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

UNITED STATES COAST GUARD
Complainant

vs.

ANNA MARIE SOSA
Respondent

Docket Number 2022-0336
Enforcement Activity Number 7530015

DECISION AND ORDER

Issue: October 2, 2024

By The Honorable Tommy Cantrell,
Administrative Law Judge

Appearances:

Andrew Myers, Esq.,
Suspension and Revocation National Center of Expertise
&
Chief Warrant Officer Aaron Sala
MSD Port Canaveral

For the Coast Guard

Anna Marie Sosa, *pro se*

For Respondent

The United States Coast Guard (Coast Guard) initiated this administrative action against Anna Marie Sosa (Respondent), seeking to revoke her Merchant Mariner Credential (MMC) for being a user of or addicted to the use of dangerous drugs. See 46 U.S.C. § 7704(b); 46 C.F.R. Parts 5 and 16 and 33 C.F.R. Part 20. Upon consideration of the record, and after conducting a hearing, I find the Coast Guard **PROVED** Respondent is a user of dangerous drugs, and **REVOKE** Respondent's MMC.

I. PROCEDURAL BACKGROUND

On August 16, 2022, the Coast Guard filed a Complaint alleging Respondent tested positive for hydrocodone/hydromorphone after submitting to a random drug test. After Respondent failed to file an Answer, the Coast Guard moved for a Default Order on September 23, 2022. Respondent then answered the Complaint on October 12, 2022, denying all jurisdictional and factual allegations. Thereafter, the Chief Administrative Law Judge (CALJ) assigned this matter to the Honorable Brian J. Curley, for adjudication. After conducting a prehearing conference on or about December 20, 2022, Judge Curley denied the Coast Guard's motion for default and set deadlines for discovery and motion practice.

On or about May 16, 2023, CALJ reassigned this matter to my docket for adjudication. Thereafter, I held a prehearing conference on May 25, 2023, and set this matter for a hearing during the week of August 15, 2023, in the Orlando, Florida area.

The hearing commenced on August 16, 2023, in Sandford, Florida. Andrew S. Myers, Esq., and Chief Warrant Officer Aaron Sala appeared on behalf of the Coast Guard and Respondent appeared, *pro se*. As part of its case-in-chief, the Coast Guard called four (4) witnesses, and offered fifteen (15) exhibits, all of which were admitted. See Attachment A. Respondent called four (4) witnesses, and offered nine (9) exhibits, all of which were admitted.

Id. At the conclusion of the hearing, I advised the parties I would issue a scheduling order outlining deadlines for post-hearing briefs.

On October 4, 2023, I issued a post-hearing scheduling order, provided a copy of the hearing transcript, and instructed the parties to file post-hearing briefs and proposed findings of fact. The Coast Guard filed its on December 1, 2023, and, to date, Respondent has not filed a post-hearing brief.

This matter is now ripe for decision. For the reasons set forth below I find the Coast Guard **PROVED** Respondent is a user of dangerous drugs, and accordingly, Respondent's MMC is **REVOKED**.

II. FINDINGS OF FACT

After careful review of the record, including witness testimony and exhibits, I find the following facts proved by preponderant evidence:

1. At all times relevant, Respondent held MMC number [redacted] (CG-01);
2. Victory Casino Cruises (Victory) employed Respondent from July 1, 2020, to December 2021. (Tr. at 187);
3. On October 7, 2021, Doctor Referral Service (DRS), a drug testing consortium utilized by Victory, selected Respondent for random drug testing. (Tr. at 23, 62; CG-05);
4. DRS selected Respondent using a random computer-generated program. (Id.);
5. Thereafter, Victory notified Respondent she was required to submit to a random drug test. (Tr. at 23–26, 62; CG-05);
6. Respondent submitted to a urine specimen collection on November 18, 2021. (Tr. at 27-28);
7. Dezarae Lee Fuste (Collector), a Department of Transportation (DOT)-certified urine specimen collector, collected Respondent's urine specimen. (Id.);
8. On November 18, 2021, the Collector was current on training in DOT collection procedures. (CG-06);

9. When collecting Respondent's urine, the Collector adhered to the following protocol:

    a. The collection occurred in one of the vessel's multi-stall restrooms. The Collector restricted access to the restroom by placing an out of order sign on the door prior to testing. (Tr. at 27–28).

    b. Prior to the test, the Collector secured the restroom by inspecting it for prohibited items, designating a stall for testing, placing blue dye in the toilets, and monitoring the sink. (Tr. at 28).

    c. The Collector completed Step 1 of the Federal Drug Testing Custody and Control Form (CCF) prior to beginning the specimen collection. (Tr. at 29–30).

    d. The Collector positively identified Respondent. (Tr. at 32-35).

    e. The Collector had Respondent remove all items from her pockets and wash her hands; thereafter, the Collector gave a collection cup to Respondent and directed Respondent to provide a sample of at least 45 milliliters. (Tr. at 29, 32-33).

    f. After Respondent returned with the urine sample, the Collector checked the sample's temperature and verified it was in the normal range. (Tr. at 33).

    g. In Respondent's presence, the collector split the specimen into the two specimen bottles and sealed both bottles. (Tr. at 33).

    h. The Collector also completed Steps 2 through 4 on the CCF. (CG-07).

    i. Respondent completed Step 5 of the CCF, which includes Respondent's signature verifying a statement that the specimen bottles were sealed in Respondent's presence. (CG-07).

    j. The Collector prepared Respondent's sample for shipping by placing the split specimen bottles and the lab copy of the CCF into the plastic test kit bag and sealed the bag. (Tr. at 36);

10. The CCF used for Respondent's urine specimen collection identified Respondent's sample as Specimen I.D. No. 5198478. (Tr. at 77, 87; CG-02);

11. Quest Diagnostics Incorporated (Quest), in Lenexa, Kansas, received Specimen I.D. No. 5198478 on November 20, 2021. (Tr. at 36, 80; CG-07, CG-09, CG-15);

12. Quest is a Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratory. (Tr. at 70–71; CG-08);

13. Quest performed an initial drug test screening on Specimen I.D. No. 5198478. Using cut off levels of 300 ng/ml for hydrocodone, 300 ng/ml for hydromorphone, and 100 ng/ml

for oxycodone, Specimen I.D. No. 5198478 yielded positive results for hydrocodone, hydromorphone, and oxymorphone. (Tr. at 77–88; CG-09, CG-10, CG-15);

14. Using gas chromatography mass spectrometry or liquid chromatography mass spectrometry, Quest performed a confirmation test on Specimen I.D. No. 5198478. The cutoff levels used in the confirmatory test were 100 ng/ml for hydrocodone, hydromorphone and oxymorphone. (CG-10, CG-15);

15. The confirmation test for Specimen I.D. No. 5198478 yielded a positive result for hydrocodone at a level of 3349 ng/mL, hydromorphone at a level of 738 ng/mL, and oxymorphone at a level of 387 ng/ml. (Tr. at 85–87, 122–23; CG-09, CG-10, CG-15);

16. Hydrocodone metabolizes into hydromorphone. (Tr. at 117);

17. Oxycodone metabolizes into oxymorphone. (CG-10);

18. At all times during the testing process, Quest properly maintained the chain of custody for Specimen I.D. No. 5198478. (Tr. at 78–88; CG-15);

19. Dr. Kevin B. Edwards, a physician and certified Medical Review Officer (MRO), served as the MRO for Noble Diagnostics, Inc., and reviewed Respondent's test results transmitted by Quest for Specimen I.D. No. 5198478. (Tr. at 102-105; CG-12, CG-13, CG-14);

20. On December 7, 2021, Dr. Edwards spoke to Respondent by phone and informed Respondent her urine specimen tested positive for hydromorphone, hydrocodone, and oxymorphone. Respondent told Dr. Edwards she had a prescription for hydrocodone and oxycodone. (Tr. at 106–110; CG-12);

21. Respondent knew at the time of the initial call with Dr. Edwards that she did not have a prescription for hydrocodone. (Tr. at 117-119; CG-12);

22. Dr. Edwards verified Respondent had a valid prescription for oxycodone. (Tr. at 107);

23. Dr. Edwards contacted Respondent to again determine if Respondent had a prescription for hydrocodone. Respondent replied her mother had a prescription for hydrocodone and she must have taken her mother's prescription by accident. (Tr. at 117- 120);

24. Dr. Edwards explained and offered split specimen testing for Respondent's sample. (CG-12);

25. At all times relevant, Respondent did not have a prescription for hydrocodone. (Tr. at 109);

26. On December 8, 2021, Dr. Edwards certified Respondent's specimen as positive only for hydrocodone and hydromorphone because Respondent had a valid prescription for oxycodone, which explained the presence of oxymorphone in Respondent's system. (Tr. at 113–14; CG-13, CG-14);

27. At all times relevant, Respondent's mother had a prescription for hydrocodone. (Tr. at 191; R-09);

28. Respondent kept her and her mother's medications in a locked safe. (Tr. at 14, 171–73, 205; R-04, R-07);

29. Since 1992, Respondent has taken either hydrocodone or oxycodone. (Tr. at 189);

30. Respondent is capable of visually differentiating between hydrocodone and oxycodone pills. (Tr. at 191–92; R-09);

31. Respondent considers her prescription for oxycodone stronger than her mother's prescription pain medication for hydrocodone. (Tr. at 196, 207); and

32. On occasion, Respondent would break one of her oxycodone pills in half because ingesting a complete pill would prevent her from sleeping. (Tr. at 202–03).

III. DISCUSSION

A. Jurisdiction

To prevail in a suspension or revocation proceeding, the Coast Guard must first prove it has jurisdiction to seek suspension or revocation. Coast Guard v. Schwieman, 2019 WL 8643835, at *3 (ALJ Decision Sept. 13, 2019). Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). Even where a mariner admits jurisdictional facts, the question of jurisdiction remains. Appeal Decision 2677 (WALKER) (2008). Furthermore, a complaint must include sufficient factual allegations that form a basis for jurisdiction. Id.

Relevant case law outlines two types of jurisdiction in Coast Guard cases: 1) when the mariner simply holds an MMC, referred to as a "holder offense;" and 2) when a mariner holds the credential and commits an offense while acting under the authority of his credential, referred

to as an "acting under the authority offense." See Appeal Decision 2668 (MERRILL) (2007); see also 46 U.S.C. § 7703 (distinguishing offenses that require a mariner to be acting under the authority of the MMC with those that simply require a mariner to "hold" the license). Where the Coast Guard alleges a holder offense, jurisdiction is proper no matter what the mariner is doing—the mere possession of an MMC, whether the mariner is on land or sea, at work or not, will confer jurisdiction over the credential. See Appeal Decision 2668 (MERRILL) (2007). For example, as in this case, if a mariner uses dangerous drugs, no matter the circumstance, the Coast Guard will have jurisdiction to bring a claim against that credential. Id.; See also Coast Guard v. Bell, 2024 WL 4346556 (ALJ Decision July 22, 2024).[1]

Here, the record shows Respondent held MMC [redacted] at the time she submitted to the random drug test. Accordingly, I have jurisdiction to adjudicate this matter.

B. Burden of Proof

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

Under the APA, the fact-finder must consider the "whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence" before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the "preponderance of the evidence" standard, meaning a party

[1] Coast Guard ALJ decisions may be found at: https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2023/.

must prove that "a fact's existence is more likely than not." Steadman v. SEC, 450 U.S. 91, 98 (1981); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

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

C. Use of or Addiction to a Dangerous Drug

The Coast Guard's Complaint asserts Respondent "has been the user of a dangerous drug" as prohibited by 46 U.S.C. § 7704(b), and 46 C.F.R. § 5.35. To prove this allegation, the Coast Guard may rely on various types of evidence, including witness' observations and/or chemical drug testing. In this case, the primary evidence comes in the form of a November 18, 2021, positive drug test.

There are two types of drug tests the Coast Guard relies on as evidence to prove a charge of use of or addicted to the use of dangerous drugs: tests ordered pursuant to 46 C.F.R. Part 16 (Part 16 drug tests), and those **not** ordered pursuant to 46 C.F.R. Part 16 (Non-Part 16 drug tests). Appeal Decision 2668 (MERRILL) (2007); Appeal Decision 2704 (FRANKS) (2014). An employer must conduct a test pursuant to Part 16 in the following circumstances: 1) Pre-employment testing; 2) Periodic testing; 3) Random testing; 4) Testing resulting from serious marine incidents; and 5) Reasonable cause testing. See 46 C.F.R. §§ 16.210-16.250. Commandant Decisions on Appeal (CDOA) often refer to these Part 16 tests as "government ordered tests" because the employer has no discretion under these five circumstances and must conduct the chemical testing as an agent of the government. Appeal Decision 2704 (FRANKS) (2014).

The Coast Guard may also rely on Non-Part 16 tests as evidence of use or addiction to the use of dangerous drugs. Employers normally order these Non-Part 16 tests for reasons other than the regulatory five reasons noted above, usually a reason stated in the employer's handbook/and or drug testing policies.[2] These "employer ordered tests" are not ordered by the government, and therefore, the employer is presumably not acting as a government agent.

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

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

[2] This decision does not address whether an employer may order a non-part 16 test, such as a hair test when a part 16 incident occurs.

In this case, the Coast Guard relies on a Part 16 random drug test to prove Respondent is a user of or addicted to the use of dangerous drugs. To establish a *prima facie* case of drug use in a Part 16 drug test, the Coast Guard must prove the following elements: 1) Respondent was properly ordered to take a Part 16 drug test; and 2) the Part 16 drug test was conducted in accordance with 49 C.F.R. Part 40 with Respondent's sample testing positive for a dangerous drug described in 46 C.F.R. § 16.105. See Appeal Decision 2704 (FRANKS) (2014); Appeal Decision 2603 (HACKSTAFF) (1998); see also Appeal Decision 2653 (ZERINGUE) (2005); Appeal Decision 2584 (SHAKESPEARE) (1997).

With these principles in mind, I turn to the instant case. For the reasons set forth below, I find the Coast Guard proved a *prima facie* case of drug use, and, therefore, Respondent is presumed to be a user of or addicted to the use of dangerous drugs.

1. Respondent's Test was Properly Ordered Pursuant to Part 16.

As stated above, the Coast Guard alleges Respondent participated in a random drug test. In order for a random drug test to be properly ordered, marine employers must establish a program for chemical testing, which randomly selects mariners using a scientifically valid method. 46 C.F.R. § 16.230 (providing examples of scientifically valid methods, including a random number table or a computer-based random number generator). In Appeal Decision 2710 (HOPPER) (2015), the Commandant further discussed the scientific validity of random number generators, explaining "there should be no question about the scientific validity of . . . either a random number table or a computer-based number generator."

Here, Victory used Doctor Review Services (DRS), a drug and alcohol consortium, for random selection of Victory's employees. DRS used a scientifically valid random computer database to select Victory employees for drug testing. On October 7, 2021, DRS provided

Victory with a list of employees selected for random testing, which included Respondent. Thereafter, Victory contacted Respondent and informed her she was selected for a random drug test. (CG Ex. 5).

As the Commandant held in HOPPER, "more than unsupported speculation would be necessary to raise doubts that would justify further probing the issue of scientific validity" for computer-based number generators. Id. at 8. As there is no such challenge in this case, I find DRS' use of a random computer database compliant with the foregoing authority. I also find Victory properly notified Respondent to submit to a Part 16 random drug test.[3] Accordingly, the Coast Guard proved the first element of its prima facie case— Respondent's random drug test was properly ordered pursuant to 46 C.F.R. Part 16.

2. Respondent's Random Drug Test was Properly Conducted in Accordance with 49 C.F.R. Part 40 and Tested Positive for Hydrocodone and Hydromorphone

Having found Respondent's selection for a drug test satisfied the 46 C.F.R. Part 16 requirements for a random test, I now consider whether the evidence is sufficient to satisfy the remaining element—whether the drug test was properly conducted in accordance with Part 40, resulting in a positive test for a dangerous drug described in 46 C.F.R. § 16.105. In order for a test to be properly conducted in accordance with Part 40, there are several steps which must be completed, namely: the collection of a respondent's sample, the laboratory testing of the sample, and finally, the MRO verification of the positive test result. I discuss each in detail below.

[3] I note there is little case law interpreting effective notification to an employee and findings concerning proper notification are necessarily limited to the specific facts of the case. See Appeal Decision 2652 (MOORE) (2005) (mariner received actual notice when a third-party administrator left a voicemail telling him to report to a specific facility within 24 hours for DOT-required drug testing); Appeal Decision 2690 (THOMAS) (2010) (Commandant affirmed ALJ finding that the respondent "was directed by his marine employer to submit to a post-SMI chemical drug test…in a clear, unmistakable and unambiguous manner"). Implicitly, I find notification is a requirement for a properly ordered Part 16 drug test.

a. Collection

On November 18, 2021, while aboard a Victory Casino Cruise ship, Respondent submitted to the random drug test. Dezarae Lee Fuste (Collector), a Department of Transportation (DOT) certified urine specimen collector, collected Respondent's urine specimen. The Collector started the collection process by restricting access to the restroom, placing blue dye in the toilets, and monitoring the sinks. (Tr. at 27-28). After preparing the restroom, the Collector started the urine collection process and once it was Respondent's turn, the Collector verified Respondent's identity. (Tr. at 31-32).

After identifying Respondent, the Collector asked Respondent to remove all items from her pockets, wash her hands, and select a specimen collection cup. (Tr. 29-33). The Collector then instructed Respondent to fill the collection cup to the red line. (Tr. at 32). Respondent proceeded into the restroom stall, voided into the collection cup, and returned the specimen to the Collector. (Tr. at 33). Next, the Collector verified the temperature of the specimen was in the normal range and then proceeded to split the urine sample into two specimen bottles. Id. Thereafter, the Collector sealed the specimen bottles in Respondent's presence. Id.

Using the DOT Federal Drug Testing Custody and Control Form (CCF) with Specimen ID Number 5198478, the Collector completed steps 2 through 4 and asked Respondent to complete step 5–verifying by signature the specimen bottles were sealed in her presence. (Tr. at 33-36, CG-07). Finally, the Collector placed Respondent's sealed specimen bottles and the CCF in the drug test kit bag to be sent to Quest Diagnostics (Quest) for testing. (Tr. at 36).

After reviewing all the evidence concerning Respondent's collection, I find it complied with the collection requirements in Part 40. Having found the Collector properly collected Respondent's sample, I now turn to the lab testing requirements of Part 40.

b. Lab Testing

Quest, a SAMSHA certified laboratory, received Specimen ID Number 5198478 (previously identified as Respondent's specimen) on November 20, 2021, with all seals intact. (Tr. at 70-72; CG-08). Upon receipt, Quest assigned accession number 553860F to Respondent's specimen to track the specimen as it moves through the testing process. (Tr. at 79-80). Thereafter, Quest performed the initial screening for the dangerous drugs listed in 49 C.F.R. § 40.85 and Respondent's sample tested positive for the presence of hydrocodone, hydromorphone, and oxymorphone.[4] (CG-10). Using the cut-off levels of 300 ng/ml, 300 ng/ml, and 100 ng/ml respectively, Quest determined Respondent's sample was a presumptive positive for the presence of hydrocodone, hydromorphone, and oxymorphone. 49 C.F.R. § 40.85; (Tr. at 85-86; CG-15). Based on these test results, Quest sent Respondent's specimen for a second, confirmatory test. Id.

Quest's confirmatory test uses either gas chromatography mass spectrometry or liquid chromatography mass spectrometry and has a cut-off level of 100 ng/ml for hydrocodone, hydromorphone, and oxymorphone. (Tr. at 85–87; CG-10). Respondent's sample tested positive in the confirmatory test for hydrocodone at 3349 ng/ml, hydromorphone at 738 ng/ml, and oxymorphone at 387 ng/ml. (CG-10).

After reviewing all the evidence concerning the laboratory testing of Respondent's specimen, I find the testing requirements complied with Part 40. Having found Quest properly tested Respondent's sample and that sample yielded positive results for hydrocodone, hydromorphone, and oxycodone, I turn to the Part 40 MRO review requirements.

[4] Hydromorphone would not be found in oxycodone. Hydromorphone it is only found in hydrocodone, a medication containing hydrocodone, or the medication form of hydromorphone (Dilaudid). (Tr. at 92-93, 118).

c. MRO Review

On December 7, 2021, Dr. Kevin Edwards, in his role as an MRO for Noble Diagnostics, contacted Respondent to discuss her positive drug test results. (Tr. at 102, 105). Specifically, Dr. Edwards informed Respondent she tested positive for hydrocodone, hydromorphone, and oxycodone. (Tr. at 106). He also asked Respondent if she had a prescription for hydrocodone and oxycodone, to which she responded she did. Id. Thereafter, Respondent provided Dr. Edwards with the name of her pharmacy so he could verify her prescriptions. Id.

Dr. Edward's assistant followed up with the pharmacy, which confirmed Respondent had a prescription for oxycodone, but not hydrocodone. (Tr. at 106, 109). Thereafter, Dr. Edwards called Respondent again to ask if she had a prescription for hydrocodone because her specimen also tested positive for that drug. (Tr. at 109). Respondent explained she did not have a prescription for hydrocodone, but her mother did, and she must have accidentally taken her mother's prescription. (Tr. at 109-110, 117; CG Ex.12). Respondent's prescription for oxycodone provided a legitimate medical reason for her specimen testing positive for oxymorphone but not the hydrocodone or hydromorphone. (Tr. at 114). Accordingly, Dr. Edwards verified Respondent's test results as positive for hydrocodone and hydromorphone. (Tr. at 113).

After reviewing all the evidence concerning the MRO's review of Respondent's positive test results, I find it complied with the testing requirements in Part 40. Accordingly, the Coast Guard proved the second element of its prima facie case—the Part 16 drug test was conducted in accordance with 49 C.F.R. Part 40 with Respondent's sample testing positive for a dangerous drug described in 46 C.F.R. § 16.105.

3. Respondent is Presumed to be a User of or Addicted to the Use of Dangerous Drugs

As stated above, when the Coast Guard establishes a *prima facie* case of use or addiction to the use of a dangerous drug in a Part 16 drug test, the respondent is presumed to be a user of dangerous drugs. Here, based on the evidence presented by both parties, I find the Coast Guard properly followed the procedures set forth in Part 16 and Part 40, and thus, proved a *prima facie* case of drug use. Respondent is presumed to be a user of dangerous drugs.

D. Respondent's Defenses

Having found the Coast Guard proved a *prima facie* case, the burden now shifts to Respondent to produce evidence to rebut the presumption. 46 C.F.R. § 16.201(b); 33 C.F.R. § 20.703(a); Appeal Decision 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); See also Appeal Decision 2527 (GEORGE) (1991).[5] 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).

At the hearing, Respondent claimed she accidently took her mother's prescription for hydrocodone instead of her prescription for oxycodone. (Tr. at 107-111). Respondent stated she was unaware of even having hydrocodone in her system until she received the results of her drug test to which she surmised she must have taken her mother's prescribed hydrocodone by accident. (Tr. at 198-200). In support of her claim, Respondent offers two explanations, either

[5] I consider not knowing, accidental, and unintentional ingestion synonymous.

she or her fiancé retrieved her mother's hydrocodone out of the safe instead of Respondent's oxycodone.

The Coast Guard refutes Respondent's claims of accidental ingestion and asserts it is not an available defense to a positive drug test. In support of its argument, the Coast Guard relies on a decision by the United States Court of Appeals for the Sixth Circuit, which held unintended ingestion does not amount to a legitimate medical explanation in Part 40 drug tests. (CG Post-Hearing Brief at 17, citing FAA v. Hermance, 2014 WL 1118309 (6th Cir. 2014)). In the Coast Guard's view, the Part 40 regulations prohibit the MRO from "consider[ing] explanations of confirmed positive test results that would not, even if true, constitute a legitimate medical explanation." Id. at 3. I am not persuaded by the Coast Guard's argument.

After a thorough review of the Coast Guard's post-hearing brief, it appears the Coast Guard conflates two defenses: accidental ingestion and legitimate medical explanation. While I agree with the Coast Guard's notion that accidental ingestion would never constitute a "legitimate medical explanation," I find "accidental ingestion" a separate defense that may refute the Coast Guard's *prima facie* case of drug use. Cf. FAA v. Hermance, 2014 WL 1118309 (6th Cir. 2014). As CLIFTON makes clear, there are three ways a mariner may refute the Coast Guard's *prima facie* case of drug use; providing a legitimate medical excuse is just one of those ways, and accidental ingestion is another. In further support of my conclusion, I turn to Commandant Decisions on Appeal.

The issue of accidental ingestion arose in GEORGE. There the Commandant held "Appellant presented only the possibility that he could have accidentally ingested cocaine. . . [he] presented no substantial or persuasive evidence that the cocaine metabolite was accidentally introduced into his system for an extrinsic source." (emphasis original). Another decision,

CLIFTON, expressly states a respondent may rebut the presumption of use of a dangerous drug by producing evidence that indicates the use was "not knowing." See also Appeal Decision 2596 (HUFFORD) (1998). And while I could find no case where a respondent successfully argued accidental ingestion, it is clear the Commandant expressly recognizes the defense, and no decision has ever repudiated the defense for mariners.

The Coast Guard's reliance on COOK and DRESSER is misplaced. First, the respondents in both cases knowingly used products containing THC (marijuana metabolite). Appeal Decision 2729 (COOK) (2020); Appeal Decision 2679 (DRESSER) (2008). Conversely, here Respondent claims she mistakenly took medication believing it was her legally prescribed prescription. Thus, Respondent asserts she unknowingly took hydrocodone. Furthermore, unlike the instant case, COOK and DRESSER specifically deal with marijuana, a Schedule I controlled substance where there is never legitimate medical explanation for a positive test. Moreover, the respondents in those cases did not argue accidental ingestion.

The Commandant in COOK and DRESSER also explained the ingestion or use of hemp oil/THC products cannot be conclusive evidence a respondent did not use marijuana. The Commandant ultimately upheld the ALJ's decision based on the ALJ's evaluation of the evidence and credibility determinations, not because accidental ingestion is an unavailable defense to a positive drug test.[6] Accordingly, I find COOK and DRESSER do not stand for the proposition accidental ingestion is not a defense to a prima facie case of drug use.

The Coast Guard also argues I cannot "jump to the conclusion that its use was the sole cause of the positive drug test" because "the scientific evidence in this case . . . cannot be

[6] I note, after DRESSER the Commandant made clear the use of products containing THC is never a defense to a positive drug test because mariners are prohibited from using any products containing THC. Appeal Decision 2729 (COOK) (2020); ALCOAST 308/20 – The Use of Hemp and Cannabidiol (CBD) Products is Prohibited. (August 13, 2020).

distinguished between Respondent accidentally using her mother's medication versus intentionally doing so." (Coast Guard Post-Hearing Brief at 19). I agree it would be difficult to determine the sole source of hydrocodone and hydromorphone in Respondent's system by reviewing the urinalysis results alone. However, the Coast Guard's well-taken point does not change Respondent's ability to prove her defense of accidentally or unknowingly using a drug. The Coast Guard appears to argue I must have "definitive or conclusory" evidence in order to believe Respondent's version of events. Ultimately it comes down to my determinations of credibility, not as the Coast Guard asserts, the need for definitive scientific evidence proving the sole source of metabolites can be traced to a one-time accidental ingestion. In other words, I am free to believe Respondent's testimony—her urine tested positive for hydrocodone and hydromorphone was the result of an accidental ingestion.

Having found the Coast Guard's argument concerning accidental ingestion unpersuasive, I now turn to the specifics of Respondent's defense and whether she met her burden to prove her defense. USCG v. Batiste, 2018-0467 (ALJ D&O July 2, 2020). As stated above, Respondent bears the burden to rebut the presumption of drug use and prove her affirmative defenses. 46 C.F.R. § 16.201(b); 33 C.F.R. § 20.703(a); Appeal Decision 2603 (HACKSTAFF) (1998). With these rules in mind, I turn to Respondent's evidence offered in support of her assertion the positive test results were cause by her accidentally ingesting her mother's medication.

During the hearing, Respondent gave a general account, verified by several witnesses, of the days and nights leading to her claimed accidental ingestion. Specifically, Respondent explained during the timeframe in question she frequently worked 16 to 17-hour days on the Victory cruise ship and at the end of these shifts she was in a lot of pain. (Tr. at 200-201). Respondent testified after working double, sometimes triple shifts, she is in intense pain and has

a hard time getting comfortable to sleep. (Tr. at 202). Respondent explained these long shifts also caused her "back to lock up" necessitating the need for a pain pill. (Tr. at 204). Moreover, Respondent believes during the timeframe in which she would have ingested the hydrocodone—the timeframe leading up to the positive drug test, she was so tired and in so much pain she inadvertently grabbed the wrong pill bottle, accidently taking her mother's prescription. In the alternative, Respondent asserts she was in so much pain that her fiancé had to retrieve her medication from the safe and accidentally gave Respondent her mother's prescription for hydrocodone. Having reviewed the specifics of Respondent's defense, I find it insufficient to rebut the presumption of drug use. Due to several inconsistencies, I am not persuaded by Respondent's version of events and find her not credible.

Commandant Decisions on Appeal recognize the ALJ's broad discretion when determining witness credibility. Ultimately, "it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and to resolve inconsistencies in the evidence." Appeal Decision 2616 (BYRNES) (2000) (citing Appeal Decision 2554 (DEVONISH). A review of these decisions illustrates credibility determinations turn primarily on the demeanor of the witness, as observed by the ALJ at hearing. Appeal Decision 2689 (SHINE) (2010); Appeal Decision 2674 (MILLS) (2008). The ALJ may also consider other factors such as prior statements of the witness, the consistency of the testimony with other evidence, and the interest of the witness in the outcome of the proceeding. USCG v. Kochis, 2016 WL 9331445 (2016 ALJ D&O). Against this backdrop, I now address the inconsistencies in Respondent's testimony.

In the first instance, Respondent testified she has been taking oxycodone for over 15 years and had previously taken hydrocodone. (Tr. at 191-192). As part of her defense,

Respondent introduced an exhibit showing two pills side-by-side. (R-9). Respondent labeled each pill on the exhibit; one was from her prescription for oxycodone and the other was from her mother's prescription for hydrocodone. (R-9). While Respondent was testifying, I covered the names of the pills and asked her to identify each of the pills. (Tr. at 192). Respondent immediately identified her pill—the oxycodone. Id. But after immediately identifying her medication, Respondent equivocated, and asserted she was not sure which pill was which, because of their similar appearance. Id. I find her immediate identification more credible than her following explanation: "See, I don't know. They are both square. I never look at the imprints. . . I was guessing. . . I just take my medicine when I am in pain." Id. I do not find it plausible that Respondent, after taking oxycodone for approximately 15 years, could not readily identify her medication in a hearing. Again, I find her initial identification truthful and consistent with someone who has taken oxycodone several times a day for over a decade. Accordingly, I do not find Respondent's testimony that she was "guessing" and could not identify her own prescription at the hearing, credible.

Next, I turn to Respondent's assertion that she had a hydrocodone prescription. Specifically, Dr. Kevin Edwards, the MRO, testified he contacted Respondent on December 7, 2021, to inform her that her urine sample tested positive for hydrocodone, hydromorphone, and oxycodone, and to ask Respondent if she had a prescription for both hydrocodone and oxycodone. (Tr. at 105-106, 109-111, CG-12). Respondent stated she had prescriptions for both and provided the MRO assistant with her pharmacy information. (Tr. at 106). Thereafter, the MRO assistant contacted the pharmacy to verify Respondent had a valid prescription for the two drugs. (Tr. at 106-109). Ultimately, the MRO assistant verified her prescription for oxycodone, but could not verify Respondent had a prescription for hydrocodone. (Tr. at 107-109, CG Ex.

12). Dr. Edwards again contacted Respondent who told him she did not have a prescription for hydrocodone, but her mother did. (Tr. at 109). Again, I find Respondent's alternating assertions self-serving. Respondent knew at the time of the initial call with Dr. Edwards that she did not have prescriptions for hydrocodone. Accordingly, I find Respondent's statements to the MRO during his initial interview not credible, and these facts weigh against finding Respondent's version of events credible.

I find Respondent's insistence she lacks knowledge concerning the differences between hydrocodone and oxycodone inherently not credible. Respondent has taken either hydrocodone or oxycodone since 1992—over 30 years. (Tr. at 189). Respondent claimed she did not know the difference between oxycodone and hydrocodone and then proceeded to explain her mother's medication (hydrocodone) is weaker than her prescription for oxycodone.[7] (Tr. at 207). It is clear Respondent knew there is a difference between the two medications. Respondent also stated she sometimes broke her pills in half when she wakes up late at night in bad pain because a whole oxycodone will not allow her to sleep. (Tr. at 202-203). Because Respondent knew her mother's prescription for hydrocodone is weaker than oxycodone, and oxycodone inhibited her from sleeping, it is reasonable to infer Respondent intentionally took her mother's medication to help her sleep. Thus, I do not find Respondent's assertion she lacked knowledge of the differences between hydrocodone and oxycodone credible.

Finally, Respondent claims it was possible she was not even the one who retrieved the medication on the night in question. (Tr. at 196, 204). Respondent implied her fiancé could have mistakenly given her the wrong pill as he occasionally gets medication for her. Id. I do not find Respondent's assertion supported by the evidence. Respondent's fiancé testified he only

[7] As recently observed by the United States Court of Appeals for the Fifth Circuit, oxycodone is one and a half times stronger than hydrocodone. United States v. Lamartiniere, 100 F.4th 625, 630 (5th Cir. 2024).

went into the safe to retrieve medication for Respondent when she had bad spasms. (Tr. at 176). Moreover, Respondent's fiancé explained that he reads the bottles before administering the medication because the pills are so similar they could be easily confused. (Id.; R-9). Because he thought the pills were similar, Respondent's fiancé would take extra precautions; he would take the bottles to the sink where there is a bright light to ensure he gave Respondent the correct medication. (Tr. at 176-177). I found his testimony forthcoming, reliable, and extremely credible. (Tr. at 206). I believe Respondent's fiancé understood the dangerous nature of prescription pain killers and thoroughly inspected the pill bottles before giving medication to Respondent. Accordingly, I find Respondent's fiancé did not give hydrocodone to Respondent by accident and give no weight to Respondent's assertions otherwise.

After review of the parties' evidence, including witness testimony, I am not persuaded by Respondent's defense. I do not find Respondent's version of events credible. Thus, I find Respondent did not rebut the presumption and is a user of dangerous drugs.

IV. 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(c); 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 dangerous drugs, and Respondent did not present any evidence of cure. Accordingly, the only appropriate sanction is **REVOCATION**.

WHEREFORE,

ORDER

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

PLEASE TAKE NOTICE, at the completion of the hearing, I retained Respondent's Merchant Mariner Credential. Upon service of the Order, my office will immediately forward Respondent's MMC to the United States Coast Guard, CWO Aaron Sala, Marine Safety Detachment, Port Canaveral, Florida.

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

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

Done and dated October 2, 2024, at
Houston, Texas.

Tommy Cantrell

_____

THE HON. TOMMY CANTRELL
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD