

SERVED: November 16, 2010

NTSB Order No. EM-207

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 15th day of November, 2010

_____)	
ROBERT J. PAPP,)	
Commandant,)	
United States Coast Guard,)	
)	
Appellee,)	
)	Docket ME-182
v.)	
)	
GARY L. HENSLEY,)	
)	
Appellant.)	
)	
_____)	

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision on appeal of the Vice Commandant (Appeal No. 2688, dated June 14, 2010), which vacated and remanded a Decision and Order that Coast Guard Administrative Law Judge Bruce T. Smith issued on August 14, 2008, following an evidentiary hearing conducted on May 22,

2008.¹ The law judge had previously granted appellant's appeal concerning the Coast Guard's July 31, 2007 complaint, in which the Coast Guard alleged that appellant violated 46 U.S.C. § 7704(c).² The complaint also referenced 46 C.F.R. § 5.35.³ We dismiss appellant's appeal, based solely on our assessment that the appeal is not yet ripe for our review.

The Coast Guard's complaint was based on appellant's April 14, 2007 application for a job at Florida Marine, which required appellant to submit to a pre-employment drug test. Appellant submitted a urine specimen at Redi-Med Clinic and Occupational Health Services in Mandeville, Louisiana, on April 16, 2007. Mary Atkins, an employee of the clinic who was

¹ A copy of the Vice Commandant's decision is attached.

² Section 7704(c) states, "If it is shown that a holder [of a merchant seaman's license] has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

³ Section 5.35, entitled, "Conviction for a dangerous drug law violation, use of, or addiction to the use of dangerous drugs," provides as follows:

Where the proceeding is based exclusively on the provisions of title 46, U.S.C. [section] 7704, the complaint will allege *conviction for a dangerous drug law violation or use of dangerous drugs or addiction to the use of dangerous drugs*, depending upon the circumstances and will allege jurisdiction by stating the elements as required by title 46, U.S.C. [section] 7704, and the approximate time and place of the offense.

(emphasis in original)

certified in Department of Transportation drug testing procedures, collected appellant's specimen. At the hearing before the law judge, both the Coast Guard and appellant stipulated to the fact that Ms. Atkins inserted a sterile test strip into the specimen before splitting the sample for testing. The test strip indicated that appellant's urine was negative for drug metabolites, but both subsequent gas chromatography-mass spectrometry tests conducted on the split specimen at drug testing laboratories indicated a positive result for marijuana metabolites.

Following the law judge's hearing on appellant's appeal, the law judge found that the insertion of the test strip did not contaminate the specimen, but did constitute a violation of DOT drug testing procedures. According to the law judge, Ms. Atkins's insertion of the strip violated the integrity of the urine specimen. Therefore, the law judge granted appellant's appeal.

In accordance with Coast Guard appellate procedures concerning mariners' licenses, the Coast Guard appealed the law judge's decision to the Commandant. Vice Admiral Sally Brice-O'Hara, the Vice Commandant of the U.S. Coast Guard, issued a decision on June 14, 2010, in which she granted the Coast Guard's appeal, but simultaneously remanded the case to the law

judge.⁴ The decision stated that the law judge was correct in determining that a violation of the DOT regulations concerning drug testing procedures had occurred, and that, therefore, the remaining issue was whether this violation compromised the integrity of the specimen. The decision stated that no evidence supported the law judge's conclusion that the test strip jeopardized the integrity of the specimen, and further stated that appellant did not show that insertion of the strip somehow caused the sample to test erroneously positive for marijuana metabolites. In both granting the Coast Guard's appeal and remanding the case, the decision provided the following instructions: "the [administrative law judge] should determine whether, in light of the fact that [appellant's] urine sample was not compromised by the insertion of the instant drug test, the outcome of this case should be altered." Vice Commandant's Decision at 9. The decision then ordered that the law judge's August 14, 2008 order be vacated and the case remanded.

Appellant then appealed the Vice Commandant's decision, arguing that the clinic failed to adhere to mandatory DOT drug testing standards. Appellant's brief includes several citations to and lengthy quotations of regulations in 49 C.F.R. part 40,

⁴ The Commandant has delegated to the Vice Commandant the authority to take final action in enforcement proceedings, except for petitions or appeals in a case where a law judge ordered revocation of a merchant mariner's credentials.

in which the standards are codified. Appellant's brief acknowledges that the Vice Commandant's decision remanded the case to the law judge for additional findings, based on the assessment that the urine sample was not compromised. The Coast Guard's reply to appellant's appeal asserted that his appeal was not ripe for review, given the remand and consequent lack of any order affirming the revocation, suspension, or denial of appellant's license. The Coast Guard argued, in the alternative, that the clinic's error concerning the test strip was harmless, as the record contained no evidence that insertion of the test strip violated the integrity of the specimen.

We first note that the Board's jurisdiction over Coast Guard appeals extends only to appeals "of the Commandant, U.S. Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register." 49 C.F.R. § 825.1.⁵ The Coast Guard's own procedural rules provide that the Commandant may remand a case to a Coast Guard administrative law judge: "[t]he 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

⁵ See also Kime v. Levin, NTSB Order No. EM-178 at 1 (1994) (stating that, "[t]he Board's authority over Coast Guard merchant mariner actions is limited to the review of decisions of the Commandant on appeals from administrative law judge decisions that deny, revoke, or suspend a seaman's license or document," and citing 49 U.S.C. § 1133).

decision or should remand the case for further proceedings.”
33 C.F.R. § 20.1004(a).

In the case at hand, we lack jurisdiction to consider appellant’s appeal at this juncture, as the Coast Guard administrative law judge must issue another decision following the instant remand. Appellant may then appeal that decision again to the Commandant, in accordance with the Coast Guard’s procedures. Appellant’s final avenue of administrative appeal would then consist of an appeal to this Board.

As an ancillary matter, we note that the Vice Commandant’s disposition of this case could appear ambiguous. The decision stated that it granted the Coast Guard’s appeal, and discussed the basis for that decision, yet proceeded to remand the case to the law judge. We discourage such dispositions, as a remand is “the act or an instance of sending something (such as a case, claim, or person) back for further action.” Black’s Law Dictionary at 1406 (9th ed. 2009). A remand is not a final disposition of a case. Styling a decision as a remand while also adding language that indicates a grant or denial of an appeal creates confusion among the parties concerning the disposition of the case, such that parties may believe they are entitled to appeal, to the next level, and expend resources pursuing such appeals. In order to avoid confusion about the status of an appeal in the future, we urge the Coast Guard to be

mindful of this distinction in considering appeals under the Coast Guard rules of procedure.

ACCORDINGLY, IT IS ORDERED THAT:

Appellant's appeal is dismissed.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, 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	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	
	:	NO. 2688
	:	
<u>Issued to: GARY L. HENSLEY</u>	:	

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 August 14, 2008, Coast Guard Administrative Law Judge (hereinafter “ALJ”) Bruce T. Smith dismissed the Coast Guard’s Complaint alleging *use of or addiction to the use of dangerous drugs* (for failure of a pre-employment drug test) against Gary L. Hensley (hereinafter “Respondent”). The ALJ dismissed the Coast Guard’s Complaint upon finding that “[t]he Coast Guard did not prove Respondent failed a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.” [D&O at 17] The Coast Guard appeals.

PROCEDURAL HISTORY

The Coast Guard filed its Complaint against Respondent with the Coast Guard ALJ Docketing Center on July 31, 2007. [D&O at 2] Respondent filed an Answer to the

Complaint on August 6, 2007.¹ [*Id.*; Answer at 1]

The hearing in the matter commenced on May 22, 2008, in New Orleans, Louisiana. The ALJ issued his D&O dismissing the Coast Guard's Complaint on August 14, 2008. Thereafter, on September 9, 2008, the Coast Guard filed its Notice of Appeal. The Coast Guard perfected its appeal by filing an Appellate Brief on October 14, 2008. Respondent filed a timely Reply Brief, after receiving a proper time extension from the ALJ, on December 1, 2008. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented, at the hearing and on the Reply Brief, by Les A. Martin, Esq., 3221 Behrman Place, Suite 105, New Orleans, Louisiana 70114. The Coast Guard Investigating Officers were LCDR Melissa J. Harper and MST1 Cynthia Dubach of U.S. Coast Guard Sector New Orleans, Louisiana. LCDR Harper filed the Appeal Brief for the Coast Guard.

FACTS

At all times relevant herein, Respondent was the holder of a Coast Guard issued Merchant Mariner License. [D&O at 3]

On April 14, 2007, Respondent applied for a job with Florida Marine. [Transcript hereinafter "Tr." at 134-35] As a condition of employment with Florida Marine, Respondent was required to submit to a pre-employment drug test. [*Id.*] Respondent presented himself on April 16, 2007, at the Redi-Med Clinic and Occupational Health Services, in Mandeville, Louisiana, to provide a urine sample for

¹ A review of the Certificate of Service portion of Respondent's Answer shows that he incorrectly dated the document as being filed on August 6, 2008. The ALJ repeated this error in his D&O. However, the ALJ Docketing Center stamped the document as being received in 2007. Because the record does not contain any evidence to suggest that Respondent's Answer was untimely, this decision concludes that the Answer was filed in 2007, rather than in 2008. The ALJ's error regarding the date was harmless.

pre-employment drug testing. [D&O at 3; Tr. at 31, 135-36; Coast Guard Exhibits 2 & 3] Ms. Mary Adkins, a properly trained and certified Department of Transportation (hereinafter "DOT") urine specimen collector and employee of the Redi-Med Clinic, collected a single urine sample from Respondent on April 16, 2007. [D&O at 3, 5; Tr. at 11-14, 36; Coast Guard Exhibit 1]

After Respondent provided his urine sample, Ms. Adkins performed an "instant drug test" on the sample. [D&O at 4, Tr. at 36-38] The "instant drug test" is less reliable than formal testing conducted by a DOT certified laboratory and is not part of the DOT-approved drug testing protocol. [D&O at 5; Tr. at 46, 116; Coast Guard Exhibit 4 at 38-39] The test is conducted by inserting a plastic card into a urine specimen cup for several seconds and then removing the card.² [D&O at 4; Tr. 36-38] In Respondent's case, the "instant drug test" showed that Respondent's urine sample was negative for a variety of drugs, including marijuana metabolites. [D&O at 5; Coast Guard Exhibit 3, at 14] Both parties stipulated that the instant test strip inserted into the specimen was sterile. [D&O at 14 footnote1; Tr. at 122-124; Coast Guard Exhibit 6]

Immediately after performing the "instant drug test" on Respondent's urine sample, Ms. Adkins divided Respondent's urine into two separate containers, thus providing a split sample for further testing. [D&O at 4; Tr. at 136] Ms. Adkins then sealed the containers holding Respondent's urine, bagged them, and shipped them to Kroll Laboratories, where DOT testing of Respondent's urine occurred. [D&O at 5; Tr. at 28-30; Coast Guard Exhibit 5] After tests revealed that Respondent's urine specimen was positive for the presence of marijuana metabolites, the Medical Review Officer

(hereinafter “MRO”), verified those results as positive for the presence of marijuana metabolites. [D&O at 6; Coast Guard Exhibit 4 at 6-13, 19, 31, 38-39] Shortly thereafter, the MRO’s office contacted Respondent and informed him of the positive test result. [D&O at 6; Tr. at 137-38] In response, Respondent requested that his split sample be submitted for further testing. [D&O at 6; Tr. at 138] The split sample test yielded a positive result for marijuana metabolites. [D&O at 7; Tr. at 138-39; Coast Guard Exhibit 4 at 26]

The ALJ found that the insertion of the sterile, instant test strip used in this instance does not contaminate specimens with marijuana metabolite. [D&O at 5; Coast Guard Exhibits 6 & 7] However, the ALJ found that the insertion of the instant test strip into the specimen constituted a violation of DOT drug testing procedures. [D&O at 13] The ALJ also determined that the insertion of the instant strip violated the integrity of the specimen. [D&O at 14] The ALJ found Respondent’s testimony that he had not used drugs in this instance credible, supported by the fact that the instant test yielded a negative result, that he had not previously failed a drug test in 23 years, and that he had passed multiple subsequent tests. [D&O at 16-17] Ultimately, the ALJ dismissed the Complaint after finding that “[t]he Coast Guard did not prove Respondent failed a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.” [D&O at 17]

BASES OF APPEAL

The Coast Guard raises the bases of appeal summarized below:

- I. *The ALJ erred in finding that insertion of the instant test strip invalidated the positive test results;*

² The plastic card is referred to predominantly within the D&O as an “instant test strip” rather than an “instant test card”.

- II. *The ALJ erred in giving undue weight to Respondent's past mariner history and subsequent test results;*
- III. *The ALJ's decision is against the overwhelming weight of the evidence.*

Given my determination as to the first issue raised in this appeal, discussion of the Coast Guard's second and third bases of appeal is neither necessary nor warranted. Accordingly, those issues will not be addressed herein.³

OPINION

Under the governing standard of review on appeal, great deference is given to the ALJ in evaluating and weighing the evidence. The ALJ's findings of fact and determinations in this regard will not be disturbed and will be upheld on appeal unless they are clearly erroneous, arbitrary and capricious, or based on inherently incredible evidence. *See Appeal Decision 2541 (RAYMOND)* (citing *Appeal Decisions 2522 (JENKINS)*, *2492 (RATH)*, and *2333 (AYALA)*). The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. *Appeal Decisions 2395 (LAMBERT)* and *2282 (LITTLEFIELD)*.

I.

The ALJ erred in finding that insertion of the instant test strip invalidated the positive test results.

The Coast Guard contends that the ALJ erred in determining, as a matter of law, that insertion of any object into the sample violates the integrity of the sample. [Appeal Brief at 11] The Coast Guard asserts that this conclusion flies in the face of the parties'

³ The Coast Guard raised a fourth issue within its statement of the issues in its appeal brief but failed to address it within the body of the brief. Therefore, I did not consider that issue.

stipulation that instant test strips in this case are sterile, individually wrapped, and have no history of contaminating urine samples. [Id.]

A review of past Commandant Decisions on Appeal shows that the primary issue presented in this case – whether insertion of a sterile object into a urine sample violates the specimen’s integrity to such an extent that the drug test must be cancelled – is one of first impression. Prior Commandant Decisions on Appeal have stated that “[i]n the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40...[be]...followed to maintain the [drug testing] system.” See Appeal Decision 2631 (SENGEL) (unqualified collector without required training failed to positively identify each crewmember providing a sample, failed to collect social security numbers, improperly required crew members to certify samples before they were provided and then stated that it was his signature on a memorandum from the laboratory that attempted to correct the missing information on the Drug Testing Custody and Control Form (hereinafter “DTCCF”) when it was clear that it was not), *citing* Appeal Decisions 2621 (PERIMAN) (Respondent developed evidence primarily after the hearing of violations of the testing laboratory’s procedures identified by National Laboratory Certification Program, false testimony by lab’s director as to his credentials, misinformation about right to retest his split sample, and premature disposal of sample precluding further testing), and 2614 (WALLENSTEIN) (significant unresolved conflicting testimony as to whether collector’s actions violated chain of custody when he left improperly labeled specimens unattended after leaving to pursue employee who had failed to sign DTCCF, and when unable to catch him asked others to forge the absent employee’s signature). However, minor technical infractions of

the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. See Appeal Decisions 2575 (WILLIAMS) (collector's failure to prevent other individuals from entering the restroom during collection and lack of continued physical possession of the DTCCF were minor technical violations of drug testing regulations), 2546 (SWEENEY) (collector's failure to have Respondent initial specimen label and failure to allow Respondent to choose his specimen jar were minor technical violations of drug testing regulations) *aff'd sub nom* NTSB Order No. EM-176 (1994), 2541 (RAYMOND) (Respondent's failure to wash his hands prior to providing urine sample, the collector's failure to allow Respondent to choose his specimen jar, and the collector's failure to record the specimen temperature were minor technical violations of drug testing regulations) *aff'd sub nom* NTSB Order No. EM-175 (1994), 2537 (CHATHAM) (absence of information on DTCCF was minor technical violation of drug testing regulations), and 2522 (JENKINS) (Respondent's failure to wash hands prior to providing urine sample was minor technical violation of drug testing regulations); *Cf. Gallagher v. National Transportation Safety Bd.*, 953 F.2d 1214 (10th Cir. 1992) (holding that where there was no evidence that the integrity of a blood sample was actually compromised by a procedural error that occurred during sample collection, results derived from the sample could properly be relied upon to support the revocation of a pilot's airman certificate).

Prior to determining whether the ALJ erred in finding that the integrity of the specimen was violated, it is first necessary to determine whether a violation of the DOT drug testing regulations occurred. 49 C.F.R. §§ 40.65 and 40.71(b) outline the step by step items to be checked and procedures to be followed by the collector after the

employee submits the specimen. These procedures do not include the insertion of any object, including a sterile instant test strip, into the specimen. *See* 49 C.F.R. §§ 40.65 and 40.71(b) (§ 40.65(b) requires the temperature of the specimen be taken, which is done by using a test strip located on the outside of the collection container). There are provisions within 49 C.F.R. § 40.13(d) and 40.71(b)(8) that allow for additional testing of excess urine remaining within the collection container after the urine is poured into the split sample specimen bottles, if the test is part of a required DOT physical examination. In this instance the instant test strip was inserted into the collection container prior to the urine being poured into the split specimen bottles. [D&O at 4; Tr. at 136] Therefore, the ALJ was correct in determining that a violation of the DOT drug testing regulations occurred.

The issue then becomes whether these actions violated the integrity of the chain of custody or the integrity of the specimen. The ALJ concluded that the insertion of the instant test, which the parties stipulated was sterile, into the urine specimen prior to splitting the sample constituted a violation of the integrity of the sample. [D&O at 14] While there is no doubt that the insertion violated the testing procedures, there is no evidence in the record to support the ALJ's conclusion that the insertion actually violated the integrity of the specimen. The record is devoid of any hint or assertion that the insertion of the sterile strip caused the specimen to test positive for marijuana metabolites. Rather, the record shows not only that the parties to this action stipulated that the instant test was sterile, but also that the instant test, itself, has not been shown to contaminate urine specimens with marijuana metabolites. [D&O at 5, 14; Tr. at 122-124; Coast Guard Exhibits 6 & 7] Accordingly, the technical violation that occurred in this

case was harmless because there is no evidence to suggest that the integrity of Respondent's urine specimen or the chain of custody was adversely affected by the use of the instant test. Therefore, the ALJ's finding that the insertion of a sterile instant test strip constitutes a violation of the integrity of the specimen is without evidentiary support and cannot stand.

Although the collector's violation of the DOT drug testing regulations in this instance was harmless, this decision should not be read to encourage either the violation of the regulations contained in 49 C.F.R. Part 40 or that insertion of objects into urine specimens is encouraged. It is not. Rather, this decision is limited to instances where the impact of the insertion could not have caused a positive result. In the case at hand, the parties clearly stipulated that the strip was sterile and could not have caused a positive result.

CONCLUSION

The ALJ erred in holding that the integrity of Respondent's urine sample was compromised by the insertion of the sterile, instant test into Respondent's urine. Therefore, the Coast Guard's appeal is granted. Pursuant to 33 C.F.R. § 20.1004, on appeal, the decision of the ALJ may be affirmed, modified, reversed, or remanded for further proceedings. Given this authority and in consideration of the ALJ's legal errors, this case is being remanded. The ALJ should determine whether, in light of the fact that Respondent's urine sample was not compromised by the insertion of the instant drug test, the outcome of this case should be altered. While the ALJ may hold further proceedings to assist in this determination, if he finds that the relevant issues have sufficiently been developed in the record, he may determine those issues absent further proceedings.

ORDER

The order of the Administrative Law Judge dated August 14, 2008, is
VACATED. The case is REMANDED for further proceedings consistent with this
decision.

Sally Brice-O'Hara

SALLY BRICE-O'HARA
Vice Admiral, U. S. Coast Guard

Signed at Washington, D.C. this 14th day of June, 2010.