UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

CHRISTOPHER J. DRESSER

Respondent

Docket Number: CG S&R 08-0062-ARB-98
CG Case No. PA98000494/dbc

DECISION AND ORDER

Issued: June 14, 2005

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant
LCDR Shannon Gilbreath
LT Boris Towns
U.S. Coast Guard
MSO New Orleans

For Respondent
J. Mac Morgan, Esq.
879 Robert E. Lee Blvd.
New Orleans, LA 70124

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PRELIMINARY STATEMENT

Background

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of the Coast Guard license and Merchant Mariner's Document (MMD) issued to Respondent, Christopher J. Dresser. The purpose of Coast Guard Suspension and Revocation proceedings is to ensure the safety of life and property at sea. 46 U.S.C. 7701(a). This administrative action was brought pursuant to 46 U.S.C. 7704, as codified in 46 CFR Part 5.[1]

On March 23, 1998, the Coast Guard Marine Safety Office (MSO) Tampa, Florida, issued a Charge Sheet against Respondent alleging use of dangerous drugs. If the charge is found proved and Respondent is unable to show sufficient evidence of cure, Respondent's license must be revoked. 46 U.S.C. 7704(c). The Charge Sheet specified that Respondent was the holder of Coast Guard issued License No. 764137 and a Merchant Mariner's Document (MMD), and charged Respondent as a user of dangerous drugs after he tested positive for the use of marijuana. Because this incident occurred in 1997, the substantive rules in 46 CFR Part 5 from that year apply.[2] As indicated in my Order of May 7, 2004, 46 CFR Part 5 (1997) applies substantively and 33 CFR Part 20 (2004) applies procedurally.

Pursuant to Respondent's motion, the initial hearing was held in New Orleans, Louisiana on April 29, June 11, 12, and 24, 1998, before The Honorable Archie R. Boggs, Administrative

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[1] During the pendency of this case, the U.S. Coast Guard transferred from the Department of Transportation to the Department of Homeland Security. Pursuant to the Savings Provision of 5005 Section 1512 (PL 107-296), pending proceedings are continued notwithstanding the transfer of the agency.

[2] In an effort to promote efficiency and eliminate unnecessary procedures from suspension and revocation proceedings, the Coast Guard revised its rules of practice, procedure, and evidence for administrative proceedings in 1999. Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard, 64 Fed. Reg. 28,054-01, (May 24, 1999). Specifically, certain sections of 46 CFR Part 5 were revised and moved to 33 CFR Part 20 to reflect the new procedural rules now contained therein. Id.

Law Judge (ALJ), now retired. Appeal Decision 2626 (DRESSER) (2001). Judge Boggs found the charge proved. Id. Respondent appealed the decision alleging several errors, including an ex parte statement based on a conversation between the judge and his son, a New Orleans lawyer, that took place after the hearing but before a decision was rendered. Id. The Commandant found that the ALJ rightfully disclosed the communication and did not allow it to impact his decision. Appeal Decision 2626 (DRESSER); see also, Dresser v. Ohio Hempery, 2000 WL 235242, 6 (E.D. La.) (2000) ("[T]he entire proceeding took place before the ALJ learned of his son's representation of the insurer of a hemp seed oil company. This Court finds no evidence that the conversations at issue biased the ALJ, or that the administrative proceeding was unfair."). Next, Respondent appealed the Commandant's decision to the National Transportation Safety Board (NTSB). The NTSB found that the ALJ should have recused himself despite his disclosure and the advice received from Coast Guard counsel permitting the judge to remain on the case. Commandant v. Dresser, NTSB Order No. EM-195 (2003). As a result, the NTSB remanded the case to be heard by a different ALJ. Id. After the NTSB remand, Respondent petitioned the U.S. Circuit Court of Appeals for the D.C. Circuit. The court denied the petition because the NTSB remand is not considered "final agency action." Dresser v. NTSB, No. 03-1169, slip op. (D.C. Cir. Oct. 1, 2003). As a result, the Undersigned was assigned to preside over the remanded hearing.

Pre-Hearing Motions

After the reassignment, the Coast Guard filed one Motion to Stand on the Record and Respondent filed numerous pre-hearing motions. The eight significant motions filed by Respondent are: one Motion Opposing the Coast Guard's Motion to Stand on the Record; one Motion for Dismissal; one Motion for a *De Novo* Hearing or Alternative Motion for

Reconsideration of the Administrative Law Judge's Ruling on the Coast Guard's Motion to Stand on the Record; one Motion for Return of License and Document and for an Order Directing the Coast Guard's Regional Examination Center to Permit Respondent to Renew His License and Document; one Motion for Supplementary Oral Testimony and Offer Additional Exhibits into Evidence; and three Motions to Disqualify the Administrative Law Judge. The Coast Guard had the opportunity to reply to each motion.

Motion to Dismiss

On March 4, 2004 and March 11, 2004, Respondent filed a Motion to Dismiss and a Supplemental Memorandum, respectively, claiming that the delay in decision-making from the original hearing to the remanded action amounted to a denial of due process. Respondent argued that the changes in Coast Guard regulations since 1998 resulted in a "heightened burden of proof . . . [that] did not exist when the suspension and revocation action was first prosecuted by the Coast Guard." Respondent's Supplemental Memorandum in Support of Motion to Dismiss, J. Mac Morgan, Esq., March 11, 2004. On May 4, 2004, the Undersigned issued the Order Denying Respondent's Motion for Dismissal, pointing out that any change in the law after the date of the incident was not applicable in the remanded hearing.

Coast Guard's Motion to Stand on the Record & Respondent's Motions for a *De Novo* Hearing

On April 22, 2004, Respondent filed a motion opposing the Coast Guard's prior motion to stand on record at the remanded hearing and moved for a *de novo* hearing. On May 7, 2004, the Undersigned issued the Order Granting the Coast Guard's Motion to Stand on the Record and Denying Respondent Dresser's Motion for *De Novo* Hearing. The Undersigned issued this order partly because "[t]o require all witnesses to testify again when there are no conflicts in the

testimony to be resolved, creates 'unduly repetitious evidence' because the original record would still be part of the new record that the fact finder must consider." Order Granting the Coast Guard's Motion to Stand on the Record and Denying Respondent Dresser's Motion for *De Novo* Hearing, ALJ Brudzinski, May 7, 2004 (citing 33 CFR 20.902). In this same order, the Undersigned ruled that the substantive portion of the hearing would be governed by 46 CFR Part 5 and the procedural portion would be governed by 33 CFR Part 20.

Respondent filed his Motion for *De Novo* Hearing or Alternative Motion for Reconsideration of the Administrative Law Judge's Ruling on the Coast Guard's Motion to Stand on the Record on May 10, 2004. In his motion, Respondent asked the ALJ to reconsider and rule on *all* of the objections raised at the 1998 hearing. The Undersigned responded in his June 7, 2004 Order Denying Respondent Dresser's Motion for *De Novo* Hearing or Alternative Motion for Reconsideration of the Administrative Law Judge's Ruling on the Coast Guard's Motion to Stand on the Record by stating that neither the Commandant nor the NTSB found anything wrong with the rulings made at the 1998 hearing. The only reason cited by the NTSB for remanding the case was because the previous ALJ did not recuse himself once he became involved in a conversation that could be considered ex parte.

Motion for Return and Renewal of Coast Guard License and Document

On May 6, 2004, Respondent filed his Motion for Return of License and Document and for an Order Directing the Coast Guard's Regional Examination Center to Permit Respondent to Renew His License and Document, contending that the NTSB vacated the decision by the ALJ and Respondent's license expired while it was in Coast Guard custody. On June 4, 2004, the Undersigned issued an Order Denying Respondent Dresser's Motion for Return of License and Document and for Order Directing the CG Regional Exam Center to Permit Respondent to

Renew his License and Document. The Order stated that Coast Guard administrative law judges do not have jurisdictional authority to direct the Regional Exam Centers to process renewal applications. Additionally, as noted in the Order, Respondent could have filed an application for document renewal after it expired or for a new document; neither the ALJ nor the Coast Guard have the authority to block application renewal despite the pending case because the regulations provide for it. 46 CFR 10.209(e)(1); 46 CFR Part 5.901. It was Respondent's choice not to apply for renewal at the proper time.

Motion for Supplementary Oral Testimony and Offer Additional Exhibits into Evidence

On May 8, 2004, Respondent moved for the ALJ to reconsider his order to allow the Coast Guard to stand on the record, and filed his Motion for Supplementary Oral Testimony and Offer Additional Exhibits into Evidence. In the June 7, 2004, Order to Stay Respondent's Motion for Supplemental Oral Testimony and Offer of Additional Exhibits into Evidence and Order for Discovery, the Undersigned stayed Respondent's motion pending the completion of discovery. The Order specified that within ten days of its receipt, the parties would make available to the ALJ and each other: (1) the witnesses that they intended to call at the hearing, a summary of each witness' testimony, and the amount of time for examination of each witness; and (2) a list of exhibits that, pursuant to section 556(d) of the Administrative Procedure Act, included an explanation of why "each exhibit is not irrelevant, immaterial, or unduly repetitious of what is contained in the existing record." After compliance with items (1) and (2), the parties had ten days to file any objections.

Motions to Disqualify the Administrative Law Judge

At three different times over a seven-week period, Respondent moved to disqualify the Undersigned ALJ.

First Motion to Disqualify the ALJ

The first Motion to Disqualify the Administrative Law Judge was filed on March 26, 2004. Respondent claimed that since the new ALJ read the entire record, he could not be a fair and impartial adjudicator of the law because he was predisposed to the facts and law. Respondent asserted that an ALJ must be disqualified if he had the opportunity to review the evidence in the case.

Second Motion to Disqualify the ALJ

Respondent's Second Verified Motion for Disqualification was filed on May 6, 2004. Respondent argued that in an October 22, 2001 memo by the Chief Administrative Law Judge addressed to "All Field ALJ's" Respondent Dresser was "labeled . . . an unbelievable witness." As a result, Respondent continued, it would be impossible for the newly assigned judge to be impartial, and therefore the ALJ should be disqualified.

Third Motion to Disqualify the ALJ

On May 8, 2004, Respondent filed his Third Verified Motion for Disqualification. Respondent argued that the Chief ALJ's October 22, 2001, memo stating that "hemp oil should not be accepted as a defense to the charge of use of a dangerous drug . . ." by definition makes the ALJ partial and therefore should be disqualified.

Denial of Respondent's Three Motions to Disqualify the ALJ

Respondent's first Motion to Disqualify the ALJ was denied on April 21, 2004, because the presumption of a judge's impartiality is not rebutted by considerable pre-hearing knowledge

of the facts of the case. "[A]dministrative tribunals must be presumed honest and that presumption can only be overcome by facts showing a 'risk of actual bias or prejudgment.'" Order Denying Motion to Disqualify the Administrative Law Judge, ALJ Brudzinski, April 21, 2004 (citing Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1465 (1975)). The Undersigned's mere review of the record does not rebut the established presumption of impartiality. Order Denying Motion to Disqualify the Administrative Law Judge, ALJ Brudzinski, April 21, 2004.

The Undersigned denied Respondent's second and third motions for disqualification by Order dated June 3, 2004. Order Denying Respondent Dresser's Second and Third Motions for Disqualification of the Administrative Law Judge, ALJ Brudzinski, at 2, June 3, 2004. In the Second Verified Motion for Disqualification, Respondent argued that the Chief ALJ's memo would improperly influence the Undersigned because the memo "labeled [R]espondent as an unbelievable witness." Id. Respondent's assertion that the Chief ALJ's memo created a stigma was a "hasty generalization" because Respondent's case was merely used as an example, and other similar decisions were also cited.[3] Respondent's Third Verified Motion for Disqualification argued that the Undersigned would be unduly influenced by instructions from the Chief ALJ stating that "hemp [seed] oil should not be accepted as a defense to the charge of use of dangerous drugs." Order Denying Respondent Dresser's Second and Third Motions for Disqualification of the Administrative Law Judge, ALJ Brudzinski at 2, June 3, 2004. As stated

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[3] The Chief ALJ's memo stated that

> . . . accidental or inadvertent ingestion of a food product containing THC will only serve as a valid defense to a charge of use of dangerous drug if the Respondent produces reliable and credible evidence. For instance, in Dresser, Docket No. 08-0062-ARB-98, ALJ Boggs rejected the Respondent's hemp seed oil defense to a charge of use of dangerous drugs where the only evidence that he used hemp oil and the product was innocently ingested was the Respondent's own self-serving testimony.

Memorandum from the Chief ALJ, USCG, regarding Hemp Oil Cases, to All Field ALJ's 2 (Oct. 22, 2001) (on file with USCG Docketing Center, Baltimore, MD).

in the Order, Respondent's third motion is without merit because the Chief ALJ's memo was issued after Respondent's 1998 hearing, and therefore does not apply to Respondent's remanded case. Id. at 3. Only those laws and recommendations in effect at the time of the incident are applicable to the remanded hearing. Id.

Remanded Hearing

The remanded hearing was held as scheduled on December 7, 2004, in New Orleans, Louisiana, and both parties had the opportunity to introduce exhibits and witness testimony. The Coast Guard introduced one (1) exhibit into evidence, and called one (1) witness to the stand. Attachment B . The Respondent introduced eleven (11) exhibits into evidence and called three (3) witnesses to the stand. Id.

After the hearing, both parties filed post-hearing briefs in lieu of oral closing arguments. Attachment D. After careful review of the facts and applicable law in this case, the Undersigned finds that the Coast Guard established by "reliable, probative, and substantial evidence" that Respondent is a user of dangerous drugs. 46 CFR 5.63 ("In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters.").

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the entire record established from the 1998 hearing through the appellate levels to the U.S. Circuit Court of

Appeals for the D.C. Circuit, and the 2004 remanded hearing. The record includes, but is not limited to documentary evidence, witness testimony, and hearing transcripts.

1. At all relevant times, Respondent was the holder of Coast Guard issued License No. 764137 and a Merchant Mariner's Document (MMD). Tr. Vol. 1 at 9-10 (1998).

Procedural History

2. The ALJ revoked Respondent's License and MMD on February 4, 1999, after finding, at a hearing held in New Orleans, Louisiana on April 29, 1998, and June 11, 12, and 24, 1998, that Respondent was a user of dangerous drugs. Appeal Decision 2626 (DRESSER) (2001).
3. On appeal, the Commandant affirmed the ALJ's decision based on Respondent's failure "to meet his burden of proof to establish that the ALJ had a personal bias in this matter or prejudged the case." Id.
4. Respondent appealed to the National Transportation Safety Board (NTSB).
5. On June 11, 2003, the NTSB remanded the case for reassignment to a different ALJ. Dresser, NTSB Order No. EM-195. The NTSB based its decision on the appearance of impropriety, not the actual existence of bias by the ALJ. Id.
6. The NTSB denied Respondent's motion to stay its June 11, 2003 Order while Respondent appealed to the U.S. Circuit Court of Appeals for the D.C. Circuit. Dresser, NTSB Order No. ME-173.
7. The Circuit Court denied Respondent's petition because the NTSB remand is not considered "final agency action." Dresser v. NTSB, No. 03-1169, slip op. (D.C. Cir. Oct. 1, 2003).

Respondent's Drug Test & Notification of Results

8. On November 13, 1997, Respondent submitted to a pre-employment drug test in accordance with 46 CFR Part 16. Tr. Vol. 1 at 13, 86-88.
9. Ms. Carolyn Watson, Medical Technician with Shore Works, Easton Memorial Hospital, Easton, Maryland, collected Respondent's urine sample in compliance with Coast Guard procedure and regulations. Respondent's signature appears in Step No. 4 on the Medical Review Officer's copy of the Drug Testing Custody and Control form under a printed statement certifying that he provided a urine specimen to the collector and the specimen was sealed with a tamper evidence seal in his presence. Tr. Vol. 1 at 26-44; IO Exhibit 1.
10. The specimen was delivered to Quest Diagnostics, Inc., a Substance Abuse and Mental Health Services Administration certified laboratory. Tr. Vol. 1 at 42, 45, 50-51; IO Exhibit 2.
11. Mr. James A. Callies, Scientific Director, Quest Diagnostics Substance Abuse Testing Laboratory, San Diego, California, and Dr. Donald Shu, Lab Technician, Quest Diagnostics testified that the chain of custody was maintained in accordance with 49 CFR Part 40. Tr. Vol. 1 at 49-54, 187-91; IO Exhibit 2.
12. At Quest Diagnostics, Inc., the sample was initially tested by enzyme immunoassay for a range of drugs. Tr. Vol. 1 at 51-52; IO Exhibit 2. The test indicated the presence of tetrahydrocannabinol (THC) (i.e., marijuana metabolite) in the specimen. Tr. Vol. 1 at 54; IO Exhibit 2.
13. Following the Department of Health and Human Services guidelines and the usual laboratory procedures, the sample was then tested again by gas

chromatography/mass spectrometry (GC/MS) to confirm or refute the initial screen results. The confirmatory test, performed by Dr. Donald Shu, certifying scientist for Quest Diagnostics, Inc., was also positive for marijuana/THC metabolite. The final laboratory report concluding that Respondent's sample was positive for marijuana/THC metabolite was dated November 18, 1997. Tr. Vol. 1 at 52-53, 60-63, 191; IO Exhibit 2.

14. Dr. Shu certified the test results. All testing was conducted in accordance with standard procedures, which Dr. Shu and Mr. James Callies, described in detail. Tr. Vol. 1 at 50-54; IO Exhibit 2. Quest Diagnostics sent Respondent's positive drug test results to the Medical Review Officer at Marine Engineers Beneficial Association Engineering School ("MEBA") District I. Tr. Vol. 1 at 53, 73-74, 92-93; IO Exhibit 6.
15. Mr. George Ellis, President, Greystone Health Sciences Corporation, supervisor of all Medical Review Officers ("MRO") at Greystone Health Sciences Corporation, reviewed the documents regarding Respondent's drug test and the testing of his specimen. Tr. Vol. 1 at 78, 97. He concluded that there were no breaks in the chain of custody. Tr. Vol. 1 at 97.
16. Mr. Ellis sent a letter from Greystone to Dr. Steven Oppenheim, an MRO with Greystone, stating that Respondent's specimen tested positive for the use of marijuana. Tr. Vol. 1 at 78-80; Tr. Vol. 2 at 18; IO Exhibit 4.
17. Dr. Oppenheim testified that there are no false positives because drug usage is presumed if there is no medical explanation for a positive drug test. Tr. Vol. 2 at 19-24. ("[A]n allegation of consuming any hemp food product is not considered a

legitimate medical explanation for a prohibited substance or metabolite in an individual specimen, and . . . when a specimen is positive for THC, the only legitimate medical explanation for its presence is a prescription for Marinol.").

18. Ms. Elaine Bradley, Senior Vice President, Greystone Health Sciences Corporation, made multiple attempts to contact Respondent. On different dates and at different times, Ms. Bradley left five different messages on Respondent's telephone answering machine at the MEBA School in Easton, Maryland, and at his home in Clearwater, Florida. Tr. Vol. 1 at 170-75. Respondent did not return her calls. Tr. Vol. 1 at 176. The messages she left stated that he should contact the MRO, but did not reveal that he tested positive for drug use. Tr. Vol. 1 at 171-72.

19. According to Mr. Ellis' testimony, the "fourteen day rule" gives the MRO fourteen (14) days to contact the test subject whose specimen tested positive, but if the individual cannot be reached for an interview within that time, then the MRO can declare the test positive without having spoken to the individual. Tr. Vol. 1 at 81-83; 49 CFR 40.33(C)(5)(ii).

20. On December 15, 1997, twenty-five (25) days after Ms. Bradley first attempted to contact Respondent, Dr. Steven Oppenheim made a final positive determination that the specimen, furnished by Respondent on November 13, 1997, was positive for the THC/marijuana metabolites. Dr. Oppenheim reasoned that over a twenty-five day period, reasonable attempts had been made to contact Respondent at both phone numbers provided. He determined that Respondent failed to return the phone calls. Tr. Vol. 2 at 15-16, 19, 30-31; IO Exhibit 4.

21. On December 15, 1997, Greystone Health Sciences sent written notification to the Coast Guard at Marine Safety Office, Baltimore, Maryland, regarding Respondent's positive drug test. Tr. Vol. 1 at 92-94, 116; Tr. Vol. 2 at 38; IO Exhibits 4 & 6.
22. Respondent is a member of the MEBA District I union, but MEBA does not handle positive drug tests on behalf of its union members. Although Greystone Health Sciences Corporation is the Medical Review Officer employed by MEBA, positive test results are sent to the Coast Guard only. Consequently, there is no "designated employer representative" as described in 49 CFR 40.33 for Respondent. Tr. Vol. 1 at 180-81; IO Exhibit 6.
23. Prior to receiving notification from the MRO that his drug test was positive, on or about, December 20, 1997, Respondent contacted MEBA to request an attorney. Tr. Vol. 2 at 317-19.
24. On January 15, 1998, Respondent's attorney requested that an aliquot from Respondent's specimen be sent for confirmation to Northwest Toxicology, in Salt Lake City, Utah. Tr. Vol. 1 at 108-09, 111-12; Tr. Vol. 3 at 15-16.
25. Northwest Toxicology, a Substance Abuse and Mental Health Services Administration certified laboratory, reconfirmed the positive drug test on Respondent's aliquot sample as positive for cannabinoids/THC[4]. Tr. Vol. 1 at 113; IO Exhibit 4.
26. On January 6, 1998, Marine Safety Office Baltimore sent the positive drug test notification to MSO Tampa, Florida for action because Respondent lived near that office. Tr. Vol. 2 at 37-41; Tr. Vol. 4 at 30-31; IO Exhibit 6.

[4] "Δ^9-Tetrahydrocannabinol (THC) is the major pharmacologically active component of the marijuana plant (*Cannabis sativa*)." Respondent Exhibit B.

27. LT Warren W. Weedon, USCG, Investigating Officer, U.S. Coast Guard MSO, Tampa, Florida, did not contact Respondent regarding his positive drug test until February 10, 1998, and at that time LT Weedon was directed to speak with Respondent's attorney. Tr. Vol. 4 at 30, 36.

28. On March 23, 1998, the Coast Guard charged Respondent with use of dangerous drugs. This was the first official notification Respondent received regarding his positive drug test. Tr. Vol. 4 at 35-38; IO Exhibit 13.

Hemp Seed Oil

29. Respondent raised the affirmative defense of hemp seed oil usage to rebut the presumption of drug use. Tr. Vol. 1 at 15-16.

30. Respondent offered two empty hemp seed oil containers as evidence of his consumption prior to the November 13, 1997 test. The Hemp Liquid Gold bottle, by Health from the Sun, was dated March 1997. Spectrum Naturals' cold pressed liquid hemp oil container was dated October 7, 1996. Both were eight ounce bottles. Id. at 221-23; Respondent's Exhibits G & H.

31. Mr. Don Wirtshafter, owner of the Ohio Hempery and board member of the National Organization for the Reformation of Marijuana Laws (NORML), testified that all hemp seed oil products contain some level of THC. The specific amount of THC varies by manufacturer. Products from the Ohio Hempery contained some of the lowest levels of THC on the market at that time. Tr. Vol. 4 at 18-19, 25-26. Concentrations of THC within hemp seed oil products vary regardless of whether they are produced by the same company or from the same seed lot. Tr. at 198-204, 207-20.

32. Mr. Wirtshafter also testified that on December 5, 1997, a catalog order was recorded with the delivery address of Respondent's home in Clearwater, Florida. Tr. Vol. 4 at 17-18. The catalog was delivered on or about December 5, 1997 to the given delivery address. Tr. Vol. 4 at 16-18.

33. Mr. Fred Kulow, president of Health From the Sun, testified that the company produces more than fifty fatty oil products, including hemp seed oil. The company began marketing hemp seed oil in liquid and capsule form in 1995 but discontinued the liquid form, Hemp Liquid Gold, in 1997 because of low demand and lack of use in the medical community. Tr. Vol. 3 at 97-105.

34. Mr. Kulow also testified that after being made aware that Hemp Liquid Gold could result in positive drug tests, his company tested people who had taken the product and found no THC present. Tr. Vol. 3 at 115-16.

35. Ms. Dana Purdy, a licensed dietician and nutritionist, testified regarding general practices for good nutrition. She stated that she would not recommend hemp seed oil as a dietary supplement for increasing one's fatty acids because the acids can be consumed by adhering to a specific diet that includes oils, e.g. olive oil, canola oil and sunflower oil. Tr. Vol. 3 at 63-67, 81-83.

36. Hemp seed oil is not a mainstream dietary supplement. Its sales are small in comparison to other dietary supplements containing the same essential fatty acids. Hemp seed oil is also very expensive in comparison to other dietary supplements that contain essential fatty acids. Tr. Vol. 3 at 63-67, 97-103.

37. LT Weedon testified to the locations of two different health food stores within twenty (20) miles of Respondent's Florida home, and both stores carried other fatty acid products in addition to hemp seed oil. Id. at 39-45.

38. On December 24, 1997, Respondent ordered Health from the Sun's Hemp Liquid Gold from the Nature's Food Patch, a health food store located a half of a mile from his home. Tr. Vol. 4 at 39-43.

MEBA School

39. Ms. Shirley Shelton, Office Manager and Registrar, MEBA Engineering School, testified that Respondent was a student at MEBA from October 27, 1997 through November 21, 1997. Tr. Vol. 4 at 50.

40. The rooms at MEBA were not equipped with refrigerators, but refrigerators were available upon request. Id. at 51.

41. Respondent did not request a refrigerator before arriving at MEBA, despite his testimony that he would keep an open bottle of hemp seed oil in a refrigerator or cooler. Tr. Vol. 2 at 313-14; Tr. Vol. 4 at 51.

42. The telephones at MEBA had the technology for Respondent to check his phone messages from a remote location, if he chose to do so. Id. at 52.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Christopher J. Dresser and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. 7704; 46 CFR Part 5 (1997); and 33 CFR Part 20 (2004).

2. At all relevant times, Respondent was the holder of Coast Guard issued License No. 764137 and a Merchant Mariner's Document (MMD).
3. Respondent tested positive for the use of marijuana in a pre-employment drug test on November 13, 1997 in violation of 46 CFR 16.201.
4. Respondent failed to rebut the presumption provided by 46 CFR 16.201(b), that he is a user of dangerous drugs.

DISCUSSION

Jurisdiction & Burden of Proof

In the Code of Federal Regulations, the Commandant delegated to administrative law judges the authority to suspend or revoke a license or certificate for a violation arising under 46 U.S.C. 7704. 46 CFR 5.19. A mariner's license, certificate of registry, or merchant mariner's document is subject to revocation upon a showing that the holder of such credentials has been a user of or addicted to the use of a dangerous drug. 46 U.S.C. 7704(c). The evidentiary standard in Coast Guard suspension and revocation hearings is "reliable, probative, and substantial evidence." 46 CFR 5.63; see also Appeal Decision 2570 HARRIS (1995). "This standard is equated to the American judicial system 'preponderance of evidence' standard of proof." Id. (citing Steadman v. S.E.C., 450 U.S. 91 (1981)). The Coast Guard has jurisdiction over this case because it retains jurisdiction over Coast Guard issued licenses/documents, and the NTSB remanded the case back to the hearing level. Tr. 10-11 (2004). As directed by the NTSB, a different ALJ was assigned to hear the case. Id. at 7, 10.

A marine employer is responsible for establishing a drug testing program in accordance with 49 CFR Part 40. Coast Guard chemical drug testing regulations authorize marine

employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing. 46 CFR Part 16, Subpart B.

> If an employee fails the chemical drug test for dangerous drugs, the individual will be presumed to be a user of dangerous drugs. See 46 CFR 16.201(b); Appeal Decision 2529 (WILLIAMS) [(1991)]. To prove the specification, the Coast Guard must establish a prima facie case of use of a dangerous drug. See 46 CFR 5.539; Appeal Decision 2379 (DRUM) [(1995)]; Appeal Decision 2282 (LITTLEFIELD) [(1982)]. The Coast Guard may establish a prima facie case by showing [(1)] that the respondent was tested for a dangerous drug, [(2)] that the respondent tested positive for a dangerous drug, and [(3)] that the test was conducted in accordance with 46 CFR Part 16. If the Coast Guard establishes a prima facie case, then the burden shifts to the respondent who must produce persuasive evidence to rebut this presumption. See Appeal Decision 2379 (DRUM) [(1995)]. If respondent produces no persuasive rebuttal evidence, the Administrative Law Judge, on the basis of the presumption alone, may find the charge proved. See Appeal Decision 2266 (BRENNER) [(1981)]; See Appeal Decision 2174 (TINGLEY) [(1980)].

Appeal Decision 2584 (SHAKESPEARE) (1997).

Presumption of Drug Use

Coast Guard policy at the time of both hearings reflects that if an individual fails a properly conducted chemical drug test, then the presumption arises that the respondent is a user of dangerous drugs. 46 CFR 16.201(b). Here, Respondent tested positive for drug use in a pre-employment drug test, and was therefore presumed a user of dangerous drugs. Tr. Vol. 1 at 12-13; IO Exhibit 13. The drug testing procedure was conducted in accordance with Coast Guard regulations. Tr. Vol. 1 at 35-39, 49-54, 97-98; IO Exhibits 1 & 2. After the Coast Guard established its prima facie case and the presumption of drug use, it became Respondent's responsibility to rebut the presumption because he raised the affirmative defense of hemp seed oil usage.

THC and THC metabolites are two distinctly different chemical compounds. Tr. Vol. 2 at 139-46. Dr. Mahmoud Elsohly, the Coast Guard's expert witness on rebuttal in 1998 and

again in 2004, testified in 2004 that the level of THC in the subject's urine may change depending on many variables involved in the absorption process, e.g. weight and contents in an individual's stomach, among other things. Tr. 196-205 (2004). Respondent failed to introduce any evidence of his own metabolism rate, absorption rate, excretion rate, or potential for dilution of his urine at the time of the urinalysis. Tr. Vol. 1-4 (1998); Tr. (2004).

Dr. Elsohly also opined at the 2004 hearing that the tests conducted by Respondent's expert witness, Dr. Luis Remus were flawed because THC is a chemical and THC metabolites are produced after the body has metabolized the chemical. Id. at 139-40. Dr. Elsohly went on to say that it would be impossible to find the metabolite without the drug being metabolized by the body. Id. at 141-45. Since the hemp seed oil did not go through the body before the urine was tested for THC in Dr. Remus' study, infra at 24 - 25, it was impossible for any metabolites to be found. Tr. Vol. 3 at 139-57. Dr. Elsohly also testified that the test conducted by Mr. Richard Struempler was invalid because consuming the substance yourself does not make for a true clinical study. Id. Dr. Elsohly further disproved Mr. Struempler's study, infra at 25 - 26, when he testified that THC comes from the outside of the hemp seed, and "by definition, is a variable process" because the level of THC depends on whether the seeds rubbed against the leaves, and which batch is accepted into production. Tr. at 213-19 (2004). As a result, all hemp seeds become contaminated during the pressing process from marijuana leaves. Tr. 215-19 (2004). Therefore, concentrations of THC within hemp seed oil products vary regardless of whether they are produced by the same company or from the same seed lot. Tr. at 198-204, 207-20. Dr. Elsohly's education and work experiences both privately and for the U.S. Government allowed the Undersigned to place controlling weight on his credible testimony regarding hemp seed oil and its effect on urine for the purpose of drug testing.

Respondent's Use of Hemp Seed Oil

Mr. Christopher J. Dresser, Respondent, testified regarding his time at the MEBA School and on the vessel the Green Wave. Tr. Vol. 2 at 204-11. He was not subjected to random drug testing for a period of more than sixty (60) consecutive days during the previous one hundred and eighty-five (185) days. Tr. Vol. 2 at 213. Respondent also testified that within sixty (60) days prior to the drug test, he had not smoked marijuana, but had ingested liquid hemp seed oil about four (4) times a week. Id. at 215-17. Respondent stated that he voluntarily took the pre-employment drug test because, "I knew I was clean. I had nothing to hide." Tr. Vol. 2 at 214.

Respondent stated that he started using hemp seed oil in an effort to improve his cardiovascular health because his father died from a heart attack. Tr. Vol. 2 at 306-09. Respondent's concern was supported at the 2004 hearing when Mrs. Mary Dresser, Respondent's mother, testified that Respondent told her "he was taking this substance because he was concerned about it happening to him." Tr. 30-31 (2004). She also stated that on one occasion, prior to the drug test, she saw Respondent drink hemp seed oil directly from a bottle that he removed from her refrigerator. Id. at 27-28, 36-38. The Undersigned does not find Mrs. Dresser's testimony credible. Although Mrs. Dresser did not testify during the original hearing in 1998, her one time observation, whether credible or not, does not establish as a fact that Respondent innocently ingested hemp seed oil to such an extent that it was the sole cause for the positive drug test.

Respondent failed to remember whether he stored his hemp seed oil supply in an ice chest or refrigerator while attending MEBA, despite the hemp seed oil label stating that refrigeration was required. Tr. Vol. 2 at 314-40. Respondent claimed that he did not take hemp seed oil with him when he sailed because of the hassle in transporting it and because it was not

readily available in foreign ports. Tr. Vol. 2 at 314-16. Further, he stated that he did not purchase any additional hemp seed oil products after December 16, 1997. However, rebuttal testimony by Mr. Donald Wirtshafter showed that Respondent placed an order for more hemp seed oil at a local store on December 24, 1997. Tr. Vol. 2 at 338-39. Respondent also testified that he was unaware of the MRO's repeated attempts to contact him in accordance with the "fourteen day rule," but when he did not receive a certificate in the mail stating that his drug test was negative, he reacted by contacting a lawyer. Tr. Vol. 2 at 15-16, 30-31; Tr. Vol. 3 at 6-19; IO Exhibit 4.

Other aspects of Respondent's testimony that cast doubt on his credibility include claiming to not check his answering machine remotely or use a telephone while on vacation from late November through early December. Tr. Vol. 2 at 333-38. Respondent's testimony of lack of use of a telephone is doubtful because he placed a telephone call to the Ohio Hempery to order a catalog, presumably in order to purchase more hemp seed oil. Id. Respondent did not make any attempt to explain why he would choose to keep an ice chest, which required regular refills, in his room at MEBA, rather than requesting a refrigerator or using the refrigerator located down the hall from his room. He also did not provide any witnesses from school, his vacation, or during the six weeks prior to his drug test to attest to his ingesting of the hemp seed oil. Overall, Respondent did not provide any credible evidence that would disprove his use of marijuana.[5]

In an effort to explain to the court that Respondent's ingestion of hemp seed oil was not the same as his participation in the use of a prohibited drug, Respondent called Mr. Julian

[5] The Eastern District of Louisiana also supported ALJ Boggs' finding that Respondent's explanation of hemp seed oil usage was not enough to overcome the presumption of drug use. See Dresser, 2000 WL 235242, 9 ("That the ALJ simply did not believe Dresser's alternative explanation for his positive test result does not indicate that the procedures the ALJ employed in the hearing were unfair.").

Murray, Esq. to the stand in the 1998 hearing. Mr. Murray was admitted as an Expert in Federal Criminal Law and Federal Criminal Prosecution. He interpreted 12 U.S.C. Section 802.16, regarding whether hemp seed oil was a prohibited substance included in the definition of marijuana, and concluded that the oil from a hemp seed is excluded from the listed definition because it does not result in a euphoric or pharmacological effect. Tr. Vol. 2 at 49-52. ". . . [T]here could be small amounts of [a] controlled dangerous substance that might not give euphoric effect but yet it would still be prohibited because it would have the THC in it. . . . " Id. at 63. Mr. Murray also testified to Congressional intent in outlawing any marijuana product, U.S. v. Walton, 514 F.2d 201 (discussing legislative intent in outlawing cannabis sativa), and statutory construction. Id. at 49- 115. While I do not find that Mr. Murray's testimony incredible, I do not assign it any weight because it was not relevant to whether Respondent innocently ingested hemp seed oil, and, if so, whether that innocent ingestion was the sole cause of his positive drug test.

Dr. Luis Remus, testified in 1998 and 2004 as an expert witness for Respondent. He testified at the 1998 hearing that he tested both types of hemp seed oil for THC by placing the product directly into the urine sample and then testing for the drug. Tr. Vol. 2 at 121, 141-43. He concluded that THC was not present in the urine. Id. at 143. Dr. Remus also testified to personally ingesting both hemp seed oil products and testing his own urine. Tr. Vol. 2 at 141-52. He stated that he did not test positive for THC metabolites after consuming the Health from the Sun gel caps, but did test positive for the metabolite after consuming Spectrum Essential's Hemp Liquid Gold product. Id. at 146-52; Respondent's Exhibit G.

At the 2004 hearing, Dr. Remus testified that after the previous hearing, he conducted the gel cap test for a second time because the dosage contained in the gel caps differed from what an

individual might consume in the liquid form. Tr. 48 (2004). He found that if the amount contained in the gel cap is ingested, either in liquid or gel cap form, then the individual will test positive for THC. Id. at 48-49, 49-62 (testimony regarding a blip in the testing measurements). He also stated that hemp seed oil has the potential to produce a false positive result in a drug test, similar to those produced by the ingestion of poppy seeds because there is no way to differentiate between a positive test for THC presence caused by marijuana or hemp seed oil. Id. at 67, 71. Although Dr. Remus' testimony was credible, it does not deserve controlling weight when compared to the testimony of the Coast Guard's expert witness, Dr. Mahmoud Elsohly. Supra at 20-21.

Dr. William J. George was admitted as Respondent's Expert in Pharmacology, Toxicology, and Forensic Toxicology at the 1998 hearing. Dr. George defined the term "metabolite," explained what an acceptable level of THC metabolite is under the 1997 regulations, and stated that both smoking marijuana and/or taking hemp seed oil will lead to a positive drug test. Tr. Vol. 2 at 243-95. Dr. George testified to the possible lack of credibility in the testimony of Respondent's other expert witness, Dr. Remus, because Dr. Remus ingested the hemp seed oil himself. Tr. Vol. 2 at 243-99. Dr. George also stated that there is no way to differentiate the test positive results of someone who smoked marijuana and someone who only took hemp seed oil. Id. He further testified that hemp seed oil is not a medical drug. Id. I find Dr. George's testimony persuasive and give weight to his statements regarding the lack of credibility given to experiments performed with the scientist and subject being one in the same, and that hemp seed oil is not a medical drug.

Mr. Richard Struempler was admitted as Respondent's expert in drug testing at the 2004 hearing. He testified that he conducted a study on the impact of hemp seed oil, specifically Hemp

Liquid Gold, in workplace drug testing. Tr. 118-39 (2004); Respondent's Exhibit B; Respondent's Supp. Exhibit K. Mr. Struempler conducted the test by using himself as the test subject, ingesting the hemp seed oil, and testing his own urine for THC metabolites. Tr. 126-35 (2004). He testified that if he drank "a higher amount of water prior to collecting" then the specimen would test negative for THC because it was diluted. Id. at 133. He concluded that by consuming Hemp Liquid Gold at the dosage suggested by Health From the Sun, a person could test positive for marijuana use in a workplace drug test. Id. Mr. Struempler also testified that the lot of hemp seeds comprising the 1995, 1996, and 1997 Hemp Liquid Gold product was a homogeneous mixture with the same amount of THC throughout. Id. at 142-43.

Mr. Struempler essentially reiterated material published in his article. Since his test results varied simply by consuming an unspecified amount of water and he used himself as the test subject, this study was not considered credible in light of Dr. Elsohly's testimony.

Analysis

Respondent's arguments and evidence presented at the 1998 and 2004 hearings were not persuasive to overcome the presumption of drug use. Respondent testified that a single bottle of hemp seed oil would last him approximately two and one half weeks at a dosage rate of one "swig" taken four to five times a week. Tr. Vol. 2 at 217, 313-16. He did not follow the dosage instructions on the bottles. Id. at 217, 235-38. Based on Respondent's testified usage rate of two and a half weeks per bottle, he would have exhausted his supply of hemp seed oil approximately one month prior to his submission of the drug test on November 13, 1997. Id. at 315. Respondent's dosage amount and usage was irregular, and he did not present witnesses or documentation regarding his frequency or volume of consumption at any particular time. Tr. Vol. 2 at 216-17, 236-38.

Even if I were to accept his testimony that he ingested hemp seed oil, I cannot jump to the conclusion that his irregular consumption of hemp seed oil was the sole cause of the positive drug test. This is especially true in the absence of information concerning his absorption rate, his physical attributes, the contents of his digestive system at the time of the test, his excretion rate, the relative dilution of his urine by water, and evidence of the last time he took hemp seed oil prior to the drug test. Further, Respondent failed to present credible evidence that would rule out the combined use of marijuana and hemp seed oil. He also failed to introduce any evidence indicating the possibility of an individual to test positive for THC metabolites one month after using a hemp seed oil product. Moreover, Respondent's actions were not consistent with someone who is truly concerned about lowering his risk of heart disease because he did not consult a physician, change his diet, quit smoking, give up alcohol, or increase his exercise habits. Instead, Respondent sought out hemp seed oil when he was looking for a fatty acid supplement even though there are many others more readily available on the market.

It is not unreasonable to infer that someone who was involved with marijuana previously[6] would know that by ingesting a hemp product, his chances of getting THC in his system would be more likely than not. Viewing this in the context of Federal Rule of Evidence 404(b)[7], in that the prior drug test failure is admitted and considered solely for the purpose of lack of mistake,

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[6] On October 24, 1994, Respondent tested positive on a pre-employment drug test for marijuana metabolites, and completed the required Coast Guard rehabilitation program. Tr. Vol. 2 at 227-32; Tr. Vol. 4 at 68-69; IO Exhibit 17; Respondent Exhibit J.

[7] FEDERAL RULES OF EVIDENCE 404(b), entitled "Other crimes, wrongs, or acts" states that:

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or *absence of mistake* or accident, . . .

(emphasis added)

Respondent was on notice that a reasonably prudent person would stay away from hemp products. Additionally, it is not unreasonable to infer that he knew he could blame his positive drug test on hemp seed oil instead of illegal drug use. At a minimum, it was irresponsible of Respondent to ingest a product containing hemp, knowing it contained THC.

It is also not unreasonable to expect that when Respondent learned he tested positive he should have immediately told the MRO about the hemp seed oil, rather than saying that he had already retained a lawyer. By not doing so, he created a negative inference to be considered along with his other actions or inactions, that his claim of hemp seed oil ingestion is a recent fabrication. Respondent knew something was wrong, and acted inconsistently with the way an innocent person would react upon being told that his entire career was at risk. Respondent's testimony and the testimony of his witnesses, although credible at times, raised too much doubt to overcome the presumption of marijuana use.

The credibility of the witnesses was a minimal factor considered in the decision-making process because the expert witnesses provided by Respondent addressed the hemp seed lots and the possible variation of THC in each lot, but none addressed Respondent's consumption of the product. As the Coast Guard pointed out, the studies commissioned and reported on by Respondent were all done on individuals other than the Respondent, and no information was presented as to whether the physical characteristics of the test subjects were similar to Respondent. In Respondent's Exhibit A only 42% of the individuals tested eight (8) hours after consumption tested at or above the Department of Transportation (DOT) cutoff. At the twenty-four hour mark only 57% tested above the DOT cutoff, and at the forty-eight hour mark only 29% tested above the cutoff. In another test conducted in Respondent's Exhibit C, the individual tested consumed a hemp seed oil product well above the recommended dosage and never tested

above the DOT cutoff at any time. Tr. at 96-99, 198-204 (2004); Respondent's Exhibits A & C. The hemp seed oil produced during the time frame that Respondent claims to have taken it does contain some amount of THC. However, consumption of hemp seed oil will only occasionally render a test result that would be above the DOT cutoff for THC metabolites. Tr. at 198-204, 207-20; Respondent's Exhibits A & C. The amount of hemp seed oil consumed varies between the studies submitted with some being significantly above the recommended dosage of the product. Tr. at 198-204, 207-20; Respondent's Exhibits A & C. Respondent's actions, lack of witnesses to testify to his actions, and expert witness testimony are not enough to overcome the presumption established by the Coast Guard that Respondent is a user of dangerous drugs.

SANCTION

Respondent tested positive for marijuana metabolites in a pre-employment drug test. Since the established presumption of drug use has not been successfully rebutted, the appropriate sanction is revocation. 46 U.S.C. 7704(c). Respondent's license and MMD expired during the 1998 hearing, and despite a twelve month grace period during which Respondent could have applied for renewal under 46 CFR 10.209(e)(1), he failed to pursue such action until his Motion for Return of License and Document and for an Order Directing the Coast Guard's Regional Examination Center to Permit Respondent to Renew His License and Document in the spring of 2004. At the end of the 1998 hearing, the Coast Guard still had authority over Respondent's expired document, and was therefore able to revoke it. Even though there is no physical document to revoke at this time, the Undersigned may revoke Respondent's credentials at issue in this proceeding.

ORDER

IT IS HEREBY ORDERED that U.S. Coast Guard license and Merchant Mariner's Document at issue in this proceeding that were issued to Respondent Christopher J. Dresser are hereby **REVOKED**.

PLEASE TAKE NOTICE that service of this Decision & Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. Attachment A.

Done and dated June 14, 2005
New York, New York

WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD

ATTACHMENT A

NOTICE OF ADMINISTRATIVE 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.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

COMPLAINANT'S WITNESSES (1998 Hearing)

1. Carolyn Watson
2. James Callies
3. George Ellis
4. Elaine Bradley
5. Dr. Donald Shu
6. Dr. Steven Oppenheim
7. Dana Purdy
8. Fredrick Kulow
9. Dr. Mahmoud Elsohly
10. Don Wirtshafter
11. Warren Weedon
12. Shirley Shelton

COMPLAINANT'S WITNESSES (2004 Hearing)

1. Dr. Mahmoud Elsohly

RESPONDENT'S WITNESSES (1998 Hearing)

1. Julian Murray
2. Luis Remus
3. Christopher Dresser
4. Dr. William George

RESPONDENT'S WITNESSES (2004 Hearing)

1. Mary Dresser
2. Dr. Remus
3. Dr. Struempler

COMPLAINANT'S EXHIBITS (1998 Hearing)

- IO Exhibit 1 – Quest Diagnostics Collection Form
- IO Exhibit 2 – Quest Diagnostics Litigation Package
- IO Exhibit 3 – 49 CFR Part 40.33
- IO Exhibit 4 – Greystone Health Sciences Corporation, Positive Drug Test Interview Form

- IO Exhibit 5 - DOT Memorandum regarding the use of marijuana by DOT safety-sensitive employees
- IO Exhibit 6 – Documents regarding the procedure for drug test result notification
- IO Exhibit 7 – List of U.S. Department of Health and Human Services certified laboratories
- IO Exhibit 8 – Catalog from the Ohio Hempery
- IO Exhibit 9 – Letter from Respondent's sponsor stating that he is drug-free
- IO Exhibit 10 – Resume of Dana Purdy
- IO Exhibit 11 – Biographical Sketch of Mahmoud Elsohly
- IO Exhibit 12 – NORML article - "Ingestion of Legal Hemp Seed Oil Can Cost You Your Job, Two Recent Studies Reveal"
- IO Exhibit 13 – Coast Guard Charge Sheet, March 23, 1998
- IO Exhibit 14 – Spectrum Naturals, Inc. document listing cases of Omega 3 and Hemp Oil sold by the company in 1997
- IO Exhibit 15 – Information received from Dr. Remus regarding hemp seed oil product manufacturing and expiration
- IO Exhibit 16 – MEBA Benefits Plan & Respondent's employment history
- IO Exhibit 17 – Drug Testing Custody & Control Forms (1994 drug test)
- IO Exhibit 18 – New Hampshire Hemp Council, Inc. v. Constantine, Administrator, Drug Enforcement Agency – Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction
- IO Exhibit 19 - New Hampshire Hemp Council, Inc. v. Constantine, Administrator, Drug Enforcement Agency –Report & Recommendation
- IO Exhibit 20 – Curriculum Vita of George Ellis
- IO Exhibit 21 – "Excretion patterns of cannabinoid metabolites after last use in a group of chronic users" by George Ellis, *et. al.*
- IO Exhibit 22 – "Detection Times of Marijuana Metabolites in Urine by Immunoassay and GC-MS" by Huestis, Mitchell and Cone
- IO Exhibit 23 – "Urinary Excretion Profiles of 11-Nor-9-Carboxy-Δ^9-Tetrahydrocannacinol in Humans after Single Smoked Doses of Marijuana" by Huestis, Mitchell and Cone

RESPONDENT'S EXHIBITS (1998 Hearing)

- Respondent's Exhibit A – Article - "Hemp Oil Ingestion Causes Positive Urine Tests for Δ^9-Tetrahydrocannabinol Carboxylic Acid" by Constantino, Schwartz and Kaplan
- Respondent's Exhibit B – Article – "Positive Cannabinoids Workplace Drug Test Following the Ingestion of Commercially Available Hemp Seed Oil" by Struempler
- Respondent's Exhibit C – Letter to the Editor – "A Positive THC Urinalysis From Hemp (Cannabis) Seed Oil"
- Respondent's Exhibit D – Resume of Luis Remus
- Respondent's Exhibit E – Tulane University Medical Center, results of test analyzing the effect of hemp oil upon urine
- Respondent's Exhibit F – Letter regarding Respondent's performance on the Green Wave
- Respondent's Exhibit G – Empty bottle of "Spectrum Essentials Cold Pressed Hemp Oil"

- Respondent's Exhibit H – Empty bottle of "Health from the Sun Hemp Liquid Gold Cold Pressed Hemp Oil"
- Respondent's Exhibit I – Letter regarding Respondent's completion of a drug dependency program
- Respondent's Exhibit J – Letter regarding Respondent's 1995 surrender of his MMD because of a positive drug test
- Respondent's Exhibit K – USCG v. Dresser – 1995 Decision & Order
- Respondent's Exhibit L – Curriculum Vitae of William George
- Respondent's Exhibit M - Letter from Respondent's sponsor stating that he is drug-free
- Respondent's Exhibit N – Biographical Sketch of Julian Murrary, Esq.
- Respondent's Exhibit 0-1 – USCG v. Dresser – Order Granting Change of Venue and Continuance (1998)
- Respondent's Exhibit 0-2 - USCG v. Dresser – Notice of Hearing Date, Time and Location
- Respondent's Exhibit 0-3 - USCG v. Dresser – Revised Notice of Hearing Time
- Respondent's Exhibit 0-4 - USCG v. Dresser – Revised Notice of Hearing Location
- Respondent's Exhibit 0-5 – Subpoena for the appearance of Ms. Shirley Shelton at Respondent's 1998 hearing

ADMINISTRATIVE LAW JUDGE'S EXHIBITS (1998 Hearing)

- ALJ Exhibit I - USCG v. Dresser – Respondent's Verified Motion for Disqualification of the Administrative Law Judge
- ALJ Exhibit II - USCG v. Dresser – Coast Guard's Verified Motion and Memorandum Against Disqualification of the Administrative Law Judge
- ALJ Exhibit III - USCG v. Dresser – Respondent's Verified Memorandum in Reply to the Coast Guard's Memorandum in Opposition to the Respondent's Motion for Disqualification of the Administrative Law Judge
- ALJ Exhibit IV - USCG v. Dresser – Denial of Respondent's Motion for Disqualification

COMPLAINANT'S SUPPLEMENTAL EXHIBITS[8] (2004 Hearing)

- Supplemental Exhibit IO Ex. 1 – Curriculum Vitae of Dr. Elsohly

RESPONDENT'S SUPPLEMENTAL EXHIBITS (2004 Hearing)

- Respondent's Supp. Ex. A - Health from the Sun/Oakmont, Interoffice Correspondence Dated 10/22/96
- Respondent's Supp. Ex. B - Health from the Sun/Oakmont, Interoffice Correspondence Dated 11/6/96

[8] The 2004 exhibits are referred to as "supplemental" in order to differentiate them from those admitted in the 1998 hearing.

- Respondent's Supp. Ex. C - Health from the Sun/Oakmont, Interoffice Correspondence Dated 11/13/96
- Respondent's Supp. Ex. D - Health from the Sun/Oakmont, Interoffice Memo Dated 11/11/96
- Respondent's Supp. Ex. E - Report of PharmChem Laboratories, to Health from the Sun/Oakmont Dated 2/23/98
- Respondent's Supp. Ex. F – Bioriginal Hemp Seed Oil Test Results for Health from the Sun/Oakmont
- Respondent's Supp. Ex. G – Promotional Literature on Hemp Seed Oil from Health from the Sun/Oakmont
- Respondent's Supp. Ex. H – (Proffered, but not Admitted) – Pages 55, 94, 100, 105 and 106 of the 30(b)(6) deposition from Health from the Sun/Oakmont
- Respondent's Supp. Ex. I – USCG Hemp Oil Defense Elimination Memo
- Respondent's Supp. Ex. J – The official record of this action, including but not limited to all motions and attachments to motions and memorandum.
- Respondent's Supp. Ex. K – Curriculum Vitae for Mr. Richard R. Struempler

ATTACHMENT C

MOTIONS, RESPONSES AND ORDERS FOR REMANDED HEARING

Document Name	Date Issued
1. NTSB Appeal Decision	June 11,2003
2. United States Court of Appeals Order	December 3, 2003
3. Order Directing CG to File Response	February 26, 2004
4. Order Granting Extension of Time for CG	March 3, 2004
5. Respondent's Motion to Dismiss and Supporting Memo	March 4, 2004
6. Supplemental Memo in Support of Motion to Dismiss	March 11, 2004
7. Order Granting Extension of Time to Respond	March 22, 2004
8. Respondent's Motion to Disqualify ALJ and Supporting Memo	March 26, 2004
9. CG Response to Respondents Motion to Dismiss	April 19, 2004
10. CG Response to ALJ Orders	April 19, 2004
11. CG Response to Respondents Motion to Disqualify ALJ	April 19, 2004
12. Order Denying Motion to Disqualify ALJ	April 21, 2004
13. Respondents Memo in Opposition to CG Motion to Stand on the Record	April 22, 2004
14. Order Denying Respondent's Motion to Dismiss	May 4, 2004
15. Respondents 2nd Motion to Disqualify ALJ; 2nd Motion to Dismiss; Motion to Return License and Document	May 6, 2004
16. Order Granting Motion to Stand on the Record	May 7, 2004
17. Respondents 3rd Motion to Disqualify ALJ; Motion for De Novo Hearing; Motion for Supplemental Oral Testimony	May 8, 2004
18. CG Motion for Extension of Time to Respond	May 18, 2004
19. Order Granting Motion for Extension of Time	May 19, 2004

20. CG Response to 2nd Motion to Disqualify	May 28, 2004
21. CG Response to Motion to Return License and Document	May 28, 2004
22. CG Response to 2nd Motion to Dismiss	May 28, 2004
23. CG Response to Motion for De Novo Hearing	May 28, 2004
24. CG Response to Motion for Supplemental Oral Testimony	May 28, 2004
25. Respondent's Reply to the CG's Response to Respondent's Motion for Supplemental Oral Testimony	May 31, 2004
26. Order Denying 2nd and 3rd Motions to Disqualify ALJ	June 3, 2004
27. Order Denying Motion to Return License and Document	June 4, 2004
28. Order Denying 2nd Motion to Dismiss	June 4, 2004
29. Order to Stay Motion for Supplemental Oral Testimony	June 7, 2004
30. Order Denying Respondents Motion for De Novo Hearing	June 7, 2004
31. CG Witness and Exhibit List	June 17, 2004
32. Respondent's Submission in Compliance with the June 7, 2004 Order of the Administrative Law Judge	June 23, 2004
33. United States Coast Guard's Submission in Accordance with the June 7, 2004 Order Regarding Supplemental Testimony and Exhibits	June 28, 2004
34. Respondent's Objections to the Coast Guard's List of Witnesses and Exhibits	June 29, 2004
35. Respondent's Reply to the Coast Guard's Objections to the Respondent's Submission in Compliance with the June 7, 2004 Order Of the Administrative Law Judge	July 6, 2004
36. Scheduling Order	August 20, 2004
37. Respondent's Post-Hearing Memorandum	February 3, 2005
38. United States Coast Guard's Submission of Argument, Proposed Finding of Fact and Proposed Conclusions of Law	February 16, 2005

ATTACHMENT D

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Coast Guard submitted its Proposed Findings of Fact and Conclusions of Law with reference to testimony, but not specific pages. The Undersigned added transcript citations only for ease of reference and review.

Coast Guard's Proposed Findings of Fact

1. On November 13, 1997, Respondent was the holder of Coast Guard issued Merchant Mariner's License Number 764137 and a Merchant Mariner's Document. Tr. Vol. 1 at 9-10 (1998). (Accepted and incorporated.) On that date, he provided a urine specimen for a pre-employment drug screen in compliance with federal drug testing regulations. Tr. Vol 1. at 30; IO Exhibit 1. (Accepted and incorporated.)

2. The Respondent was required to take a pre-employment drug test prior to going back to work under the authority of his Merchant Mariner's License or Document since he had not been subject to random drug testing for a period of more than sixty consecutive days during the previous one hundred and eighty-five days. 46 CFR Part 16.210; Tr. Vol. 2 at 213. (Accepted and incorporated.)

3. Respondent reported to Easton Memorial Hospital, where he was directed by Ms. Carolyn Watson, certified collector, to furnish the specimen for the test. Tr. Vol. 1 at 28, 30. (Accepted and incorporated.)

4. Respondent furnished a sample of his urine in accord with standard procedures, which Ms. Watson described in detail. Id. at 35-39. (Accepted and incorporated).

5. After Respondent provided the specimen, Ms. Watson performed the routine identification and sealing procedures in his presence. Id.; IO Exhibit 1. (Accepted and incorporated).

6. Respondent's signature appears in step No. 4 on the Medical Review Officer's copy of the Drug Testing Custody and Control form under a printed statement, which certifies that he provided a urine specimen to the collector and the specimen was sealed with a tamper evident seal in his presence. Id.; IO Exhibit 1. (Accepted and incorporated).

7. The specimen was then delivered to Quest Diagnostics, Inc., which was, and is, a Substance Abuse and Mental Health Services Administration (SAMSHA) certified laboratory. Tr. Vol. 1 at 42, 45, 50-51; IO Exhibit 2. (Accepted and incorporated).

8. At Quest Diagnostics, Inc., the sample was initially tested by enzyme immunoassay for a range of drugs. Tr. Vol. 1 at 51-52; IO Exhibit 2. The test indicated the presence of THC in the specimen. Tr. Vol. 1 at 54; IO Exhibit 2. (Accepted and incorporated).

9. Following the Department of Health and Human Services guidelines and the usual laboratory procedure, the sample was then tested again by gas chromatography/mass spectrometry (GC/MS) to confirm, or refute, the initial screen results. The confirmatory test was also positive for marijuana/THC metabolite. The final laboratory report concluding that Respondent's sample was positive for marijuana/THC metabolite was dated November 18, 1997. Tr. Vol. 1 at 52-53, 60-63; IO Exhibit 2. (Accepted and incorporated).

10. The results were certified by Donald Shu, certifying scientist for Quest Diagnostics, Inc. All testing was conducted in accordance with standard procedures, which Mr. Donald Shu and Mr. James Callies, scientific director of the substance abuse testing laboratory, described in detail. Tr. Vol. 1 at 50-54; IO Exhibit 2. Quest Diagnostics sent the results of Respondent's positive drug test to Greystone Health Sciences Corporation, the Medical Review Officer for MEBA District 1. Tr. Vol. 1 at 53, 73-74, 92-93; IO Exhibit 6. (Accepted and incorporated).

11. Ms. Elaine Bradley, Senior Vice President at Greystone Health Sciences, described her attempts to reach Respondent on behalf of the Medical Review Officer. Ms. Bradley left messages for Respondent at the MEBA School in Easton, Maryland, and at his home in Clearwater, Florida. The essence of those messages was for Respondent to contact the Medical Review Officer at 1-800-666-3791. Ms. Bradley left those messages on the following dates and times: November 21, 1997, 3:05 P.M., November 25, 12:14 P.M., December 1, 9:38 A.M., December 8, 12:09 P.M.,

December 10, 1:16 P.M. Respondent never returned these phone calls. Tr. Vol. 1 at 168-72, 174-76; IO Exhibit 4. (Accepted and incorporated).

12. At no point did Ms. Bradley reveal the results of Respondent drug test as positive on any of the messages left. Respondent never returned the MRO's phone calls. Id. (Accepted and incorporated).

13. MEBA District I refuses to handle positive drug tests on behalf of its union members. Respondent is a member of the MEBA District I union. Although Greystone Health Sciences Corporation is the Medical Review Officer employed by MEBA, positive test results are sent to the Coast Guard only. Consequently, there is no "designated employer representative" as described in 49 CFR 40.33 for Respondent. Tr. Vol. 1 at 180-81; IO Exhibit 6. (Accepted and incorporated).

14. On December 15, 1997, twenty-five (25) days after Ms. Bradley first attempted to contact Respondent, Dr. Steven Oppenheim, Medical Review Officer at Greystone Health Sciences, made a final positive determination that the specimen, furnished by Respondent on November 13, 1997, was positive for the THC/marijuana metabolites. Dr. Oppenheim reasoned that over a twenty-five day period, reasonable attempts had been made to contact Respondent at both phone numbers provided. He determined that Respondent had failed to return the phone calls. This conclusion was rendered in accord with 49 CFR 40.33(c)(5)(ii) commonly referred as the

"fourteen-day rule." Tr. Vol. 2 at 15-16, 30-31; IO Exhibit 4. (Accepted and incorporated).

15. On December 15, 1997, Greystone Health Sciences sent written notification to the Coast Guard at Marine Safety Office Baltimore, Maryland, regarding Respondent's positive test. Tr. Vol. 1 at 116; Tr. Vol. 2 at 38; IO Exhibits 4 & 6. (Accepted and incorporated).

16. On January 6, 1997, MSO Baltimore forwarded the positive drug test notification to MSO Tampa for their action since Respondent resided in Clearwater, Florida, which is MSO Tampa's area of responsibility. Tr. Vol. 4 at 30-31. (Accepted and incorporated).

17. On January 15, 1998, Respondent's attorney requested an aliquot be taken from Respondent's specimen and sent to a referee lab of his choosing, which was Northwest Toxicology, in Salt Lake City, UT. IO Exhibit 4. (Accepted and incorporated).

18. Northwest Toxicology, the SAMSHA certified referee lab, reconfirmed the positive drug test on Mr. Dresser's aliquot sample as positive for cannabinoids/THC. IO Exhibit 4. (Accepted and incorporated).

19. On March 23, 1997, Respondent was charged with use of a dangerous drug. Tr. Vol. 4 at 46; IO Exhibit 13. (Accepted and incorporated).

20. On October 24, 1994, Respondent tested positive on a pre-employment drug test for marijuana metabolites, and completed the required Coast Guard rehabilitation program. Tr. Vol. 2 at 227; Tr. Vol. 4 at 68-69; IO Exhibit 17. (Accepted and incorporated).

21. Respondent denied using marijuana and offered an affirmative defense claiming that his positive drug test was the result of consumption of two types of hemp seed oil, Hemp Liquid Gold, manufactured by Health from the Sun, and Spectrum Essentials, manufactured by Spectrum Naturals as a dietary supplement. Tr. Vol. 2 at 214-16, 223-33. (Accepted and incorporated).

22. Respondent offered the empty containers of the two products as evidence of his consumption prior to the November 13, 1997 test. Hemp Liquid Gold, by Health from the Sun was dated March 1997. Spectrum naturals cold pressed liquid hemp oil was dated October 7, 1996. Both were eight ounce bottles. Id. at 221-23; Respondent's Exhibits G & H. (Accepted and incorporated).

23. Respondent claimed to have been taking hemp seed oil to lower his risk of heart disease. Tr. Vol. 2 at 216-17. (Accepted and incorporated).

24. Respondent did not consult a physician for cardiovascular advice. No physician told him that he had a cardiovascular problem. Tr. Vol. 2 at 307-08. (Accepted and incorporated).

25. Respondent's actions were not consistent with someone who is truly concerned about lowering his risk of heart disease because he did not change his diet, quit smoking, give up alcohol, and did not increase his exercise habits. Tr. Vol. 2 at 304-08. (Accepted to the extent that Respondent's concern over his cardiovascular health did not result in a change in diet, smoking habit, alcohol consumption or exercise habits. Rejected to the limited extent that the Coast Guard is voicing its opinion that Respondent's actions were inconsistent with someone concerned with their health, when the record does not specifically state such a fact.)

26. Hemp seed oil is not a mainstream dietary supplement. Hemp oil sales are small in comparison to other dietary supplements containing the same essential fatty acids as hemp oil. Hemp oil is also very expensive in comparison to other dietary supplements that contain essential fatty acids. Tr. Vol. 3 at 63-67, 97-103. (Accepted and incorporated).

27. Essential Fatty Acids (EFA) are necessary to maintain good cardiovascular health. EFA's can be obtained through healthy eating habits; ordinarily a dietary supplement is not necessary. A licensed physician or dietician usually makes the determination that a supplement is necessary. Id. (Accepted regarding EFA's being

essential to good cardiovascular health and that the substance is available in the form of a dietary supplement. Rejected to the limited extent that a licensed physician or dietician is necessary in making the decision to ingest a dietary supplement. There was no information presented stating that the majority of the population consult a dietician or physician before starting a regiment of dietary supplements, even though it might be the healthier thing to do.)

28. Respondent did not follow the dosage instructions on the bottles. Tr. Vol. 2 at 217, 235-38. (Accepted and incorporated).

29. Hemp oil requires refrigeration. Tr. Vol. 2 at 314-16. (Accepted and incorporated).

30. Respondent claimed that he did not take hemp seed oil with him when he sailed because of the hassle in transporting it and because it was not readily available in foreign ports. Id. (Accepted and incorporated).

31. Based on an eight ounce bottle with an average consumption rate of one bottle every two and one half weeks, a twelve week supply would constitute only five bottles which could be transported with very little inconvenience and refrigeration would be available aboard the ship. Tr. Vol. 2 at 313-16, 342. (Accepted up to and including the word "bottles," and rejected thereafter. Respondent stated that he did not bring the hemp oil bottles onboard the ship with him specifically because they needed to

be refrigerated. The Coast Guard's contention that bringing the bottles onboard the ship would result in "little inconvenience" is not supported by testimony.)

32. Respondent testified that a single bottle would last him approximately two and one half weeks at a dosage rate of a "swig" taken four to five times a week. Tr. Vol. 2 at 217, 313-16. (Accepted and incorporated).

33. Between September 14, 1997 and leaving for the MEBA class in October of 1997 Respondent claims to have purchased only two, eight ounce sized bottles of hemp seed oil. This constituted his total supply of hemp seed oil from the middle of September until the middle of December when he claims to have stopped using the product. Tr. Vol. 2 at 205-42, 303-80; Tr. Vol. 3 at 6-20. (Rejected. Respondent testified that the two bottles of hemp seed oil presented at the hearing were not the only bottles he consumed while at MEBA. Tr. Vol. 2 at 239.).

34. Based on his testified usage rate of two and a half weeks per bottle Respondent would have exhausted his supply of hemp seed oil approximately one month prior to his submission of the drug test on November 13, 1997. Tr. Vol. 2 at 315. (Accepted and incorporated).

35. Respondent has failed to introduce any evidence that indicates it is possible for an individual to test positive for the THC metabolite one month after using a hemp seed oil product. (Accepted as a conclusion rather than finding of a basic fact).

36. Respondent introduced only one witness to corroborate his testimony that he used hemp seed oil and that was the Respondent's own Mother, Mary Dresser. She testified to observing him consuming it only one time and this occurred at least six weeks prior to his failed drug test. Tr. at 27-28 (2004). (Accepted and incorporated).

37. There were no witnesses presented that could corroborate the Respondent's claim that he was taking hemp seed oil at any time within six weeks of his failed drug test. Tr. Vol. 1-4 (1998); Tr. (2004). (Accepted and incorporated).

38. There were no witnesses presented that could corroborate the Respondent's claim that he continued to use hemp seed oil until around the middle of December. Tr. Vol. 1-4 (1998); Tr. (2004). (Accepted and incorporated).

39. Despite Respondent's testimony, he received notification that he needed to contact the MRO prior to December 5, 1997. Tr. Vol. 2 at 317-18. (Accepted to the extent that he suspected something was wrong and that is the reason he hired a lawyer).

40. On October 23, 1997, the National Organization for the Reform of Marijuana Laws (NORML) published a press release on the NORML's web page site on the Internet titled, "Ingestion of Legal Hemp Seed Oil Can Cost You Your Job, Two Recent Studies Reveal." The press release discussed the two studies published in The

Journal of Analytical Toxicology, that the Respondent entered as evidence, and listed Mr. Wirtshafter, whom Respondent contacted for information on hemp oil, as a point of contact. His number of the Ohio Hempery was provided. (*sic*) The number was (614) 662-4367. Tr. Vol. 4 at 18-23; IO Exhibit 12; Respondent's Exhibits A, B & C. (Accepted and incorporated).

41. Respondent's search for an affirmative defense led him to NORML's press release. (Rejected. It is not known whether Respondent's thoughts about hemp seed oil usage existed prior to reading the NORML article. The Coast Guard does not know for a fact that Respondent's thoughts about claiming hemp oil usage as an affirmative defense did not exist prior to reading the NORML article).

42. On or one day immediately prior to December 5, 1997, Respondent ordered the Ohio Hempery catalogue, which listed, for sale the Spectrum Naturals liquid hemp oil product. That phone call was made from Florida and by long distance. Respondent did not order any products from that catalogue. Tr. Vol. 4 at 16-18; IO Exhibit 8. (Accepted and incorporated).

43. On December 24, 1997, Respondent ordered Health from the Sun's Hemp Liquid Gold from the Nature's Food Patch; a health food store located a half of a mile from his home. Tr. Vol. 4 at 39-43. (Accepted and incorporated).

44. There are significant differences in how individuals process THC that effect the amount of metabolite found in a urine specimen. Tr. at 96-99, 198-204 (2004). (Accepted and incorporated).

45. These variables include an individual's metabolism rate, his absorption rate, which is also impacted by the contents of the stomach, his excretion rate and even the relative dilution of the urine by water. All of these variables impact how THC is processed and each individual processes it at a different rate. This is particularly evident when dealing with relatively small concentrations of THC. Id. (Accepted and incorporated).

46. Respondent has failed to introduce any evidence of his own metabolism rate, absorption rate, excretion rate or potential for dilution of his urine at the time of the urinalysis. Tr. Vol. 1-4 (1998); Tr. (2004). (Accepted and incorporated).

47. Testing for the THC metabolite at a concentration above the Department of Transportation (DOT) cutoff following consumption of hemp seed oil produces a wide variation of results between individuals. For example in Respondent's Exhibit A only 42% of the individuals tested eight hours after consumption tested at a level above the DOT cutoff. At the twenty-four hour mark only 57% tested above the DOT cutoff and at the forty-eight hour mark only 29% tested above the cutoff. In another test conducted in Respondent's Exhibit C the individual tested consumed a hemp seed oil product well above the recommended dosage and never tested above

the DOT cutoff at any time. These variations highlight the differences in how individuals process the THC contained in hemp seed oil. Tr. at 96-99, 198-204 (2004); Respondent's Exhibits A & C. (Accepted and incorporated).

48. The studies commissioned and reported on by Respondent were all done on individuals other than the Respondent and there has been no evidence submitted that these individuals' physical characteristics are in any way similar to those of the respondent. (Accepted although this statement is more of a conclusion than a finding of a basic fact).

49. The hemp seed oil produced during the time frame the Respondent claims to have taken it does contain some amount of THC. However, consumption of hemp seed oil will only occasionally render a test result that would be above the DOT cutoff for the THC metabolite. Tr. at 198-204, 207-20; Respondent's Exhibits A & C. (Accepted and incorporated).

50. Concentrations of THC within hemp seed oil products vary. This is true regardless of whether or not they are produced by the same company or from the same seed lot. Tr. at 198-204, 207-20. (Accepted and incorporated).

51. THC is in hemp seed oil because of the debris (marijuana plant material) that is adsorbed on the surface of the seed and processed with the seed. Thus, the amount

of THC within hemp seed oil product varies greatly due to the variability of the debris on the hemp seed. Tr. at 207-20. (Accepted and incorporated).

52. Respondent failed to establish the actual THC concentration of the product in either bottle he claims to have taken. (Accepted although this is more of a conclusion than a finding of a basic fact).

53. The amount of hemp seed oil consumed varies between the studies submitted with some being significantly above the recommended dosage of the product. Tr. at 198-204, 207-20; Respondent's Exhibits A & C. (Accepted as a conclusion).

54. The actual amount of THC within the products studied was not determined and so that variable cannot be accurately compared between the studies submitted. (Accepted as a conclusion).

55. The Respondent has failed to show that the material tested in the studies submitted is from the same batches of hemp seed oil he claims to have consumed. (Accepted as a conclusion).

56. In addition to variations in the amount of hemp seed oil consumed in the studies submitted, there were also significant differences in the time between doses as well as the length times from the last dosage to when the urinalysis testing was conducted. (Accepted as a conclusion).

57. Respondent has failed to establish a solid dosage rate and time between his last use of hemp seed oil and the actual urinalysis. (Accepted as a conclusion).

Coast Guard's Proposed Conclusions of Law

1. The United States Department of Transportation (DOT) and the Coast Guard is charged with enforcing United States dangerous drug laws against the holder of a license or merchant mariner's document, if the holder is found to have used a dangerous drug. 46 U.S.C. § 7704. (Accepted and incorporated).

2. DOT/Coast Guard testing procedures test a mariner's urine for the presence of the marijuana metabolite in order to determine if an individual is a user of marijuana, which is a Schedule II Controlled Substance under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801, et seq., referred to as the Controlled Substance Act (CSA). (Accepted and incorporated).

3. Respondent failed a chemical test for dangerous drugs and is presumed to be a user of dangerous drugs under 46 C.F.R. § 16.201(b). The Coast Guard met its burden of proof by a preponderance of the evidence by reliable, probative and substantial evidence as required under both 46 C.F.R. § 5.63 and 33 C.F.R. § 20.702, that the Respondent is a user of dangerous drugs; marijuana. (Accepted and incorporated to the extent that the Coast Guard met its burden by reliable, probative, and substantial evidence, the standard used at the time of the 1998 initial hearing.)

4. Respondent failed to prove his affirmative defense because he failed to prove that he used hemp seed oil and that the use of the hemp seed oil caused him to test above the DOT cutoff for the THC metabolite. (Accepted and incorporated to the extent that the hemp seed oil he consumed, if any, did not, by itself, cause Respondent to test above the DOT cutoff).

5. The Coast Guard is seeking revocation of the Respondent's U.S. Coast Guard merchant mariner credentials, the only available sanction for dangerous drug use under 46 U.S.C. § 7704 (c) and 46 C.F.R. § 5.59(b). Further, the Coast Guard is recommending that Respondent not be given the opportunity for administrative clemency or be allowed to apply for another U.S. Coast Guard merchant mariner credential. This is based on the Coast Guard's previous finding of Respondent's use of marijuana in October of 1994. (Accepted to the extent that revocation is the only sanction available for use of a dangerous drug. The Undersigned has no authority to bar further administrative action, including clemency).

Respondent's Proposed Findings of Fact and Conclusions of Law

Respondent's counsel did not provide an enumerated list his proposed findings of fact and conclusions of law. Instead, he submitted twelve arguments. The arguments are summarized as follows:

1. Respondent asserts that because the Undersigned did not conduct a *de novo* hearing, the Respondent's affirmative defense involving the innocent ingestion of hemp seed oil must be accepted as a matter of law. (Respondent's Post-Hearing Memorandum at 1-2). (Rejected. The Coast Guard's motion to stand on the record was granted for the purpose of judicial

economy, but at the remanded hearing both parties were permitted to present any witness testimony or evidence that they saw fit, so long as it was not unduly repetitious. Just because the Respondent's testimony in the 1998 hearing was not rebutted by live testimony does not mean that the ALJ must find Respondent's affirmative defense as factual as a matter of law. As stated above, even if I were to accept his testimony that he ingested hemp seed oil, I cannot jump to the conclusion that his irregular consumption of it at irregular intervals was the sole cause of the positive drug test in the absence of additional evidentiary considerations such as absorption rate, etc., as described by Dr. Elsohly. Further, there would have to be credible evidence that would rule out the use marijuana during the period of time while hemp seed oil was being ingested. Other than his own testimony, which I find not credible, Respondent presented no such evidence. Respondent's affirmative defense of hemp seed oil consumption was not supported by his expert witnesses, and the Coast Guard produced expert witnesses in rebuttal.

2. Respondent argues that the Coast Guard's stipulation equates to an admission that Respondent innocently ingested hemp seed oil contaminated with THC. (Respondent's Post-Hearing Memorandum at 2-3). (Rejected. The Coast Guard stipulated that Respondent claims he innocently ingested hemp seed oil all manufactured from the same seed lot; the Coast Guard does not stipulate that he actually ingested the substance. Tr. 87 (2004). A stipulation of what a witness claims does not equal a finding of fact. The Coast Guard also stipulated that hemp seed oil manufactured at the time of the incident contained some level of THC, but the actual amount is unknown. Tr. 88 (2004). There was no evidence presented to prove that the level of THC present in hemp seed oil was high enough to trigger a positive

test. Nor was there any evidence presented that excluded the use of marijuana and that the hemp seed oil ingestion, if any, was the sole cause of Respondent's positive drug test. Aside from Respondent's mother's testimony and his own testimony, there was no evidence that Respondent ingested hemp seed oil at all.)

3. According to Respondent, the testimony of Dr. Remus combined with the stipulation that has already been rejected, establishes that there is no way to differentiate between someone who tests positive in a drug screen after ingesting hemp seed oil and someone who took marijuana. Respondent argues that without the ability to determine the reason for the positive drug test, the ALJ must find for Respondent. (Respondent's Post-Hearing Memorandum at 3-4). (Rejected. The evidence provided by Respondent shows that it is impossible to determine whether Respondent's positive drug test was caused by marijuana usage, hemp seed oil ingestion, or a combination of both. As a result, the evidence and witness testimony provided by Respondent is not sufficiently reliable, probative or substantial to rebut the presumption that by testing positive for marijuana metabolites, Respondent is a user of dangerous drugs. See supra at 20, 22, 27.)

4. Respondent offers the testimony of Mr. Struempler and his tests on the effect of Hemp Liquid Gold on urine to prove that the level of THC present in hemp seed oil is sufficient to result in a positive test for marijuana metabolites in a drug screen. (Respondent's Post-Hearing Memorandum at 4). (Accepted to the extent that Mr. Struempler is an expert in urine drug testing. He tested to the effect of hemp seed oil on urine, and that hemp seed oil contained THC. For the reasons cited by Dr. Elsohly, to whose opinion I accord controlling

weight, I reject the argument that all hemp seed oil contains sufficient amounts of THC to result in a positive drug screen by all who submit specimens for testing after hemp oil ingestion. See supra at 21, 25-26.)

5. The testimony of Mrs. Dresser, Respondent's mother, was offered to corroborate Respondent's 1998 testimony regarding his hemp oil ingestion, and that his purpose in taking it was for his cardiovascular health. (Respondent's Post-Hearing Memorandum at 5). (Rejected. Mrs. Dresser's testimony is not credible. As Respondent's mother, it is difficult to consider her an objective and uninterested witness. Furthermore, Mrs. Dresser did not testify at the original hearing in 1998 but urges us to put weight on her testimony six years later, where she purports her memory to be fresh and accurate. Even if I were to accept Mrs. Dresser's testimony, it would establish only that on one occasion, Respondent took a "swig" of hemp seed oil. It does not establish regular use of sufficient quantity, to the exclusion of marijuana use, that would be sufficient to cause a positive drug test. Therefore, no weight can be given to Mrs. Dresser's testimony. See supra at 22.)

6. Respondent asserts that Dr. Elsohly's testimony established that hemp seeds contaminated with THC can result in a positive drug test result for marijuana metabolites. As a result of this testimony, Respondent argues that his innocent ingestion of hemp seed oil prior to a voluntary drug test should establish that the positive result was caused by hemp seed oil. (Respondent's Post-Hearing Memorandum at 5-6). (Accepted to the limited extent that even if the absorption and amount of THC in the product is unknown, it would be possible for someone to consume hemp seed oil and test positive for marijuana metabolites.

Respondent's argument is otherwise rejected. The mere possibility that someone who consumes hemp seed oil might test positive for marijuana metabolites does not rebut the presumption of marijuana use. See supra at 19-21, 24-29.)

7. Respondent argues that the testimony of Ms. Purdy, a licensed dietician nutritionist, should be disregarded because she could not testify to having any specific knowledge of him. (Respondent's Post-Hearing Memorandum at 7). (Rejected. The testimony of Ms. Purdy was not intended to be specific to the Respondent; Ms. Purdy testified to general information regarding substances that people with heart conditions are advised to take or not take. Specifically, Ms. Purdy testified that hemp seed oil is not recommended to people with concerns about the condition of their heart because it contains fatty acids that can otherwise be obtained by eating a diet that includes oils. Tr. Vol. 3 at 63-67, 81-83. An expert witness testifying to good nutritional practices to avoid heart disease is necessary so that the fact finder may compare what the Respondent claims he did for good heart nutrition, here, ingesting only hemp seed oil, and what is the generally accepted practice. Actual knowledge of the Respondent is unnecessary when the witness is simply stating generally accepted principles. See supra at 17.)

8. Respondent asserts that the testimony of Mr. Kulow, President, Oak Line Investment Company, Inc., parent company of Health from the Sun, should be disregarded because he committed perjury at the 1998 hearing. Respondent contends that Mr. Kulow had knowledge of the presence of THC in Health from the Sun's hemp oil product, but testified that his product did not contain THC. (Respondent's Post-Hearing Memorandum at 8). (Rejected.

Respondent has not established that Mr. Kulow acknowledged or accepted as true and correct that the Health from the Sun hemp oil product contained THC prior to testifying at the initial hearing that it did not contain THC. It is possible that Mr. Kulow dismissed the contents of the 1996 memo because he thought Mr. Struempler was making a false accusation. Had Mr. Kulow previously testified under oath prior to the 1998 hearing that his hemp seed oil contained THC, Respondent might have a point. However, Mr. Kulow's testimony is given little weight in the decision-making process because it is inconsistent with the testimony of Dr. Elsohly, whose testimony is accorded controlling weight in assessing scientific evidence. See supra p. 17.)

9. Respondent asserts that the charges against him should be dismissed with prejudice because the Coast Guard failed to establish that Ms. Watson is properly trained in the collection of urine, and that by doing so, the Coast Guard failed to establish a *prima facie* case. (Respondent's Post-Hearing Memorandum at 8-11). (Rejected. When reviewed in its entirety, the testimony of Ms. Watson establishes that she is properly trained in accordance with 49 CFR Part 40. Tr. Vol. 1 at 26-44. At a minimum, her testimony establishes that she was sufficiently trained by her employer, and that her laboratory conformed to the requirements of 46 CFR Part 40. Id. The fact that the Coast Guard did not establish the name of the videotape she watched pursuant to her training does not mean that her employer did not properly certify her as a trained collector. Supra at 12.)

10. Respondent argues that telephonic testimony should not have been admitted in the 1998 hearing because the Coast Guard did not move to have it admitted. (Respondent's Post-

Hearing Memorandum at 11). Respondent asserts that all telephonic testimony should be stricken from the record and the charges against him dismissed. (Respondent's Post-Hearing Memorandum at 12). (Rejected. On appeal, the Commandant addressed this issue and found that the ALJ had discretion to admit testimony via telephone when it would otherwise be taken by deposition. Appeal Decision 2626 Dresser (2001). The Commandant found that the ALJ properly allowed the Coast Guard's witnesses to testify telephonically. Id. Telephonic testimony has long been permitted in Suspension and Revocation proceedings. It is consistent with the constitutional concept of due process and is sufficient to protect the legitimate interests of Respondent. Appeal Decision 2538 (SMALLWOOD) (1992). The reliance on telephonic testimony therefore does not establish a reversible error as Respondent would contend.)

11. Respondent avers that hemp seed oil is not a dangerous drug for the purposes of U.S. Coast Guard regulations and therefore Respondent cannot be found to have violated Coast Guard regulations. (Respondent's Post-Hearing Memorandum at 13-14). (Rejected. Without addressing the legislative background as discussed during the 1998 hearing, to accept this claim the Undersigned would have to conclude that Respondent's ingestion of hemp seed oil, if any, was the sole cause of the positive drug test and rule out any use of marijuana. As discussed above, Respondent's ingestion of hemp seed oil does not rebut the presumption of drug use established by his urine specimen testing positive for marijuana metabolites.)

12. Respondent's final argument is that the transcript was not certified properly and is therefore fraudulent. (Respondent's Post-Hearing Memorandum at 14-15). (Rejected. A bare claim

of fraud in the absence of credible evidence is without merit. The court reporter made a voice activated recording of the December 7, 2004 hearing. In this form, any court reporter can transcribe the recording and certify it as a true and accurate copy of what was heard on the sound recording. If Respondent thinks that there is a difference between the recording and the transcript, and the difference is material, the recording is available for him to examine and he can make the proper motions after he listens to the recording and compare it to the transcript. As for the certification, it is not fraudulent. Maryland Court Reporting's first certification contained an error stating that the original court reporter transcribed the recording, when in fact she made only the voice recording. Tr. 261 (2004). After this error was brought to the company's attention, it sent a corrected certification stating that the audio recording was made by the original court reporter, and a different court reporter with Maryland Court Reporting did the transcription. Tr. 262 (2004).)