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

UNITED STATES COAST GUARD
Complainant

vs.

SIMONE JOYCE SOLOMON

Respondent

Docket Number 2012-0351
Enforcement Activity No. 4405978

COMPLAINANT'S APPELLEE BRIEF

July 15, 2013

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SUMMARY

The United States Coast Guard (Appellee) initiated a Suspension and Revocation proceeding seeking revocation of the Appellant's Merchant Mariner's Document (MMD) Number 184789. This action was brought pursuant to the authority contained in Title 46, United States Code (U.S.C.) § 7703(1)(B) and its underlying regulations at Title 46, Code of Federal Regulations, (CFR) Part 5 and 33 CFR Part 20.

In its August 10, 2012, Complaint the Appellee charged the Appellant with Misconduct as described in 46 U.S.C. § 7703(1)(B), and 46 CFR § 5.27. Specifically, the APPELLEE alleged, on July 2, 2012, Appellant participated in a random chemical test and wrongfully refused to test by providing a verified substituted sample.

On August 10, 2012, the Appellant filed an answer admitting all jurisdictional allegations, but denying specific factual allegations, and requesting a hearing.

On January 15-16, 2013, a hearing was conducted in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59, 46 CFR Part 5, and 33 CFR Part 20, in Jacksonville, FL.

On May 15, 2013, the Honorable Dean C. Metry, Administrative Law Judge (ALJ), issued a Decision and Order (hereinafter *D&O*), finding the charge PROVED and the Appellant's MMD SUSPENDED outright for fourteen (14) months.

On June 6, 2013, both the Appellee and Appellant filed a *Notice of Appeal* with the ALJ Docket Center.

On June 08, 2013, Appellant filed a document titled *Request for Amicus Curiae*, in which Appellant requested the ALJ "suggest [an] independent *Amicus Curiae* to answer [a] question of scientific fact." That question being, "Is urinary creatinine stable up to a temperature of 300 degrees celcius [sic] (572 degrees Farenheit [sic])?" More precisely, "Can urinary creatinine degrade at temperatures of 46 degrees celcius [sic] (115 degrees Farenheit [sic])?"

In the same filing, the Appellant appeals the ALJ's *D&O* of May 15, 2013, asserting the ALJ erred on three accounts.

Those alleged errors are:

I. The ALJ erred in allowing the Appellee to commit discovery violations which resulted in a denial of the Appellant's due process;

II. The ALJ erred in accepting Dr. Khella's (Medical Review Officer or MRO) testimony that "creatinine within urinary solute must hit a mark of 300 degrees Celsius before potential degradation"; and

III. The Complaint was insufficient and lacked the required information necessary.

On June 28, 2013, Appellant submitted an untimely document titled "*Amicus Curiae Brief in Support of Proposition that Urinary Creatinine can Degrade in Temperatures Lower than 300 Degrees Celsius* [hereinafter *Amicus Curiae Brief*].

This brief is a reply to the issued raised in the Appellant's *Request for Amicus Curiae* and *Amicus Curiae Brief.* The Coast Guard's Appeal Brief is being filed separately.

AMICUS CURIAE BRIEF

Because the *Amicus Curiae Brief* was not offered to the ALJ before or during the hearing and not until after the *D&O* was issued, it was not available for consideration by the ALJ in forming his decision. "The issues raised on appeal are matters in defense of the charge found proved. Such items would have been proper subjects to place before the Administrative Law Judge for his consideration during the hearing, but they are not timely when raised for the first time on appeal, and will not be considered." [Appeal Decision 1923 (ADAMS)]

However, in the alternative, if it is accepted, the Appellee offers the following:

It remains undisputed, the Appellant's specimen was a "substituted specimen" as defined by 49 CFR § 40.3. To counter the MRO's verification, the Appellant has the burden of proof that there is a legitimate medical explanation and is required to "… demonstrate that he or she did produce or could have produced urine through physiological means, meeting the creatinine concentration criterion of less than 2 mg/dL and the specific gravity criteria of less than or equal to 1.0010 or greater than or equal to 1.0200 (see § 40.93(b))." [49 CFR § 40.145(e)(2)] The *Amicus Curiae Brief* fails to meet this burden.

The *Amicus Curiae* challenges, "The opinion rendered in this case on May 15th, 2013, contains scientific inaccuracies regarding the degradation of urinary creatinine by finding that creatinine is 'heat stable' in urine. The opinon [sic] adopts misleading and incorrect findings regarding the stability of creatinine in urine exposed to heat over time." [*Amicus Curiae Brief* at 4]

It is argued by the Appellant (although not accepted as fact by the ALJ) that the specimen may have been exposed to temperatures as high as 46 degrees Celsius [114.8 degrees Fahrenheit].[1] [Respondent's *Request for Amicus Curiae* at 1] Actually, the only definitive testimony or evidence concerning the storage/transportation temperature for the Appellant's specimen is that it was kept at a temperature of around 18 to 20 degrees Celsius [64.4 to 68 degrees Fahrenheit] [Tr. Vol. I at 58]

Assume the Appellant's specimen was exposed to temperatures as high as 46 degrees Celsius [114.8 degrees Fahrenheit] for several days while in the United Arab Emirate.

Given the reference points provided in the *Amicus Curiae Brief*, for specimens of normal human urine, when stored for eight days at 37 degrees Celsius [98.6 degrees Fahrenheit], the creatinine level decrease by 10%; and for specimens of normal human urine when stored for eight days at 93 degrees Celsius [199.4 degrees Fahrenheit], the creatinine level decrease by 43%. [*Amicus Curiae Brief* at 3]

Given those reference points, it is interpolated a specimen of normal human urine, when stored for eight days at 46 degrees Celsius [114.8 degrees Fahrenheit], the creatinine level would decrease by ~15.3%. Therefore, if the Appellant's specimen's creatinine level was 1.3 mg/dL when tested, the original creatinine level would have been 1.53 mg/dL, still below the 2.0 mg/dL cutoff specified in 49 CFR 40.93(b).

In addition, in the *Amicus Curiae Brief*, the *Amicus Curiae* states, "… the maximum decrease in creatinine was observed in the aliquot stored at 93 degrees Celsius [199.4 degrees Fahrenheit]." [Emphasis added; *Amicus Curiae Brief* at 3] This represents a maximum creatinine level decrease of 43%. Therefore, if the Appellant's specimen's creatinine level was 1.3 mg/dL when tested, the original creatinine level would have been 2.28 mg/dL. Although, this creatinine level is greater than the 2.0 mg/dL cutoff specified in 49 CFR 40.93(b), given the specimen's specific gravity of 1.0223, the specimen is still not consistent with normal human urine. [Tr. Vol. I at 229]

Additionally, the *Amicus Curiae Brief* offers only speculation. The *Amicus Curiae* admits, "The true rate of degradation of creatinine in a specific urine sample cannot be accurately predicted due to variables of bacterial contamination and enzymatic reactions." [Emphasis added, *Amicus Curiae Brief* at 4]

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[1] (°C × 1.8) + 32 = °F or (°F - 32) x 0.56 = °C

The *Amicus Curiae Brief* does not counter the testimony of the MRO nor the ALJ's reliance on his testimony that "the [Appellant's] specimen was inconsistent with normal human urine." [*D&O* at 7]

Therefore the ALJ's decision is not arbitrary, capricious, or in error. [Also see ***II. Urinary Creatinine Degradation*** below]

APPELLANT'S BASIS FOR APPEAL

I. Discovery Violations

The Appellant contends it was an error and abuse of discretion by the ALJ to moot any motions potentially raised by Appellant concerning purported recordings of various telephone conversations between the MRO and the Appellant, as well as a conversation between the MRO and a union doctor.

First addressed are the purported recordings of telephone conversations between the MRO and the Appellant. The Appellant insinuates the Appellee had an obligation to provide any recorded conversations between the MRO and the Appellant as part of discovery. However, the Appellee was not in the possession, custody, or control of any purported recordings, nor did the Appellee intend to introduce them as evidence, as it would not be needed to support its case and would be duplicative to the expected testimony and cross-examination of Dr. Khella.

Moreover, the Appellant admitted knowledge of the purported recordings prior to the hearing and as such, the purported recordings were available to the Appellant from the custodian of the record. If Appellant believed the purported recordings were needed to rebut the Appellee's claims, the Appellant was free to motion the ALJ for issuance of a subpoena for the recordings per 46 CFR, § 20.608. Since Appellant was a part of the conversation and aware of the issues discussed, the Appellant suffered no surprise at the hearing and was not disadvantaged.

Appellant mentions purported recordings of telephone conversations between the MRO and a union doctor. Again, the Appellant insinuates the Appellee had an obligation to provide any recorded conversations between the MRO and the union doctor as part of discovery. As before, the Appellee was not in the possession, custody, or control of any purported conversation recording, nor did the Appellee intend to introduce them as evidence, as it would not be needed to support its case and would be duplicative to the expected testimony and cross-examination of Dr. Khella.

Appellant again admitted knowledge of the purported recordings prior to the hearing and as such, it was always available to the Appellant from the custodian of the record. If the purported recording was needed to rebut the Appellee's claims, the Appellant was free to motion the ALJ for issuance of a subpoena for the recordings, per 46 CFR, § 20.608. Any such conversation would have little or no relevance or probative value if presented at the hearing.

Therefore, the ALJ was not in error nor did he abuse his discretion by mooting any motions potentially raised by Appellant concerning purported recordings of various purported telephone conversations between the MRO and the Appellant, as well as a purported conversation between the MRO and a union doctor.

II. Urinary Creatinine Degradation

The Appellant contends the ALJ erred in granting the testimony of Dr. Logan and Dr. Syfert less weight than the testimony of Dr. Khella's, concerning whether or not creatinine is "heat stable" and that "sitting in the desert [during shipment] is not going to cause the urine to degrade and cause . . . the creatinine to disappear, or to break down."

In Coast Guard Suspension and Revocation proceedings, the ALJ is the arbiter of facts and responsible for assigning weight and credibility to evidence and testimony presented before him or her at hearing. It has long been established, the Commandant will not overturn an ALJ's finding of fact unless they are shown to be arbitrary and capricious or shown to be clearly in error. [Appeal Decisions 2695 (AILSWORTH)]

In his *D&O*, the ALJ expresses sound logic and reasoning in assigning greater weight and credibility to the testimony of Dr. Khella and lesser weight and credibility to the testimony of Dr. Logan and Dr. Syfert. [*D&O* at 14]

> "If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or [Commandant] sitting in his stead) might reach a contrary conclusion. Stated another way, [Commandant] will not substitute [his/her] findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious.")." "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 2695 (AILSWORTH) citing Appeal Decisions 2685 (MATT), 2395 (LAMBERT), and 2282 (LITTLEFIELD)]

Therefore, the ALJ did not error in granting Dr. Khella's testimony greater weight and probative value than the testimony of Dr. Logan and Dr. Syfert concerning creatinine being "heat stable" and that "sitting in the desert [during shipment] is not going to cause the urine to degrade and cause . . . the creatinine to disappear, or to break down."[2]

III. Deficient Complaint

Appellant contends the Complaint was deficient for the reason that it lacked pertinent facts of the violation, as required by 33, CFR, § 20.307(a)(3).

> Findings that lead to the suspension or revocation of a license can be made without regard to the framing of the original specification as long as the Appellee has actual notice and the questions are litigated. See Kuhn v. Civil Aeronautics Board, 183 F.2d 839, (D.C. 1950); Appeal Decisions 2545 (JARDIN); 2422 (GIBBONS); 2416 (MOORE); 1792 (PHILLIPS); 2578 (CALLAHAN). When the record clearly indicates that the parties understand exactly what the issues are, the parties cannot afterward make a claim of surprise, lack of notice, or other due process shortcoming. See Appeal Decision 2545 (JARDIN); 2512 (OLIVO); Kuhn, *supra*. [CDOA 2578 (CALLAHAN)]

The Appellant was charged with Misconduct. The Complaint clearly alleges which act constitutes the basis for the Misconduct charge; namely, Appellant's wrongful refusal to take a required drug test. [*Complaint*] To prove Misconduct, under 46 CFR § 5.27, the Coast Guard must prove by a preponderance of the evidence, the Appellant engaged in some behavior that violates some formal, duly established rule. It is the refusal to test which the Coast Guard must prove to support the charge of Misconduct. While the specimen test results may be evidence supporting the refusal, they are not necessary elements of Misconduct.

Therefore, the Complaint did provide pertinent facts of the violation, as required by 33, CFR, § 20.307(a)(3).

In addition, although not directly related to the alleged deficiencies of the Complaint, the Appellant insinuates the Appellee had an obligation to provide the laboratory "litigation package" as part of discovery. At the time of initial exchange of discovery, the "litigation package" was not in the possession, custody, or control of the Appellee, nor did the Appellee intend to introduce the "litigation package" as evidence at the hearing, as it would not be needed to support its case and would be duplicative to the expected testimony and cross-examination of Mr.

[2] The *Amicus Curiae Brief* was not submitted to the Docket by Appellee until June 28, 2013, and was not presented to the ALJ before or during the hearing and not until after the *D&O* was issued. It was not available for the ALJ to consider when making his decision.

LeBard and Dr. Khella. At the hearing, the Appellee could rely (heavily but not solely) on the presumption created by the MRO's verification of the substituted specimen.[3] [49 CFR § 40.191(b)]

Further, this information was always available to the Appellant from the custodian of the record. If the Appellant believed the "litigation package" was needed and would rebut the Appellee's claim, the Appellant was free to motion the ALJ for issuance of a subpoena for the record, per 46 CFR, § 20.608.

Regardless of the above, after the Appellant's October 30, 2012, *Motion for Summary Disposition and Motion to Dismiss Complaint*, the Appellee did obtain and provide the Appellant with a copy of the Laboratory Data package for Specimen ID Y25425812. Not only did the Appellee provide the Laboratory Data package for Specimen ID Y25425812 at the government's effort and expense, the Appellee identified the location within the document where the information sought by the Appellant could be found.

Finally, because the records were obtained (by the Appellee on behalf of the Appellant and the location of the information the Appellant sought was provided) the Appellant was not disadvantaged and suffered no surprise at the hearing.

Therefore, the Complaint was not deficient for the reason that it lacked pertinent facts of the violation, as required by 33 CFR, § 20.307(a)(3). In addition, the omission of the "litigation package" from the Appellee's initial discovery exchange did not disadvantage the Appellant or cause the Appellant to suffer surprise at the heating.

CONCLUSION

The ALJ did not err in accepting the MRO's testimony that Appellant's specimen is not consistent with normal human urine. [D&O at 7]

The ALJ did not err or abuse his discretion by mooting any motions potentially raised by Appellant concerning purported recordings of various telephone conversations between the MRO and the Appellant, as well as a conversation between the MRO and a union doctor.

The ALJ did not err in granting Dr. Khella's testimony greater weight and probative value than the testimony of Dr. Logan and Dr. Syfert concerning creatinine being "heat stable" that "sitting in the desert [during shipment]

[3] In the opinion of the National Transportation Safety Board, the laboratory report itself, once signed by the MRO, constituted proof

is not going to cause the urine to degrade and cause . . . the creatinine to disappear, or to break down," and that the Appellant's specimen was not consistent with normal human urine.

The Complaint was not deficient and did contain pertinent facts of the violation, as required by 33, CFR, § 20.307(a)(3).

Therefore, the Decision of the ALJ should be AFFIRMED.

RESPECTFULLY SUBMITTED by the U. S. Coast Guard, through undersigned Investigating Officer.

For the U.S. Coast Guard

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Mr. Eric A. Bauer
Mr. Brian C. Crockett
U. S. Coast Guard Suspension and Revocation
National Center of Expertise

Date: July 15, 2013

adequate to shift to appellant the burden of going forward with rebuttal. [NTSB Order No. EM-176]