UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

ROBERT GARRETT NELSON

Respondent

Docket Number 2019-0403
Enforcement Activity No. 5771699

DECISION AND ORDER

Issued: June 29, 2020

By Administrative Law Judge: Honorable Michael J. Devine

Appearances:

CWO DEREK GIBSON
Sector Key West

LINEKA N. QUIJANO, ESQ.
Suspension & Revocation National Center of Expertise

For the Coast Guard

ROBERT GARRETT NELSON, *Pro Se*

For Respondent

I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Robert Garrett Nelson's (Respondent) Merchant Mariner Credential (MMC) No. 000288801. This action is brought pursuant to the authority contained in 46 U.S.C. 7704(b) and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

The Coast Guard issued a Complaint on October 15, 2019, charging Respondent with use of or addiction to dangerous drugs under 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35. Specifically, the Coast Guard alleges Respondent took a random drug test on September 12, 2019, which yielded a positive result for amphetamines and methamphetamines.

On November 11, 2019, Respondent filed a Motion to Dismiss for Failure to State a Claim Under Which Relief Can Be Granted Rule 12(b)(6) Federal Law of Civil Procedure, instead of an Answer to the Complaint admitting or denying the allegations.[1] The undersigned Administrative Law Judge (ALJ) considered the motion as a request for summary decision and denied the motion because disputes of material fact remained in issue.

Respondent filed his Answer on December 10, 2019, admitting all jurisdictional allegations and denying, or stating lack of sufficient knowledge to admit or deny, all factual allegations of the Complaint. Respondent also asserted affirmative defenses, alleging the drug test was not performed in accordance with the regulations at 46 C.F.R. Part 16, the Medical Review Officer (MRO) and testing consortium failed to follow post-testing confirmation procedures, Respondent produced multiple urine samples which resulted in conflicting results, Respondent was suffering from an illness that influenced the test results, Respondent has tested negative for drug use in previous tests, and Respondent's test result was contaminated by his mate's drug possession.

One day before the hearing, Respondent filed a 95-page motion requesting summary decision and/or dismissal of the case, including assertions of constitutional violations. Pursuant to a scheduling order issued on December 23, 2019, all pre-hearing motions were due on or before January 17, 2020, to allow the parties sufficient time to respond and the ALJ sufficient time to consider the filings. At the beginning of the hearing, the Coast Guard objected to Respondent's motion because it was well beyond the deadline and beyond the scope of this proceeding. The ALJ denied Respondent's motion as untimely and also advised Respondent his arguments regarding the constitutionality of the administrative enforcement proceedings were beyond the Court's jurisdiction.

The hearing commenced on February 6, 2020, in Key West, Florida. The Coast Guard moved for admission of twelve (12) exhibits, all of which were admitted, and presented the testimony of five (5) witnesses. Respondent moved for admission of four (4) exhibits, all of which were admitted, and presented the testimony of two (2) witnesses, including himself. The list of witnesses and exhibits is contained in **Attachment A**.

During the hearing, Respondent raised questions regarding whether he was properly notified by the MRO of his rights in relation to his positive drug test. At the close of the hearing, the ALJ notified the parties the record would remain open until February 10, 2020, to allow Respondent to request split sample specimen testing of the urine sample provided on September 12, 2019.[2] The Coast Guard objected on the record at the hearing and also filed a motion requesting the ALJ reconsider the order allowing Respondent to request a split sample test. Respondent did not request a split sample test by the February 10, 2020 deadline and the ALJ denied the Coast Guard's reconsideration motion as moot.

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[1] Coast Guard procedural regulations contained in 33 C.F.R. Part 20 and 46 C.F.R. Part 5 govern suspension and revocation proceedings, rather than the Federal Rules of Civil Procedure.

[2] The Commandant recently held, in Appeal Decision 2728 (DILLON) (2020), an MRO's failure to advise a mariner of the opportunity for split-sample specimen testing may be cured by an ALJ's offer at trial to continue the

Both parties submitted post-hearing briefs on March 17, 2020. The record is now closed and the case is ripe for a decision. After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations, and case law, I find the charged violation of use of or addiction to dangerous drugs **PROVED**, and in keeping with the regulations, the appropriate sanction is **REVOCATION.**

II. FINDINGS OF FACT

The following 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.

1. At all times relevant to the instant case, and specifically on September 12, 2019, Robert Garrett Nelson (Respondent) held Merchant Mariner Credential (MMC) No. 000288801. (Ex. CG-001).

2. On September 12, 2019, Key Largo Parasail employed Respondent. (Tr. at 21; Ex. CG-003).

3. Key Largo Parasail is a member of Keys Consortium, a drug testing consortium. (Tr. at 19; Exs. CG-003, CG-005).

4. Keys Consortium engages Total Compliance Network (TCN) to perform the random selection of mariners to undergo random drug testing and meet requirements for testing at the annual minimum rate required by the Coast Guard. (Tr. at 48-50, 120-121).

5. TCN selects mariners for random drug testing from a pool consisting of the members of Keys Consortium (approximately 500 individuals). (Tr. at 81-82, 84; Ex. CG-008).

6. TCN selects mariners through a computer-based random number generator that uses mariners' employee ID numbers instead of names. (Tr. at 110; Ex. CG-008).

7. If the randomly selected mariner is not available for testing, for instance if that mariner is no longer employed, TCN randomly chooses an alternate mariner from the same marine employer to undergo drug-testing also by using a random number generator. (Tr. at 84-85, 117).

8. Keys Consortium employs Lori Dekker as a specimen collector and drug testing program administrator. (Tr. at 45-46).

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proceedings pending testing of the split-sample, if the chain of custody has not been broken and it remains "sealed, preserved, and available for testing." (Id. at p. 8).

9. Ms. Dekker is certified a DOT collector. (Tr. at 57-58; Ex. CG-006).

10. Using an employee list printed on August 19, 2019, TCN randomly selected Patrick McCoy of Key Largo Parasail to undergo drug testing; however, when Ms. Dekker notified Key Largo Parasail's owner of the selection, the owner notified Ms. Dekker that Mr. McCoy was no longer employed by Key Largo Parasail. (Tr. at 52-53, 82; Ex. CG-003).

11. On or about September 10, 2019, Ms. Dekker notified Mr. Shirley, Owner of Key Largo Parasail that TCN randomly selected Respondent to undergo drug testing as an alternate selection and Mr. Shirley notified Respondent to report for testing. (Tr. at 27-30; 53-55; Exs. CG-004 and 005).

12. On September 12, 2019, Respondent presented himself to Keys Consortium for urine collection. (Tr. at 27, 30, 56-57, 64-65; Ex. CG-007).

13. Respondent produced two urine specimens on that date; the collector required him to produce a second specimen because his first specimen was outside of the acceptable temperature range. (Tr. at 64-79; Ex. CG-007).

14. Ms. Dekker administered Respondent's first urine collection as follows: (Tr. at 64-79).

    a. Respondent produced identification and Ms. Dekker had Respondent write his Social Security Number at Step 1, Part C of the Federal Drug Testing Custody and Control Form (CCF). (Tr. at 67).

    b. Respondent washed and dried his hands. (Tr. at 66).

    c. Ms. Dekker accompanied Respondent to the bathroom and poured blue ink into the toilet. (Tr. at 66).

    d. Ms. Dekker took the seal off the collection cup in front of Respondent and instructed him to fill the cup with as much urine as possible, then Ms. Dekker left the restroom to allow Respondent to void into the collection cup. (Tr. at 66, 71).

    e. When Respondent finished filling the collection cup, he handed it to Ms. Dekker, and she assessed the temperature of the specimen within four minutes. (Tr. at 71).

    f. Respondent's urine sample was not in the acceptable temperature range. (Tr. 71; Ex. CG-007).

    g. Respondent observed Ms. Dekker pour the specimen into two split sample specimen containers and seal the containers; Ms. Dekker affixed the date and had Respondent initial the sealed containers. (Tr. at 71, 76).

h. Ms. Dekker then had Respondent fill out the CCF at Step 5. (Tr. at 72).

i. Ms. Dekker then filled out Step 2 of the CCF. (Tr. at 76-78).

15. While Respondent filled out Step 5 of the CCF, Ms. Dekker advised him he would have to provide another urine specimen under observation because his first specimen was out of temperature range. (Tr. at 72, 246).

16. The process for Respondent's second urine collection followed the same procedure but with the addition of an observer, as follows:

a. Ms. Dekker chose a mariner of the same gender as Respondent to act as the observer. (Tr. at 72).

b. Ms. Dekker advised the observer to enter the restroom with Respondent and stand with his (the observer's) back against wall, facing Respondent, so the observer could see Respondent void directly into the collection cup. (Tr. at 74).

c. Ms. Dekker advised the observer to have Respondent pull his shirt out and his pants down and turn in a circle, to allow the observer to notice any contraband on Respondent's person, if any existed. (Tr. at 74).

d. The observer performed the observation according to Ms. Dekker's instructions. (Tr. at 74-75).

e. When Respondent finished producing the sample, the observer left the restroom; Respondent handed the collection cup to Ms. Dekker and she took the temperature of the sample within four minutes. (Tr. at 75).

f. Respondent's second urine sample was in the acceptable temperature range. (Tr. at 75; Ex. CG-007).

g. Respondent observed Ms. Dekker pour the specimen into two split sample specimen containers and seal the containers; Ms. Dekker affixed the date and had Respondent initial the sealed containers. (Tr. at 76).

h. Ms. Dekker filled out Step 2 of the CCF and noted that a first collection was performed that required a second collection under direct observation (Tr. at 76-78).

i. Respondent filled out Step 5 of the CCF for the second specimen. (Tr. at 77, 246).

j. Ms. Dekker packaged the sealed split sample specimen containers into separate plastic bags (the two split sample specimen containers for the first collection went into one bag, and the two split sample specimen containers for the second collection went into another bag), inserted the respective CCFs into the bags, sealed the bags, and stapled the bags together. (Tr. at 78, 132).

k. Ms. Dekker stored the sealed and packaged specimens in a file cabinet in her office for the remainder of the work day. At the end of the work day, she placed the sealed and packaged specimens in a lock box for pick-up by the lab courier. (Tr. at 79).

17. The CCF identified Respondent's second urine specimen, which had an acceptable temperature, as Specimen ID # 2103505 (Tr. 69, 195; Ex. CG-007).

18. Quest Diagnostics (Quest) performed the testing of Respondent's urine specimens. (Tr. at 132; Ex. CG-009).

19. At all times relevant to this proceeding, Quest was accredited by the National Laboratory Certification Program to perform drug-testing that comports with DOT standards. (Tr. at 128-129).

20. Quest received Specimen ID # 2103505 on September 13, 2019, and the split sample specimen bottle seals were intact. (Tr. at 133; Ex. CG-009 at p. 7).

21. At no time during Quest's possession of Specimen ID # 2103505 was the chain of custody compromised. (Tr. at 144, 146-147: Ex. CG-009 at pp. 14, 63).

22. Quest validated its screening of Respondent's specimen by running control tests on specimens with known concentrations of drugs. Those control tests all produced the predicted results and indicated the result of the screening performed on Respondent's specimen was reliable. (Tr. at 139-141, 147-148; Ex. CG-009 at p. 72).

23. The cut-off level for positive amphetamine and methamphetamine tests is 250 ng/mL. Specimen ID # 2103505 tested positive for amphetamines at a level of 5011.40 ng/mL and for methamphetamines at 55014.20 ng/mL. (Tr. at 138, 149-151; Ex. CG-009 at pp. 57, 110-111).

24. Quest performed confirmation tests on Specimen ID # 2103505 to determine whether the positive results for amphetamines and methamphetamines were accurate. (Tr. at 146-163).

25. Such confirmation testing included analysis of the amount of D-isomer and L-isomer within the methamphetamine metabolite, which resulted in an L-isomer concentration of three percent and a D-isomer concentration of 96 percent, indicating use of illicit methamphetamine. (Tr. at 160-161; Ex. CG-009 at p. 168; Ex. CG-012).

26. Lysaida (Theta) Moore served as Quest's certifying scientist and certified the testing of Specimen ID # 2103505 met all relevant standards and the results were accurate. (Tr. at 162-163; Ex. CG-009 at p. 7).

27. Dr. Seth Portnoy is, and at all times relevant to these proceedings was, a certified Medical Review Officer (MRO). (Tr. at 179-180; Ex. CG-010).

28. Dr. Portnoy served as the MRO for TCN and reviewed the test results transmitted by Quest for Specimen ID # 2103505. (Tr. at 195; Exs. CG-011, CG-012).

29. On September 25, 2019, Dr. Portnoy, or one of his assistants, made two attempts to contact Respondent by telephone to set up a time for Dr. Portnoy to discuss the result of the testing of Specimen ID # 2103505. (Tr. at 189, 195-196, 218-219; Ex. CG-011 at p. 8).

30. The first call to Respondent was placed on September 25, 2019, at 3:25 p.m., but Respondent did not answer the phone. (Tr. at 196; Ex. CG-011 at p. 8).

31. A second call to Respondent was placed on September 25, 2019, at 7:07 p.m., Respondent answered, the person explained the reason for the call was a drug test, and Respondent did not accept the call at that time but asked to be called back again. (Tr. at 196, 208-209; 238, Ex. CG-011 at p. 8).

32. Respondent did not receive another call from the MRO and Respondent did not call the MRO back at any time. (Tr. at 237-238, 242, 247).

33. MRO Dr. Portnoy certified on September 26, 2019, that Respondent's urine, Specimen ID # 2103505, collected on September 12, 2019, tested positive for amphetamines and methamphetamines. (Tr. at 198-199; Ex. CG-011 at p. 13; Ex. CG-012).

34. Respondent testified that he never used methamphetamines and did not have any prescription for methamphetamine. (Tr. at 244, 248).

35. At the hearing, Respondent was offered the opportunity to request split sample specimen testing on or before February 10, 2020, but did not make the request. (Tr. at 249-251; Order Denying Coast Guard Motion to Reconsider issued Feb. 19, 2020).

III. DISCUSSION

The purpose of Coast Guard suspension and revocation (S&R) proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Title 46 C.F.R. § 5.19 gives ALJs authority to suspend or revoke an MMC for violations arising under 46 U.S.C. § 7704. Under 46 U.S.C. § 7704(b), an MMC shall be revoked if the holder has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that he is cured. See generally Appeal Decision 2634

(BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (*rev'd on other grounds*)(definition of cure established).[3]

The chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16 and 49 C.F.R. Part 40. If an employee fails a chemical test by testing positive for a dangerous drug and the test is demonstrated to be in compliance with the requirements of 46 C.F.R. Part 16, the individual is then presumed to be a user of dangerous drugs. See 46 C.F.R. §16.201(b); Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for amphetamines and methamphetamines in a random drug test taken on September 12, 2019. The Coast Guard seeks revocation of Respondent's MMC in accordance with 46 C.F.R. § 5.569. For the reasons stated below, I find the Coast Guard has **PROVED** the charged violation based on the evidence in the record as a whole.

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). 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 No. 000288801 at all times relevant. (Respondent's Answer; Ex. CG-001). Accordingly, I have jurisdiction to adjudicate this matter.

[3] See Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

B. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard S&R hearings before United States ALJs. 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). Under Coast Guard procedural rules and regulations, the burden is on the Coast Guard to prove the charges are supported by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Securities and Exchange Commission , 450 U.S. 91, 107 (1981).

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. Construction Laborers Pension Trust for Southern 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 charged violation.

C. *Prima Facie* Case of Use of a Dangerous Drug

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 testing—the drafters of the regulations ensured that the constitutionally protected privacy

interests of the mariner were balanced with the overriding need to ensure a drug-free and safe workplace.[4] Appeal Decision 2704 (FRANKS), at *4 (2014).

As stated above, the Coast Guard bears the burden of proof. Where the sole basis of proof for the charged violation is a positive urinalysis test, the Coast Guard must establish a *prima facie* case in order to prove that a merchant mariner is a user of or addicted to dangerous drugs. See Appeal Decision 2584 (SHAKESPEARE) (1997); Appeal Decision 2704 (FRANKS) (2014); 46 C.F.R. § 16.201(b).[5] [6]

A *prima facie* case of the use of a dangerous drug is made when the following three elements are established: 1) Respondent was the person who was tested for dangerous drugs; 2) Respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998); see also Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2584 (SHAKESPEARE) (1997).

Once the Coast Guard establishes a *prima facie* case that a respondent is a user of or addicted to dangerous drugs, the respondent may then present evidence to rebut the presumption of the positive drug test result. If the respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997).

[4] See 46 C.F.R. §§ 16.210-16.250.

[5] 46 C.F.R. § 16.201(b): If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.

[6] "However, where the Coast Guard seeks to rely upon the regulatory presumption, all the terms which form the predicates for the presumption must be established according to the same standard of proof. That is to say, the elements of the case must be shown by substantial evidence of a reliable and probative nature." Appeal Decision 2603 (HACKSTAFF) (1998).

1) The Keys Consortium Random Drug Testing Process that Resulted in Respondent's Selection for a Random Chemical Test Complied with 46 C.F.R. Part 16

In this case, Respondent was required to participate in a random drug test, which is one of the bases permitted for chemical testing under 46 C.F.R. Part 16, Subpart B. Marine employers are required to establish programs for chemical testing for dangerous drugs on a random basis for crewmembers on inspected vessels who occupy a position required by the vessel's Certificate of Inspection. 46 C.F.R. § 16.230(a)(1).[7] The vessels on which Respondent worked were inspected vessels, and Respondent served as a captain on those vessels. (Tr. at 18, 21, 39). Therefore, Respondent was a crewmember subject to random testing.

Marine employers are authorized to form or otherwise use sponsoring organizations or contractors to conduct the random chemical testing required by the regulations. 46 C.F.R. § 16.230(d); 49 C.F.R. § 40.15. Key Largo Parasail's use of Keys Consortium for random chemical testing complies with the regulations. Id.

Under 46 C.F.R. § 16.230(e), at the time of Respondent's drug test, the minimum annual rate of random testing was 50 percent of a marine employer's crewmembers. (Tr. at 50). As noted above, marine employers may be part of a larger consortium of marine employers. However, even when participating in a testing consortium, each marine employer must ensure its crewmembers are subject to testing at the annual minimum rate. 46 C.F.R. § 16.230(g). Further, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of crewmembers covered by the consortium. Id.

Random selection must be done in accordance with a scientifically valid method, such as a computer-based random number generator that is matched with a unique number for each crewmember. 46 C.F.R. § 16.203(c); Appeal Decision 2710 (HOPPER) (2015). Key Largo Parasail was part of Keys Consortium, and the pool of mariners subject to random selection for

any given period consisted of all mariners belonging to Keys Consortium. (Tr. at 19-20, 81-82, 84; Ex. CG-008). A contractor called Total Compliance Network (TCN) performed random selection for Keys Consortium. (Tr. at 48). If a randomly selected mariner was not available for testing, for instance if that mariner was no longer employed, TCN would randomly choose an alternate mariner from the same marine employer. (Tr. at 84-85, 117). The selection method in this case used in both initial and alternate selection met the standard of 46 C.F.R. § 16.230(c), as TCN utilized a computer-based random number generator matched to unique Employee ID numbers to select mariners. (Tr. at 110; Ex. CG-008).

In this case, the TCN computer-based program initially selected Patrick McCoy of Key Largo Parasail to undergo random testing. When notified of the random selection, Key Largo Parasail owner Brad Shirley notified Keys Consortium that Mr. McCoy was no longer an employee. (Tr. at 52-53, 82). At that point, TCN then selected another mariner from Key Largo Parasail as an alternate pick. That mariner was Respondent. (Tr. at 53; Ex. CG-005). The practice of choosing initial and alternate mariners for random testing is consistent with 46 C.F.R. § 16.230(e) to meet the testing requirements of the regulation (50 percent of a marine employer's crewmembers). The number of crewmembers selected for random testing could be based on each individual marine employer **or** on the total number of crewmembers in the consortium. 46 C.F.R. § 16.230(g).

Respondent challenged the validity of his testing on September 12, 2019, including the sufficiency of the random selection process, because the employee list for Key Largo Parasail that TCN used to perform random selection in August 2019 was inaccurate. Wide latitude is given to self-represented (*pro se*) mariners in raising such issues. Appeal Decision 2697 (GREEN) (2011). The Key Largo Parasail employee list contained four names. Brad Shirley

[7] Marine employers are also required to establish programs for chemical testing for dangerous drugs on a random basis for crewmembers on uninspected vessels as noted in 46 C.F.R. § 16.230(b).

(owner of Key Largo Parasail) testified two of the mariners (one of which was Patrick McCoy) were no longer employed in August 2019, and one employed mariner was not on the list. (Tr. at 25). According to Mr. Shirley, the list should have had three names—Respondent, Mr. Shirley, and David Perry. (Tr. at 25). The regulations provide that even when employers use service agents to comply with testing requirements, the employer remains responsible for compliance. 49 C.F.R. § 40.15; 46 C.F.R. § 16.230(a). Here, the employee list contained a mariner that was no longer employed by Key Largo Parasail and that person (Patrick McCoy) was initially selected by the random computer program. (Tr. 52-56). When Mr. Shirley notified that Mr. McCoy was no longer employed by Key Largo Parasail, and TCN chose from the remaining three crewmembers on the list, Respondent had the same chance of being picked as an alternate had the list been accurate—he still would have been one of three crewmembers on the list and subject to being selected as the alternate.[8]

As discussed in Appeal Decision 2710 (HOPPER) (2015), the purposes of 46 C.F.R. § 16.230 are to be achieved without rigidity in considering the validity of the random selection process. The rationale for the regulations is to deter drug use by providing mariners the expectation that they have an equal chance of selection for random testing. While the employer should have kept the employee list up to date, this type of administrative error is not sufficient to support cancellation of the drug test. 49 C.F.R. § 40.209. The use of the computer program for selection is sufficient to show that there was a valid random selection process and no unfair targeting of Respondent for testing. Accordingly, I find Respondent's employer, through Keys Consortium and its contractor, TCN, employed a random selection method that complied with 46 C.F.R. § 16.230, and Respondent's September 12, 2019 drug test met the regulatory requirements of a random drug test.

[8] Even considering the employer's failure to keep the employee list up to date as an administrative error, it is not the type of error that would invalidate a DOT drug test. See 49 C.F.R. § 40.209(b)(10); Appeal Decision 2728

2) The Administration of the Drug Test Satisfied the Remaining Elements of a *Prima Facie* Case of Use of a Dangerous Drug

Having found Respondent's selection for a drug test satisfied the 46 C.F.R. Part 16 requirements for a random test, the ALJ now considers whether the evidence is sufficient to satisfy the remaining elements of a *prima facie* case to support the presumption of 46 C.F.R. § 16.201(b). When the basis for the Complaint is a Department of Transportation (DOT) drug test, the 46 C.F.R. Part 16 regulations also require the Coast Guard to demonstrate the drug test was conducted in compliance with the DOT drug testing regulations in 49 C.F.R. Part 40.

a. Respondent Was the Person Tested for Dangerous Drugs

The regulations and applicable case law require the Coast Guard to prove Respondent is the person who submitted the specimen that was tested for drugs. The evidence shows that the specimen collection process was conducted in compliance with 49 C.F.R. §§ 40.41 – 40.73. As noted in the Findings of Fact above, Keys Consortium employed Lori Dekker as a specimen collector and drug testing program administrator. (Tr. at 45-46). On September 12, 2019, Ms. Dekker was certified in collection procedures meeting the DOT drug testing program standards. (Tr. at 57-58; Ex. CG-006); 49 C.F.R. § 40.31(a).

On September 12, 2019, Respondent arrived at Keys Consortium and provided an initial specimen in keeping with the procedures directed by the collector, Ms. Dekker. (Tr. at 66-71). When Respondent finished filling the collection cup, he provided it to Ms. Dekker, and she assessed the temperature of the specimen within four minutes. (Tr. at 71). Ms. Dekker noted the temperature of Respondent's first urine specimen was not in the acceptable temperature range. (Tr. 71; Ex. CG-007). She completed the collection process for the first specimen in keeping with 49 C.F.R. §§ 40.61, 63, 65, 71, and 73. Because the first specimen was not in the acceptable temperature range, the collector required Respondent to provide a second specimen

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(DILLON) (2020).

with an observer. Respondent complied with the collector's direction and provided a second specimen.

During the second specimen collection, Ms. Dekker followed the same procedure as noted above, with the addition of a direct observer. She chose a mariner of the same gender as Respondent to act as the observer. (Tr. at 72). Ms. Dekker advised the observer to enter the restroom with Respondent and stand with his back against the wall, facing Respondent, so that the observer could see Respondent void directly into the collection cup. (Tr. at 74). Ms. Dekker advised the observer to have Respondent pull his shirt out and his pants down and turn in a circle, to allow the observer to notice any possible contraband on Respondent's person. (Tr. at 74). The observer performed the observation according to Ms. Dekker's instructions. (Tr. at 74-75). When Respondent finished producing the sample, the observer left the restroom; Respondent handed the collection cup to Ms. Dekker and she took the temperature of the sample within four minutes. (Tr. at 75). Respondent's second urine sample was in the acceptable temperature range. (Tr. at 75; Ex. CG-007).

Ms. Dekker had Respondent observe as she poured the specimen into two split sample specimen containers and seal the containers; she affixed the date and had Respondent initial the sealed containers. (Tr. at 76). Ms. Dekker filled out Step 2 of the CCF and noted a first collection was performed requiring a second collection under direct observation (Tr. at 76-78). Respondent filled out Step 5 of the CCF for the second specimen. (Tr. at 77, 245-246).

Ms. Dekker completed the collection process as noted in Finding of Fact No. 16, above. I find the collector followed the regulations in conducting both collections, and therefore, I find the Coast Guard has demonstrated by a preponderance of the evidence that Respondent is the person who submitted to the September 12, 2019 drug test and provided Specimen ID # 2103505.

b. Laboratory Testing of Respondent's Specimen Met 49 C.F.R. Part 40 Requirements

Dr. Steven Sykes testified on behalf of Quest Diagnostics (Quest) as to the testing of Respondent's urine specimens. (Tr. at 124-177). Dr. Sykes holds a Ph.D. in cellular biology from the University of Georgia and is the scientific director for Quest. (Tr. at 126-127). Only laboratories certified by the U.S. Department of Health and Human Services (HHS) under the National Laboratory Certification Program (NLCP) may perform DOT drug testing. 49 C.F.R. § 40.81(a). At all times relevant to this proceeding, Quest was certified by the NLCP. (Tr. at 128-129).

The second urine specimen produced by Respondent, Specimen ID # 2103505, had an acceptable temperature and was valid for DOT drug testing. (Tr. 69, 195; Ex. CG-007). Quest received Specimen ID # 2103505 on September 13, 2019, with the split sample specimen bottle seals intact (Tr. at 133; Ex. CG-009 at p. 7). At no time during Quest's possession of Specimen ID # 2103505 was the chain of custody compromised. (Tr. at 144, 146-147: Ex. CG-009 at pp. 14, 63).

Quest performed an initial screening of Respondent's specimen using an immunoassay test, which produced a positive result for amphetamines and methamphetamines (Tr. at 138-139). Quest validated the immunoassay test by running control tests on specimens with known concentrations of drugs. (Tr. at 139-141). Those control tests all produced the predicted results and indicated the result of the immunoassay test run on Respondent's specimen was reliable. (Tr. at 139-141, 147-148; Ex. CG-009 at p. 72).

Quest then performed confirmation testing using gas chromatography mass spectrometry. (Tr. at 141, 152). Respondent's specimen produced a very concentrated result for methamphetamine, and so Quest performed "in vial dilution" and re-tested the specimen to produce a more accurate result. (Tr. at 153-156). The cut-off level for positive amphetamine

and methamphetamine tests is 250 ng/mL. (Tr. at 150); 49 C.F.R. § 40.87(a). Specimen ID # 2103505 tested positive for amphetamines at a level of 5011.40 ng/mL and for methamphetamines at 55014.20 ng/mL. (Tr. at 138, 149-151; Ex. CG-009 at pp. 57, 110-111).

Quest performed further confirmation tests on Specimen ID # 2103505 to ensure the positive results for amphetamines and methamphetamines were accurate. (Tr. at 146-163). Such confirmation testing included an analysis of the amount of D-isomer and L-isomer within the methamphetamine metabolite (Tr. at 157-158, 199-200). The concentration of D-isomer and L-isomer aids in determining whether the ingestion of the substance containing methamphetamine was legal, such as from a prescribed medication. Most prescription methamphetamine contains more L-isomer than D-isomer, and most illicit methamphetamine contains more D-isomer than L-isomer. (Tr. at 158). One type of over-the-counter medication, a Vick's vapor inhaler, contains a higher concentration of D-isomer, but such concentration does not exceed 20 percent. (Tr. at 200). Here, Respondent's specimen showed an L-isomer concentration of three percent and a D-isomer concentration of 96 percent. (Tr. at 160-161; Ex. CG-009 at p. 168; Ex. CG-012).

Lysaida (Theta) Moore served as Quest's certifying scientist and certified the testing of Specimen ID # 2103505 met all relevant federal standards. (Tr. at 162-163; Ex. CG-009 at p. 7). Quest's receipt, handling, and testing of Respondent's urine specimens complied with the requirements of 49 C.F.R. Part 40.

The evidence presented by the Coast Guard showed that Quest complied with the regulations contained in 49 C.F.R. Part 40, Subpart F, and satisfied quality control practices in its testing of Respondent's specimen. The Laboratory followed custody and control procedures and testing procedures and reported Respondent's positive test results for amphetamines and methamphetamines to the MRO in keeping with 49 C.F.R. § 40.97.

c. The MRO Verified the Positive Drug Test Results

Dr. Seth Portnoy was the Medical Review Officer (MRO) that evaluated the results of Respondent's drug test. He is an osteopathic physician licensed in Florida and North Carolina and a certified MRO. (Tr. at 179-180; Ex. CG-010). In accordance with an MRO's obligation to discuss positive drug screen results with a mariner and provide the mariner with an opportunity to give a legitimate explanation for a positive finding, Dr. Portnoy's office attempted to contact Respondent two times. (Tr. at 189, 195-196, 218-219; Ex. CG-011 at p. 8). 49 C.F.R. § 40.131.

Dr. Portnoy, or one of his assistants, called Respondent first on September 25, 2019, at 3:25 p.m., but Respondent did not answer the phone. (Tr. at 196-197; Ex. CG-011 at p. 8). Dr. Portnoy testified he could not recall who made the calls to Respondent because he and his assistants sometimes make hundreds of calls a day, but his office maintains logs of the calls. (Tr. at 197-198). Dr. Portnoy, or one of his assistants, again called Respondent on September 25, 2019, at 7:07 p.m. The MRO testified that according to his notes, when Respondent answered, the contacting person explained the reason for the call, and then Respondent hung up. (Tr. at 195-196, 208-209; Ex. CG-011 at p. 8).

Under the regulations governing the MRO confirmation process, staff under the direct supervision of the MRO may call a mariner to set up the MRO interview. 49 C.F.R. § 40.131(b) ("As the MRO, staff under your personal supervision may conduct this initial contact for you."). Further, an MRO may verify a positive test result without interviewing the mariner if the mariner expressly declines the opportunity to discuss the test; or if he or she has been informed, or there was an attempt to inform, of the consequence of refusing to discuss the results. 49 C.F.R. § 40.131(b)(1) ("You may verify a test result as a positive…if the employee expressly declines the opportunity to discuss the test with you. You must maintain complete documentation…including notation of informing, or attempting to inform, the employee of the consequences of not exercising the option…").

Here, Dr. Portnoy's staff did make contact with Respondent on September 26, 2019, and attempted to inform him of the interview process. There is some dispute as to how that call ended. The MRO indicated from his office record notes that Respondent hung up after being informed of the purpose of the call. (Tr. at 212). Dr. Portnoy's staff documented this information in a date- and time-stamped call log. (Ex. CG-011 at p. 8). Respondent contended his cell phone was dying and he asked for a call back later. (Tr. at 237). The MRO documented the contact as the individual refused the call, and then verified the test as positive; the MRO then reported the verified result to the contact, Ms. Lori Dekker, on September 26, 2019. (Exs. CG-011, CG-12; Tr. at 196, 216-218).

After receiving the MRO's report, Keys Consortium provided notice to Respondent of the opportunity for requesting a retest of his specimen by contacting the MRO. (Ex. R-C). At the hearing, the MRO also testified that the test results, particularly the presence of over 96% D-isomer in the sample, eliminated the possibility of a false positive from an over the counter inhaler, and the test results for Respondent's specimen demonstrated they were positive for use of dangerous drugs (amphetamines and methamphetamines). (Tr. at 198-200; Ex. CG-12).

Respondent testified that he received the call from the MRO's assistant, but told the caller his cell phone was dying and asked for a call back. Respondent's witness, Kathy Shirley, also testified that Respondent requested a call back. (Tr. at 226). Respondent did not receive another call from the MRO's office, and he did not call back to the MRO office either, after that call, or after receiving the notice from Keys Consortium to contact the MRO for a retest contained in Ex. R-C. (Tr. 238-42, 246-248). The MRO did not make a third call to Respondent. However, Respondent was clearly aware of the nature of the call and could have returned the call to the MRO.

When contacting a donor, the regulations provide that the MRO is to allow the donor to provide any information about prescriptions that may have caused a positive and to explain the

opportunity for a retest. 49 C.F.R. §§ 40.135, 40.137, and 40.153. Although Respondent did not have an MRO verification interview, Respondent testified at the hearing that he did not use methamphetamines and on cross examination stated he did not have a prescription for methamphetamines. (Tr. 244, 248). Even if the MRO telephone contact on September 25, 2019, should not have been considered an express rejection of the MRO interview by Respondent, at the most this would be a procedural error and is not a valid basis to cancel a chemical test. See 49 C.F.R. § 40.209(b). Considering all of the evidence in the record, I find the MRO's review of the lab results and verification of the positive drug test result satisfied the requirements for initial MRO verification of a positive test and reporting results to the designated employer representation (DER) in keeping with 49 C.F.R. §§ 40.129 and 40.137.

D. Respondent's Rebuttal Evidence Was Not Sufficient to Rebut the *Prima Facie* Case Presented by the Coast Guard

After the Coast Guard presents sufficient evidence to support applying the regulatory presumption of use of a dangerous drug under 46 C.F.R. § 16.201(b), the respondent "may rebut the presumption by producing evidence (1) that calls into question any of the elements of the *prima facie* case, (2) that indicates an alternative medical explanation for the positive test result, or (3) that indicates the use was not wrongful or not knowing." Appeal Decision 2560 (CLIFTON) (1995).[9] At all times the Coast Guard bears the burden of proof. Id.; 33 C.F.R. § 20.703(b). Respondent testified on his own behalf, presented exhibits, and cross-examined witnesses at the hearing to dispute the Coast Guard's case.

1) Respondent's Selection for Random Drug Testing Complied with 46 C.F.R. Part 16

Respondent contended the Coast Guard failed to establish his selection for the drug test was random, within the meaning of 46 C.F.R. Part 16. He testified regarding the number of

[9] If the Coast Guard establishes a *prima facie* case of use of dangerous drugs based on a positive drug test by a preponderance of the evidence, a presumption of dangerous drug use arises, but does not shift the burden of proof.

times he has been selected for random testing and suggests his selection could not have been random because he has been chosen too many times. (Tr. at 38-39). Respondent presented a report of past drug testing of Key Largo Parasail employees through Keys Consortium (Ex. R-B). Though the document shows several persons were tested more than once, it does not demonstrate an error in the random selection process. He also contended the process of selecting an alternate went against the regulations. However, that argument is inconsistent with 46 C.F.R. § 16.230(g). Respondent's challenge to the validity of his random selection is rejected, as discussed in Section III(C)(1), above.

2) Respondent Did Not Demonstrate the MRO Verification of the Positive Test Results Was Insufficient to Comply with 49 C.F.R. Part 40

Respondent contended the MRO did not follow the requirements of the regulations by not calling him back, by reporting his test as positive without actually discussing the test with him, and by indicating in documentation that the MRO had advised Respondent of his opportunity to request a split specimen test even though that had not occurred. (Tr. at 206-214, 238-242). As discussed in Section III(C)(2)(c), above, even if the MRO telephone contact on September 25, 2019, is not considered an express rejection by Respondent, at the most this would be a procedural error and not a valid basis to cancel a chemical test. 49 C.F.R. § 40.209. Considering all of the evidence in the record, the MRO's review of the lab results and verification of the positive drug test result satisfies the requirements for initial MRO verification of a positive test and reporting results to the designated employer representation (DER) in keeping with 49 C.F.R. §§ 40.129 and 40.137.

a. Respondent's Opportunity to Request a Split Specimen Test

Although Respondent's claim of error in the drug testing process focused on the MRO, his arguments may also encompass an error by the employer. As noted above, wide latitude is

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However, the respondent will have the burden of going forward with evidence to rebut or meet the presumption. 33

given to self-represented (*pro se*) mariners in raising such issues. Appeal Decision 2697 (GREEN) (2011). Respondent introduced into evidence Respondent's Exhibit C (Ex. R-C), which is the September 29, 2019 notice from Keys Consortium of Respondent's right to request a split specimen test within 72 hours. Ex. R-C indicates that payment would be required before the specimen is shipped to the second lab. However, Ex. R-C does not include any indication that the employer must pay for the re-test, rather than the employee, if it is requested within the 72-hour timeframe. There was no evidence that the employer provided any training to Respondent regarding drug testing and how the split specimen testing process works. This evidence shows a lack of compliance with 49 C.F.R. §§ 40.171, and 40.173.

While the validity of the collection and testing process is not affected by this issue, it presents a procedural error in regard to Respondent's rights provided in the drug testing regulations. To address the concern of whether Respondent was provided a sufficient opportunity to request a split specimen test, at the hearing the ALJ provided Respondent the opportunity to request his split specimen be tested. He was given until close of business on Monday, February 10, 2020, to inform the ALJ whether he desired that test. Respondent did not request the split specimen test. Therefore, any potential procedural error in regard to his notice of his right to a split specimen test is harmless since he declined an available remedy. Appeal Decision 2728 (DILLON) (2020).

b. Respondent's Opportunity to Provide Information Regarding Prescriptions

As noted in Section III(C)(2)(c) above, the MRO considered Respondent's response to the call on September 25, 2019, an express rejection of the opportunity to discuss the positive test with the MRO. Respondent could have called the MRO back, or he could have contacted the MRO after receiving Ex. R-C. As part of the interview process, the MRO would have inquired

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C.F.R. § 20.703(a); Appeal Decisions 2603 (HACKSTAFF) (1998).

whether Respondent had a legitimate prescription that may have caused the positive test. 49 C.F.R. §§ 40.135, 40.137 and 40.153. At the hearing, Respondent testified that he did not use methamphetamine and did not have a prescription for methamphetamine. (Tr. 244, 248). Even if the MRO's determination that Respondent declined to discuss his positive drug test with the MRO was a procedural error, there is no basis to cancel the drug test. 49 C.F.R. § 40.209.

3) Respondent Did Not Show Errors in the Collection or Laboratory Process

Respondent's testimony and evidence focused primarily on asserting claims of error in the random selection process and the MRO's contact and verification of the positive drug test results. The evidence Respondent presented at the hearing does not call into question the validity of the collection of his specimen, as detailed in the findings of fact, or the testing process by Quest. The MRO testified that his medical review of the testing results found no over the counter inhaler or medication could have resulted in the level of the positive drug test for amphetamines. (Tr. at 198-200). Respondent did not dispute that he provided the observed specimen and did not claim to have any prescription for an inhaler or any type of amphetamine. (Tr. at 245-248).

Respondent also challenged several other aspects of the Coast Guard's case in his post-hearing brief. As he alleged in his Answer, Respondent contended he was sick with a fever when he produced the urine specimens, arguing this may have altered the results. (Tr. at 235). This allegation is not supported by any medical evidence and is not sufficient to overcome the evidence presented by the Coast Guard showing the specimen collection and testing process to be in compliance with the regulations. The evidence in the record shows that the collection of the specimens and the laboratory analysis met the requirements of 49 C.F.R. Part 40.

Respondent also alleged in his Answer that his roommate had been arrested for methamphetamine possession and somehow this caused Respondent to test positive for the drug. However, Respondent presented no evidence at the hearing showing any link between his

roommate's arrest for possession of methamphetamine and Respondent's positive test. The evidence showed Respondent's first specimen as out of the acceptable temperature range and the second specimen was a valid observed specimen that tested positive. I found the lab process and the verification by the MRO to be sufficient to satisfy the requirements of the regulations. Considering all of the evidence in the record, I do not find Respondent's denial of use of a dangerous drug credible.

4) Respondent's Assertion of Constitutional Error

Finally, Respondent argues the urine specimen collection process violated his rights under the U.S. Constitution, particularly his Fourth and Fifth Amendment rights. S&R proceedings are administrative, not judicial. See Appeal Decision 2646 (McDONALD) (2003). Their purpose is to promote safety at sea. 46 U.S.C. § 7701(a). Following final agency action and appeal to the National Transportation Safety Board, judicial review is available in the federal courts. 5 U.S.C. § 702; 46 C.F.R. § 1.01-30; 46 C.F.R. § 5.713; 33 C.F.R. § 20.1101(b)(2). The focus of S&R proceedings is compliance with statutes and regulations. The constitutionality of statutes are the province of the Federal Courts. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Appeal Decisions 2632 (WHITE) (2002), 2135 (FOSSANI) (1978), 2049 (OWEN) (1976), and 1382 (LIBBY) (1963). This is not the proper forum to address the constitutionality of Coast Guard and Department of Transportation regulations; therefore Respondent's request for relief on claims of constitutional error are denied. However, it should also be noted that Appeal Decision 2704 (FRANKS) (2014) references Skinner v. Railway Labor Executive's Association, 489 U.S. 602 (1989), which found Federal Railroad Administration regulations regarding post-accident breath and urine testing to constitute reasonable searches under the Fourth Amendment.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner Credential No. 000288801.

2. 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 codified at 5 §§ U.S.C. 551-59.

3. On September 12, 2019, Respondent participated in a properly directed 46 C.F.R. Part 16 random drug test.

4. Respondent's observed urine specimen tested positive for amphetamines and methamphetamines.

5. The Coast Guard provided sufficient evidence that Respondent's positive drug test met all of the elements of a *prima facie* case in order to apply the rebuttable regulatory presumption that he is a user of dangerous drugs. 46 C.F.R. § 16.201(b).

6. Respondent did not present credible evidence sufficient to rebut the presumption he is a user of dangerous drugs.

7. Accordingly, the Coast Guard has **PROVEN** by a preponderance of reliable, probative, and credible evidence that Respondent was a user of dangerous drugs.

V. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 C.F.R. § 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and to promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), aff'd by NTSB Docket ME-174. When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, revocation of all Coast Guard issued licenses, documents, or other credentials is the appropriate sanction unless cure is proven. 46 U.S.C. 7704(c); 46 C.F.R. § 5.569; Appeal Decision 2535 (SWEENEY) (1992). Here, the Coast Guard proved by a preponderance of reliable, probative, and credible evidence that Respondent was a user of dangerous drugs, and Respondent did not present any evidence of cure. In keeping with 46 C.F.R. § 5.59, the appropriate sanction is **REVOCATION**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED, Merchant Mariner Credential No. 000288801, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent Robert Garrett Nelson, are **REVOKED**.

PLEASE TAKE NOTICE, within three (3) years or less, Respondent may file a motion to reopen this matter and seek modification of the order of revocation upon a showing that the order of revocation is no longer valid and the issuance of a new license, certificate, or document is compatible with the requirement of good discipline and safety at sea. The revocation order may be modified upon a showing that Respondent:

(1) has successfully completed a bona fide drug abuse rehabilitation program;

(2) has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the drug rehabilitation program; and

(3) is actively participating in a bona fide drug abuse monitoring program.

See generally 33 CFR 20.904; 46 CFR 5.901. The drug abuse monitoring program must incorporate random, unannounced testing during that year. Appeal Decision 2535 (SWEENEY) (1992).

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. (Attachment B).

Done and dated June 29, 2020
Baltimore, Maryland

_/s/_____
Michael J. Devine
Administrative Law Judge
United States Coast Guard

Date: June 29, 2020

ATTACHMENT A

Coast Guard's Witnesses

1. Bradford Shirley
2. Lori Dekker
3. LT Katharine Brodie
4. Dr. Steven Sykes
5. Dr. Seth Portnoy

Coast Guard's Exhibits

CG Exhibit 1:	Copy of Respondent's MMC (1 page)
CG Exhibit 2:	Federal Register Vol. 84, No. 169 (2 pages)
CG Exhibit 3:	Employee lists for Key Largo Parasail (2 pages)
CG Exhibit 4:	Photo of text message exchange (2 pages)
CG Exhibit 5:	Notification of random selection (2 pages).
CG Exhibit 6:	SAPAA Certificate of Qualification issued to Lori Dekker (1 page)
CG Exhibit 7:	Custody and Control Forms – Collector Copy (2 pages)
CG Exhibit 8:	Total Compliance Network selection methodology and Medical Review Officer Determination/Verification Report (8 pages)
CG Exhibit 9:	Quest Diagnostics laboratory litigation package (282 pages)
CG Exhibit 10:	AAMRO Certification issued to Dr. Seth Portnoy (1 page)
CG Exhibit 11:	Documentation received by Dr. Seth Portnoy through TCN portal (13 pages)
CG Exhibit 12:	Custody and Control Form – Medical Review Officer Copy (1 page)

Respondent's Witness

1. Kathy Shirley
2. Robert Garrett Nelson

Respondent's Exhibits

Resp. Exhibit A: Mobile phone record (1 page)

Resp. Exhibit B: DOT testing history for Key Largo Parasail (1 page)

Resp. Exhibit C: Notice of Respondent of right to split sample specimen testing (1 page)

Resp. Exhibit D: E-mail exchange between Respondent and Dr. Seth Portnoy (2 pages)