawful directive by his marine employer to submit to a reasonable cause drug screen on May 26, 2011.

At the hearing, Respondent testified that he didn't know that over-the-counter medications might affect his ability to provide a urine specimen until he went to see Dr. Imseis—after the May 26, 2011 date when he failed to submit a urine specimen. (Tr. at 231).

Respondent's Exhibit B, is, in fact, dated "5/14/2011 8:58 AM," -- twelve days before his May 26, 2011 drug test. A portion of that Exhibit clearly reads: "Side effects [of Advil Cold and Sinus] . . . such as: urinating less than usual or not at all." Interestingly, Respondent had taken a pen and drawn a box around that language on the original copy of Respondent's Exhibit B. At the very least, Respondent's Exhibit B undercuts Respondent's assertion that he didn't know an over-the-counter medication might impair his ability to urinate until Dr. Imseis told him so—long after May 26, 2011.

Rather, the curious timing of these events raises the spectre that Respondent had a "ready-made defense" in the event he was ever forced to submit to maritime drug testing. That Respondent coincidentally had a printed copy of a web page which discussed the potential side effects of an over-the-counter decongestant two weeks prior to his drug test, is entirely too convenient. These facts suggest Respondent may have knowingly used illegal substances and was prepared to assert a "defense" well in advance of any drug test that he would have been subject to as a member of the maritime industry.

Based upon MRO/Dr. Bourgeois' highly credible testimony; Respondent's testimony and Respondent's own Exhibit B, the court finds Respondent's version of the facts to be lacking in veracity. Moreover, he has not sufficiently established an affirmative defense sufficient to overcome the Coast Guard's evidence. See 33 CFR §20.702.

Accordingly, the court finds that Respondent failed to provide an adequate medical explanation for his failure to submit a urine specimen on May 26, 2011.

4. Refusal to Submit a Urine Specimen for a Lawfully Directed Drug Screen Constitutes Misconduct

Pursuant to 46 CFR §5.27, "Misconduct is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes [and] regulations, It is an act which is forbidden or a failure to do that which is required." Id. By virtue of Respondent's refusal to submit a urine specimen, when lawfully directed to do so by his marine employer, Respondent committed an act of Misconduct.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 CFR §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 USC §7701; 46 CFR §5.5; Appeal Decision 1106 (LABELLE) (1959).

The decision on an appropriate sanction is one of the most crucial aspects of a court's resolution of a Suspension and Revocation hearing. Too frequently, however, the parties fail to produce probative evidence in support of their respective positions on a sanction.

Guidance on whether a credential ought to be suspended or revoked is found in 46 CFR §5.569 and its attendant Table. The Table provides a "Suggested Range of Appropriate Orders" for various offenses. The purpose of the Table is to provide guidance to the Administrative Law

Judge and promote uniformity in orders rendered. 46 CFR §5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. In this case, the Coast Guard seeks revocation of Respondent's Merchant Mariner's credential.

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action was brought against a mariner for Misconduct, alleging his refusal to submit to a drug test. The NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the Administrative Law Judge find, specific factors in aggravation sufficient to depart from the guidance provided in 46 CFR Table 5.569. The NTSB explained that the guidance contained in the Table is "for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered."

While it is true that 46 CFR §5.569(d) also explains that "[the] table should not affect the fair and impartial adjudication of each case on its individual facts and merits," it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to this Respondent, absent an evidentiary basis.

In this case, the Coast Guard seeks revocation, yet Table 5.569 lists the offense of "Refusal to Take Chemical Drug Test" and suggests a suspension of between twelve and twenty-four months.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an Administrative Law Judge should consider: any remedial actions undertaken by a respondent; a respondent's prior records; and evidence of mitigation or aggravation. See 46 CFR §5.569(b)(1)-(3).

Remedial Action: Neither party offered any evidence pertaining to Respondent's efforts at remediation of Respondent's behavior vis this offense.

Respondent's Prior Records: The court notes that the Coast Guard did not produce any evidence that Respondent's credential had ever been the subject of any prior sanctions or disciplinary action.

Mitigation or Aggravation: The Coast Guard offered no evidence in aggravation and Respondent offered no evidence in mitigation. However, the evidence, particularly Respondent's own testimony vis-à-vis the matters contained in his Exhibit B, strongly suggest Respondent's mendacity; that he may have been premeditating a "defense" to mask illicit drug use long before the events of May 26, 2011. This evidence strongly suggests an aggravating factor of Respondent's Misconduct: premeditation.

The holdings of Appeal Decisions 2578 (CALLAHAN) (1996) and 2624(DOWNS) (2001), dictate that a person who evades a chemical drug test ought not suffer a lesser sanction than one who takes a chemical drug test and fails. The logic and import of CALLAHAN and DOWNS is that a lesser sanction for failure to submit to a chemical drug test would encourage offenders to evade or fail to submit to chemical testing. In this case, the evidence suggests Respondent intentionally evaded providing a urine specimen when lawfully directed to do so.

The court finds that anything less than revocation herein would indeed encourage offenders to attempt to evade testing and would undermine the government's compelling interest in maintaining safety at sea.

Accordingly, revocation of Respondent's credential is appropriate in this case.

VI. CONCLUSION

For the reasons discussed above, the Coast Guard **PROVED** by a preponderance of reliable, probative and credible evidence that Respondent Justin Scott Roberts committed an act of Misconduct by his refusal to submit a urine specimen in response to his marine employer's lawful directive and that he had no adequate medical explanation for such inability.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the allegations contained in the Coast Guard's Complaint were **PROVED** and that Respondent's credential is **REVOKED**. The Coast Guard will undertake appropriate and timely measures to ensure retrieval of Respondent's credential.

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



Bruce Tucker Smith
Administrative Law Judge
US Coast Guard

Date:

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Screen shot of Respondent Justin Scott Roberts' Coast Guard licensure records (1 page)
13. Certificate of Inspection issued to Tank Barge S-24 (3 pages)
14. Correspondence from Thomas J. Willis, Jr., Executive Vice-President of John W. Stone Oil Distributor, LLC, dated June 6, 2011 (1 page)
15. John W. Stone Oil Distributor, LLC Job Description for Tankerman, dated May 2003 (3 pages)
16. John W. Stone Oil Distributor, LLC Drug and Alcohol Use & Testing, undated (2 pages)
17. John W. Stone Oil Distributor, LLC Employment Application number 2055 completed by Respondent Justin Scott Roberts, dated November 18, 2008 (2 pages)
18. Statement by Marisa Andrews of John W. Stone Oil Distributor, LLC, dated August 4, 2011 (1 page)
19. John W. Stone Oil Distributor, LLC Drug and Alcohol Policy-Other Substances, dated April 1, 2010, and signed by Respondent Justin Scott Roberts April 28, 2010 (1 page)
20. Employee Safety Incentive Guidelines dated January 1, 2011, and signed by Respondent Justin Scott Roberts January 18, 2011 (1 page)
21. Certificate of Completion of Drug and Alcohol Awareness Training issued to Respondent Justin Scott Roberts on March 24, 2010 (1 page)
22. Five question drug and alcohol awareness training quiz taken by Respondent Justin Scott Roberts on March 24, 2010 (1 page)
23. Color photograph of John W. Stone Oil Distributor, LLC Davant facility (1 page)
24. Color photograph of John W. Stone Oil Distributor, LLC Davant facility with walkway in foreground and office/berthing shown to the left (1 page)
25. Color photograph of John W. Stone Oil Distributor, LLC Davant facility with walkway in foreground and office/berthing shown to the left (1 page)
26. Color photograph of John W. Stone Oil Distributor, LLC Davant facility depicting potable water tank and entrance to office/berthing (1 page)
27. Color photograph of John W. Stone Oil Distributor, LLC Davant facility depicting switches to the potable water tank and deck of the S-24 (1 page)
28. Color photograph of John W. Stone Oil Distributor, LLC Davant facility depicting the deck of the S-24 (1 page)
29. Statement by Ben Sasso, dated June 10, 2011 (1 page)
30. Statement by Chip Brewer, dated June 10, 2011 (1 page)
31. Statement by Glen Zetsch, West Jefferson Industrial Medicine, LLC, dated June 16, 2011 (2 pages)
32. Copy 1 of the Federal Drug Testing Custody and Control Form completed on Respondent Justin Scott Roberts, dated May 26, 2011 (1 page)
33. Correspondence from Brian Bourgeois, M.D. to Tommy Willis of John W. Stone Oil Distributor, LLC, undated (1 page)

COAST GUARD WITNESSES

1. Thomas J. Willis, Jr.
2. Marisa Andrews
3. Susan Wheelis Oelkers
4. Ben Alexander Sasso

5. Chester "Chip" Brewer
6. Glen Zetsch
7. Brian Michael Bougeois, M.D.

RESPONDENT EXHIBITS

- A. Correspondence by Dr. Imseis
- B. Print results from drugs.com on "Advil Cold and Sinus" dated 5/14/2011 at 8:58 AM
(2 pages)

RESPONDENT WITNESSES

- A. Justin Scott Roberts

ATTACHMENT B – NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 20.1001 General.

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

33 CFR 20.1002 Records on appeal.

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

33 CFR 20.1003 Procedures for appeal.

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

(b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

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

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

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

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

33 CFR 20.1004 Decisions on appeal.

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

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