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

UNITED STATES COAST GUARD
Complainant

vs.

DAVID ALLAN DICKERSON Sr.

Respondent

Docket Number 2015-0285
Enforcement Activity No. 5213877

DECISION AND ORDER

Date Issued: May 11, 2016

By Administrative Law Judge: Honorable Bruce Tucker Smith

Appearances:

For the Coast Guard;

LTJG Shane E. Palmira
Sector New Orleans

For the Respondent;

David Allan Dickerson Sr., *Pro se*

I. STATEMENT OF THE CASE

On September 1, 2015, the United States Coast Guard (Coast Guard) filed a Complaint against David Allan Dickerson, Sr. (Respondent) seeking revocation of his Coast Guard–issued Merchant Mariner's Credential (credential) alleging use of, or addiction to the use of, dangerous drugs—a violation of 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. The Complaint alleges that on May 28, 2015, Respondent submitted a sample of his hair, as part of an employer-directed, non-46 C.F.R. Part 16 drug test. The hair specimen collected from Respondent subsequently tested positive for marijuana metabolites.

On October 19, 2015, Respondent filed an Answer admitting all jurisdictional allegations and admitting some factual allegations. On January 6, 2016, the undersigned convened a telephonic pre-hearing conference with the parties and set various discovery dates, as well as a hearing date. Thereafter, the parties engaged in discovery and trial preparation.

On March 10, 2016, the hearing of this matter commenced in the Administrative Law Judge (ALJ) Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana. Lineka N. Quijano, Esq. and LTJG Shane Palmira appeared on behalf of the Coast Guard. Respondent appeared on his own behalf. The Coast Guard presented the testimony of four witnesses and offered eleven exhibits into evidence, all of which were admitted into the record.[1] Respondent did not testify under oath and did not formally offer any exhibits into evidence. However, Respondent did bring several documents with him to the hearing. In an abundance of caution for the protection of the Respondent's due process rights, the undersigned accepted same, without an evidentiary foundation, and assigned appropriate evidence markings; Respondent's Exhibits A –

[1] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at __). Citations referring to Coast Guard Exhibits are as follows: CG followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Resp. followed by the exhibit letter (Resp. Ex. A, etc.). Attachment A sets forth the parties' witnesses and exhibits.

G.[2] The Respondent did make several unsworn statements which potentially relate to a claim of "innocent ingestion" of marijuana.[3] The undersigned explained to Respondent that he was not testifying under oath at the time he made those statements, but rather, was simply providing the court with an overview of what might transpire in the case to follow. (Tr. at 14, 136, et. seq.). Because Respondent elected not to testify under oath, the undersigned did not accept his "unsworn" statements as evidence and thus, assigned no evidentiary weight to same.

After careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the undersigned finds the allegations as set forth in the Coast Guard in the Complaint **PROVED**. Accordingly, Respondent's Merchant Mariner's Credential is **REVOKED**.

II. FINDINGS OF FACT

After a thorough and careful analysis of the documentary evidence, testimony of the witnesses, and the entire record taken as a whole, the undersigned makes the following Findings of Fact based on a preponderance of the evidence:

1. At all relevant times, Respondent was a holder of a valid Coast Guard-issued Merchant Mariner's Credential. (Respondent's Answer).

2. At all relevant times, Respondent was employed by Galliano Marine Service. (Tr. at 43, 57; CG Ex. 1, 2).

3. At all relevant times, Respondent's marine employer, Galliano Marine Service, maintained a company drug policy prohibiting "the [] use . . . of drugs, drug paraphernalia, controlled substances . . . or any mind altering substance. . . ." (CG Ex. 1).

4. At all relevant times, Respondent's marine employer, Galliano Marine Service, maintained a company drug policy prohibiting "any employee from

[2] Many of those documents bear either no or only marginal relevance to this case. However, those documents that can be reasonably read to have bearing on "cure" are discussed below.

[3] Query whether the defense of "innocent ingestion" is recognized in Suspension and Revocation cases. Appeal Decisions2632(WHITE) (2002) and 2626(DRESSER) (2001) reference such a defense, but do not discuss or elaborate. Absent guidance from the Commandant regarding such an affirmative defense, and absent sworn testimony from the Respondent, the undersigned elected not to develop the record further on that issue.

having any amount of drugs or controlled substances . . . present in his or her body while within the course and scope of his/her employment." (CG Ex. 1).

5. At all relevant times, Respondent's marine employer, Galliano Marine Service, maintained a company policy requiring all employees to submit to drug testing, including hair analysis. (CG Ex. 2).

6. On or about March 25, 2013, Respondent signed the Galliano Marine Service's drug and alcohol free work environment policy. (CG Ex. 2).

7. On May 28, 2015, Respondent submitted a hair sample for a non-DOT drug test. (Tr. at 65 - 66).

8. On May 28, 2015, a hair specimen was collected from Respondent's head by Keith Breaux of C-Port, an entity within Edison Chouest Offshore, the parent company of Respondent's Marine employer, Galliano Marine Service. (CG Ex. 5).

9. Keith Breaux is a safety technician employed by Edison Chouest Offshore. (Tr. at 52, 55 - 56; CG Ex. 4). Part of Mr. Breaux's responsibilities as a safety technician includes obtaining a hair specimen for drug testing. (Tr. at 52).

10. On October 21, 2014, Keith Breaux successfully completed Psychemedics Sample Collection Training Program. (Tr. at 54; CG Ex. 4)

11. On May 28, 2015, Keith Breaux used the following hair collection procedure:

    a. Respondent's hair sample was collected from the back of Respondent's head. (Tr. at 59; CG Ex. 5).
    b. The hair sample taken from Respondent was cut with a pair of sanitized scissors. (Tr. at 59).
    c. Respondent's hair sample was then placed into a piece of aluminum foil, which was then folded over twice and then sealed in an envelope. (Tr. at 59).
    d. Respondent initialed the envelope attesting that only his hair sample was contained within the envelope. (Tr. at 59).
    e. Respondent signed the Custody and Control Form consenting to testing by a laboratory called Psychemedics. (Tr. at 64; CG. at 5).
    f. The envelope containing Respondent's hair sample was then placed in a clear plastic bag, together with the Custody and Control Form, then sealed and shipped to a laboratory via FedEx overnight. (Tr. 60-61).
    g. Keith Breaux testified there were no fatal flaws regarding the hair collection of Respondent's hair sample. (Tr. at 64 - 65).

12. Psychemedics Lab is accredited by the ANSI-ASQ National Accreditation Board/FQS and meets the requirements of international standard ISO/IEC 17025:2005 demonstrating competence in the field of forensic hair testing. (CG. Ex. 7).

13. On May 30, 2015, Psychemedics Laboratory received and tested Respondent's hair specimen bearing the same discreet identification number listed on the Psychemedics Forensic Drug Testing Custody and Control form. (CG Ex. 8).

14. The initial screening test Psychemedics performed on Respondent's hair sample was an immunoassay test. (Tr. at 79).

15. The immunoassay test used by Psychemedics Laboratories for the detection of illegal drugs in human hair is "cleared" by the Federal Drug Administration (FDA). (Tr. at 80 - 81).

16. When Psychemedics screened Respondent's hair specimen using its immunoassay test, the result was presumptively positive. (CG Ex. 8).

17. Because Respondent's specimen was reported as presumptively positive, Psychemedics performed a second test, gas chromatography mass spectrometry (GCMS), as a confirmatory test. (Tr. at 83).

18. GCMS testing produces quantitative data. (Tr. at 83).

19. The test cut-off level for marijuana is 1 pictogram per 10 milligrams of hair. (Tr. at 86).

20. GCMS testing of Respondent's hair revealed the presence of carboxy THC, a primary marijuana metabolite, in a concentration of 1.6 picograms per 10 milligrams of hair. (Tr. at 102; CG Ex. 8).

21. The record does not indicate any abnormalities in the drug testing procedures or protocols from the time the specimen was harvested from Respondent's head until the time the results were generated. (CG Ex. 8).

22. Dr. Darren J. Duet, MD is the Chief Medical Officer and Corporate Medical Director for Edison Chouest Offshore and was previously a DOT-certified Medical Review Officer (MRO). (Tr. at 117-120; CG Ex. 9).

23. Dr. Duet is a duly-licensed physician in the State of Louisiana. (Tr. at 116; CG Ex. 11).

24. As Chief Medical Officer for Edison Chouest Offshore, Dr. Duet received the results of Psychemedics' testing on June 2, 2015 and noted the "positive" test result on the Psychemedics Forensic Drug Testing Custody and Control Form. (CG Ex. 10).

25. On or about June 2, 2015, GMS terminated Respondent's employment as a result of the positive drug test. (Tr. at 39).

III. PRINCIPLES OF LAW

A. Suspension & Revocation Proceedings

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. §7701(a). The Coast Guard seeks to revoke Respondent's credential because 46 U.S.C. §7704(c) provides a Coast Guard-issued credential shall be revoked if it is proven that the holder of the credential has been a user of or addicted to the use of dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. (emphasis added). Absent cure, ALJs must revoke a mariner's credential for violations arising under 46 U.S.C. §7704(c). See also 46 C.F.R. §5.19(b).

B. Jurisdiction

Violations of 46 U.S.C. §7704(c) are "holder offenses." The mariner's status as a "holder" of a current credential establishes jurisdiction under §7704(c) to institute suspension and revocation proceedings. Appeal Decision 2560 (CLIFTON) (1995). A mariner need not have been acting under the authority of his credentials to be subject to the Coast Guard's jurisdiction when a violation of 46 U.S.C. §7704(c) is alleged. Id. Here, it is uncontested that Respondent is the holder of a credential; therefore, the Coast Guard has jurisdiction over the §7704(c) charge.

C. Standard and Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§551-59, applies to Coast Guard Suspension and Revocation proceedings. 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. 5 U.S.C. §556(d). The undersigned regards the "substantial evidence" standard as synonymous the "preponderance of the evidence" standard in Coast Guard

hearings. 33 C.F.R. §20.701. Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges. 33 C.F.R. §20.702(a).

The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation(s) charged.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. Appeal Decision 2640 (PASSARO) (2003). Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

The evidence in this matter largely consists of scientific evidence and expert testimony. In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the Supreme Court held that Rule 702 of the Federal Rules of Evidence imposes upon the trial court a gatekeeper obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." The Court later extended this requirement to all expert testimony. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

Strictly speaking, the Daubert rule does not apply to this proceeding, because Daubert and its progeny interpret the Federal Rules of Evidence, which do not specifically apply to administrative hearings. Nevertheless, "the spirit of Daubert" does apply to administrative

proceedings because "'[j]unk science' has no more place in administrative proceedings than in judicial ones." Lobsters, Inc. v. Evans, 346 F. Supp.2d 340, 344 (D. Mass. 2004) (quoting Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir.2004)). See also Appeal Decision 2670 (WAIN) (2007). Thus, one major inquiry the undersigned must make in this matter is whether the scientific testimony or evidence introduced by the Coast Guard is not only relevant, but reliable.

IV. ANALYSIS

The ultimate issue before the undersigned is whether the Coast Guard has proved by a preponderance of the evidence that Respondent was a user of, or addicted to the use of, dangerous drugs.

A. DOT-Recognized Drug Testing

Coast Guard regulations implement the Federal Transportation Workplace Drug Testing Programs. Those regulations are found at 46 C.F.R. Part 16. The testing mandated in the Coast Guard regulations follows the procedures set forth by the Department of Transportation (DOT) in 49 C.F.R. Part 40. Today, most Coast Guard cases charged under 46 U.S.C. § 7704(c) relate to the drug tests mandated in 46 C.F.R. Part 16 and conducted in accordance with 49 C.F.R. Part 40.

Those regulations define a chemical test as "a scientifically recognized test which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or tissues for evidence of dangerous drug or alcohol use." 46 C.F.R. § 16.105. Hair testing is not included. Title 46 C.F.R. Subpart B, says chemical testing "must be conducted as required by this subpart and in accordance with the procedures detailed in 49 CFR Part 40." 46 C.F.R. §16.201(a). Currently, the DOT drug testing regime in 49 C.F.R Part 40 allows only urinalysis testing. However, the test at issue in this case involves hair testing, conducted entirely in accordance with a private marine employer's internal policies and procedures.

B. The Galliano Non-DOT Testing Program

At all relevant times, Galliano Marine Service (GMS) employed Respondent. (Tr. at 43; CG Ex. 1, 2). GMS's drug testing procedures, including hair testing, are described in the company's personnel manual. (CG Ex. 1, 2). GMS makes all mariners aware of its drug policy when a job offer is made and before the employee is formally hired. The GMS Drug and Alcohol Free Work Environment Policy is also posted throughout GMS "facilities, and buildings, and vessels, and [discussed during] the new hire orientation program." (Tr. at 32).

In this case, Respondent received and signed for copies of the drug and alcohol policies at the time he was hired at GMS. (Id.).

Billy Pellegrin, the GMS Director of Quality, Health, Safety, and Environmental Affairs, testified regarding the GMS drug and alcohol program. (Tr. at 24; CG Ex. 1).

Mr. Pellegrin testified that GMS conducts both DOT testing in accordance with the applicable regulations and non-DOT testing in accordance with its own company policy. (Tr. at 29; CG. Ex. 1). Mr. Pellegrin explained that GMS utilizes non-DOT testing as a means to "extend the timeframe that we actually look for an individual under the influence, as well as we extend the type of medicines that we look for as well. . . . [including other illicit drugs]." (Tr. at 31). Mr. Pellegrin also testified GMS uses non-DOT testing to ensure its employees are not operating under an altered mental state. (Id.

Mr. Pellegrin further testified that his company's drug policy is designed to "ensure without a shadow of a doubt that the employee understands the company's drug and alcohol free work environment stance, and what conditions he can and/or will be tested under." (Tr. at 36-37).

Because the GMS testing "was not conducted by or for the State; and the testing was not required by the State, the testing . . . in this context was not a search within the meaning of the Fourth Amendment." Whye v. Concentra Health Servs., Inc., CIV.A. ELH-12-3432, 2013 WL 5375167 (D. Md. Sept. 24, 2013). "The Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative." Whye at *21, citing Skinner v. Railway Labor Exec. Assn., 489 U.S. 602, 614 (1989). However, the evidence shows Respondent knew, prior to accepting employment with GMS, that a private, non-DOT hair test for drugs could be imposed. Therefore, the hair test poses no Constitutional issues that would affect the Coast Guard's ability to seek revocation of Respondent's MMC.

Under Coast Guard drug testing rules, if an individual fails a chemical test for dangerous drugs under 46 C.F.R. Part 16, "the individual will be presumed to be a user of dangerous drugs." 46 C.F.R. §16.201(b). Because this is not a test under 46 C.F.R. Part 16 there is no presumption that a positive drug test is sufficient to find Respondent is a user of or addicted to the use of dangerous drugs. Instead, the undersigned must determine whether the Coast Guard's evidence of a non-DOT test is scientifically valid and reliable and is sufficient to establish Respondent is a user of, or addicted to the use of, dangerous drugs.

C. The Hair Testing in This Case is Scientifically Valid

The Complaint alleges Respondent took a drug test and his hair specimen subsequently tested positive for marijuana metabolites as certified by a Medical Review Officer. The record establishes that Respondent submitted a hair sample for drug testing purposes at his employer's facility, C-Port, on May 28, 2015. (CG Ex. 5). The sample was collected by Keith Breaux, a trained and certified collector. (CG. Ex. 4, 5).

Mr. Breaux testified that he removed a hair specimen from the Respondent by cutting a piece of hair from the root using a pair of sanitized scissors. (Tr. at 59). Respondent's hair specimen was then placed into a piece of aluminum foil, folded twice, and then sealed into an envelope. (Id.).

Once the envelope was sealed, the Respondent placed his initials on the envelope attesting that it contained his hair specimen. (Id.). According to Mr. Breaux, it is impossible to adulterate the seal of the envelope, inasmuch as it was folded several times, placed on an adhesive backing, then sealed with red tape that can only be cut off once it is sealed. (Tr. at 60). Mr. Breaux testified that once the specimen envelope was sealed and the Custody and Control Form was completed, both were then placed in a shipping bag, and sealed together with the envelope. (Tr. at 60-62). The shipping bag containing the specimen envelope and the Custody and Control Form were then immediately shipped via FedEx to Psychemedics Laboratories. (Tr. at 60).

That package was then received by Psychemedics, a DOT-approved laboratory. (CG Ex. 5). At Psychemedics, the sample underwent both an immunoassay test and gas chromatography, mass spectrometry analysis (GCMS), and both produced a "positive" test result. (CG Ex. 8).

Dr. Ryan B. Paulsen, Senior Analytical Chemist for Mass Spectrometry with Psychemedics, testified about the specific procedures his laboratory used in analyzing Respondent's sample. (Tr. at 69, et. seq.) He explained that when Psychemedics received Respondent's sample, technicians reviewed the sample to ensure all the tamper evident seals were still intact and that the proper chain of custody had been followed. (Tr. at 77).

After that review, the sample was assigned a laboratory accessioning number (LAN), which is different from the donor identification number used on the Custody and Control Form. (Id.). The LAN was used, together with a bar code, to track Respondent's sample throughout the testing process. (Id.). A portion of the sample was then weighed and analyzed using an FDA-cleared immunoassay test. (Tr. at 77).[4] Since the immunoassay test revealed a presumptively positive sample, that sample was then subjected to a confirmation test by GCMS analysis. (Tr. at 78). Respondent's sample was analyzed the by GCMS and found to contain carboxy THC, a primary marijuana metabolite, in a concentration of 1.6 pictograms per 10 milligrams of hair, greater than the established cut-off level of 1 pictogram per 10 milligrams of hair. (CG. Ex. 8).

In United States v. Bush, 44 M.J. 646 (A.F.Ct.Crim.App.1996), aff'd 47 M.J. 305 (C.A.A.F.1997), cert. denied, 522 U.S. 1114 (1998), the U.S. Air Force Court of Criminal Appeals held in a case of first impression that GC/MS hair analysis was properly admitted in a court-martial to prove the accused's unlawful use of cocaine. Applying Daubert and Military Rule of Evidence 702, the court found that mass spectrometer analysis of hair samples was accepted as scientifically reliable in the relevant community of forensic chemistry, had been subjected to peer review, and was the subject of a growing body of professional publications and studies. Id. at 651-52. See also Woods v. Wills, 2005 WL 5990326, at *6 (E.D. Mo. Oct. 27, 2005) (discussing the Bush court's analysis of GC/MS hair testing, as well as other courts' treatment of radioimmunoassay hair analysis, and finding the testimony of an expert is necessary to establish validity and reliability).

In US. v. Medina, 749 F. Supp 59, 61 (E.D.N.Y. 1990), the court found that extensive scientific writings on radioimmunoassay hair analysis establish both its reliability

[4] It is important to emphasize that Psychemedics immunoassay tests have been cleared by the FDA, "meaning that [the tests] provide accurate results . . . and are able to distinguish a positive from a negative. Further, the test must

and its acceptance in the field of forensic toxicology when used to determine cocaine use. The Medina court also held that in addition to "satisfying itself on general theoretical soundness, before admitting relatively novel scientific evidence the undersigned should determine that (1) the sample was properly obtained-here, for example, by obtaining hair from appropriate portions of the body, (2) the particular laboratory technique used was sound and (3) the laboratory was careful and accurate in its use of that technique." (Id. at 61-62).

In this case, there is ample evidence that Respondent's sample was properly obtained, that the laboratory technique was sound and that the laboratory was careful and accurate in its use of the technique.

Following laboratory testing, the positive test results in this case were then transmitted to an MRO, Dr. Darren Duet, who reported the test results as being positive for marijuana.[5] (CG Ex. 12).

Here, the undersigned has weighed the uncontroverted testimony of the specimen collector regarding collection techniques and the scientific testimony of the laboratory expert witness and finds both credible. The undersigned therefore finds the use of scientific hair testing to determine the presence of a dangerous drug, in this case, to be relevant and reliable and within the "spirit of Daubert."

D. Respondent's Hair Tested Positive for Marijuana - a Dangerous Drug

The testimony in this case establishes that Respondent's hair sample was properly harvested, preserved, and shipped to a laboratory for testing. The chain of custody of Respondent's sample was unbroken. The evidence establishes that the sample

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be deemed by the FDA to be quantitatively reliable." (Tr. at 81).

arrived at the laboratory intact and laboratory personnel processed it using correct scientific. Dr. Paulsen certified that he reviewed the results and found proper procedures were used by his laboratory. Moreover, the "positive" results from laboratory testing were reported to an MRO who confirmed the test result as "positive" for marijuana.

The Complaint alleges Use [or addiction to the use] of a Dangerous Drug. Title 46 U.S.C. §7704(c) states "[i]f 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."

A dangerous drug is defined in 46 U.S.C. §2101(8a) as "a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. §802))." The Controlled Substances Act (CSA) states that the "term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." Title 21 U.S.C. §812 lists marijuana as a Schedule I drug. Marijuana is therefore a "dangerous drug" for purposes of 46 U.S.C.§7704(c).

The undersigned finds ample evidence in the record which establishes that Respondent was tested for dangerous drugs and provided a hair sample that tested positive for marijuana, a dangerous drug. The Coast Guard provided reliable, credible, and probative evidence of Respondent's drug use. Therefore, the evidence in the record establishes it is more likely than not that Respondent is a user of, or addicted to the use of, dangerous drugs. Because the test here at issue was not a DOT-approved test, no presumption of drug use or addiction obtains. However, Respondent elected not to

[5] Because this was a non-part 16 test, the participation of a Medical Review Officer was not required in this case, as it would have been, were this a Part 16 DOT test. See 49 C.F.R. Subpart G.

testify under oath. Hence, he did not testify as to any facts which may have contradicted the Coast Guard's proof. Thus, the Administrative Law Judge may, and hereby does, find the Charge proved. See Appeal Decisions 2174 (TINGLEY)(1980); 2266 (BRENNER)(1981).

V. ULTIMATE FINDINGS OF FACT & CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. §7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§551-59.

2. The hair tests conducted in this case were not required by any federal statute or regulation.

3. The hair sample was collected using a process that had sufficient safeguards to prevent contamination and preserved the chain of custody.

4. The hair tests conducted here were scientifically valid, relevant and reliable.

5. Respondent is a user of, or addicted to the use of dangerous drugs. 46 U.S.C. §7704(c); 46 C.F.R. §5.35.

6. Respondent did not prove "cure" per the holding of Appeal Decision 2535 (SWEENEY) (1992).

VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ, per 46 C.F.R. §§5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." 46 U.S.C. §7701; 46 C.F.R. §5.5; Appeal Decision 1106 (LABELLE) (1959).

The Coast Guard's Complaint seeks revocation of Respondent's credential. Title 46 U.S.C. §7704(c) mandates that a Coast Guard issued credential shall be revoked if it is proven "that the holder of the credential has been a user of, or addicted to, the use of dangerous drugs, unless the holder provides satisfactory proof that the holder is cured." Id. (emphasis added).

The statute does not define what "cure" means. However, the concept of "cure" is typically discussed in that line of cases flowing from Appeal Decision 2535 (SWEENEY) (1992).[6]

The cure set forth in SWEENY is a rigorous course of conduct whereby a respondent must not only participate in an active rehabilitation program, he must also submit to random urinalysis testing for a full calendar year.

As indicated above, Respondent, who appeared pro se, elected not to testify under oath. (Tr. at 137). Despite the fact that Respondent did not testify under oath, the undersigned, in an abundance of caution for the Respondent's due process rights, accepted (without evidentiary foundation) several documents from Respondent. Some of those documents ostensibly relate to "cure." (Tr. at 136, et. seq.) Respondent's Exhibit A is an October 20, 2015, letter from Gulf South Resources, authored and signed by a John Mehlhorn, who identifies himself as a "substance abuse professional." The letter is addressed to a business entity called "Mariner's World Central" and describes Respondent's apparent evaluation for substance abuse and his participation in a drug rehabilitation program. The letter also describes Respondent's participation in 12 Alcoholics Anonymous/Narcotics Anonymous meetings. The letter further recommends a series of 18 follow-up drug tests over the two years from the date of the letter. There is no evidence Respondent complied with those tests.

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[6] SWEENEY defines "cure" as:

> 1. The respondent must have successfully completed a bona fide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).
>
> 2. 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.

Even reading the Mehlhorn letter, together with results of Respondent's alleged drug testing in July, 2013 and in January, 2016 (Resp. Ex. C, D), in a light most favorable to the Respondent, the undersigned cannot assign any probative weight to same, because no evidentiary foundation establishing relevance for any of those documents was established by sworn testimony. Moreover, the letters do not establish that Respondent's "rehabilitation" program was a "bona fide drug abuse rehabilitation program designed to eliminate physical and psychological dependence" as that phrase is defined by SWEENEY. Nor is there evidence of Respondent's submission to (or results from) random drug testing for the required period, nor abstinence from drug use following his participation in the "rehabilitation" program. Nor did Respondent successfully demonstrate a complete non-association with drugs for a minimum period of one year following successful completion of the rehabilitation program; again, as per SWEENEY.

Thus, Respondent did not prove "cure" as that term is defined and recognized by Coast Guard case law. Thus, **REVOCATION** of Respondent's credential is mandatory in this case.

VII. CONCLUSION

The Coast Guard established that Respondent is a user of, or addicted to the use of, dangerous drugs by a preponderance of the evidence. Respondent did not prove "cure." Hence, the allegations set forth in the Complaint are found **PROVED.**

VIII. ORDER

IT IS HEREBY ORDERED, that Respondent's Coast Guard-issued credential is **REVOKED**. Respondent is to turn in his Credential to the nearest Coast Guard facility immediately. 46 C.F.R. §5.567(d).

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

IT IS SO ORDERED.

Bruce Tucker Smith
US Coast Guard
Administrative Law Judge

Date: May 11, 2016

ATTACHMENT A: WITNESS & EXHIBIT LISTS

Coast Guard Exhibits

1. GMS Management System
2. Drug & Alcohol Testing Policy and Consent Form
3. Employer Notification to USCG
4. Certificate of Training—Keith Breaux
5. Psychemedics Forensic Drug Testing Custody and Control Form—Collector Copy
6. CV - Dr. Ryan B. Paulsen
7. Certificate of Accreditation—Psychemedics Lab
8. Laboratory Data Package
9. Medical Review Officer Certification—Darren J. Duet, M.D.
10. MRO copy of CCF
11. Dr. Duet Medical license

Respondent Exhibits

A. Gulf South Resources letter October 20, 2015
B. Unattributed e-mail November 29, 2015
C. SECON form Jul 1, 2013
D. Central Boat Rental letter January 19, 2016
E. Central Boat Rental letter January 19, 2016
F. Central Boat Rental letter January 19, 2016
G. Numerous unassociated documents: including a September 9, 2014 letter from USCG NMC, various internet documents, CFRs, bank statements.

ALJ Exhibits

None

Coast Guard's Witnesses

1. Billy J. Pellegrin
2. Keith Breaux
3. Dr. Ryan B. Paulsen
4. Dr. Darren J. Duet

Respondent's Witnesses

None

ATTACHMENT B: SUBPART J, APPEALS

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.