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

UNITED STATES COAST GUARD
Complainant

vs.

DEMETRIUS BATISTE
Respondent

Docket Number 2018-0467
Enforcement Activity No. 5760536

DECISION AND ORDER

Issued: July 02, 2020

By Administrative Law Judge: Honorable Dean C. Metry

Appearances:

LCDR Brett F. Belanger
Sector Houston/Galveston
&
Jennifer A. Mehaffey, Esq.
Suspension & Revocation National Center of Expertise

For the Coast Guard

Jeffery C. King, Esq.

For the Respondent

I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action by filing a Complaint against Demetrius Batiste (Respondent), seeking to revoke his Merchant Mariner Credential (MMC). 46 U.S.C. § 7704. Specifically, the Complaint alleges Respondent is a user of or addicted to dangerous drugs as prohibited by 46 U.S.C. § 7704(b)[1], and the underlying regulations codified at 46 C.F.R. Parts 5 and 16 and 33 C.F.R. Part 20. The Complaint's primary factual allegations allege Respondent tested positive for marijuana metabolites on or about July 14, 2018, after submitting to an employer-ordered urine test. Respondent filed an Answer to the Complaint on February 20, 2019.[2] Thereafter, the parties conducted discovery and motion practice.

This matter proceeded to a hearing on October 16, 2019, in Dallas, Texas. During the hearing, Jennifer A. Mehaffey, Esq., and LCDR Brett F. Belanger appeared on behalf of the Coast Guard. Jeffery C. King, Esq., appeared on Respondent's behalf. As part of its case-in-chief, the Coast Guard called five witnesses, and offered 19 exhibits, all of which were admitted.[3] Respondent called two witnesses, including himself, and offered three exhibits, all were admitted. The undersigned also entered one exhibit identified as Court Exhibit I.

After the presentation of evidence and witnesses, the undersigned instructed the parties to file post-hearing briefs on the merits. Pursuant to the court's briefing order, the Coast Guard

[1] The National Defense Authorization Act of 2019 redesignated subsection (c) to subsection (b). The Coast Guard's Complaint referred to the previous subsection, 7704(c). Throughout this Decision and Order, the undersigned will reference the subsection as 46 U.S.C § 7704(b), as this was a technical change and the substance of the subsections did not change.

[2] Respondent's Answer shows he did not admit nor deny the factual or jurisdictional allegations in the Complaint. However, the parties proceeded throughout this case as if Respondent had denied all the allegations. The Coast Guard could have moved for an order deeming Respondent's failure to respond to each individual paragraph of the Complaint as an admission, but did not do so during the entirety of the proceedings. 33 C.F.R. § 20.308. Accordingly, given that the parties proceeded to a hearing on the merits, the undersigned has treated Respondent's Answer as a general denial of all allegations.

[3] The Coast Guard's exhibits are identified as CGX 1 through 19. Respondent's exhibits are identified as RX A, B, and C.

filed its brief by January 15, 2020. Respondent's brief was due by February 18, 2020; however, the undersigned never received Respondent's brief. On or about June 17, 2020, the undersigned's staff discovered Respondent's counsel filed a motion on February 19, 2020, (one day after the due date for his response brief) requesting additional time to file a post-hearing brief. Although the document was filed in the Marine Information for Safety and Law Enforcement database, the undersigned's staff never received the request due to an apparent preexisting email problem. See Sua Sponte Order to Show Cause dated June 17, 2020. Accordingly, the undersigned issued a Sua Sponte Order to Show Cause, instructing Respondent to explain why his request for more time should be entertained at such a late date in the proceedings and to explain why he had not yet filed a brief. The June 17, 2020 Order gave Respondent until June 26, 2020, to provide an explanation. As of the date of this Decision, Respondent has not responded to the undersigned's June 17, 2020 Order. Accordingly, I find no good cause exists to permit Respondent to file a brief at this stage of the proceeding.

This matter is now ripe for decision. For the reasons stated below and in consideration of the record as a whole, I find the Coast Guard **PROVED** Respondent is a user of dangerous drugs and accordingly, Respondent's MMC is **REVOKED**.

II. FINDINGS OF FACT

The undersigned finds the following facts proved by preponderant evidence in the record.

1. At all times relevant, Respondent held MMC #000454040. CGX 1.
2. Sometime in September 2017, Harley Marine Services hired Respondent. Transcript II at 75; CGX 5.
3. Harley Marine Services is the parent company of Olympic Tug and Barge, Inc. Tr. 1 at 20.
4. At the time of Respondent's hire, and all relevant times, Harley Marine Services maintained a drug and alcohol policy (D&A policy) requiring "all individuals directly involved in any marine casualty, incident, or injury that is deemed serious by company management" to submit to drug and alcohol testing. Tr. I at 76; CGX 5.

5. Respondent electronically signed the D&A on September 1, 2017, which was in effect in July, 2018. Tr. I at 76; CGX 5.

6. On July 12, 2018, Respondent reported for duty in Seattle, Washington, in preparation to commence work for Olympic Tug and Barge, Inc., on July 13, 2018. Tr. II at 90, 107.

7. On July 13, 2018, Respondent injured his hip while moving heavy equipment (blower fans), weighing more than 100 pounds, on the Barge FIGHT FANCONI ANEMIA (FFA). CGX 2.

8. On July 14, 2018, Respondent reported his injury to a coworker employee, "Jordan" and ultimately to Robert Wayne Sortor, the health safety environmental manager for Harley Marine Services and regional safety manager for Olympic Tug and Barge, Inc.. Id.

9. Mr. Sortor's responsibilities included responding to injuries and making determinations regarding when chemical testing occurs. Tr. I at 21-25.

10. On July 14, 2018, Mr. Sortor instructed Respondent to complete paperwork and to call him. CGX 4, 5; Tr. II at 117-118.

11. During their phone conversation, Mr. Sortor instructed Respondent to go to a medical clinic and advised he would be submitting to drug screening after undergoing a physical. Id.

12. Respondent ultimately went to U.S. HealthWorks, a clinic in Seattle, where he presented himself for a drug screening. Tr. II at 122-123.

13. Jim Clark, a trained urine collector with 30 years' experience, collected Respondent's urine specimen on July 14, 2018. Tr. I at 104; CGX 6, 8, 9.

14. As part of the collection procedures, Respondent provided Mr. Clark with photo identification to confirm his identity. Tr. I at 104-110; CGX 8, 9.

15. Mr. Clark then instructed Respondent to remove everything from his pockets, and Respondent complied. Tr. I at 104.

16. Mr. Clark next selected a sealed cup in a sealed container, tore it open and handed the cup to Respondent. Id.

17. Mr. Clark walked Respondent to the restroom, checked the toilet to confirm it was flushed and ensure nothing was in the restroom to adulterate the specimen. Id.

18. Mr. Clark then instructed Respondent to provide at least 30 mL of urine. Id. at 105.

19. Respondent voided in the specimen cup and provided it to Mr. Clark, who checked the lid on the specimen, making sure it was tightly closed. Id. at 105.

20. The cup Respondent used provided instant initial results to a drug test and indicated Respondent's specimen was considered an initial positive. Tr. I at 109-110.

21. Mr. Clark then checked the temperature to ensure it was acceptable, sealed the cup with a seal reflecting specimen identification number AA04310405 identifying Respondent, and Respondent also initialed on the cup. Id. at 105-106, 119.

22. Respondent and Mr. Clark signed an accompanying electronic form reflecting the same identification number AA04310405. Id. at 105.

23. Mr. Clark printed the electronically signed forms, placed the lab copy into a bag with the specimen, and sealed the bag. Id.

24. Mr. Clark then sent the specimen to a lab for testing at Clinical Reference Laboratory (CRL). Id. at 105; CGX 8, 11.

25. After submitting the urine specimen, Respondent submitted to a doctor's physical examination; the doctor did not make a specific diagnosis but was "sure [Respondent's employer was] going to send [Respondent] home" and further advised that Respondent needed to be off work for "a couple days." Id.

26. After the collection, Respondent's specimen arrived at CRL on July 17, 2018, a laboratory certified by the Department of Health and Human Services to meet the standards for Mandatory Guidelines for Federal Workplace Drug Testing Programs, federally certified under the National Laboratory Certification Program, and accredited under the College of American Pathologists. Tr. I at 130, 133; CGX 10.

27. At all times relevant, CRL employed Dr. David J. Kuntz as the Executive Director of Analytical Toxicology, Co-Laboratory Director and Scientific Director. Tr. I at 129.

28. Dr. Kuntz supervised the testing procedures and processes for Respondent's urine specimen testing. Id.

29. The form and transfer of the specimen to the laboratory was properly conducted, and there was no adulteration or tampering. Id. at 137-138.

30. The first test conducted on Respondent's specimen was an immunoassay test, a technique which looks for a specific presence of a certain group of drugs, including marijuana. Id. at 139.

31. Respondent's test results under the immunoassay revealed the presence of marijuana assay at 97 nanograms per milliliter. Id. at 150.

32. Respondent's test results under a second test, the mass spectrometry, revealed the presence of marijuana, revealing 25 nanograms per milliliter of urine. Tr. I at 138-140; CGX 11.

33. Each time Respondent's sample was touched, CRL documented the movement. Id. at 153.

34. The instruments used to conduct the test were validated as accurately performing throughout the testing process. Id. at 151.

35. The chemical testing procedures conducted in this case did not substantially differ from those protocols required by the Department of Transportation (DOT). Tr. I at 161.

III. DISCUSSION

A. Jurisdiction

Under Coast Guard case law, jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 COX (2001). Like federal courts, the undersigned has an "independent obligation to ensure" it does not exceed the scope of its jurisdiction and therefore "must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011). See also Appeal Decision 2656 (JORDAN) (2006).

When the Coast Guard charges use of a dangerous drug, jurisdiction exists so long as the respondent holds a credential at the time the Coast Guard initiates the proceedings. Appeal Decision 2712 (MORRIS) (2016); Appeal Decision 2721 (TOWNSEND) (2018). Here, the record shows Respondent held MMC #000454040 at all times relevant. CGX 1. Accordingly, the undersigned has jurisdiction to adjudicate this matter.

B. Burden of Proof

Pursuant to 46 U.S.C. § 7702(a), title 5 U.S.C. §§ 551-559 of the Administrative Procedure Act (APA) applies to Coast Guard suspension and revocation (S&R) proceedings. The APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. 5 U.S.C. § 556(d). In an S&R proceeding, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a). Respondent bears the burden to prove any affirmative defenses. Id.

Under the APA, the fact-finder must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial

evidence" before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party must prove that "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Here, the Coast Guard must prove by preponderant evidence that Respondent is the user of or addicted to a dangerous drug, as alleged in the Complaint. 46 U.S.C. § 7704(b).

C. Use of or Addiction to a Dangerous Drug

The Coast Guard's single-count Complaint asserts Respondent "has been the user of a dangerous drug" as prohibited by 46 C.F.R. § 7704(b), and 46 C.F.R. § 5.35. To prove this allegation, the Coast Guard may rely on various types of evidence, including witness' observations and/or chemical drug testing. In this case, the primary evidence comes in the form of a July 14, 2018 positive drug test.

There are two types of drug tests the Coast Guard relies on as evidence to prove a charge of use of, or addiction to the use of dangerous drugs; tests ordered pursuant to 46 C.F.R. Part 16 (Part 16 drug tests), and those **not** ordered pursuant to 46 C.F.R. Part 16 (Non-Part 16 drug tests). Appeal Decisions 2668 (MERRILL) (2003); 2625 (ROBERTSON) (2002); 2545 (JARDIN) (1992); 2704 (FRANKS) (2014). An employer conducts a test pursuant to Part 16 only for one, or more, of the following reasons: 1. Pre-employment testing; 2. Periodic testing; 3. Random testing; 4. Testing resulting from serious marine incidents; and 5. Reasonable cause testing. See 46 C.F.R. §§ 16.210-16.250. Commandant Decisions on Appeal (CDOA) often refer to these Part 16 tests as "government ordered tests" because the employer has no discretion under these five circumstances, and must conduct the chemical testing as an agent of the government. Appeal Decision 2704 (FRANKS) (2014).

The Coast Guard may also rely on Non-Part 16 tests. Employers order these Non-Part 16 tests for reasons other than the regulatory five reasons, usually a reason set forth in the employer's handbook/and or drug testing policies. These "employer ordered tests" are not ordered by the government, and therefore, the employer is not acting as a government agent.

When the employer acts as a government agent, the regulations trigger extra measures to protect the mariner. In Part 16 tests, this extra protection includes the requirement for urine specimens to be tested pursuant to the DOT regulations in 49 C.F.R. Part 40. 46 C.F.R. § 16.201. In Non-Part 16 tests, there is no requirement to comply with Part 40 because the employer is seemingly not acting as a government agent. However, if Part 16 testing requirements in Part 40 are not followed, the administrative law judge (ALJ) must ensure the urine specimen test results are reliable.

The key difference between the Coast Guard relying on Part 16 tests versus a Non-Part 16 test is whether Respondent is presumed to be a user of dangerous drugs based solely on the positive drug test. 46 C.F.R. § 16.201(b). Under Section 16.201(b), the Coast Guard can obtain a presumption that the respondent is a user of dangerous drugs **if and only if** the Coast Guard proves the employer ordered the tests for one of the reasons in Part 16 (the why) and the test was conducted in accordance with Part 40 (the how). See Appeal Decision 2704 (FRANKS) (2014) (discussing the "why" and "how" under Part 16 tests). On the other hand, the presumption never applies when the Coast Guard relies on an employer ordered Non-Part 16 test, or relies on testing/collection procedures not done in accordance with Part 40.

Having outlined these differences, the undersigned turns to the case at bar.

1. Non-Part 16 Tests as Evidence of Drug Use

In this case, the Coast Guard relies on a Non-Part 16 test, ordered by Respondent's employer, to prove Respondent is the user of a dangerous drug. Specifically, the Coast Guard claims Harley Marine tested Respondent pursuant to a policy in the employer's D&A handbook, not for any of the reasons in 46 C.F.R. § 16.210-16.250. Second, the Coast Guard recognized at the hearing the testing procedures in this case did not comply with Section 16.201 and Part 40. Tr. I at 12. Accordingly, the undersigned will review the evidence and testimony in this case consistent with similar CDOAs.

2. Prima Facie Case of Drug Use Based on Non-Part 16 Test

When relying on an employer ordered Non-Part 16 test, the Coast Guard must prove: 1) Respondent participated in an employer ordered chemical drug test; 2) Respondent tested positive for dangerous drug(s) described in 46 C.F.R. § 16.105; 3) The chemical test conducted is a reliable test because it was conducted in accordance with procedures and safeguards demonstrating the reliability to the ALJ. I address each in turn, considering the evidence offered during the hearing.

a. Respondent Participated in an Employer Ordered Non-Part 16 Drug Test

Although the parties disagree on the exact date, they agree Respondent took a drug test in response to his employer's instructions. Tr. II at 142. Respondent admits he reported his injury to a co-worker, made contact with Rob Sortor (a manager), and Mr. Sortor ordered Respondent to undergo drug screening. Tr. II at 118. During his conversation with Mr. Sortor, Respondent described his injury as a light strain, and Mr. Sortor did not believe the injury was a serious marine incident. Tr. I at 51; Tr. II at 117. Accordingly, at the time the employer ordered the test, Respondent gave no indication, and there was no objective evidence, that any of the events in sections 16.210-16.250 transpired. Therefore, the employer had no reason to conduct a

government-ordered test required by Part 16 in this case. Consequently, the only drug testing that Harley Marine could have ordered under these facts was an employer-ordered Non-Part 16 test.

As it concerns Harley Marine's policy, the record shows Mr. Sortor had authority to order the test under the company's drug testing provisions, which Respondent signed upon hire. Tr. I at 76; CGX 5. Specifically, Harley Marine Services' D&A policy required "all individuals directly involved in any **marine casualty**, incident, or injury that is deemed serious by company management" to submit to drug and alcohol testing. Tr. I at 76; CGX 5 (emphasis added).

Although not defined in the company policy, the regulations define "marine casualty" as: "events caused by or involving a vessel and includes, but is not limited to, the following: (1) Any fall overboard, **injury**, or loss of life of any person." 46 C.F.R. § 4.03-1 (emphasis added); see also Appeal Decision 2445 (MATHISON) (1987) (noting the definition of marine casualty in S&R proceedings).[4] Applying this definition here, the record shows Respondent's injury was a quintessential "marine casualty." When describing the incident, Respondent admitted he injured his hip while moving heavy equipment aboard the Barge FFA. Tr. II at 94, 97, 117. Therefore, the record shows Respondent was involved in a marine casualty within the ambit of Harley Marine's D&A policy—Respondent suffered an injury involving a vessel. As a result, I find the D&A policy directly encompassed this factual scenario and the D&A authorized Mr. Sortor's order to test.

With regard to the actual collection of Respondent's testing, the record shows Respondent submitted to drug screening on or about July 14, 2018. Jim Clark, a trained urine collector with 30 years' experience, collected Respondent's urine. Tr. I at 100-102; CGX 8, 9. As part of the collection procedures, Respondent provided Mr. Clark with photo identification to

[4] Harley Marine's handbook's use of "marine casualty" should not be confused with "marine casualty" as used in reasonable cause testing under 33 C.F.R. § 95.035(a)(1).

confirm his identity. Tr. I at 104-110; CGX 8, 9. Mr. Clark then instructed Respondent to remove everything from his pockets, and Respondent complied. Tr. I at 104. Mr. Clark selected a sealed cup in a sealed container, tore it open and handed the cup to Respondent. Id. Mr. Clark walked Respondent to the restroom, checked the toilet to ensure it was flushed, and verified nothing was in the restroom to adulterate the specimen. Id. Mr. Clark then instructed Respondent to provide at least 30 mL of urine. Id. at 105. Respondent voided in the cup and provided it to Mr. Clark, who ensured he tightly closed the lid on the specimen cup. Id. at 105. Mr. Clark then checked the temperature to confirm it was acceptable and sealed the cup with a seal reflecting a specimen identification number AA04310405 identifying Respondent; Respondent also initialed on the cup. Id. at 105-106, 119. Respondent and Mr. Clark signed an accompanying electronic form reflecting the same identification number AA04310405. Id. at 105. Mr. Clark printed the electronically signed forms, placed the lab copy into a bag with the specimen, and sealed the bag. Id. Mr. Clark then sent the specimen to a lab for testing at CRL. Id. at 105; CGX 8, 11.

Based on this evidence, I find Respondent submitted to an employer ordered chemical drug test on or about July 14, 2018.

b. **Respondent Tested Positive for Dangerous Drugs**

After the collection, Respondent's specimen arrived at CRL, a laboratory certified by the Department of Health and Human Services to meet the standards for Mandatory Guidelines for Federal Workplace Drug Testing Programs, federally certified under the National Laboratory Certification Program, and accredited under the College of American Pathologists. Tr. I at 130, 133; CGX 10. At the time Respondent's specimen underwent testing, CRL employed Dr. David J. Kuntz as the Executive Director of Analytical Toxicology, Co-Laboratory Director and Scientific Director. Tr. I at 129. Dr. Kuntz supervised the testing procedures and processes for Respondent's urine specimen testing in this case. Id. Dr. Kuntz confirmed the form and transfer

of the specimen to the laboratory from the clinic was proper and there was no evidence of adulteration or tampering. Id. at 137-138.

As it concerns the actual testing of Respondent's specimen, Dr. Kuntz explained CRL first conducted an immunoassay test, a technique that looks for a certain group of drugs, including marijuana. Id. at 139. Respondent's test results under the immunoassay revealed the presence of marijuana assay at 97 nanograms per milliliter. Id. at 150. Under the DOT testing requirements, the initial test cut off is 50 ng/mL for marijuana metabolites; anything above 50 ng/mL indicates the presence of marijuana. 49 C.F.R. § 40.87. Therefore, applying the DOT standards here, Respondent's first test indicated the presence of marijuana. 49 C.F.R. § 40.87.

Dr. Kuntz testified CRL also subjected Respondent's specimen to a second test identified as the mass spectrometry. Tr. I at 151. The mass spectrometry is a confirmatory test and this test revealed Respondent's urine contained the presence of marijuana metabolites at a level of 25 nanograms per milliliter of urine. Tr. I at 138-140; CGX 11. Under the DOT standards in 49 C.F.R. § 40.87, a confirmatory test is positive for marijuana if it is over 15 ng/mL. Accordingly, because Respondent's urine tested positive at 25 ng/mL, it is a positive result under 49 C.F.R. § 40.87.

After CRL tested Respondent's specimen, Stephanie Ridgeon, a Medical Review Officer (MRO) Assistant at Concentra,[5] reviewed Respondent's test results and eventually made contact with Respondent. Tr. II at 12. Ms. Ridgeon testified Respondent did not explain why his test would have come back positive and only indicated Respondent admitted to taking Advil. Id. Based on this conversation, Ms. Ridgeon concluded Respondent's test was positive for marijuana. Tr. II at 16.

[5] The record contains references to U.S. HealthWorks. Concentra purchased U.S. HealthWorks at some time before the hearing in this case. See Tr. II at 8.

Given the strength of Dr. Kuntz' testimony, and after reviewing the thoroughness of the documents supporting his sworn statements, the undersigned concludes Respondent's urine specimen tested positive for marijuana metabolites at a concentration sufficient to support the conclusion Respondent tested positive for marijuana. Moreover, as recognized by Appeal Decision 2529 (WILLIAMS) (1991), marijuana is a dangerous drug. See 21 U.S.C. § 802(16). Therefore, I find Respondent tested positive for a dangerous drug.

c. CRL Conducted the Test in Accordance with Procedures and Safeguards Showing the Test Was Reliable

As explained by the Commandant, when the Coast Guard relies on a Non-Part 16 test not done in accordance with the procedures of 49 C.F.R. Part 40, the Coast Guard must prove the collection and testing was conducted with procedures and safeguards sufficient to convince the ALJ that the test is accurately showing the presence of a dangerous drug. Appeal Decision 2720 ARGAST (2018); Appeal Decision 2704 (FRANKS) (2014). ARGAST makes clear one way the Coast Guard can show this reliability is to show the test at issue complies with Part 40.

Here, the evidence shows the collection and testing procedures were very close with 49 C.F.R. Part 40. In fact, the procedures appear to only deviate from Part 40 in three ways: first, the collector did not create a split sample as required by 49 C.F.R. § 40.71; second, the collector required only 30 mL of urine instead of the requisite 45 mL mandated by 49 C.F.R. § 40.63; and third, Respondent's drug testing results were never reviewed by an MRO as required by 49 C.F.R. § 40.121-40.169, but were reviewed by an MRO assistant. Tr. I at 116; Tr. II at 8, 14. In fact, Mr. Clark testified the collection procedures in this case were almost exactly the same with the exception of the split sample and the paperwork. Tr. I at 116. Similarly, Dr. Kuntz testified concerning the actual testing of the sample that "[i]n this particular case, with marijuana there is no difference, we follow the same identical protocols" for Harley Marine testing or tests done in accordance with 49 C.F.R. Part 40. Tr. I at 161.

Dr. Kuntz also vouched for the accuracy of the instruments used during testing and swore under oath the instruments in this case were validated as accurately performing throughout the process. Id. at 151. Dr. Kuntz also testified "[e]very time [the sample] was touched, even if it was moved from one side of the table to the next it gets documented." Tr. I at 153. In any event, Respondent never argued, nor does anything in the record show, that any of these three deviations affected the validity of the test results.

With this evidence in mind, the undersigned concludes the collection and testing procedures in this case demonstrate the accuracy of the test results showing presence of marijuana metabolite is reliable.

D. Respondent's Defenses

Although Respondent did not file a post-hearing brief, the undersigned acknowledges his counsel and his testimony advanced several arguments that merit discussion. Specifically, Respondent asserts: 1. he never used marijuana; 2. the positive test results might be due to his use of CBD cream; 3. the order to undergo drug screening violates the fourth amendment and circumvents Part 16; and 4. the order to undergo drug screening somehow included racial animus. I reject each in turn.

1. Respondent's Testimony that He Never Used Marijuana Is Not Credible

Respondent's testimony directly conflicts with the positive urinalysis; he vehemently denies ever using marijuana. Tr. II at 47. Therefore, the undersigned must consider Respondent's credibility and ultimately decide whether to believe the test results, or Respondent's testimony.

CDOAs roundly recognize the ALJ's broad discretion when determining witness credibility. Ultimately, "it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and to resolve inconsistencies in the evidence." Appeal Decision 2616 (BYRNES) (2000) (citing Appeal Decision 2554 (DEVONISH). A review of CDOAs shows credibility

determinations turn primarily on the demeanor of the witness, as observed by the ALJ at hearing. Appeal Decision 2689 (SHINE) (2010); Appeal Decision 2674 (MILLS) (2008). The ALJ may also consider other factors such as prior statements of the witness, the consistency of the testimony with other evidence, and the interest of the witness in the outcome of the proceeding. USCG v. Kochis, 2016 WL 9331445 (2016 ALJ D&O).

a. The Consistency of Respondent's Statements with Other Evidence

The record shows Respondent's narration of events is inconsistent with other evidence and testimony in the record. First, the 2018 calendar conflicts with Respondent's recollection of the precise days and dates surrounding the actual injury and report to management. Specifically, Respondent recalled reporting to work on "Tuesday" July 12, 2018, and remembered the injury happening on his first actual work day on July 13, 2018, which would have been a Wednesday. Tr. II at 107, 111. However, a review of the calendar in July 2018, shows July 12, and July 13, 2018 were on a Thursday and Friday, not Tuesday and Wednesday.[6] The undersigned fully acknowledges that any witness can make such a mistake concerning exact dates and/or days of the week; alone, this minor inconsistency would not normally call a witness' credibility into serious doubt. Indeed, Respondent may have simply recalled starting work on a Tuesday and being injured on a Wednesday (the first actual work day), and simply forgot the calendar date correlating to that day of the week. But as explained below, the inconsistencies do not stop there.

A review of CGX 2 shows Respondent filled out a form reporting the incident to management on July 14, 2018—a Saturday. In the form, Respondent indicated the injury

[6] The undersigned takes official notice of the 2018 calendar. See 33 C.F.R. § 20.806; Fed. R. Evid. 201 (court may take judicial notice of facts that are capable of accurate determination by sources whose accuracy cannot reasonably be questioned); see also Horowitz v. GC Services Ltd. Partnership, 2015 WL 1959377 at *3 (S.D. Cal. Apr. 28, 2015) (finding that a "calendar date is not subject to reasonable dispute because the accuracy of a calendar date cannot be reasonably questioned."). As required by the rule, all parties shall have 5 days to rebut the facts established by the undersigned's official notice of the 2018 calendar.

happened on July 13, 2018, which, being the day before, would have been Friday.[7] Thus, CGX 2 alone indicates Respondent reported the injury **one day after it happened**. But that is not what Respondent swore to at the hearing. At the hearing, Respondent's testimony vividly describes his attempt from Wednesday-Saturday to relieve his pain and suffering, e.g., calling his brother for help, using exercise and medication, resting on two different vessels, and trying alternative medical treatment. Tr. II at 107-117.[8] Therefore, the undersigned concludes one of two scenarios must have happened: 1. None, or few of the events Respondent described in his testimony at hearing actually transpired; or 2. Respondent was untruthful when he informed management that his injury happened one day prior to the report. Either way, given these notable inconsistencies, I find this factor militates against Respondent's credibility.

b. The Interest of the Witness in the Outcome of the Proceeding

Respondent's interest in this case is obviously high and any motive to be dishonest about drug use is self-evident. Should the undersigned believe the test results, and disbelieve Respondent's assertion that he never ingested marijuana, the undersigned would have no option but to revoke his MMC. That does not mean that every mariner posed with the same situation should be disbelieved. However, in light of the other evidence in this case, and the inconsistencies mentioned above, the undersigned concludes this factor cuts against believing Respondent's testimony when compared to a reliable test as described above.

c. Respondent's Demeanor

The undersigned's observation of Respondent's demeanor also calls his credibility into question. During the hearing, Respondent's testimony was theatrical at times, smacked as misleading, and did not possess the value of honesty and forthrightness. When considering

[7] Respondent admits he completed the Hotline Incident Questionnaire—CGX 2. Tr. II at 117.
[8] I reject Respondent's timeline described in the transcript, Tr. II at 107-117.

Respondent's demeanor, and the two factors discussed above, I am left with the firm belief Respondent was simply not completely truthful about his use of dangerous drugs in this case.

Ultimately, after considering the three factors above, the undersigned concludes Respondent was not credible and therefore his testimony that he did not ingest marijuana is unconvincing.

2. The Positive Test Results Might Be Due to Respondent's Use of CBD Cream

During the hearing, Respondent made some references to use of CBD cream when referencing his attempts to treat his injury. Tr. II at 136. Respondent's counsel also made arguments that these creams are not "heavily regulated" and implicitly asked the undersigned to infer an "innocent ingestion" argument based on the totality of the circumstances. Tr. II at 179. In other words, Respondent's counsel asks the undersigned to conclude Respondent innocently used CBD cream with marijuana properties, and that is the cause of the positive urinalysis.

First, as there is no authority that simple use of CBD cream, alone, would excuse any positive drug test; I reject that argument outright. The innocent ingestion theory, however, is somewhat viable. Had Respondent proved he unknowingly ingested or used CBD cream without actual or constructive knowledge that the cream might have marijuana properties, the undersigned could consider the defense when determining if the positive drug tests prove he is a user of a dangerous drug. However, Respondent raised this issue for the first time during the defense's case-in-chief, and did not present any other evidence besides his fleeting statements to support the innocent ingestion theory. The federal courts would conclude Respondent waived the affirmative defense by not pleading it in his Answer, which would allow the Coast Guard to have notice and opportunity to conduct discovery. Day v. McDonough, 547 U.S. 198, 209-11 (2006). However, even if Respondent did not waive the defense by failing to raise it in the Answer, the undersigned finds he did not offer any convincing evidence to support the theory, and his testimony alone was simply unconvincing. Therefore, Respondent failed to carry the

burden to prove an affirmative defense required under 33 C.F.R. § 20.702, and I find his innocent ingestion theory **NOT PROVED**.

3. Mr. Sortor's Order to Undergo Drug Screening Does Not Violate the Fourth Amendment and there Is No Evidence Harley Marine Was Attempting to Circumvent Part 16

During the hearing, Respondent's counsel made references to violating Respondent's constitutional rights because, in his view, the Coast Guard and Respondent's employer were circumventing Part 16 by ordering a Non-Part 16 test without cause.

Before turning to Respondent's argument, the undersigned notes CDOAs address the undersigned's restricted ability to address constitutional arguments. As explained in Appeal Decision 2556 (LINTON) (1994):

> These proceedings are governed by statute and regulations and are intended to maintain standards for competence and conduct essential to the promotion of safety at sea. Title 46 U.S.C. § 7701; 46 C.F.R. § 5.5. Those regulations specifically detail the authority of the Administrative Law Judge at the hearing level and the Commandant of the Coast Guard at the appellate level. Neither the Administrative Law Judge nor I, as the Commandant, are vested with the authority to decide constitutional issues; that is exclusively within the purview of the federal courts. See 4 Davis, Administrative Law Treatise § 26.6 (1983); Appeal Decisions Nos. 2433 (BARNABY) and 2202 (VAIL).

Thus, strictly speaking, LINTON prohibits the undersigned from ruling on these constitutional issues.

However, in FRANKS, the Commandant found it necessary to discuss the Fourth Amendment as it concerns chemical drug testing under Part 16. There, the Commandant explained:

> Clearly, the procedures in 46 C.F.R. Part 16 were established not only to protect public safety interests, but also to ensure that the constitutional rights of the mariner were safeguarded throughout the drug testing process. By expressly mandating limited, specific types of drug tests -- pre-employment, periodic, random, serious marine incident and reasonable cause drug tests -- the drafters of the regulations ensured that constitutionally protected privacy interests of the mariner were balanced with the overriding need to ensure a drug-free and safe workplace. The

> drafters recognized that the Fourth Amendment applies and that testing undertaken by private employers to comply with Federal regulatory requirements constitutes Government action. Hence, when the employer tests to comply with 46 C.F.R. Part 16, the employer acts as an instrument or agent of the Government. Cf. Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 611-615 (1989).

Appeal Decision 2704 (FRANKS) (2014). In contrast, the Commandant concluded, when an employer is not compelled to test under Part 16, and conducts a Non-Part 16 test under an employer ordered test, "the constitutional harms that Part 16 seeks to avoid are absent."[9] But as discussed below, FRANKS does warn the ALJ should consider whether the Coast Guard and/or the employer attempted to circumvent Part 16.

In FRANKS, the Commandant made clear that a marine employer could test for reasons not set forth in Part 16. However, without much discussion, FRANKS issued the following caveat: "A complaint based on an alleged employer-required test independent of Part 16 should be subjected to close scrutiny to ensure that Part 16 has not been circumvented." Id., at 11, n. 1. Given that FRANKS concerned a Part 16 test, the undersigned considers the caveat obiter dicta and not binding on the undersigned. Nonetheless, the undersigned interprets the caveat to mean that where a Part 16 test reason exists—one of the reasons set forth in 46 C.F.R. §§ 16.210-16.250—the employer should employ a 49 C.F.R. Part 40 test. In other words, when the Coast Guard brings an S&R case based on an employer based test, using procedures not complying with 49 C.F.R. Part 40, the ALJ should consider whether the employer should have tested for one of the reasons in Part 16, and conducted a test compliant with 49 C.F.R. Part 40.

Applying this interpretation here, the undersigned concludes Harley Marine had no objective evidence that a Part 16 event transpired when Respondent reported the injury to his hip

[9] The undersigned is uncertain whether FRANKS is completely accurate on this point. As explained in Skinner "[T]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one." Skinner, 489 U.S. at 615. Unfortunately, neither party addressed this issue in this case, therefore the undersigned declines to analyze whether FRANKS runs awry of the Supreme Court's decision in Skinner. That discussion must wait for another day.

in this case. As discussed above, Respondent did not fully disclose his injury to his employer, he described it as a "light muscle strain." Tr. II at 117. Based on this description, Harley Marine could conceivably conclude this injury was not "a serious marine incident" which would have triggered a Part 16 test. Indeed, Mr. Sortor testified he knew this was not a serious marine incident based on Respondent's description. Tr. I at 51. Accordingly, the undersigned concludes Harley Marine did not circumvent Part 16 when it ordered Respondent to undergo a Non-Part 16 test because he had no reason to believe an event requiring testing set forth in 46 C.F.R. §§ 16.210-16.250 had transpired.

4. Respondent's Order to Undergo Chemical Testing Was Not Racially Motivated

Throughout much of his testimony, Respondent made specific references to racial comments he has endured during his career as a mariner. Tr. II at 63-70. And although not directly present in a post-hearing brief or otherwise, the undersigned pauses to note that no evidence in this record supports even the slightest conclusion that Respondent's order to undergo chemical drug testing resulted from racially motivated prejudices or animus. Indeed, if the undersigned suspected that such motives existed in this case, the undersigned would have conducted intensive questioning of Respondent's employer to uncover any evidence supporting the possibility. It goes without saying that if a marine employer uses race based motives to target an employee and subject him to chemical drug screening, such a test could never form the basis of an S&R proceeding. With this principle in mind, the undersigned reviewed all of the evidence and testimony here and concludes while Respondent has endured racial animosity throughout his career, no racial animus or racial motive played any role in Mr. Sortor ordering Respondent to undergo chemical testing in this case. Instead, I find Mr. Sortor ordered the testing consistent with company policy.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent held MMC #000454040 and the undersigned has jurisdiction to adjudicate this matter.

2. On July 14, 2018, Respondent participated in an employer ordered chemical drug test pursuant to company policy;

3. Respondent's urine specimen was collected using procedures protecting the chain of custody, ensuring association with Respondent, and ensuring no adulteration of the specimen;

4. Respondent's specimen tested positive for marijuana, a dangerous drug described in 46 C.F.R. § 16.105;

5. The chemical test conducted is a reliable test because it was conducted in accordance with procedures and safeguards demonstrating the reliability to the ALJ;

6. None of Respondent's defenses rebut the Coast Guard's evidence of drug use in this case;

7. The Coast Guard proved by preponderant evidence Respondent is a user of or addicted to a dangerous drug as described in 46 U.S.C. § 7704.

V. SANCTION

When the Coast Guard proves a mariner has used or is addicted to dangerous drugs, revocation of the MMC is the only imposable sanction unless cure is proven. See 46 U.S.C. § 7704(b); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). Respondent made no showing of cure in this case, and therefore the only appropriate sanction is **REVOCATION**.

VI. ORDER

IT IS HEREBY ORDERED, Respondent's Merchant Mariner Credential Number 000454040, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent are **REVOKED**.

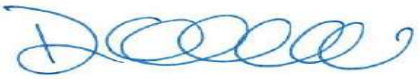
IT IS FURTHER ORDERED, upon service of this Order, Respondent shall immediately surrender his credentials and all other valid licenses, documents, and endorsements

issued by the Coast Guard to the United States Coast Guard, LT Brett F. Belanger, Sector Houston/Galveston 13411 Hillard Street, Houston, TX 77034.

IT IS FURTHER ORDERED, because the undersigned takes official notice of the 2018 calendar, all parties shall have 5 days from the date of this order to rebut the facts established by the undersigned's official notice of the 2018 calendar. 33 C.F.R. § 20.806.

PLEASE TAKE NOTICE, pursuant to 33 C.F.R. § 20.904 and/or 46 C.F.R. § 5.901, Respondent may file a motion to reopen this matter. The filing of a motion to reopen the record of a proceeding does not affect any period for appeals.

PLEASE TAKE FURTHER NOTICE, 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.



Dean C. Metry
U.S. Coast Guard Administrative Law Judge

Date: July 02, 2020