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

UNITED STATES COAST GUARD
Complainant

vs.

NICHOLAS RYAN SOUTHWOOD
Respondent

Docket Number 2019-0346
Enforcement Activity No. 5767962

DECISION AND ORDER
Issued: September 18, 2020

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.
Suspension and Revocation National Center of Expertise
CWO Stephen M. Cheney
Sector Puget Sound
For the Coast Guard

Nicholas Ryan Southwood, Pro se
For the Respondent

PRELIMINARY STATEMENT

Pursuant to 46 U.S.C. § 7704(b) and its underlying regulation at 46 C.F.R. Part 5, the United States Coast Guard (Coast Guard) initiated this administrative action to revoke Nicholas Ryan Southwood's (Respondent) Merchant Mariner's Credential (MMC). The Coast Guard issued a Complaint on September 5, 2019, charging Respondent with the use of, or addiction to the use of dangerous drugs in violation of 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35.

On September 25, 2019, Respondent filed a timely Answer admitting all jurisdictional allegations and denying the factual allegations. I held a prehearing conference with the parties on December 1, 2019, during which I set the hearing for March 24-25, 2020 at the Nakamura U.S. Courthouse in Seattle, Washington. On March 13, 2020, I entered a Notice of Cancellation of Hearing due to Covid-19 related restrictions on travel and public meetings, and scheduled another telephonic prehearing conference for March 24, 2020. With the agreement of the parties, I determined at the conference that this hearing was amenable to being held telephonically and set a new hearing date for April 28, 2020.

I held a final pre-hearing teleconference on April 24, 2020, of which both parties had notice, to discuss the logistics of the telephonic hearing. The Coast Guard's representatives participated, but Respondent did not. My staff attempted to contact him with no success. On April 28, 2020, the Coast Guard's representatives appeared at the telephonic hearing; Respondent did not. The Coast Guard moved for default pursuant to 33 C.F.R. § 33.310, and I announced on the record that I would issue an Order to Show Cause, giving Respondent 30 days to explain his failure to appear. See 33 C.F.R. § 20.705(b). Respondent's explanation was due by June 4, 2020, but to date, he has not filed any response.

The Commandant previously used Fed. R. Civ P. 55 in interpreting Coast Guard rules for defaults. See Appeal Decision 2696 (CORSE) (2011). This rule allows the ALJ to conduct a hearing when, in order to enter a default judgement, the judge "needs to: (A) conduct an

accounting; (B) determine the amount of damages; (C) establish the truth of any allegation by evidence; or (D) investigate any other matter." Fed. R. Civ. P. 55(b)(2). I determined that while the Complaint alleged Respondent took a non-DOT, post-accident drug test which was positive for marijuana metabolites, it did not provide sufficient facts about the employer's post-casualty testing policy; the nature of the accident that led to Respondent's drug test; the use of the DOT Federal Drug Testing Custody and Control Form for a non-DOT test; or the reliability of the testing process. Consequently, I heard limited testimony on these issues to aid me in determining whether the allegations set out a legally sufficient basis for suspending or revoking Respondent's MMC. I took notice of the the Coast Guard's written opening statement, admitted Coast Guard Exhibit #1,[1] and heard testimony from five witnesses.

After careful review of the entire record, including the applicable statutes, regulations, and case law, and for the reasons discussed below, I **GRANT** the Coast Guard's Motion to find the Respondent in default and order Respondent's MMC **REVOKED**.

FINDINGS OF FACT

1. On March 26, 2019, Respondent was a crewmember on board the BEARCAT, a towing vessel owned by Westar Marine Services. (Tr. at 9-11).
2. While the vesel was landing a fuel barge, it rubbed a piling which resulted in minor damage. (Tr. at 10).
3. Respondent assisted in directing the barge landing. (Tr. at 11, 14).
4. Westar Marine directed Respondent on March 27, 2019, to take a drug test under its company policy. (Tr. at 12, 23).
5. When Westar Marine orders such a test, informes the drug testing companies the test is a post-accident test; but does not distinguish between company-directed tests and Coast Guard mandated tests. (Tr. at 28).
6. The collector at the test site prepares the custody and control form. (Tr. at 28).
7. On March 27, 2019, Respondent submitted a urine specimen collected by Brian Carver of On-Site Health & Safety, Rodeo, CA. (Complaint).

[1] The Coast Guard referred to other exhibits throughout the hearing but did not seek admission of any exhibits other than CG Ex. 1.

8. On-Site Health & Safety untilied a DOT Federal Drug Testing Custody and Control form during Respondent's collection process. (Tr. at 42).

9. Respondent signed a Federal Drug Testing Custody and Control Form for providing specimen ID # Y38115825. (Complaint).

10. MedTox, St. Paul, MN, a SAMHSA certified, laboratory, received and analyzed Specimen ID # Y38115825 by. (Complain).

11. On April 6th, 2019, specimen ID # Y38115825 tested positive for Marijuana metabolites as reported by MedTox. (Complaint).

12. When Dr. Thrasher contacted Respondent about the results, Respondent said he had not used marijuana for over a month. (Tr. at 61).

13. On April 9th, 2019, after review and interpretation of the results, Dr. Dennis Thrasher, the Medical Review Officer, certified Respondent tested positive for Marijuana metabolites. (Complaint).

DISCUSSION

A. Jurisdiction

Although a respondent's default results in all alleged facts being considered admitted, the burden of establishing jurisdiction nonetheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2677 (WALKER) (2008); see also Appeal Decision 2656 (JORDAN) (2006). As in Walker, this case arises from a default action, and the facts supporting the jurisdictional allegation are found solely within the confines of the Coast Guard's Complaint. The Complaint alleges Respondent holds a Coast Guard-issued credential, and charges Respondent with use of, or addiction to the use of, dangerous drugs. Under 46 U.S.C. § 7704(c), being a holder of a Coast Guard-issued credential is an adequate basis for jurisdiction in cases involving the use of dangerous drugs. Accordingly, the record established jurisdiction.

B. Respondent is in Default

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C.A. § 7701(a). Title 46 C.F.R. § 5.19 gives Administrative Law Judges (ALJs) the authority to suspend or revoke merchant mariner credentials for violations arising under 46

U.S.C. §§ 7703 and 7704. Under the Coast Guard's procedural regulations, the ALJ may find a respondent in default upon failure to file a timely answer to the complaint or, after motion, upon failure to appear at a conference or hearing without good cause shown. 33 C.F.R. § 20.310; see also 33 C.F.R. § 20.705.

As stated above, after Respondent's failure to appear I issued a Show Cause Order giving Respondent 30 days to explain his failure to appear, and to date, Respondent has not replied. In accordance with the default procedures, I find Respondent in default and **GRANT** the Coast Guard's oral motion for default, made on the record during the hearing. Pursuant to 33 C.F.R. § 20.310 (c), default by the respondent constitutes an admission of the facts alleged in the Complaint and a waiver of his right to a hearing on those facts. However, the fact that Respondent is in default does not, standing alone, establish a sanctionable violation.

C. Legal Sufficiency of the Complaint

In order for the Coast Guard to prove its *prima facie* case, the Complaint must set out a legally sufficient claim. See Peerless Industries, Inc. v. Herrin Illinois Cafe, Inc., E.D.Mo.1984, 593 F.Supp. 1339, aff'd 774 F.2d 1172 (Court has discretion to require proof of necessary facts to support a valid cause of action and if such facts are lacking the court can choose not to enter default judgment). While the Complaint alleges Respondent took a non-DOT drug test, it describes the general procedures for DOT testing protocols. Moreover, the Coast Guard's evidence shows that the collector used a Federal Custody and Control Form for Respondent's collection. The Complaint also failed to allege any facts supporting the test's reliability. Federal and non-Federal tests have different legal implications in Suspension and Revocation proceedings because, when a mariner fails a drug test mandated by 46 C.F.R. Part 16, the mariner is presumed to be a user of dangerous drugs. 46 CFR § 16.201(b). When the drug test is not among the types specifically authorized by 46 C.F.R. Part 16, the presumption does not arise and the Coast Guard must present "modest additional evidence to prove that the presence of

metabolite in a non-Part 16 test means that the mariner used dangerous drugs, absent evidence to the contrary, in addition to evidence linking the results to the mariner and proving the reliability of the test . . .” Appeal Decision 2704 (FRANKS) (2014), 2014 WL 4062506, at *9.

Although the Complaint presents as a factual allegation that Respondent is a user of, or addicted to, dangerous drugs, I find this to be a conclusion of law which must be supported by the factual allegations deemed admitted. In other words, in order to show that Respondent is a user of, or addicted to, dangerous drugs when relying on a non-Federal drug test, the factual allegations deemed admitted must establish each element of the Coast Guard’s *prima facie* case.

Due to the conflict between the Complaint and the evidence about the reason for testing, and the Complaint’s lack of any allegations about the test’s reliability, I could not determine whether the allegations in the Complaint, even when deemed admitted, established a violation of 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35. Since it would not be in the interest of judicial efficiency to grant a default motion without being able to reach a conclusion as to the violation or sanction, I permitted the Coast Guard’s witnesses to testify at the scheduled hearing in order to supplement the record. Had Respondent responded to the Order to Show Cause, I would have recalled any witnesses he wished to cross-examine, but since he did not file a response, I am basing my review on the record as a whole, including the pleadings, witness testimony, and other documentary evidence.

D. Respondent’s March 27, 2019 Drug Test is Reliable and May be Used as Evidence to Prove Use of or Addiction to the Use of Dangerous Drugs

It is settled law that “a non-DOT drug test may be used to establish substantial evidence of drug use in these proceedings, provided that the test and its associated positive result are found to be reliable.” Appeal Decision 2720 (ARGAST) (2018). Similarly, the Coast Guard’s Marine Employers Drug Testing Guidance – September 2009 states, “If a marine employer elects to do testing in the event of an accident that does not rise to the level of a Coast Guard mandated

SMI or marine casualty, the marine employer is not eligible to use a Federal CCF for the drug test, but can do a non-DOT drug test." Guidebook at 29.

Here, Respondent was a crewmember aboard the BEARCAT on March 26, 2019 when it allided with a piling, causing minor damage to the piling. The damage was under the threshold for a serious marine incident pursuant to 46 C.F.R. § 4.06-3 and 46 C.F.R. § 16.240, but it is Westar Marine's policy to test all mariners involved in accidents causing damage in excess of $100. Westar notified the testing facility that Respondent would be arriving for a post-accident drug test, but did not distinguish whether it was a company-directed test or a Coast Guard-mandated test.

On March 27, 2019, the Westar Marine's health and safety officer properly directed Respondent to submit to a drug test as required company policy. Respondent provided a urine sample on that same day, March 27, 2019, to an On-Site Health & Safety collector. The collector, Mr. Carver, believed this was a DOT test and therefore used the Federal Custody and Control Form (CCF). (Tr. at 42-44). Although On-Site Health & Safety maintains non-DOT forms for other companies who use company-directed testing, there is no separate form for Westar Marine. (Tr. at 44-45).

Here, it is clear that Westar Marine intended this to be a company-directed test, but miscommunications between Westar Marine personnel and On-Site Health & Safety personnel resulted in the collector using a Federal CCF. Mr. Carver testified On-Site Health & Safety mainly provides testing for marine construction employers, who follow different regulations than employers of merchant mariners. (Tr. at 45). However, the collection procedures he would have used for a company-directed test are identical to the procedures he used for the test in question, as On-Site Health & Safety collectors use DOT guidelines for every test they administer.

Here the principal issue is whether the use of a DOT CCF for a non-DOT drug and alcohol test renders the test invalid. Based on the evidence in the record, I must consider the

application of 49 C.F.R. § 40.13, which details how DOT drug and alcohol tests relate to non-DOT tests. The regulations require DOT and non-DOT tests to be "completely separate . . . in all respects." 49 C.F.R. § 40.13(a). It forbids samples collected for DOT purposes from being used in other, non-DOT tests (with one exception not relevant here). 49 C.F.R. § 40.13(b)-(d). Finally, it states, "As an employer, you must not use the CCF in your non-DOT drug and alcohol testing programs. This prohibition includes the use of the DOT forms with references to DOT programs and agencies crossed out." 49 C.F.R. § 40.13(f).

The DOT collection rules state "as an employer, you are prohibited from using the CCF for non-Federal urine collections. You are also prohibited from using non-Federal forms for DOT urine collections. Doing either subjects you to enforcement action under DOT agency regulations. 49 C.F.R. § 40.47(a). However, the regulations also provide, "[i]n the rare case where the collector, either by mistake or as the only means to conduct a test under difficult circumstances . . . uses a non-federal form for a DOT collection, the use of a non-federal form does not present a reason for the laboratory to reject the specimen for testing or for an MRO to cancel the result." 49 C.F.R. § 40.47(b)(1). Rather, the use of a non-Federal form is a correctable flaw which the MRO must correct. 49 C.F.R. § 40.47(b)(2).

The regulations do not speak to the practical effect of using a Federal form in a non-Federal test, but in Appeal Decision 2723 (BOUDREAUX) (2019), the Commandant held the regulations are intended to "prevent employers from interfering with the DOT chemical testing program by conducting their own, non-DOT chemical testing on federally-mandated DOT samples." There, the collector took samples for both a DOT urinalysis drug test and a non-DOT breath alcohol test during the same session, but under the circumstances there was no risk that the samples would be commingled or contaminate the DOT test.

The mandated procedures for DOT drug testing are far more stringent than those for company-directed tests. Although neither the regulations nor case law addresses the precise issue

here—whether the use of a Federal CCF for a company-directed test invalidates the test—I conclude the problem is not fatal to the Coast Guard's case. If the use of a non-Federal form in a DOT test is not a fatal flaw, then the reverse should likewise be true, particularly since the regulations are designed to protect the integrity of the Federal testing process.

While Westar Marine may wish to revisit its communication and testing protocol with On-Site Health & Safety in order to avoid potential penalties under 49 C.F.R. § 40.47(a), the use of a Federal CCF here nevertheless appears to be a genuine mistake. Westar Marine clearly did not intend to order a Federal test, and the use of a Federal CCF in this instance did not compromise the integrity of the sample itself or the DOT drug testing regime generally.

I also find the test was reliable. The evidence shows that the urine sample was transmitted with proper chain of custody protections to MedTox, St. Paul, MN a SAMHSA certified laboratory where it was properly tested with appropriate procedures and safeguards resulting in a positive finding of marijuana metabolites. Dr. Dennis Thrasher, the Medical Review Officer (MRO), verified Respondent's sample positive for marijuana after speaking with Respondent on April 9, 2019, and Respondent offered no medically valid explanation for the positive results. Respondent stated to the MRO he last used marijuana over a month before the test, but did not offer any reasonable medical explanation for the positive test. (Tr. at 61).

Given the test was administered under the Federal standards and yielded a positive result, I find the test acceptable as evidence of drug use here. I find the facts alleged in the Complaint, as proved by default and supplemented by additional evidence from the Coast Guard, are sufficient to prove Respondent was a user of marijuana, a dangerous drug as described by 46 U.S.C. § 7704(b) and 46 C.F.R. § 5.35.

SANCTION

Under 46 U.S.C. § 7704(b), "if it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be

revoked unless the holder provides satisfactory proof that the holder is cured." Pursuant to 46 C.F.R. § 5.569, "[t]he only proper order for a charge of dangerous drugs found proved is revocation." Since the facts alleged in the Complaint are deemed admitted due to Respondent's default, the Respondent's MMC is hereby **REVOKED**.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED the Coast Guard's Motion for Default is **GRANTED.**

IT IS FURTHER ORDERED that Respondent, Nicholas Ryan Southwood's MMC and all other documents and certificates held by Respondent are **REVOKED**. Respondent is to surrender his MMC to the nearest Coast Guard facility immediately.

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

George J. Jordan
US Coast Guard Administrative Law Judge

Date: September 18, 2020

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

Coast Guard's Witnesses:

1. Douglas Owens
2. Benjamin Huber
3. Brian Carver
4. Mitch LeBard
5. Dr. Dennis Thrasher
6. CWO Stephen Cheney

Coast Guard's Exhibits:

Number	Description	Status
CG-01	Copy of Respondent's Merchant Mariner Credential (MMC) 000396743	Admitted
CG-02	(REVISED) Westar Drug and Alcohol (D&A) policy requirements dated 2018 for post accident drug and alcohol testing and Respondent's acknowledgment and receipt of D&A policy.	Not Offered
CG-03	Westar Accident Report 26 March 2019	Not Offered
CG-04	Westar Daily Work Report for 26 March 2019	Not Offered
CG-05	DOT Urine Specimen Collector Certificate for Brian Carver	Not Offered
CG-06	Drug Screen sign-in sheet for 27 March 2019	Not Offered
CG-07	Federal Register Notice of Certified Testing Facilities Labs – (84 FR 37328, 1 March 2019) SAMHSA approval for MedTox Laboratories	Not Offered
CG-08	FCCF – Copy 1, Specimen ID Y38115825 (Test Facility copy)	Not Offered
CG-09	Lab Litigation Package for Specimen ID Y38115825	Not Offered
CG-10	FCCF – Copy 2, Specimen ID Y38115825 (Medical Review Officer (MRO) copy)	Not Offered
CG-11	MRO certification for Dr. Dennis Thrasher, M.D.	Not Offered
CG-12	MRO Notes on communication with Respondent to verify positive result (9 April 2019)	Not Offered