UNITED STATES OF AMERICA

UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

ADAM B. DEBREE

Respondent.

Docket Number: CG S&R 06-0084
CG Case No. 2594461

DECISION AND ORDER

Issued: December 4, 2006

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

For Complainant
LT Dan Sylvestro, USCG
MST2 Russell Dorin, USCG
Coast Guard Sector Key West
Trumbo Point
Key West, Florida 33040

For Respondent
Richard Baron, Esquire
501 NE First Avenue, Suite 201
Miami, Florida 33132

PRELIMINARY STATEMENT

The United States Coast Guard initiated this administrative action seeking revocation of Adam B. Debree's (Respondent) Merchant Mariner's License (1027254). This action is brought pursuant to the authority contained in 46 U.S.C. 7704(c) and its underlying regulations at 46 CFR Part 5, and 33 CFR Part 20. Title 46 U.S.C. 7704(c) provides that "[i]f it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

The Coast Guard issued a Complaint on March 2, 2006 charging Respondent with use of or addiction to the use of dangerous drugs in that he took a pre-employment drug test on June 2, 2005 which tested positive for cocaine metabolite. Respondent filed his timely Answer in which he admitted all jurisdictional allegations as well as factual allegations 1, 2, 3, and 4. He admits that the specimen tested positive for cocaine metabolites but denies that the test results were accurate. Further, he denies that the test results are an accurate reflection of whether he has been a user of, or addicted to dangerous drugs. Respondent further alleges that even if the test results are accurate, he has been cured.

On April 4, 2006, the undersigned ALJ was assigned to this case. After a pre-hearing teleconference on April 13, 2005, the hearing was set for August 8, 2006 in Key West, Florida. Another pre-hearing teleconference was held on July 11, 2006 to discuss discovery and telephonic testimony.

At the hearing, the parties stipulated that on the date in question, Respondent took a pre-employment drug test; that his specimen was properly collected and properly tested and certified in accordance with applicable regulations. The specimen was properly handled through the chain

of custody; that the specimen belonged to Respondent; and that his specimen did, in fact, test positive for cocaine metabolite. Tr. 5. The undersigned then announced that as the result of the stipulation, the Coast Guard has made out a prima facie case and as per 46 CFR 46.201(b), if an individual fails a chemical test for dangerous drugs, the individual will be presumed to be a user of dangerous drugs. The burden then shifts to Respondent to rebut that presumption.

To establish an evidentiary foundation for the stipulation, the Coast Guard introduced Exhibits 1 through 12 and then rested. Respondent presented the testimony of his girlfriend, Ms. Angela Wynn, his expert in addiction medicine, Dr. John C. Eustace, M.D., and himself. In rebuttal, the Coast Guard presented the testimony of the Medical Review Officer (MRO), Dr. Seth Portnoy, D.O. In summary, Respondent testified that he had never used cocaine and that he believed someone must have put cocaine in one of his drinks the night prior to the drug test. Ms. Wynn testified that she has never known Respondent to do drugs. Dr. Eustace testified that Respondent is not a drug user and that the Respondent is cured.

Pursuant to the post hearing brief scheduling order issued on August 23, 2006, proposed findings of fact and conclusions of law were due on September 25, 2006 and reply briefs were due on October 16, 2006. On September 7, 2006, the parties and the undersigned participated in a post-hearing teleconference initiated by the undersigned to provide further opportunity for the Respondent's expert witness to subsequently explain via affidavit the underlying reasons why he believes Respondent is cured. This supplemental evidence has been received, made part of the record, and argued by both parties in their post hearing briefs. The proceedings were conducted in accordance with the Administrative Procedure Act (APA), 5 U.S.C. 551-59, and Coast Guard procedural regulations at 46 CFR Part 5 and 33 CFR Part 20. The matter is now ripe for decision.

After careful review of the entire record taken as a whole, including witness testimony contained in the transcript, the expert's supplemental affidavit, the exhibits, applicable statutes, regulations, and relevant case law, I find by the preponderance of credible, reliable, probative, and substantial evidence the Coast Guard **PROVED** that Respondent is a user of or addicted to dangerous drugs in violation of 46 U.S.C. 7704(c). Further, I find that Respondent did not provide satisfactory proof that he is cured in accordance with Coast Guard law. Therefore, his license must be revoked.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the entire record taken as a whole.

1. On June 2, 2005, Respondent participated in a pre-employment drug test at the Keys Drug Consortium Facility in Tavernier, Florida. (IO Exhibit 3; stipulation).
2. Michelle Rogers, a specimen collector, collected the urine split sample from Respondent. (IO Exhibit 3; stipulation).
3. Respondent signed the federal drug custody and control form. (IO Exhibit 3; stipulation).
5. Ms. Rogers followed collection procedures in accordance with DOT collection standards. (IO Exhibit 2; Stipulation).
6. LabOne, Inc. received Respondent's specimen intact and screened it as positive (300 nanograms per milliliter (ng/ml)) cutoff and confirmed positive by gas chromatography/mass spectrometry at 2898.1 nanograms per milliliter (150 ng/ml cutoff) for cocaine metabolite. (IO Exhibits 5, 6, 7, and 8; stipulation).

7. Labcorp – North Carolina tested Respondent's split sample and reconfirmed it as positive for cocaine metabolite. (IO Exhibits 11 and 12).
8. LabOne, Inc. and Labcorp are Substance Abuse and Mental Health Services Administration (SAMHSA) certified laboratories. (IO Exhibit 4).
9. On June 7, 2005, the Medical Review Officer (MRO), Dr. Seth Portnoy, D.O., verified the positive drug test taken by Respondent and found no medical reason. (IO Exhibits 9, 10 and 11; stipulation).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times mentioned herein and specifically on or about June 2, 2005, Respondent was a holder of Merchant Mariner's License Number 1027254 issued by the United States Coast Guard. (IO Exhibit 1).
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, 5 U.S.C. 551-59.
3. The drug test was performed in accordance with applicable regulations in Title 46 CFR Part 16, 49 CFR Part 40, and rulings found in applicable Commandant Decisions on Appeal.
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 credible, reliable, probative, and substantial evidence that Respondent is a user of or addicted to dangerous drugs.

7. Respondent did not provide satisfactory proof that he is cured in accordance with Coast Guard law.

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 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(c) which prescribes that 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)* Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

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. 46 CFR Part 16. In this case, the Respondent underwent a pre-employment drug test because marine employers may not engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer. 46 CFR 16.210. Further, 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); Appeal Decision 2584 (SHAKESPEARE) (1997).

Burden of Proof

The Administrative Procedure Act, 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 Supreme Court of the United States." Appeal Decision 2477 (TOMBARI) (1988); *see also, Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 107 (1981). "The burden of showing something by a 'preponderance of the evidence,' the most common standard in the civil law, 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 to prove that a merchant mariner is a user of or addicted to dangerous drugs. Appeal Decision 2603 (HACKSTAFF) (1998). 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 burden of going forward with the evidence rests with the Respondent who must then present persuasive evidence to rebut the presumption of the positive drug test result. *Id.* Here, the Respondent and the Coast Guard stipulated that the Respondent's sample tested positive for cocaine metabolite and that the tests were preformed in accordance with applicable regulations. Based on that stipulation alone, the Coast Guard established a prima facie case that Respondent failed a chemical test for dangerous drugs. At that point, a presumption arose that Respondent is a user of dangerous drugs. 46 CFR 16.201(b). If the Respondent fails to rebut the evidence presented by the Coast Guard, the ALJ may find the charges proved based upon the presumption alone. Appeal Decision 2592 (MASON) (1997); 46 CFR 16.201(b).

Respondent's Evidence to Rebut the Presumption of Drug Use

Respondent testified that he is a Coast Guard veteran and was stationed in the Islamorada area back in 1993. (Tr. 24) He was a Boatswains mate who also performed duties as a boarding officer. In that capacity, he boarded thousands of vessels, (Tr. 29) some of which he now shares

dock space. (Tr. 25) He does not know all of the boat captains but some of them just know him "as a young punk that used to be in the Coast Guard" (Tr. 25) He never cited any of those captains for illegal activities personally. He usually brought someone else with him to issue the citations because he lived in Islamorada and was not well liked. He said the Coast Guard had problems with the "locals" in Islamorada and that as a Coastguardsman, he was only allowed to go to a handful of restaurants and bars in the area because it was unsafe. Many people hated the Coast Guard and still do because many of their family members were put in jail right before he was stationed there. The "locals" often picked fights with Coastguardsmen. Tr. 25. He worked with Customs, DEA, and the Florida Marine Patrol and boarded vessels on which drugs were found. Those vessels are still around today. Tr. 27. He tries to avoid those people but all are involved in the fishing business and are generally at the same functions as Respondent. *Id.* He hears them talking about him when he goes down to the docks but he chooses not to confront them. They call him "Coastie." Tr. 27.

He has never used any illegal drugs and is turned off by them. Tr. 28 - 30. His mother used drugs and he grew up in a bad environment. His parents divorced and he went to live with his father at age 11. Tr. 29. He has had his merchant mariner's license for 11 years and the Coast Guard has never issued charges against his license or issued citations concerning his boat. Tr. 29, 30. He has taken drug tests and has passed them all. Tr. 31.

On the day prior to the drug test, June 1, 2005, there was a fishing tournament. He was at a captains' meeting on the dock that evening and there was talk about raising their prices because of the fuel price increases. Tr. 31, 32. Everyone was having cocktails. He told them he had to go home early because he was going to take his drug test the following morning. Tr. 32. He made an appointment to take the test because his consortium card had expired. The people he was with

were giving him a hard time about going home early instead of "staying out, hanging out with the boys." Tr. 33. He had no anticipation that he would test positive for cocaine. He said he has never used cocaine Tr. 34 and has never tested positive for any drugs or alcohol. Tr. 35. He first heard about his test results when a doctor called notifying him that his urine test came back positive for cocaine. Tr. 36. After thinking about it for about a year he is sure someone put something in his drink the night before. "Someone who doesn't like me which I definitely would not put that past them at all and I wish I knew who did it. I definitely would go back to find out who did it." Tr. 39. He stayed out until 11 or 11:30 that night and claimed that he set his drink on the bar all the time but may have, on occasion, left it unattended. Tr. 40, 41.

Respondent "heard of someone who had Rophynel (sic) and pills dropped in their drinks and heard people joking about it on the docks. I know several girls who have been down there who have had stuff put in their drinks before." Tr. 41. He said that it's not unusual in that area and it's been going on since he first got there. *Id.* Although he had a buzz from drinking, he did not feel anything out of the ordinary. Tr. 43. He bought two rounds of drinks, each round being comprised of 8 to 12 drinks. Others in the group also bought rounds. Tr. 47, 48. Usually the guys drank rum and coke, the drink of choice in Islamorada, according to Respondent. Tr. 48. The Respondent drank rum and coke as well as a couple of beers. Tr. 49.

Respondent did not say anything to his friends about the results. He was embarrassed and did not want it to become general knowledge because he claims that some people do not want him in their town. Tr. 55, 56. He was afraid that if he told someone he did not pass the drug test, they would probably kick him out of the marina – something he did not want to happen. Tr. 56. He never talked to the bartender but he testified that he spoke to a close friend, A.J. Stewart, about testing positive and asked him if he knew who could have done this to him. He "was afraid to go

and bring up any type of red flag there at the marina. I still am now. There is (sic) still very few people that know about it. I didn't want anybody to get the satisfaction of knowing that they did do that to me and that they did get me which is part of my problem." Tr. 60. He did not want to go around asking questions. Tr. 61. Respondent has two friends that he trusts but he did not ask them if they saw anything unusual that night because he believed that they would have told him. Tr. 62, 63. Essentially, Respondent believes that someone spiked his drink (because he says he heard that it happens to girls in the bars in that community but has no personal knowledge of an incident) on the night prior to his drug test but he did not want the community to know about it because he was concerned about his reputation and business. Tr. 64 – 69.

Respondent's girlfriend testified that she has known him for 12 years, dated him for 4 of those years and has lived with him for the last 3 ½ years. She has never known him to use drugs and was surprised to learn that he tested positive. Tr. 77 – 80.

Respondent's expert witness, Dr. John C. Eustace, M.D. testified as an expert in "addiction medicine." Dr. Eustace is also a medical review officer for the FAA, the Florida Bar, the Florida Board of Bar Examiners, and the Professional Resource Network. Tr. 88. He first saw Respondent on June 22, 2006 and then on August 3, 2006, and finally on August 8, 2006. Dr Eustace testified that Respondent produced a negative drug screen on June 13, 2005. He testified that Respondent also produced negative drug screens on June 22, 2006, and on August 3, 2006. Tr. 90, 91, 107; Resp. Ex. "A." Dr. Eustace concluded that "from an addiction medicine standpoint, it's [Respondent's positive test for cocaine metabolite] in the area of inadvertent episodic non-intentional ingestion;" that in his experience at least 100 people have told him that they have not knowingly or voluntarily ingested cocaine; and that in most of those instances it has turned out to be true. Tr. 91 - 93. Dr. Eustace opined that within reasonable medical

probability, the Respondent's case is one of the involuntarily ingestion of a potentially harmful substance. Tr. 94, 95; Resp. Ex. "A." Dr. Eustace said that Respondent did not exhibit pathological denial and does not fit the criteria for being an addict. Tr. 98, 99. He opined that Respondent "did not 'fail' his required chemical test for dangerous drugs" and that he is not a drug user, although he agrees that the urine tested belonged to Respondent and that Respondent's sample tested positive for cocaine metabolite. "A 'user' is a person who knowingly, willfully and intentionally participates in the ingestion, inhalation and/or injection of the substance in question." Tr. 99, 100; Resp. Ex. "A." He testified further that the positive test looked more like a tainted beverage than intentional use because of Respondent's background, and that in this medical experience it is not unusual for someone to have his drink spiked. In addition, he believes that it is not unusual for someone not to investigate who spiked his drink. Tr. 101 – 104. When questioned concerning different methods of ingesting cocaine, Dr. Eustace said that when cocaine is ingested into the stomach it is almost immediately broken down into " . . . a non mood altering drug . . . that then is excreted into the urine. . . In my experience, if the person who has had a positive test and has no admission of it or medically certifiable reason for it the vast majority of them felt nothing. They are shocked that it's there." Tr. 111, 112. Respondent's cocaine metabolite was 19 times the cutoff amount but there is no clinical correlation between the amount ingested and the resulting amount of nannograms per milliliter in the confirmation test. Tr. 119. Cocaine is a stable substance and does not break down in an alcoholic beverage. Tr. 121.

Dr. Seth Portnoy, D.O., the Certified Medical Review Officer, testified in rebuttal that Respondent's confirmation nannograms per milliliter reading of 2,898.1, which is over 19 times the cutoff of 150 nannograms per milliliter, is not the result of an accidental, one-time ingestion

of cocaine product. Tr. 126. Dr. Portnoy further opined that a level of cocaine metabolite such as that of Respondent would not be from ingestion by swallowing. Tr. 129, 132. Respondent told the MRO (Dr. Portnoy) that he did not use cocaine. Dr. Portnoy also testified that he has correlated the metabolic results with what people tell him concerning ingestion of cocaine and the results are from 150 nannograms per milliliter to the tens and twenties thousand. Tr. 135. Further, Dr. Portnoy opined that if one who tested positive on June 2nd took another test on June 12th, the test result would be negative assuming no drug use between tests. Tr. 136. Dr. Eustace did not agree with Dr. Portnoy's opinions. (Tr. 138-141).

Law

In Appeal Decision 2527 (GEORGE) (1991), Respondent George argued that he was employed in a bar frequented by drug users and that he could have "inadvertently ingested cocaine." George also argued that his urine tested negative for cocaine metabolite in a test conducted 18 days later. The Commandant found that George "presented only the possibility that he could have accidentally ingested cocaine at this place of employment. Appellant presented no substantial or persuasive evidence that the cocaine metabolite was accidentally introduced into his system from an extrinsic source. Mere supposition or speculation unfounded in fact will not serve to vitiate a certified laboratory analysis, conducted in accordance with applicable regulations" citing Appeal Decision 2522 (JENKINS) (1991). In JENKINS, the respondent also raised the issue of accidental introduction of cocaine, only into his urine sample. The Commandant held that "[t]he entire issue of accidental introduction of cocaine powder into Appellant's urine sample is purely speculative. It is merely a theoretical possibility raised by Appellant of how the urine sample could have resulted in a positive reaction for cocaine metabolite. *Id.*

The Commandant next visited the issue of rebutting the presumption of dangerous drug use by way of inadvertence or mistake in Appeal Decision 2529 (WILLIAMS) (1991). In WILLIAMS, the Respondent claimed that he inadvertently and mistakenly ingested marijuana-laced brownies while attending a party. The party's host and hostess testified that several days after the party they received a call from one of their guests who asked them how they enjoyed the brownies. The caller also told them that he had baked marijuana into them. The Respondent's wife testified that after she learned that her husband's sample tested positive, she called the party's hostess and asked if any drugs had been used there. The hostess told her that she had received a call from a guest who told her about the brownies and both the wife and the hostess concluded that the brownies accounted for the positive test result. Williams testified that he had eaten two or three brownies but did not perceive himself to be the under the influence of marijuana, although he felt somewhat lightheaded when leaving the party. Both Williams and his wife testified he was not a marijuana user. The party guest who called the hostess claiming he had baked marijuana into the brownies did not testify.

The Administrative Law Judge (ALJ) ruled that Williams did not rebut the presumption of drug use. The ALJ found that the testimony of the alleged telephone conversation with the party's guest who admitted to baking marijuana into the brownies was weak, uncorroborated hearsay. On appeal, the Commandant found that it was within the ALJ's discretion to give such statement little weight or to discount it entirely because it is "classic hearsay." The ALJ found that its weight was insufficient to overcome the presumption of use provided by 46 CFR 16.201(b). The Commandant also opined that "[d]eterminations regarding the credibility of witnesses and weight to be attributed to particular evidence are within the discretion of the trier

of fact and will not be disturbed on appeal unless shown to be arbitrary and capricious." *Id.* Citations omitted.

In Appeal Decision 2546 (SWEENEY) (1992), the Respondent attempted to rebut the presumption by offering the theory that eating marijuana-laced brownies at a party caused him to test positive for marijuana. The ALJ did not accept the laced brownie defense and found that if Sweeney in fact ingested such brownies, he did so knowingly. The Vice Commandant found that such evidentiary determinations are within the exclusive province of the Administrative Law Judge.

In 1997, the Commandant again addressed the issue of whether a respondent rebutted the presumption of dangerous drug use in Appeal Decision 2583 (WRIGHT) (1997). In WRIGHT, Respondent's sample tested positive for marijuana and was so proved at the hearing. Wright attempted to rebut the presumption by offering the testimony of himself, his wife, and his physician, all suggesting that he never used marijuana or other illegal drugs. He denied ever using marijuana and his wife's testimony supported that of her husband. Wright's personal physician for approximately ten years testified that in his opinion, Wright showed no signs of marijuana or any other illegal drug use. Wright argued that his evidence of non-use rebutted the presumption of use created by the positive test. The Administrative Law Judge did not find the testimony presented by Wright and his witnesses sufficient to overcome the presumption. He viewed the disclaimers of drug use by both Wright and his wife as self-serving and decided that Wright's physician had little knowledge of Wright's daily activities.

In Appeal Decision 2632 (WHITE) (2002), the Respondent's sample tested positive for cocaine metabolite as a result of a random drug test. At the hearing, the Respondent stipulated that he submitted a urine sample, that he signed the drug testing custody and control form, and

that the sample tested positive for cocaine metabolite. The Coast Guard established a prima facie case of dangerous drug use and the Respondent attempted to rebut the presumption by claiming that he might have ingested Peruvian Inka tea laced with cocaine. Respondent claimed that illegal Peruvian Inka tea did exist and produced evidence that the Drug Enforcement Administration had been trying for ten years to stop the flow of Peruvian Inka tea containing coca leaves from entering the United States. The ALJ did not consider the presence and illegal sale of Peruvian Inka tea to support the fact that it was highly likely that Respondent digested Peruvian Inka tea laced with cocaine. The Commandant upheld the ALJ.

The Administrative Law Judge will carefully consider expert medical opinion but is not bound by it. Appeal Decision 2191 (BOYKIN) (1980); Appeal Decision 2576 (AILSWORTH) (1996). "The function of the trier of fact in these cases is to evaluate the testimony of all witnesses and other evidence presented by both sides in reaching his decision. He is entitled to accept or reject evidence which he feels is or is not competent and persuasive. The testimony of an expert witness, even though it is uncontradicted, may be disregarded after careful consideration because of its improbability or because of the interests of the witness." Appeal Decision 2294 (TITTONIS) (1983) citing Appeal Decision 2030 (RIVERA) (1975).

Decision on Whether Respondent Rebutted the Presumption

Respondent's argument can be summarized as follows: although his sample tested positive for cocaine metabolite, it was the result of involuntary ingestion. In support of that argument, Respondent states: 1) that he is not well liked by several of the boat captains at the marina where he docks his boat; 2) he has heard of people having their drinks spiked; 3) several people knew he was going to have a drug test the following morning; and 4) that therefore someone must have spiked his drink with cocaine the night before he was scheduled to take his pre-employment drug

test. The evidence Respondent offers in support of his argument is his own testimony, that of his girlfriend, and Dr. Eustace, his treating physician from June 22, 2006 to August 8, 2006.

Respondent's explanation for the positive drug test is supposition or speculation unfounded in fact because there is no evidence that anyone introduced cocaine into his drink(s). As found in Appeal Decision 2527 (GEORGE) (1991) above, Respondent "presented no substantial or persuasive evidence that the cocaine metabolite was accidentally introduced into his system from an extrinsic source. Mere supposition or speculation unfounded in fact will not serve to vitiate alone a certified laboratory analysis, conducted in accordance with applicable regulations."

Likewise, Ms. Wynn's testimony that she has never known Respondent to use drugs is insufficient, either singly, or in combination with the testimony of Respondent and Dr. Eustace to rebut the presumption of drug use.

Dr. Eustace's opinion, while perhaps medically appropriate for treatment purposes, is based fundamentally on Respondent's supposition or speculation that his drink was spiked. Since I have already found Respondent's explanation of the positive drug test to be supposition or speculation, adding Dr. Eustace's medical opinion does not transmogrify that supposition or speculation into a finding of fact. As a result, I cannot give Dr. Eustace's opinion sufficient weight either alone or in combination with Respondent's and Ms. Wynn's testimony to overcome the presumption of drug use. 46 CFR 16.201(f). I have carefully considered Dr. Eustace's expert opinion but I am not bound by it. Appeal Decision 2191 (BOYKIN) (1980); Appeal Decision 2576 (AILSWORTH) (1996). Having accorded little weight to Dr. Eustace's opinion, Dr. Portnoy's testimony in rebuttal, while persuasive, need not be considered.

After considering the entire record and the totality of the circumstances surrounding the events before and after the drug test, I find Respondent's evidence insufficient to rebut the presumption of dangerous drug use.

Respondent's Evidence of Cure

Dr. Eustace testified that Respondent is cured. (Tr. at 104; Resp. Ex. A). In his affidavit, Resp. Ex. "A," he states that Respondent's "positive test . . . does not . . . diagnose the doner as a 'user' ... A user is a person who knowingly, willfully and intentionally participates in the ingestion . . . of the substance in question. A positive test is the stimulus to initiate the process of exploring the differential diagnosis of the conclusion involved. The differential diagnosis of a positive urine screen includes: proper use . . . willful and intentional use . . . unintentional ingestion . . . emergency medical need . . . tainted food/beverage (prank, malicious – date rape; jealousy/revenge . . . The standard substance abuse/mental health evaluation of [Respondent] was diagnostic of unintentional ingestion. [Respondent] does not and never has had a history of the willful or intentional use of a harmful drug, as defined in medical-legal terminology. [Respondent's] case is that of the unknowing, unintentional ingestion of a 'tainted' (cocaine laced) beverage . . . In standard practice, the 'cure' is defined as the remedy for the diagnosis, which has been established."

Dr. Eustace opines that cure "for a patient who has unknowingly and unwillingly ingested a tainted beverage is to: orchestrate a thorough psychosocial/medical history and examination, which includes a repeat urine drug test; education about the potential sociopathic behaviors of the community at large; education concerning the individual's responsibility to protect themselves from elements of society, now that an untoward and personally hurtful event has

occurred; longitudinal follow-up to: substantiate the diagnosis, obtain additional drug screens, continue support for emotional recovery, and document the medical record."

Dr. Eustace believes that "[Respondent] is cured because he has voluntarily complied with all of the evaluation and therapeutic modalities which are pertinent to his diagnosis and which are appropriate . . . and was seen in formal and follow-up sessions initially on June 22, 2006, and followed up sessions August 3, 2006, and August 8, 2006 (with his attorney). [Respondent] produced negative drug screens on June 13, 2005, June 22, 2006, and August 3, 2006. Dr. Eustace states that he did not refer the Respondent to a federally approved drug treatment program because he does not meet the criteria for a substance disorder and it would be improper medical practice for a physician to refer a patient to treatment for which he had no criteria. Dr. Eustace also testified that he did not refer Respondent for additional drug screens because his diagnosis of involuntary ingestion does not warrant it.

Dr. Eustace summarizes his diagnosis as unintentional ingestion of tainted beverage and recommends repeated urine drug screens and education to prevent recurrence. He also recommends support for recovery from the emotional impact and threat to professional occupation as well as continuing to follow rules and regulations as they apply to licensure. Further, Dr. Eustace opines that Respondent was never a danger to his profession and that he did not fail his required chemical test for dangerous drugs on June 2, 2005 but rather his test result warranted comprehensive assessment, proper diagnosis and appropriate remedial action. Finally, Dr. Eustace states that the Respondent has participated in and has completed all of the recommendations appropriate to his diagnosis and is safe to continue to practice his profession without further consequence. (Resp. Ex. A).

Law

The controlling statute, 46 U.S.C. §7704(c), requires that a merchant mariner's license/document be revoked "[i]f it is shown that a holder has been a user of, or addicted to a dangerous drug ... unless the holder provides satisfactory proof that the holder is cured." (emphasis supplied). The burden of establishing "cure" is on the Respondent. Appeal Decision 2526 (WILCOX) (1991). The basic requirements for cure are set forth in 46 CFR 5.901(d) which states as follows:

> (d) For a person whose license, certificate, or document has been revoked or surrendered for the wrongful simple possession or use of dangerous drugs, the three year time period may be waived by the Commandant upon a showing that the individual:
>
> (1) Has successfully completed a bona fide drug abuse rehabilitation program;
>
> (2) Has demonstrated complete non-association with dangerous drugs for a minimum of one year following completion of the rehabilitation program and;
>
> (3) Is actively participating in a bona fide drug abuse monitoring program.

The Commandant of the Coast Guard expanded the basic requirements of 46 CFR 5.901(d) in Appeal Decision 2535 (SWEENEY) (1992),

> I consider the following factors to satisfy the definition of cure in cases where drug use is an issue:
>
> 1. The respondent must have successfully completed a bonafide drug abuse rehabilitation program designed to eliminate physical and psychological dependence. This is interpreted to mean a program certified by a governmental agency, such as a state drug/alcohol abuse administration, or in the alternative, certified by an accepted independent professional association, such as the Joint Commission on Accreditation of Health Care Organizations (JCAHO).
>
> 2. The respondent must have successfully demonstrated a complete non-association with drugs for a minimum period of one year

following successful completion of the rehabilitation program. This includes participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

In Appeal Decision 2546 (SWEENEY) (1992), the Commandant stated:

> This case was previously remanded to the Administrative Law Judge in Appeal Decision 2535 (SWEENEY) on the basis that the Administrative Law Judge failed to comply with 46 U.S.C. 7704 by not issuing a sanction of revocation for proven drug use. In SWEENEY, supra, the Vice Commandant defined "cure" for the purposes of 46 U.S.C. 7704. See, SWEENEY, 7 – 9.
>
> Nothwithstanding the Board's reversal of SWEENEY, supra, in NTSB Order No. EM-1650, [1992] the definition of 'cure' stated in that Appeal Decision is not vitiated an will remain in effect for future cases. The [National Transportation Safety] Board's decision, while prohibiting the application of the definition of 'cure' retroactively to Appellant, specifically did not prohibit the prospective application of the definition to future cases.
>
> Appeal Decision 2546 (SWEENEY) (1992)

"A review of subsequent NTSB decisions shows that the NTSB has expressly affirmed the use of the "so-called Sweeney standard" to determine whether a mariner has submitted adequate evidence of cure. See *Loy v. Wright*, NTSB Order No. Em-186 (1999). Appeal Decision 2657 (BARNETT) (2006)

In Appeal Decision 2638 (PASQUARELLA) (2003), the Commandant reiterated SWEENEY and added additional requirements:

> . . . I reaffirmed and clarified these principles in Commandant Decision on Review #18 (CLAY) discussed below. In addition, Coast Guard regulations also require an MRO to verify that the mariner is drug free and that the risk of subsequent use of dangerous drugs by that mariner is sufficiently low to justify his return to work aboard a vessel. 46 C.F.R.16.201(f).

In Review Decision 18 (CLAY) (1992), the Commandant held that once a prima facie case of illegal drug use is established to the satisfaction of the ALJ, the mariner poses a danger to public safety such that sufficient cause exists to withhold the license or document until cure is complete. CLAY was further explained in Appeal Decision 2634 (BARRETTA) (2002):

> The issue of whether an ALJ can permit a Respondent to retain possession of a license or document pending completion of cure was squarely addressed in Commandant Decision on Review #18 CLAY. In that case, I held that once a prima facie case of illegal drug use is established to the satisfaction of the ALJ, the mariner poses a danger to public safety such that sufficient cause exists to withhold the license or document until cure is complete. The CLAY decision recognized that once the Coast Guard has proven that a mariner used an illegal drug, his license or document must be revoked, or, in the alternative, the license or, (sic) withheld until the Respondent proves that he or she is cured.
>
> Appeal Decision 2634 (BARRETTA) (2002).

Therefore, while participating in the requisite drug rehab program and the follow-on one year period of drug abuse monitoring and unannounced testing, the mariner may not possess his or her license or document.

In addition to the above requirements, 46 CFR 16.201(f) provides as follows:

> Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual must agree to be subject to increased unannounced testing –
>
> (1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40;
>
> (2) For any additional period as determined by the MRO up to a total of 60 months.

As a matter of practice and policy, when a mariner tests positive for dangerous drugs and wishes to voluntarily surrender his license to avoid a hearing, 46 CFR 5.203 and enter into a cure settlement agreement, the Coast Guard has been requiring, among other things, a minimum of six (6) random drug screens to be completed during the one-year period following successful completion of the drug rehabilitation program to satisfy the SWEENEY requirement of participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year. Pursuant to the settlement agreement and upon successful completion of cure as defined above, the Coast Guard returns the mariner's license. The provisions of subparagraphs (1) and (2) of 46 CFR 16.201(f) will apply if appropriate after the Coast Guard returns the mariner's license.

Applying Respondent's Evidence of Cure to Coast Guard Law

The burden of establishing "cure" is on the Respondent. Appeal Decision 2526 (WILCOX) (1991). Here, Respondent's evidence of cure is based on Dr. Eustace's medical opinion that Respondent is not a user. As a result, Respondent "was not referred to a Federally-approved drug treatment program because he does not/did not have criteria for a substance abuse disorder (diagnosis) [and] [i]t would be improper for a physician to refer a patient to a treatment for which he had no criteria...." Resp. Ex "A." Since Dr. Eustace accepts Respondent's explanation for his positive drug test result, the requirement for successful completion of a bona fide treatment program has not been met.

Further, there no evidence that Respondent has shown a complete non-association with drugs for a minimum of one-year through a random, unannounced, drug testing monitoring program following completion of a bona fide drug treatment program. After his initial, negative drug screen on June 13, 2005, it was not until June 22, 2006 and again on August 3, 2006 that

Respondent produced additional drug screens. While Respondent actively sought the June 13, 2005 negative drug screen, there is no indication that the negative drug screens of June 22, 2006 and August 3, 2006 were part of an active drug abuse monitoring program which incorporates random, unannounced testing during that year.

An MRO has not verified that Respondent is drug free and that the risk of subsequent use of dangerous drugs by him is sufficiently low to justify his return to work aboard a vessel. Dr. Eustace testified that he is an MRO for the FAA, the Florida Bar, the Florida Board of Bar Examiners, and the Professional Resource Network. However, he was not testifying as the MRO in Respondent's case. Dr. Eustace is Respondent's treating physician and expert witness, not an "independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process." 49 CFR 40.123(a). Further, it is not the MRO's function

> [T]o consider explanations of confirmed positive, adulterated, or substituted test results that would not, even if true, constitute a legitimate explanation. For example, an employee may tell you that someone slipped amphetamines into her drink at a party, that she unknowingly ingested a marijuana brownie, or that she traveled in a closed car with several people smoking crack. MROs are unlikely to be able to verify the facts of such passive or unknowing ingestion stories. Even if true, such stories do not present a legitimate medical explanation. Consequently, you must not declare a test as negative based on an explanation of this kind.
>
> 49 CFR 40.151(d)

While Dr. Eustace's stated that he is familiar with the term "cured" concerning merchant marine license holders, he was clear to point out that in his opinion Respondent is cured from a medical standpoint. Tr. 104; Resp. Ex. "A."

Further, Respondent has possessed his license at all relevant times since June 2, 2005. He presented his license at the start of the hearing and I returned it to him at the conclusion. According to the Coast Guard's closing brief, Respondent has not voluntarily deposited or

surrendered his license. As held in Review Decision 18 (CLAY) (1992) and Appeal Decision 2634 (BARRETTA) (2002), once a prima facie case of illegal drug use is established to the satisfaction of the ALJ, the mariner poses a danger to public safety such that sufficient cause exists to withhold the license or document until cure is complete. The CLAY decision recognized that once the Coast Guard has proven that a mariner used an illegal drug, his license or document must be revoked, or, in the alternative, the license or, (sic) withheld until the Respondent proves that he or she is cured. Therefore, under Coast Guard law, a Respondent may not possess his or her license while going through the cure process.

Decision on Whether Respondent has Provided Satisfactory Proof of Cure

If I cannot accept Dr. Eustace's opinion on whether Respondent is a user because it is fundamentally based on his belief of Respondent's uncorroborated supposition or speculation that someone spiked his drink, I cannot accept his opinion that Respondent is cured because it is also predicated fundamentally upon his belief of Respondent's uncorroborated supposition or speculation. Further, I cannot accept Dr. Eustace's opinion that Respondent is cured because it does not meet the Commandant's requirements for cure as set forth above. Determining whether Respondent has proved he is cured is a legal conclusion to be determined by the Administrative Law Judge. 33 CFR 20.902(a)(1). Therefore, I find that Respondent has not provided satisfactory proof that he is cured in accordance with Coast Guard law.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). When the Coast Guard proves that a mariner has used or is addicted to dangerous drugs, any Coast Guard issued licenses, documents, or other credentials must be revoked unless the holder provides satisfactory proof that the holder is cured.

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).

Having found proved that Respondent failed a chemical test for dangerous drugs which gave rise to the presumption that he is a user, and having found that Respondent has failed to rebut that presumption, and further finding that he has not provided satisfactory proof that he is cured in accordance with Coast Guard law, the only sanction is Revocation.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED that Merchant Mariner's License Number: 1027254, and all other valid licenses, documents, and endorsements issued by the Coast Guard to Adam Buckley Debree are **REVOKED** and must be surrendered to the Coast Guard immediately.

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

Done and dated December 4, 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

Dr. Seth Portnoy, D.O.

RESPONDENT'S WITNESSES

1. Adam Debree, Respondent
2. Dr. John C. Eustace, M.D.
3. Angela Wynn

EXHIBIT LIST

GOVERNMENT'S EXHIBITS

IO Ex. 1	Copy of Respondent's U.S. Merchant Mariner License #1027254, Expiring December 31, 2006. 1 page.
IO Ex. 2	Title 49 CFR Subparts D, E, and F. 10 pages.
IO Ex 3	Copy 3 of Federal Drug Testing Custody and Control Form #42229044 showing split sample provided. 1 page.
IO Ex. 4	70 Fed. Reg. 32641, 32642 showing LabOne, Inc. and Laboratory Corporation of American, the labs that tested samples A and B are SAMSA approved laboratories. 2 pages.
IO Ex. 5	Copy 1 of Federal Drug Custody and Control Form #42229044 showing primary specimen tested positive for cocaine metabolite. 1 page.
IO Ex. 6	Letter from HEC/KEYS Consortium showing positive cocaine metabolite test results for Respondent's sample. 1 page.
IO Ex. 7	Laboratory test results for sample #4229044 showing 2898.1 ng/ml of cocaine metabolite in Respondent's sample. 2 pages.

IO Ex. 8 Testing Result Summary dated 6/30/06 showing sample #42229044 tested positive for cocaine metabolite. 1 page.

IO Ex. 9 TCN Total Compliance Network, Inc. letter of June 15, 2006 showing specimen number 42229044 reconfirmation of cocaine. 1 page.

IO Ex.l0 Copy 2 of Federal Drug Custody and Control Form #42229044 showing medical review officer's determination of positive test dated 6/7/06. 1 page.

IO Ex.11 Total Compliance Network Medical Review Officer Determination/Verification Report showing specimen #42229044 tested positive for cocaine. 1 page.

IO Ex.12 Split sample "B" chain of custody and Federal Custody and Control Form showing split sample tested positive for cocaine metabolite. 2 pages.

RESPONDENT'S EXHIBITS

Resp. Ex. A Dr. Robert Eustace's Supplemental Affidavit dated September 25, 2006

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.

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS

RESPONDENT

1. The Complaint in this matter filed on or about March 2, 2006 alleges a violation of 46 U.S.C. 7734 (c) Dangerous drugs as grounds for revocation which states in material part: "(c) If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."

   Accepted and incorporated to the extent that section 7734 actually means 7704.

2. The instant complaint alleges that" (1) on June 2, 2005 the Respondent took a Pre-employment drug test; (2) a urine specimen was collected by Michelle D. Rogers of Keys Drug Consortium; (3) the Respondent signed a Federal Drug Custody and Control Form; (4) the urine specimen was collected and analyzed by LabOne using procedures approved by the Department of Transportation; and (5) the specimen subsequently tested positive for cocaine metabolites.

   Accepted and incorporated.

3. Counsel for the Respondent stipulated that on the date in question the Respondent took the pre-employment drug test and that his specimen was properly collected, properly tested, there was proper chain of custody and that the specimen did in fact test positive for cocaine metabolites.

   Accepted and incorporated.

4. As to the 46 U.S.C. 7704 (c) analysis, the license of the Respondent must be revoked unless the Respondent can prove that he has been "cured." Here the only evidence presented by the Coast Guard was that the Respondent had a positive drug test for dangerous drugs and that therefore *a priori* the Respondent is a dangerous drug user and the burden is therefore on the Respondent to prove that he is "cured" or his license must be revoked. The Respondent me his burden to prove that he is cured. The evidence presented was that the Respondent scheduled the appointment for the urinalysis voluntarily at a time and place of his own choosing. This was not an involuntary or surprise test. Although the Court is skeptical of the Respondent's testimonial version of a spiked drink, the Respondent presented evidence that he immediately volunteered for a second test. His girlfriend of four years testified that she observed no drug use or activity and the Respondent presented detailed expert testimony as to inadvertent drug use. The Court was impressed with the testimony of Dr. Eustace who in his clinical experience has dealt with over 100 non-intentional ingestion cases and found the instant case to fit both his experience and the medical model. Critically, Dr. Eustace opined that the Respondent is cured under 46 U.S.C. 7704(c). This testimony is unrebutted and it would be an abuse

of discretion to ignore such unrebutted testimony on this critical issue. The Court therefore finds that the Respondent is cured under 46 U.S.C. 7704(c) and his license is therefore not subject to revocation.

Not accepted as explained in the Decision and Order

5. Notwithstanding such a finding, the Coast Guard proved a *prima facia* case for the Respondent's failure of a chemical test for dangerous drugs creating the presumption under 46 CFR 16.201 that the Respondent is a user of dangerous drugs which states in material part:

> 46 CFR 16.201
>
> (b) If an individual fails a chemical test for dangerous drugs under this part, the individual will be presumed to be a user of dangerous drugs.
>
> * * *
>
> (e) An individual who has failed a required chemical test for dangerous drugs may not be re-employed aboard a vessel until the requirements of paragraph (f) of this section and 46 CFR part 5, if applicable, have been satisfied.
>
> (f)Before an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. In addition, the individual must agree to be subject to increased unannounced testing –(1) For a minimum of six (6) tests in the first year after the individual returns to work as required in 49 CFR part 40; and (2) For any additional period as determined by the MRO up to a total of 60 months.

Accepted and incorporated.

6. There is no language in 46 CFR 16.201 or elsewhere in the Code of Federal Regulations which permits the Respondent to overcome the presumption of 46 CFR 16.201(b) that upon the failure of a chemical test that the Respondent is deemed a user of dangerous drugs and the language is conclusory. The Respondent's sole remedy under 46 CFR 16.201(b) is contained in 46 CFR 16.201(f) which states that the MRO must determine that the Respondent is drug free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work. Here the testimony of Dr. Eustace, who is an MRO to the FAS, the Florida Board of Bar Examiners and the Florida Board of Medicine opined that the Respondent is drug free and is no risk to operate a vessel. The Coast Guard failed to offer any evidence on the dispositive issue and did not inquire of Dr. Seth Portnoy, the Respondent's MRO, as to the applicability of 46 CFR 16.201(f). Again, testimony by Dr. Eustace on this issue was unrebutted and

unchallenged. It would be an abuse of discretion to ignore such unrebutted and unchallenged testimony on this critical issue.

Not accepted for reasons stated in the Decision and Order.

7. This Court therefore finds that under 46 CFR 16.201 (f) that Respondent Adam DeBree is drug-free and the risk of subsequent use of dangerous drugs by Respondent Adam DeBree is sufficiently low to justify his or her return to work and the restoration of his license upon the written agreement that Respondent Adam DeBree be subject to increased unnounced testing, (1) For a minimum of six (6) tests in the first year; and (2) For any additional period as determined by the MRO up to a total of 60 months.

   Not accepted for reasons stated in the Decision and Order.

COAST GUARD PROPOSED FINDINGS OF FACT

1. On June 02, 2005, Mr. Adam DeBree took a pre-employment drug test and subsequently tested positive for cocaine metabolites. (Tr. at 4, lines 11-14).

Accepted and incorporated.

2. During this time period, Mr. DeBree was the holder of, and serving under the authority of, his Coast Guard issued License (No. 1027254). Further, at this time the Respondent has not voluntarily deposited his license with the Coast Guard. (Stipulations).

Accepted and incorporated.

3. Respondent stipulated that on the date in question he took the pre-employment drug test and that his specimen was properly collected, properly tested, proper chain of custody maintained and the specimen did in fact test positive for cocaine metabolites. (Tr. at 5, lines 3 – 8).

Accepted and incorporated.

4. Respondent testified that he unintentionally ingested this cocaine at a fishing tournament party the night before his drug test. (Tr. at 39, lines 12, 13). Respondent testified that he had never before voluntarily ingested cocaine. (Tr. at 42, lines 5 – 8).

   Accepted as Respondent's testimony but not incorporated because it is mere supposition or speculation not based on fact.

5. In the alternative, Respondent claimed that he has been "cured" of his use of dangerous drugs pursuant to 46 U.S.C. 7704(c). (Tr. at 104, starting at line 22).

Accepted as Respondent's testimony but not incorporated as a finding of fact or an ultimate finding of fact/conclusion of law because the evidence submitted in support of "cure" does not comport with the Coast Guard law.

COAST GUARD'S PROPOSED ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The subject matter of this hearing and Respondent are properly within the jurisdiction vested in the U.S. Coast Guard by 46 U.S.C. 7704.

   Accepted and incorporated.

2. The jurisdictional and factual allegations of use of or addiction to the use of dangerous drugs against Mr. DeBree are found proven.

   Accepted and incorporated.