

SERVED: March 6, 2008

NTSB Order No. EM-204

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 4<sup>th</sup> day of March, 2008

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THAD W. ALLEN,		)
Commandant,		)
United States Coast Guard,		)
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		)
	v.	)
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PATRICK BEAU SHEA,		)
		)
	Appellant.	)
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Docket ME-180

**OPINION AND ORDER**

Appellant, by counsel, seeks review of a decision of the Vice Commandant (Appeal No. 2664, dated August 7, 2007) affirming a decision entered by Coast Guard Administrative Law Judge Walter J. Brudzinski on January 25, 2005, following an evidentiary hearing that concluded on October 6, 2004.<sup>1</sup> The law judge

<sup>1</sup> Copies of the decisions of the Vice Commandant and the law judge are attached. We note that nearly 3 years elapsed between the hearing in this matter and the Vice Commandant's decision on appeal, and we urge the Commandant to take measures to improve the timelines of final Coast Guard resolution of mariner appeals.

sustained charges of misconduct (46 C.F.R. § 5.27) and incompetence (46 C.F.R. § 5.31) on the basis of appellant deserting his assigned engineering watch, and his subsequent medical diagnosis of having manic bipolar disorder. On the basis of the incompetence charge, the law judge ordered that appellant's merchant mariner's license and his merchant mariner's document be revoked with immediate effectiveness. As we find no valid basis in appellant's assignments of error for overturning the Vice Commandant's affirmance of the law judge's decision and order, appellant's appeal will be denied.

The relevant facts for the purposes of our review of this appeal are essentially undisputed.<sup>2</sup> On December 18, 2003, respondent was serving as second assistant engineer aboard the S/S EWA as it was en route from Long Beach, California, to Honolulu, Hawaii. In the early morning hours, while assigned as the officer of the watch in the vessel's engine room, appellant abandoned his watch without obtaining a relief, or substitute, and was discovered crawling on his hands and knees on the bridge wing. When confronted by the chief officer, respondent exhibited irrational behavior and then fled the bridge wing, grabbed a life ring with a strobe light attached to it, and, shortly thereafter, the chief officer observed two strobe lights flashing in the water off the port quarter of the vessel. Appellant was soon thereafter found again in the engine room, and a replacement engineering officer was assigned to assume appellant's watch.

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<sup>2</sup> A more detailed recitation of the record evidence can be found in the law judge's decision and order.

Appellant was confined to his quarters for the 3 remaining days of the voyage and placed on a 24-hour suicide watch, because it was discovered that appellant had filled several large trash bags with food, water, clothing, and reading material, all of which were found tethered to an inflatable life raft that he admitted to having dragged from its proper location and assembled for the purpose of leaving the ship. Appellant also gave copies of his medical files to the master. The files indicated to the master that appellant was previously diagnosed with a psychiatric illness, and likely at that time experiencing a recurrent episode. In consultation with shore-based medical personnel, the master administered controlled medication, monitored appellant's vital signs, and arranged for hospital treatment upon reaching Honolulu. At times, appellant was agitated, made threatening statements, and was restrained for his own safety and the safety of the crew.

Appellant explained to the master that he was concerned about some mechanical problems in the engine room, and that the weather was going to be unfavorable, and, therefore, that he desired to get off the vessel. When it was discovered that appellant had again packed bags with water and survival suits, he was again restrained for his protection, and became very agitated and demanded that the survival gear be returned to him. Upon arrival in Honolulu, on or about December 22, 2003, appellant was admitted to Queen's Hospital. He received care and medication from a psychiatrist, Dr. Barry S. Carlton, until his discharge from the hospital on January 6, 2004. Thereafter, Dr. Carlton

continued to act as appellant's treating psychiatrist, and, at the time of the hearing, was treating appellant on an out-patient basis. Dr. Carlton's diagnosis is that appellant has bipolar disorder-manic, and he prescribed the psychotropic medication Zyprexa, which appellant takes nightly.

At the hearing, Dr. Carlton testified that appellant's illness appeared to be in remission in that appellant had not had any breakthrough symptoms while in Dr. Carlton's care. He explained that appellant appears so far to be able to successfully manage his disorder with proper control of his medication, regular meetings with a psychiatrist, complying with wellness issues having to do with exercise and "most importantly ... maintenance of a normal sleep pattern," self-awareness of his disorder, and knowledge of how to recognize onset of breakthrough symptoms. Tr. at 113. On that basis, and in conjunction with a review of appellant's second assistant engineer position description, Dr. Carlton testified that in his medical opinion appellant was mentally competent and fit for sea duty. However, Dr. Carlton also testified that it is difficult to estimate what the chances are that appellant may have a relapse, and that appellant will always be at greater risk than the general public of suffering from psychiatric effects associated with his illness. Tr. at 107-112.

The law judge considered the testimony of Dr. Carlton, and the prospects for successful medical monitoring and management of appellant's medical condition. Specifically, the law judge reasoned:

Dr. Carlton ... states that bipolar disorder is a chronic illness that requires long-term management and could not say with certainty that ... [appellant] ... would not have breakthrough episodes because it is difficult to judge the illness' course....

Dr. Carlton's opinion that [appellant] is fit for duty ... is not unqualified. It carries many caveats or warnings.... The only thing that is known for sure is that despite his insight and efforts in lifestyle management and sleep patterns, [appellant] still remains at greater risk for breakthrough symptoms than the general population. Adding to this uncertainty is the reasonably foreseeable likelihood of emergency situations arising aboard ship creating stress and unpredictable sleep patterns. Moreover, the greater likelihood of other circumstances such as having to stand additional watches for another engineer ... inadvertently may place [appellant] at greater risk for breakdown episodes despite his insight and perceived ability to adjust his medication.

Decision and Order at 16-20 (record citations omitted).

Accordingly, the law judge concluded that the record evidence demonstrated appellant to be mentally incompetent to safely perform the duties associated with his mariner credentials.

We find it unnecessary to address in detail most of the arguments renewed here that either the law judge or the Vice Commandant has previously rejected, for we are not persuaded that they have incorrectly analyzed any of the primary issues appellant raised for their consideration. We will, accordingly, confine our comments only to a few matters that we believe merit additional discussion.

Appellant's argument that the return of his license and document before, and in anticipation of, the revocation proceedings precludes the charge of incompetence is unavailing.<sup>3</sup>

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<sup>3</sup> Appellant has attached to his brief a copy of what is purported to be, and in fact appears to be, the Voluntary Deposit Agreement executed between appellant and the Coast Guard investigating officer. However, this record was not introduced at the hearing,

It appears that Coast Guard regulations at 46 C.F.R. §§ 5.201, 5.203, and 5.205 provide an adequate basis for the Coast Guard to retain, pursuant to a voluntary deposit agreement, appellant's license and document indefinitely or permanently, in light of his present disorder. However, although we find no precedent in cases appealed to the Board of the Coast Guard doing so, we discern no proscription against a Coast Guard investigating officer abandoning a voluntary deposit agreement, and simultaneously proceeding with formal charges to be litigated at a revocation hearing, as the investing officer elected to do in this instance.<sup>4</sup> We think that appellant's argument—that the Coast Guard's abandonment of the voluntary deposit agreement in favor of revocation proceedings somehow constituted an acknowledgement by the Coast Guard that appellant was at that time fit for sea duty—improperly attempts to impute a medical diagnosis to the investigating officer's procedural decisions. Appellant's argument is at odds with the hearing evidence

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(..continued)

and therefore has not been properly authenticated, and appellant has not filed leave to submit new evidence. Therefore, it shall not be considered. Nonetheless, we note that the agreement states, in part: "I understand that while this agreement is in effect the Coast Guard will not issue a complaint for incompetence against me." It also states: "I understand that this voluntary deposit agreement will remain in effect until I present a report from a licensed physician which states that I am *fully fit, in all respects*, to perform my duties aboard ship.... I understand that the Coast Guard will promptly return my Credential(s) to me after confirming the physician's report...." (emphasis added).

<sup>4</sup> We also note that the Coast Guard's election in this regard is consistent with precedent. See Appeal Decision 2181 (Burke) (articulating a "strict policy of requiring revocation of all licenses and documents when mental incompetence is found proved").

regarding appellant's actual medical condition and competence to exercise the privileges of his credentials.

Appellant's argument that the law judge and the Vice Commandant erred in not ascertaining whether appellant's disorder is capable of being adequately monitored and managed at sea is also unavailing. We find that the Vice Commandant adequately explained, consistent with precedent and the record evidence, including Dr. Carlton's testimony, his agreement with the law judge's determination. The Vice Commandant thus properly determined that reasonably-foreseeable shipboard conditions would render impractical the necessary monitoring and illness management measures necessary to ensure that appellant could be relied upon to competently and safely exercise his duties.

In addition, contrary to appellant's other arguments, we find that the law judge did not abuse his discretion to regulate the admission of competent and relevant hearing evidence. We discern no error in the law judge's decision to admit copies of appellant's medical records from his psychiatric treatment in Canada prior to the events on the S/S EWA.

Finally, we find no precedent that supports appellant's argument that his mental illness precludes the charge of misconduct. See Appeal Decision 1677 (Canjar) ("proof of the 'mental incompetence' charge ... [does] not automatically necessitate dismissal of the misconduct charges"). Appellant testified that he was cognizant of his prior psychiatric care in Canada, and that he had discontinued medical treatment against the advice of his attending physician, in favor of holistic

treatment. Appellant also testified that he was fully cognizant of leaving his watch and of his actions aboard the S/S EWA even though he now realizes that his thoughts at the time were "grandiose," due to his untreated illness. In short, although the charge is largely superseded by the revocation for mental incompetence, we discern no basis to disturb the Vice Commandant's decision to sustain the charge of misconduct.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Appellant's appeal is denied; and
2. The Vice Commandant's decision affirming the decision and order of the law judge is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA  
DEPARTMENT OF HOMELAND SECURITY  
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD

vs.

MERCHANT MARINER LICENSE &  
MERCHANT MARINER DOCUMENT

Issued to: PATRICK BEAU SHEA

DECISION OF THE  
VICE COMMANDANT  
ON APPEAL  
NO. 2664

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated January 25, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Honolulu, Hawaii, issued a decision revoking the merchant mariner credentials of Mr. Patrick B. Shea, (hereinafter "Respondent") upon finding proved charges of both misconduct and incompetence.

The first specification found proved alleged that Respondent committed misconduct by abandoning his watch station, without a relief, while underway on the SS EWA on December 18, 2003. The second specification found proved alleged that Respondent was incompetent due to his suffering from bipolar disorder which caused him to abandon his watch station on the SS EWA on December 18, 2003, and act in an irrational manner, which resulted in Respondent being relieved of all duties and being placed in restraints and confined to his quarters until the end of the vessel's voyage.

PROCEDURAL HISTORY

On June 3, 2004, the Coast Guard filed a Complaint against Respondent alleging both incompetence and misconduct. The Complaint was personally served on Respondent and was filed with the ALJ Docketing Center on the same day. Respondent filed his Answer to the Complaint on June 18, 2004, admitting all jurisdictional allegations but denying several of the factual allegations that supported the charges.

The hearing was held on October 6, 2004, in Honolulu, Hawaii. Respondent was represented by professional counsel. During the hearing, the Coast Guard Investigating Officers (hereinafter "IOs") called three witnesses and introduced six exhibits into the record. Respondent introduced one exhibit into evidence and testified on his own behalf.

On January 25, 2005, the ALJ issued the D&O, finding the charges of incompetence and misconduct proved. [D&O at 1] Thereafter, on February 15, 2005, Respondent filed his notice of appeal in the matter. Respondent perfected his appeal by filing his Appellate Brief on March 14, 2005. Therefore, this appeal is properly before me.

APPEARANCE: John O'Kane, Esq. and Mark Hamilton, Esq. for Respondent. The Coast Guard was represented by Lieutenant Michael Pierno and Chief Warrant Officer Giles Loftin of U.S. Coast Guard Sector Command Central Pacific, Honolulu, Hawaii.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner credentials at issue in these proceedings. [Transcript (hereinafter "Tr.") at 12]

On December 18, 2003, Respondent was acting under the authority of his Coast Guard issued merchant mariner credentials when he served as Second Assistant Engineer aboard the SS EWA. [Tr. at 31, 52] At that time, the SS EWA was underway on a voyage from Long Beach, California, to Honolulu, Hawaii. [Tr. at 46, 51] At or about 0630 on December 18, 2003, while on watch in the engine room of the SS EWA, Respondent left his watch station without obtaining a relief watch stander. [Tr. at 32-33, 177-178] Shortly after leaving his watch station, the Chief Mate observed Respondent crawling on his hands and knees on the vessel's port bridge wing. [Tr. at 32-33, 62, 177-178; IO Exhibit 1]

As a result of Respondent's erratic behavior, he was relieved of his duties, placed in restraints and kept confined to his stateroom, under a suicide watch, for three days until the SS EWA arrived in Honolulu. [Tr. at 35-38, 68-71, 177-178; IO Exhibit 1] The Master of the SS EWA, Captain Thomas Stapleton, interviewed Respondent in his stateroom in order to determine the cause of his erratic behavior. [Tr. at 68-69; IO Exhibit 1] During this interview, Respondent handed a folder with his medical records to Captain Stapleton. [Id.] The folder contained summaries of medical treatment received by Respondent at Lions Gate Hospital in North Vancouver, British Columbia, Canada, from March 3, 2003, to March 19, 2003, and again from April 3, 2003, to April 22, 2003. [Tr. at 65-67; IO Exhibit 1; IO Exhibit 2] From these medical records, Captain Stapleton learned that Respondent was suffering from a mental illness. [Tr. at 77; IO Exhibit 1; IO Exhibit 2] During the interview, Captain Stapleton also learned that Respondent was concerned that the vessel would not complete its voyage to Honolulu and that, as a result, he had made preparations to abandon ship, which included removing

a life raft from its cradle and dragging it aft approximately fifty feet and stuffing trash bags with food and personal belongings. [Tr. at 71-74; IO Exhibit 1; IO Exhibit 3]

Upon the SS EWA's arrival at Honolulu on December 22, 2003, Respondent was taken to Queen's Medical Center and was treated by Dr. Barry Carlton, the hospital's Assistant Chief of Psychiatry. [Tr. at 90-91; IO Exhibit 5] Dr. Carlton's diagnosis of Respondent was that he was suffering from bipolar disorder, current episode manic. [Tr. at 94, 96; I.O. Exhibit 6] Dr. Carlton treated Respondent from his admission to the hospital until his discharge on January 6, 2004, and remained his treating psychiatrist on an out-patient basis through the date of the hearing. [Tr. at 89-91; I.O. Exhibit 5] On February 13, 2004, Dr. Carlton declared Respondent "fit for duty" because his mental illness was in remission and his symptoms were being treated with prescription medications. [Tr. at 99-101; I.O. Exhibit 5]

The details of Respondent's erratic behavior on December 18, 2003, during the SS EWA's voyage to Honolulu were reported by Captain Stapleton to the Coast Guard. [I.O. Exhibit 1] Apparently, Respondent then voluntarily deposited his mariner credentials with the Coast Guard.<sup>1</sup> On June 3, 2004, the Coast Guard allegedly returned Respondent's merchant mariner credentials to him. On that same day, the Coast Guard issued Respondent a Complaint, alleging incompetence and misconduct. [D&O at 4] The hearing and D&O that followed resulted in Respondent's appeal which is now before me.

<sup>1</sup> Reference to a voluntary deposit is made in Respondent's Appellate Brief. However, the record does not contain a copy of any kind of voluntary deposit or voluntary surrender agreement between Respondent and the Coast Guard. There is no other mention of a voluntary deposit or voluntary surrender in the record.

BASES OF APPEAL

This appeal is taken from the ALJ's D&O which found the charges of incompetence and misconduct proved. After a thorough review of Respondent's Appellate Brief, his multiple assignments of error are summarized as follows:

- I. *The ALJ erred in finding Respondent incompetent since the Coast Guard returned his voluntarily deposited merchant mariner credentials.*
- II. *The ALJ erred in finding Respondent incompetent since his condition is manageable.*
- III. *The ALJ erred in finding Respondent incompetent by applying an erroneous standard by misinterpreting Appeal Decision 2417 (YOUNG).*
- IV. *The ALJ erred in admitting Respondent's medical discharge summaries from Lions Gate Hospital into evidence because they were not properly authenticated and constituted only a portion of Respondent's relevant medical history.*
- V. *The ALJ erred in finding Respondent committed an act of misconduct because willfulness is a necessary element to a charge of misconduct and that element was not proven by the Coast Guard.*

OPINION

## I.

*The ALJ erred in finding Respondent incompetent since the Coast Guard returned his voluntarily deposited merchant mariner credentials.*

On appeal, Respondent asserts that he voluntarily deposited<sup>2</sup> his merchant mariner credentials with the Coast Guard and that those credentials were later returned to him.

<sup>2</sup> Respondent's appeal brief uses the terms "voluntary deposit" and "voluntary surrender" interchangeably. However, under the applicable regulations, these terms do not have the same meaning. A voluntary deposit is an agreement where a mariner leaves his mariner credential(s) in the possession of a Coast Guard Investigating Officer during a period of physical or mental incompetence, until such incompetence is cured. 46 C.F.R. § 5.201. A voluntary surrender, on the other hand, is the relinquishment of a mariner's credential(s) in order to avoid a suspension and revocation hearing. 46 C.F.R. § 5.203. Although the record is unclear as to whether—or even if—Respondent entered into a voluntary deposit or surrender agreement with the Coast Guard, viewing the record in the light most favorable to Respondent, this decision will assume that Respondent's argument is referring to a voluntary deposit agreement.

[Respondent's Appeal Brief at 4] Based upon these alleged occurrences, Respondent argues that the Coast Guard would not have returned his credentials to him unless he had "demonstrated satisfactory rehabilitation of his condition and complied with the physical and professional requirements for the issuance of a license or document." [Respondent's Appeal Brief at 4] For the reasons discussed below, Respondent's assertion, in this regard, is not persuasive.

Respondent's argument implies that the return of a voluntarily deposited mariner credential precludes the Coast Guard from taking suspension and revocation action. This is simply not the case. On its face, the regulation that authorizes the Coast Guard to accept a voluntary deposit in cases of physical or mental incompetence does not expressly prohibit the agency from further action, even when a voluntarily deposited mariner credential is returned to the mariner. 46 C.F.R. § 5.201. According to 46 C.F.R. § 5.105, the courses of action available to a Coast Guard Investigating Officer include issuing a Complaint, accepting a voluntary surrender, accepting a voluntary deposit, referring the case to others for further action, giving a written warning, and closing the case. The regulation does not make any one course of action mutually exclusive of the others, nor does it expressly limit the Investigating Officer to only one course of action. Accordingly, Respondent's assertions with respect to the return of his voluntarily deposited mariner credentials are wholly unpersuasive.

## II.

*The ALJ erred in finding Respondent incompetent since his condition is manageable.*

On appeal, Respondent argues that the ALJ erred in finding him incompetent because the record contains substantial evidence to support a conclusion that

Respondent's mental condition is medically manageable. To that end, Respondent argues that because he was declared fit for duty by his physician on February 13, 2004, and has taken his medication as ordered and not suffered any relapses, the ALJ erred in finding him incompetent. After a thorough review of the record, I do not find Respondent's assertions in this regard persuasive.

Pursuant to Coast Guard regulation, "incompetence" is "the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof." 46 C.F.R. § 5.31. Apart from providing a definition of the term "incompetence," Coast Guard regulations do not address whether medical management of a physical or mental ailment is an appropriate factor to be considered in ultimately determining whether a mariner is competent to hold Coast Guard issued merchant mariner credentials. However, as Respondent notes in his appeal, at least one prior Commandant Decision on Appeal has stated that the feasibility of management of a mental or physical condition is an appropriate factor to be considered in determining whether a mariner is incompetent. See Appeal Decision 2547 (PICCIOLO). Citing Appeal Decision 2547 (PICCIOLO), Respondent asserts that the ALJ erred in failing to accord the evidence that he presented as to the manageability of his mental condition proper weight. I disagree.

In the *Picciolo* case, Mr. Picciolo suffered from diabetes and was found by a Coast Guard ALJ to be physically incompetent to hold a merchant mariner credential due to episodes of high blood sugar. Following Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Picciolo's blood sugar level could be controlled through a periodic monitoring

program, whether such a program was compatible with available medical services at sea or ashore, whether such a program would unduly interfere with Mr. Picciolo's ability to perform his duties, and the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program.

Although the original record did not contain evidence as to the impact that a medical monitoring program would have on the mariner's ability to perform the duties associated with his mariner credential in the *Picciolo* case, such evidence was admitted to the record in this case. Indeed, a careful review of the ALJ's D&O shows that he spent considerable time discussing the effect that medical monitoring would have on Respondent's ability to perform the duties associated with his mariner credentials:

[Respondent] has been taking Zyprexa, a psychotropic drug, and according to Dr. Carlton his illness is currently in remission. As such, Dr. Carlton opines that Respondent is now competent and fit for duty. However, Dr. Carlton also states that bipolar disorder is a chronic illness that requires long-term management and could not say with certainty that...[Respondent]...would not have breakthrough episodes because it is difficult to judge the illness' course. Dr. Carlton expects a sustained remission but, even so, one who is in remission still has a greater risk of breakthrough episodes than someone who does not have bipolar disorder. Moreover, it is not certain that Respondent will remain symptom free even if he is compliant and takes the medication because the course of the illness is highly variable.

\* \* \*

Dr. Carlton's opinion that Respondent is fit for duty...is not unqualified. It carries many caveats or warnings: Dr. Carlton anticipates at least five years of asymptomatic condition before he would even consider recommending discontinuing the medication. The course of Respondent's remission and the chances that he will have breakthrough episodes cannot be predicted and it cannot be said with certainty that he will not have a breakthrough episode. The medicines are helpful in preventing breakthroughs but it (absence of breakthrough episodes) cannot be guaranteed. There is always an ongoing risk. Respondent will not be cured but will remain in remission because Bipolar disorder is [a] chronic [condition] that requires long-term management...Even if Respondent remains in remission; that is symptom free, for five years and continues to take Zyprexa for that period of time, he still remains at greater risk than

the (general) population for an exacerbation of illness. The inference from Dr. Carlton's caveats is that no matter how compliant Respondent is with his regimen of medication and lifestyle practices, at best, his illness still puts him at greater risk than the general population for breakthrough episodes.

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In reviewing Respondent's course of treatment starting with the discharge summaries from Lions Gate Hospital...through his inpatient treatment at Queen's Medical Center...and the present outpatient treatment, there is no question that Dr. Carlton's treatment is responsible for...[Respondent's]...favorable prognosis and it appears that Respondent may well continue to remain symptom free as long as he is compliant with his medication and properly manages his lifestyle issues, including weight control and normal sleep patterns. Or, he may not. The only thing that is known for sure is that despite his insight and efforts in lifestyle management and sleep patterns, he still remains at greater risk for breakthrough symptoms than the general population. Adding to this uncertainty is the reasonably foreseeable likelihood of emergency situations arising aboard a ship creating stress and unpredictable sleep patterns. Moreover, the greater likelihood...[that]...other circumstances such as having to stand additional watches for another engineer...inadvertently may place Respondent at greater risk for breakdown episodes despite his insight and perceived ability to adjust his medication.

[D&O at 16-20, citations to transcript omitted]

The key issue presented here, therefore, is whether the ALJ considered the testimony, evidence, and arguments presented by Respondent regarding the manageability of his mental condition and whether the ALJ gave that evidence the appropriate weight in reaching his determination. Numerous prior Commandant Decisions on Appeal make clear that, in evaluating the evidence presented at a hearing, the ALJ is in the best position to both weigh the testimony of witnesses and assess the credibility of evidence. *See, e.g., Appeal Decisions 2584 (SHAKESPEARE), 2421 (RADER), 2319 (PAVELIC), 2589 (MEYER), 2592 (MASON), and 2598 (CATTON).* In addition, prior Commandant Decisions on Appeal show that the ALJ has broad discretion in making determinations regarding the credibility of witnesses and in

resolving inconsistencies in evidence. *See, e.g., Appeal Decisions 2560 (CLIFTON), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), 2598 (CATTON), 2382 (NILSEN), 2365 (EASTMAN), 2302 (FRAPPIER), and 2290 (DUGGINS).* Moreover, the ALJ's decision is not subject to reversal on appeal unless his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g., Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff'd NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMENKE), 2589 (MEYER), 2592 (MASON), and 2560 (CLIFTON).*

In this case, the ALJ found that “[b]ecause Respondent remains at greater risk than the general population for having breakthrough episodes even if fully compliant” with the medical regimen prescribed by his physician, he could not accept Dr. Carlton’s opinion that Respondent was fit for duty. [D&O at 17] The record shows that, irrespective of the finding of “fit for duty,” Respondent’s physician testified: 1) that he could not state to a reasonable degree of medical certainty that Respondent would remain asymptomatic even if he continued taking his medication, 2) that the prescription drug that Respondent is taking had the potential to impair Respondent’s judgment and motor skills, and 3) that Respondent would have to remain asymptomatic for five years before contemplating cessation of his medication. [Tr. at 105, 107, 109, 120, 135-135]

As is discussed above, a review of the ALJ’s D&O shows that he carefully considered the evidence presented as to the manageability of Respondent’s condition. Although the ALJ reached a different conclusion than Respondent’s physician after reviewing that evidence, given the ALJ’s broad authority to weigh the evidence and to

make credibility determinations, and the fact that at least one prior Commandant Decision on Appeal supports the notion that the ALJ is not bound by the recommendations of a psychiatrist in these proceedings, I find that the ALJ did not err in finding Respondent incompetent. *See Appeal Decision 2192 (BOYKIN)*. Accordingly, I am not persuaded by Respondent's second basis of appeal.

### III.

*The ALJ erred in finding Respondent incompetent by applying an erroneous standard by misinterpreting Appeal Decision 2417 (YOUNG).*

Respondent next argues that the ALJ abused his discretion by incorrectly basing his finding that Respondent was incompetent on Respondent's risk of future incompetence, rather than the evidence presented which showed that Respondent was competent and able to safely perform his duties as a ship's engineer at the time of the hearing. [Respondent's Appeal Brief at 7] To that end, Respondent argues that the ALJ's D&O "erroneously concluded... [that Respondent]... was incompetent because he was more of a risk of incompetence than the general population, not that he was unable to perform required duties." After a thorough review of the record, I am not persuaded by Respondent's assertions in this regard.

As Respondent notes in his appeal, *Appeal Decision 2417 (YOUNG)* states that a finding of mental incompetence "must rest upon substantial evidence of a reliable and probative character showing that the person charged suffers from a mental impairment of sufficient disabling character to support a finding that he is not competent to perform safely his duties aboard a merchant vessel." Respondent argues that the ALJ did not find, in accordance with *Young*, that Respondent currently suffers from a mental impairment that precludes him from holding merchant mariner credentials, but rather that the ALJ

found that Respondent could, at some point in the future, suffer such an affliction. I disagree.

In this case, the ALJ found that Respondent "currently suffers from a psychiatric condition that would affect adversely his ability to serve at sea." [D&O at 16, Emphasis added] In so finding, the ALJ disregarded a finding of "fit for duty" from Respondent's physician because he determined that the finding was "based on the premise that Respondent will control his symptoms by being compliant with his medication and properly manages lifestyle issues," actions which the ALJ determined would be uncertain given the "reasonably foreseeable likelihood of emergency situations arising aboard" merchant vessels. [D&O at 19] Although Respondent argues the contrary, acknowledging and mitigating the risk of a future mental breakdown stemming from a contemporaneous affliction is not without precedent in these proceedings.

In Appeal Decision 2181 (BURKE), an ALJ's decision to revoke a mariner's license due to mental incompetence was affirmed. In *Burke*, the ALJ expressly found that "the risk that Appellant will again suffer another debilitating 'psychotic episode' is of such significance as to preclude a finding that Appellant can be expected to perform duties aboard a merchant vessel of the United States without substantially endangering the lives of those aboard, and the vessel itself." The *Burke* decision was subsequently upheld by the National Transportation Safety Board which expressly found that although the mariner's current mental status was, as in this case, satisfactory, his history of 'emotional difficulties' caused him to present a risk of a future 'emotional difficulty' that disqualified him for work in a supervisory capacity." Commandant v. Burke, NTSB Order No. EM-83, 3 N.T.S.B. 4441 (1980).

Although Respondent's physician determined that he was "fit for duty," the ALJ disregarded that finding because the physician's decision, in that regard, was:

...based on the premise that Respondent will control symptoms by being compliant with his medications and properly manage lifestyle issues and sleep patterns because he has sufficient insight to identify symptoms and take appropriate action. Although Dr. Carltons's fit for duty opinion is based on a review of Matson's Second Assistant Engineer job description, it is reasonable to infer that prolonged exposure to heat, rotating shifts that disrupt sleep patterns, and emergency situations, are unpredictable and would tend to impact adversely on Respondent's ability to manage lifestyle issues. This greater risk for breakthrough episodes is sufficient evidence subsequent to his treating psychiatrist finding him fit for duty to find the Incompetence charge proved.

[D&O at 20]

As I stated above, the decision of the ALJ may only be overturned if his findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See, e.g., Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff'd NTSB Order No. EM-182, 2390 (PURSER), 2363 (MANN), 2344 (KOHAJTA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMENKE), 2589 (MEYER), 2592 (MASON), and 2560 (CLIFTON).* The exhaustive testimony of Dr. Carlton, shows that Respondent suffers from a chronic mental illness that will require the administration of psychotropic drugs for the foreseeable future. [D&O at 18; Tr. at 105-110] While Dr. Carlton declared Respondent "fit for duty," the record shows that the physician could not quantify the risk of remission posed by Respondent's condition, even with regular doses of prescription medication being taken to control Respondent's symptoms. [D&O at 18; Tr. at 107, 109] Furthermore, Dr. Carlton stated that one of the prescription drugs being used to treat Respondent's condition carries with it a risk of impaired judgment and impaired motor skills, as well as a warning against operating hazardous machinery. [Tr. at 120] Based

upon this evidence, the record contains substantial evidence to support the ALJ's conclusion that the risk that Respondent could suffer another manic episode while standing watch on a merchant vessel while at sea is significant enough to preclude a finding that he is competent to perform his duties. As such, the ALJ's finding, in this regard, was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence and will not now be disturbed.

#### IV.

*The ALJ erred in admitting Respondent's medical discharge summaries from Lions Gate Hospital into evidence because they were not properly authenticated and constituted only a portion of Respondent's relevant medical history.*

Respondent asserts that it was error to allow the medical discharge summaries from Lions Gate Hospital to be admitted into evidence because they were not authenticated in accordance with Federal Rule of Evidence 901 and they did not represent Respondent's complete medical record. [App. Br. at 13] I disagree.

In Coast Guard suspension and revocation proceedings, the ALJ has broad authority to admit any evidence that he or she deems relevant. *See* 33 C.F.R. § 20.802 and Appeal Decision 2657 (BARNETT). Relevant evidence is defined as "evidence tending to make the existence of any material fact more probable or less probable than it would be without the evidence." 33 C.F.R. § 20.802. In addition, the Coast Guard's procedural rules require that the ALJ "regulate and conduct the hearing so as to bring out all relevant and material facts and to ensure a fair and impartial hearing." *See* 46 C.F.R. § 5.501 and Appeal Decision 2657 (BARNETT). Clearly, the medical discharge summaries from Lions Gate Hospital were relevant to the issue of Respondent's alleged incompetence and were thus admissible.

Respondent's reliance on Federal Rule of Evidence 901 is unavailing. Federal agencies are not bound by the strict rules of evidence that govern jury trials. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) *citing* Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Instead, the admissibility of evidence before executive agencies is governed by the Administrative Procedure Act, which allows any documentary or oral evidence to be received. See 5 U.S.C. § 556(d), Gallagher and Sorenson. Only irrelevant, immaterial or unduly repetitious evidence need be excluded. *Id.* "Under this standard, in order to be admissible for consideration in an administrative proceeding, the evidence need not be authenticated with the precision demanded by the Federal Rules of Evidence." Gallagher at 1218. Authentication of Respondent's medical records under Federal Rule of Evidence 901 was not a necessary predicate to their admission into evidence.

Respondent's further argument that the medical discharge summaries from Lions Gate Hospital were not his complete medical record and were therefore prejudicial to him fails for the same reasons. [Respondent's Appeal Brief at 15] Since these proceedings are not strictly bound by the Federal Rules of Evidence, Respondent's reliance on Federal Rule of Evidence 106 is also misplaced and without merit. Gallagher v. National Transportation Safety Board, 953 F.2d 1214, 1218 (10th Cir. 1992) *citing* Sorenson v. National Transportation Safety Board, 684 F.2d 683, 688 (10th Cir. 1982). Therefore, because Respondent's medical discharge summaries were relevant to the charge of incompetence, the ALJ did not err in admitting them into the record.

## V.

*The ALJ erred in finding Respondent committed an act of misconduct because willfulness is a necessary element to a charge of misconduct and that element was not proven by the Coast Guard.*

Respondent argues that the ALJ erred in finding that an act of misconduct was committed because the Coast Guard failed to prove Respondent's willfulness, a necessary element of the charge of misconduct. [Respondent's Appeal Brief at 12] Respondent's assertion, in this regard, is without merit.

46 CFR 5.27 states that "misconduct" is,

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. It is an act which is forbidden or a failure to do that which is required.

The misconduct for which Respondent was charged was his departure from his watch station in the engine room aboard the SS EWA while it was underway. [D&O at 21] Respondent left his watch station without a proper relief and later had to be relieved of all duties and confined to his quarters. [*Id.*] Respondent does not deny this conduct; rather, he asserts that because he was suffering from a debilitating illness when the conduct occurred and because the conduct was not due to negligence or callous disregard for the consequences, the ALJ erred in finding the misconduct charge proved. I disagree.

It is well established that "willfulness" is not a necessary element of a charge of misconduct in these proceedings. *See, e.g., Appeal Decisions 2490 (PALMER), 2286 (SPRAGUE), 2447 (HODNET), 2445 (MATHISON), 2248 (FREEMAN), 2136 (DILLON), and 922 (WILSON).* Indeed, when a misconduct charge is based upon a

violation of a duty imposed by formal rule or regulation, as in this case, there is no requirement that misconduct be willful. Appeal Decision 2445 (MATHISON).

Irrespective of Respondent's mental state at the time of the incident, there is reliable, probative and substantial evidence in the record to support the ALJ's conclusion that Respondent committed misconduct by departing his watch station without a proper relief and, thereafter, having to be relieved of all duties and confined to his quarters. Accordingly, the ALJ's finding that Respondent committed misconduct was not arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence and is affirmed.

#### CONCLUSION

The actions of the ALJ had a legally sufficient basis and his decision was not arbitrary, capricious, or clearly erroneous. Competent, reliable, probative, and substantial evidence existed to support the findings and order of the ALJ. Therefore, Respondent's bases of appeal are without merit.

#### ORDER

The order of the ALJ, dated January 25, 2005, at New York, New York, is **AFFIRMED**.



Signed at Washington, D.C. this 7<sup>th</sup> of August, 2007.

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

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UNITED STATES COAST GUARD

Complainant

vs.

PATRICK BEAU SHEA

Respondent.

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Docket Number: CG S&R 04-0292  
CG Case No. 2026523

**DECISION AND ORDER**

**Issued: January 25, 2005**

**Issued by: Walter J. Brudzinski, Administrative Law Judge**

**Appearances:**

**For Complainant**

LT Michael R. Pierno, USCG  
Investigating Officer (I/O)  
USCG Sector Honolulu  
433 Ala Moana Blvd.  
Honolulu, HI 27813-4999  
(808) 522-8266

**For Respondent**

John O'Kane, Esquire  
Frame, Formby and O'Kane  
Four Waterfront Plaza, Suite 4-575  
500 Ala Moana Blvd.  
Honolulu, HI 92813  
(808) 545-3043

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## PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard at Honolulu, Hawaii ("Coast Guard" or "Agency") initiated this administrative action on June 3, 2004 against Respondent Patrick Beau Shea seeking to revoke his Merchant Mariners license and document. In its Complaint, the Coast Guard charged Respondent with one count of Misconduct and one count of Incompetence arising out of incidents occurring on December 18, 2003 while serving as Second Assistant Engineer onboard the SS EWA while underway from Long Beach, California to Honolulu, Hawaii.

Specifically, the Complaint, as amended at the hearing and by the undersigned for clarity and to conform to the testimony that the vessel involved is a steamship that was transiting from Long Beach, California to Honolulu, Hawaii, reads as follows:

### Misconduct

- “1. The Coast Guard alleges that on or about December 18, 2003, Respondent was employed as Second Assistant Engineer on the SS EWA.
2. The Respondent did abandon his watch in the engine room, and was observed crawling on his hands and knees on the bridge wing, while the vessel was underway.
3. Respondent was relieved of his duties for failure to maintain his watch.”

### Incompetence

- “1. The Coast Guard alleges that on or about December 18, 2003, the Respondent had to be relieved of his duties, placed in restraints, and confined to quarters after displaying irrational behavior.
2. The Respondent had packed bags with survival equipment and made it known that he intended to leave the ship, while it was underway between Long Beach, CA and Honolulu, HI.

3. The Respondent was admitted to Queen's Medical Center upon arrival in Honolulu on or about December 22, 2003 for a psychiatric evaluation.

4. On a letter dated March 22, 2004, Dr. Barry Carlton, MD diagnosed the Respondent with having Bipolar disorder – manic.

5. The Respondent had also been diagnosed with Schizophreniform disorder, incipient and Bipolar mood disorder, mixed mood state with catatonic features, after he was admitted to Lions Gate Hospital on March 3, 2003.”

The purpose of Coast Guard suspension and revocation proceedings is to ensure the safety of life and property at sea.<sup>1</sup> There is strong public policy embodied in Coast Guard law and regulations to remove incompetent mariners from serving aboard vessels.<sup>2</sup> The regulations authorize the Coast Guard to investigate and issue a complaint if reasonable grounds exist to believe that the holder of a license may have committed an act of incompetence, misconduct, or negligence while acting the authority of his license or document.<sup>3</sup> The regulations also authorize a mariner to voluntarily deposit a license or document with the Coast Guard when there is evidence of mental or physical incompetence.<sup>4</sup>

The hearing was held on October 6, 2004 at Honolulu, Hawaii. The parties were given 30 days after receipt of the hearing transcript to file post-hearing briefs and proposed findings. The undersigned received the Coast Guard's proposed findings of fact and conclusions of law on November 20, 2004 and the Respondent's post hearing brief and proposed findings of fact and conclusions of law on November 29th and December 2, 2004 respectively. This matter is now ripe for decision.

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<sup>1</sup> 46 U.S.C. 7701(a).

<sup>2</sup> 46 U.S.C. 7703(1)(B) authorizing proceedings against a license or document if the holder commits an act of incompetence, misconduct, or negligence.

<sup>3</sup> 46 CFR 5.101(a), 5.105(a).

<sup>4</sup> 46 CFR 5.201.

## FINDINGS OF FACT

1. That at all times relevant, Patrick Beau Shea (also referred to as "Respondent") has been the holder of U.S. Coast Guard license number 979580 and a Merchant Mariner's Document bearing his Social Security Number. (Tr. at 12).
2. That Respondent graduated from the United States Merchant Marine Academy in 1994 with a class standing of 22 out of 222. (Tr. at 150).
3. That on December 18, 2003, Patrick Beau Shea was employed as Second Assistant Engineer on board the Steamship ("SS") EWA in charge of the 0400 to 0800 engine room watch during the EWA's voyage from Long Beach, California to Honolulu, Hawaii. (Tr. at 2, 46, 51, 52).
4. Respondent's working environment requires him to work around heavy machinery and temperatures in excess of a one hundred twenty degrees Fahrenheit. (I/O Ex. A; Tr. at 52-54, 172-175).
5. That while on watch in the engine room at or around 0630 on December 18, 2003 and acting under the authority of his license and document, Respondent left his watch station with no relief and was observed crawling on his hands and knees on the bridge wing while the vessel was underway. (I/O Ex. 1; Tr. at 20, 32, 33, 177-178).
6. That after the Chief Officer asked him to come into the wheelhouse so someone could be called to resume his engine room watch, Respondent immediately ran down the outside ladder from the bridge wing deck, grabbed a life ring with a strobe light attached to it, threw it over his shoulder, and then continued down the next ladder. Shortly afterwards, the Chief Officer saw two strobe lights flashing in the water off the port quarter of the ship. The Chief Officer ultimately had the 3<sup>rd</sup> Assistant Engineer assume Respondent's watch. (Tr. at 35; Ex 1, p. 1).

7. That Respondent had to be relieved of his duties, placed in restraints, and under a 24-hour suicide watch for the remaining three days of the 4 ½ day voyage from Long Beach, California to Honolulu, Hawaii because he had filled a couple of large trash bags with his clothing and personal items, along with food, water, and reading material, all of which was found attached to the life raft that he admitted to dragging and assembling for the purpose of leaving the ship. (Tr. at 36, 37, 38, 42, 46, 51, 70; I/O Ex. 1, p. 1, 2; Ex 3).
8. That in the discharge of his duty to ensure the safety of the vessel, cargo, and crew, Captain Thomas M. Stapleton, Master of the SS EWA, interviewed Respondent in Respondent's stateroom. (Tr. at 64, 69, 78).
9. That Respondent told Captain Stapleton he was concerned about some of the mechanical problems in the engine room and that the weather was not going to be very favorable en route to Hawaii. As a result of these concerns, Respondent told Captain Stapleton that he wanted to get off the vessel. (Tr. at 64, 65, 71, 73, 74).
10. That in further response to Captain Stapleton's questions, Respondent voluntarily handed over a folder containing his medical records (discharge summaries) for treatment received at Lions Gate Hospital in North Vancouver, British Columbia, Canada March 3<sup>rd</sup> through the 19<sup>th</sup> and April 3<sup>rd</sup> through April 22<sup>nd</sup> of 2003 saying, "Here, you could hold onto these" or words to that effect. (Tr. at 65, 68, 69; I/O Ex 1, p. 1, I/O Ex. 2).
11. That Captain Stapleton learned shortly after reading the discharge summaries from Lions Gate Hospital that Respondent suffered from mental illness. (Tr. at 77).
12. That Respondent told Captain Stapleton he had taken the life raft out of its cradle and dragged it 50 to 60 feet aft and left it in the position where it was found when Captain Stapleton photographed it. (Ex. 3; Tr. at 74).

13. That Respondent became very hostile and belligerent towards Captain Stapleton, demanding to have his packed bags and survival suit returned immediately. He then threatened Captain Stapleton whereupon Captain Stapleton handcuffed Respondent to his bunk rail. Respondent continued his rants and threats, locking himself to the toilet railing. (Ex. 1, p. 3).
14. That after Captain Stapleton briefed the company's contract doctor at Health Force Medical concerning Respondent's condition, the contract doctor advised that Respondent be administered Diazepam (Valium) (10 mgs) every 6 hours for its calming effect. (Ex. 1, p. 2; Tr. at 77, 78, 83).
15. That Captain Stapleton maintained contact with the company's contract doctor who ordered adjustments to Respondent's medications. The Matson (owner) representative in Honolulu told Captain Stapleton to forward Respondent's discharge summary medical records to the attending physician upon arrival Honolulu. (Ex. 1, pp. 3, 4).
16. That prior to these incidents, Respondent had been a very alert and responsible officer. (Tr. at 81).
17. That Dr. Barry S. Carlton, MD was Respondent's attending psychiatrist upon his admission to Queen's Hospital in Honolulu on or about December 22, 2003 until his discharge on January 6, 2004 and has remained his treating psychiatrist on an out-patient basis through the date of this hearing. (Tr. at 89-91; IO Ex. 5 at 2).
18. That Dr. Carlton received the discharge summaries from Respondent's two hospitalizations at Lions Gate Hospital in Canada in March and April of 2003. (Tr. at 95).
19. That upon admission to Queen's Medical Center on or about December 21, 2003, Dr. Barry S. Carlton, MD diagnosed Respondent with Bipolar Disorder, current episode

manic, based on the information that was provided both from the emergency department's review of records from the hospitalizations in Canada (I/O Ex. 2) as well as from information provided by the ship's master (Captain Stapleton). (Tr. at 94).

20. That Dr. Carlton prescribed Olanzapine (generic name for Zyprexa) for treatment of acute mania as well as for the prevention of manic or a prophylaxis (prevention) of bipolar disorder symptoms. He also prescribed Lorazepam, (Ativan), an anti-anxiety agent, and briefly, Fluoxetine (Prozac), an antidepressant. Respondent was discharged on Zyprexa. Upon discharge, and on February 13, 2004, Dr. Carlton declared that Respondent was fit for duty because his illness was in remission. (Tr. at 98-100; I/O Ex. 5; I/O Ex 6).

21. That Dr. Carlton saw Mr. Shea at various intervals from twice each week to bi-weekly except when Respondent was out of town or at sea. In September 2004, Dr. Carlton saw Respondent twice and found no signs of mood disturbance or thought disorder. (Tr. at 102).

22. That Dr. Carlton opined there is no literature to suggest how long medication management should be but he anticipates at least a two (2) year, if not a five (5) year period of medication management and at least five (5) years of asymptomatic condition before he would recommend discontinuing the medication. (Tr. at 105, 106).

23. That Dr. Carlton opined Zyprexa has been approved by the Federal Drug Administration for treatment of acute mania as well as long-term management with prophylaxis and that the medication at this point is used to prevent the onset of future episodes of illness. (Tr. at 106, 107).

24. That Dr. Carlton further opined “[t]here are patients who go on to maintain remission; that is, absence of symptoms for many years. And then there are also those who, despite medication, do have breakthrough symptoms. There is no science to suggest what the prognosis will be, or whether I could predict a remission....” (Tr. at 107).
25. That Dr. Carlton opined, “[t]he medicines are helpful. They prevent breakthroughs, but you can’t guarantee it...there is always an ongoing risk... there is no evidence at this point from Mr. Shea’s either (sic) presentation or current clinical status that he...has...frequent episodes of illness...he is on 15 milligrams of Zyprexa ...(has) good mood stability, good thought stability, and absence of daytime sedation. At one point he was on a higher dose...and the side effect would be daytime sedation. He does have sufficient insight...that should there be breakthrough symptoms, he would...increase the medicine.” (Tr. at 108, 109).
26. That Dr. Carlton opined Respondent will more or less remain in remission and not ever be “cured” because “...bipolar disorder is a chronic illness that requires long-term management. And so I could not say...with certainty that he would not have a breakthrough episode.” (Tr. at 109).
27. That Dr. Carlton opined a patient taking Zyprexa and symptom free for five years remains at greater risk for breakdown episodes than one who does not have the illness. (Tr. at 112).
28. That Dr. Carlton opined Respondent has more insight and control of these symptoms since he has been taking Zyprexa because it stabilizes his mood. (Tr. at 115-116).
29. That Dr. Carlton opined Respondent would be more of a threat to himself rather than to others in the event of a relapse. (Tr. at 117).

30. That Dr. Carlton opined Zyprexa is a psychotropic medication. (Tr. at 118).
31. That the Physician's Desk Reference (PDR) states "Somnolence was a commonly reported adverse event associated with Olanzapine (Zyprexa), occurring at an incidence of 26 per cent in Olanzapine patients compared to 15 per cent in placebo. This adverse event was also "dose related" and somnolence led to continuation in 0.4 percent of patients. Since Olanzapine (Zyprexa) has the potential to impair judgment, thinking, or motor skills, patients should be cautioned about operating hazardous machinery, including automobiles, until they were reasonably certain that Olanzapine therapy does not affect them adversely." (Tr. at 120).
32. That in his March 3-19, 2003 discharge summary at Lions Gate Hospital in North Vancouver, Canada, Dr. Christian H. Schenk, MD diagnosed Respondent with Schizophreniform disorder, incipient, and Bipolar mood disorder, mixed mood state with catatonic features. On his April 4-22, 2003 discharge summary at Lions Gate, Dr. Schenk diagnosed Respondent with Bipolar mood disorder, rule out Schizophreniform psychosis. (Ex. 2, p. 6 and p. 9).
33. Dr. Carlton ruled out Schizophrenia. "[H]is total absence of the symptoms, return of mood stability... his very good social functioning, (and) interpersonal skills, would make the diagnosis a Bipolar disorder rather than Schizophrenia." (Tr. at 128, 129).
34. That Dr. Carlton opined Respondent is able to understand the symptoms and what to do about them and that "there is no reason to expect that he would have an exacerbation of illness...he also has to use common sense...assure the proper sleep, no drugs or alcohol, and to monitor for symptoms." (Tr. at 130-131).

35. That Dr. Carlton opined to a reasonable degree of medical certainty, Respondent is fit for duty at the present time to perform his job as described by the Matson (owner) job description in Respondent's Exhibit "A." Dr. Carlton previously found Respondent fit for duty on February 13, 2004. (Tr. at 133, 134, 135; IO Ex. 5; Respondent's Ex. "A").
36. That Dr. Carlton opined it is not certain that Respondent will remain symptom free, even if he takes his medication because the course of the illness is highly variable; however, one can expect a sustained remission. (Tr. at 134, 135).
37. That Dr. Carlton opined a side effect (of Zyprexa) is sedation, which Respondent currently does not have and weight gain, which he manages well. Further, there is no evidence of cognitive impairment. (Tr. at 141, 142).
38. That Dr. Carlton opined heat (in the engine room) should not be a problem assuming that Respondent hydrates properly. However, rotating shifts could be a problem because he needs stability of shifts to maintain a normal sleep pattern. (Tr. at 142-144).
39. Since being under the care of Dr. Carlton, and returning to work on June 3, 2004, Respondent has taken only those jobs that would allow his sleeping patterns to remain normal. (Tr. at 158, 159, 161).
40. That Respondent believes he is capable of performing the duties as a second assistant engineer for Matson. (Tr. at 164).
41. The position and work that the Respondent performs on board a vessel requires him to be able to perform during unexpected emergency situations that can occur at any time, day or night on any merchant vessel. These unexpected emergency situations inherently carry a certain level of stress and can affect the level of sleep that the Respondent is able to get when having to address any emergency situation. (Tr. at 173, 174).

## ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. That Respondent, Patrick Beau Shea and the subject matter of this hearing are within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703.
2. The Coast Guard is not precluded from issuing a complaint following a period of voluntary deposit of license or document and its return.
3. That Exhibit 2, hospitalization discharge summaries and laboratory reports from Respondent's hospitalization at Lions Gate March 3 – 19, 2003 and April 4 - 22, 2003 are admissible as part of Respondent's medical history.
4. That Respondent's argument that he should not have his license and document revoked for alleged misconduct that was the result of an illness, and not willful or negligent, or even an error in judgment, is rejected. "[W]illfulness is not a necessary element of each and every allegation of 'misconduct,' and no special willfulness was an element of the offense charged here." Appeal Decision 2136 (DILLON) (1978). Therefore, the undersigned cannot find as a conclusion of law that the Respondent's illness either diminished his capacity to form specific intent or rendered him not legally responsible for his acts that gave rise to the Misconduct charge. Appeal Decision 1677 (CANJAR) (1968).
5. That the Coast Guard did not violate Chapter 2, Section C, Paragraph 9 of the Marine Safety Manual. The above-referenced Marine Safety Manual section deals with procedures in lieu of a hearing that are to be followed only if the Coast Guard chooses not to initiate suspension and revocation proceedings. That section of the Marine Safety is not applicable to suspension and revocation hearings.

6. That Respondent was operating under the authority of his license and document at the time of these charges.
7. That by the preponderance of reliable, probative, and substantial evidence, the Misconduct charge is found proved in that at or about 0630 on December 18, 2003, Respondent left his watch station in the engine room of the SS EWA while underway transiting from Long Beach, California to Honolulu, Hawaii without a relief and was seen crawling on his hands and knees on the bridge wing. Respondent had to be relieved of his duties for failure to maintain his watch. (IO Ex. 1; Tr. at 20, 32, 33, 177-178).
8. That by the preponderance of reliable, probative, and substantial evidence, the Incompetence charge is found proved in that Respondent had to be relieved of his duties, placed in restraints, and confined to his quarters after displaying irrational behavior by packing bags with survival equipment and making it known that he intended to leave the ship while the ship was underway. Having been previously diagnosed with Schizophreniform disorder, incipient, and Bipolar mood disorder, mixed mood state with catatonic features, Respondent was diagnosed with Bipolar Disorder, current episode manic, upon admission to Queens Medical Center on or about December 22, 2003. Therefore, he was incompetent at the time of the incident on December 18, 2003. Currently taking Zyprexa, a psychotropic medication, his treating psychiatrist found him found fit for duty on February 13, 2004 and at the time of the hearing because his bipolar disorder was in remission. However, he is still a greater risk than the general population for breakdown symptoms. Therefore, Respondent is presently suffering from a mental impairment of sufficient disabling

character to support a finding that he is not competent to perform safely his duties aboard a merchant vessel.

9. That Respondent is not competent and fit for duty. Although Dr. Carlton opined that Mr. Shea's is competent and fit for duty because, among other things, his mental illness is in remission, that opinion is based on Respondent continuing his psychotropic medication for at least 5 years, maintaining normal sleep patterns, controlling his weight, continuing regular contact with a psychiatrist, avoiding drug and alcohol abuse, using common sense, and monitoring for symptoms. Further, Respondent is not cured. These factors, plus the fact that Respondent still remains at greater risk than the general population, comprise sufficient evidence of incompetence subsequent to his fit for duty declaration.

### DISCUSSION

*"Incompetence* is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof."<sup>5</sup> "No one who is suffering from a psychiatric disability should be permitted to serve aboard any vessel...in a capacity in which he could cause serious harm to himself, to others, or the vessel itself."<sup>6</sup> Dr. Carlton opined that Respondent would be more of a threat to himself than to others in the event of a relapse. However, judging from Respondent's acts aboard EWA on December 18, 2003, his acts of attempting to abandon ship and disturbing the ship's safety gear also present potential danger to the vessel and its crew.

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<sup>5</sup> 46 CFR 5.31.

<sup>6</sup> Appeal Decision 2417 (YOUNG) (1985) citing Appeal Decision 2181 (BURKE) (1980), modified sub nom. Commandant v. Burke, 2 NTSB 2784 (Order EM-83, (1980).

The regulations authorize the Coast Guard to investigate and issue a complaint if reasonable grounds exist to believe that the holder of a license may have committed an act of incompetence while acting under the authority of the holder's license or document.<sup>7</sup> At a hearing, a finding of mental incompetence must rest upon substantial evidence of a reliable and probative nature that the person charged suffers from a mental impairment of sufficient disabling character which renders the person unable to safely perform his duties aboard a merchant vessel.<sup>8</sup> At a revocation hearing, "ordinarily, any allegation of incompetence must be based on sufficient evidence subsequent to any fit for duty declaration by the USPHS (U.S. Public Health Service) or it should not be proved."<sup>9</sup> "The only proper order for a charge of incompetence if found proved (by the preponderance of the evidence) is **revocation**."<sup>10</sup>

#### Decision

By the preponderance of reliable, probative, and substantial evidence I find that the Incompetence and Misconduct charges are proved. It is clear from the evidence in this case that the Respondent, Patrick Beau Shea, currently suffers from a psychiatric condition that would affect adversely his ability to serve at sea. Subsequent to the incidents that gave rise to the incompetence charge, Mr. Shea was hospitalized and diagnosed with Bi-polar Disorder – current episode manic.

He has been taking Zyprexa, a psychotropic drug, and according to Dr. Carlton his illness is currently in remission. As such, Dr. Carlton opines that Respondent is now competent and fit for duty. However, Dr. Carlton also states that bipolar disorder is a chronic illness that requires long-term management and could not say with certainty that Mr. Shea would not have

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<sup>7</sup> 46 CFR 5.101(a)(1) and 5.105(a).

<sup>8</sup> Appeal Decision 2417 (YOUNG) (1985).

<sup>9</sup> Appeal Decision 2417 (YOUNG) (1985) citing Appeal Decision 2280 (ARNOLD) (1982).

<sup>10</sup> 46 CFR 5.569(d); 46 CFR 5.61(a)(9); 33 CFR 20.701).

breakthrough episodes because it is difficult to judge the illness' course. Dr. Carlton expects a sustained remission but, even so, one who is in remission still has a greater risk of breakthrough episodes than someone who does not have bipolar disorder. Moreover, it is not certain that Respondent will remain symptom free even if he is compliant and takes his medication because the course of the illness is highly variable. In accordance with 46 CFR 5.569(d), 5.61(a)(9) and 33 CFR 20.701, the only proper order for a charge of incompetence if found proved (by the preponderance of the evidence) is revocation.

The credible testimony of the SS EWA's Chief Officer Jeff Hood and the Master, Captain Thomas M. Stapleton, together with his log,<sup>11</sup> comprises the preponderance of reliable, probative, and substantial evidence to prove the factual incidents of the Misconduct and Incompetence charges. Also, the credible testimony of Dr. Barry S. Carlton, MD, plus the exhibits, comprise the preponderance of medical evidence to prove that Respondent currently suffers from a mental impairment of sufficient disabling character that renders him unable to perform his duties safely aboard a merchant vessel. Moreover, Dr. Carlton's prognosis that Respondent still poses a greater risk for breakthrough episodes than the general population comprises sufficient evidence of incompetence subsequent to his finding Mr. Shea fit for duty.

Because Respondent remains at greater risk than the general population for having breakthrough episodes even if fully compliant, I cannot accept Dr. Carlton's opinion that Respondent is competent and fit for duty. "[T]he administrative law judge is not bound by the recommendations of the psychiatrist or even the medical findings and opinion...the ultimate finding as to fitness of the person is a function of the Administrative Law Judge."<sup>12</sup>

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<sup>11</sup> (I/O Ex. 1).

<sup>12</sup> Appeal Decision (2191) BOYKIN (1980).

Dr. Carlton's opinion that Respondent is fit for duty opinion is not unqualified. It carries many caveats or warnings: Dr. Carlton anticipates at least five years of asymptomatic condition before he would even consider recommending discontinuing the medication.<sup>13</sup> The course of Respondent's remission and the chances that he will have breakthrough episodes cannot be predicted and it cannot be said with certainty that he will not have a breakthrough episode.<sup>14</sup> The medicines are helpful in preventing breakthroughs but it (absence of breakthrough episodes) cannot be guaranteed. There is always an ongoing risk.<sup>15</sup> Respondent will not be cured but will remain in remission because Bipolar disorder is chronic that requires long-term management.<sup>16</sup> The National Institutes of Mental Health recommend medication maintenance and ongoing regular psychotherapeutic contact. In addition, he must avoid substance and alcohol abuse and focus on wellness (exercise and weight control), plus he must use common sense stress management.<sup>17</sup> Maintenance of normal sleep patterns is also important in symptom management.<sup>18</sup> Even if Respondent remains in remission; that is, symptom free, for five years and continues to take Zyprexa for that period of time, he still remains at greater risk than the (general) population for an exacerbation of illness. The inference from Dr. Carlton's caveats is that no matter how compliant Respondent is with his regimen of medication and lifestyle practices, at best, his illness still puts him at greater risk than the general population for breakthrough episodes.

Dr. Carlton testified that there are patients who maintain remission for many years<sup>19</sup> and, to that extent, there is no evidence from Mr. Shea of rapid cycling or frequent episodes of illness.

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<sup>13</sup> Tr. at 105.

<sup>14</sup> Tr. at 107, 109.

<sup>15</sup> Tr. at 108.

<sup>16</sup> Tr. at 109.

<sup>17</sup> Tr. at 110.

<sup>18</sup> Tr. at 113.

<sup>19</sup> Tr. at 107.

Dr. Carlton says Mr. Shea has good mood stability, good thought stability, and absence of daytime sedation (sleepiness). There is no evidence of abnormal thinking, either logic or odd ideas, and no evidence of abnormal mood stability, elevation, or depression that cause problems with behavior. Further, Dr. Carlton says that with Mr. Shea's insight and medication management, Mr. Shea can increase the medicine himself if he has breakthrough symptoms.<sup>20</sup> His opinion on Respondent's insight is based on when Mr. Shea was initially discharged from Queen's Medical Center, he was able to report symptoms and he sought advice as to how to manage them. Respondent believes he has the ability to self medicate if necessary. Further, he must keep track to make sure that he doesn't have any odd ideas or odd behaviors that would signal the beginning of another illness episode, plus he must manage his weight since weight gain is one of the side effects of Zyprexa.<sup>21</sup>

In reviewing Respondent's course of treatment starting with the discharge summaries from Lions Gate Hospital in March and April of 2003 through his inpatient treatment at Queen's Medical Center from on or about December 22, 2003 through January 6, 2004 and the present outpatient treatment, there is no question that Dr. Carlton's treatment is responsible for Mr. Shea's favorable prognosis and it appears that Respondent may very well continue to remain symptom free as long as he is compliant with his medication and properly manages lifestyle issues, including weight control and normal sleep patterns. Or, he may not. The only thing that is known for sure is that despite his insight and efforts in lifestyle management and sleep patterns, he still remains at greater risk for breakthrough symptoms than the general population. Adding to this uncertainty is the reasonably foreseeable likelihood of emergency situations arising aboard ship creating stress and unpredictable sleep patterns. Moreover, the greater

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<sup>20</sup> Tr. at 108, 109.

<sup>21</sup> Tr. at 113-115, 162.

likelihood of other circumstances such as having to stand additional watches for another engineer, as when the Third Assistant Engineer had to take over Respondent's watches, inadvertently may place Respondent at greater risk for breakdown episodes despite his insight and perceived ability to adjust his medication. It is no reflection on this Respondent, but all other qualifications being equal, his illness leaves him less than fully qualified compared to his peers who do not have Bipolar disorder.

I find Dr. Carlton a very credible witness and accord great weight to his opinions except for his opinion that Respondent is competent and fit for duty. Less weight is accorded that opinion because it is based on the premise that Respondent will control his symptoms by being compliant with his medications and properly manage lifestyle issues and sleep patterns because he has sufficient insight to identify symptoms and take appropriate and timely action. Although Dr. Carlton's fit for duty opinion is based on a review of Matson's Second Assistant Engineer job description,<sup>22</sup> it is reasonable to infer that prolonged exposure to heat,<sup>23</sup> rotating shifts that disrupt sleep patterns,<sup>24</sup> and emergency situations,<sup>25</sup> are unpredictable and would tend to impact adversely on Respondent's ability to manage lifestyle issues. This greater risk for breakthrough episodes is sufficient evidence subsequent to his treating psychiatrist finding him fit for duty to find the Incompetence charge proved. As noted above, the only sanction for a proved finding of Incompetence is revocation.

*"Misconduct* is human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general

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<sup>22</sup> Respondent's Ex. "A"

<sup>23</sup> Tr. at 142

<sup>24</sup> Tr. at 143, 158, 159.

<sup>25</sup> Tr. at 172-174.

maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required."<sup>26</sup>

Abandoning his watch station in the engine room at 0630 without a relief on December 18, 2003, being observed crawling on his hands and knees on the bridge wing of the SS EWA while it was underway, and having to be relieved of his duties for failure to maintain his watch comprises the preponderance of reliable, probative, and substantial evidence to find the Misconduct charge proved. Respondent's inability to resume his watch created a situation on EWA in which the Third Assistant Engineer took over Mr. Shea's duties, in addition to his own, thereby reducing the number of qualified personnel available for other shipboard duties as well as reducing the ship's ability to adequately respond to emergencies.

Affirming a hearing examiner's (now ALJ) finding of guilt on three counts of Misconduct involving failure to stand watch and Unauthorized Absence, the Commandant held that "[w]hen an able bodied seaman wrongfully fails or is unable to perform his duties there is 'harm done.' The ship's organization and operations are affected. Someone else must be used to perform his duties. In the event that the master is forced to use a less qualified person, or an equally qualified person who is overtired, the additional, potential danger is great."<sup>27</sup> With the exception of Misconduct for wrongful possession, use, sale, or association with dangerous drugs, revocation is not a mandatory sanction if Misconduct is found proved. "When the finding (of Misconduct) is proved, the Administrative Law Judge may order an *admonition*, *suspension* with or without probation, or *revocation*."<sup>28</sup>

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<sup>26</sup> 46 CFR 5.27.

<sup>27</sup> Appeal Decision 1731 MILLS (1968).

<sup>28</sup> 46 CFR 5.567

### Pre-Hearing Brief

On September 30, 2004 counsel for Respondent filed a pre-hearing brief. Since there was not sufficient time for the Coast Guard to respond in writing and for the undersigned to issue a written Order prior to convening the October 6<sup>th</sup> hearing, the issues raised in counsel's pre-hearing brief, except item "C", were argued and ruled on at the beginning of the hearing. Item "C" could not be ruled on pre-hearing because testimony from Respondent's treating psychiatrist had not yet been heard. In item "C", Respondent argues that if there is sufficient evidence subsequent to the "fit for duty" declaration that the mariner is competent and can safely perform his duties aboard a merchant vessel; the mariner should retain his license and document.

### Post-Hearing Brief

In his post hearing brief, Respondent made the following arguments: that he was competent when his voluntarily deposited documents were returned to him by the Coast Guard; that he was competent subsequent to the fit for duty declaration; that the Misconduct charge should be dismissed; that there is lack of authentication and/or certification (on the discharge summaries from Lions Gate Hospital); and that admitting only a portion of the unauthenticated discharge summary records from Lions Gate Hospital is prejudicial.

The item "C" argument in Respondent's pre-hearing brief in which he argues that if there is sufficient evidence subsequent to the "fit for duty" declaration that the mariner is competent and can safely perform his duties aboard a merchant vessel, the mariner should retain his license and document, will be discussed together with the post-hearing brief argument that he was competent when his voluntarily deposited documents were returned to him and that he was competent subsequent to the fit for duty declaration.

### Incompetence Subsequent to the Fit for Duty Declaration

“[A] finding of incompetence due to mental incapacity must rest upon substantial evidence of a reliable and probative character showing that the person charged suffers from a mental impairment of sufficient disabling character to support a finding that he is not competent to perform safely his duties aboard a merchant vessel.”<sup>29</sup> “[O]rdinarily, any allegation of incompetence must be based on sufficient evidence subsequent to any fit for duty declaration by the USPHS (United State Public Health Service) or it should be found not proved.<sup>30</sup> Respondent argues that if subsequent to the fit for duty declaration there is sufficient evidence that the mariner is competent and can safely perform his duties aboard a merchant vessel, the mariner should retain his license and document. Respondent also argues that since being declared fit for duty, he has ably and safely performed his duties aboard the vessels to which he has been assigned. In addition, he has taken his medications as ordered and has not suffered a relapse. Clearly, Respondent adds, when the I/O returned his documents he must have reasonably believed that Shea was fit for duty; otherwise returning his license and document was irresponsible and a dereliction of duty. Respondent urges that when a seaman has shown that he is fit for sea duty at the time of the hearing, he should be allowed to resume his duties.

Respondent’s argument that when the I/O returned his license and document he must have believed Shea was fit for duty; otherwise returning them was irresponsible and a dereliction sounds compelling but it is misplaced. When the I/O returned Mr. Shea’s license and document, that act did not constitute a belief that the Coast Guard agreed with Dr. Carlton’s opinion that Respondent was fit for duty because Respondent was simultaneously served with the instant Complaint. After a Complaint is served and the Respondent requests a hearing, the decision on

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<sup>29</sup> Appeal Decision 2417 (YOUNG) (1985) citing 46 CFR 5.31; Appeal Decision 2181 (BURKE) (1980).

<sup>30</sup> Appeal Decision 2417 (YOUNG) (1985) citing Appeal Decision 2280 (ARNOLD) (1982).

fitness to hold a license rests with the administrative law judge and until Respondent is his full due process rights, his license and document cannot be involuntarily taken away from him.

Respondent's argument that if subsequent to the fit for duty declaration there is sufficient evidence that the mariner is competent and can safely perform his duties aboard a merchant vessel, the mariner should retain his license and document is also misplaced. The legal standard, as set forth in Appeal Decision 2417 (YOUNG) (1985) citing Appeal Decision 2280 (ARNOLD) (1982) is that "ordinarily, any allegation of incompetence must be based on sufficient evidence subsequent to any fit for duty declaration by the USPHS or it should be found not proved." The standard in YOUNG and ARNOLD is different from what Respondent is arguing. Respondent seems to be saying that all he needs to show is that he has been compliant with his medication management and has not had any breakdown symptoms; therefore, it must be inferred that he is competent and can safely perform his duties aboard a merchant vessel. As stated in ARNOLD and YOUNG, the standard is that there must be sufficient evidence (of incompetence) subsequent to any fit for duty declaration. If Respondent's argument were the legal standard, evidence of a seaman's mental illness in remission could never prevail over a showing that there have not yet have been any breakdown symptoms since the incident because one who is in remission experiences an absence of symptoms. As a result, any mental illness for which one is taking psychotropic medication to maintain remission would not be disqualifying unless and until the seaman has breakdown symptoms.

While Respondent is free to "prove" that since the fit for duty declaration he has been compliant and has not had any breakthrough symptoms, "any allegation of incompetence must be

based on sufficient evidence subsequent to any fit for duty declaration ....”<sup>31</sup> In response to counsel’s question, “[i]f he continues to take his medication, to a reasonable degree of medical certainty, will he remain symptom free?” Dr. Carlton replied, “I could not say with certainty.”<sup>32</sup> As stated, I find Dr. Carlton’s opinion expressing qualifiers and caveats on his fit for duty declaration to comprise “sufficient evidence” of incompetence at the time of the hearing.

### **Dismissal of the Misconduct Charge**

The undersigned rejected Respondent’s argument made at the beginning of the hearing and in part “B” of his pre-hearing brief that he should not have his license and document revoked for alleged misconduct that was the result of an illness, and not willful or negligent, or even an error in judgment. The same argument is made in part B of his post hearing brief. As cited and argued by the I/O, Appeal Decision 1677 (CANJAR) (1968) stands for the proposition that a misconduct charge need not be dismissed merely because the examiner finds that at the time of the act’s omission, the party was not mentally competent to hold the seaman’s license or document. In CANJAR the Commandant stated, “[t]hat a condition of mental incompetence, such as to disqualify a person from holding a seaman’s license or document, is not ‘equatable’ to a state of legal insanity, which is to constitute a defense against a criminal charge incident. The tests are entirely different...that I so wish to make it clear that there is no compulsion on an examiner to dismiss a charge of misconduct merely because he finds that at the time of commission of the act the party was not mentally competent to hold the seaman’s license or document.”<sup>33</sup> After acknowledging the holding in CANJAR concerning legal insanity and

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<sup>31</sup> Appeal Decision 2280 (ARNOLD) (1982).

<sup>32</sup> Tr. at 134, 135.

<sup>33</sup> Tr. at 15, 16 quoting CANJAR.

further stating that these are not specific intent type crimes, (wherein a defense of diminished capacity could be used to negate intent), I denied the motion to dismiss the Misconduct charge.<sup>34</sup>

In Appeal Decision 1466 (SMITH) (1964), the Coast Guard charged Respondent with Misconduct and Incompetence for killing another member of the ship's crew while in Africa. A Congolese court had previously found that the homicide was proved but that it was excusable by reason of insanity. The Examiner found both the misconduct and the incompetence charges proved but on appeal, the Commandant opined that the findings of Examiner were inconsistent and the misconduct charge must yield to the incompetence charge because the Examiner specifically found that the homicide was committed during the period of mental insanity. In the instant case, there was no evidence presented that Respondent was insane. In SMITH, the Commandant recognized "that in proceedings looking to the preservation of safety at sea the test of incompetence is not such as is required to establish a defense to a criminal charge. In many instances one act may be an act of misconduct for which the party is responsible and may also demonstrate a degree of incompetence for sea service." Applying SMITH and CANJAR to the instant case, absent a finding by a court of competent jurisdiction that Respondent was insane at the time of the incidents and remained so at the time of the hearing, there is no legal basis to dismiss an otherwise proved misconduct charge.

Respondent also argues that like his mental illness, diabetes is a chronic, incurable disease but symptoms can be ameliorated by proper therapy, medication, and diet. He cites Appeal Decision (2547) (PICCIOLO) (1992) in which the Commandant remanded the ALJ's decision directing the ALJ to permit evidence of the mariner's recent medical condition, prognosis, and impact that any medical monitoring program will have on his ability to perform his job. Implicit in this argument is that some sort of accommodation should be made for the

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<sup>34</sup> Tr. at 18.

mariner to minimize the effects of diabetes. While this might be true for physical illness, the Commandant has made it clear that “no one who is suffering from a psychiatric disability should be permitted to serve aboard any vessel...in a capacity in which he could cause serious harm to himself, to others, or the vessel itself.”<sup>35</sup> Dr. Carlton has opined that even with proper medication management and adherence to lifestyle issues, Respondent is still vulnerable to breakdown symptoms more so than the general population.

### **Lack of Authentication on the Discharge Summaries**

In considering whether the photocopies of the Lions Gate medical records were authentic, I used the framework of Federal Rule of Evidence (FRE) 901 “Requirement of Authentication and Identification” which states in paragraph (a) “The requirement of authentication or identification as a condition to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Section (b)(1) of FRE 901 provides that by way of illustration only, and not by way of limitation, testimony of a witness with knowledge that the matter is what it is claimed to be is an example of authentication or identification conforming with the requirement of this rule. The records were in Respondent’s possession and were relied upon by Respondent in support of his claim to MEBA.<sup>36</sup> An examination of the discharge records reveals that they were dictated and accepted by Dr. Christian H. Schenk, MD, Respondent’s treating psychiatrist at Lions Gate. At the top of each page is the name, “Lions Gate – Health Record,” a machine made printing consistent with a facsimile machine stamp of origin. Additionally, the lab reports attached to the discharge records also carry the name, “Lions Gate Hospital.” Attached to the records is a cover letter with the letterhead reading, “C.H. Schenck, MD, PRCP(C) Psychiatry.” The subject line reads “Re:

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<sup>35</sup> Appeal Decision 2417 (YOUNG) (1985) citing BURKE.

<sup>36</sup> I/O Ex. 2 at 4.

Patrick Shea.” It also contains a signature block reading, “Dr. Chris Schenck, MD” and a signature that clearly reads, “C Schenck.” The letter is addressed “Dear Colleague” and summarizes Respondent’s course of treatment. The summary in the letter is consistent with the contents of the attached discharge records. Attached to the cover letter is a letter from MEBA Medical & Benefits Plan stating additional information is required to process Respondent’s claim for medical care payment for treatment provided from March 3, 2003 to April 16, 2004 (the start and end dates of Respondent’s medical care received at Lions Gate Hospital). The letter asks four questions and contains a notation in the above right hand corner that reads, “Called Nancy @ 10:35 AM 8/19/03 Gave Requirements 1-4.” Respondent also handed these discharge summaries to Captain Stapleton on December 18, 2003 as an explanation of his conduct. Additionally, Captain Stapleton, the company’s doctor, and Respondent’s current treating psychiatrist, relied upon these documents.

In his post-hearing brief, Respondent cites Appeal Decision 903 MAHOOD (1956) that the records must be certified or authenticated as true and accurate copies before being introduced into evidence. In MAHOOD, the Respondent was charged with Misconduct based on assault and battery with a knife. Failing to appear for his hearing, Mahood was tried in absentia and the charges were found proved based largely on entries made in the master’s logbook. On appeal, Mahood argued, among other things, that the logbook evidence submitted was entirely hearsay and therefore not sufficient to support the findings. The Commandant found that the log entry was made in the regular course of business and is admissible as an exception to the hearsay rule on the principle of necessity and in accordance with the Official Records Statute (28 U.S.C. 1733) as an official document since it is an entry required by law. The Commandant went on to say that, “[i]t has been the consistent position of the Commandant that copies of such documents,

when certified in proper form by Coast Guard officers performing investigating duties under the delegated authority of the Commandant, meet the requirements of authentication for the admission of copies in evidence in these administrative proceedings where the technical rules of evidence are not strictly applied.” Unlike the records in MAHOOD, the discharge records in question came into possession of the government through Respondent. He used these them in his request to MEBA that the hospital bill be paid and he also tendered them to Captain Stapleton as his implicit explanation for his conduct during the incidents that gave rise to these charges. Captain Stapleton did not question the authenticity of these medical records in his conversations with the company doctor. Finally, neither the emergency room personnel nor Respondent’s treating psychiatrist questioned the records’ authenticity in the course of providing medical care to Respondent. These records were an integral part of Respondent’s medical history and were relied upon by him and others in the course of his illness. In MAHOOD, the log entries comprised the only direct evidence used in finding the charge proved. In this case, the Lions Gate discharge summaries help form an integral part in the longitudinal history of Respondent’s illness and are not relied upon solely as the basis for proving the charges, as was the case in MAHOOD.

Respondent also cites Appeal Decision 1579 (HARRISON) (1966) that evidence received in lieu of witness testimony, which cannot be authenticated by a witness as records kept in the regular course of business, cannot provide the sole basis for findings of fact. As in MAHOOD above, Harrison failed to appear and the hearing proceeded with Respondent in absentia. Also, as in MAHOOD, all of the evidence was documentary. On appeal, the Commandant found that “[t]he evidence which was received by the Examiner in lieu of testimony of witnesses, documents which are not part of the official Log Book and which, while not identified in any

way by any competent witness, do not purport to be records kept in the regular course of business, is pure hearsay. As such it cannot be the sole predicate for findings of fact.” Unlike MAHOOD and HARRISON, the records in the instant case do not comprise the sole predicate for findings of fact. Everyone having anything to with Respondent’s treatment since the incidents on December 18, 2003, has referred to or relied upon these records. They form the necessary background and starting point for Respondent’s medical history and do not constitute the sole, dispositive evidence on the charges as in MAHOOD and HARRISON, above.

### **Prejudicial Effect**

Respondent argues that the discharge summaries are incomplete and that there must be relevant records still extant that should accompany those introduced. Further, he urges that the missing records would help explain the conclusions and assertions made in the discharge summaries. In addition, he cites FRE 106 as authority. FRE 106 states “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.” Respondent states that FRE 106 was drafted because of concern that the court not be misled because portions of a statement are taken out of context thereby creating prejudice.

I reject these arguments.<sup>39</sup> I found no evidence to question to accuracy, authenticity, or completeness of the discharge summaries. They are clear and unambiguous on their face. There is no evidence that any of medical personnel involved in Respondent’s treatment who referred to these records requested the underlying treatment notes. In addition, Respondent never

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<sup>39</sup> To meet the FRE 106 standard, the other writings must be relevant to the issues and must be necessary to (1) explain the admitted portion, (2) place the admitted portion in context, (3) avoid misleading the trier of fact, or (4) insure a fair and impartial understanding. United States v. Soures, 736 F.2d 87, 91 (3<sup>rd</sup> Cir, 1984), cert. denied, 469 U.S. 1161, 105 S. Ct. 914, 83 L.Ed. 2d 927 (1985). Accord, United States v. Glover, 101 F.3d 1183, 1190 (7<sup>th</sup> Cir.

questioned these records. The addition of the underlying treatment notes absent a compelling reason to question the discharge summaries' accuracy amounts to a needless presentation of cumulative evidence.<sup>40</sup>

### SANCTION

There is no evidence that Respondent has any previous disciplinary actions. The Master of the SS EWA testified that that prior to these incidents, Respondent had been a very alert and responsible officer. (Tr. at 81). Regardless of Respondent's prior history, however, the only proper order for a proved charge of Incompetence is Revocation. 46 CFR 5.569(d), 5.61(a)(9) and 33 CFR 20.701.

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1996); United States v. Branch, 91 F.3<sup>rd</sup> 699, 727-29 (5<sup>th</sup> Cir. 1996), cert. denied, 520 U.S. 1185, 117 S.Ct. 1467, 137 L.Ed.2d 681 (1997).

<sup>40</sup> 33 CFR 20.802(b).

**ORDER**

IT IS HEREBY ORDERED that the license and document issued to Respondent, Patrick Beau Shea, be and hereby is, REVOKED. Respondent is to turn over his license and document to the Investigating Officer at Coast Guard Sector Honolulu, Hawaii immediately.

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 CFR 20.1001 – 20.1004.  
(Attachment A).

Done and dated January 25, 2005  
New York, New York

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

## ATTACHMENT A

### 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.

**ATTACHMENT B**  
**WITNESS AND EXHIBIT LISTS**

**WITNESS LIST**

**COMPLAINANT'S WITNESSES**

1. Jeff Hood, Chief Officer, SS EWA. (Tr. 28-50).
2. Captain Thomas M. Stapleton, Master, SS EWA. (Tr. 51-89).
3. Dr. Barry S. Carlton, MD, Respondent's treating psychiatrist. (Tr. 89 – 148).

**RESPONDENT'S WITNESSES**

1. Dr. Barry S. Carlton, MD, Respondent's treating psychiatrist (Tr. 89 – 148).  
(Judicial economy and convenience of the witness necessitated Respondent examining Dr. Carlton during I/O's case in chief).
2. Patrick Beau Shea, Respondent (Tr. at 148 – 180).

**EXHIBIT LIST**

**COMPLAINANT'S EXHIBITS**

- I/O Ex. 1 Statement of Captain Thomas M. Stapleton, Master, SS EWA. 4 pages. (Tr. at 61)
- I/O Ex. 2 Discharge Summaries from Lions Gate Hospital, North Vancouver, British Columbia, Canada handed to Captain Stapleton by Respondent. 21 pages. (Tr. at 68).
- I/O Ex. 3 Photograph of a life raft and two bags dragged aft by Respondent. Photo taken by Captain Stapleton. 1 page. (Tr. at 75).
- I/O Ex. 4 Resume/CV of Dr. Barry S. Carlton, MD. 6 pages. (Tr. at 93).
- I/O Ex. 5 Counsel for Respondent's letterhead and handwritten "fit for duty" letter from Dr. Carlton. 2 pages. (Tr. at 100).
- I/O Ex. 6 Counsel for Respondent's letterhead and "diagnosis" and prognosis by Dr. Carlton. 2 pages. (Tr. at 104).

## **RESPONDENT'S EXHIBITS**

Respondent Ex. "A" Second Engineer Job Description from Respondent's employer – Matson.

## **JUDGE'S EXHIBITS**

**None.** However, official notice was taken of the following:

Appeal Decision (1677) CANJAR (1968) during the hearing. (Tr. at 16).

Chapter 2, Section C, Paragraph 9 of the Marine Safety Manual. (Tr. at 17).

The Physician's Desk Reference – used by the I/O when questioning Dr. Barry S. Carlton, MD. (Tr. at 119).

The undersigned took official notice of all the cases cited by the parties, in addition to the regulations found at 33 CFR Part 20 as well as 46 CFR Part 5.

## ATTACHMENT C

### RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### COMPLAINANT'S PROPOSED FINDINGS

1. On December 18, 2003, Patrick Beau Shea was employed on board the Steamship EWA as the Second Assistant Engineer. (Tr. at 31). (Accepted and incorporated).
2. The Respondent did leave his station in the engine room, and was observed crawling on his hands and knees on the bridge wing, while the vessel was underway (I.O. Exhibit 1, Statement by Captain Tom Stapleton, Master of the SS EWA; Statement by Mr. Hood). (Accepted and incorporated).
3. Respondent was relieved of duty and confined to quarters during the remainder of the vessel's voyage. (I.O. Exhibit 1, Statement by Captain Tom Stapleton and Chief Mate Hood). (Accepted and incorporated).
4. The Respondent had packed bags with survival equipment and made it known that he intended to leave the ship while it was underway between Los Angeles, CA and Honolulu, HI (I.O. Exhibit 1, Statement of Captain Stapleton; I.O. Exhibit 3 Picture of life raft and bags of survival equipment found; Mr. Hood's statement). (Accepted and incorporated).
5. During the time that the Respondent was first confined to quarters, he gave Captain Stapleton, Master of the SS EWA, a copy of discharge summaries from Lion's Gate Hospital, Vancouver, Canada. These discharge summaries showed that the Respondent had been admitted in March and again in April of 2003. During which

time he had been diagnosed with bipolar mood disorder (I.O. Exhibit 1, Statement of Captain Stapleton; I.O. Exhibit 2, Discharge summaries from Lion's Gate Hospital; (Captain Stapleton's testimony). (Accepted and incorporated).

6. After the SS EWA docked in Honolulu, HI, the Respondent was admitted to Queen's Medical Center from December 21, 2003 and was discharged on January 6, 2004. While at Queen's Medical Center, Barry S. Carlton, M.D. evaluated the Respondent and diagnosed him with bipolar disorder – manic (Exhibit 4, Curriculum Vitae of Barry Stuart Carlton, M.D.; I.O. Exhibit 5 Handwritten letter from Dr. Carlton; I.O. Exhibit 6 Letter from Mr. O'Kane with notes from Dr. Carlton; Dr Barry S. Carlton's testimony). (Accepted and incorporated).
7. The respondent's bipolar disorder is a chronic disorder that requires long-term management. Dr. Carlton couldn't be certain that the Respondent wouldn't have a breakthrough episode. (Dr. Carlton's testimony). (Accepted and incorporated).
8. Dr. Carlton prescribed the Respondent Zyprexa, a psychotropic drug, with no indication as to if or when it would be discontinued. He also anticipated a five-year medication management and follow-up evaluation. This will aid in keeping the Respondent's disorder in remission but there is no cure for this disorder. It is also difficult to judge the course of the illness. "There are patients who go on to maintain remission; that is, absence of symptoms for many years. And then there are also those who, despite medication, do have breakthrough symptoms." (Dr. Barry S. Carlton's testimony). (Accepted and incorporated).
9. The Respondent is also required to self-monitor and maintain a life style that requires exercise, stress management and a normal sleep pattern. Dr. Carlton should monitor

the Respondent on a regular basis to ensure that there is no relapse. During times when Dr. Carlton cannot monitor the Respondent, the Respondent will have to rely on self-monitoring to try and identify any possible relapse symptoms. (Dr. Carlton's testimony; Patrick Shea's testimony). (Accepted and incorporated).

10. The position and work that the Respondent performs on board a vessel requires him to be able to perform during unexpected emergency situations that can occur at any time, day or night on any merchant vessel. These unexpected emergency situations inherently carry a certain level of stress and can effect the level of sleep that the Respondent is able to get when having to address any emergency situation. (Patrick Shea's testimony). (Accepted and incorporated).
11. There are certain side effects associated with Zyprexa, such as the potential to impair judgment, thinking, or motor skills. Patients are cautioned about operating hazardous machinery. Patients taking this medication are also advised about exposure to extreme heat and being exposed to dehydration. (Physicians Desk Reference; Dr. Carlton's testimony). (Accepted but not incorporated. Dr. Carlton opined that Respondent has taken Zyprexa for a sufficient period of time that those side effects would have manifested by now; however, Dr. Carlton opined that extreme heat is managed with proper hydration and that was incorporated).
12. The Respondent's working environment requires him to work around heavy machinery and temperatures in excess of a one hundred twenty degrees Fahrenheit. (Captain Stapleton's testimony; Patrick Shea's testimony). (Accepted and incorporated).

13. Should Respondent remain symptom free and continue to take Zyprexa for five years, he remains at a greater risk than the population for an exacerbation of illness. (Dr. Carlton's testimony). (Accepted and incorporated).
14. Psychiatric illness has a pattern of behavior, making it possible to anticipate that the Respondent would display the same type of thinking and behavior during a relapse. (Dr. Carlton's testimony). (Accepted to the extent that Dr. Carlton opined that Respondent has had this pattern – odd ideas about religiosity and about being anointed. He would now recognize these behaviors).

### **Ultimate Findings**

1. Patrick Beau Shea, being the holder of U.S. Coast Guard license number 879580 and merchant mariner's document number [REDACTED], on December 18, 2003, was working on board the SS EWA as the Second Assistant Engineer. While on board Mr. Shea abandoned his post in the engine room and was witnessed crawling on his hands and knees around the vessel's bridge. Concern for Mr. Shea's behavior and crew safety that day caused him to be restrained by the crew and confined to quarters for the remainder of the vessel's voyage. (Accepted and incorporated).
2. After the SS EWA docked in Honolulu, Hawaii, Mr. Shea was removed from the vessel and admitted to Queen's Medical Center in Honolulu, Hawaii. Mr. Shea was psychiatrically evaluated by Dr. Barry S. Carlton, M.D. Dr. Carlton diagnosed Mr. Shea with Bipolar disorder, and subsequently prescribed Zyprexa, a psychotropic drug, with continued psychiatric monitoring and life-long maintenance. (Accepted and incorporated).

## Conclusions of Law

1. The United States Department of Transportation (DOT) and the Coast Guard is charged with enforcing the United States Law or regulations intended to promote marine safety or to protect navigable waters against the holder of a license or merchant mariner's document, if the holder is found to have "committed an act of incompetence." (46 U.S.C. 7703). (Accepted and incorporated to the extent that the Coast Guard is now under the Department of Homeland Security).
2. The Coast Guard met its burden of proof by reliable, probative and substantial evidence as required under 33 CFR 20.702, that the Respondent is incompetent to hold any Coast Guard issued Merchant Mariner's Credentials (i.e. Coast Guard issued License and Coast Guard issued merchant mariner's Document). (Accepted and incorporated by the preponderance or reliable, probative, and substantial evidence).
3. An order of revocation was affirmed in Commandant's Decision on Appeal (CDOA) BURKE 2182, when it was "established that the Appellant has suffered what apparently were "psychotic breaks," severe enough to require hospitalization on two occasions and to require his relief from duty aboard a vessel..." Also it was determined that, "the diagnosis of current remission is said to mean "that the psychotic state is inactive at the present time, but the psychotic episodes have a tendency to recur in this patient. [Appellant's] risk of a future psychotic break cannot be stated in percentage form but it can be said to be greater than that of a person who has no history of mental illness." (Accepted and incorporated).
4. The Commandant affirmed an order of revocation for incompetence in CDOA BOYKIN 2191, whereby the Administrative Law Judge (ALJ), "concluded that

Appellant was mentally incompetent at the time of the assault. He additionally concluded that Appellant was not fit for duty because he was required to remain on medication." It was also noted that, "appellant's psychiatrist opined that while Appellant was mentally incompetent during the alleged assault, he is fit for duty as a merchant seaman." With (sic) the Commandant acknowledged that ALJ, "concluded that Appellant was not fit for duty" and that the ALJ, "is not bound by the recommendations of the psychiatrist or even by the medical findings and opinion." (Accepted and incorporated).

5. Commandant noted in CDOA WILLIAMS 1502 the following, "I am convinced that Appellant's failure to do his job properly was due to his mental illness which cannot be blamed on other conditions on the ship. Appellant's fears, suspicions and other signs of his emotionally disturbed state of mind were symptoms of this mental illness." The Commandant concludes, "...in the absence of any showing his condition has been cured, Appellant is mentally incompetent to perform duties on a vessel at sea." (Accepted and incorporated to the extent that in the absence of any showing that Mr. Shea's condition has been cured, he is mentally incompetent to perform duties on a vessel at sea).
6. The Coast Guard is seeking revocation of the Respondent's U.S. Coast Guard license number 879580 and merchant mariner's document number 394869310, the only available sanction for incompetence under 46 CFR 5.569. (Accepted and incorporated).

## RESPONDENT'S PROPOSED FINDINGS

1. Shea is the holder of U.S. Coast Guard ("USCG") license number 879580 and Merchant Mariner's Document number (Redacted). (Accepted and incorporated).
2. On December 18, 2003, Shea was working as Second Assistant Engineer aboard the SS EWA. (Tr. at 31, 51-52). (Accepted and incorporated).
3. While on duty, Shea suffered the onset of a debilitating illness that caused him to abandon his post in the engine room. (Tr. at 32, 33, and 178). (Rejected).
4. Prior to the incident aboard the M/V EWA, Shea received advice from a naturopathic physician that he could treat his illness through naturopathic therapy. (Tr. at 133-34, 153-56). (Accepted but not incorporated as irrelevant on the issue of competency).
5. The initial results were encouraging. Consequently, Shea believed his illness was under control. (Tr. at 133-34, 153-56). (Accepted but not incorporated).
6. Around 0630, Shea was seen crawling on his hands and knees near the vessel's bridge. (Tr. at 32-33, and 178). (Accepted and incorporated).
7. Later, it was discovered Shea had packed bags with survival equipment and was preparing to abandon ship because he believed the vessel was in danger. (Ex. 1, 3; Tr. at 71, 75, 76, and 178). (Accepted and incorporated).
8. Because of his behavior, Shea was put under restraints and confined to his quarters for the remainder of the voyage. (Ex. 1 Tr. at 46, 70). (Accepted and incorporated).

9. On December 22, 2003, after the EWA docked in Honolulu, Hawaii, Shea was taken to Queens Medical Center where he was examined by Barry S. Carlton, M.D. (Tr. at 91). (Accepted and incorporated).
10. Dr. Carlton diagnosed Shea as having bi-polar disorder, and treated Shea through psychotherapy and medication. (Tr. at 94). (Accepted and incorporated but with the addition of the term "Manic.")
11. Bi-polar disorder is a chronic illness that requires long-term management. (Tr. at 109). (Accepted and incorporated).
12. Naturopathic medicines cannot treat bipolar disorder. (Tr. at 133-34, 153-56). (Accepted but not incorporated as irrelevant on the issue of competency).
13. On December 22, 2003, the day he was admitted to Queen's Medical Center, Shea voluntarily surrendered his merchant mariner's documents and license to the USCG investigating officers. (Tr. at 101). (Accepted with the exception that Respondent actually voluntarily deposited his license and document in accordance with 46 CFR 5.201. A voluntary surrender under 46 CFR 5.203 is made in preference to appearing at a hearing. Unlike a voluntary deposit, a voluntary surrender permanently relinquishes all rights to the license, certificate or document).
14. Dr. Carlton was Shea's physician while he was inpatient in Queen's Medical Center, and after his discharge on or around January 6, 2004, continued to see Shea on an outpatient basis. (Tr. at 91). (Accepted and incorporated).

15. At the current time, Shea is taking Zyprexa, a medication approved by the FDA for treatments of bi-polar disorder and as a prophylaxis to prevent future episodes. (Tr. at 99). (Accepted and incorporated).
16. Sedation is a side effect of Zyprexa. Shea, as an outpatient, initially reported some sedation at the 20 milligram dose, but at this current dosage of 15 milligrams, he has not reported sedation. (Tr. at 212). (Accepted and incorporated).
17. Shea has been on Zyprexa long enough that the side effects should be predictable. Shea's initial difficulty with sedation has not been a recent problem and he as managed the larger side effect of weight gain quite well. (Tr. at 139-40). (Accepted and incorporated).
18. Dr. Carlton has not seen any clinical evidence of cognitive impairment or excessive sedation resulting from the medication. (Tr. at 141). (Accepted and incorporated).
19. In Dr. Carlton's medical opinion, the heat of the engine room should not be a problem if Shea hydrates properly. (Tr. at 142-43). (Accepted and incorporated).
20. Although Zyprexa acts as a prophylaxis to prevent future episodes, Shea could suffer a relapse, even while taking his medication. (Tr. at 106-07). (Accepted and incorporated).
21. However, provided proper medical medication management, Shea has sufficient insight to increase his medication as needed should there be breakthrough symptoms. (Tr. at 109). (Accepted only to the extent that it is Dr. Carlton's opinion. To accept Dr. Carlton's opinion as an ultimate fact is to conclude that Respondent possesses the ability to control any future breakdown symptoms).

22. There is a medical officer on board the vessels trained to a level slightly higher than that of an emergency medical technician. (Tr. at 84). (Accepted only to the extent that it applies to the SS EWA and that the medical officer, who is not a trained physician, may distribute non-controlled medications. There is no evidence that there are medical officers on board other vessels on which Respondent might serve or that said medical officers actually have received training greater than emergency medical technicians).
23. The medical officer could administer Shea's medication and help monitor his condition. (Tr. at 86). (Accepted, to the extent that there is a process aboard the Matson vessels where the medical office or some person, maybe the master, could control (the medication) and ensure that it (the dosage) was followed, but not incorporated).
24. If Shea remains asymptomatic for a period of five years, he could possibly discontinue medication. (Tr. at 105). (Accepted to the extent that Dr. Carlton would anticipate at least five years of asymptomatic condition before he would even consider recommending discontinuing the medication).
25. Early treatment, good return to function, continued insight would help predict that Shea would have a good outcome. (Tr. at 108). (Accepted as Dr. Carlton's opinion).
26. Dr. Carlton has stated that given Shea's course of illness you would expect a sustained remission. (Tr. at 135). (Accepted as Dr. Carlton's opinion).
27. On February 13, 2004, based on his examination and treatment of Shea, and after reviewing a job description of the Second Assistant Engineer's position provided

by Matson navigation, Shea's employer, Dr. Carlton declared Shea "fit-for-duty."  
(No reference provided but this evidence is found in I.O. Exhibit 5 and the transcript at 133). (Accepted as Dr. Carlton's opinion).

28. On June 3, 2004, the USCG met with Dr. Carlton and Patrick Shea, questioned them extensively, and returned Shea's documents without restrictions. (Tr. at 13, 158). (Accepted and incorporated).
29. Since being declared fit for duty, Shea has taken his medications as ordered and has not suffered a relapse. Shea has returned to work as a ship's engineer and has ably and competently performed his duties aboard the vessels to which he has been assigned. (Tr. at 161). (Accepted to the extent that Respondent testified that had had no problems at all with his illness since he returned to work June 3, 2003).
30. At the October 6, 2004 hearing, Dr. Carlton reaffirmed his belief Shea is fit for duty and stated that to a reasonable degree of medical certainty, Shea is able to perform the job of ship's engineer without difficulty. (Tr. at 133). (Accepted only as Dr. Carlton's opinion).

### **Conclusions of Law**

1. Ordinarily, an allegation of incompetence must be based on sufficient evidence subsequent to any fit for duty declaration or it should be found not proved. Appeal Decision 2417 (YOUNG) (1985) citing Appeal Decision 2280 (ARNOLD) (1982). Since being placed under the care of Dr. Carlton and declared fit for duty, Shea has taken his medications as ordered, has not suffered a relapse, and has safely and competently performed his duties aboard the vessels to which he has been assigned. At the October 6,

2004 hearing, Dr. Carlton confirmed that Shea is fit for duty. There is not sufficient evidence subsequent to either fit for duty declaration to find Shea incompetent. (Rejected as per discussion above. The sufficient evidence is that Respondent Bipolar disorder – manic is currently in remission and is therefore subject to breakdown symptoms).

2. Although “[a] n Administrative Law Judge is not bound by the recommendations of the psychiatrist or even by the medical findings and opinion[,]” he or she should carefully consider the expert’s medical opinion. Appeal decision 2191 (BOYKIN) (citing Appeal Decision 2021 (BURKE) (1975). Dr. Carlton is an expert in the field of psychiatry, and has repeatedly examined Shea and declared him competent. (Accepted to the extent that Dr. Carlton’s opinion has been given thoughtful consideration; however, as noted above, the Administrative Law Judge is not bound by medical findings and opinions. The ultimate finding as to fitness is his alone. Appeal Decision 2547 (PICCIOLO) (1992) citing Appeal Decisions 2191 (BOYKIN) (1980), 1720 (HOWELL) (1968) (aff’d 1 NTSB 2165); 1466 (SMITH) (1964)).
3. In Appeal Decision 2191 (BOYKIN) (1980), the seaman was diagnosed with acute paranoia. Shea suffers from bipolar disorder, one of the most treatable of psychic disorders and has demonstrated his ability to self-monitor his illness and competently handled the responsibilities of the ship’s engineers since his license and documents were returned. (Rejected. There is no evidence that bipolar disorder is the most treatable of psychic disorders. Dr. Carton has opined, “[I]t is difficult to judge the course of the illness. There are patients who remain in remission, that is, absence of symptoms for many years. And then there are also those who, despite medication, do have breakthrough symptoms.” (Tr. at 107). It is not a fact that Respondent will always remain in remission).

4. Appeal Decision 2021 (BURKE) (1975) was modified by 2 NTSB 2784 (1976) and remanded to the Administrative Law Judge (“ALJ”) for a re-hearing. Appeal Decision 2181 (BURKE) (1980) is the Commandant’s decision on the appeal filed after the ALJ’s decision on remand. (Accepted. On February 11, 1980 the remanded 2181 (BURKE) Decision on Appeal was issued. That decision held that,

“[T]he record contains evidence sufficient to establish that Appellant currently suffers from what is diagnosed as ‘paranoid schizophrenia, in remission.’ It is further established that Appellant has suffered what apparently were ‘psychotic breaks,’ severe enough to require hospitalization on two occasions and to require his relief from duty aboard a vessel on a third occasion. Lastly, the diagnosis of current remission is said to mean ‘that the psychotic state is inactive at the present time, but the psychotic episodes have a tendency to recur in this patient. [Appellant’s] risk of a future psychotic break cannot be stated in percentage form but it can be said to be greater than that of a person who has no history of mental illness.’”).

5. In Appeal Decision 2181 (BURKE) (1980) the psychiatrist’s opinion was that the seaman “was not fit for service at sea.” Unlike the seaman in Appeal Decision 2181, Shea has been declared fit for duty. Moreover, the seaman in Appeal Decision 2181 (BURKE) (1980) was diagnosed with paranoid schizophrenia, a far more serious illness than Shea’s bipolar disorder. (Accepted to the extent that it was Appeal Decision 2021 (BURKE) (1975) that references the psychiatrist letter declaring Respondent Burke unfit. The assertion that paranoid schizophrenia is a far more serious illness than Shea’s bipolar disorder is rejected because Dr. Carlton did not discuss the differences between the two illnesses in his testimony. The possibilities that Respondent can have another breakdown are greater than those of the general population. Therefore, I am not prepared to find as a fact that the conduct displayed by Respondent is less a threat to maritime safety than conduct that might obtain from a schizophrenic breakdown).

6. In Appeal Decision 1502 (WILLIAMS) (1965), the Commandant ordered “[t]he suspension of all licenses and other documents issued to the Appellant by the United States Coast Guard shall remain in effect until such time as Appellant produces a certificate issued by the United States Public Health Service stating that Appellant’s past medical history has been studied and that he is mentally fit to (sic) sea duty, but the final determination as to whether or not Appellant is considered to be cured and fit for sea duty shall rest with the Commandant.” Unlike the mariner in Appeal Decision 1502 (WILLIAMS) (1965), Shea has been declared fit for duty and there has been no evidence of incompetence since Dr. Carlton declared him fit for duty on February 13, 2004. (Rejected because it would require the trier of fact to give controlling weight to the opinion of Respondent’s treating psychiatrist on the ultimate issue – incompetence when the issue of competence is for the administrative law judge to make).
7. In Appeal Decision 2417 (YOUNG) (1985), the Commandant found the charges were not supported by the evidence because there was no diagnosis of the Appellant’s mental condition at the time of the hearing, and remanded the case to the ALJ to order a psychiatric evaluation of the mariner. Shea was evaluated by Dr. Carlton on September 30, 2004, six days before the hearing, and at the October 6, 2004 hearing, he was declared competent. (Rejected. To accept Dr. Carlton’s opinion that Respondent is competent is contrary to Commandant policy as stated in the Appeal Decisions 1502 WILLIAMS (1965) and 2547 (PICCIOLO) (1992) line of cases that a mariner’s fitness is determined by the Commandant as delegated to the administrative law judge).
8. The ultimate issue is whether the mariner can perform the functions expected of him. Appeal Decision 2547 (PICCIOLO) (1992). Shea has proven that he can. (Rejected. The

ultimate issue is whether Respondent suffers from an impairment of sufficiently disabling character to support a finding that he is not competent to perform safely duties aboard a merchant vessel of the United States. If the answer to this question is "yes," then revocation of all licenses and documents is the only proper sanction. (Appeal Decision 2118 (BURKE) (1980)).

9. The USCG has not met its burden of proof as required under 33 CFR 20.702. Therefore, Patrick Beau Shea is competent to hold his Merchant Mariner's Credentials and continue his career as a ship's engineer. (Rejected. The burden is not to rebut or to disprove a treating psychiatrist's opinion that a mariner is fit for duty, as fitness is the final decision of the Commandant. The burden of proof is to establish that Respondent suffers from an impairment of sufficiently disabling character to support a finding that he is not competent to perform safely duties aboard a merchant vessel of the United States. If the answer to this question is "yes," then revocation of all licenses and documents is the only proper sanction. (Appeal Decision 2181 (BURKE) (1980)).

10. 46 CFR 5.27 (2004) states that "[m]isconduct is 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. It is an act which is forbidden or a failure to do an act which is required." (Accepted and incorporated).

11. Although 46 CFR 5.27 (2004) does not require willful intent to violate a duly established rule, or reckless disregard of or even knowledge of a rule, courts have interpreted similar statutes to require willful or negligent acts or omissions. See e.g. *Rechany v. Rowland*, 235 F. Supp. 79, 84 (S.D.N.Y. 1964) (defining misconduct under 46 CFR 137.05-

20(a)(1), the statute replaced by 46 CFR 5.27, as a willful or negligent act or omission, an act or omission beyond a mere error during judgment). (Rejected for the reasons discussed above. The standard for finding a seaman not competent to hold a merchant mariners license is not the same as finding a criminal defendant not legally responsible for the crime. The evidence shows that Respondent intended to leave his watch. He acknowledged as much when he told the Chief Officer that it was “stuffy down there” or words to that effect).

12. “[P]roof of the ‘mental incompetence’ charge...[d]oes not automatically necessitate dismissal of the misconduct charge,” however, an ALJ may dismiss a misconduct charge because of the particular circumstances of a case. Appeal Decision 1677 (CANJAR) (1968). An ALJ should consider the events surrounding the misconduct charge and make a decision based on whether a preponderance of the evidence shows the respondent’s incompetence caused an isolated incident of misconduct for which he was not legally responsible. In this case, Shea sought treatment to correct his illness and unfortunately chose the wrong therapeutic remedies. Although Shea left his workstation as alleged, his actions were not willful or negligent, or even an error in judgment. Shea did not knowingly neglect his duty to the vessel, its Master or his fellow crewmembers. He should not be penalized for an incorrect assessment of the nature of his illness and for the resulting actions that eventually led to his receiving the care and help he needed. The misconduct charge is dismissed. (Rejected for the reasons discussed above).

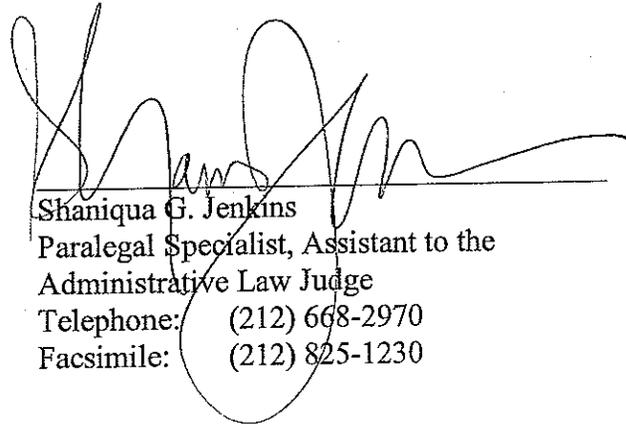
**CERTIFICATE OF SERVICE**

I, Shaniqua G. Jenkins, hereby certify that the foregoing **DECISION AND ORDER** was sent to the following parties and limited participants by following methods indicated:

USCG Sector Honolulu  
Attn: LT Michael R. Pierno, USCG  
433 Ala Moana Blvd.  
Honolulu, HI 27813-4999  
Telephone: (808) 522-8266  
**Via First Class Mail**

John O’Kane, Esquire  
Frame, Formby and O’Hare  
Four Waterfront Plaza, Suite 4-575  
500 Ala Moana Blvd.  
Honolulu, HI 82813  
Telephone: (808) 545-3043  
**Via First Class Mail**

ALJ Docketing Center  
40 S. Gay Street, Room 412  
Baltimore, MD 2122-4022  
Telephone: (410) 962-7434  
**VIA FACSIMILE**



Shaniqua G. Jenkins  
Paralegal Specialist, Assistant to the  
Administrative Law Judge  
Telephone: (212) 668-2970  
Facsimile: (212) 825-1230

Done and dated January 25, 2005  
New York, NY