

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

UNITED STATES COAST GUARD

Complainant

vs.

SCOTT STANDARD

Respondent.

Docket Number: CG S&R 05-0529
CG Case No. 2485130

DECISION AND ORDER

Issued: May 23, 2006

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant

LT Erich Stein, USCG
J. Michael Shea, Esq.
USCG Aux.

U.S. Coast Guard Sector St. Petersburg
155 Columbia Drive
Tampa, Florida 33606

For Respondent

John Weinberg, Esq.
1401 Brickell Avenue
Suite 510
Miami, Florida 33131

PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Scott Standard's (Respondent) Merchant Mariner's License (1100673). This action is brought pursuant to the authority contained in 46 U.S.C. 7704(c) and its underlying regulations codified at 46 CFR Part 5, and 33 CFR Part 20.

The Coast Guard issued a Complaint on September 6, 2005 charging Respondent with use of or addiction to the use of dangerous drugs. Specifically, the Coast Guard alleges Respondent took a random five (5) panel Department of Transportation (DOT) urinalysis test on July 25, 2005 and tested positive for cannabinoids (marijuana metabolites). Respondent filed his Answer on September 23, 2005, wherein Respondent denied all factual allegations contained in the Complaint and asserted three (3) affirmative defenses: (1) The positive test result of Respondent's specimen was in error; (2) Respondent's positive test result was due to cross-contamination; (3) Respondent's positive test result was due to innocent ingestion, i.e. passive inhalation.

On September 27, 2005, the undersigned ALJ was assigned and scheduled the matter for hearing in Tampa, Florida on December 8, 2005. The Coast Guard filed a Motion to Allow Telephonic Testimony on November 29, 2005 and it was granted on November 30, 2005. In addition, on November 29, 2005, Respondent filed a Motion to Continue Evidentiary Hearing. The undersigned ALJ denied Respondent's request because due to the length of time involved in the docket calendar.

The hearing initially commenced on December 8, 2005, at 09:20 a.m. and was continued and concluded on February 7, 2006. The hearing was conducted in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. 551-59, and Coast

Guard procedural regulations set forth in 46 CFR Part 5 and 33 CFR Part 20. The Coast Guard moved for admission of six (6) exhibits and presented testimony of four (4) witnesses.

Respondent moved for admission of three (3) exhibits and presented the testimony of four (4) witnesses. The list of witnesses and exhibits is contained in **Attachment A**.

After careful review of the entire record taken as a whole, including witness testimony, applicable statutes, regulations and case law, I find the Coast Guard **PROVED** that Respondent was a user of dangerous drugs in violation of 46 U.S.C. 7704(c). Respondent's license was voluntarily deposited with the Coast Guard on February 7, 2006 and both parties declined to submit proposed findings of fact and conclusions of law in accordance with 33 CFR 20.710. (Tr. Vol. 2 at 79). However, on March 29, 2006, counsel for Respondent submitted a letter arguing that the evidence presented at hearing is consistent Respondent's affirmative defense of passive inhalation.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on or about July 25, 2005, Respondent was a holder of Merchant Mariner's License Number: 1100673 issued by the United States Coast Guard. (Tr. Vol. 1 at 8; ALJ Ex. 1)¹.
2. Respondent is the captain of the vessel Apollo and employed by his parents. (Tr. Vol. 1 at 140, 145, 149).

¹ Citations referencing the transcript are as follows: Transcript followed by the page number (Tr. Vol. __ at __). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the page number (IO Ex. __); Respondent's Exhibits are as follows: Respondent followed by the page number (Resp. Ex. __).

3. On or about Thursday, July 21, 2005, Respondent opened his parents' mail and discovered that he was scheduled to participate in a random drug test on Monday, July 25, 2005. (Tr. Vol. 1 at 148-50).
4. Respondent attended a friend's party with his wife and two friends on the evening of July 24, 2005 in Ozella, Florida. (Tr. Vol. 1 at 142, 160).
5. There were various individuals smoking at least one (1) marijuana cigarette around a bonfire at the party.² (Tr. Vol. 1 at 121, 143, 151).
6. Respondent and his friends were approached by unknown individuals who offered a marijuana cigarette to them. (Tr. Vol. 1 at 121-22, 143, 150-51). Witness testimony stated that the marijuana cigarette was declined by Respondent and his friends. (Tr. Vol. 1 at 121-22).
7. Respondent and his friend left the party in a van with four (4) or five (5) unknown individuals to purchase beer from a store located twenty-five (25) minutes away. (Tr. Vol. 1 at 143-44, 152, 162).
8. Respondent could not recall how many marijuana cigarettes were smoked during the ride to and from the store. However, when questioned, Respondent testified at least one (1) marijuana cigarette was smoked in the van on the way to and from the store. (Tr. Vol. 1 at 144-45, 155, 163).
9. The majority of the testimony indicates that the windows of the van were rolled up and the air conditioning was turned off during the ride to and from the store. (Tr. Vol. 1 at 154-55, 162).
10. On July 25, 2005, Respondent participated in a random drug test at the Quest Diagnostics' Crystal River Facility. (Tr. Vol. 1 at 14, 132-33; IO Ex. 1).

11. Debbie Jones, a specimen collector with approximately thirteen (13) years experience with Quest Diagnostics, collected a urine sample from Respondent for the purposes of performing a five (5) panel DOT urinalysis drug test by a certified laboratory.³ (Tr. Vol. 1 at 14; IO Ex. 1).
12. Ms. Jones followed collection procedures in accordance with DOT collection standards for a urinalysis drug screen and described it as follows. (Tr. Vol. 1 at 15-19).
- a. Ms. Jones testified the process begins with the collector verifying the identity of the person providing the specimen and the individual selecting their own specimen kit. (Tr. Vol. 1 at 16). Then, the specimen provider must empty their pockets but may retain their wallet. Id. Specimen providers wash their hands without soap and then the water is turned off. Id.
 - b. After a sample is provided, the collector checks the temperature of the specimen to ensure the sample is between ninety (90) and one hundred (100) degrees Fahrenheit, the normal temperature range for human urine when measured within four (4) minutes of production. (Tr. Vol. 1 at 16; IO Ex. 1).
 - c. Respondent's specimen was measured at ninety-four (94) degrees Fahrenheit. (Tr. Vol. 1 at 16; IO Ex. 1).
 - d. The specimen is then placed into two (2) separate specimen bottles, commonly referred to as a "split specimen." Each bottle is sealed and the donor initials and dates the seal on each specimen bottle. (Tr. Vol. 1 at 16; IO Ex. 2).

² Throughout the transcript the bonfire attended by Respondent is referred to as a "barn fire."

- e. Respondent initialed the seal on each specimen bottle. (IO Ex. 2).
 - f. Next, Ms. Jones completes the Custody and Control Form with Respondent's information. (Tr. Vol. 1 at 17-19; IO Ex. 1).
 - g. Respondent signed the Custody and Control Form. (IO Ex. 1).
 - h. Each Custody and Control Form contains a unique specimen identification number recorded on the tamper proof seal. (IO Ex. 1, 2).
 - i. Ms. Jones placed Respondent's specimen bottles in a bag which was stored in a locked refrigerator until its release to a Quest Diagnostics' courier. (Tr. Vol. 1 at 17; IO Ex. 1).
13. Dr. Edward A'Zary, four (4) year lab director of Quest Diagnostics in Atlanta, Georgia, offered sworn expert testimony regarding laboratory procedures performed on Respondent's urine specimen in accordance with the drug testing rules and regulations set forth in 49 CFR Part 40. (Tr. Vol. 1 at 29).
14. Quest Diagnostics is a Substance Abuse and Mental Health Services ("SAMHSA") certified laboratory. (Tr. Vol. 1 at 19, 29, 63).
15. Respondent's specimen was received by Quest Diagnostics, a secure facility where only people with key cards can access to facility, with the specimen seal intact. (Tr. Vol. 1 at 33, 35- 37). The specimen was then processed by the laboratory micro-logger and placed into temporary storage. Id.
16. The chain of custody for Respondent's specimen was intact and without flaws. (Tr. Vol. 1 at 37-40; IO Ex. 2).

³ A five (5) panel DOT drug test tests for the following drugs: (1)marijuana metabolite, (2)cocaine metabolites, (3)amphetamines, (4)opiate metabolites, and (5)phencyclidine (PCP). 49 CFR 40.85.

17. The initial drug screening test cutoff measurement is set at the DOT standard of fifty (50) nanograms per milliliter. (Tr. Vol. 1 at 62, 67).
18. Respondent's specimen yielded a positive result in the initial drug screening test. (Tr. Vol. 1 at 42; IO Ex. 2).
19. The confirmatory test cutoff measurement for a positive test result is fifteen (15) nanograms per milliliter. (Tr. Vol. 1 at 46).
20. The confirmatory test corroborated the presence of marijuana metabolite in Respondent's specimen measuring sixty-five (65) nanograms per milliliter, which exceeded the cutoff measurement of fifteen (15) nanograms per milliliter. (Tr. Vol. 1 at 46).
21. Respondent's urine sample tested positive for marijuana metabolites in the confirmatory test. (Tr. Vol. 1 at 42, 46; IO Ex. 1, 2).
22. All of Quest Diagnostics' Gas Chromatography/Mass Spectrometry (GC/MS) machines were calibrated to the federal standard of plus or minus twenty (20) percent of the inspection value, and all the ION ratios met the accepted SAMSHA standard. (Tr. Vol. 1 at 66).
23. Dr. James Vanderploeg, Medical Review Officer (MRO), verified the positive drug test take by Respondent on July 25, 2005. (Tr. Vol. 1 at 100; IO Ex. 3).
24. Dr. Vanderploeg interviewed Respondent on July 28, 2005 to determine if a legitimate explanation existed for Respondent's positive drug test. (Tr. Vol. 1 at 106-07; IO Ex. 3).

25. Respondent informed Dr. Vanderploeg that the only medication he was taking was a multivitamin. (Tr. Vol. 1 at 107). Respondent also explained that he was around people who were smoking marijuana. Id.
26. Respondent denied using marijuana. (Tr. Vol. 1 at 107).
27. The only legitimate medical explanation for a positive test result for marijuana metabolite is the prescription drug Marinol. (Tr. Vol. 1 at 61).
28. Respondent did not supply Dr. Vanderploeg with a legitimate medical reason for the positive test result. (Tr. Vol. 1 at 108).
29. Respondent requested that the split sample be tested by a second laboratory. (Tr. Vol. 1 at 107).
30. Department of Health and Human Services (DHHS) Laboratory, Minneapolis Veterans Affairs Medical Center performed the split sample test and confirmed the presence of marijuana metabolite in Respondent's sample. (IO Ex 3).
31. Dr. Vanderploeg's final determination is that Respondent used marijuana and the urine specimen was positive for marijuana metabolites. (Tr. Vo. 1 at 108; IO Ex. 3).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner's License 1100673.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7704(c); 46 CFR Parts 5 and 16; 33 CFR Part 20; and the APA codified at 5 U.S.C. 551-59.

3. On July 25, 2005, Respondent participated in a random drug test and tested positive for cannabinoids (marijuana metabolite).
4. Respondent's positive drug test created the presumption that he is a user of dangerous drugs. 46 CFR 16.201(b).
5. Respondent failed to rebut the presumption that he is a user of dangerous drugs.
6. The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of or addicted to dangerous drugs.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. 7701. Title 46 CFR 5.19 gives Administrative Law Judges authority to suspend or revoke a license or certificate in a hearing for violations arising under 46 U.S.C. 7704. Under 46 U.S.C. 7704(c), a Coast Guard issued license or certificate shall be revoked if the holder of that license or certificate has been a user of or addicted to a dangerous drug, unless the holder provides satisfactory proof that the holder is cured. See also Appeal Decision 2634 (BARRETTA) (2002); Appeal Decision 2535 (SWEENEY) (1992) (rev'd on other grounds); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

The Coast Guard chemical drug testing laws and regulations require maritime employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize use of dangerous drugs by merchant mariners. See 46 CFR Part 16. Here, the type of drug test was a random drug test. Marine employers must establish programs for chemical testing of dangerous drugs on a random basis of crew members who occupy a position required by the vessel's certificate of inspection; perform duties and functions required

by Chapter I, Title 46 Code of Federal Regulations; or are specifically assigned duties relating to emergencies. 46 CFR 16.230(a). Additionally, the marine employer's drug testing program must be in accordance with the applicable statutes, regulations, and Appeal Decisions. See generally 49 CFR Part 40 and 46 CFR Part 16. If an employee fails a chemical test by testing positive for a dangerous drug, the individual is then presumed to be a user of dangerous drugs. 46 CFR 16.201(b); see also Appeal Decision 2584 (SHAKESPEARE) (1997).

The Coast Guard charged Respondent with use of or addiction to dangerous drugs because Respondent tested positive for marijuana metabolite in a random drug test taken on July 25, 2005. The Coast Guard seeks revocation of Respondent's license in accordance with 46 CFR 5.569. For the reasons stated below, I find that the Coast Guard proved Respondent is a user of or addicted to the use of a dangerous drug.

Burden of Proof

The Administrative Procedure Act, Title 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove that the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Securities and Exchange Commission, 450 U.S. 91, 107 (1981). The burden of proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in

favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard Investigating Officer (IO) must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not committed the violation charged.

Prima Facie Case of Use of a Dangerous Drug

The Coast Guard must establish a prima facie case in order to prove that a merchant mariner is a user of or addicted to dangerous drugs. Appeal Decision 2603 (HACKSTAFF) (1998). In order to establish a prima facie case the Coast Guard must first show that Respondent took a drug test under 46 CFR Part 16. Id. Next, the Coast Guard is required to illustrate that Respondent tested positive for dangerous drugs; that the test was performed by a certified laboratory; and that a MRO certified the positive test results. Id. The Coast Guard must prove that the drug test was conducted in compliance with 46 CFR Part 16. Id. Once the Coast Guard establishes a prima facie case that Respondent is a user of or addicted to dangerous drugs, the Respondent or his attorney must then present persuasive evidence to rebut the presumption of the positive drug test result. Id. If Respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997).

Respondent provided a split sample specimen in a random drug test on July 25, 2005 which yielded a positive test result for the presence of marijuana metabolites. (Tr. Vol. 1 at 42, 46, 132-33). A confirmatory test was then performed on Respondent's specimen using a GC/MS machine which verified the presence of marijuana metabolites measuring sixty-five (65)

nanograms per milliliter. (Tr. Vol. 1 at 46). The cutoff level for the initial test is fifty (50) nanograms per milliliter. 49 CFR 40.87. The second test, also referred to as the confirmatory test, has a cutoff level of fifteen (15) nanograms per milliliter. Id. Dr. A'Zary, explained the cutoff level of the initial test set at fifty (50) nanograms per milliliter because of the numerous metabolites produced by marijuana. When the initial test yields a positive result the confirmatory test's is performed with a cutoff level of fifteen (15) nanograms per milliliter. (Tr. Vol. 1 at 62-63). Since Respondent's specimen measured sixty-five (65) nanograms per milliliter, significantly above the cutoff level of fifteen (15) nanograms per milliliter, Respondent's specimen yielded a positive result.

Dr. Vanderploeg, the MRO, received and verified the Respondent's positive laboratory test results. He also interviewed Respondent to determine whether a legitimate medical explanation existed for Respondent's positive drug test. (Tr. Vol. 1 at 106-07). During his interview with the MRO, Respondent explained that the only medication he was taking was a multivitamin and requested that his split sample be tested by a second certified laboratory. (Tr. Vol. 1 at 107). Respondent's split sample was sent to Minneapolis Veterans Affairs Medical Center, a DHHS laboratory, and yielded a positive test result. (IO Ex 3). Dr. A'Zary, director of Quest Diagnostics, testified under oath that Marinol is the only legitimate medical explanation for positive test result for marijuana metabolite. (Tr. Vol. 1 at 61), See also 49 CFR Part 40. Since Respondent was not taking Marinol at the time of his random drug test, Dr. Vanderploeg determined that there was no legitimate medical explanation for Respondent's positive drug test. (Tr. Vol. 1 at 108). Ultimately, it was determined by two (2) certified laboratories, performing a total of three (3) tests, and the MRO that there were positive findings of marijuana use by

Respondent. Given all the above, I find that the Coast Guard did establish and prove a prima facie case of dangerous drug use.

Respondent's Rebuttal

Respondent, through counsel, asserted that passive inhalation based on laboratory errors and marijuana potency in his case-in-chief. Respondent avers that on the night of July 24, 2005 he attended a party where marijuana was being smoked and rode as a passenger in a van for approximately fifty (50) minutes where marijuana was being smoked by other passengers in the van. (Tr. Vol. 1 at 144-45, 155, 163). Furthermore, Respondent claims that he did not smoke marijuana that night. Mr. Morris, expert for Respondent, supported Respondent's claim and presented evidence to corroborate the affirmative defense of passive inhalation due to marijuana potency and laboratory errors. (Tr. Vol. 2 at 35).

i. Laboratory Errors

Mr. Morris, an expert for Respondent in forensic toxicology, presented evidence concerning three (3) types of laboratory errors: instrumental, calibration, and experimental error. Instrumental error is the parameter of an instrument defined by the manufacturer and the methodology. (Tr. Vol. 1 at 194-95). The instrumental error of GC/MS as testified by Mr. Morris is plus or minus twenty (20) percent. Id. Calibration error is the degree of accuracy between the calibration line drawn and the data points. (Tr. Vol. 1 at 196). Experimental error is the total summation of all the errors. Id. Experimental error includes errors of weighing and measuring the controls and standards, preparation, pipetting, calibration, instrument and technician errors. Id.

Mr. Morris testified that the experimental error is at least a twenty-eight (28) percent error. (Tr. Vol. 1 at 197). Using Mr. Morris' experimental error rate of twenty-eight (28)

percent, the experimental error range for Respondent's test result is forty-seven (47) to eighty-three (83) nanograms per milliliter. (Tr. Vol. 2 at 21). This range, in Mr. Morris' opinion, allows for passive inhalation. Id. Dr. A'Zary, director of Quest Diagnostics, testified that all of Quest Diagnostics' machines were tested and calibrated to the proper standards. (Tr. Vol. 1 at 66). Furthermore, Respondent's own expert, Mr. Morris, testified that the Laboratory did not make a mistake. (Tr. Vol. 2 at 12). Thus, I find that all of Quest Diagnostics' machines were calibrated to the federal standard of plus or minus twenty (20) percent of the inspection value, and all the ION ratios met the accepted SAMSHA standard. (Tr. Vol. 1 at 66).

ii. Passive Inhalation and Marijuana Potency

Mr. Morris testified that marijuana today is at least three (3) times more potent than it was in the 1980's when the Cone study was performed.⁴ (Tr. Vol. 2 at 21-29, 31, Resp. Ex. B, C). Mr. Morris asserts that this higher potency allows for the possibility of passive inhalation with higher concentrations of marijuana metabolite in specimens. (Tr. Vol. 2 at 31-32). Thus, Mr. Morris contends, the possibility of "passive inhalation cannot be eliminated" with Respondent's specimen result of sixty-five (65) nanograms per milliliter due to experimental error combined with the higher marijuana potency. Id.

DOT regulations state that the cutoff level for marijuana metabolites in the initial test is fifty (50) nanograms per milliliter. If the test result is at or above the cutoff concentration a confirmatory test must be conducted for Delta -9-tetrahydrocanna-binol-9-carboxylic acid (THC). 49 CFR 40.87. If the confirmatory drug test yields a result at or above the cutoff concentration level of fifteen (15) nanograms per milliliter, the result must be reported as a confirmed positive. 49 CFR 40.87(c). The cutoff level of fifty (50) nanograms per milliliter was

set at that level to eliminate the possibility of someone testing positive from passive inhalation. (Tr. Vol. 1 at 60-61, 71-72).

Respondent's confirmation specimen tested at sixty-five (65) nanograms per milliliter, well above the fifteen (15) nanograms per milliliter cutoff level established in DOT regulations. (Tr. Vol. 1 at 46). Furthermore, Respondent has not presented any evidence that the marijuana inhaled by him was three (3) times more potent than the marijuana in the Cone study. Although I find Mr. Morris credible, I do not find that Respondent's potency argument rebutted the presumption that Respondent is a user of dangerous drugs.

iii. Credibility

Finally, I do not find Respondent or Respondent's fact witnesses credible. Respondent testified that he was riding in a van in Florida in July without air conditioning. (Tr. Vol. 1 at 154-55). There is also disputed testimony as to whether the windows were rolled down during the ride to the store. Respondent testifies that he asked to have the windows rolled down and the driver obliged, but Respondent's own witness testified that he did not believe Respondent asked to have the window rolled down. (Tr. Vol. 1 at 162). I do not find it reasonable that seven (7) adults were riding in a van with all the windows rolled up and the air conditioning turned off on a July evening in Florida without concluding that Respondent and the other occupants were smoking marijuana with the purpose of getting high. Thus, I do not find that Respondent's affirmative defense of passive inhalation adequate to rebut the positive drug test.

The Coast Guard has proved by substantial, reliable, credible, and probative evidence that Respondent used or is addicted to a dangerous drug. Although I find Mr. Morris credible, I do not find that his explanation exonerates Respondent in this case. I do not find Respondent or

⁴ The Cone Study is a DOT study that was used in developing DOT drug testing regulations. (Tr. Vol. 1 at 72). The study involved people sitting in a room alone with four (4) marijuana cigarettes for the period of one (1) hour and

Respondent's other fact witness' testimony credible, thus, Respondent did not rebut the valid drug test result when considering the record as a whole.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 49 CFR 5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless cure is proven. See 46 U.S.C. 7704(c); 46 CFR 5.569; Appeal Decision 2535 (SWEENEY) (1992). Absent evidence of cure or substantial involvement in the cure process, an ALJ must revoke a respondent's license and document under 46 U.S.C. 7704(c). See also Appeal Decision 2634 (BARRETTA) (2002), Appeal Decision 2583 (WRIGHT) (1997).

Here, the Coast Guard proved and the Undersigned Judge found that Respondent used a dangerous drug. Neither Respondent nor Respondent's attorney presented any evidence that Respondent took any steps to participate in the cure process. Therefore, I am precluded from issuing an order less than **REVOCATION**.

repeated over the course of six (6) consecutive days. (Tr. Vol. 1 at 74).

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License Number: 1100673, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Scott Standard are **REVOKED**.

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

(Attachment B).

Done and dated [May 23, 2006](#)
New York, NY

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

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LIST

GOVERNMENT’S WITNESSES

1. Debbie Jones, Collector
2. Dr. Edward A’Zary, Question Diagnostics Lab Director
3. Dr. James Vanderploeg, Medical Review Officer
4. Scott Standard, Respondent

RESPONDENT’S WITNESSES

1. Joanne Lynch
2. David Moore
3. JoEllen Standard
4. Wayne A. Morris

EXHIBIT LIST

GOVERNMENT’S EXHIBITS

- | | |
|----------|--|
| IO Ex. 1 | Federal Drug Testing Custody and Control Form |
| IO Ex. 2 | Quest Diagnostics Litigation Package |
| IO Ex. 3 | MRO Package |
| IO Ex. 4 | Notes from IO interview with Scott Standard |
| IO Ex. 5 | Letter from Maritime Consortium Inc. to Senior IO: formal notification of Scott Standard’s positive drug test. |
| IO Ex. 6 | Article: “Passive Cannabis Smoke Exposure and Oral Fluid Testing” by R. Sam Niedbala, et. al. |

RESPONDENT'S EXHIBITS

Resp. Ex. A Wayne A. Morris Curriculum Vitae

Resp. Ex. B Article: "Potency of Cannabis Seized in Central Florida during June 2002" by
Christina Newell

Resp. Ex. C Average THC Content in Seized Marijuana (1972 - 2004)

JUDGE'S EXHIBITS

ALJ Ex. I Photocopy of Respondent's License

ATTACHMENT B

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.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision and Order was sent to the following parties and limited participants by the means indicated below:

LT Erich Stein, USCG
USCG Sector St. Petersburg, Florida
Investigations Division
155 Columbia Drive
Tampa, FL 33606
St. Petersburg, FL
Telephone: (813) 228-2193, ext. 8154
Facsimile: (813) 228-2399
(Via Facsimile and Electronic Mail at erich.v.stein@uscg.mil)

John M. Weinberg, Esquire
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Facsimile: (305) 379-0341
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USCG ALJ Docketing Center
40 S. Gay Street, Rm 412
Baltimore, MD 21202
Telephone: (410) 962-7434
Facsimile: (410) 962-1746
(Via Facsimile)

Done and dated May 23, 2006
New York, NY

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