

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

UNITED STATES COAST GUARD

Complainant

vs.

ROBERT KELVIN COOK III,

Respondent.

Docket Number 2017-0358
Enforcement Activity No. 5745123

DECISION AND ORDER

Issued: November 01, 2018

By Chief Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

**Lineka N. Quijano, *Esq.*
Suspension and Revocation
National Center of Expertise
For the Coast Guard**

-and-

**LT Charles W. Taylor
Sector Delaware Bay
For the Coast Guard**

**Jeffrey S. Moller, *Esq.*
For the Respondent**

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated these proceedings alleging Robert Kelvin Cook, III (Respondent) is a user of, or addicted to dangerous drugs and his merchant mariner credentials (MMC) should be revoked. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.35. The Coast Guard's allegations stem from a random urinalysis drug test which Respondent took and tested positive for marijuana metabolites (THC). Respondent does not contest the positive drug test result; rather, he presented evidence showing the positive test resulted from his application of cannabinoid topical ointment used to ease pain in his knee. He argues this legal, over-the-counter, and non-intoxicating substance is not the type of "dangerous drug" the law intends to punish people for taking. Respondent asserts he is not a user or abuser of dangerous drugs.

While the undersigned is sympathetic to Respondent's argument, the preponderance of the evidence establishes he is a user of dangerous drugs as defined by Coast Guard regulations and case law. The undersigned therefore finds the Coast Guard's case **PROVED** and orders Respondent's MMC **REVOKED** as the law requires.

Because Respondent has demonstrated substantial involvement in the cure process, the **REVOCATION** is **STAYED** to allow him additional time to provide satisfactory proof of cure. Respondent is to immediately surrender all Coast Guard issued credentials with the Investigating Officer at U.S. Coast Guard Sector Delaware Bay. The credentials will remain with the Coast Guard until the undersigned issues an appropriate Order either rescinding this Revocation because Respondent has provided satisfactory proof of cure, lifting the **STAY** because he has not provided satisfactory proof of cure, or further continuing the **STAY** to allow Respondent additional time to provide satisfactory proof of cure. If Respondent provides satisfactory proof of cure and the Revocation is rescinded, the period of time Respondent's credentials were in the Coast Guard's possession will be converted to a period of outright suspension.

Respondent is to provide the Coast Guard with all evidence of cure by December 17, 2018. This matter will reconvene on December 19, 2018, at which time the undersigned will conduct a telephone conference to further develop the record and determine if Respondent has provided satisfactory proof of cure. A scheduling order for the telephone conference is forthcoming. Either party may request the matter be reconvened before December 17, 2018 if either party believes Respondent has or has not provided satisfactory proof of cure prior to that date, at which time the undersigned will reconvene this matter.

II. PROCEDURAL HISTORY

On November 27, 2017, the Coast Guard filed a Complaint charging Respondent with one count of “Use of, or Addiction to the Use of Dangerous Drugs” in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. The Coast Guard alleges Respondent took a random drug test on October 11, 2017 which tested positive for marijuana metabolites (THC). The Coast Guard seeks revocation of Respondent’s MMC. In his Answer, Respondent admitted to the jurisdictional allegations and many of the factual allegations. However, Respondent denied he is a user of dangerous drugs and requested a hearing on the proposed order.

The undersigned Administrative Law Judge (ALJ) conducted the hearing on March 6, 2018, in Philadelphia, Pennsylvania in accordance with the Administrative Procedure Act (APA) at 5 U.S.C. §§ 551-559 and the regulations at 46 C.F.R. Part 5 and 33 C.F.R. Part 20. At the beginning of the hearing, the parties notified the undersigned that the basic facts of the case were not in dispute. (Tr. at 4-12). The Coast Guard read Joint Stipulations of Fact into the record.

(Id.). The parties also stipulated to the authenticity and admission of exhibits. (Id.). The Coast Guard introduced fifteen (15) exhibits and Respondent introduced sixteen (16).¹ The Coast Guard did not present any witness testimony. Respondent introduced testimony of eight (8) witnesses. The witness and exhibit list is contained in **Attachment A**. The parties submitted post-hearing briefs (PHB) and the record is now ripe to issue a decision.

III. FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

A. *Prima Facie* Case Proved by Joint Stipulations

1. Respondent holds MMC No. 231558, which the Coast Guard issued on February 24, 2014 and expires on February 24, 2019. (Joint Stipulation 1).
2. Respondent is a member of The Pilots' Association of the Bay and River Delaware (Pilots' Association). (Joint Stipulation 2).
3. At all times relevant to these proceedings, Ship to Shore Drug and Alcohol Testing Services (Ship to Shore) provided the Pilots' Association drug and alcohol testing services for marine employers to comply with federally mandated regulations. (Joint Stipulation 3).
4. As a pilot for the Pilots' Association, Respondent was included within a pool of participants subject to random drug testing in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40. (Joint Stipulation 4).
5. On September 5, 2017, Ship to Shore generated a random selection list for the Pilots' Association using a computer program, which produced a list of Pilots' Association participants that would be required to submit to a federally mandated drug test pursuant to 46 C.F.R. Part 16 and 49 C.F.R. Part 40. (Joint Stipulation 5).
6. On September 5, 2017, Ship to Shore's random software selected Respondent for a random Department of Transportation (DOT) drug test in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40. (Joint Stipulation 6).
7. On October 11, 2017, after receiving notification of the required random selection, Respondent arrived at the Pilots' Association building, located in Lewes, Delaware, to provide a urine specimen. (Joint Stipulation 7).

¹ Respondent introduced fifteen exhibits during the hearing and an additional exhibit post hearing.

8. Mr. William Dawson collected a urine specimen from Respondent following the regulatory procedures outlined in 49 C.F.R. Part 40. (Joint Stipulation 8). Mr. Dawson documented the collection of Respondent's urine specimen on a Federal Custody and Control Form (FCCF) as required under DOT regulations found at 49 C.F.R Part 40. (Id.).
9. At the end of the collection process, Respondent signed the FCCF. (Joint Stipulation 9).
10. Respondent's urine specimen was sent to MedTox Laboratories located in St. Paul, Minnesota, for analytical testing. (Joint Stipulation 10).
11. During the month of October 2017, MedTox Laboratories was a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory that met the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs. (Joint Stipulation 11).
12. MedTox Laboratory scientists and technicians analyzed Respondent's urine specimen in accordance with 49 C.F.R. Part 40. (Joint Stipulation 12).
13. Respondent's urine specimen tested positive for marijuana metabolites (THCA) at 51 ng/mL. (Joint Stipulation 13). The Certifying Scientist reviewed the results of Respondent's urine specimen analysis on October 16, 2017. (Id.).
14. The results of Respondent's test were forwarded to Dr. Jeffrey Kleeman, the Medical Review Officer (MRO). (Joint Stipulation 14).
15. On October 17, 2017, Dr. Kleeman reviewed Respondent's drug test results and the chain of custody forms following the regulatory procedures outlined in 49 C.F.R. Part 40, Subpart G. (Joint Stipulation 15).
16. On October 17, 2017, Dr. Kleeman conducted a phone interview with Respondent, as required under 49 C.F.R. Part 40, during which Respondent said he was currently taking prescription medications, using herbal teas, and using a topical cream called Mary's Medicinals that contained cannabinoids but denied using marijuana in any other form. (Joint Stipulation 16).
17. On October 17, 2017, Dr. Kleeman marked Step 6 on the FCCF for urine specimen as positive for THC. (Joint Stipulation 17).
18. On October 18, 2017, Respondent requested Dr. Kleeman to initiate the process to test his split urine specimen, as is permitted by 49 C.F.R. Part 40. (Joint Stipulation 18).
19. Respondent's split urine specimen was forwarded from MedTox Laboratories to Clinical Reference Laboratory (CRL), located in Lenexa, Kansas. (Joint Stipulation 19).

20. During the month of October 2017, CRL was a SAMHSA certified laboratory that met the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs. (Joint Stipulation 20).
21. CRL confirmed that a marijuana metabolite was present in Respondent's split urine specimen and forwarded this information to Dr. Kleeman, the MRO. (Joint Stipulation 21).
22. On October 24, 2017, Dr. Kleeman marked Step 7 in the FCCF for urine specimen as reconfirmed for THC. (Joint Stipulation 22).

B. Respondent's Distinguished Maritime Career

23. Respondent has served in the maritime industry for nearly 40 years and maintains an unblemished safety record. (Joint Stipulation 23; Tr. at 22-26).
24. Since 1993, Respondent has been a licensed Delaware River pilot, during which time he transported thousands of full size ships up and down the Delaware River without incident. (Joint Stipulation 2; Tr. at 23-29).
25. Throughout his entire maritime career, Respondent has never failed a drug test. (Joint Stipulation 23; Tr. at 29).
26. Industry peers consider Respondent a consummate professional and one of the best pilots on the Delaware River. (Tr. at 154-162).

C. Cannabinoid (CBD) Ointment

27. Respondent suffers from knee pain and constantly looked for remedies to alleviate the pain. (Tr. at 33, 84-85).
28. In 2015, Respondent traveled to and attended his son's graduation from the University of Colorado. (Tr. at 38, 49, 82-84).
29. While in Colorado, Respondent and his wife shopped in a store for homeopathic joint pain remedies. (Id.).
30. Respondent purchased a "pen" dispenser of Cannabinoid (CBD) ointment manufactured by "Mary's Medicinals." (Tr. at 34, 84; Resp't Ex. 1A).
31. Purchasing the CBD ointment did not require a prescription and the salesperson informed Respondent it would have no psychotropic effects and would not affect any drug tests. (Id.).
32. Respondent brought the CBD ointment back to his house in New Jersey, where it remained for a few years in a medicine drawer, unused. (Tr. at 33-34; 49).
33. Sometime in October 2017, Respondent's knee became inflamed so he used the

CBD ointment that he noticed in the drawer. (Id.).

34. Respondent also used the CBD ointment on his knee the night before his October 11, 2017 drug test. (Tr. at 35).
35. Pursuant to a laboratory's analyst, the CBD ointment contained THCA. (Tr. at 136-38; Resp't Ex. 12).
36. The marijuana cream contained, in order from the greatest to the least concentration, cannabidiol (CBD), cannabinol (CBN), Delta-9-tetrahydrocannabinol (THC), and Delta-9-tetrahydrocannabinolic acid (THCA). (Tr. at 136; Resp't Ex. 12).
37. CBD, CBN, THC, and THCa are cannabinoids, which are a "[c]lass of diverse chemical compounds that act on cannabinoid receptors on cells that repress neurotransmitter release in the brain. The most well-known cannabinoids include THC, CBD, CBN and THCa." (Resp't Ex. 6).
38. The label on the ointment tube states specifically that the product is "accurately formulated to contain 100 milligrams of CBD and 10 mg of THC . . . is infused with marijuana. The intoxicating effects of this product may be delayed by two or more hours. The effects will be felt within fifteen minutes and have a lasting effect of four to eight hours depending on body composition and metabolism. . . [d]o not drive a motor vehicle or operate heavy machinery while using marijuana" (Resp't Ex. 2; Tr. at 77-78).
39. At the time he purchased the Mary's Medicinals product, Respondent knew that the cream contained marijuana, specifically THC. (Tr. at 51-52).

IV. DISCUSSION

"The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea." 46 U.S.C. § 7701(a). The Commandant of the Coast Guard "delegated to Administrative Law Judges the authority to admonish, suspend with or without probation or revoke a license, certificate or document issued to a person by the Coast Guard under any navigation or shipping law."² 46 C.F.R. § 5.19. Administrative actions against a mariner's credentials "are remedial and not penal in nature" and are intended to help maintain the high standards of conduct needed for safety at sea. 46 C.F.R. § 5.5.

² The Coast Guard now refers to licenses, certificates of registry, and documents as credentials. 74 Fed. Reg. 11,216, 11,196 (March 16, 2009).

The APA, at 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before ALJs. See 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. See 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. See 33 C.F.R. §§ 20.701, 20.702(a).

With the above framework in mind, I will now outline and discuss the issues present in this case.

A. Issues Presented

The primary issue before me is whether the Coast Guard proved, by a preponderance of the evidence, that Respondent was a user of dangerous drugs. The underlying facts of the case are not in dispute and the Coast Guard argues the stipulations establish a *prima facie* case, which creates a presumption of dangerous drug use. However, Respondent argues that the Coast Guard failed to establish a *prima facie* case. Respondent further argues that even if a *prima facie* case was established, the presumption is rebutted because the drug he tested positive for is not actually a dangerous drug. Finally, if he is found to be a user of dangerous drugs, Respondent believes he is “cured” and the use was experimental. Therefore, an order less than revocation is justified. In summary, the following issues need to be addressed:

1. Did the Coast Guard establish a *prima facie* case proving Respondent is a user of dangerous drug?
2. If a *prima facie* case is proven, did Respondent rebut the presumption that he is a user of dangerous drugs? Specifically, Respondent asserts his usage of a CBD ointment resulted in his “positive” test. Did the CBD ointment cause the positive test and, if so, is CBD ointment a “dangerous drug?”
3. If Respondent is found to be user of dangerous drugs, what is the appropriate

sanction? Has Respondent already established cure and is his use of a CBD ointment experimental, which carries a penalty less than revocation?

B. *Prima Facie* Case is Found Proved

The Coast Guard can establish a *prima facie* case of drug use based solely on a urinalysis test result by proving the following three elements: (1) that Respondent was tested for a dangerous drug; (2) that Respondent tested positive for a dangerous drug; and, (3) that the test was conducted in accordance with 46 C.F.R. Part 16, which includes procedures in 49 C.F.R. Part 40. See Appeal Decision 2704 (FRANKS) (2014); Appeal Decision 2697 (GREEN) (2011); see also 46 C.F.R. § 16.201(b).

As outlined in the Joint Stipulations of Fact, most of the underlying facts in this case are not in dispute. (Tr. at 4-6). Respondent is the holder of a MMC and admits to the jurisdictional allegations listed in the Complaint. (Answer; Joint Stipulation 1). Respondent also admits to the factual allegations needed to prove a *prima facie* case of drug use. The first element asks if respondent was tested for a dangerous drug. As a Delaware River pilot, Respondent was subject to random drug testing in accordance 46 C.F.R. Part 16 and 49 C.F.R. Part 40. (Joint Stipulation 4). On October 11, 2017, Respondent provided a urine specimen upon being notified he was selected to take a random DOT dangerous drug test. (Joint Stipulations 6, 7). The second element asks if respondent tested positive. Respondent's urine specimen did test positive for marijuana metabolites (THCA) at 51 ng/mL. (Joint Stipulation 13). His split urine sample was tested and also contained marijuana metabolites. (Joint Stipulations 20-23). The third, and final element, asks if the drug test was conducted in accordance with 46 C.F.R. Part 16, which prescribes the test must follow the procedures outlined in 49 C.F.R. Part 40. See 46 C.F.R. § 16.201(a). Respondent stipulates he was selected to participate in a random drug test in accordance with 46 C.F.R. Part 16, and the test was conducted in accordance with 49 C.F.R. Part 40. (Joint Stipulations 4, 5, 6, 8, 12, and 15). The Coast Guard clearly established a *prima*

facie case of drug use.

C. Respondent Fails to Rebut Presumption

Once a *prima facie* case of dangerous drug is established, the “burden then shifts to the Respondent to produce persuasive evidence to rebut the presumption.” Appeal Decision 2632 (WHITE) (2002); Appeal Decision 2603 (HACKSTAFF) (1998). If the respondent fails to produce evidence rebutting the presumption, the ALJ may find the charges proved based on the presumption itself. *Id.* In this case Respondent attempts, but fails to rebut the presumption of drug use.

Respondent vehemently claims he is not a user or abuser of dangerous drugs. He does not smoke tobacco, does not use marijuana, rarely drinks alcohol, and has had a distinguished maritime career. (Reply Brief at 1; Tr. at 45, 83, 87). Respondent asserts the Coast Guard presented no evidence showing Respondent is the “typical” user of marijuana in that he smokes or ingests marijuana recreationally in order to get high. Instead, Respondent believes he presented strong evidence showing the positive drug test was a result of rubbing CBD ointment on his knee. Respondent asserts the CBD ointment he used was non-intoxicating and lawfully obtained; therefore, it cannot properly be classified as a dangerous drug. I concur with many, but not all of Respondent’s assertions.

1. Respondent’s Distinguished Career

Respondent has served in the maritime industry for nearly forty years and has an unblemished record. (Joint Stipulation 23; Tr. at 22-26). Respondent graduated from the State University of New York (SUNY) Maritime College, served in the Military Sealift Command, and holds a master’s limited and chief mate’s unlimited licenses. (Tr. at 23-26, 50). Since 1993, Respondent has been a licensed Delaware River pilot, during which time he has transported thousands of full-sized seagoing ships up and down the Delaware River without incident. (Joint Stipulation 2; Tr. at 23-29). Throughout his entire maritime career, Respondent has never failed

a drug test. (Joint Stipulation 23; Tr. at 29). Respected members of the maritime community testified Respondent is a pleasure to work with, is a consummate professional, and is one of the best pilots on the Delaware River. (Tr. at 154-162). These mariners were incredulous that Respondent used or smoked marijuana recreationally. (Id.). I find these witnesses' character testimony very credible. Aside from the positive drug test, the Coast Guard presents no evidence showing Respondent was a "typical" user of marijuana (i.e., that he smoked or ingested marijuana recreationally in order to obtain a high).

2. CBD Ointment Caused the Positive Drug Test

Respondent believes the positive drug test was caused by his use of a CBD ointment. For many years, Respondent suffered from knee problems and was always looking for remedies to relieve the pain. (Tr. at 33, 84-85). In 2015, Respondent traveled to and attended his son's graduation from the University of Colorado. (Tr. at 38, 49, 82-84). While in Colorado, Respondent and his wife shopped in a store for homeopathic joint pain remedies. (Id.). They purchased a "pen" dispenser of CBD ointment manufactured by "Mary's Medicinals." (Tr. at 34, 84; Resp't Ex. 1A). The store did not require a prescription to purchase the CBD ointment and the salesperson informed Respondent the ointment would have no psychotropic effects and would not affect any drug tests. (Id.). Respondent brought the CBD ointment back to his house in New Jersey, where it sat for a few years in a medicine drawer unused. (Tr. at 33-34; 49).

Sometime in October 2017, Respondent's knee became inflamed; he noticed the CBD ointment in the drawer and he used it. (Id.). He also used the CBD ointment on his knee the night before his October 11, 2017 drug test. (Tr. at 35). The CBD ointment was later submitted to a laboratory for analysis of its contents. Pursuant to the laboratory's analysis, the CBD ointment contained THCA. (Tr. at 136-38; Resp't Ex. 12). The exact concentration of THCA within the CBD ointment was not determined. (Tr. at 139).

Following the October 11, 2017 positive drug test, the Navigation Commission for the

Delaware River ordered Respondent to be examined by a selected expert physician. (Resp't Ex. 7; Tr. at 93). Dr. James W. Cornish, a board certified psychiatrist with over thirty years of experience in the substance abuse field and recognized expert, examined Respondent. (Tr. at 90-93). Upon examining Respondent, Dr. Cornish determined Respondent did not have the profile for being a substance abuser, was not an addict, and did not need treatment for substance abuse pursuant to the criteria set forth in the Diagnostic and Statistical Manual for Mental Disorders (DSM-5).³ (Tr. at 95-99). Dr. Cornish testified that given his many years of experience in the drug abuse field, he thinks it is reasonable that Respondent tested positive because he used the CBD ointment. (Tr. at 100-01, 110). I find Dr. Cornish's testimony credible, and given his expertise in the field, I give his testimony great weight.

Given the preponderance of the evidence presented, I conclude Respondent's positive drug test was a result of him using the CBD ointment. While it is possible the positive drug test resulted from Respondent using marijuana recreationally, the evidence does not support this inference. Instead, given the longevity of Respondent's unblemished career, the character testimony, and the expert witness testimony, the CBD ointment very plausibly caused the positive drug test. I find the positive drug test was a result of him using the CBD ointment.

3. CBD Ointment is a Dangerous Drug

Just because Respondent did not smoke or ingest marijuana recreationally or intend to gain an intoxicating affect when taking the CBD ointment, does not mean he did not run afoul of DOT drug testing regulations. Respondent argues the CBD ointment is not a dangerous drug. I disagree; the CBD ointment is clearly a dangerous drug prohibited by DOT regulations.

A dangerous drug means a narcotic drug, a controlled substance, or a controlled-

³ The criteria used to establish if a person is a "substance abuser" pursuant to the DSM-5 verses a "user of dangerous drugs" under Coast Guard law and regulations are separate and distinct. Just because a person is not a "substance abuser" in accordance with the DSM-5, does not preclude them from being a "user" under Coast Guard law. Later in the Decision, I will outline what a user of dangerous drugs is, as defined by Coast Guard law.

substance analog. 46 C.F.R. § 16.105. Marijuana is a Schedule I controlled substance under the Controlled Substances Act of 1970. 21 U.S.C. § 812. A mariner is “presumed to be a user of dangerous drugs” if he/she fails a chemical test for drugs under 46 C.F.R. Part 16. 46 C.F.R. § 16.201(b). Part 16 tests for a variety of dangerous drugs, to include testing for marijuana. 46 C.F.R. § 16.113. The regulations prescribe initial that drug testing shall test for marijuana metabolites (THC) at 50 ng/mL and will test for THCA at 15 ng/mL. 49 C.F.R. § 40.87. THC is the most abundant metabolite, psychoactive drug, found in cannabis/marijuana. (CG Ex. 14 at 178).

Respondent attempts to argue the CBD ointment is not a dangerous drug because the salesperson said it was non-intoxicating and lawfully obtained. (Resp’t PHB). Respondent’s argument is unpersuasive and is rebutted by the product label itself. Across the entire CBD ointment tube are warnings and announcements that the product contains marijuana and THC. On the front of the tube and within the name Mary’s Medicinals, is a picture of a marijuana leaf. (Resp’t Ex. 1A). Language on the tube states, “[t]he product is *infused with marijuana*. The *intoxicating effects* of this product may be delayed by two or more hours.” (Tr. at 77, emphasis added). Furthermore, it states, “[d]o not drive a motor vehicle or operate heavy machinery while using marijuana. The marijuana -- product contained within this package has not been tested for contaminants.” (Tr. at 78). While Respondent technically received the CBD ointment over-the-counter (no prescription needed), the product itself says, “[t]his product is unlawful outside the State of Colorado.” (*Id.*). Respondent testified, when purchasing the product, he understood that it was a marijuana-based product that contained THC. (Tr. at 49-52).

Respondent argues this product labeling was “lawyerly language” used to satisfy product liability requirements. (Resp’t PHB; Resp’t Reply Brief). I disagree; this is not standard language that appears on most over-the-counter medications. This language was on this product because the ointment contained marijuana/THC. The product label stated it contained “10 mg of

THC” and a laboratory analysis confirmed the CBD ointment contained THC. (Tr. at 77, 136-38; Resp’t Ex. 12). While the exact amount of THC in the product was not confirmed during the laboratory test, obviously it contained more than trace amounts, because the CBD ointment caused Respondent to test positive on his drug test.

One could argue the CBD ointment was used topically and therefore cannot be classified as a dangerous drug. How one uses marijuana and its psychoactive ingredient THC, is not prescribed or proscribed by the regulations. The regulations use many terms when describing how dangerous drugs can be taken, to include: ingesting, drinking, smoking, using, and consuming. 49 C.F.R. § 40.151. Likely, the law is written broadly on purpose, because there are many ways to take drugs. Here, Respondent tested positive for marijuana because of the topical application he used. I find that using a topical application, such as the CBD ointment, is considered “use” when relating to using dangerous drugs.

4. Respondent Fails to Rebut the *Prima Facie* Case of Dangerous Drug Use

The CBD ointment contains marijuana/THC, which is a dangerous drug. Respondent’s contention that he purchased the product over-the-counter and a sales person assured him the product was safe to take is not sufficient to rebut the presumption he used dangerous drugs. The product label clearly warns the user that the CBD ointment contains marijuana/THC, is illegal outside of Colorado, will cause intoxicating effects, and is not safe to use when operating heavy machinery. Respondent knew, or clearly should have known, that he was using a product that contained marijuana/THC, a dangerous drug. Respondent failed to rebut the *prima facie* case and is found to be a user of dangerous drugs.

D. Respondent’s Post-Hearing Supplemental Submission

On August 8, 2018, Respondent’s counsel submitted a letter from the Pennsylvania Office of General Counsel (General Counsel) dated August 1, 2018. The General Counsel’s letter states that after its inquiry concerning Respondent’s positive drug test for marijuana, the

Pennsylvania Bureau of Professional and Occupational Affairs (PBPOA), which has jurisdiction over Respondent's State Pilot's License, has decided not to file formal charges against him.

Respondent's counsel requests to have the General Counsel's letter added to the record in further support of his Proposed Finding of Fact No. 27, and in support of his argument that Respondent should continue to hold his credential to pilot ships on the Delaware River and that he does not pose a risk to maritime safety. Respondent's Proposed Finding of Fact No. 27 is "[t]he Commonwealth of Pennsylvania has taken no action to charge Respondent with misconduct and has not suspended or revoked his First Class Pilot license." (Tr. at 40).

The Coast Guard opposed adding the letter to the record because Respondent's counsel submitted it after the record closed and while the matter is pending decision. Further, 33 C.F.R. § 20.904 contains the procedures for reopening the record to take additional evidence and requires the moving party to set forth facts to be proved and the grounds for reopening within thirty (30) days or less after closing the record. Finally, the Coast Guard states the letter is not relevant.

Because Respondent has demonstrated substantial involvement in the cure process by proof of enrollment in a rehabilitation program and is currently undergoing random drug tests to prove non-association with dangerous drugs for a minimum of one year and the fact that these proceedings are continued to allow Respondent sufficient time to provide satisfactory proof that he is cured, the General Counsel's letter is relevant to show Respondent's potential for success in providing satisfactory proof that he is cured. Further, 33 C.F.R. § 20.904(c) allows the ALJ to "reopen the record of a proceeding if he or she believes that any change in fact or law, or that the public interest, warrants reopening it." Showing that the PBPOA is not taking action against Respondent at this time supports the undersigned's decision that it is in the public interest to stay the revocation to allow Respondent sufficient time to provide satisfactory proof that he is cured in accordance with Coast Guard law. Further, the General Counsel did not mail its decision until

August 1, 2018, after the record closed. Therefore, the undersigned grants Respondent's request to add this document to the record in further support of his Proposed Finding of Fact No. 27.

The document will be marked as Respondent's Exhibit 16.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. § 7704; 46 C.F.R. Part 5; and 33 C.F.R. Part 20.
2. The Joint Stipulations of Fact are sufficient to establish a *prima facie* case of dangerous drug use.
3. Respondent failed to rebut the *prima facie* case of dangerous drug use.
4. Respondent's urine sample tested positive for marijuana metabolites.
5. Marijuana is a "dangerous drug" as contemplated by 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35.
6. Respondent's positive drug test is a result of his use of a CBD ointment; Respondent used the ointment to treat knee pain.
7. Respondent's positive drug test and Joint Stipulations of Fact sufficiently amount to a violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35.
8. Respondent is a "user of dangerous drugs" and his MMC must be revoked, unless he is able to show cure.

VI. SANCTION

When issuing a decision, the ALJ must include the disposition of the case, including the appropriate order. 33 C.F.R. § 20.902(a)(2). In this matter, Respondent is found to have violated 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35, Use of, or Addiction to the Use of Dangerous Drugs. The Coast Guard seeks an order of revocation for this violation. Despite arguments by Respondent to the contrary, I concur that revocation is appropriate in this case.

A. Revocation is Mandatory

When the Coast Guard proves a mariner used or is addicted to dangerous drugs,

revocation of all Coast Guard issued credentials is the mandatory order, unless cure is proven. See 46 U.S.C. § 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). As set forth in SWEENEY, the seminal Coast Guard dangerous drug case, the ALJ “is without discretion to issue an order less than revocation unless the respondent has proved to the Administrative Law Judge’s satisfaction that he is cured of drug use and/or addiction.” SWEENEY at 3.

To establish cure, the Commandant identified two steps that must occur. SWEENEY at 4. First, the respondent must “have successfully completed a bona fide drug abuse rehabilitation program designed to eliminate physical and psychological dependence.” Id. Second, the respondent “must have successfully demonstrated a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.” Id. This mandatory two-step cure process is well-established Coast Guard case law. See Appeal Decision 2638 (PASQUARELLA) (2003); Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2669 (LYNCH) (2007); Appeal Decision 2657 (BARNETT) (2006).

When a respondent is undergoing the cure process, the mariner is not entitled to work under their merchant marine credential. PASQUARELLA at 3. Once the Coast Guard proves a mariner used illegal drugs, the mariner is considered a threat to public safety and their credentials must be deposited with the Coast Guard and withheld until cure is completed. Id.

B. Respondent Argues Against Mandatory Revocation

Respondent makes several arguments that an order less than revocation is appropriate in this case. He argues that SWEENEY is inapplicable and out of date, that his drug use was experimental, and that he is an accomplished mariner whose removal would negatively impact maritime safety. Respondent’s arguments are unpersuasive.

Respondent asserts that SWEENEY was “decided over 25 years ago, is out of date and is inapplicable to the facts at bar.” (Resp’t Reply Brief at 3). Despite this claim, Respondent is unable to provide legal citations supporting his assertion, because SWEENEY is still good law. See Appeal Decision 2638 (PASQUARELLA) (2003) (affirming the two-step cure process); Appeal Decision 2709 (COFFY) (2015) (in the most recent CDOA referencing SWEENEY, an ALJ’s order revoking a mariner’s credential for use of dangerous drugs – based in part on SWEENEY – is upheld). While SWEENEY is an old case, it remains the Coast Guard’s seminal dangerous drug law case. Because Respondent used dangerous drugs, SWEENEY is applicable.

Respondent argues even if the CBD ointment is determined to be marijuana, his use was only experimental. Respondent correctly points out that if a mariner is found to have “experimented” with marijuana, then 46 C.F.R. § 5.59(a) allows for an order of less than revocation. However, 46 C.F.R. § 5.59(a) applies only to charges of "misconduct" which is a violation under 46 U.S.C. § 7703(1)(B). Respondent was not charged with misconduct, but instead was charged with “use of, or addiction to the use of, dangerous drugs” under 46 U.S.C. § 7704(c). The marijuana experimentation provision is not applicable for a violation occurring under 46 U.S.C. § 7704(c). Appeal Decision 2526 (WILCOX) (1991). Because Respondent was charged under 46 U.S.C. § 7704(c), the experimental exception does not apply.

Finally, Respondent states he is an accomplished mariner whose removal would not support the purpose of these proceedings, which is to promote safety at sea. The undersigned is very sympathetic to Respondent’s situation. As I have stated above, Respondent’s maritime career is outstanding and he is a superb mariner. I believe his taking the CBD ointment was misguided and done without much foresight; however, I agree with Respondent, and do not believe the evidence shows he is a risk to maritime safety. Given this, Coast Guard law and regulations bind me. I find Respondent to be a user of dangerous drugs. Therefore, his MMC

must be revoked and surrendered to the Coast Guard. The Coast Guard shall not return Respondent's credentials until he completes the two-step cure process.

C. Revocation is Stayed

While an ALJ must revoke if a respondent is found to be a user of dangerous drugs, “[a]n ALJ may grant a continuance of the hearing if the Respondent has demonstrated substantial involvement in the cure process by proof of enrollment in an acceptable rehabilitation program.” Appeal Decision 2634 at 3 (BARRETTA) (2002). This continuance allows the ALJ to stay the revocation while the respondent completes the cure process. Id. Even though an ALJ may stay the proceedings, the mariner is not permitted to work under his credential until cure is completed. Id. at 4.

Respondent has already demonstrated substantial involvement in the cure process. Before being allowed to return to work, Respondent's employer required he meet with a Substance Abuse Professional (SAP), attend a drug educational program, and agree to take twelve (12) random, unannounced drug tests during the course of a year. (Tr. at 41-43; Resp't Ex. 15). As a result, Respondent met with a certified SAP, attended a four (4) hour substance abuse education session, and took a drug test. (Tr. at 42, 130-32; Resp't Ex. 3). Following the completion of the required SAP evaluations and recommendations, an MRO issued Respondent a return to duty letter on November 22, 2017 and, Respondent agreed to participate in twelve (12) random, unannounced follow-up drugs tests over the course of a year. (Resp't Ex. 4).

The Coast Guard believes additional evidence is needed to ensure the drug educational program was sufficient (i.e. – done by a certified government agency or independent professional association) and they have some concerns regarding the SAP evaluation. (CG PHB at 13). Respondent will need to provide additional evidence before cure is proved. However, I find Respondent has demonstrated substantial involvement in the cure process. He met with and followed the recommendations of the SAP, completed a drug educational program, and is

engaged in a yearlong random drug testing regime. As a result, I am staying the revocation in order to provide Respondent time to complete the cure process. During this stay, Respondent may not work under his MMC and must surrender his MMC to the Coast Guard in accordance with Coast Guard law. I will reconvene this matter on December 19, 2018, at which time Respondent can submit additional evidence showing if he has completed cure.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, the Coast Guard's allegations that Respondent is a User of, or Addicted to Dangerous Drugs is **PROVED**.

IT IS FURTHER ORDERED, Respondent's MMC, and all other Coast Guard issued credentials are **REVOKED**. Respondent must immediately surrender all Coast Guard issued credentials to the Investigating Officer at U.S. Coast Guard Sector Delaware Bay.


IT IS FURTHER ORDERED, the **REVOCATION** is **STAYED** to allow Respondent additional time to provide satisfactory proof of cure. Therefore, Respondent's MMC and all other Coast Guard issued credentials will remain with the Investigating Officer at U.S. Coast Guard Sector Delaware Bay until the undersigned issues an appropriate **ORDER** either rescinding this Revocation because Respondent has satisfactorily proved cure or lifting the **STAY** because he has not satisfactorily proved cure, or further continuing the **STAY** to allow Respondent additional time to provide satisfactory proof of cure. If Respondent provides satisfactory proof of cure and the Revocation is rescinded, the period of time Respondent's credentials were in the Coast Guard's possession will be converted to a period of outright suspension.

IT IS FURTHER ORDERED, Respondent is to provide the Coast Guard with all evidence of cure by **December 17, 2018**.

IT IS FURTHER ORDERED, this matter will **RECONVENE** on **December 19, 2018**, at which time the undersigned will conduct a telephone conference and take evidence to determine if Respondent has satisfactorily proved cure. A Scheduling Order for the telephone conference is forthcoming.

PLEASE TAKE NOTICE, either party may request the matter be reconvened before December 17, 2018 if either party believes Respondent has or has not provided satisfactory proof of cure prior to that date, at which time the undersigned will reconvene this matter.

PLEASE TAKE FURTHER NOTICE, service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, attached hereto as **Attachment C**.



Hon. Walter J. Brudzinski
Chief Administrative Law Judge
United States Coast Guard
Date: November 01, 2018

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

Coast Guard's Witnesses:

None.

Coast Guard's Exhibits:

- CG Exhibit 1: Ship to Shore, Inc.'s Authorization and Registration from the Respondent (1 page).
- CG Exhibit 2: Ship to Shore, Inc. Testing Program Guide (19 pages).
- CG Exhibit 3: Copy of Respondent's MMC (1 page).
- CG Exhibit 4: Random selection – participants list batch (1 page).
- CG Exhibit 5: Collector's Certificate of Training (4 pages).
- CG Exhibit 6: Federal Drug Testing Custody and Control Form, Laboratory Copy (1 page).
- CG Exhibit 7: Department of HHS Current List of Certified Laboratories (2 pages).
- CG Exhibit 8: MRO Certification (1 page).
- CG Exhibit 9: MedTox Laboratories Specimen report (1 page).
- CG Exhibit 10: MRO Notes of Phone Interview with Respondent (1 page).
- CG Exhibit 11: Federal Drug Testing Custody and Control Form, MRO Copy (1 page).
- CG Exhibit 12: MRO Worksheet (1 page).
- CG Exhibit 13: Clinical Reference Laboratory Split Specimen Report (2 pages).
- CG Exhibit 14: MedTox Laboratories Laboratory Litigation Package (180 pages).
- CG Exhibit 15: DOT, Office of Drug and Alcohol Policy and Compliance Notice (2 pages).

Respondent's Witnesses:

1. Robert Cook
2. Heidi Cook
3. Dr. James W. Cornish
4. Michael Cipressi
5. Susan Neith
6. James Roche
7. Aruther Sulzer, Jr.
8. Howard Wyche

Respondent's Exhibits:

- Respt. Exhibit 1(a): Picture of the front Mary's Medicinals CBD Pen (1 page).
- Respt. Exhibit 1(b): Picture of the back Mary's Medicinals CBD Pen (1 page).
- Respt. Exhibit 2: The actual Mary's Medicinals CBD Pen.
- Respt. Exhibit 3: Case Summary for Robert Cook (1 page) .
- Respt. Exhibit 4: SeaCare Medical Services letter showing completed SAP evaluation (3 pages).
- Respt. Exhibit 5: LabCorp test results (1 page).
- Respt. Exhibit 6: Mary's Medicinals fact sheet (4 pages).
- Respt. Exhibit 7: Evaluation of Respondent by James W. Cornish, M.D., FCPP (4 pages).
- Respt. Exhibit 7(a): Curriculum Vitae for James W. Cornish, M.D., FCPP (12 pages).
- Respt. Exhibit 8: Letter of reference from James Roche (1 page).
- Respt. Exhibit 9: Letter of reference from J. Ward Guilday (1 page).
- Respt. Exhibit 10: Letter of reference from Arthur Sulzer (1 page).
- Respt. Exhibit 11: Letter of reference from Tyrone Wise (1 page).
- Respt. Exhibit 12: NMS Labs report (2 pages).

- Respt. Exhibit 13: Lab Corp Report to Dr. James W. Cornish (1 page).
- Respt. Exhibit 14: Commonwealth of PA Office of General Counsel Order, Notice, and Petition to Compel Mental Physical Exam against Respondent (14 pages).
- Respt. Exhibit 15: Pilots' Association for Bay and River Delaware, Substance Abuse and Prevention Policy for Pilots (10 pages).
- Respt. Exhibit 16: Commonwealth of Pennsylvania letter of August 1, 2018 advising it will not file formal charges against Respondent concerning his positive drug test. (1 page).

ATTACHMENT B

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Coast Guard and Respondent submitted Proposed Findings of Fact and Conclusions of Law.

Coast Guard's Proposed Findings of Fact

The parties filed a Joint Stipulation of Fact consisting of twenty-four (24) separate paragraphs. At my direction, the Coast Guard read the joint stipulation into the record. (Tr. at 8-12). In its post-hearing brief, the Coast Guard incorporated that stipulation as its proposed findings of fact 1-24 which are hereby Accepted and Incorporated. In addition to those 24 findings of fact, the Coast Guard proposes the following findings:

25. Approximately three years ago, in 2015, Respondent purchased a tube of cream manufactured by Mary's Medicinals ("marijuana cream") in a store in Colorado that sold marijuana-based products. (Tr. at 34, 85.) (Accepted and Incorporated.)
26. The marijuana cream contained, in order from the greatest to the least concentration, cannabidiol (CBD), cannabinol (CBN), Delta-9-tetrahydrocannabinol (THC), and Delta-9-tetrahydrocannabinolic acid (THCA). (Tr. at 136, Respondent's Ex. 12.) (Accepted and Incorporated.)
27. CBD, CBN, THC, and THCA are cannabinoids, which are "chemical compounds that act on cannabinoid receptors on cells that repress neurotransmitter release in the brain." (Respondent's Ex. 6.) (Accepted and Incorporated.)
28. The label on the marijuana cream tube states specifically that the product is "accurately formulated to contain 100 milligrams of CBD and 10 mgs of THC," is "infused with marijuana," and that the content's "intoxicating effects" will be felt "within 15 minutes and have a lasting effect of four to eight hours depending upon body composition and metabolism." (Respondent's Ex. 2; Tr. at 77-78.) (Accepted and Incorporated.)
29. Respondent knew, at the time that he purchased the Mary's Medicinals product, that the cream contained marijuana, specifically THC. (Tr. at 51-52.) (Accepted and Incorporated.)

Coast Guard's Proposed Conclusions of Law

1. Respondent and the subject matter of this hearing are properly within jurisdiction of the U.S. Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. § 7704, 46 C.F.R. Parts 5 and 16, and 33 C.F.R. Part 20. (Accepted and Incorporated).
2. At all relevant times, Respondent was as holder of Merchant Marine Credential #231558. (Accepted and Incorporated.)
3. Respondent tested positive for marijuana metabolites, which gives rise to the presumption that he is a user of dangerous drugs under 46 C.F.R. § 16.20(b). (Accepted and Incorporated.)
4. Marijuana is a dangerous drug as contemplated by 46 U.S.C. § 7704(c). (Accepted and Incorporated.)
5. Respondent failed to rebut the presumption that he is a user of dangerous drugs. (Accepted and Incorporated.)
6. Respondent is a user of marijuana, a dangerous drug. (Accepted and Incorporated.)
7. Under 46 U.S.C. § 7704(c), if it is shown that a holder of a Merchant Mariner Credential has been a user of, or addicted to a dangerous drug, the Merchant Mariner Credential shall be revoked unless the holder provides satisfactory proof that he or she has been cured of the use of dangerous drugs. (Accepted and Incorporated.)
8. In order to demonstrate cure, Respondent must have completed a bona fide drug rehabilitation program and, subsequently, demonstrated one year of non-association with dangerous drugs by taking random, unannounced drug tests throughout that year. (Accepted and Incorporated.)

Respondent's Proposed Findings of Fact

1. Respondent Robert Cook is a 1980 graduate of State University of New York Maritime College ("Ft. Schuyler"). (Testimony of Respondent, Tr. at 23, 50.) (Accepted and Incorporated.)
2. He is the founder and president of the Organization of Black Maritime Graduates from 1993 to the present. (Testimony of Respondent, Tr. at 30.) (Accepted and Incorporated.)
3. He has served continuously since graduation from Ft. Schuyler as a licensed mariner, achieving the grade of Master, Unlimited Tonnage, All Oceans. (Testimony of Respondent, Tr. at 23, 24.)

4. He is the holder of a valid and current U.S. Coast Guard-issued Merchant Mariner Credential (“MMC”) #231558. (Joint Stipulation, Paragraph 1.) (Accepted and Incorporated.)
5. He has had command (served as Master) aboard several Military Sealift Command ships in times of war, including in the Persian Gulf during Operation Desert Storm. (Testimony of Respondent, Tr. at 23.) (Accepted and Incorporated.)
6. He is currently a First Class Pilot, licensed by both the U. S. Coast Guard and the Commonwealth of Pennsylvania, for service piloting ships of maximum length, breadth and draft upon the Delaware River and its navigable tributaries from the Delaware Capes to the uppermost navigable limits. (Testimony of Respondent, Tr. at 26.) (Accepted and Incorporated.)
7. He has continuously served as a river pilot and member of the Pilots’ Association of the Bay and River Delaware ever since graduating from its four-year apprenticeship program in 1993 and earning his First Class Pilot license. (Joint Stipulation, Paragraph 2; Testimony of Respondent, Tr. at 24, 25, 27.) (Accepted and Incorporated.)
8. Respondent needed to obtain a pilotage endorsement on his federal merchant mariner credential in order to obtain his state license. (Testimony of Respondent, Tr. at 56-57.) (Accepted but not Incorporated as a finding of fact).
9. Respondent serves as one of the limited group of Special Duty Pilots, who navigate ships within the confines of the Delaware River harbors and ports, and the challenging portions of the Delaware River to its northern-most point of navigability. (Testimony of Respondent, Tr. at 26-27.) (Accepted but not Incorporated as a finding of fact.)
10. His record of service as a licensed pilot and credentialed mariner is unblemished but for the imposition of a small civil penalty for failing to report, in a timely manner, a minor marine casualty. (Testimony of Respondent, Tr. at 24-25, 28, 55-56.) (Accepted and Incorporated.)
11. He has been subjected to drug and alcohol testing in accordance with DOT protocols and U.S. Coast Guard regulations for the entirety of his 30+ year long career as a mariner. (Testimony of Respondent, Tr. at 28-29, 53). (Accepted and Incorporated.)
12. He has never tested positive for any proscribed substance until being tested on October 11, 2017. (Joint Stipulation, Paragraph 23; Testimony of Respondent, Tr. at 29.) (Accepted and Incorporated.)
13. He has been tested five times since October 11, 2017, and has passed each of those subsequent tests. (Joint Stipulation, Paragraph 24; Testimony of Respondent, Tr. at 43.) (Accepted and Incorporated.)
14. He was examined and interviewed by both a credentialed Substance Abuse Professional (“SAP”) and a board certified psychiatrist specializing in substance abuse, both of whom emphatically opined without hesitation that he is not user of or

addicted to any dangerous drug. (Testimony of Michael Cipressi and James W. Cornish, M.D., Tr. at 130 and 93-95, 105, 123.) (Accepted and Incorporated.)

15. Respondent has been married to wife Heidi for 30 years and is the father of two sons, Nyall John Cook and Robert Kelvin Cook IV – one son is in law school and the other, having also graduated from Ft. Schuyler, is a licensed officer serving on tugboats in the Delaware River. (Testimony of Respondent and Heidi Cook, Tr. at 38 and 81, 82.) (Accepted and Incorporated.)
16. In 2015, while attending son Nyall’s graduation from the University of Colorado, Respondent and his wife were shopping in a store for joint pain remedies that offered homeopathic medicinal remedies. (Testimony of Respondent and Heidi Cook, Tr. at 38, 49 and 82-84.) (Accepted and Incorporated.)
17. Respondent was at the time interested in weaning himself off of blood pressure medicine and was also concerned about using prescription pain medication to treat the occasional bouts of pain he experienced as a result of a decades-old knee injury he suffered playing college football. (Testimony of Respondent, Tr. at 33-34.) (Accepted and Incorporated.)
18. They purchased a “pen” dispenser of CBD ointment manufactured by “Mary’s Medicinals” after being assured by the salesperson that the substance would have no intoxicating effects. (Testimony of Respondent and Heidi Cook, Tr. at 34 and 85; Exhibit 1A; Respondent’s Exhibit 2.) (Accepted and Incorporated.)
19. Respondent brought the pen of CBD home to New Jersey and used it now and then over the succeeding years. He never experienced any intoxicating or “high” effect from it. He did not believe that its use was prohibited by any law or regulation. On October 10, 2017, he was doing yardwork and tweaked his knee. Rather than relieving the pain with a prescription medication in his medicine chest, such as Oxycodone and Percocets, he decided to try the CBD ointment. (Testimony of Respondent, Tr. at 35-36, 49.) (Accepted and Incorporated.)
20. The next day, October 11, he reported for work at the pilot station/office at Lewes, DE/Philadelphia. He was there told that his name had been selected for a random drug screen. He provided a urine sample. (Joint Stipulation, Paragraph 7.) (Accepted and Incorporated.)
21. Days later he was informed that his sample had contained 51 units of a marijuana metabolite, one unit in excess of the limit. (Joint Stipulation, Paragraph 13.) (Accepted and Incorporated except for the language that the 51 units of a metabolite is one unit in excess of the limit. Under 49 C.F.R. § 40.87, marijuana metabolites (THCA) have a 50 ng/mL initial test cutoff, and a 15 ng/mL confirmatory test cutoff, so the 51 ng/mL was actually 36 ng/mL or 36 units above the confirmatory test cutoff instead of one unit above.)
22. Respondent had not used marijuana in any form at any time in his career and certainly had not used marijuana in smokeable, ingestible or medicinal form at any time in the

- days, weeks or months prior to the October 11 drug screen administration. (Testimony of Respondent, Tr. at 33, 50.) (Accepted and Incorporated.)
23. The results of the October 11 drug screen were sent to both the U.S. Coast Guard and the Commonwealth of Pennsylvania. (Accepted and Incorporated.)
 24. The Commonwealth of Pennsylvania, by its Navigation Commission for the Delaware River and its Navigable Tributaries, issued an order dated November 7, 2017 requiring Respondent to be examined by its selected expert physician, Dr. James W. Cornish. (Testimony of Respondent, Tr. at 39-40; *see* Exhibit 14.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 25. Dr. Cornish first examined Respondent on December 7, 2017 and administered an unannounced drug screen test. The result of the drug screen was negative for any substance, including marijuana metabolites. He reported to the Commonwealth of Pennsylvania that Respondent showed no signs of being a user of or addicted to dangerous drugs. Dr. Cornish gave the opinion both to the Pennsylvania Navigation Commission and at the hearing under oath that Respondent did not present a risk to maritime safety if he continued to hold and practice under his pilot license. (Testimony of James W. Cornish, M.D., Tr. at 97-99, 105, 115.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 26. Dr. Cornish is a board certified psychiatrist who attended the preeminent Thomas Jefferson Medical College and has specialized in and is a recognized expert in substance use and abuse treatment for the past 38 years. (*See* CV of James W. Cornish, M.D., Exhibit 7A.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 27. The Commonwealth of Pennsylvania has taken no action to charge Respondent with misconduct and has not suspended or revoked his First Class Pilot license. (Testimony of Respondent, Tr. at 40.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 28. Subsequent to the October 11 drug screen, Respondent was interviewed by the Pilots' Association's Medical Review Officer ("MRO"), Dr. Jeffrey Kleeman, and its Substance Abuse Professional ("SAP"), Michael Cipressi. (Testimony of Respondent, Tr. at 58, 59, 126.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 29. In those interviews, Respondent admitted to using the CBD ointment prior to the October 11 drug screen but denied use of marijuana except for an experimental use back in his college days. (Joint Stipulation, Paragraph 16.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
 30. The SAP opined and testified at the hearing, that Respondent was not a user of any dangerous drugs. (Testimony of Michael Cipressi, Tr. at 130.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)

31. Respondent complied with the Pilots' Association's Substance Abuse Policy and was fully restored to the active duty pilot list by December 2017. (*See* Exhibit 15; Testimony of Respondent, Tr. at 42.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
32. Per the Pilots' Association's policy, Respondent agreed to be subjected to increased testing for the next 12 months. (Testimony of Respondent, Tr. at 43, 60.) (Accepted and Incorporated to the extent it demonstrates substantial involvement in the cure process.)
33. The pen of CBD ointment purchased and used by Respondent (Respondent's Exhibit 2) was submitted to a qualified laboratory for analysis of its contents. (Accepted and Incorporated.)
34. The substance of the CBD pen did contain THCa, per the laboratory's analyst who testified at the hearing. (Testimony of Susan Neith, Tr. at 136-138; *see* Respondent's Exhibit 12.) (Accepted and Incorporated.)
35. According to the Mary's Medicinals website and the label, the CBD pen primarily contained CBD but did not contain trace amounts of THCa (*See* Respondent's Exhibit 6, 1, 2.) (Accepted and Incorporated.)

Respondent's Proposed Conclusions of Law

1. The cause of Respondent's positive drug screen was his use of the Mary's Medicinals CBD ointment. (Accepted and Incorporated to the extent it does not rule out other causes.)
2. Respondent is not a user of dangerous drugs in the parlance or meaning of 46 U.S.C. § 7704. (Not Accepted. Respondent knowingly used the ointment despite the language on the label that it contained marijuana.)
3. The CBD product used by Respondent was not a dangerous drug within the meaning of 46 U.S.C. §7704. (Not Accepted for the reasons stated in #2 above.)
4. Respondent is currently "cured" of any use of dangerous drugs. (Not Accepted. Respondent has not yet provided satisfactory proof that he is cured in accordance with Coast Guard law as expressed in Commandant Appeal Decisions.)
5. Allowing Respondent to continue to hold his U.S. Coast Guard-issued Merchant Mariner Credential does not pose a risk to maritime safety. (Not Accepted as per Coast Guard Appeal Decisions.)
6. To the extent that Respondent's usage of the CBD ointment made him a user of marijuana, such use was experimental in nature, and Respondent has submitted satisfactory evidence that he is cured of such use and that possession or association with marijuana will not recur. (Not Accepted. Under 46 C.F.R. § 5.59(a), experimental use is available only when the charge is Misconduct and when the respondent has submitted satisfactory evidence that he or she is cured of such use and

that the possession or association will not recur. Here, the charge is not under
Misconduct and Respondent has not yet provided satisfactory proof that he is cured.)

ATTACHMENT C

NOTICE OF APPEAL RIGHTS

33 C.F.R. § 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 C.F.R. § 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 C.F.R. § 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.

- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 C.F.R. § 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.