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

UNITED STATES COAST GUARD

Complainant

vs.

SHEAN MASON CARROLL

Respondent

Docket Number 2010-0575
Enforcement Activity No. 3909456

DECISION AND ORDER
Issued: January 20, 2012

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

CWO Christian Menefee
LT Christopher L. Jones
Sector Houston/Galveston

For the Coast Guard

Vuk S. Vujasinovic, Esq.
Kenneth B. Fenelon, Jr., Esq.
Vujasinovic & Beckcom, P.L.L.C.

For the Respondent

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this Suspension and Revocation proceeding seeking revocation of Respondent Shean Mason Carroll's Merchant Mariner's License Number 1508245. This action is brought pursuant to the authority contained in 46 U.S.C. § 7703(1)(B) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On December 14, 2010, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7703(1)(B), alleging two counts of Misconduct pursuant to 46 C.F.R. § 5.27. Specifically, the Coast Guard alleges that on February 5, 2010, Respondent participated in a random drug test and wrongfully refused to test by (1) failing to follow instructions pursuant to 49 C.F.R. § 40.191(a)(9) and (2) by possessing or wearing a prosthetic or other device that could be used to interfere with the collection process pursuant to 49 C.F.R. § 40.191(a)(10).[1]

Respondent filed his Answer January 3, 2011, admitting all jurisdictional allegations, denying factual allegations, and requesting a hearing. On January 14, 2011, the Chief Administrative Law Judge referred this case to the undersigned for hearing and disposition.

A hearing on this matter was held on August 17-18, 2011 and August 25, 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. Lieutenant Christopher Jones and Chief Warrant Officer Christian Menefee represented the Coast Guard. Mr. Vuk Vujasinovic, Esq. and Mr. Kenneth Fenelon, Esq. appeared on behalf of Respondent. At the hearing, the Coast Guard presented testimony of five (5) witnesses and ultimately offered sixteen (16) exhibits, fifteen (15) of which were admitted into the record. Respondent presented testimony of two (2) witnesses

[1] For purposes of this Decision and Order, the undersigned will apply 49 C.F.R. Part 40 as codified on February 5, 2010, the date of the alleged incident. 49 C.F.R. Part 40 was subsequently amended after the date of the incident.

and offered three (3) exhibits, all of which were admitted into the record. The list of witnesses and exhibits is contained in **Attachment A.** Counsel for both parties elected to make closing arguments on the record at the end of the third day of the hearing. (Tr. at 771-789). Additionally, the Coast Guard and Respondent both submitted closing briefs on September 26, 2011.

After careful review of the entire record, including the witness testimony, applicable statutes, regulations and case law, I find the Coast Guard **PROVED** that Respondent committed two (2) counts of Misconduct for refusal to test in violation of 49 C.F.R. § 40.191(a)(9) and 49 C.F.R. § 40.191(a)(10).

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 Serial No. 1508245. (See Tr. at 677).

2. Kinder Morgan employed Respondent at all relevant times mentioned herein. (See Tr. at 38-40, 43, 88, 115, 144, 489, 493, 539, 689, See CG Ex. 4).

3. Kinder Morgan utilizes Pipeline Testing Consortium (Pipeline) to make random selections for drug testing. (Tr. at 571).

4. Pipeline provides Kinder Morgan with a list of randomly selected employees every quarter. This list is distributed to Kinder Morgan managers/supervisors, who may choose any day during that quarter to test a selected employee. (Tr. at 571-572).

5. Kinder Morgan ordered Respondent to take a random drug test on February 5, 2010 as he was returning from his time off and about to make a crew change onto the Motor Vessel MR. BENNETT. (Tr. at 38-41).

6. On February 5, 2010, Kinder Morgan employee Don Osmeyer drove Respondent and fellow employee Captain Blane Broussard to Concentra, the testing facility. (Tr. at 41-43, 691-92).

7. Cristina Martinez of Concentra, a DOT-certified collector, asked Respondent to provide a urine sample. (Tr. at 139, 152).

8. After Respondent provided his urine sample, Ms. Martinez checked the temperature strip on Respondent's urine sample within four (4) minutes and documented that it was out of temperature range pursuant to 49 C.F.R. § 40.65(b)(1). (See Tr. at 139, 162-63, 183).

9. Ms. Martinez discarded Respondent's initial urine specimen. (Tr. at 164, 175).

10. Captain Broussard testified that Respondent was gone for twenty (20) minutes while submitting his initial urine specimen to Ms. Martinez. (Tr. at 703).

11. Ms. Martinez initialed a Concentra document entitled "Unusual Collection Form" indicating that Respondent's initial urine collection was out of temperature range. (Tr. at 141-43, CG Ex. 6).

12. Ms. Martinez filled out Step 1 of the Custody and Control Form (CCF) and checked a box in Step 2 to indicate Respondent's sample was out of temperature range. (Tr. at 146, 263, CG Ex. 2, CG Ex. 7).

13. Since the initial urine specimen was out of temperature range, Concentra asked Respondent to submit to a follow-up, observed urinalysis. (See Tr. at 91, 161, 167-69, 177).

14. As Ms. Martinez was not the same gender as Respondent, Michael Escobedo served as the collector for the second, observed urinalysis. (Tr. at 140-41, 148-49, 161).

15. Mr. Escobedo was a DOT-certified collector on February 5, 2010. (CG Ex. 18).

16. During the observed collection attempt, Respondent refused to comply with Mr. Escobedo's instructions for him to raise his shirt and lower his clothing to show no prosthetic device was being used. (See Tr. at 239-40, CG Ex. 1, CG Ex. 16).

17. Mr. Escobedo observed a clear, plastic tube protruding from Respondent's underwear. (Tr. at 240, 246-48, CG Ex. 1, CG Ex. 16).

18. Mr. Escobedo stopped the collection process after he saw the tube, and both Respondent and Mr. Escobedo exited the bathroom. (CG. Ex. 1, CG Ex. 16).

19. Mr. Escobedo indicated on a Concentra "Non-Injury Flowsheet" form that Respondent had a "device in [his] pants." (Tr. at 254-55, CG Ex. 17).

20. Mr. Escobedo transmitted the "Non-Injury Flowsheet" to Dr. David Paine, the Medical Review Officer (MRO). (Tr. at 253).

21. Mr. Escobedo prepared a written statement summarizing his version of the events. (CG Ex. 1, CG Ex, 16).

22. Mr. Escobedo completed Steps 4, 5, portions of Step 2 of the CCF, and indicated on the CCF that he observed a "device" in Respondent's pants. (CG Ex. 2, CG Ex. 7, Tr. at 261-62, 267).

23. Respondent testified that, during the observed collection, Mr. Escobedo was verbally abusive, threatening, and touched Respondent's left arm causing some of Respondent's urine to spill onto Respondent. (Tr. at 618).

24. Captain Broussard testified that he witnessed a verbal altercation between Mr. Escobedo and Respondent following the attempted observed collection. (Tr. at 694-95).

25. Respondent left the Concentra facility approximately twenty (20) minutes after the observed collection attempt. (Tr. at 620).

26. Concentra fired Ms. Martinez, the collector of the initial specimen, approximately six weeks later for leaving the facility while on the job. (Tr. at 150-51).

27. Shortly after the observed collection attempt, Respondent informed Antoine Flagg, the Safety, Quality and Environmental Training Coordinator at Kinder Morgan that Mr. Escobedo was trying to look at his private parts and touched him such that he felt violated. (See CG Ex 14, Tr. at 55, 61-62, 64, 91).

28. Respondent informed Mr. Flagg that he had recently been around people smoking marijuana, but stated that he wasn't worried. (Tr. at 55, 90, See CG Ex. 14).

29. Dr. Paine, the MRO, did not interview Respondent about his version before indicating on the Custody and Control Form that Respondent had refused the subsequent, observed urine collection attempt. (Tr. at 430).

30. Dr. Paine testified that Respondent's version of events would not have changed his opinion. (Tr. at 470-71).

31. Dr. Paine failed to check the "failed to remain" box on the MRO verification sheet. (Tr. at 443-45, CG Ex. 3).

32. After consultation with Dr. Paine, Valeria Hope, the Designated Employer Representative (DER) for Kinder Morgan properly determined Respondent's actions constituted a refusal to test. (Tr. at 355, 384, 402, 441).

33. Mr. Escobedo learned that Respondent was making a complaint against him after he had already completed his written statement of the incident. (Tr. at 284-88, CG Ex. 1, CG Ex. 16).

34. Ms. Martinez and Mr. Escobedo completed only one Custody and Control Form (CCF) for Respondent. Ms. Martinez filled out Step 1 of the form and indicated she checked a box noting the temperature was out of range; Mr. Escobedo completed Steps 4 and 5. Mr. Escobedo stated that he wrote notations in Step 2 of the CCF, but was uncertain whether he had marked the boxes for Step 2. (Tr. at 146, 165, 184-85, 261-63, 267, CG Ex. 2, CG Ex. 7).

35. The CCF indicates that the sample collected was not in temperature range, not observed, was a split sample, and was sent out via FedEx. (CG Ex. 2, CG Ex. 7).

36. The CCF is signed only by Michael Escobedo. (CG Ex. 2, CG Ex. 7).

37. The CCF was used to document both the unobserved collection and observed collection attempt. (CG Ex. 2, CG Ex. 7).

38. Michael Escobedo acknowledged that, in completing the form, he was "taking over" the paperwork for Ms. Martinez. (Tr. at 303).

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 suspend or revoke a mariner's license, certificate or document for violations arising under 46 U.S.C. § 7703.

The Coast Guard's 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. Marine employers must establish programs for chemical testing of dangerous drugs on a random basis of crewmembers who occupy a position required by the vessel's certificate of inspection, perform duties and functions required by Chapter I, Title 46 Code of Federal Regulations, or are specifically assigned duties relating to emergencies. 46 C.F.R. § 16.230(a). 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.

Here, the Coast Guard has alleged two counts of Misconduct pursuant to 46 C.F.R. § 5.27. Title 46 C.F.R. § 5.27 specifically defines Misconduct as "…human 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." In the instant case, the "duly established rule[s]" the Coast Guard alleges Respondent violated are 49 C.F.R. § 40.191(a)(9), refusing a drug test "…by failing to follow instructions given by Mr. Escobedo for an observed collection;" and 49 C.F.R. § 40.191(a)(10), refusing a drug test by "…possessing or wearing a prosthetic or other device that could be used to interfere with the collection process."

A. 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 violations charged.

B. Coast Guard's Argument

In the instant case, the Coast Guard proffers that on February 5, 2010, Respondent's employer, Kinder Morgan, selected Respondent for a random drug test. See 46 C.F.R. § 16.230. After submitting an initial specimen out of temperature range, Respondent was properly asked to submit to a subsequent observed test. During the observed test, Mr. Escobedo, the DOT-certified collector, was unable to see urine leave Respondent's body and requested that Respondent turn around, raise his shirt, and lower his pants to show that a prosthetic device was not being used; Respondent refused to comply. During the observed collection procedure, Mr. Escobedo observed a clear, plastic tube protruding from Respondent's underwear.

C. Respondent's Argument

Respondent proffers that the Coast Guard has failed to prove the charges by a preponderance of the evidence. Respondent's argument is three-fold: (1) The crux of the Coast Guard's case rests on the testimony of one unreliable witness; (2) an unbelievable version of events; and (3) the drug testing procedures violated numerous DOT regulations, and were so fatally flawed that they ceased to be DOT tests.

1. Witness Reliability

Ms. Martinez, the collector of the first urine specimen, was generally credible. Overall, Ms. Martinez was forthcoming about what she could and could not remember from the incident. When Ms. Martinez was uncertain of something, she admitted such. (See Tr. at 164-170). Ms. Martinez credibly asserted that it was her practice to always check the temperature of urine specimens within four (4) minutes as required by 49 C.F.R. Part 40. (Tr. at 139). Ms. Martinez's testimony is buttressed by the fact that she contemporaneously documented that Respondent's specimen temperature was out of range by initialing an internal Concentra "Unusual Collection Form." (CG Ex. 6).

Although Mr. Escobedo was argumentative at times during his testimony, the undersigned found him to be generally credible. (See Tr. at 308). Mr. Escobedo was similarly

forthcoming about what he could not remember from an incident that occurred over a year ago. (See Tr. at 233-34). Mr. Escobedo honestly acknowledged that he "…[didn't] know exactly what [the purported prosthetic device] was," but consistently and confidently stated that he did see some sort of tube on Respondent's person and that Respondent refused to follow his verbal instructions. (Tr. at 240, 246, 248-50, 330, CG Ex. 1, CG Ex. 16). Additionally, Mr. Escobedo documented both seeing a tube and Respondent's failure to comply on both the CCF and his written statements. (CG Ex. 1, CG Ex. 2, CG Ex. 7, CG Ex. 16).

Put simply, Respondent was a less reliable witness than Mr. Escobedo. Respondent was evasive and inconsistent in answering certain questions. (See Tr. at 628-29). For example, when asked whether he had signed a form acknowledging that he would need to raise his shirt and lower his clothing for the observed collection, Respondent initially replied that the form "[wasn't] a DOT document." (Tr. at 629). When questioned as to whether he knew being drug tested during a crew change was a possibility, Respondent initially answered "no," then acknowledged he had been tested during a crew change before, but interjected "[w]ell, anything is possible." (Tr. at 624).

Further, although Respondent testified that "a great deal of the specimen" spilled onto him when Mr. Escobedo purportedly made physical contact with him, the undersigned notes that in Respondent's more contemporaneous written statement he made no mention of being splashed with "a great deal", or any, of his own liquid excrement. (Tr. at 618, CG Ex. 15). When confronted about this, and asked whether specimen had, in fact, spilled on his leg, Respondent stated "[s]ome did, yes." (Tr. at 658). Further, although Respondent described Mr. Escobedo as

"verbally abusive," the only specific, purportedly abusive statement Respondent could recount was "[l]et me see more or I'm going to fail you for the test." [2] (Tr. at 618).

Although Captain Broussard supported Respondent's testimony, Captain Broussard was generally not a credible witness. Early in his testimony, Captain Broussard described his relationship with Respondent as merely an "acquaintance," who he did not socialize with outside of work. (Tr. at 716). However, as his testimony progressed, Captain Broussard acknowledged that he was actually closer to Respondent than he originally stated. In fact, Captain Broussard ultimately referred to Respondent as a "friend," and described his relationship with Respondent and various other co-workers as "…like a big family." (Tr. at 722). He further explained that he had spoken with Respondent about "a half dozen times" over the course of the last year and a half, and that he "…knew about [Respondent's] personal life." (Tr. at 722). The inconsistencies in Captain Broussard's testimony cause the undersigned to afford less weight to Captain Broussard's assertions that Respondent engaged in a verbal altercation with Mr. Escobedo and was absent for fifteen to twenty (15-20) minutes while providing his initial sample. (Tr. at 719-21).

Ultimately, the question of whether Respondent engaged in the specific allegations of misconduct boils down to the conflicting testimony between Respondent and Mr. Escobedo, the only two people present in the small bathroom at the time of the alleged misconduct. (See Tr. at 242-43, 283). Between the two, the undersigned finds Mr. Escobedo more credible.

2. The Coast Guard's Version of Events

At the hearing and in closing briefs, Respondent proffered that the Coast Guard's version of events was incredulous in that, due to the random nature of Kinder Morgan's testing procedures, Respondent would be required to carry human urine with him at all times in order

[2] Additionally, Respondent stated that Mr. Escobedo "...claimed to say that [Respondent] was going to try to cheat the test at some point or sometime or somehow," which the undersigned finds inherently vague and not credible. (Tr. at 618).

for the alleged events to have occurred. As such, Respondent proffered that Mr. Escobedo's version of the events is merely a reactionary story designed to cover for Mr. Escobedo's own inappropriate behavior.

During closing arguments, the Coast Guard put forth a cogent argument: Respondent admitted to Mr. Flagg that he had associated with marijuana users around February 5, 2010. (See Tr. at 623). Accordingly, since Respondent had reason to fear drugs may have been in his system, and because Respondent had previously been tested for drugs during a crew change, Respondent was prepared on February 5, 2010. The Coast Guard does not assert Respondent always carries a tube filled with human urine on his person, but rather that he carries urine with him on occasions when he fears drugs may be in his system. (Tr. at 788-89).

3. Collection Errors

Respondent also proffers that the collection procedures employed at Concentra were so numerous and severe that the test was fatally flawed and ceased to be a DOT test. In the instant case, Respondent has alleged multiple violations of the DOT regulations, including: 49 C.F.R. § 40.65(b)[3] (failure to check specimen within four minutes, improperly pouring the initial specimen into another container to determine the temperature); 49 C.F.R. 40.65(b)(6) (failure to retain specimens); 49 C.F.R. §§ 40.67(e), 40.45(a), 40.45(c), 40.83(c)(3) (failing to document every collection using the CCF form); 49 C.F.R. §§ 40.67(h), 40.67(i) (failure to provide verbal

[3] In his closing brief, Respondent asserted that "[t]he collector (Martinez) admitted that she failed to check the first specimen within four minutes," in violation of 49 C.F.R. § 40.65(b). Upon review of the record, the undersigned notes that Ms. Martinez did not admit that she failed to check the specimen within four (4) minutes. Ms. Martinez had already twice indicated that it is not her practice to leave specimens out for a prolonged period of time, when she was again asked by Respondent's counsel if it was possible the specimen was left out. She responded, "[i]t is possible, but…" and was then interrupted by Respondent's counsel. (Tr. at 162-63). Accordingly, since the undersigned does not know how Ms. Martinez intended to qualify her statement of "[i]t is possible…" the undersigned does not accept Ms. Martinez's statement as an admission. Further, based on the credibility determinations discussed above, the undersigned finds that Ms. Martinez did check the sample within four (4) minutes as required.

instructions); 49 C.F.R. § 40.67(e)(2) (failure to mark "observed" as required); and 49 C.F.R. § 40.33 (improper conduct by a collector).[4]

The regulations found at 49 C.F.R. Part 40 contain several mandatory provisions regarding the collection process for DOT tests, including a number of fatal flaws that require a drug test to be cancelled. See 49 C.F.R. § 40.199. A reading of the fatal flaws listed in Section 40.199 reveals that such flaws are directed more toward significant errors that may happen once the donor has provided a sample to be tested. However, just because errors are not specifically listed as "fatal" under 49 C.F.R. § 40.199 does not mean that such errors are not serious enough to cause a test to be cancelled. See Appeal Decision 2653 (ZERINGUE) (2002). The key questions center on whether the collection was conducted in a way that the integrity of the sample or chain of custody is potentially compromised and whether test results can be deemed reliable.

The regulations also provide a non-exclusive list of other procedural deviations from the regulations that do not invalidate the test. See 49 C.F.R. § 40.209. Section 40.209 makes it clear that a test may not be cancelled "based on an error that does not have a significant adverse effect on the right of the employee to have a fair and accurate test." Id. The commentary to this section affirms that the proper remedy for such errors is not to cancel the test because "[t]his is a safety rule, and it is not consistent with safety to permit someone with a positive drug test to continue performing safety-sensitive functions because a collector made a minor paperwork error that does not compromise the fairness or accuracy of the test." See 65 FR 79462, 79503 (December 19, 2000).

Along these same lines, 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

[4] Based on the credibility determinations discussed above, the undersigned finds that Mr. Escobedo provided proper verbal instructions and did not engage in "improper conduct" as alleged. See 49 C.F.R. § 40.33.

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).

At the offset, it is important to note that Respondent was charged with Misconduct pursuant to 46 C.F.R. § 5.27 based on events that took place during the observed collection procedure; no specimen was ever processed or submitted for testing. Nevertheless, the undersigned will examine Respondent's allegations of error for each of the two tests.

a. The Initial, Unobserved Test

Respondent proffered at the hearing and via closing brief that the Coast Guard presented only one CCF even though two separate collections took place. Notably, 49 C.F.R. Part 40, states that the CCF "…must be used to document every urine collection required by the DOT drug testing program." 49 C.F.R. § 40.45.

Upon review of the evidence in the record, specifically the CCF form itself and the testimony of Ms. Martinez and Mr. Escobedo, the undersigned finds that the CCF form was incorrectly used to document information for both the unobserved and observed tests. Although Ms. Martinez stated that she believed the form represented the latter, observed collection, her opinion is not dispositive. (Tr. at 198-99). The CCF clearly contains information about both tests, as it states both that the temperature was out of range and that Respondent had a "device" in his pants. (CG Ex. 2, CG Ex. 7).

Although Concentra failed to complete a CCF specifically for the unobserved collection, the undersigned finds this error non-fatal. Notably, in addition to the CCF, the Coast Guard also presented an "Unusual Collection Form" on Concentra letterhead indicating that a sample had been taken that was "Out of Range and/or Signs of Tampering," as well as a "Non-Injury Flowsheet" indicating "Pt. 1st specimen not Temp. [sic]". (CG Ex. 6, CG Ex 17).

Additionally, Respondent contemporaneously signed the Unusual Collection Form acknowledging that his initial specimen was out of range, and that, as a result, he would be asked to submit to an observed collection. (CG Ex. 6). At the hearing, Respondent admitted that Ms. Martinez collected his first urine sample, but proffered that she failed to check his specimen within four (4) minutes. (Tr. at 23, 617). However, based on credibility determinations, the undersigned has determined that Ms. Martinez did, in fact, test the specimen within four (4) minutes.

Although 49 C.F.R. § 40.199(b)(1) notes that the lack of a collector's signature is a fatal flaw and Ms. Martinez did not sign the CCF, the undersigned notes that this provision relates to errors discovered at the laboratory level. A thorough reading of the fatal flaws enumerated at 49 C.F.R. § 40.199(b) indicates the delineated fatal flaws relate to the integrity of the sample or the chain of custody of the sample once a urine specimen has been collected, sealed, and submitted for testing. Here, no specimen was ever submitted to a laboratory for testing.[5] Accordingly, the undersigned finds that, even absent a CCF solely for the unobserved collection, sufficient evidence existed for Concentra to order Respondent to submit to a subsequent, observed test.

b. The Second, Observed Test

Respondent has also made numerous allegations of error related to the subsequent, observed test. However, at the offset, the undersigned again notes that no sample was actually collected or processed as a result of the observed test. Therefore, the undersigned need not examine the reliability of the sample itself as there is no risk of a tainted or mislabeled sample. Nevertheless, the undersigned will determine whether any of the alleged errors sufficiently call

[5] For the record, based on credibility determinations, the undersigned does not believe that Ms. Martinez poured the specimen into a second container, as alleged. (See Tr. at 164, 616). While Ms. Martinez preemptively discarded the initial specimen, the undersigned finds this too is a non-fatal error. Per 49 C.F.R. Part 40, the specimen ultimately should have been discarded after Respondent's subsequent misconduct. See 49 C.F.R. 40.65(7). (Tr. at 164, 616-17).

into question the chain of custody or in any way or impact Respondent's right to a fair and accurate test. See 49 C.F.R. § 40.209.

As to the observed test, Respondent has correctly asserted that the paperwork contained inaccuracies. Although no sample was actually collected or retained, the lone CCF indicates that a specimen was collected, but was not between ninety (90) and one hundred (100) degrees in temperature. The form further indicates a split sample was taken and released "via FedEx." Perhaps most notably, the collector failed to check a box indicating the collection was observed. (CG Ex. 2, CG Ex. 7). Further, based on witness admissions at the hearing, it is clear that the form was filled out by two separate people: Ms. Martinez and Mr. Escobedo.[6] (See Tr. at 146, 303).

While the paperwork was undoubtedly imperfect, the undersigned notes that none of the inaccuracies impacted Respondent's right to a fair and accurate test.[7] Respondent acknowledged he was selected for testing, submitted to an observed test, and was present in the bathroom with the collector, Mr. Escobedo. Respondent does not allege a case of mistaken identity; instead, he has proffered an affirmative defense for his behavior which the undersigned finds not to be credible.[8] Because Respondent admits he was directly observed by Mr. Escobedo on February 5, 2010, the inaccuracies on the CCF in no way undercut the fairness of the test by

[6] Per 49 C.F.R. § 40.43(d)(5), the collector must "[m]aintain personal control over each specimen and CCF throughout the collection process."

[7] At the hearing, the Coast Guard attempted to proffer that a CCF was not necessary for the second test because no "directly observed collection" was actually taken. (See Tr. at 310-11). See 49 C.F.R. § 40.67(e). However, 49 C.F.R. § 40.191, which addresses "What is a refusal to take a DOT drug test, and what are the consequences?" explains that, when refusal occurs, the collector or MRO must, among other things, "document the refusal on the CCF." 49 C.F.R. § 40.191(d). Since 49 C.F.R. § 40.191 specifically takes into account situations in which no specimen is actually provided, the undersigned is convinced that a separate CCF should have been completed for Respondent's observed collection even if no specimen was actually collected. As discussed, the record contains only one CCF representing both the unobserved collection and the observed collection attempt. Nevertheless, because no sample was actually processed and tested, the CCF submitted into evidence, along with the testimony and written statements of Mr. Escobedo are sufficient to substantiate the allegations of misconduct.

[8] Respondent also alleged at the hearing that Ms. Martinez was the collector for both samples, and Mr. Escobedo was merely an observer. (See Tr. at 161, 167-69). While not dispositive, in the instant case, the undersigned finds that Mr. Escobedo, who is properly qualified, served as was collector for the second, observed test. (See Tr. at 167-68, 175, 236, 292, CG Ex. 18). 49 C.F.R. § 40.3.

calling into question whether it was actually Respondent subjected to the observed collection procedures on February 5, 2010.

The MRO failed to provide Respondent an opportunity to explain his version of events prior to certifying the test as a refusal. Although after the fact, Dr. Paine nonetheless credibly testified that Respondent's version of events would not have changed his opinion. (Tr. at 470, 474). Similarly, Dr. Paine's failure to check a box indicating that Respondent failed to remain at the collection site is not so severe as to invalidate the test. See generally 49 C.F.R. § 40.209.

While the undersigned notes that the paperwork errors at Concentra were numerous, upon review of 49 C.F.R. Part 40 and applicable case law, the undersigned finds that none of the alleged errors related to the observed test were significant enough to invalidate the test. Accordingly, the undersigned finds that neither the unobserved or observed tests were fatally flawed.

4. Conclusion

Accordingly, upon review of the entire record, including witness statements, documentary evidence, testing procedures, and the parties' respective version of events, the undersigned finds by a preponderance of the evidence that Respondent engaged in Misconduct pursuant to 49 C.F.R. 40.191(a)(9) and 49 C.F.R. 40.191(a)(10) and his actions were properly classified as a refusal to test.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein, Respondent was a holder of Merchant Mariners License Serial No. 1508245. (See Tr. at 677).

2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7703(1)(B); 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 was lawfully directed by his marine employer to submit to chemical testing. 46 C.F.R. § 16.230.

4. Respondent wrongfully refused to comply with Mr. Escobedo's verbal instructions in violation of 49 C.F.R. § 40.191(a)(9).

5. Respondent wrongfully refused to test by possessing or wearing a prosthetic or other device in violation of 49 C.F.R. § 40.191(a)(10).

6. Respondent's urine tests were not fatally flawed.

7. The Coast Guard has **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent engaged in Misconduct pursuant to 49 C.F.R. § 40.191(a)(9) and 49 C.F.R. § 40.191(a)(10).

SANCTION

A. Background

At the beginning of the hearing, the Coast Guard asked the undersigned for "…guidance on how to treat aggravating factors." (Tr. at 31). In response, the undersigned asked the Coast Guard to alert the undersigned when they intended to introduce matters in aggravation such that a clear delineation was made between evidence introduced for purposes of proving the charge, and evidence introduced for matters in aggravation. The undersigned explained that this delineation would prevent confusion of issues and enable Respondent's counsel to adequately prepare his examination of the witnesses. The undersigned explained to the Coast Guard that the issue would be dealt with as it came up. (Tr. at 31-32). In response, the Coast Guard stated that they would "…endeavor to…maximize the amount of questioning that [could] be used for both purposes." (Tr. at 34).

During closing arguments, the Coast Guard asked whether it would be an appropriate time to address matters in aggravation; the undersigned stated that it would after Respondent's closing arguments. (Tr. at 781). Later during closing arguments, the undersigned erroneously stated that, if the charge was found proved, counsel would be given the opportunity to present evidence in aggravation and mitigation. (Tr. at 796-97). The undersigned acknowledges that this statement was made in error and ostensibly indicated to the parties that the proceedings were bifurcated. As a result of the undersigned's statement, the parties may not have introduced

evidence in aggravation and mitigation that they otherwise might have introduced during closing arguments.

On September 26, 2011, the undersigned received the Coast Guard's post-hearing brief. In the brief, the Coast Guard requested the opportunity to question Respondent under oath "…regarding mitigating statements he made during the hearing."[9] As a result, the undersigned convened a post-hearing conference on November 2, 2011 to clarify any confusion regarding the submission of evidence in aggravation and mitigation and to discuss how to best handle evidence in aggravation and mitigation.

During the conference, the undersigned acknowledged that the statements during closing arguments were made in error, and, as a means of rectifying any potential reversible errors, allowed both parties to submit evidence in aggravation and mitigation along with argument as to why such evidence should be considered. Subsequently, on November 17, 2011 the Coast Guard submitted a Notice for Submission Regarding Sanction (Submission).[10] Respondent submitted a Supplemental Post-Hearing Brief on December 2, 2011.

B. Coast Guard's Position

In the Submission[11], the Coast Guard proffered that in the Complaint, they sought revocation, "…a sanction outside the range specified for charges of misconduct and 'refusal to

[9] The undersigned notes that the Coast Guard had a full opportunity to question Respondent regarding inconsistent and mitigating statements he may have made while on the stand at the hearing. In their post-hearing brief, the Coast Guard cites two sections of the transcript, Tr. at 645-46 and 666-67, as containing "mitigating statements." As discussed infra, the undersigned does not find Respondent's statements at pages 645-46 mitigating in nature. The latter cite refers to statements made by Respondent in response to questions by the undersigned regarding child custody and family court proceedings.

[10] In their Notice for Submission Regarding Sanction, the Coast Guard stated that the undersigned "…sustained several objections made by Respondent's Counsel when the USCG representative attempted to offer evidence and make argument in aggravation of any charges proved…", citing the transcript at pages 209-220, 228, and 795-98. For the record, the undersigned notes that pages 209-220 and 228 relate to a proffer made by the Coast Guard related to statements Respondent made subsequent to the incident in question. The undersigned sustained the objections of Respondent's counsel not because the undersigned was erroneously bifurcating the proceedings, but because the information was not relevant to either proving the charges alleged or to matters in aggravation. (See Tr. at 217-19). Notably, the Coast Guard did not attempt to adduce this evidence in their November 17, 2011 Notice for Submission Regarding Sanction. Pages 795-98 cite to closing arguments.

[11] The undersigned notes that in their Notice for Submission Regarding Sanction, the Coast Guard states that the "…post-hearing conference was held to reconsider the Court's rulings on Respondent's objections to the USCG's

take chemical drug test' in Table 5.569 of 46 CFR 5.569." The Coast Guard explained that, per 46 C.F.R. 5.61(b), the Coast Guard seeks revocation because permitting Respondent to continue to serve under his license "…would be clearly a threat to the safety of life or property, or detrimental to good discipline."

The Coast Guard acknowledged that, per Coast Guard v. Moore NTSB Order No. EM-201 (2005), they are required to prove factors in aggravation to depart from the Table 5.569 guidelines, but explained that "…there exists a well-established history of Commandant Decisions on Appeal affirming the principles that refusal to test by intentionally interfering with the integrity of the chemical testing process creates the risk of an impaired mariner continuing to serve in a safety sensitive position, and that drug testing regulations designed to minimize drug use by mariners and promote a safe, drug-free work environment would be undermined if mariners could either manipulate or refuse required testing and face a lesser sanction than if they tested positive for a dangerous drug. Appeal Decisions 2578 (Callahan) (1996), 2624 (Downs) (2001), 2625 (Robertson) (2002), 2624 [sic] (Moore) (2005), 2690 (Thomas) (2010) and 2694 (Langly) [sic] (2010) [sic]; *see* Decision & Order USCG v. Robert Landry, Docket No. 2004-0144 (SR-2004-15)." The Coast Guard proffered that Respondent's actions "…constituted deliberate and intentional acts designed to thwart the important safety objectives of USCG and DOT drug testing regulations…".

The Coast Guard offered three additional exhibits into the record, Coast Guard Exhibit 23, Coast Guard Exhibit 24, and Coast Guard Exhibit 25.

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representative's attempts to submit evidence and argument in aggravation of any charges proved, as the ALJ believe one or more of the rulings may constitute reversible error, were the eventual decision and order to be appealed." For the record, the undersigned did not convene the post-hearing conference as a result of sustained objections, but rather because the undersigned erroneously stated during closing arguments that he would consider evidence of aggravation and mitigation after a determination of whether the underlying charges had been proved.

Coast Guard Exhibit 23

Coast Guard Exhibit 23 (CG Ex. 23) is an Order Modifying Temporary Orders in Suit to Modify Parent-Child Relationship from the District Court of Harris County, Texas. The Order refers to a hair follicle drug test Respondent took on February 26, 2008. The Order indicates that Respondent's hair sample "tested positive for illegal drug use."

Coast Guard Exhibit 24

Coast Guard Exhibit 24 (CG Ex. 24) is a lab report from Quest Diagnostics in Houston, Texas showing that Respondent's February 26, 2008 "Hair substance abuse panel" tested positive for the following drugs: Benzoylecgonine, Cocaine, Cocaethylene, and Norcocaine.

Coast Guard Exhibit 25

Coast Guard Exhibit 25 (CG Ex. 25) consists of Respondent's U.S. Coast Guard "Application for License as an Officer, Staff Officer, or Operator and for Merchant Mariner's Document." In the Application, Respondent indicated that he had never been a user of dangerous drugs and signed a mandatory certification avowing the accuracy of the information contained in the Application.

Argument

In proffering Exhibits 23 and 24, the Coast Guard explained that the Exhibits contradict Respondent's mitigating assertion that he has a perfect record with regards to drug screens. As to both exhibits, the Coast Guard stated that "…[the] record creates the implication that Respondent is, in fact, a user of dangerous drugs and that his actions during the urine specimen collection attempts on February 5, 2010 were designed to cover up actual drug use, rather than any other explanation provided by Respondent."

In offering Exhibit 25, the Coast Guard asserted that, had Respondent disclosed his positive drug test, "…his suitability to hold a Merchant Mariner's Credential would have been further scrutinized, and that he may have been required to complete a rehabilitation program,

among other items." The Coast Guard explained that Exhibit 25 "…demonstrates the lengths to which Respondent was willing to go to conceal his drug use from the USCG, and, by association, his employer."

In offering each of the three (3) exhibits, the Coast Guard asserted verbatim that "[t]he purpose this record serves in aggravation of any charges proved is to show Respondent's duplicitous behavior and deceptive actions with respect to the charged conduct. *See* Decision & Order, USCG v. Harold Langley, Docket No. 2009-0397 (SR-2010-03), *aff'd by* Appeal Decision 2694 (Langly) [sic] (2010) [sic]; Decision & Order USCG v. Michael J. Thomas, Docket No. 2008-0554 (SR-2009-11), *aff'd by* Appeal Decision 2690 (Thomas) (2010)."

The Coast Guard explained that the matters offered in aggravation may also be introduced under 33 C.F.R. § 20.1315(c) "…as evidence and argument in rebuttal of any evidence and argument offered by Respondent in mitigation, as Respondent's testimony during the hearing on August 18, 2011 and statement provided in CG-15 would serve to mitigate the severity of the charges proved." The Coast Guard later noted that, "…[i]n his testimony Respondent affirmed that he had a perfect track record in regards to drug screens as a justification for why he would not have refused to take a drug test as charged," and attempted to minimize the severity of his actions by pointing to the malfeasance of others.

C. Respondent's Position

In his Brief, Respondent notes that, at the hearing, the Coast Guard proffered exhibits at the last minute, and now seeks admission of additional exhibits for which Respondent has not had an adequate opportunity to prepare a response.

Respondent further notes that the family court order modifying Respondent's parental rights is not a "judgment of conviction" within the meaning of 33 C.F.R. § 20.1307, nor is it a "disciplinary record" pursuant to 33 C.F.R. § 20.1315. Further, 33 C.F.R. §20.807(b) requires

evidence to be filed fifteen (15) days before the hearing, and these exhibits were never disclosed to Respondent.

Respondent also argues that the records are inadmissible under both 33 C.F.R. § 20.802(a), because the documents are irrelevant, and 33 C.F.R. § 20.802(b), because the probative value of the documents is substantially outweighed by the danger of prejudice, explaining that "…these [hair follicle] tests are not an approved drug test with the Coast Guard…". Respondent also notes that the records are not proper rebuttal evidence pursuant to 33 C.F.R. § 20.1315(c), as "[Respondent] has squarely denied the charges. Contrary to the Coast Guard's suggestion, [Respondent] has not offered any evidence as 'mitigating' evidence."

Last, Respondent urges that the Coast Guard's reliance on LANGLEY is misplaced, as LANGLEY is distinguishable from the instant case in both substance and procedure. Respondent noted further that he surrendered his license to the Coast Guard on October 14, 2010.

Discussion

Title 46 C.F.R. § 5.569 explains that, "[e]xcept for acts or offenses for which revocation is mandatory, factors which may affect the order include: (1) Remedial actions which have been undertaken independently by the respondent; (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation." Title 33 C.F.R. § 20.1315, "Submission of prior records and evidence in aggravation or mitigation," explains that the Coast Guard may offer evidence and argument in rebuttal to any evidence and argument offered by the respondent in mitigation.[12] 33 C.F.R. § 20.1315(c).

[12] Title 33 C.F.R. § 20.1315 also defines the prior disciplinary record of the respondent, noting that the record is comprised of the following items less than 10 years old: (1) Any written warning issued by the Coast Guard and not contested by the respondent. (2) Final agency action by the Coast Guard on any S&R proceeding in which a sanction or consent order was entered. (3) Any agreement for voluntary surrender entered into by respondent. (4) Any final judgment of conviction in Federal or State courts. (5) Final agency action by the Coast Guard resulting in the

At the offset, the undersigned notes that, in their Submission, the Coast Guard twice asserted that Respondent testified as to his perfect track record with drug tests at the August 18, 2011 hearing, but failed to provide a citation for such testimony. A reading of the transcript reveals Respondent never made any such statement. Although Respondent was questioned about a written statement wherein he indicated he had a perfect track record with drug screenings, Respondent never testified as to the accuracy of the written statement, but simply affirmed that he had written the statement.[13] (Tr. at 646, CG Ex. 15). There appears to be no testimonial basis for the Coast Guard's assertion that "…[i]n his testimony Respondent affirmed that he had a perfect track record in regards to drug screens as a justification for why he would not have refused to take a drug test as charged." Further, the Coast Guard, and not Respondent, offered the written statement into evidence. 33 C.F.R. § 20.1315(c).

Respondent's hair follicle test, conducted as part of a 2008 child custody hearing, does not fall under the category of "prior disciplinary record," pursuant to 33 C.F.R. § 20.1315 and is not a judgment of conviction admissible pursuant to 33 C.F.R. § 20.1307. Instead, it appears to the undersigned, and the Coast Guard has asserted, that Exhibits 23 and 24, were introduced largely to show that "…Respondent is, in fact, a user of dangerous drugs and that his actions during the urine specimen collection attempts on February 5, 2010, were designed to cover up actual drug use, rather than any other explanation provided by Respondent." Based on this proffer, it appears that the evidence relates more to the underlying charge than to matters in aggravation. In finding the underlying charged proved, the undersigned has already determined

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imposition against the respondent of any civil penalty or warning in a proceeding administered by the Coast Guard under this title. (6) Any official commendatory information concerning the respondent of which the Coast Guard representative is aware. The Coast Guard representative may offer evidence and argument in aggravation of any charge proved. The respondent may offer evidence of, and argument on, prior maritime service, including both the record introduced by the Coast Guard representative and any commendatory evidence.

[13] When asked which was more accurate, his written statement or testimony, Respondent replied that the written statement was "better." However, this statement was made in response to the Coast Guard's statement that "[w]e've already established that there are differences between what's contained in your written statement and your testimony here under oath." Respondent's written statement regarding drugs screenings had not been discussed. (Tr. at 643-45). Thus, the Coast Guard's proffer that Respondent testified that he had a perfect track record with regards to drug screenings is tenuous at best.

that a wrongful refusal occurred and that Respondent's affirmative defenses for his behavior were not credible.

The Coast Guard has also asserted that "[t]he purpose this record serves in aggravation of any charges proved is to show Respondent's duplicitous behavior and deceptive actions with respect to the charged conduct." Thus, the Coast Guard implies that Respondent's refusal is somehow more duplicitous as a result of his alleged drug use as demonstrated by the hair follicle test.

However, the undersigned notes that there are serious reliability issues with Respondent's hair follicle test. Neither the reliability of the test itself nor the acceptable cutoff levels for positive results have been conclusively established. See USCG v. Lockwood, 10-0176 (USCG ALJ March 11, 2011). While the Coast Guard explained that "[i]f required, the USCG is prepared to provide sponsor witnesses for CG-24, including the records custodian for the collection site, National Screening Centers, and lab, Quest Diagnostic, as well as the USCG investigating officer who obtained the record in the course of his investigation," the undersigned notes that these witnesses were never listed or even mentioned in the Coast Guard's pre-hearing filings or at any point during the hearing.

Further, as Respondent correctly asserts, the Coast Guard never indicated prior to the hearing that they intended to introduce the three (3) proffered exhibits. 33 C.F.R. § 20.601(a)(2). 33 C.F.R. § 20.807(b). To the extent the Coast Guard argues that these exhibits serve as rebuttal to mitigating statements Respondent testified to at the hearing, the undersigned again notes that a careful reading of the transcript reveals that Respondent never testified that he had a perfect track record with regards to drug screenings.

Accordingly, upon consideration of the arguments provided by the Coast Guard and the reliability and relevance issues with CG Ex. 23, CG Ex. 24 and CG Ex. 25[14], the undersigned finds that the three (3) additional exhibits are more prejudicial than probative, and the exhibits are not admitted into the record. 33 C.F.R. § 20.802(b).

Sanction

The authority to impose sanctions at the conclusion of a case is exclusive to the Administrative Law Judge. 46 C.F.R. §§ 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 U.S.C. § 7701; 46 C.F.R. § 5.5; Appeal Decision 1106 (LABELLE) (1959).

The 46 C.F.R. § 5.569 guidelines provide 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 C.F.R. § 5.569(d); Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174.

The undersigned has carefully reviewed the entire record and all of the evidence presented in this matter and notes that the proposed sanction of revocation exceeds the suggested range of sanctions considered in the 46 C.F.R. § 5.569 guidelines. The guidelines suggest a range of sanction from 12 to 24 months outright suspension for Refusal of a drug test. However, while two charges of Misconduct for refusing a drug test were found proved, the undersigned notes that Respondent either refused the drug test or did not refuse the drug test; the sanction guidelines will not be doubled.

Although the Coast Guard proffers that "…despite the absence of revocation as a suggested sanction in the Table 5.569 ranges provided for misconduct and refusal to take a

[14] The undersigned notes that CG Ex. 25 is only relevant if Respondent is, in fact, a user of dangerous drugs. The undersigned did not render such a finding, nor was the undersigned required to as the underlying charges were two counts of Misconduct.

required chemical test, there exists a well-established history of Commandant Decisions on Appeal affirming the principles that refusal to test… [warrants revocation]," the undersigned notes that three (3) of the seven (7) cases cited by the Coast Guard predate the NTSB decision in Coast Guard v. Moore, NTSB Order No. EM-201 (2005). In Coast Guard v. Moore, the NTSB disapproved a license revocation order in a refusal to test case because specific factors in aggravation sufficient to depart from 46 C.F.R. § 5.569 guidelines had not been articulated.[15]

While the undersigned notes that the Commandant has upheld decisions wherein the ALJ has revoked a mariner's license for refusal to test, it is not mandatory, and ALJs frequently follow the sanction guidelines for refusal cases. See USCG v. Grays, 2010 ALJ 17. USCG v. Simones, 2010 ALJ 11. USCG v. Webb, 2009 ALJ 12. In the instant case, the undersigned finds a sanction within the Table guidelines appropriate. However, noting that Respondent did not submit any mitigating evidence, and finding that Respondent possessed a prosthetic device to be an aggravating factor in and of itself, the undersigned finds that a suspension in the high end of the suggested range is appropriate. Accordingly, Respondent's Merchant Mariner's License shall be suspended outright for twenty-four (24) months.

Respondent surrendered his credentials to the Coast Guard as a good faith deposit on October 14, 2010. (Tr. at 677). Accordingly, Respondent has been unable to work under the authority of his License for approximately fifteen (15) months. Therefore, affording credit to Respondent for the period of his good faith deposit, the Coast Guard is ordered to return Respondent's Merchant Mariner's License in nine (9) months.

[15] It appears the Coast Guard also cited the Commandant's Decision in MOORE to support their proffer. This decision was subsequently overturned by the NTSB in Coast Guard v. Moore, NTSB Order No. EM-201 (2005).

ORDER

IT IS HEREBY ORDERED that Respondent, Shean Mason Carroll's Merchant Mariner's License Number 1508245 is hereby **SUSPENDED** outright for a period of twenty-four (24) months. However, Respondent shall be given credit for the duration of his good faith deposit.

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. (**Attachment C**).

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

Date: January 20, 2012

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COAST GUARD'S WITNESSES

1. Antoine Flagg
2. Cristina Martinez
3. Michael Escobedo
4. Dr. David Paine
5. Valeria Hope

RESPONDENT'S WITNESSES

1. Shean Carroll
2. Blane Broussard

EXHIBIT LIST

COAST GUARD'S EXHIBITS

CG Ex. 1 Michael Escobedo's Statement
CG Ex. 2 Custody and Control Form
CG Ex. 3 MRO Verification Letter
CG Ex. 4 Acceptance Statement
CG Ex. 5 OFFERED THEN WITHDRAWN
CG Ex. 6 Unusual Collection Form
CG Ex. 7 Custody and Control Form
CG Ex. 8 NOT OFFERED AT THE HEARING
CG Ex. 9 NOT OFFERED AT THE HEARING
CG Ex. 10 NOT OFFERED AT THE HEARING
CG Ex. 11 NOT OFFERED AT THE HEARING
CG Ex. 12 NOT OFFERED AT THE HEARING

CG Ex. 13 NOT OFFERED AT THE HEARING
CG Ex. 14 Antoine Flagg's Statement
CG Ex. 15 Respondent's Written Statement
CG Ex. 16 Michael Escobedo's Statement
CG Ex. 17 Concentra Medical Non-Injury Flowsheet
CG Ex. 18 Michael Escobedo's DOT Drug Screen Collector Qualification Certificate
CG Ex. 19 Dr. Paine's Notes
CG Ex. 20 Dr. Paine's Curriculum Vitae
CG Ex. 21 Kinder Morgan Drug and Alcohol Policy, Revised 07/01/2009
CG Ex. 22 OFFERED, NOT ADMITTED AT THE HEARING
CG Ex. 23 Weather Information from the Houston Chronicle for February 5, 2010
CG Ex. 23[16] OFFERED, NOT ADMITTED POST-HEARING
CG Ex. 24 OFFERED, NOT ADMITTED POST-HEARING
CG Ex. 25 OFFERED, NOT ADMITTED POST-HEARING

RESPONDENT'S EXHIBITS

Resp. Ex. A E-mail from Valeria Hope dated 2/9/10
Resp. Ex. B May 10, 2010 Kinder Morgan Letter
Resp. Ex. C Facsimile from Dr. Paine's Office

[16] As numbered by the Coast Guard in the Notice for Submission Regarding Sanction.

ATTACHMENT B

Coast Guard's Proposed Findings of Fact

1. At all relevant times herein, Respondent Shean Mason Carroll was the holder of United States Coast Guard (USCG)-issued Merchant Mariner's License (MML) No. 1508245. Answer.
   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. At all relevant times herein, Respondent acted under the authority of MML No. 1508245. Answer.
   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

3. At all relevant times herein, Respondent was the employee of Kinder Morgan. CG-04.
   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

4. At all relevant times herein, Kinder Morgan was subject to Department of Transportation (DOT) chemical testing regulations contained in 49 CFR Part 40 as an "Employer" and USCG chemical testing regulations contained in 46 CFR Part 16 as a "Marine Employer." Tr. Vol. 2, Pgs 480-530; 566-570; CG-21.
   ACCEPTED.

5. At all relevant times herein, Respondent was subject to DOT chemical testing regulations contained in 49 CFR Part 40 as an "Employee" and USCG chemical testing regulations contained in 46 CFR Part 16 as a "Crewmember." Tr. Vol. 2, 649-50; CG-21.
   ACCEPTED.

6. At all relevant times herein, Ms. Cristina Martinez was subject to DOT chemical testing regulations contained in 49 CFR Part 40 as a "Collector." Tr. Vol. 1, Pgs. 131-49.
   ACCEPTED.

7. At all relevant times herein, Mr. Michael Escobedo was subject to DOT chemical testing regulations contained in 49 CFR Part 40 as a "Collector." CG-18.
   ACCEPTED.

8. At all relevant times herein, Dr. David Paine, M.D., was subject to DOT chemical testing regulations contained in 49 CFR Part 40 and USCG chemical testing regulations contained in 46 CFR Part 16 as a "Medical Review Officer (MRO)." Tr. Vol. 2, Pgs 348-357, 377-411.
   ACCEPTED.

9. At all relevant times herein, Ms. Valeria Hope was subject to DOT chemical testing regulations contained in 49 CFR Part 40 as "Designated employer representative (DER)" for Kinder Morgan. Tr. Vol. 2, Pgs 480-530; 566-570.
   ACCEPTED.

10. In the days just prior to February 5, 2010, Respondent had been with individuals smoking marijuana. Tr. Vol. 1, Pg. 55, Tr. Vol. 2, Pgs 641-43; CG-14. **NEITHER ACCEPTED NOR REJECTED.** This statement is ambiguous and could mean either that Respondent

was smoking marijuana with other individuals, or that Respondent was with other individuals who were smoking marijuana.

11. During his time serving aboard vessels, Respondent had previously been subjected to random drug testing as part of a scheduled crew change. Tr. Vol. 2, Pg 624.
ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

12. On February 5, 2010, Respondent reported to work as a USCG-licensed Mate/Pilot for Uninspected Towing Vessels at Kinder Morgan Ship Channel Services as part of a scheduled crew change for the Towing Vessel Mr. Bennett.
ACCEPTED.

13. On February 5, 2010, Antione Flagg of Kinder Morgan, Respondent's Marine Employer, directed Respondent to participate in a required random drug test. Tr. Vol. 1, Pgs 40-42.
ACCEPTED.

14. On February 5, 2010, Respondent appeared at Concentra Medical in Houston, TX for participation in a required random drug test. Tr. Vol. 2, Pgs 613-14.
ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

15. On February 5, 2010, while at Concentra Medical, Respondent provided what appeared to be a urine specimen to Ms. Cristina Martinez. Tr. Vol. 1, Pgs. 131-49; CG-02 and 06.
ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

16. Upon receiving what appeared to be a urine specimen from Respondent on February 5, 2010, Ms. Martinez observed the purported specimen to be outside the acceptable range described by 49 CFR 40.65(b)(1), as indicated by a thermometer strip on the exterior of the specimen collection container. Tr. Vol. 1, Pgs. 131-49; CG-02, 06, 15 and 14.
ACCEPTED.

17. After determining that the temperature of the specimen was outside the acceptable range, Ms. Martinez made a telephone call to Kinder Morgan's identified representative regarding the temperature irregularity of the specimen provided by Respondent and the need to obtain another urine specimen from Respondent under direct observation procedures in accordance with 49 CFR 40.67(c)(3), and that the collector/observer witnessing and obtaining the direct observed specimen must be of the same gender as Respondent; Kinder Morgan's representative concurred with the need to obtain a direct observed specimen from Respondent. Tr. Vol. 1, Pgs. 131-49; CG-06.
ACCEPTED.

18. Ms. Martinez also presented Respondent with a "Regulated Collections – Unusual Collection Form," bearing Respondent's name and Social Security Number, which Respondent then signed, certifying that he understood that the first specimen he attempted to provide was not within acceptable temperature range (90° to 100°F) and/or the collector had reason to believe that Respondent may have or may attempt to alter his specimen; the form also contained Respondent's certification that he was advised on the required procedures for collecting a direct observed urine specimen, including the need to comply with the collector's/observer's instructions, show the collector/observer a prosthetic device is not being used, allow the collector/observe to view urine leave the

donor's body and go into the collection container, and remain at the testing site until the testing process is complete; and the form advised Respondent that failure to comply with required procedures and instructions will result in the test being considered a refusal. Tr. Vol. 1, Pgs. 131-49; Tr. Vol. 2, Pgs. 625-29; CG-02, 06 and 07.
ACCEPTED.

19. As Ms. Martinez is not the same gender as Respondent, Mr. Michael Escobedo, another employee at Concentra Medical in Houston, Texas, was assigned to serve as the collector/observer for Respondent providing a urine specimen under direct observation procedures. Tr. Vol. 1, Pgs. 131-49.
ACCEPTED IN PART, as provided in the Decision and Order. The undersigned finds that Mr. Escobedo served as the collector for the direct observation test.

20. On February 5, 2010 Respondent was directed by Mr. Escobedo to provide another urine specimen. Tr. Vol. 1, Pgs 240-250; CG-01 and 16.
ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

21. On February 5, 2010 Respondent failed to comply with Mr. Escobedo's instructions during an observed collection under 49 CFR 40.67(i) respective of raising his shirt and lowering clothing and turning around to show there was no prosthetic device. Tr. Vol. 1, Pgs 240-250; CG-01 and 16.
ACCEPTED.

22. On February 5, 2010, while attempting to observe the direct collection of Respondent's urine specimen, Mr. Escobedo saw a plastic tube of approximately four inches in length protruding from Respondent's underwear. Tr. Vol. 1, Pgs 240-250; CG-01, 16 and 17.
ACCEPTED.

23. Upon taking notice of the plastic tube coming from Respondent's underwear and Respondent's failure to comply with the procedures for an observed collection, Mr. Escobedo informed Respondent that a collection could not be made. Tr. Vol. 1, Pgs 240-250; CG-01 and 16.
ACCEPTED.

24. After being informed that Mr. Escobedo saw the tube and that the collection could not be made, Respondent left the testing site. Tr. Vol. 1, Pgs 240-250 and CG-01, 02, 16 and 17.
ACCEPTED.

25. On February 5, 2010, the direct observed collection attempt for a urine specimen from Respondent was documented on the Custody and Control Form for Specimen ID No. 0059252209, bearing Respondent's Social Security Number, and transmitted it to David W. Paine, M.D., Medical Review Officer. Tr. Vol. 1, Pgs 256-267; CG-02 and 07.
ACCEPTED IN PART, as provided in the Decision and Order. The undersigned finds that the Custody and Control Form documented both the unobserved and observed urine collections.

26. On February 5, 2010, Mr. Escobedo documented Respondent's refusal to test and possession of a device to interfere with the testing process on the Concentra Medical

Non-Injury Flowsheet form generated for Respondent's specimen collection. Tr. Vol. 1, Pgs 254-55; CG-17.
ACCEPTED IN PART, REJECTED IN PART. Mr. Escobedo documented that Respondent had a device in his pants, but did not classify this as a refusal.

27. On February 5, 2010, after the direct observed test was stopped, Respondent called Mr. Flagg of Kinder Morgan and explained that he did not know why the temperature on the first specimen container was out of range and that he walked away from the second test because the collector was, among other things, trying to look at his penis. Tr. Vol. 1, Pgs 54-55; CG-14.
ACCEPTED.

28. On February 5, 2010, after leaving Concentra Medical in Houston, Respondent prepared a written statement and provided it to Kinder Morgan; the statement provided that the female collector "found the specimen to be below temp" and that Respondent would not allow the male collector to see Respondent's private parts during the direct observed test. Tr. Vol. 2, Pg 620;CG-15.
ACCEPTED.

29. On or about February 8, 2010, Mr. Escobedo documented Respondent's refusal to test and Respondent's possession of a device used to interfere with the testing process on a written statement provided to Dr. Paine and Ms. Hope. Tr. Vol. 1, Pgs 253-272; CG-01 and 16.
ACCEPTED.

30. On or after February 5, 2010, Ms. Hope began a review of the incident regarding Respondent's actions at Concentra Medical on February 5, 2010, which included contacting and discussing the matter extensively with Dr. Paine. Tr. Vol. 2, Pgs 480-530; 566-570.
ACCEPTED.

31. On or about February 8, 2010, Dr. Paine, upon reviewing the Custody and Control Form for Specimen ID No. 0059252209 and inquiring into the incident documented therein, initiated minor corrective actions to the Custody and Control Form via Mr. Escobedo and concluded that the matter was a refusal to test under 49 CFR 40.191(8)(9)(10), as documented on Step 6 on the Specimen ID No. 0059252209. Tr. Vol. 2, Pgs 348-357, 377-411; CG-02, 03, 16 and 19.
ACCEPTED.

32. On or about February 8, 2010, Ms. Hope, after reviewing all pertinent records and documentation and consulting with Dr. Paine, determined that Respondent's actions at Concentra Medical in Houston constituted a refusal to test per 49 CFR 40.191. Tr. Vol. 2, Pgs 348-357, 377-411, 480-530; 566-570; CG-01, 02, 03, 14, 15, 16 and 19.
ACCEPTED.

ATTACHMENT C

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.