UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA **UNITED STATES COAST GUARD,** **Complainant,** **vs.** **DONALD W. SINCLAIR, III,** **Respondent**	**Docket Number: 00-0383** **Case Number: PA00001049**

DECISION AND ORDER

BEFORE: THOMAS E. P. McELLIGOTT
ADMINISTRATIVE LAW JUDGE

Representing the U.S. Coast Guard:

Lieutenant Derek A. D'ORAZIO, Attorney, Investigating Officer, and Lieutenant Commander Elmer EMERIC, Senior Investigating Officer, both stationed at the Marine Safety Office for Houston and Galveston, Texas at 9640 Clinton Drive, Houston, Texas 77029.

Representing the Respondent:

Truett B. AKIN, IV, Attorney, 440 Louisiana, Suite 1600, Houston, Texas 77002

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I. PRELIMINARY STATEMENT

This adversary hearing before the above Administrative Law Judge is brought pursuant to the legal authority contained in 46 U.S.C. Chapter 77, specifically §§ 7701-04 (West Supp. 2000); the U.S. Administrative Procedure Act, 5 U.S.C. §§ 551-59 (West Supp. 2000); Rules of Practice, Procedure, and Evidence for Formal Administrative Proceedings of the Coast Guard, 33 C.F.R. Part 20 (2000); Marine Investigation Regulations - Personnel Action, 46 C.F.R. Part 5 (1999); Chemical Testing, 46 C.F.R. Part 16 (1999); and Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. Part 40 (1999).

On August 23 through 25, 2000, a hearing before the Judge for the above captioned matter convened as scheduled in the hearing room located in Houston, Texas. This administrative proceeding was commenced on June 7, 2000 against Donald W. Sinclair, III., (Respondent) through personal service of a Complaint by the Attorney, Investigating Officer (I.O.), Lieutenant Derek A. D'Orazio. The Complaint alleges a statutory violation charging the Respondent with the Use of or Addiction to the Use of Dangerous Drugs in violation of 46 U.S.C. § 7704 (c) (West Supp. 2000). The Complaint seeks the revocation of the Respondent's U.S. Coast Guard issued Merchant Mariner's Document, (MMD), Number ***[REDACTED]*** and License, Number 831351.

The Coast Guard's Complaint alleges the following Factual Allegations:

1. On [March 20, 2000,] the Respondent took a Post Accident drug test.

2. A urine specimen was collected by Perry Proter[1] of Marine Medical, Inc.
3. The Respondent signed the Federal Drug Testing Custody and Control Form.
4. The urine sample was collected and analyzed by SmithKline Beecham Clinical Laboratories (now part of Quest Diagnostics) using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for Marijuana Metabolite.

The Respondent acknowledged personal service and receipt of the Complaint signified by his signature on page two (2) of the Complaint. On June 26, 2000, the Respondent through the appearance of his attorney, Truett B. Akin, IV., Esq. of Houston, Texas, filed a timely written formal Answer to the Complaint admitting to all Jurisdictional Allegations.[2] The Respondent denied all Factual Allegations with the exception of allegation Number Two (2), in which the Respondent admits urine collector Mr. Perry Porter of Marine Medical, Inc. collected the Respondent's urine sample on Monday, March 20, 2000. In his Answer, the Respondent requested a hearing before an Administrative Law Judge and affirmatively alleged that his drug test sample was "Tainted/Contaminated." Respondent's Answer at 2.

The Complaint and Respondent's written Answer were filed with the U.S. Coast Guard, Administrative Law Judge Docketing Center and this matter was assigned to the undersigned Judge on June 27, 2000. On July 7, 2000, a Scheduling Order was issued by this Judge that scheduled the hearing to commence August 2, 2000 at 09:00 a.m. at the Hearing Room, 8876 Gulf Freeway, Room 370, Houston, Texas 77017-6542. On July 13, 2000, the Respondent's attorney filed an unopposed Motion, "Respondent's Agreed Motion to Continue" where he moved to continue the

[1] The collector's name, Mr. Perry Porter, was a typographic error reversing two letters in the name Porter.

hearing until August 23rd due to the unavailability of a material witness for the August 2nd hearing date. On July 17, 2000, the undersigned approved the Respondent's Motion to Continue and set the hearing date to commence on August 23, 2000 at 09:00 a.m. until completed at the same location.

On July 25, 2000, the Respondent filed a Motion for Discovery seeking responses to interrogatories and the production of named documents from the U.S. Coast Guard. On July 31, 2000, the Respondent filed a Motion for Summary Decision. On August 1, 2000, a Notice to the Coast Guard was issued by the undersigned to allow written response to the Respondent's Summary Decision Motion. However, upon review of the Respondent's Summary Decision Motion, it was evident that genuine issues of material fact would remain and therefore, on August 4, 2000, the undersigned issued an Order denying the Respondent's Motion for Summary Decision. On the day that the Order was issued denying the Respondent's Summary Dismissal Motion, the undersigned received a Supplemental Brief for the Respondent's Summary Decision Motion. Given that the filing of the Respondent's Supplemental Brief was filed contemporaneously with the undersigned's Order denying Respondent's Summary Decision Motion, the undersigned considered the Supplemental Brief as timely. Upon consideration of the Respondent's Supplemental Brief, the undersigned on August 10, 2000 issued an Order sustaining his denial of the Respondent's Summary Decision Motion.

On August 23, 2000, prior to the 09:00 a.m. commencement of the three-day hearing, the undersigned Judge held a pre-hearing conference with all representatives

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[2] The Coast Guard's Complaint listed the Respondent's address and his Merchant Mariner's Document and License Numbers as jurisdictional allegations.

present. At the pre-hearing conference the parties stipulated to the admission of all exhibits with the exception of I.O. Ex. No. 27 and Respondent's Ex. No.'s 15 and 16.[3] At the conclusion of the hearing, the Respondent withdrew several exhibits, Resp't Ex. No. 12, 15 and 16. However, the Respondent maintained his objection to the admittance of I.O. Ex. No. 27 citing 33 C.F.R. § 20.808 (2000) that states:

> The ALJ may enter into the record the written testimony of a witness. The witness shall be, or have been available for oral cross-examination. The statement must be sworn to, or affirmed, under penalty of perjury.

At the hearing, the undersigned reserved ruling on the Respondent's objection to I.O. Ex. No. 27 and now rules the Respondent's objection is SUSTAINED. Investigating Officer Ex. No. 27 is not admitted into evidence as it contains unsworn, unaffirmed written testimony by two individuals who provided "statements" of findings and conclusions that specifically address issues in this matter. Neither of the individuals listed in I.O. Ex. No. 27 has been or was made available for oral cross-examination to the Respondent's attorney. THEREFORE, the Respondent's Exhibits No.'s 1 – 20, with the exception of numbers 12, 15 and 16 are admitted into evidence. The Investigating Officer's Exhibits No.'s 1 – 30, with the exception of No. 27, are admitted into evidence.

At the hearing eleven (11) witnesses testified. The Investigating Officer presented six (6) witnesses who testified under oath. The Respondent presented five (5) witnesses, including himself, who testified under oath. Initially about fifty (50) exhibits were listed. Forty-six (46) were admitted into evidence by the Judge. A

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[3] The exhibits will be numerically identified as "I.O. Ex. No." for the Coast Guard and "Resp't. Ex. No." for the Respondent. All citations to the official transcript will be designated by "TR."

complete list of witnesses and exhibits is contained in Appendix A, List of Witnesses and Exhibits. The parties' proposed findings of fact and conclusion of law and the undersigned's rulings are contained in Appendix B. These were recently filed and the matter is now ready for the Decision and Order.

II. FINDINGS OF FACT BASED UPON THE ENTIRE RECORD CONSIDERED AS A WHOLE

1. At all relevant times herein mentioned and specifically on and before August 23, 2000, the Respondent, Donald W. Sinclair, III., was a holder in possession of a U.S. Coast Guard issued, Merchant Mariner's Document, Number ***[REDACTED]*** and License, Number 831351.
2. On March 20, 2000, the Respondent served as a deputy pilot for the Houston Pilots Association of Houston, Texas. A deputy pilot is the title given by the Houston Pilots Association to those persons enrolled in their pilot training or apprentice program. TR. 36-37. As a deputy pilot for the Houston Pilots Association, the Respondent was required to complete specific qualification requirements that involved the piloting of vessels in and out of the Houston, Texas Ship Channel. It is a very busy fifty-mile navigable waterway between the port-city of Houston, Texas and the port-city of Galveston, Texas with several additional ports along this route. It is regarded as the fourth largest port complex in the U.S.A. when measured by the amount of cargo shipped in and out; 365 days per year and 24 hours per day. There is no stoppage for ice as in many ports in

the U.S.A. during winter. The Respondent performed these "qualification requirements" under the supervision of an experienced and qualified pilot of the Houston Pilots Association. TR. 37-40. The Respondent served under the authority of his U.S. Coast Guard Merchant Mariner's Document and License as a deputy pilot of the Houston Pilots Association.

3. On March 20, 2000, the Respondent, under the supervision of Master or Senior Pilot/Captain Robert Bratcher, completed a qualification requirement for the Houston Pilots Association by piloting of the vessel named TMM OAXACA on its outbound transit on the Houston Ship Channel, Texas. TR. 44. After the vessel was piloted to its designated marker or place, the Respondent and Captain Bratcher disembarked the TMM OAXACA to return home. TR. 51-55. However, at or near his home, the Respondent received a telephone call from Pilot/Captain Bratcher stating that the vessel they had been piloting, TMM OAXACA, was reported to have run aground and that Pilot Bratcher was going out on another vessel to that vessel to investigate. TR. 63, 886-87. A short time later, Captain Bratcher called the Respondent and informed him that the vessel TMM OAXACA was not aground or no longer aground and that it was, in fact, underway and proceeding outbound. TR. 63, 888. Not knowing exactly as to what events had just transpired or what damages had been done involving the vessel TMM OAXACA or its cargoes, Captain Bratcher decided as a precautionary measure to take a chemical urinalysis drug test by providing his own urine sample that same afternoon or evening. TR. 63, 95-96, 886-887, 892. Captain Bratcher stated this position to the Respondent, whereupon the

Respondent decided to do the same and also provide his urine sample for drug testing, as is often done after such maritime accidents or incidents by those who had been controlling the vessel's route and navigation. Both Captain Bratcher and the Respondent proceeded separately to Marine Medical, Inc. and submitted to a chemical urinalysis drug screen by each providing his own urine sample. TR. 892-96. Captain Bratcher arrived first and then left. Marine Medical, Inc. is the designated or contracted for urine collection facility for drug testing of pilots for the Houston Pilots Association. It is the usual routine urine specimen collector for the Houston Pilots Association, both deputy pilots and fully qualified pilots or master pilots. Collector Mr. Perry Porter completely finished his urine sample collection from Pilot Bratcher before he started the urine collection process from Respondent Sinclair. Respondent's urine sample was the only other urine collection Porter performed after Pilot Bratcher had already given his urine sample and left that day.

4. Collector Perry Porter is employed by Marine Medical, Inc. and is a trained and experienced urine specimen collector. TR. 892. Mr. Porter personally testified in this matter when called or subpoenaed as an I.O. witness who testified under oath. Mr. Porter is and was the urine specimen collector for the Respondent's March 20, 2000 urine sample. Id. Mr. Porter did the same earlier for the Master Pilot Bratcher during that same evening or late afternoon on Monday, March 20, 2000. Pilot Bratcher's two urine tests by the same original certified laboratory were clear or negative for the usual five drugs tested for. Experienced collector Porter testified credibly that the toilets had blueing in the water and that Respondent

Sinclair did wash his hands before giving his urine sample. Respondent said he did not wash his own hands and saw no blueing in the toilet water.

5. Captain and Pilot Bratcher did not testify that he Bratcher was not reminded to wash his hands before giving his urine sample. Also, Captain Bratcher did not complain or testify that he did not see blueing in the toilet waters that same afternoon or evening when he gave his urine sample just before Respondent Sinclair did it. Captain/Pilot Bratcher was found negative or clear from the use of marijuana or other drugs by the first certified laboratory.
6. Even though Mr. Porter had performed numerous urine specimen collections and is familiar with U.S. Department of Transportation (DOT) rules and regulations governing the collection of urine specimens, he had developed certain procedural techniques in the collection process. Mr. Porter testified that he used the following procedural techniques in the collection of the Respondent's March 20, 2000 urine specimen:
    a. Mr. Porter checked the block on the Respondent's Drug Testing Custody and Control Form (DTCCF) indicating that the Respondent's urine specimen was in the proper temperature range just before the Respondent submitted his urine specimen. TR. 127-29. Mr. Porter testified that if an individual's urine specimen was, within the required four minutes of donation, found to be out of normal temperature range, collector Porter would start over using a new form. TR. 129.

b. Mr. Porter asked the Respondent to fill out and sign the DTCCF collection form just before the Respondent submitted his urine specimen. TR. 134-35, 164-65.

c. Mr. Porter recorded the results of the Respondent's alcohol breathalyzer test in the "remarks" section of copy four (4) on the collection report form DTCCF rather than complete a separate DOT Breath Alcohol Testing form. TR. 138-40, 352.

d. Mr. Porter had the Respondent initial the seals for his split urine specimen bottles just prior to actually placing the two (2) seals on the two (2) bottles. TR. 161-62.

7. The Respondent's urine sample was collected as a DOT split specimen analysis whereby Mr. Porter provided the Respondent with two (2) clean and split specimen containers or bottles for the collection of Respondent's urine sample. The Respondent then provided at least the required amount of urine sample for both split specimen containers. The split specimen containers are designated as "A" for the primary sample and "B" for the confirmatory or additional urine sample.

8. The Respondent has given numerous urine samples for such drug testing down through the years in the maritime industry, so Respondent knew he should wash his hands before giving his urine sample. The Respondent claimed that he did not wash his hands prior to giving his urine sample. TR. 892. Mr. Porter testified Respondent did wash Respondent's hands. The Respondent did admit, however, that he was familiar with the urine collection process and that during his thirteen

(13) to fourteen (14) years in the maritime industry, Respondent had been told by "some" urine collectors that he should wash his hands before providing a urine specimen. TR. 935-36. There was a sink provided nearby where Respondent could have easily and quickly washed his hands. In addition, the Respondent contends that the toilet at the urine collection facility lacked a water blueing agent; and that Mr. Porter did not give him an option to void his urine directly into a single, larger collection container rather than directly into the two split specimen containers or bottles ("A" and "B" split specimen containers) provided to him by collector Porter. TR. 897, 892. The purpose of the blueing is to prevent a urine donor from diluting his own urine specimen with toilet water. This could cause tests resulting in numbers too low for a positive. The blueing would be visible through the sides of the "A" and "B" containers or bottles to the collector and to the certified laboratory's scientists. Neither reported blueing, so it is of no consequence in this case. Especially since the three certified laboratory tests all resulted in three positives above the minimum numbers for a positive for marijuana.

9. It is of no consequence that Respondent put his urine sample directly into the "A" and "B" containers. It saved a step. If he filled a third separate container, it would only have to be poured from it into the "A" and "B" containers anyway.

10. Upon receipt of the Respondent's urine specimen, Mr. Porter continued the initial chain of custody by sealing both of the Respondent's split specimen urine containers ("A" and "B" containers) in the Respondent's presence on that same date, during the same collection. TR. 175-78, 189. Mr. Porter then placed the

two sealed split specimen “A” and “B” urine containers into a shipment plastic bag that was again sealed in the presence of the Respondent. TR. 175-78, 189. While Mr. Porter may have performed certain steps possibly out of sequence, the Respondent nonetheless signed his collection form or report DTCCF in the presence of Mr. Porter and in the proper place signifying that his “A” and “B” split specimen containers were sealed and dated in his presence at the date and time of the collection. I.O. Ex. No. 6.

11. Due to the time, late on Monday, March 20, 2000, at which the Respondent’s urine specimen was collected, the Respondent’s sealed split specimen shipment bag was initially stored in the refrigerator at the Marine Medical Facility until it was picked up for shipment to the first certified laboratory. TR. 178. The Respondent’s split specimen shipment bag was as usual later delivered to the first of two certified DOT testing laboratories, Quest Diagnostics, Inc. of Dallas, Texas, (formerly SmithKline Beecham Bio-Science Laboratories) for analysis of Respondent’s urine sample. I.O. Ex. No. 6, TR. 198-99.

12. Quest Diagnostics, Inc. carefully performed in accordance with the rules the analytical testing by the two required tests on portions or aliquots from the Respondent’s “A” split specimen and finally determined by both tests that it was positive for the presence of marijuana metabolites. I.O. Ex. No. 6. This result was sent to the Medical Review Officer’s (MRO’s) office in California and assigned to Dr. Suzanne Sergile, M.D. and MRO, who reviewed the collection and laboratory report and first notified and interviewed the Respondent on March 23, 2000, reporting to Respondent that his March 20, 2000 urine sample

was found positive for the use of marijuana. MRO Sergile also asked if he had any doctor's prescription for marijuana. Respondent replied no he did not. TR. 471-607, I.O. Ex. No. 8. At that point the Respondent requested that a second laboratory test his "B" split specimen. I.O. Ex. No. 9. Quest Diagnostics properly transferred directly the Respondent's "B" split specimen to another second certified laboratory, LabOne, Inc. of Lenexa, Kansas, for an additional third testing and analysis. I.O. Ex. No. 10. LabOne, Inc. performed the confirmatory testing analysis for the Respondent's "B" split specimen by the confirmatory test known as gas chromatography/mass spectrometry (GC/MS). It confirmed the positive test result of the first certified laboratory, Quest Diagnostics, Inc., establishing that the Respondent's March 20, 2000 urine specimen was positive for marijuana. I.O. Ex. No. 13. The confirmatory positive result from the second laboratory, LabOne, Inc., was again sent to the same MRO office or company. The Respondent was again notified, by the same MRO, Dr. Suzanne Sergile, of this third test result of a positive for marijuana use, on April 5, 2000. I.O. Ex. No. 14. Therefore, the two tests by the first certified laboratory and the third test by the second certified laboratory all resulted in positives, finding marijuana in Respondent's urine samples. The combining of these three tests is regarded as extremely reliable state of the art of testing by the legal, medical and scientific communities in the U.S.A. The two said laboratory certifying scientists and two MROs, who all testified credibly, found these results were a definite positive for marijuana in Respondent's urine samples "A" and "B," both collected on the same date, March 20, 2000.

13. The DTCCF, collection and report form, for the Respondent's March 20, 2000 urine specimen is identified on the form by two identifying numbers, a unique printed number, 8362248, and by Respondent's Social Security Number. I.O. Ex. No. 6. The DTCCF is designed to document separate chains of custody and analysis for the Respondent's two split specimens and has designated pages labeled as 8362248-A, for the "A" split specimen and 8362248-B, for the "B" split specimen. I.O. Ex. No. 6, 13, TR. 215. Quest Diagnostics, Inc. used the "8362248-A" form to document its test result and chain of custody for the Respondent's "A" split urine specimen. I.O. Ex. No. 6. The "8362248-B" form was used by the second or confirmation laboratory, LabOne, Inc., to document its test result and chain of custody for the Respondent's "B" split specimen. I.O. Ex. No. 13, TR. 215-17.
14. Quest Diagnostics, Inc. and the second laboratory were inspected and approved by the U.S. Department of Health and Human Services as certified laboratories. Quest was contracted with by the Houston Pilots Association to analyze the Respondent's and all their pilots' urine specimens. I.O. Ex. No. 3, TR. 208. The certifying scientist at the first certified laboratory, Quest Diagnostics, Inc., for the Respondent's primary or "A" split urine specimen and their two required tests is Dr. Mary Hightower, Ph.D. TR. 199.
15. Dr. Hightower testified credibly under oath at the hearing. I find her testimony to be reliable, including the receipt, custody and analytical testing of the Respondent's "A" split specimen. TR. 194-338. As the certifying scientist, Dr. Hightower, Ph.D. reviewed all the documentation of the Respondent's "A"

split specimen and verified that "the requisition, the report, the pending high sheet all agree that [the Respondent] was positive and . . . that these numbers all match." TR. 224-25. In addition, Dr. Hightower properly identified the Respondent's "A" and "B" split specimen by its unique specimen identification number and by the Respondent's social security number as shown on the DTCCF. TR. 211-22. The external chain of custody showing the collection and receipt of both of the Respondent's split specimens "A" and "B" to the first certified laboratory, Quest Diagnostics, Inc., is valid and proper.

16. The external chain of custody for the Respondent's "A" and "B" split specimen was initiated when Mr. Perry Porter, the collector, signed the transfer of the Respondent's "A" and "B" split specimen to the courier who delivered it to the specimen processor at the first certified laboratory, Quest Diagnostics, Inc. I.O. Ex. No. 6, TR. 213-14. Upon receipt at Quest Diagnostics, the specimen processor verified the integrity of the sealed shipment bag and the additional seals on the Respondent's "A" and "B" split specimen containers. TR. 214, 217-18. The laboratory's specimen processor verified that the Respondent's "A" and "B" split specimen identification numbers listed on the DTCCF match the identification numbers on the Respondent's sealed "A" and "B" split specimen containers. I.O. Ex. No. 6, TR. 214.

17. The Respondent's "A" split specimen was further assigned an additional third unique identifying number, an internal laboratory accession number (010039X), that is and was used by Quest Diagnostics, Inc. as an additional third unique internal chain of custody and control number. I.O. Ex. No. 6, TR. 219.

18. The Respondent's "A" split specimen was initially screened or tested for the presence of drugs as required by DOT screening guidelines using an immunoassay screening analysis or test. TR. 223, 247. The Respondent's initial immunoassay screening analysis test detected the presence of marijuana related compounds at "almost two times the [DOT mandated] cut-off level" or minimum level for a positive of fifty (50) or more nanograms per milliliter. I.O. Ex. No. 6 at 12, TR. 253, 262-64.
19. The first immunoassay screening analysis or test is designed to detect the various compounds in human urine associated with the ingestion or smoking of marijuana. TR. 254. However, other compounds may be present which could contribute to a positive immunoassay screening test result. TR. 254. Therefore, federal guidelines and DOT regulations require that a positive immunoassay screening test result be also confirmed by the second test, a more specific and highly accurate gas chromatography/mass spectrometry (GC/MS) analysis or test. TR. 255. As a result, the Respondent's positive immunoassay screening analysis was considered by the first testing laboratory to be "pending positive or pending high" until confirmed by the second test called the GC/MS analysis or test. TR. 255-56, 266-67.
20. The GC/MS analysis test is a specific, highly accurate, scientifically and legally reliable analysis designed to show the presence of a specific ion associated with the use of marijuana. TR. 333-37. The specific ion establishing the use of marijuana under DOT regulations is called "11 nor-delta 9 carboxy THC" or "carboxy-THC." TR. 333 –34. The GC/MS analysis identifies "carboxy-THC" at

its atomic level and essentially results in "a molecular fingerprint" for the presence of marijuana in the Respondent's urine specimen. TR. 333-34. The GC/MS analysis is considered to be the "gold standard in the industry" or the best and is a completely separate test from the initial screening analysis performed by immunoassay testing. TR. 332, 404.

21. The Respondent's "A" split specimen was then analyzed by GC/MS analysis as the second test. It confirmed the first test result of the Respondent's "positive" immunoassay screening analysis or test at the first certified laboratory. I.O. Ex. No. 1. The second GC/MS analysis test showed the Respondent's urine specimen contained seventeen point nine (17.9) nanograms per milliliter of the specific marijuana metabolite "carboxy THC." TR. 288-89, 307, and Quest's Laboratory Litigation Package pages 37 and 38, I.O. Ex. No. 6. The DOT mandated minimum level for this specific metabolite is fifteen (15) nanograms per milliliter of marijuana or more. TR. 290, 322. The 17.9 nanograms per milliliter was then "rounded off" to 17 nanograms per milliliter. However, the scientific GC/MS test result and finding was 17.9 (or 17 and 9/10ths) nanograms per milliliter. I.O. Ex. No. 6, pages 37 and 38.

22. DOT rules and regulations test for the specific marijuana metabolite, "11 nor-delta 9 carboxy THC" or "carboxy-THC" to determine whether a person has *used marijuana*. This is because "carboxy THC" is only produced internally by the human body, primarily by the liver and kidneys when the human body metabolizes or processes the active ingredients of marijuana. TR. 308. The marijuana plant does not contain the "carboxy-THC" metabolite. TR. 308. It

develops in the human body after the body metabolizes or processes the marijuana. Further, the GC/MS analysis is designed and calibrated to only detect the specific metabolite, "carboxy THC" (or marijuana). TR. 308. Moreover, DOT rules and regulations mandate a minimum level for the GC/MS analysis of at least 15 or more nanograms per milliliter to eliminate any "false positive" test result based on a person's exposure to what is commonly referred to as "second hand" marijuana smoke, or soap possibly containing marijuana. TR. 326-328, I.O. Ex. No. 6, Litigation Package.

23. Dr. Hightower, Ph.D. testifying credibly for the first certified laboratory, Quest, reviewed with great detail the Respondent's chain of custody, the immunoassay screening analysis and the GC/MS analysis test results. TR. 330-31. She testified the Respondent's "A" split urine specimen was "POSITIVE, for the following: CANNABINOIDS as carboxy – THC" (marijuana) at a concentration above the established DOT mandated minimum reporting levels. I.O. Ex. No. 6.

24. The completed positive test results from both the first immunoassay screening test and the second GC/MS analysis test were sent by Quest Diagnostics, Inc., the first laboratory, to the name and office address of the Medical Review Officer (MRO), Dr. Murry Lappe (as listed on the DTCCF). I.O. Ex. No. 6 at 1-2, TR. 295. On Thursday, March 23, 2000, the Respondent was notified by the MRO assigned to handle Respondent's case as the MRO by Dr. Suzanne Sergile, M.D., also employed as an MRO by Dr. M. Lappe and his corporation, that Respondent's March 20, 2000 urine specimen tested at the laboratory as positive for marijuana use. The MRO Dr. S. Sergile, M.D. then also asked Respondent if he had any

doctor's prescription for marijuana use. Respondent admitted he did not. Following this, the Respondent, as provided by DOT regulations, requested that his "B" split specimen be also again tested or analyzed. I.O. Ex. No. 9, TR. 902. The Respondent's "B" split specimen was then packaged and shipped directly from the first certified laboratory, Quest Diagnostics, Inc. in Dallas, Texas, to the second certified laboratory, LabOne, Inc. in Lenexa, Kansas. I.O. Ex. No. 13, TR. 297-300. Dr. Hightower, Ph.D. verified the chain of custody for the shipment of the Respondent's "B" split specimen from Quest Diagnostics, Inc. to Airborne Express for delivery to LabOne, Inc. I.O. Ex. No. 11, TR. 298. In most cases, the specimen donors accept the findings of the first laboratory's two tests, and this is often accepted by judges as adequate legal proof of a positive, especially when supported by credible testimony from one credible collector, one laboratory representative and one MRO. Here, in Respondent Sinclair's case, we have three laboratory tests positive, supported by two certifying scientists and two MROs, who testified credibly and supported by twenty-nine (29) I.O. Exhibits.

25. LabOne, Inc. in Lenexa, Kansas is certified and inspected, by the U.S. Department of Health and Human Services, as a certified drug testing laboratory, as is the first laboratory. I.O. Ex. No. 12, TR. 374, 383.

26. Mr. John Joseph Skuban, Jr. is employed by the second certified laboratory, LabOne, Inc., and is a "Positive Certifying Scientist" who personally prepared and credibly testified about LabOne, Inc.'s testing and litigation package for the confirmation analysis test of the Respondent's "B" split urine specimen also donated at the same time on March 20, 2000. I.O. Ex. No. 13, TR. 375, 379, 390-

92. The actual certifying scientist who first performed the review of the Respondent's "B" split specimen testing was Dr. Carrie Strumpf, Ph.D. TR. 394. Dr. Strumpf was unavailable to testify at this hearing. TR. 394. Therefore, Mr. Skuban, using standard LabOne, Inc. procedures, again reviewed and prepared the litigation package identified and admitted as I.O. Ex. No. 13. He is familiar with all LabOne, Inc. procedures, tests and importantly, with the persons, their signatures, initials, and qualifications who were involved in the analysis and third test of the Respondent's "B" split specimen by this second certified laboratory. TR. 392-96, 398-99, 412-15.

27. On April 3, 2000, the Respondent's "B" split specimen donated by Respondent on March 20, 2000 was received by the specimen processor at LabOne, Inc. who signed for its receipt from the courier or carrier and verified the integrity of the shipment bag, the "B" split specimen bottle and all seals. I.O. Ex. No. 13 at 3, TR. 396-98, 401. Upon receipt at LabOne, Inc., the specimen processor assigned an additional internal and unique laboratory accession third number to the Respondent's "B" split specimen and designated the "B" specimen as a "retest confirmation" sample. TR. 396-99, 403.

28. The Respondent's "B" split specimen is not required under the rules and regulations to be re-screened or re-tested by immunoassay screening analysis (first test). The reanalysis request form, as provided by Quest Diagnostics, Inc., reported that the initial or "A" split specimen immunoassay screening analysis resulted in a positive for the presence of marijuana compounds. I.O. Ex. No. 13 at 4, TR. 403-04. Therefore, pursuant to the usual and acceptable DOT rules and

regulations, the Respondent's "B" split specimen is only required to be tested for a third time by the second laboratory, LabOne, Inc., using the extremely reliable GC/MS analysis testing to either confirm or deny the initial laboratory's (Quest Diagnostics, Inc.) final GC/MS analytical test results. TR. 404.

29. Further, the GC/MS analysis performed by LabOne, Inc. is a confirmatory analysis and test used to verify the test result of Quest Diagnostics, Inc. and as such, under DOT regulations, LabOne, Inc. is not required to use the standard minimum of 15 nanograms per milliliter cut-off level for "carboxy – THC." TR. 423. As long as the second laboratory, LabOne, Inc., is able to detect the presence of "carboxy –THC" (marijuana) in the Respondent's "B" split urine specimen at a concentration above its GC/MS equipment's lower limit of detection, the confirmatory analysis will again positively confirm the first laboratory, Quest Diagnostics, Inc., positive test result of the Respondent's "A" split urine specimen. TR. 423-26.

30. The second laboratory was testing for a positive of 3 or more nanograms per milliliter. The Respondent's "B" split specimen analyzed by GC/MS analysis at the second laboratory, LabOne, Inc., yielded a test result of 14 nanograms per milliliter of "carboxy THC" (marijuana). TR. 422, 433-35. The lower limit of detection for the LabOne, Inc. GC/MS equipment that was used to analyze the Respondent's "B" split specimen is three (3) nanograms per milliliter. Thus, a positive of 3 or more nanograms would result in a third positive test. The final third test result was 14 nanograms per milliliter, more than sufficient for a third positive test of finding marijuana. Tr. 425-26.

31. While the third confirmatory test result of LabOne, Inc. yielded a value of 14 nanograms per milliliter, which is below the 17.9 nanograms per milliliter reported by Quest Diagnostics, Inc., it is still considered by the laboratory scientists and MD-MROs to be within the normal parameters or limits of a definite positive for marijuana under DOT regulations. TR. 423-26. LabOne's confirmatory test result simply reflects a certain expected level of degradation or dropping of the number of nanograms of the Respondent's "B" split specimen over time and days, including shipment and storage. The more time, the lesser the numbers. TR. 423-26.

32. LabOne, Inc. positively confirmed Quest Diagnostics, Inc. GC/MS analysis of the Respondent's "A" split specimen and verified the presence of "carboxy-THC" proving the use of marijuana by the Respondent on or before March 20, 2000. I.O. Ex. No. 13. LabOne, Inc. reported its confirmatory third test result for the Respondent's "B" split specimen on the DTCCF as "Reconfirmed for the following - Cannabinoids as Carboxy – THC" (marijuana). I.O. Ex. No. 13 at 1. The confirmation third test result by LabOne, Inc. and a copy of the Respondent's "B" split specimen DTCCF report was again sent to the Medical Review Officers (MROs), Dr. Suzanne L. Sergile, M.D. and Dr. Murray I. Lappe, M.D., using electronic download over a secure network. TR. 428.

33. Dr. Suzanne Sergile, M.D. and Dr. Murray Lappe, M.D. both testified at the hearing and are certified Medical Review Officers employed at or by National Medical Review Offices, Inc. ("NMRO"). Dr. Sergile works on a part time basis and reviews and interprets confirmed positive chemical urinalysis test results and

also interviews donors or respondents. I.O. Ex. No. 7, TR. 471, 478-82. The NMRO corporation is owned by MRO, Dr. Murray Lappe, M.D., who also testified in person at this hearing. TR. 608. Dr. Suzanne Sergile, M.D. is the MRO who reviewed or studied the collection documents and test results by both laboratories for the Respondent's "A" and "B" split specimens and performed the two required notifications to Respondent and conducted the two telephone interviews of the Respondent after the three positive tests by the two certified laboratories. TR. 483, 486.

34. On March 23, 2000, Dr. Sergile conducted the first telephone interview with the Respondent after she received the positive test result from the first certified laboratory, Quest Diagnostics Inc., for the Respondent's "A" split specimen. I.O. Ex. No. 8. During that first interview, Dr. Sergile inquired if the Respondent was taking or had a doctor's prescription for Marinol. TR. 489, 532. Marinol is the only valid medical prescription under DOT rules that can be used to explain and thus negate, positive test results for the use of marijuana. TR. 489, 532. The Respondent admitted to Dr. Sergile, M.D. and MRO that he was not taking Marinol, nor did he have a medical doctor's prescription for Marinol. TR. 489. Dr. Sergile therefore reported the result on the NMRO's Marine Result Verification Form that the Respondent was "POSITIVE" for "THC" (marijuana). I.O. Ex. No. 8, TR. 489-90. At this point, Dr. Sergile had yet to personally verify the Respondent's chain of custody but had relied on NMRO's administrative staff to have conducted the necessary reviews and if relevant, transferred any

information onto NMRO's Marine Result Verification Form. I.O. Ex. No. 8, TR. 566-67.

35. Dr. S. Sergile, M.D. and MRO further testified that:

    a. the fact that "post accident" was checked as the reason for the Respondent's urine tests was irrelevant to her determination after notifying Respondent and interviewing Respondent that the Respondent's "A" split specimen tested positive for the use of marijuana in the first certified laboratory and that Respondent had no proper medical excuse, TR. 498-501, 600,

    b. the fact that the collector had also recorded the alcohol breathalyzer test result of negative or clear for alcohol use by Respondent in the "remarks" section of the Respondent's DTCCF report had no influence on her determination that the Respondent's "A" split specimen tested positive in the first certified laboratory for marijuana; and she found no proper medical excuse or reason to not confirm the laboratories' findings, TR. 503-04,

    c. the fact that subsequent tests taken by the Respondent were negative for marijuana use had no influence on her determination that the Respondent's March 20, 2000 "A" split specimen tested positive for marijuana, TR. 504-06,

    d. the fact that the Respondent claims to have used soap on his skin or ingested food or other products that contained some hemp oil are irrelevant under DOT rules and guidelines when considering whether a medical explanation or excuse is present for positive laboratory test results for the use of marijuana, TR. 506-08, and

e. the fact that allegations or arguments were made by Respondent concerning irregularities in the collection process consisting of: (1) failure by the Respondent to wash his hands (denied by the collector), (2) failure by the collector to use a toilet blueing agent at the collection facility (denied by the collector), and (3) the lack of an option to void his urine into a single collection cup or container versus the two split specimen containers had no importance and influence on her final determination that the Respondent's "A" split urine specimen still tested positive in the first laboratory for marijuana and Respondent had no doctor's prescription for Marinol or other medical proper excuse. TR. 508-10, 540-43.

36. During the March 23, 2000 first telephone interview, Dr. S. Sergile, MRO-MD also informed the Respondent that he could request to have his March 20, 2000 urine specimen re-tested within the next seventy-two hours. TR. 489, 511. Dr. Sergile then transferred the Respondent to their office's recorded message providing the specific detailed instructions on how Respondent could request a retest. TR. 489, 511. The Respondent subsequently properly requested that an independent confirmatory second laboratory retest his "B" split urine specimen collected on March 20, 2000. I.O. Ex. No. 9. In addition, the Respondent requested on March 23, 2000 that he be sent a written copy of his March 20, 2000 positive urinalysis test results of his "A" split specimen by the first laboratory and the MRO. I.O. Ex. No. 9.

37. On March 27, 2000, four days after her first telephone interview of the Respondent, Dr. Sergile MRO signed the Respondent's original report form

DTCCF. She determined, signed and reported that the Respondent's first laboratory analysis for his "A" split urine specimen was "Positive" after her first notification and interview of Respondent. I.O. Ex. No. 1. Prior to signing the DTCCF, Dr. Sergile personally reviewed the Respondent's chain of custody and the first laboratory's reports and found them to be proper and in full compliance. I.O. Ex. No. 1, TR. 495-98, 566-67. Further, Dr. Sergile MRO expressed certainty that the Respondent's "A" split specimen tested positive for the use of marijuana and that the Respondent had no proper medical excuse and indeed used marijuana on or before March 20, 2000. TR. 601, 603.

38. As a result of the Respondent's request to have his "B" split specimen tested by a confirmatory laboratory, Quest Diagnostics, Inc. sent the Respondent's "B" split urine specimen directly to LabOne, Inc. for confirmatory analysis. The third test result of the LabOne, Inc. confirmation analysis for the Respondent's "B" split specimen was also positive for marijuana use. It confirmed by the third test that the Respondent had used marijuana on or before March 20, 2000. I.O. Ex. No. 13. The confirmation third test results of LabOne, Inc. for the Respondent's "B" split urine specimen was sent to Dr. Sergile on April 4, 2000. I.O. Ex. No. 14. On April 5, 2000, Dr. Sergile notified the Respondent that his "B" split specimen test result was also positive and it confirmed the test results of his "A" split specimen proving his use of marijuana on or before Monday, March 20, 2000 without any medical prescription or excuse for use of marijuana. I.O. Ex. No. 1, 14, TR. 512.

39. When the Respondent was initially notified by Dr. Sergile on March 23, 2000 that his March 20, 2000 "A" urine sample and urinalysis test were positive for marijuana use, the Respondent submitted to another chemical urinalysis test. TR. 904-05. This second urinalysis specimen was provided by the Respondent during the evening of March 23, 2000 and was again collected by Mr. Perry Porter. TR. 905-06. One Source Toxicology Laboratory, Inc. analyzed only by the first test immunoassay the Respondent's March 23, 2000 urine specimen. Resp't Ex. No. 1. Dr. Jack Zaun, a certifying scientist at One Source Toxicology Laboratory, Inc., reported the Respondent's second urine sample from Thursday, March 23, 2000 was "negative" on March 29, 2000. Resp't Ex. 1.

40. On April 20, 2000, the Respondent's then named first attorney, Mr. E. Burbock, Esq., made a request to Dr. Murray Lappe, the president and owner of NMRO, that he provide a "safe to return to work letter" for the Respondent in order that the Respondent would not be placed in a position where he would be unable to work for two (2) years. TR. 643-47. Dr. Lappe is a certified and qualified MRO and is accepted as an expert witness in this matter. TR. 608-21. Dr. Lappe testified that Attorney Burbock attempted to get him to agree that the Respondent's March 20, 2000 urinalysis was "incorrect." TR. 648. However, Dr. Lappe MRO reviewed the Respondent's entire case file and told Attorney Burbock that the Respondent's test results from the Respondent's urine samples of March 20, 2000 were a definite positive for marijuana use and that Dr. Lappe MRO would not cancel or overturn the positive test result. TR. 648. Nevertheless, Dr. Lappe testified that he stayed late that evening and conducted a

review of Coast Guard regulations to determine if he could "assist in some way" this Pilot Respondent. TR. 649-51. Dr. Lappe decided that he could write a "safe to return to work letter" because the Respondent Pilot did not have any prior history and subsequent tests showed negative results indicating that the Respondent had a "relatively low risk of recurrence." TR. 650-51. Dr. Lappe based his decision using Coast Guard regulations that allow an MRO to determine when an individual may return to work following a positive drug test. TR. 649-50; see also 46 C.F.R. § 16.370 (d) (1999).

41. On April 20, 2000, Dr. Lappe signed for the Respondent a "safe to return to work letter." I.O. Ex. No. 16. The letter stated that upon review of the "appropriate documents and subsequent test results," the Respondent is now "drug free and the risk of subsequent use of dangerous drugs by Captain Sinclair is sufficiently low to justify his return to work." Id. Further, Dr. Lappe directed that the Respondent "must be subject to increased, unannounced testing for a period of Sixty (60) months." Id.; TR. 649-51. This 60 months of extra drug testing of Respondent is the maximum Dr. Murray Lappe MRO could give a Respondent under 46 C.F.R. § 16.370(d). In addition, Dr. Lappe has maintained his position that the Respondent still tested positive for the use of marijuana on Respondent's March 20, 2000 urine sample and that under no conditions was Dr. Lappe MRO changing the final test result certified positive by Dr. S. Sergile MRO. TR. 651. In providing the "safe to return to work letter" requested by the Respondent Pilot, Dr. Lappe was simply stating that the Respondent was now a "relatively low risk of [drug use] recurrence." I.O. Ex. No. 16, TR. 643-652. Coast Guard

regulations state that "[b]efore an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO shall determine that the individual is drug free" and a "low risk" to return to drug use. 46 C.F.R. § 16.370 (d) (1999).

42. At the hearing, the Respondent raised an issue that Dr. M. Lappe and his corporation's office address were initially pre-printed or stamped on the Respondent's collection form DTCCF as the MRO, but it was Dr. S. Sergile MRO who actually performed that function and signed as the MRO for the Respondent's DTCCF. Dr. Lappe testified that the Respondent's DTCCF, as well as all of the DTCCFs used by collectors or facilities doing business with his corporation NMRO, lists just Dr. M. Lappe as the MRO. TR. 638. Dr. Lappe testified that his name and company address are pre-printed on millions of such collection forms that are used by NMRO clients and collectors each year. TR. 638. The fact that Dr. M. Lappe's name and company address appear on the top of the Respondent's DTCCF and the fact that Dr. S. Sergile MRO personally served as the Respondent's MRO and is the MRO who signed the Respondent's positive report on the DTCCF are normal and proper procedures. Dr. Suzanne Sergile, M.D. and MRO is another MRO properly and legally employed by Dr. Lappe and the NMRO corporation to work with Dr. Lappe and other MROs there to handle a large volume of MRO duties.

43. Further, Dr. Lappe MRO personally reviewed Dr. Sergile MRO's work in this matter and testified he agreed with her final determination that the Respondent's "A" and "B" split specimens both tested positive for marijuana by three certified

laboratory tests and that the Respondent, did in fact, use marijuana on or before March 20, 2000. These two MROs found no medical excuse for these three positive test findings by the two certified laboratories. TR. 642-43, 651.

44. Dr. Lappe further testified that according to the Operating Guidance for DOT Mandated Drug Testing Programs, MROs should only cancel positive certified laboratory test results when these two following fatal flaws exist:

    a. the donor's signature fails to appear on the DTCCF at step 4 and no comment is made that the donor refused to sign; (The donor's signature does so appear at step 4.) and

    b. the certifying scientist's signature is missing on the laboratory copy of the DTCCF. (The certifying scientists' signatures were both present.)

    There were no such flaws in this case. I.O. Ex. No. 25, TR. 653-655.

45. Dr. Lappe, M.D. and MRO reviewed the Respondent's three laboratory test results and testified that the Respondent's test results contained no fatal flaws and further:

    a. the failure to use a toilet blueing agent is not a fatal flaw requiring cancellation of the Respondent's test, TR. 656,

    b. the failure of the collector to provide the Respondent with the option to void into a single collection cup versus the two split specimen containers is not a fatal flaw requiring cancellation of the Respondent's test, TR. 656,

    c. the fact that a different MRO's pre-printed name, Dr. Murray Lappe, appears on the collection form than the MRO, Dr. Suzanne Sergile, M.D., who actually works for and with Dr. Murray Lappe and reviewed the collection

and two laboratories' results, interviewed Respondent twice and signed the positive final report as the MRO in this case is not a fatal flaw requiring cancellation of the Respondent's test, TR. 656,

d. the fact that the collector also recorded the Respondent's alcohol breathalyzer test result in the "remarks" section on the DTCCF urine collection form is not a fatal flaw requiring cancellation of the Respondent's test, TR. 656,

e. the fact that he, Dr. Lappe, wrote a "safe to return to work" letter is not a fatal flaw requiring cancellation of the Respondent's test and at worst, the "safe to return to work" letter would only be considered invalid, if so determined, TR. 657-59, and

f. the fact that "post-accident" may arguably have been wrongly checked as the reason for the Respondent's test and that the Respondent may have even volunteered to provide the urine specimen at issue is not a fatal flaw requiring cancellation of the Respondent's positive for marijuana use test. TR. 660-61.

46. Dr. Lappe MRO testified there are only two valid reasons to overturn a positive test result for the use of marijuana and that neither reason exists in this case:

a. the Respondent had a doctor's prescription for the use of Marinol, TR. 663, and

b. the reconfirmation analysis of the split sample, the Respondent's "B" split specimen failed to reconfirm the presence of marijuana. TR. 664.

47. Dr. Lappe MRO testified that current DOT policy written guidance states: "MROs must never accept an assertion of consumption of a hemp food product as a basis for verifying a marijuana test negative." "…consuming a hemp food product is

not a legitimate medical explanation for prohibited substance or metabolite [of marijuana] in an individual specimen." I.O. Ex. No. 21, TR. 662.

48. Dr. Lappe testified that the alleged use of hemp oil soap products while showering or bathing by the Respondent is not a basis to overturn a positive urine test result for marijuana use. TR. 665. Dr. Lappe reiterated that DOT drug testing procedures specifically analyze for the presence of "carboxy THC" (marijuana) and that this specific metabolite is only formed when the human liver metabolizes marijuana present in the human body which is then excreted into an individual's urine. TR. 675–76. Dr. Lappe stressed that the marijuana product must pass internally through the human body to produce the specific metabolite "carboxy – THC" and it cannot be spontaneously converted in the urine without passing through the body. TR. 676.

49. Dr. Lappe MRO confirmed that the Respondent's March 20, 2000 chemical urinalysis test was positive for the use of marijuana based on the double test results of Quest Diagnostics, Inc. of Dallas, Texas ("A" split specimen) and that it was positively confirmed by LabOne, Inc. of Lenexa, Kansas ("B" split specimen) regardless of the fact that the Respondent subsequently tested negative only by chemical urinalysis screening on March 23, 2000 and had two (2) hair analyses performed (April 7, 2000, April 20, 2000) that indicated "negative" again only by immunoassay screening. TR. 713.

50. At the hearing, the Respondent introduced a duplicate copy of DTCCF copy 4 for the Respondent that was signed by Respondent and Dr. Lappe creating the appearance that two MROs had signed for the Respondent's "A" split specimen

drug test. Resp't Ex. No. 21, I.O. Ex. No. 1, TR. 677-80. The only apparent difference between the two DTCCFs was that Dr. Lappe MRO signed this copy of the form instead of Dr. Sergile MRO and that the copy signed by Dr. Sergile as an MRO positive contained a stamped and signed attestation signifying that it was a certified and true copy of the original of copy 4. Resp't Ex. No. 21, I.O. Ex. No. 1. Both copies, however, more importantly, again established that the Respondent's March 20, 2000 urine samples and later urinalysis test results were positive for marijuana. Resp't Ex. No.21, I.O. Ex. No.1. Dr. Lappe MRO explained it was NMRO's or his company's policy to early after receipt from the laboratory at his company to scan a Respondent's DTCCF copy 4 into its computer system. TR. 695. This allows NMRO the capability to print out a scanned copy of the Respondent's DTCCF copy 4 to anyone who requests it and that it would not always contain an MRO's signature. However, the original did and does contain an MRO's signature by Dr. Sergile, M.D. reporting a positive of marijuana. TR. 695-96, 701.

Dr. Lappe explained that if a party requested a copy of the DTCCF copy 4, it was NMRO's normal policy to print out the scanned copy and then sign the scanned version of a Respondent's DTCCF copy 4 using the information provided on the original copy 4 that was signed by the actual MRO reviewing the case. TR. 694-98, 701. In this instance, by request of the Respondent, Dr. Lappe provided a signed and dated copy of the Respondent's DTCCF copy 4 using the specific date and information contained on MRO Dr. Sergile's original DTCCF form copy 4. Resp't Ex. No. 21, TR. 702, 710. Dr. Lappe relied on the original DTCCF and

did not review the case file nor contact the Respondent prior to signing the scanned DTCCF copy 4. TR. 701-05. Dr. Lappe MRO signed the scanned copy or version using the same date that Dr. Sergile MRO had signed on the original DTCCF, even though this was effectively days later. TR. 701-05.

Even though Dr. Lappe did not personally review nor strictly comply with the written statement contained on the DTCCF copy 4 that states the MRO signing this form has "reviewed the laboratory results," it is nevertheless true, that both signed versions reported the Respondent's test result as "positive." Resp't Ex. No. 21, I.O. Ex. No. 1. Moreover, to clear up any confusion, the Respondent's original DTCCF copy 4 that was signed positive by Dr. Suzanne Sergile, M.D. and assigned MRO on March 27, 2000 was Federal Expressed overnight and admitted into evidence at this hearing as I.O. Ex. No. 30 by Judge T. McElligott.

51. In the later part of April 2000, the Respondent sought the consultation of Dr. Eric Comstock concerning his March 20, 2000 urine samples' positive urinalysis test result. TR. 726. Dr. Comstock is a board certified medical doctor in the area of medical toxicology and is admitted as an expert witness in that field. TR. 718-23. Dr. Comstock, however, is not, nor has he ever been, a Medical Review Officer (MRO). TR. 787.

52. Dr. Comstock, Respondent's own witness, testified and admitted that the Respondent's March 20, 2000 urine samples and laboratories urinalysis "positively identified the presence of a derivative of marijuana." TR. 762. However, it is Dr. Comstock's opinion or theory after review of the Respondent's two (2) urinalysis tests (March 20, 2000 and March 23, 2000) and the

Respondent's April 20, 2000 hair analysis test, that the Respondent's March 20, 2000 positive urinalysis test result was due to the "use of hemp products contaminated with marijuana." TR. 784, 800, 1015.

53. It was Dr. Comstock who advised the Respondent to have a hair analysis performed to determine if the Respondent's hair samples would detect the presence of drugs. TR. 726-27. As a result, the Respondent asserted that he submitted two (2) hair specimens, the first on April 7, 2000 and the second on April 20, 2000. Resp't Ex. No. 2, 3.

54. Dr. Comstock, Respondent's own witness, discounted completely the Respondent's April 7, 2000 first hair sample and analysis as irrelevant and placed no confidence in it "[b]ecause the hair had not grown out" sufficiently to reflect the time period surrounding the Respondent's March 20, 2000 positive chemical urinalysis test result. TR. 744, 794-96. Dr. Comstock does consider the Respondent's second later hair sample (April 20, 2000) to be a valid negative representative of whether or not the Respondent used drugs on or about March 20, 2000. TR. 797. The Respondent's April 20, 2000 hair analysis test result was said to be negative as analyzed only by immunoassay screening analysis for cannabinoids. Resp't Ex. No. 3. It is important and significant that the Respondent's April 20, 2000 second hair analysis was not analyzed by the highly specific and accurate GC/MS analysis hair test, but rather by the less accurate and more generalized immunoassay screening analysis. Resp't Ex. No. 3, TR. 798-800.

55. Dr. Comstock's opinion that the Respondent's March 20, 2000 chemical laboratories three urinalysis test results are a "false positive" test result is based in part on the subsequent drug tests taken by the Respondent following his March 20, 2000 positive urinalysis test result. TR. 792, 800. Dr. Comstock is aware that MROs are not allowed to take into account or consider subsequent or later drug tests (urine or hair) pursuant to the carefully considered and established guidelines of the MRO handbook when determining the validity of a positive chemical urinalysis drug test result. One of the reasons for this stated policy is that once a urine donor completely stops using the drug and it flushes out of his body, he can then pass hundreds of later or subsequent tests. I.O. Ex. No. 18, TR. 791-92, Judicial Notice, Fed. Rules of Evidence and Official Notice; 33 C.F.R. Part 20; TR. 241-458. This does not disprove that on March 20, 2000, there were marijuana metabolites in Respondent's urine.

56. Dr. Comstock further acknowledged that such hair testing for drug use is not U.S. DOT approved nor is it even approved by the U.S. Food and Drug Administration (FDA). TR. 791. Dr. Comstock admitted that hair analysis drug testing is not FDA approved because "it has not been around and in use long enough to be subject to the very prolonged tedious evaluation procedures used to achieve FDA approval." TR. 1022. One of the standards established in Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579, by the U.S. Supreme Court requires scientific evidence to be reliable and accepted by the scientific community. The scientific community relies on and accepts these certified laboratory urine tests not later urine and hair tests.

57. Moreover, Respondent's Dr. Comstock testified and admitted that hair analysis drug testing is probably "not as sensitive as the urine test" even though he thinks or believes that a single use of marijuana would be detectable in the "picogram quantities" as indicated by hair analysis drug testing. TR. 1027-28. It is clear that hair analysis used in workplace drug detection programs utilizes a different standard in analyzing and reporting test results. TR. 1029. Hair analysis test results are quantified in "picograms per gram" rather than "nanograms per milliliter" as analyzed and reported under DOT approved procedures. TR. 1029. While clearly, a picogram represents a smaller unit of measurement than a nanogram, it is noteworthy that the Respondent's April 20, 2000 hair analysis was not tested by the very reliable GC/MS analysis tests, but was only screened by immunoassay screening analysis and yielded only a negative, non-quantifiable test result. Resp't Ex. No. 3, TR. 798.

58. In addition to relying on the Respondent's subsequent drug tests, Dr. Comstock believes that the Respondent's March 20, 2000 positive urinalysis test result was "not evidence of illegal [drug] use, [but] was the result of a legal product containing traces of marijuana." TR. 800.

59. However, in formulating his opinion, Dr. Comstock had no specific knowledge of what hemp oil related products were actually used by the Respondent nor did he have any knowledge as to what amount or concentration of THC (marijuana) was or was not present in the hemp oil products claimed to have been used by the Respondent. TR. 804. Dr. Comstock relied entirely upon the truthfulness of statements of the Respondent and his wife that they used hemp oil related food

products and soap in their home. TR. 803. Finally, it is Dr. Comstock's opinion that the Respondent's claimed use of hemp oil products is only a "possible explanation" for the Respondent's March 20, 2000 positive urinalysis test result. TR. 1021, 1023.

60. While maintaining this position, Dr. Comstock testified that the "possibility" exists that "THC under a variety of conditions spontaneously oxidizes without the necessity of being in the body" and that hemp oil could possibly be absorbed into the body "through the skin." TR. 1018-19. Dr. Comstock did agree, however, that if THC (marijuana) levels are kept below a certain threshold level in legally purchased hemp oil products then a "false positive" chemical urinalysis drug test result should not occur. TR. 1014.

61. The Respondent introduced Dr. Head to testify as an expert witness as a qualified MRO. TR. 961-67. Dr. Head is an Assistant Professor of Internal Medicine at the University of Texas Medical Branch, in Galveston, Texas. Resp't Ex. No. 13, TR. 964. While Dr. Head is certified as an MRO, he devotes the majority of his time to his medical practice and academic work. TR. 968-69. Moreover, since 1997, Dr. Head has only served as an expert witness once. TR. 967-968. Based on the above, the Coast Guard objected to Dr. Head being admitted as an expert witness and the undersigned Judge sustained that objection as to an expert witness, but Dr. Head was permitted to testify. TR. 967-976. Dr. Head is mainly in the general practice of medicine.

62. Dr. Head presented a somewhat confused opinion or theory as he testified telephonically from his home regarding the applicability and definitions contained

in 49 C.F.R. Part 40 and 46 C.F.R. Part 16 as they apply to DOT chemical urinalysis drug testing. TR. 976-84. On one hand, Dr. Head testified that subsequent hair analysis testing results could be taken into consideration if 49 C.F.R. "Part 40 did not apply," but it definitely does apply; and that he would cancel the Respondent's March 20, 2000 positive test result. TR. 984-986. However, more importantly, Dr. Head, Respondent's own witness, later contradicted his own prior testimony; and admitted that using existing DOT rules and regulations for the Respondent's case, he would not negate nor cancel the Respondent's March 20, 2000 positive for marijuana test results. TR. 1003.

63. Dr. Head for Respondent further testified that:

a. the fact that Dr. M. Lappe's MRO name appeared printed on top of the DTCCF as the MRO's name and office address when MRO Dr. Suzanne Sergile, M.D. actually reviewed Respondent's data and signed the positive as the actual MRO assigned as MRO to Respondent's case was not a fatal flaw in the urinalysis testing process, TR. 1000-01;

b. the fact that a person did not wash their hands prior to giving a urine sample was not a fatal flaw in the urinalysis testing process, TR. 1001;

c. the failure to use a toilet blueing agent at the collection facility was not a fatal flaw in the urinalysis testing process, TR. 1001. The urine collector, Perry Porter, testified they did have blueing in the toilet in the men's room or bathroom where Respondent donated his "A" and "B" urine samples on March 20, 2000, TR. 157;

d. Respondent voiding his urine into one container versus directly into two "A" and "B" containers or bottles was not a fatal flaw in the urinalysis testing process, TR. 1001-02; collector Porter testified that Respondent chose to void directly into the two containers rather than into one collection cup to be later poured into the "A" and "B" containers, TR. 150-160; there were two (2) sinks readily available for hand washing by Respondent, TR. 150-160;

e. the possible wrong reason for taking the drug test being checked on the DTCCF was not a fatal flaw in the two laboratories' urinalysis testing process, TR. 1002;

f. the fact that the Respondent's clear alcohol breathalyzer test result was also recorded by the collector in the "remarks section" on the DTCCF was not a fatal flaw in the urinalysis testing process, TR. 1002; and

g. that under current U.S. Department of Transportation (DOT) rules regarding the MROs consideration of subsequent drug test analysis, the Respondent's March 20, 2000 positive drug test results would not be negated or cancelled, but would be respected. TR. 1003.

64. The Respondent personally appeared and testified in this hearing. TR. 831-32. It is the Respondent's position that the cause of his March 20, 2000 positive urinalysis test results was due to the use of hemp oil soaps that he used in the normal ways of showering or bathing. TR. 956-57. The Respondent did not know how long he had been using hemp oil soaps and he testified that he did not knowingly ingest or drink any hemp oil related products prior to March 20, 2000.

TR. 956-57. Respondent and Respondent's wife did not know the amount, if any, of hemp oil in these products. TR. 937, 1040-1043.

65. The Respondent's wife, Sandra Sinclair, testified that she had been purchasing natural or handmade products, like the hemp oil soaps presented in Resp't. Ex. No. 19, ever since she was nineteen years old. TR. 1039-41. While Mrs. Sinclair expressed a strong preference for purchasing or using natural or homemade products, neither she nor the Respondent paid any attention to the labels and thus did not know the actual ingredients or amount of ingredients contained in the products she purchased. Thus she and Respondent did not know of the amount, if any, of hemp oil in these products. TR. 937, 1040-43. Mrs. Sinclair further testified that she purchased lotions and oils, including salad oils containing hemp oil that were used in the home. TR. 1042. However, no evidence was introduced by the Respondent on what these products were and whether or not they actually contained hemp oil nor did they show any amounts of hemp oil in any claimed products. TR. 1052-53. Mrs. Sinclair testified that she had purchased natural and homemade products throughout her twenty-year marriage with the Respondent. TR. 1041-46. However, Respondent testified that he passed several urine drug tests in the past fourteen (14) years in the U.S. Merchant Marines. So why did these hemp oil products not produce positive tests before?

66. The Respondent did introduce an exhibit that purported to contain copies of three (3) labels for the hemp oil soap products that he used only on his skin in the normal manner of bathing or showering. Resp't Ex. No. 19.

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Donald W. Sinclair, III., and the subject matter of this hearing are clearly and properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S. Code Chapter 77, including, 46 U.S.C. § 7704 (West Supp. 2000); U.S. Department of Transportation's (DOT's) 49 C.F.R. Part 40 (1999); and the U.S. Coast Guard's (USCG's) 46 C.F.R. Parts 5 and 16, (1999), 33 C.F.R. Part 20 (2000), and 33 C.F.R. Part 95.
2. At all relevant times, the Respondent was the holder of and acted under the authority of his U.S. Coast Guard issued Merchant Mariner's Document, No. ***[REDACTED]*** and License, No. 831351 while serving as a deputy pilot or trainee pilot for the Houston Pilots Association of the Houston Ship Channel and Houston, Texas.
3. The chemical urinalysis drug tests on the two urine samples submitted by Respondent Donald W. Sinclair, III. on March 20, 2000, were satisfactorily performed without any fatal errors in substantial compliance with DOT and USCG chemical urinalysis drug testing rules including, 46 C.F.R. Part 16 (1999), 49 C.F.R. Part 40 (1999). They were supported and determined by three drug tests supported by two qualified and certified drug testing laboratories, two certifying scientists, and two certified and qualified Medical Doctors/Medical Review Officers, to be POSITIVE for marijuana, proving the use of a dangerous drug, namely marijuana, by the Respondent, on or before March 20, 2000.

4. The Complaint **"USE OF OR ADDICTION TO THE USE OF DANGEROUS DRUGS"** is found **PROVED** by a preponderance of the reliable, probative, substantial and credible evidence as taken from the entire hearing record considered as a whole.

IV. OPINION

Some major purposes of Coast Guard suspension and revocation proceedings and hearings before Administrative Law Judges are to promote safety at sea and in our nations ship channels, port cities and navigable waterways. See 46 U.S.C. § 7701 (West Supp. 2000). "If it is shown that a holder 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." 46 U.S.C. § 7704 (c) (2000); see also COMMANDANT'S APPEAL DECISION 2535 (SWEENEY). "If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs." 46 C.F.R. § 16.201 (b) (2000).

On March 20, 2000, the Respondent submitted his urine specimen for chemical urinalysis drug testing that was analyzed by two different approved test methods by two federally approved, tested and certified testing laboratories that finally reported the Respondent's urine specimen to be "positive" for the presence of marijuana. The Respondent later requested a confirmation analysis of this same urine specimen by an independent second certified laboratory as provided under Coast

Guard rules. An independent federally approved, tested and certified laboratory performed a confirmation analysis GC/MS test of the Respondent's March 20, 2000 urine specimen. The confirmation laboratory verified the initial laboratory's two test results and reported the Respondent's March 20, 2000 urine specimen as "reconfirmed" by a third laboratory test for the presence of marijuana. The Respondent's urine specimen had a verified unbroken chain of custody for both the initial and confirmatory laboratories. The complete test results from the two certified laboratories were carefully reviewed and supported in testimony by two certifying scientists and two qualified and certified Medical Review Officers (MROs) who testified credibly that the Respondent's March 20, 2000 urine specimen was positive and that the Respondent had used marijuana on or before March 20, 2000. The Investigating Officer presented by the preponderance of the evidence, including credible and reliable testimony and documentary exhibits that proved the Respondent did use a dangerous drug on or before March 20, 2000. The statutory wording of 46 U.S.C. § 7704 (c) (2000) clearly shows that even a one time use of a dangerous drug constitutes grounds for revocation unless the mariner shows satisfactory proof that he is cured. See 46 U.S.C. § 7704 (c); see also APPEAL DECISION 2535 (SWEENEY).

The Investigating Officer has the burden of proof in a Coast Guard suspension and revocation proceeding to establish a prima facie case by the preponderance of the evidence that the Respondent is a user of or is addicted to the use of a dangerous drug. See 46 U.S.C. § 7704; 33 C.F.R. § 20.701-02 (2000); see also APPEAL DECISION 2379 (DRUM) (stating U.S. Coast Guard has burden of proof to establish

drug use). The Respondent submitted a urine specimen to a chemical urinalysis drug test on March 20, 2000 that was tested, analyzed and confirmed by three tests by two independent, approved and certified laboratories that resulted in a positive test result three times for the presence of marijuana. Two laboratory scientists and two MROs testified credibly to support these positive results. The Respondent's March 20, 2000 positive urinalysis three test results created the presumption and more that he used a dangerous drug on or before March 20, 2000. See 46 C.F.R. § 16.201(b) (1999). The Respondent's evidence did not properly persuade nor rebut the Investigating Officers' strong evidence.

The Respondent argued *inter alia* that his March 20, 2000 positive urinalysis drug test was due to the use of legally obtained hemp oil products, especially hemp oil soaps used in the normal manner of bathing or showering. The Respondent's witness, Dr. Comstock, testified that the Respondent's claimed use of hemp oil bathing soaps used in the normal course of bathing "could" be a "possible explanation" for the Respondent's March 20, 2000 positive urinalysis test results. Respondent's other medical witness, Dr. Head, contradicted this as did the four expert witnesses and numerous exhibits of the Investigating Officer. The Respondent has further raised arguments or issues concerning his March 20, 2000 positive urinalysis three test results.

I. The Claimed Use of Hemp Oil Contained in Food Products and Soap is Not a Valid Reason to Cancel or Negate Three Positive Certified Laboratory Chemical Urinalysis Test Results by Two Certified Laboratories, Supported by Two Credible Certified Scientists and Two Credible Medical Review Officers (MROs) and Twenty-nine (29) I.O. Exhibits

The Respondent claimed that his March 20, 2000 positive chemical urinalysis drug test result was due to the use of legally obtained hemp oil bathing soaps that he used in the normal manner of showering or bathing. The soaps containing hemp oil were either purchased by the Respondent's wife or given to the family as gifts. The Respondent and his wife testified that they did not read the product labels or ingredients for the hemp oil soaps and that they were unaware that any hemp oil products were used in their home. The Respondent's wife testified that it was only after the Respondent had tested positive for marijuana use on March 20, 2000 that they learned that hemp oil products might possibly cause a positive urinalysis test result. The Respondent's wife asserted that it was only at that time, they attempted to determine what hemp oil products were present in their home and then realized that many of their household products did not have labels. However, the Respondent was able to argue that the showering or bathing soaps he was using contained hemp oil and submitted an exhibit containing a copy of three (3) soap labels. The Respondent testified that as a deputy pilot his work schedule revolved around the various arrival and departure times for the numerous vessels moving in and out of the approximately

50 mile Houston Ship Channel. This created a highly varied work schedule where the Respondent would shower sometimes multiple times a day.

The Respondent's witness, Dr. Comstock, testified that external exposure to hemp oil soap products "could" be a "possible explanation" for the Respondent's March 20, 2000 positive test result. Dr. Comstock testified that the active ingredient in marijuana (THC) is an oil-based product that could be absorbed into the body and metabolized as "carboxy – THC." As previously stated, "carboxy-THC" is the marijuana metabolite that is analyzed by DOT chemical urinalysis drug testing procedures to determine whether a person has used marijuana. Further, Dr. Comstock testified that the hemp oil contained in the bathing soaps could be externally retained by the Respondent's body and may have externally contaminated the Respondent's March 20, 2000 urinalysis specimen. The Respondent testified that although he has given many urine samples over the prior 14 years, he failed to wash his hands this one time when he provided his March 20, 2000 urine specimen. Respondent argues that soap products from under his fingernails or residual to his skin could possibly have contaminated his urine specimen. However, if it came from his fingers, it would not contain the marijuana <u>metabolites</u> found by the laboratories in his urine sample. Metabolites only come from being processed through the human body. Collector Porter testified there were two sinks for hand washing readily available to Respondent on the evening of collection about 7 p.m. to 8 p.m. on March 20, 2000. TR. 150-160. He testified Respondent did wash his hands.

Dr. Comstock follows that claim that the Respondent's contaminated urine specimen could contain the active ingredient of marijuana (THC) which could

somehow “spontaneously metabolize” in the Respondent’s urine specimen without ever passing regularly through the human body and produce the “carboxy-THC” metabolite analyzed by DOT drug analysis. The Respondent further asserts that his frequent and repeated use of hemp oil bathing soaps allowed for the absorption of the active ingredient of marijuana (THC) through his skin into his body which was then somehow metabolized into his March 20, 2000 urine specimen.

For the following reasons, the undersigned finds the Respondent’s explanation and the testimony of Dr. Comstock improbable and unreliable when weighed against the preponderance of reliable and credible evidence introduced at this hearing that supports the finding that the Respondent used a dangerous drug on or before March 20, 2000 as proved by his three positive chemical urinalysis test results.

The Respondent’s March 20, 2000 urinalysis specimen was collected and analyzed by trained, experienced and qualified persons using DOT, Department of Health and Human Services and U.S. Coast Guard carefully approved procedures and rules that govern chemical urinalysis drug testing. Respondent’s own witness, Dr. Comstock, testified and even admitted that upon review of the Respondent’s March 20, 2000 positive test results that the Respondent’s urine specimen did, in fact, contain the specific metabolite, “carboxy-THC” (marijuana). However, it is Dr. Comstock’s opinion that the source of the “carboxy-THC” found in the Respondent’s March 20, 2000 urine specimen was not due to the illegal use of marijuana but by the use of and subsequent contamination caused by the Respondent’s hemp oil bathing or showering or eaten products.

The Respondent testified that he could bathe or shower numerous times a day while he was waiting for the arrival and departure times of the vessels he would assist in navigating up and down the Houston Ship Channel. The Respondent testified that he showered and rinsed as any normal person would in the normal course of showering and did not knowingly ingest or eat any part of the soap products. It is from this scenario that the Respondent and his expert witness formulate their hypothesis that the hemp oil contained in the bathing soaps somehow contaminated and/or resulted in his March 20, 2000 three positive urinalysis test results. The undersigned Judge finds it highly improbable that a sufficient amount of soap could be retained on the skin or under the fingernails of the Respondent that could contaminate his March 20, 2000 urine specimen to the high level that would cause three positive urinalysis test results. This finding is based in part on the fact that DOT regulations have established a minimum cut-off level for determining a positive chemical urinalysis test result whose purpose is to insure that "false positive" results do not occur. Further, it is noted that Dr. Comstock's opinion that the active ingredient in marijuana (THC), that may or may not have been present in sufficient quantities in the hemp oil soap products used by the Respondent could "spontaneously metabolize" was refuted by the testimony of several witnesses, including the testimony of an expert opinion introduced by the Investigating Officer.

Neither the Respondent nor his witness, Dr. Comstock, offered any credible, convincing and persuasive evidence or scientific study or literature to support or corroborate their arguments or theory. Whereas the Investigating Officer introduced convincing, persuasive, reliable and credible evidence including expert witness

testimony from two laboratory certifying scientists and two medical doctors who were also Medical Review Officers (MROs) and twenty-nine (29) I.O. Exhibits to clearly support the finding that the Respondent used a dangerous drug on or before March 20, 2000.

Both the Respondent and his wife testified that they had been unaware of using hemp oil related products prior to learning of the Respondent's March 20, 2000 positive urinalysis drug test results. The Respondent's wife testified that she purchased, with the exception of one of the bathing soaps gifted to them, all of the hemp oil bathing soaps and household products used by the Respondent. She testified that over the course of their twenty-year marriage, she had always looked for and purchased homemade or natural products. Her testimony suggests a high degree of preference to the use of natural or homemade products. However, her testimony regarding this preference is not consistent or congruent with her testimony that she never looked at product labels. One would necessarily conclude that a person interested in purchasing those type products would also be very interested in the ingredients they contain. It is interesting to note that importantly Respondent is not reported to have failed prior urine tests for drugs during prior tests during fourteen (14) years in the U.S. Merchant Marine industry, although they claim such use of products in the prior twenty (20) years.

However that may be, most telling are the opinions and testimony given by the Investigating Officers' two certifying scientists and two Medical Doctors/MROs and Respondent's own witness, Dr. Comstock. Dr. Comstock clearly acknowledged and admitted that the Respondent's March 20, 2000 urine specimen tested positive for

“carboxy-THC” (marijuana). Moreover, Dr. Comstock merely concludes that his theory or opinion is only a “possible cause” as to why the Respondent’s March 20, 2000 urinalysis test was positive for marijuana by the three usual and required type laboratory tests. Dr. Comstock did not offer into the record any medical toxicology documentation, scientific study or literature to support or corroborate his theory or opinions in this area. This is of particular concern given the facts that the Investigating Officer introduced contradictory testimony from four other witnesses, including expert witness testimony and I.O. Exhibits 24, 25, and 26 that directly contradicts Dr. Comstock’s theories. Moreover, Dr. Comstock never investigated nor inquired into what specific products or amounts the Respondent used, or whether or not they actually contained any hemp oil and to what degree or concentration of THC (marijuana) may have been present in the hemp oil bathing soaps. Dr. Comstock’s opinion in this area may speculate a “possible reason” as to why the Respondent tested positive, but it does not rebut the conclusion that the Respondent used marijuana on or before March 20, 2000 as proved by his three positive urinalysis drug test results supported by two certified laboratories, supported by credible testimony of two certifying scientists and confirmed by two Medical Review Officers: Dr. S. Sergile, M.D. and Dr. M. Lappe, M.D. and twenty-nine (29) I.O. Exhibits. The Respondent failed to introduce sufficient convincing evidence to show that his use of hemp oil products or soaps used in the normal course of showering or bathing could result in a positive urinalysis test result for marijuana. I do not find Dr. Comstock’s or Dr. Head’s testimony convincing when compared with the credible, convincing testimony of two scientific experts from the two certified laboratories, the two

Medical Review Officers and the twenty-nine (29) I.O.'s documentary exhibits admitted into evidence.

Since 1997, DOT policy regarding MRO evaluations concerning claims of hemp oil use by Respondents is strong and clear, "MROs must never accept an assertion of consumption of a hemp food product as a basis for verifying a marijuana test as negative. Whatever else it may be, consuming a hemp food product is not a legitimate medical explanation for a prohibited substance or metabolite in an individual's specimen." I.O. Ex. No. 23. Emphasis added. The MRO guidebook further supports the testimony and evidence introduced by the Investigating Officer against the speculative and tenuous nature of the Respondent's arguments that his positive drug test result was only due to using hemp oil products especially by showering or bathing soaps.

Given all the above, the Respondent's arguments falls short to rebut the proof, presumption and findings that the Respondent used a dangerous drug (marijuana) on or before March 20, 2000 as proved by the three positive test results by the two certified laboratories of his chemical urinalysis drug tests and also supported by the two certifying scientists and the findings by the two Medical Review Officers, Dr. S. Sergile, M.D. and Dr. M. Lappe, M.D. "The unrebutted presumption is sufficient to find a charge and specification alleging use of a dangerous drug proved." APPEAL DECISION 2555 (LAVALLAIS).

II. The Use of Subsequent Drug Testing, Particularly Hair Analysis, Can Not be Used to Cancel or Negate the Prior Three Positive for Marijuana Chemical Urinalysis Test Results by Two Certified Laboratories

It is a well known scientific and medical fact that once a mariner or specimen donor completely stops taking or using drugs such as marijuana, that since the human body continually flushes out the drug or marijuana, that shortly afterward all his or her tests will then be clear or negative, or at least below the levels for positive tests. I am taking judicial notice of these facts in accord with Federal Rule of Evidence, 201, Uniform Rule 12, and McCormick on Evidence, Sec. 330, p. 712.

The Respondent submitted to three (3) subsequent drug analyses following the first notification to Respondent by the MRO, Dr. S. Sergile, M.D., that his March 20, 2000 urine sample "A" that underwent two laboratory urinalysis tests was positive for marijuana use. The first later analysis by Respondent was a chemical urinalysis drug test submitted by Respondent days later. The second later analysis by Respondent was a hair analysis drug test on some hair submitted on April 7, 2000. The third later analysis by Respondent was also a hair analysis drug test on some hair submitted on April 20, 2000. The test results from all three (3) subsequent drug analyses by Respondent were reportedly "negative" but were analyzed only by immunoassay screening analysis. Only the extremely reliable GC/MS tests provide the specific amount of marijuana found by the tests and this GC/MS test was not used on any of Respondent's later or subsequent tests.

As for any assessment that could possibly be considered, the Respondent's April 7, 2000 first hair analysis drug test is totally irrelevant and disregarded in this case. Even Respondent's own witness, Dr. Comstock, testified and admitted that the Respondent's first April 7, 2000 hair specimen test cannot be considered for any reliable and representative testing purpose in this proceeding. Nevertheless, the Respondent seeks to use the remaining two drug test results to support his arguments that his March 20, 2000 three positive laboratory urinalysis drug tests could have only been caused by specimen contamination or hemp oil soap use. However, the undersigned finds that the Respondent's subsequent drug test analysis cannot be used to cancel or negate the Respondent's March 20, 2000 three positive urinalysis test results supported by two certified laboratories, two credible certifying scientists and two credible MROs, Dr. Suzanne Sergile, M.D. and Dr. Murray Lappe, M.D. and the numerous Investigating Officers' documentary exhibits admitted into evidence.

DOT and Coast Guard policy and regulations provide that MROs are *not* to consider the test results of subsequent drug test analysis when determining whether or not a positive drug test result is valid. Specifically, "The MRO shall not, however, consider the results or (of sic) urine samples that are not obtained or processed in accordance with this part." 49 C.F.R. Part 40, § 40.33 (b) (3) (2000). The Coast Guard regulations and procedures used to conduct workplace drug testing as mandated by 46 U.S. Code Chapter 77 and the U.S. Department of Transportation require the use of, and in fact, only recognize chemical urinalysis drug testing by certified and inspected laboratories as the only proper analysis used for workplace drug testing. See 49 C.F.R. Subpart B (2000). Further, the Medical Review Officers

Handbook, I.O. Exhibit 18, serves to provide direct guidance on this very issue and states in section 196:

> In no circumstance may the MRO consider the analysis of any specimen other than the original specimen (or its split specimen) in determining whether a particular result is positive or negative. This means that if two separate specimens (not a split specimen) are collected from a donor at a given time or at two different times, the result of one specimen has absolutely no bearing on the result of the other.
>
> This regulatory prohibition also serves an important role in preventing individuals with positive tests from having additional uncontrolled tests performed and submitting the "negative" findings to confound the MRO verification process. Hair, blood and additional urine tests have all been proffered by individuals as "proof" that the controlled test was wrong. This information can certainly be the basis for retesting an aliquot [portion of the original specimen] or reviewing the first test, <u>but it cannot and should not be used to reverse a positive test</u>.

I.O. Ex. No. 18. Emphasis added.

Some of the reasons for this handbook guidance for MROs is that once a respondent or mariner completely stops using a drug such as marijuana, and the human body flushes out what they previously used, they will then continuously test negative or clear by all later tests. These subsequent tests do not disprove that on March 20, 2000 Respondent's urine sample tested positive three times. This does not convincingly contradict the three certified laboratory test findings supported by the credible testimony of two certifying scientists and two MROs and 29 I.O. Exhibits. TR. 324, 241-459, 471-718, 729-732 and exhibits cited herein.

Moreover, the Respondent's own witness, Dr. Comstock, testified that the Respondent's March 20, 2000 three certified laboratory positive urinalysis test results validly proved the presence of "carboxy-THC" (marijuana) in the Respondent's urine specimen given on March 20, 2000. Even though Dr. Comstock theorizes that hair

analysis testing is sensitive enough to detect a single, one time use of marijuana, his proposition concerning the accuracy of the Respondent's hair analysis cannot be reconciled and is self-contradictory with his opinion that the Respondent's March 20, 2000 three laboratory urinalysis test results were also valid. Further, Dr. Comstock testified and admitted further that hair analysis drug testing is "probably is not as sensitive as the urine test." TR. 1027. Dr. Comstock's opinion regarding the accuracy of hair analysis drug testing to detect a single or brief use of marijuana was not corroborated or supported by any scientific study or literature in contrast to the credible and convincing testimony and numerous exhibits that were received into evidence in disagreement with Respondent's theory or opinion. Not only did the Investigating Officer introduce expert witness testimony, including a summary from a scientific study countering Dr. Comstock's opinion, I.O. Exhibit 26, Dr. Comstock himself testified that his opinion was in opposition to the person who actually signed the hair analysis test results for the Respondent.

Given DOT's and the Coast Guard's policy, rules and regulations governing the reliable strict control of workplace drug testing programs and procedures, the Respondent has not demonstrated with any persuasive validity, any "alternate medical explanations for [his] positive test result." 49 C.F.R. § 40.33 (3) (2000). In reaching this conclusion, the undersigned makes no specific ruling regarding the overall validity or acceptance of hair analysis drug testing when used for workplace drug testing programs except in specifically finding:

(1) DOT regulations only recognize and use chemical urinalysis drug testing for workplace drug testing up to the time of this hearing; and

(2) subsequent drug tests yielding a negative test result cannot by themselves rebut the presumption that the Respondent used a dangerous drug when the Respondent has tested positive for marijuana, when tested by two certified laboratories and confirmed by two Medical Review Officers.

Further, the undersigned allowed the novel evidentiary issues surrounding the introduction and admittance of hair analysis drug testing and finds that the Respondent's hair analysis test results are relevant to this proceeding in consideration of the record as a whole to ascertain the credibility and weight to be given to the testimony of the Respondent and his witnesses and the Investigating Officers' witnesses and all exhibits. See APPEAL DECISION 2575 (WILLIAMS).

III. Minor Documentation and Procedural Claimed Irregularities Do Not Reach the Level of a Fatal Error That Would Render Void the Three Laboratory Positive Test Results of the Respondent's March 20, 2000 Urinalysis Specimen Supported by Two Credible Certified Scientists and Medical Review Officers (MROs)

The Respondent has raised several arguments concerning the collection and analysis of his March 20, 2000 urine specimen. For all the reasons mentioned in this Decision as a whole and in consideration of the entire record as a whole, the undersigned finds that the claimed irregularities do not reach the level of a fatal flaw rendering void the Respondent's March 20, 2000 three laboratory positive urinalysis test results. Further, the undersigned finds that LabOne, Inc., the second certified laboratory, correctly and accurately confirmed the positive test results by the extremely reliable GC/MS test, thereby supporting Quest Diagnostics, Inc. which

found by both a screen test and a GC/MS test that the Respondent's March 20, 2000 urine specimen contained the marijuana metabolite "carboxy-THC" establishing the Respondent's use of marijuana. These three certified laboratory findings of a positive for marijuana use were supported by credible hearing testimony of two certifying scientists, and by two MROs, Dr. Suzanne Sergile, M.D. and Dr. Murray Lappe, M.D., and twenty-nine (29) I.O. Exhibits.

The integrity of the Coast Guard's drug testing program is of paramount concern. It is highly important that the regulatory chain of custody, including the integrity of the urine specimen be maintained. However, "a drug use charge may be found proved even when minor procedural errors not adversely affecting the actual chain of custody or specimen integrity exist." APPEAL DECISION 2555 (LAVALLAIS); see also Gallagher v. NTSB, 953 F.2d 1214 (10th Cir. 1992); APPEAL DECISION 2546 (SWEENEY); APPEAL DECISION 2541 (RAYMOND); APPEAL DECISION 2522 (JENKINS); APPEAL DECISION 2537 (CHATHAM).

The Respondent does not specifically contend that chain of custody issues exist. Respondent argues that procedural errors occurred in the collection, analysis and reporting of the Respondent's March 20, 2000 positive urinalysis test result. It is clear from the Respondent's own testimony and that of his witnesses that the claimed or established procedural irregularities that have been noted in the Findings of Fact above would not reach the level of or constitute a fatal flaw requiring the cancellation of his March 20, 2000 urine analysis. The Respondent's reported and actual chain of custody, including the integrity of his March 20, 2000 urine specimens ("A" and "B" split specimens) have been clearly established by substantial and credible evidence

and are found to be valid and accurate. Even if the claimed irregularities as noted by the Respondent in the collection of his March 20, 2000 urine specimen are true, none of the issues raised would cause cancellation of his positive test result. While the Findings of Fact have disposed of the majority of the issues raised by the Respondent, several items require discussion.

First, the fact that "post accident" was checked as a reason for conducting the March 20, 2000 urinalysis drug test is of no importance. It cannot be used to negate the Respondent's three laboratory positive test results nor can it be used to negate the applicability of the statutes, regulations and procedures used herein. The facts clearly establish and demonstrate that the Respondent submitted a urine sample on March 20, 2000 to typical and usual chemical urinalysis drug tests that subsequently was analyzed and confirmed in three tests as positive by two independent and certified drug testing laboratories. The two laboratories and two certifying scientists testifying for the I.O. found that the Respondent's March 20, 2000 urine specimen was positive for the presence of marijuana. The fact that no definite proof was introduced on whether or not the vessel TMM OAXACA actually grounded as reported and then moved off this grounding which might give rise to a "serious marine incident" is of no importance in the outcome of the Respondent's positive urinalysis test results for the use of marijuana. See APPEAL DECISION 2226 (DAVIS).

Secondly, however curt or brief the MRO, Dr. Suzanne L. Sergile, M.D., may have been when she properly conducted the two notices and two interviews of Respondent, when she notified the Respondent of his March 20, 2000 positive test results, this MRO acted properly and did not violate to any substantial degree the

review, reporting and interview requirements established under 49 C.F.R. Part 40 (2000) that would mandate the cancellation of the Respondent's March 20, 2000 positive urinalysis test result. The Respondent's own witness testified and admitted that an MRO's interview using the minimum requirements of inquiry, notification and interview under Coast Guard rules or regulations could in fact be "very brief." TR. 997. It is found that MRO Dr. S. Sergile, M.D. did accomplish what was necessary to perform properly as an MRO in this case. Dr. Sergile MRO reviewed the collection and laboratory reports on two occasions, notified and interviewed Respondent on two occasions, properly and within the rules and guidelines.

Finally, the Respondent has raised an issue concerning the validity of the confirmatory analysis performed by the second certified laboratory, LabOne, Inc. at Lenexa, Kansas. As previously stated, LabOne, Inc. is a designated federally inspected, approved and certified laboratory that conducted the confirmatory third test analysis of the Respondent's "B" split specimen donated by Respondent on March 20, 2000. At the hearing, the Respondent raised a concern that his "B" split specimen was not properly analyzed when LabOne's data sheet reported the test result of his "B" split specimen also contained a statement saying "Abort batch due to neg[ative] control failure." See I.O. Ex. No. 13 at 17. In addition to the "abort batch" statement, the Respondent also noted that another different particular urine specimen demonstrated divergent test results just prior to the "abort batch" statement contained in the data sheet.

Mr. John Joseph Skuban, Jr. is board certified in four (scientific) disciplines, including clinical chemistry and toxicology. Mr. John Joseph Skuban, Jr. is the

"Positive Certifying Scientist" with eighteen (18) years overall experience who testified credibly for the second certified laboratory, LabOne, Inc. in Lenexa, Kansas. He is the person who supervised the preparing of the Respondent's "B" split specimen third urinalysis test report by GC/MS testing. Mr. Skuban testified at the hearing that the Respondent's batch report did contain one other urine specimen in a "batch" of several specimens that exhibited some type of problem. However, this one specimen was not the Respondent's urine specimen. TR. 375-459. Mr. Skuban further testified that the "abort batch" message was automatically generated by the computer system because a positive value (0.07) was recorded for the negative control standard used by the GC/MS equipment as a self check or calibration feature. Mr. Skuban testified that the Respondent's specimen was correctly analyzed and that all of the GC/MS self-calibration checks performed for the Respondent's urine sample batch were correctly performed. Mr. Skuban testified that the negative control test standard that generated the "abort batch" message "was not part of the original run" involving the Respondent's urine specimen. The "abort batch" message applied to a "re-injection run" that was created when another individual's urine specimen's test result appeared to fall outside of the normal limits or parameters required for a successful analysis.

In reviewing the LabOne, Inc. confirmation report, the Respondent's witness, Dr. Comstock, argued that the entire batch should have been discarded. However, Dr. Comstock based his opinion on the fluctuating test results of another urine specimen that was not the Respondent's urine specimen and where the GC/MS analysis correctly recognized a "problem" specimen. Dr. Comstock is not a certifying

scientist for a certified laboratory as Mr. Skuban is, and his opinion, as such, is limited in this specific area. Moreover, Dr. Comstock did not recognize nor is he knowledgeable in the specific test controls utilized by the GC/MS analysis equipment as described by Mr. Skuban. The undersigned finds Mr. Skuban's testimony to be reliable and credible and that the Respondent's "B" split specimen was properly analyzed by the second certified laboratory when it confirmed the Respondent's March 20, 2000 sample third urinalysis test as again positive for marijuana.

V. CONCLUSION

The Investigating Officer has met his burden of proof by proving his case by a preponderance of the reliable, probative and substantial evidence, including credible five (5) witnesses' testimony and twenty-nine (29) exhibits to support the findings by two laboratories' three tests of valid positive urinalysis drug test results that the Respondent used a dangerous drug, to wit, marijuana on or before March 20, 2000.

I.O. witness, MRO Lappe, testified that the MRO found Respondent is a "safe risk" to be returned to duty as a pilot; and secondly that this MRO already signed a "back to work letter" pursuant to 46 C.F.R. 16.370(d) for Respondent. The Respondent makes an impression as an intelligent and knowledgeable mariner and does not appear to be addicted to a dangerous drug. Therefore, in light of MRO Dr. Lappe M.D.'s findings, letter and testimony, the undersigned will stay the order of revocation IF the Respondent gives written notification from a proper Drug Rehabilitation Program to the Coast Guard Senior Investigating Officer within thirty

(30) days upon receipt of this Decision and Order by Respondent or by Respondent's attorney that Respondent has enrolled or entered into a Coast Guard approved drug rehabilitation program. Respondent will complete the requirements to establish cure as outlined by Commandant's Appeal Decision SWEENEY supra. It is also required that Respondent be random drug tested once per month during the rehabilitation program for the next thirteen (13) months, in accordance with MRO Lappe's requirements of additional testing and as required by MRO Lappe thereafter. THEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that the Respondent's U.S. Merchant Mariner's Document, Number ***[REDACTED]*** and License, Number 831351, all duplicates and all other valid unexpired Coast Guard documents, licenses, certificates and authorizations whatsoever, are hereby **REVOKED**. This revocation **WILL BE STAYED** upon showing by the Respondent within thirty (30) days after receipt of this Order that the Respondent has notified the Coast Guard Senior Investigating Officer at Marine Safety Office Houston-Galveston that he has enrolled to enter or entered into a Coast Guard approved drug rehabilitation program with the specific intent to complete the requirements of cure, in accordance with 46 U.S. Code Section 7704(c) and the Commandant's Appeal Decision SWEENEY, cited above.

The Respondent's U.S. Merchant Mariner's License, Number 831351, all duplicates and all other Coast Guard licenses whatsoever will then be SUSPENDED

and deposited with the Senior Investigating Officer for a period of twelve (12) months to allow the Respondent time to complete the requirements of cure.

Following Respondent's successful completion of cure, the Respondent's U.S. Merchant Mariner's Document, Number ***[REDACTED]*** and License, Number 831351, all duplicates and all other Coast Guard documents, licenses, certificates and authorizations whatsoever shall be subject to a twelve (12) month probation period whereby no charge relating to drug possession or drug use under 46 U.S.C. § 7703 or § 7704 can be proved against the Respondent without violating this probation resulting in Revocation of all Coast Guard issued credentials.

OTHERWISE, if Respondent does not so enroll within thirty (30) days, the Respondent's U.S. Merchant Mariner's Document, Number ***[REDACTED]*** and License, Number 831351, all duplicates and all other valid and unexpired Coast Guard documents, licenses, certificates and authorizations whatsoever are **REVOKED OUTRIGHT**.

YOU ARE HEREBY NOTIFIED that any party may file a notice of appeal from this decision within thirty (30) days. If neither party files an appeal pursuant to 33 C.F.R. Subpart J, this Decision and Order will constitute final Coast Guard action. An appeal notice, if any, shall be served on all parties and filed with: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street, Baltimore, Maryland 21202-4022, phone number (410) 962-7434, fax number (410) 962-1742, AND with the undersigned Judge, U.S. Coast Guard, 8876 Gulf Freeway, Number 370, Houston, Texas, 77017-6542, fax number (713) 948-3372. See enclosure of 33 C.F.R. Subpart J.

The rules and procedures for appellate review are found in 33 C.F.R. Part 20, Subpart J, specifically, §§ 20.1001–1103. A copy of Subpart J has been provided to the Respondent as part of the service of this order.

Each party appealing this Decision and Order has sixty days (60) following the issuance of this decision or receipt of the transcript to file an appellate brief. An appellate brief shall be served on all parties and filed with: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street, Baltimore, Maryland 21202-4022, phone number (410) 962-7434, fax number (410) 962-1742, AND with the undersigned Judge, U.S. Coast Guard, 8876 Gulf Freeway, Number 370, Houston, Texas, 77017-6542, fax number (713) 948-3372.

Procedures are provided by which a person, or Respondent, whose U.S. Merchant Mariner's License or Document has been revoked, may apply to any Commanding Officer of a Marine Safety Office of the U.S. Coast Guard for administrative clemency. This is known as applying to the Coast Guard "Administrative Clemency Review Board." These rules and conditions are found in 46 C.F.R. Subpart L (46 C.F.R. 5.901, 5.903, and 5.905) entitled "Issuance of New Licenses, Certificates or Documents After Revocation or Surrender," and can be found in the U.S. Coast Guard Marine Safety Manual.

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Thomas E. P. McElligott
Administrative Law Judge
U.S. Coast Guard

Done and dated on this _____ of February, 2001
Houston, Texas