

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

UNITED STATES COAST GUARD,

Complainant,

vs.

DOUGLAS SCOTT ROBB,

Respondent.

**Docket Number 2019-0415
Enforcement Activity No. 5763995**

DECISION AND ORDER

Issued: January 14, 2021

By Administrative Law Judge: Honorable Michael J. Devine

Appearances:

**JENNIFER A. MEHAFFEY, ESQ.
Suspension & Revocation National Center of Expertise**

**LT BRIAN J. PORTER
Sector Lower Mississippi**

**MR. JAMES D. FAYARD
Sector Lower Mississippi**

For the Coast Guard

JAMES W. ALCANTARA, ESQ.

For Respondent

TABLE OF CONTENTS

I. PROCEDURAL HISTORY.....3

II. FINDINGS OF FACT.....4

III. PRINCIPLES OF LAW.....6

A. Jurisdiction.....6

B. Burden of Proof.....7

C. *Prima Facie* Case of Use of a Dangerous Drug.....8

IV. DISCUSSION.....9

A. The Collector Identified Respondent as the Donor of Specimen ID # Y37700626 and the Urine Collection Process Met 49 C.F.R. Part 40 Requirements.....10

B. The Selection Process that Resulted in the Crew of the SLNC PAX Being Selected for a Random Drug Test Complied with 46 C.F.R. Part 16.....13

C. The Evidence Shows Respondent Failed the Drug Test and the Drug Test Was Conducted in Compliance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.....14

 1) **Respondent’s Specimen Tested Positive for Dangerous Drugs and the Laboratory Testing Met 49 C.F.R. Part 40 Requirements**.....15

 2) **The MRO Verified Respondent’s Sample as Positive and the MRO Review Process Met 49 C.F.R. Part 40 Requirements**.....16

D. Respondent’s Rebuttal Evidence Was Insufficient to Rebut the *Prima Facie* Case Presented by the Coast Guard.....17

 1) **Respondent Did Not Demonstrate His Selection for Random Drug Testing Violated 46 C.F.R. Part 16**.....18

 2) **Respondent Did Not Demonstrate Errors in the Collection Process Sufficient to Undermine the Chain of Custody or Integrity of the Specimen**.....19

 3) **Respondent Did Not Demonstrate the MRO Verification of the Positive Drug Test Result Violated 49 C.F.R. Part 40**.....23

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW.....24

VI. SANCTION.....25

ORDER.....25

ATTACHMENT A – WITNESS AND EXHIBIT LISTS.....27

ATTACHMENT B – NOTICE OF APPEAL RIGHTS.....29

I. PROCEDURAL HISTORY

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Douglas Scott Robb's (Respondent) Merchant Mariner Credential (MMC) No. 000363248. 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 22, 2019, charging Respondent with use of or addiction to the use of 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 August 31, 2018, which yielded a positive result for amphetamines and methamphetamines.

Respondent, through counsel, filed an Answer on November 6, 2019, admitting the jurisdictional allegations of the Complaint, and admitting he took a random drug test on August 31, 2018, pursuant to 46 C.F.R. Part 16. Respondent denied the remainder of the factual allegations.

The hearing of this case was originally set to commence on March 5, 2020, in Memphis, Tennessee. Due to the coronavirus pandemic and the resulting travel restrictions and health concerns surrounding in-person hearings, the testimony of the collector was taken by telephone on July 23, 2020, and the parties agreed to hold the rest of the hearing by telephone and video-conferencing technology (Zoom for Government). The remainder of the hearing was completed September 22, 2020.

On October 22, 2020, the parties submitted post-hearing briefs setting forth legal argument and proposed findings of fact. The record is now closed and the case is ripe for a decision. After careful review of the entire record, including witness testimony, documentary evidence, applicable statutes, regulations, and case law, I find the Coast Guard **PROVED** Respondent was a user of, or addicted to, dangerous drugs.

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.¹

1. At all times relevant to the instant case, and specifically on August 31, 2018, Respondent held MMC No. 000363248. (Ex. CG-001).
2. In August 2018, Patriot Contract Services (Patriot), operator of the vessel SLNC PAX, arranged for Respondent to travel to Ulsan, South Korea to serve as a crewmember of the vessel SLNC PAX.
3. On August 30, 2018, Respondent reported on board the SLNC PAX. Respondent began performing duties as First Assistant Engineer on that vessel on August 31, 2018. (Tr. Day 2 at 40-48, 136-137).
4. At all relevant times, Anderson-Kelly Associates performed specimen collections and drug testing for Patriot. (Exs. CG-003, CG-005, CG-006; Tr. Day 2 at 37).
5. At all relevant times, American Maritime Safety (AMS) performed the random drug testing selection process for Patriot. (Ex. CG-005; Tr. Day 2 at 35-37).
6. AMS selected the crew of the SLNC PAX to undergo random drug testing, and the selection was made using a computer program that randomly selected SLNC PAX from a database. (Ex. CG-005; Tr. Day 2 at 35-36).
7. On August 31, 2018, Anderson-Kelly employed Hie Jung as a specimen collector in Ulsan, South Korea, to conduct the collection from the crew of the SLNC PAX. (Tr. Day 1 at 18).
8. At all times relevant, Mr. Jung was a certified collector who had undergone training in DOT and Coast Guard-specific drug and alcohol testing requirements. (Ex. CG-002; Tr. Day 1 at 13).
9. On August 31, 2018, Mr. Jung collected urine specimens from the crew of the SLNC PAX, including Respondent. (Exs. CG-004, CG-009; Tr. Day 1 at 18-34).
10. Prior to August 31, 2018, Respondent had participated in over 60 drug tests in his career as a mariner. (Tr. Day 2 at 132-133).
11. Mr. Jung administered the urine collection for the crew of the SLNC PAX, including Respondent, on August 31, 2018, as follows: (Tr. Day 1 at 18-40).

¹ The transcripts of the July 23, 2020 and September 22, 2020 hearings will be referred to as “Tr. Day 1” and “Tr. Day 2,” respectively.

- a. During the collection procedures, each crewmember, including Respondent, produced photo identification to Mr. Jung verifying their identity. (Tr. Day 1 at 25).
 - b. After verifying their identity, Mr. Jung had each crewmember, including Respondent, sign the Federal Drug Testing Custody and Control Form (CCF). (Tr. Day 1 at 26).
 - c. Respondent initialed the seals that are intended to be placed on the split specimen bottles while the seals were still attached to the CCF. (Tr. Day 1 at 37-38).
 - d. Each donor chose a collection kit and filled the urine cup with 40 to 50 mL of urine. (Tr. Day 1 at 26).
 - e. Before entering the restroom to produce the urine specimen, each donor emptied his pockets; Mr. Jung put blue dye tablets into the toilet and capped the sink faucet, to prevent donors from deliberately contaminating or diluting the specimen. (Tr. Day 1 at 25-26).
 - f. After the crewmembers, including Respondent, produced a specimen of sufficient volume and provided it to Mr. Jung, Mr. Jung checked its temperature. (Tr. Day 1 at 27).
 - g. Mr. Jung poured the urine into two split specimen bottles and sealed the bottles in the donor's presence. (Tr. Day 1 at 37-38).
 - h. Mr. Jung completed the collection by placing the sealed split specimen bottles in a pouch with the CCF, to be sent to a lab for testing. (Tr. Day 1 at 30-31).
 - i. On August 31, 2018, Mr. Jung did not give a copy of the CCF to the donors immediately after the collection. Mr. Jung gave all of the donor copies of the CCF to the master, who provided them to the crew later that day. (Tr. Day 2 at 8-9).
12. The CCF identified Respondent's urine specimen as Specimen ID # Y37700626. (Exs. CG-004, CG-009, CG-014).
 13. Medtox Laboratories, Inc. (Medtox) performed the testing of Specimen ID # Y37700626 (Respondent's urine specimen). (Tr. Day 2 at 61; Exs. CG-009, CG-010).
 14. At all relevant times, Medtox was accredited by the National Laboratory Certification Program to perform drug-testing that comports with Department of Transportation (DOT) standards. (Tr. Day 2 at 64; Ex. CG-011).
 15. Medtox received Specimen ID # Y37700626 on September 6, 2018, with the split sample specimen bottle seals intact (Tr. Day 2 at 72-73; Ex. CG-009; Ex. CG-010 at 5).

16. Medtox properly maintained the chain of custody for Specimen ID # Y37700626. (Tr. Day 2 at 72-73; Ex. CG-10 at 7-21).
17. Specimen ID # Y37700626 tested positive for amphetamines and methamphetamines in the initial screening, and after confirmatory testing, it tested positive for amphetamines at a level of 552 ng/ml and for methamphetamines at 9057 ng/mL (Tr. Day 2 at 67; Ex. CG-009; Ex. CG-010 at 1, 5-6).
18. Mary Dommer served as Medtox's certifying scientist/technician and certified the testing of Specimen ID # Y37700626 met all relevant federal standards. (Ex. CG-009; Ex. CG-010 at 5).
19. Mitchell LeBard, Associate Director of Forensic Toxicology at Medtox, reviewed the lab documentation, verified Ms. Dommer's certification, and further verified that Medtox's receipt, handling, and testing of Respondent's urine specimen complied with the requirements of 49 C.F.R. Part 40. (Tr. Day 2 at 58-63).
20. Dr. Walter H. Oakes is, and at all times relevant to these proceedings was, a licensed physician and certified Medical Review Officer (MRO). (Tr. Day 2 at 97-100; Ex. CG-012).
21. Dr. Oakes reviewed the test results transmitted by Medtox for Specimen ID # Y37700626. (Tr. Day 2 at 102; Exs. CG-013, CG-014).
22. Dr. Oakes' office attempted to contact Respondent by phone multiple times between September 12 and 20, 2018; Dr. Oakes eventually connected with Respondent on September 21, 2018, and conducted the MRO interview. (Tr. Day 2 at 102; Ex. CG-013).
23. Dr. Oakes asked Respondent if he had been prescribed any medication that may have caused his urine sample to test positive for methamphetamine, and Respondent answered in the negative. (Tr. Day 2 at 114-116).
24. Respondent told Dr. Oakes he had used an over-the-counter Vicks® inhaler prior to taking the drug test. (Tr. Day 2 at 115, 117-119, 144).
25. Dr. Oakes certified on September 21, 2018, that Specimen ID # Y37700626, collected on August 31, 2018, tested positive for amphetamines and methamphetamines. (Tr. Day 2 at 107-108; Exs. CG-013, CG-014).
26. Respondent denied using methamphetamine. (Tr. Day 2 at 134).

III. PRINCIPLES OF LAW

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. 000363248 when the Coast Guard filed the Complaint initiating the case. (Ex. CG-001). Accordingly, I have jurisdiction to adjudicate this matter.

B. Burden of Proof

The Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard suspension and revocation (S&R) hearings before United States Administrative Law Judges (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 of proof 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 drug testing 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.² Appeal Decision 2704 (FRANKS), at *4 (2014).

As stated above, the Coast Guard bears the burden of proof. When the Coast Guard seeks revocation of a mariner’s credential based on a failed drug test conducted pursuant to 46 C.F.R. Part 16, the Coast Guard can obtain a presumption that the respondent is a user of dangerous drugs if it presents a *prima facie* case. 46 C.F.R. § 16.201(b).³ A *prima facie* case 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). In establishing the afore-mentioned three elements, the Coast Guard, in effect, establishes that the drug test was properly ordered for one of the reasons listed in Part 16 (*i.e.*, the test was a pre-employment, periodic, random, serious marine incident, or reasonable cause drug test) and the test was conducted in a reliable manner in accordance with 49 C.F.R. Part 40. See Appeal Decision 2704 (FRANKS) (2014) (discussing the “why” and “how” of drug testing under 46 C.F.R. Part 16).

² See 46 C.F.R. §§ 16.210-16.250.

³ 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.

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).

IV. DISCUSSION

The purpose of Coast Guard S&R proceedings is to promote safety at sea. See 46 U.S.C. § 7701. ALJs are authorized by 46 C.F.R. § 5.19 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).

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).

Considering the evidence in the record as a whole, I find the Coast Guard established a *prima facie* case of drug use. I further find that Respondent's rebuttal evidence did not overcome the presumption arising from the establishment of the *prima facie* case. The reasons for my findings are set forth, below.

A. The Collector Identified Respondent as the Donor of Specimen ID # Y37700626 and the Urine Collection Process Met 49 C.F.R. Part 40 Requirements

The Coast Guard must prove Respondent was the person who submitted the specimen that was tested for drugs. Appeal Decision 2584 (SHAKESPEARE) (1997). To meet this element of the *prima facie* case, the Coast Guard must show that the specimen collection process generally complied with the requirements of 49 C.F.R. Part 40, Subparts C, D, and E.

Patriot contracted with Anderson-Kelly Associates to perform specimen collections. (Exs. CG-003, CG-005, CG-006; Tr. Day 2 at 37). Anderson-Kelly employed Hie Jung as a specimen collector. (Tr. Day 1 at 12). At all times relevant to this proceeding, Mr. Jung was certified in collection procedures meeting the DOT drug testing program standards. (Ex. CG-002); 49 C.F.R. § 40.31(a). Scott Couturier, Master of the SLNC PAX, testified about the collector coming on board and setting up for the collection on August 31, 2018, and did not recall any problems with the collection process that day. (Tr. Day 2 at 7-10, 27).

On August 31, 2018, in Ulsan, South Korea, Mr. Jung boarded the SLNC PAX to collect urine specimens from the crew in connection with the random drug test for which SLNC PAX was selected. (Ex. CG-003; Tr. Day 1 at 18; Tr. Day 2 at 6-7). When Mr. Jung testified on July 23, 2020, he did not have a specific recollection of the collection from Respondent on August 31, 2018. (Tr. Day 1 at 20, 23, 35). However, Mr. Jung testified as to his normal collection routine and stated that if any problems had occurred with Respondent's collection on August 31, 2018, such as Respondent being unable to produce a sufficient volume of urine, he would have noted that on the CCF at the "Remarks" section. (Tr. Day 1 at 23, 28, 40). Mr. Jung further stated that if an issue had occurred, such as any tampering with a specimen, he would have a specific recollection of that occurrence. (Tr. Day 1 at 35). Regarding the collection on August 31, 2018, Mr. Jung testified that Respondent's specimen collection occurred without any issues and

pointed out that the CCF had no notes under the “Remarks” section. (Ex. CG-004; Tr. Day 1 at 40).

Mr. Jung testified that he boarded the vessel, was given a list of the crew to be tested, and was escorted to the collection site. (Tr. Day 1 at 24-25). Only one donor entered the collection site at a time, and Mr. Jung had each donor produce photo identification so that Mr. Jung could verify that the donor producing the urine specimen was the crewmember listed on the crew list. (Tr. Day 1 at 25). After verifying the donor’s identity, Mr. Jung had the donor sign the CCF. (Tr. Day 1 at 26). He then directed the donor to choose a collection kit and fill the urine cup with 40 to 50 mL of urine. (Tr. Day 1 at 26). Before the donor entered the restroom to produce the urine specimen, Mr. Jung directed the donor to empty his pockets; he also put blue dye tablets into the toilet and capped the sink faucet, to prevent the donor from deliberately contaminating or diluting the specimen. (Tr. Day 1 at 25-26).

Mr. Jung was shown a “Collector Copy” carbon copy of a CCF bearing the date August 31, 2018, Respondent’s name and purported signature, and a control number that is unique to that CCF (Specimen ID # Y37700626), marked as Ex. CG-004. Mr. Jung testified that he believed this was the Collector Copy of the CCF that he prepared and that Respondent signed, for the collection that took place on August 31, 2018. (Tr. Day 1 at 21, 27; Ex. CG-004). Respondent did not object to the authenticity of Ex. CG-004, and acknowledged during his testimony that he signed the form. (Tr. Day 2 at 137-138).

Mr. Jung testified he would have had the donors, including Respondent, fill the urine specimen cup to the appropriate level, then tested the temperature of the specimen to ensure it was in the acceptable range. (Tr. Day 1 at 26-27). Respondent contended he was unable to produce enough urine at first, and had to leave the collection site to drink fluids, and then return to produce another specimen. (Tr. Day 1 at 39; Tr. Day 2 at 138). Respondent also alleged that Mr. Jung did not follow the proper “shy bladder” procedure and possibly had Respondent reuse

his urine collection container even though Respondent also stated he could not tell if it was the same bottle. (Tr. Day 2 at 138-139; 164). When asked about Respondent's allegations during cross-examination, Mr. Jung disagreed with Respondent's contention and stated that the CCF had no notes in the "Remarks" section, where he would have noted an issue such as a failure to produce a sufficient specimen. (Tr. Day 1 at 39-40; Ex. CG-004).

Mr. Jung further testified that he would have poured the donor's specimen into two smaller split specimen bottles and applied the seals that bear the CCF control number to the bottles. (Tr. Day 1 at 29). On cross-examination, Respondent alleged that Mr. Jung had him initial the seals while they were still attached to the CCF and allowed him to leave the collection room before he saw his urine specimen poured into the split specimen tubes and sealed. (Tr. Day 1 at 38; Tr. Day 2 at 139-140). In response, Mr. Jung acknowledged that he may have had Respondent initial the seals while they were attached to the CCF, but that the donors, including Respondent, were present when he sealed the bottles, and that he always applies the seals to the split specimen bottles in the presence of the donor. (Tr. Day 1 at 37-38). Respondent acknowledged that he signed Step 5 of the CCF certifying that the specimen was sealed in his presence. (Ex. CG-004; Tr. Day 2 at 137-138). Although not consistent with the procedure set forth in 49 C.F.R. § 40.71, having a donor initial the seals before they were placed on the split specimen bottles is a technical error that would not compromise the integrity of the specimen if the bottles were sealed in the donor's presence. See Appeal Decision 2688 (HENSLEY) (2010); Appeal Decision 2554 (DEVONISH) (1994).⁴

⁴ Where the ALJ found that the collector had directed donors to sign and certify the CCF prior to completing the collection process, the Commandant held that this was an administrative error. The Commandant stated "[D]onors should not be required to sign the certification until all of the identified procedures have been completed. As discussed below, however, even though Appellant signed the donor certification before providing his specimen, the record contains substantial evidence that the required procedures were correctly completed in the presence of the donor. Therefore, the error in prematurely signing the DTCCF is of little consequence." Appeal Decision 2554 (DEVONISH) at *3.

Mr. Jung testified that no one complained to him or questioned the collection procedures when the collection occurred August 31, 2018. (Tr. Day 1 at 33). Respondent did not raise any complaint at the time of the collection. (Tr. Day 2 at 140). Scott Couturier, Master of the SLNC PAX, and Timothy Kelley, Chief Engineering Officer, both testified that they participated in the urine collection that day and did not recall any problems with the collection process. (Tr. Day 2 at 8-9, 27). I find that the testimony of the collector, combined with Respondent's signature on the CCF (Ex. CG-004), and his acknowledgement that he signed it, to be sufficient evidence to prove Respondent is the person who provided Specimen ID # Y37700626.

B. The Selection Process that Resulted in the Crew of the SLNC PAX Being Selected for a Random Drug Test Complied with 46 C.F.R. Part 16

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). In this case, there was no dispute that SLNC PAX is an inspected vessel and that its crewmembers are subject to the random drug testing requirements of 46 C.F.R. Part 16. As discussed more fully in Section IV(D), Respondent presented some evidence attempting to argue that he was not technically a crewmember at the time the drug test was administered. However, in his Answer, Respondent admitted factual allegation 1, which alleges, "[o]n August 31, 2018, Respondent took a required random drug test pursuant to 46 CFR Part 16." In answering a Complaint, if a respondent does not specifically deny an allegation, the allegation is considered admitted. 33 C.F.R. § 20.308(c). On the date of the drug test, Respondent was employed and performing duties as First Assistant Engineer of the SLNC PAX. (Tr. Day 2 at 7-8, 40-41). Considering Respondent's Answer and the evidence in the record, which is discussed more fully in Section IV(D), I find that on August 31, 2018, Respondent was performing duties under the authority of his MMC on board SLNC

PAX and was a crewmember of SLNC PAX subject to random testing under 46 C.F.R. § 16.230(a)(1).

Compliance with the regulations includes the requirement that random selection for drug testing be done in accordance with a scientifically valid method, such as a computer-based random number generator that selects a vessel for testing, provided that each vessel subject to the marine employer's test program remains equally subject to selection. 46 C.F.R. § 16.230(c); Appeal Decision 2710 (HOPPER) (2015). Marine employers may use contractors to administer the random chemical testing programs required by Part 16. 46 C.F.R. § 16.230(d). Here, Patriot, operator of the SLNC PAX, contracted with AMS to perform the random drug testing selection process. (Tr. Day 2 at 35). AMS issued a notification indicating that the crew of the SLNC PAX had been randomly selected for drug testing. (Ex. CG-005; Tr. Day 2 at 35-36). AMS made the selection through a computer program that randomly selected SLNC PAX from a database. (Tr. Day 2 at 36). 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. Accordingly, I find that the random selection process in this case complied with the requirements of 46 C.F.R. Part 16.

C. The Evidence Shows Respondent Failed the Drug Test and the Drug Test Was Conducted in Compliance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40

As noted above, the evidence shows Respondent was the person tested and that the random selection process satisfied the 46 C.F.R. Part 16 requirements for a random test. The ALJ now considers whether the evidence is sufficient to show that Respondent failed the drug test. When the basis for the charge is a 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 found in 49 C.F.R. Part 40.

1) Respondent's Specimen Tested Positive for Dangerous Drugs and the Laboratory Testing Met 49 C.F.R. Part 40 Requirements

Continuing with the elements required to be proven to make a *prima facie* case, I must determine if the evidence shows Respondent failed the drug test. This requires an examination of the evidence regarding the laboratory analysis of Respondent's urine specimen.

Mitchell LeBard testified on behalf of Medtox as to the testing of Respondent's urine specimen. (Tr. Day 2 at 58-75). Mr. LeBard is the Associate Director of Forensic Toxicology for Medtox and has worked at Medtox since 1996. (Tr. Day 2 at 58-60). Only laboratories certified by the U.S. Department of Health and Human Services 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, Medtox was certified by the NLCP. (Tr. Day 2 at 64; Ex. CG-011).

Medtox received Specimen ID # Y37700626 on September 6, 2018, with the split sample specimen bottle seals intact. (Tr. Day 2 at 72-73; Ex. CG-009; Ex. CG-010 at 5). Upon receipt, Medtox assigned Specimen ID # Y37700626 a unique accession number G8997283. (Tr. Day 2 at 66; Ex. CG-009; Ex. CG-010 at 10). At no time during Medtox's possession of Specimen ID # Y37700626 was the chain of custody compromised. (Tr. Day 2 at 72-73; Ex. CG-10 at 7-21).

Medtox performed an initial screening of Respondent's specimen using an immunoassay test, which produced a presumptive positive result for amphetamines and methamphetamines. (Tr. Day 2 at 63, 67). Medtox then performed confirmatory testing using gas chromatography mass spectrometry. (Tr. Day 2 at 67). The confirmatory test cut-off level for positive amphetamine and methamphetamine confirmatory tests is 250 ng/mL. (Tr. Day 2 at 71); 49 C.F.R. § 40.87(a). After confirmatory testing, Specimen ID # Y37700626 tested positive for amphetamines at a level of 552 ng/ml and for methamphetamines at 9057 ng/mL. (Tr. Day 2 at

67; Ex. CG-009; Ex. CG-010 at 1, 5-6). Medtox ensured its equipment produced accurate results by performing calibration and quality control tests. (Tr. Day 2 at 63).

Mary Dommer served as Medtox's certifying scientist/technician and certified the testing of Specimen ID # Y37700626 met all relevant federal standards. (Ex. CG-009; Ex. CG-010 at 5). Mr. LeBard reviewed the lab documentation and verified Ms. Dommer's certification, and further verified that Medtox's receipt, handling, and testing of Respondent's urine specimens complied with the requirements of 49 C.F.R. Part 40. (Tr. Day 2 at 61-63).

The evidence presented by the Coast Guard showed that Medtox 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. Accordingly, I find Respondent's Specimen ID # Y37700626 tested positive for amphetamines and methamphetamines.

2) The MRO Verified Respondent's Sample as Positive and the MRO Review Process Met 49 C.F.R. Part 40 Requirements

Determining if Respondent failed the drug test also requires an analysis of the verification by the MRO of the positive drug test result produced by the laboratory.

Accordingly, I must examine the evidence presented regarding the MRO's verification process.

The Coast Guard presented the testimony of Dr. Walter Oakes, the MRO who evaluated the results of Respondent's drug test. He is a licensed physician and a certified MRO. (Tr. Day 2 at 97-100; Ex. CG-012). 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. Oakes' office attempted to contact Respondent by phone a number of times between September 12 and 20, 2018; Dr. Oakes was successful in connecting with Respondent on September 21, 2018. (Tr. Day 2 at 102; Ex. CG-013).

The regulations provide that the MRO is to allow the donor to provide any information about lawfully prescribed medication that may have caused a positive result and to explain the

opportunity for a retest. 49 C.F.R. §§ 40.135, 40.137, and 40.153. Dr. Oakes asked Respondent if he had been prescribed any medication that may have caused his urine sample to test positive for methamphetamine, and Respondent answered in the negative. (Tr. Day 2 at 114-116).

Respondent stated in the phone call with Dr. Oakes, and asserted during Dr. Oakes' cross-examination and in his own testimony, that he had used an over-the-counter Vicks® inhaler prior to taking the drug test. (Tr. Day 2 at 115, 117-119, 144). Dr. Oakes testified that the Vicks® inhaler is an over-the-counter product that can cause the presence of "L type" methamphetamine in a person's urine sample, but it does not cause the presence of "D type" methamphetamine. (Tr. Day 2 at 110, 117, 119). Dr. Oakes testified that only a few kinds of prescription medications can cause the presence of "D type" methamphetamine. (Tr. Day 2 at 109-110). Dr. Oakes further testified that Respondent's specimen showed the presence of 95% "D type" and 5% "L type" methamphetamine. (Tr. Day 2 at 119-120). Because Respondent stated he had no prescription for any medication that may have caused the positive result, and because Respondent's purported use of the Vicks® inhaler could not have caused the result of 95% "D type" methamphetamine, Dr. Oakes concluded that Respondent had no medically valid reason for testing positive and verified Respondent's drug test result. (Ex. CG-014).

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 MRO verification of a positive test and reporting results to the designated employer representative (DER), in keeping with 49 C.F.R. Part 40, Subpart G. I find there is sufficient evidence presented to show that Respondent failed the drug test.

D. Respondent's Rebuttal Evidence Was Insufficient to Rebut the *Prima Facie* Case Presented by the Coast Guard

If the Coast Guard establishes a *prima facie* case by a preponderance of the evidence, a presumption of dangerous drug use arises, and the burden then shifts to the respondent to

produce persuasive evidence to rebut the presumption. 46 C.F.R. § 16.201(b); 33 C.F.R. § 20.703(a); Appeal Decisions 2603 (HACKSTAFF) (1998). A respondent faced with overcoming the presumption of use of a dangerous drug “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). If a respondent’s evidence sufficiently rebuts the presumption, the burden of presenting evidence of a respondent’s drug use returns to the Coast Guard, which always bears the ultimate burden of proof on this issue. Id.; 33 C.F.R. § 20.703(b).

Respondent cross-examined the Coast Guard’s witnesses; testified on his own behalf; presented the testimony of Second Assistant Engineer Thomas Stenquist; presented a tape recording of his verification interview with the MRO, Dr. Walter Oakes, which was transcribed into the record; and presented documentary evidence. After consideration of Respondent’s evidence in rebuttal, I find that Respondent did not overcome the presumption of drug use that arose from the Coast Guard’s *prima facie* case.

1) Respondent Did Not Demonstrate His Selection for Random Drug Testing Violated 46 C.F.R. Part 16

Respondent argued the random drug test in which he participated on August 31, 2018, was invalid because he was not yet a crewmember of the SLNC PAX when his urine was collected. Respondent contended he had not yet signed the ship’s articles on August 31, 2018, and thus was not a crewmember until he signed the articles “three or four more days” after August 31, 2018. (Tr. Day 2 at 136). This argument is rejected. As stated in Section IV(B), above, Respondent’s Answer admitted the jurisdictional allegations and the factual allegation that he took a random drug test required by 46 C.F.R. Part 16 on August 31, 2018. Respondent also testified he reported aboard the vessel on August 30, 2018, as directed by his employer,

Patriot, and was performing the duties of his position (First Assistant Engineer) on the vessel, including participating in the urinalysis collection. (Tr. Day 2 at 136).

I find Respondent was employed in the service of the vessel and acting under the authority of his credentials on August 31, 2018. 46 C.F.R. § 5.57. Whether Respondent signed the articles on the ship does not eliminate or contradict the facts of his actions in performing duties aboard the vessel SLNC PAX. Pursuant to 46 C.F.R. § 16.230(a), the crewmembers of inspected vessels who occupy positions required by the Certificate of Inspection must be subject to random drug testing. Therefore, I find Respondent was a crewmember of SLNC PAX subject to random testing on August 31, 2018. Additionally, the Coast Guard presented adequate evidence of the company's use of a valid random selection process for its vessels through the contractor AMS. Respondent's challenge to the validity of his random selection is rejected.

Respondent also questioned the length of time that elapsed between AMS notifying Patriot that the crew of the SLNC PAX was selected for random testing and the administration of the testing. David Nolan, the Personnel Manager and DER for Patriot, testified Patriot was notified of the selection on April 25, 2018, but testing was not performed until August 31, 2018. (Tr. Day 2 at 51; Ex. CG-005). However, Respondent did not show that the delay in performing the test violated any regulation in Part 16. There was no evidence that the delay undermined the rationale for random testing under Part 16—to deter drug use by crewmembers and to ensure that mariners are not unfairly targeted for testing.

2) Respondent Did Not Demonstrate Errors in the Collection Process Sufficient to Undermine the Chain of Custody or Integrity of the Specimen

Respondent's evidence focused primarily on asserting claims of error in the collection process. Respondent testified Mr. Jung was not wearing gloves during the collection process. (Tr. Day 2 at 138). He stated that he initialed the seals that are intended to be placed onto the split specimen bottles while they were still attached to the CCF. (Tr. Day 2 at 140). Respondent

alleged Mr. Jung did not allow Respondent to choose the collection kit but was instead given one to use by Mr. Jung. (Tr. Day 2 at 138). He testified he could not produce a sufficient amount of urine and was directed by Mr. Jung to leave, drink water, and return at some unspecified time to try to give another specimen. (Tr. Day 2 at 138). According to Respondent, when he returned, Mr. Jung gave him a urine collection cup that was not wrapped. Respondent stated the collection cup “appeared to be the same bottle but I could not tell because if it was mine it would have been wiped out, because the drops of urine that were in there when I handed it to him were not there.” (Tr. Day 2 at 139). After producing sufficient urine in the collection cup, Respondent stated he gave the cup to Mr. Jung, and Mr. Jung then allowed Respondent to leave the room before he poured the urine into the split specimen tubes and applied the seals. (Tr. Day 2 at 140).

In support of his argument, Respondent presented the testimony of Thomas Stenquist, the Second Assistant Engineer aboard the SLNC PAX, on August 31, 2018. Mr. Stenquist testified that by August 31, 2018, he had given his notice to Patriot that he was leaving his employment on the vessel and wanted to be sure his exit from the ship was “by the book.” (Tr. Day 2 at 79, 85). Mr. Stenquist testified the collector verified his ID and then already had a urine collection kit for him, and the collector had already opened the kit. (Tr. Day 2 at 81). He also testified the collector had him sign the CCF and initial the seals prior to placing the seals on the bottles, and that the collector allowed him to leave the room before the collector placed the seals on the split specimen bottles. Mr. Stenquist also stated he went back into the room and saw the seals were already on the bottles. (Id.). Mr. Stenquist also testified that the collector did not provide a copy of the CCF to him immediately after the collection. (Tr. Day 2 at 80-82). Mr. Stenquist then said that Respondent told him that he initially could not provide a sample and was told to drink water and come back. Mr. Stenquist also said that Respondent told him that when he provided a specimen later, the collector let him use the same cup. (Tr. Day 2 at 82-83).

Mr. Stenquist further testified that the day after the collection, he discussed the collector's procedures with other members of the crew and then raised his concerns to the attention of Capt. Couturier and Chief Engineer Timothy Kelley, but Mr. Stenquist stated that they did not share his concerns with the test. (Tr. Day 2 at 84-85). At that point, Mr. Stenquist said he sent an email documenting his concerns to the "designated person ashore" at Patriot. Respondent offered into evidence an email sent by Mr. Stenquist to "Philip.dimoulas@asmhq.com" on September 5, 2018. (Ex. R-001). There was no testimony regarding who Philip Dimoulas was and what he did with the email shown in Ex. R-001, but David Nolan (Personnel Manager and DER for Patriot) testified he received an email from Mr. Stenquist stating concerns with the August 31, 2018 collection and forwarded the email to another DER at Patriot. (Tr. Day 2 at 50). Respondent also moved into evidence two emails from individuals named Andrew Mayorga and Victor Armenta that express agreement with Mr. Stenquist's concerns. (Exs. R-002, R-003). Neither Mr. Mayorga nor Mr. Armenta testified at the hearing. I have reviewed this evidence, along with the testimony presented at the hearing, and I do not find that it presents evidence that affects the integrity of the specimen collection from Respondent on August 31, 2018.

Mr. Stenquist testified that he was concerned about the collection because it was important to his career and followed through by sending an email regarding his concerns to the company DER. However, only part of his testimony is relevant and I find it is not persuasive. While he contends he was allowed to leave the room before the seals were affixed to the specimen bottles, he said the bottles were sealed when he immediately went back into the room. He also complained that the collector did not wear gloves. However, while wearing gloves may be a good practice, it is not required by the regulations. The collector is responsible for attaching the seals to the bottles, but the specimen donor is responsible for signing the CCF acknowledging the seals were attached in his or her presence. There was also some contention of

noncompliance with the company's D 148 checklist, but no checklist was presented in evidence and there is no basis to find a problem in regard to the alleged checklist. While Mr. Stenquist may have had some concerns regarding the collection, none of them appear to provide a basis to find that the specimen integrity was somehow compromised. Additionally, in regard to Respondent's specimen collection, Mr. Stenquist has no personal knowledge of Respondent's interaction with the collector, and his testimony repeating what Respondent told him is classic hearsay. Although hearsay is admissible in S&R proceedings, Stenquist's repetition of Respondent's statements without any personal knowledge does not provide a basis for giving any weight to that hearsay testimony.

Like Mr. Stenquist, Respondent is an experienced mariner. Respondent testified he had participated in over 60 drug tests. (Tr. Day 2 at 132-133). Despite his familiarity with the process, Respondent did not make a complaint to the collector and insist on proper procedures when the collector allegedly committed significant errors. While there may be some conflicting evidence between the evidence presented by the Coast Guard and Respondent, I find the evidence shows that Respondent did not make a contemporaneous complaint regarding the process to the collector or to the master on August 31, 2018.

Respondent does not dispute he signed the CCF certifying that the specimen bottles were sealed in his presence. (Ex. CG-003). I find Respondent's contentions that the collector did not allow him to choose a collection cup and allowed him to leave the collection site prior to sealing the split specimen bottles in his presence not credible. Likewise, I find Respondent's contention that he could not produce a sufficient specimen on his first attempt and then later may have been asked to use the same specimen bottle not credible.

I find Mr. Jung's testimony that he followed his typical procedures, which are consistent with the requirements of 49 C.F.R. Part 40, to be credible. At all relevant times, Mr. Jung was a certified collector who had undergone training in DOT and Coast Guard drug and alcohol testing

requirements. (Ex. CG-002). Mr. Jung testified he allowed the specimen donors, including Respondent, to choose their own collection kit. (Tr. Day 1 at 26, 36). He testified he poured Respondent's urine into the split specimen bottles and sealed the bottles in Respondent's presence. (Tr. Day 1 at 37-38). Mr. Jung acknowledged he may not have worn gloves, but, while it may be a good practice, the DOT regulations do not require collectors to wear gloves.

As discussed in Section IV(A), above, having specimen donors sign the CCF seals while still attached to the form is an administrative error that does not call into question the integrity of the specimen, if the ALJ finds that the bottles were sealed in the mariner's presence. See Appeal Decision 2554 (DEVONISH) (1994). I find Mr. Jung's testimony that he sealed the bottles in Respondent's presence to be credible and corroborated by Respondent's signature on the form, which Respondent acknowledged to be his signature. Finally, Mr. Jung testified he did not recall if he provided the mariners copies of the CCF forms. The master, Scott Couturier, testified that on August 31, 2018, he received all of the CCF forms from the collector and then provided them to the crew. (Tr. Day 2 at 9). Although the crewmembers should have been provided with a copy of the form at the time of the collection, this is an administrative error that does not affect the chain of custody or integrity of the specimen. For all of the foregoing reasons, I find that Respondent's evidence was not sufficient to demonstrate that the collector failed to substantially follow the requirements of 49 C.F.R. Part 40.

3) Respondent Did Not Demonstrate the MRO Verification of the Positive Drug Test Result Violated 49 C.F.R. Part 40

The MRO advised Respondent of his opportunity to request a split specimen test at another laboratory and inquired whether Respondent had a prescription for methamphetamine. Respondent told the MRO, Dr. Oakes, that he used an over-the-counter Vicks® inhaler prior to taking the drug test. (Tr. Day 2 at 114-115). During the interview, and at the hearing, Dr. Oakes explained that this product could cause the presence of "L type" methamphetamine in a person's

urine sample. Dr. Oakes pointed out that Respondent's specimen showed the presence of 95% "D type" methamphetamine, which would not be the result of using an inhaler. (Tr. Day 2 at 110, 117, 119).

Respondent contended that the MRO failed in his duty to investigate the circumstances of Respondent's drug test because of his complaint about the collection process. Respondent argues that his drug test must have been corrupted in some way, otherwise it would have shown the presence of more "L type" methamphetamine. Respondent's argument relies, in part, on finding his testimony regarding use of the over-the-counter Vicks® inhaler credible; but it also fails to address the fact there was a very high positive result for the "D" type of methamphetamine. Neither the MRO nor the undersigned ALJ are obligated to believe Respondent's contention that he was using the inhaler or that his alleged use of an inhaler would have contradicted the results determined by Medtox. Dr. Oakes properly questioned Respondent about whether he had any prescriptions that may have caused the presence of the "D type" methamphetamine, and when Respondent stated he had taken no such prescription medication, Dr. Oakes found no legitimate medical basis for the positive test result. He also advised Respondent of his opportunity to request a split specimen test. (Tr. Day 2 at 115). Considering all of the evidence in the record, the MRO's review of the lab results and verification of the positive drug test result satisfied the requirements of 49 C.F.R. Part 40, Subpart G.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to the instant proceeding, Respondent was a holder of Coast Guard issued Merchant Mariner Credential No. 000363248.
2. Respondent was performing duties as First Assistant Engineer on the vessel SLNC PAX on August 31, 2018.
3. 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.

4. On August 31, 2018, Respondent participated in a properly directed 46 C.F.R. Part 16 random drug test.
5. Respondent's urine specimen tested positive for amphetamines and methamphetamines. Medtox analysis showed Respondent's test results exceeded the cutoff levels of 500 ng/ml provided by 49 C.F.R. 40.87. As noted in Findings of Fact 17 above, Specimen ID # Y37700626 tested positive for amphetamines at a level of 552 ng/ml and for methamphetamines at 9057 ng/mL. (Tr. Day 2 at 67; Ex. CG-009; Ex. CG-010 at 1, 5-6).
6. 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 was a user of dangerous drugs. 46 C.F.R. § 16.201(b).
7. Respondent did not present sufficient evidence to rebut the presumption that he was a user of dangerous drugs.
8. The Coast Guard has proven by a preponderance of reliable, probative, and credible evidence that Respondent was a user of dangerous drugs.

VI. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, revocation of all Coast Guard issued licenses, documents, and other credentials is the appropriate sanction unless cure is proven. 46 U.S.C. § 7704(b); 46 C.F.R. § 5.59; 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 or addicted to dangerous drugs, and Respondent has not presented 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. 000363248, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Respondent Douglas Scott Robb, are **REVOKED**. Respondent's MMC shall be surrendered to U.S. Coast

Guard Sector Lower Mississippi, 2 A.W. Willis Ave, Memphis, Tennessee 38105-1502,
Attention Mr. James Fayard, Investigating Officer, and shall be processed appropriately.

Respondent must immediately surrender any other Coast Guard-issued credentials to the Coast Guard. If Respondent knowingly continues to use his credentials, he may be subject to criminal prosecution.

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 C.F.R. § 20.904; 46 C.F.R. § 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. (See Attachment B).

<p>/s/</p> <hr/> <p>Michael J. Devine Administrative Law Judge United States Coast Guard</p> <p style="text-align: center;">January 14, 2021</p> <p>Date:</p>
--

ATTACHMENT A

Coast Guard's Witnesses

1. David Nolan
2. Scott Couturier
3. Timothy Kelley
4. Hie Jung
5. Mitchell LeBard
6. Walter Oakes, M.D.

Coast Guard's Exhibits

- CG Exhibit 1: Copy of Respondent's MMC
- CG Exhibit 2: DOT/USCG Collector Training Certificate issued to Hie Jung
- CG Exhibit 3: Notice of completed collection for crew of SLNC PAX on August 31, 2018
- CG Exhibit 4: Federal Drug Testing Custody and Control Form (CCF) for Specimen ID # Y37700626, Copy 3 "Collector Copy"
- CG Exhibit 5: Random Selection Notification from American Maritime Safety to SLNC PAX
- CG Exhibit 6: Notification of scheduled urine specimen collection from Anderson-Kelly Associates to SLNC PAX
- CG Exhibit 7: Positive Drug Test Notification letter dated October 2, 2018, from David Nolan to Coast Guard
- CG Exhibit 8: Patriot Contract Services, LLC Drug and Alcohol Policy
- CG Exhibit 9: CCF for Specimen ID # Y37700626, Copy 1 "Test Facility Copy"
- CG Exhibit 10: Medtox Laboratories, Inc. Litigation Package
- CG Exhibit 11: Federal Register Vol. 83, No. 171 (Listing of HHS-Certified Laboratories)
- CG Exhibit 12: MRO Verification of Certification issued to Dr. Walter Oakes
- CG Exhibit 13: MRO report of positive drug test result

CG Exhibit 14: CCF for Specimen ID # Y37700626, Copy 2 “Medical Review Officer Copy”

Respondent’s Witnesses

1. Thomas Stenquist
2. Douglas Scott Robb

Respondent’s Exhibits

- Resp. Exhibit R1: Statement of Tom Stenquist and email from Stenquist to Philip.dimoulas@asmhq.com
- Resp. Exhibit R2: Email from Andrew Mayorga
- Resp. Exhibit R3: Email from Victor Armenta
- Resp. Exhibit R3: Photograph of Inhaler (1)
- Resp. Exhibit R4: Photograph of Inhaler (2)

ALJ Exhibit

- ALJ Exhibit I: Stipulation of parties to authenticity of exhibits

ATTACHMENT B

Notice of Appeal Rights

33 CFR 20.1001 – General.

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

33 CFR 20.1002 – Records on appeal.

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

33 CFR 20.1003 – Procedures for appeal.

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

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

33 CFR 20.1004 – Decisions on appeal.

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