

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

UNITED STATES COAST GUARD

Complainant

v.

LARRY GEORGE PEARCE

Respondent

Docket No: 09-0299
CG Enforcement Activity No: 3540597

DECISION & ORDER

Date Issued: February 24, 2010

Issued by: HON. BRUCE TUCKER SMITH
Administrative Law Judge

Appearances:

For Complainant:

LT Michelle Schopp, IO
LT Eric Rivera, IO
USCG Sector Miami

For Respondent:

Larry George Pearce, *pro se*

I. PRELIMINARY STATEMENT

The United States Coast Guard Sector Miami (Coast Guard) initiated the instant administrative action seeking revocation of Respondent Larry George Pearce's (Respondent) Coast Guard-issued Merchant Mariner's License (MML). The instant action is brought pursuant to the legal authority codified at 46 U.S.C. §7704 and the underlying regulations set forth in 46 C.F.R. Part 5.

On July 23, 2009, the Coast Guard filed an original Complaint alleging that on June 3, 2009, Respondent submitted to a random drug test that subsequently tested positive for cocaine metabolites, in violation of 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. Service was attempted upon Respondent via express courier service. On August 10, 2009, the Coast Guard filed an Amended Complaint correcting Respondent's home address and Respondent was personally served with the Amended Complaint that same day. On August 28, 2009, Respondent filed an Answer denying all jurisdictional and factual allegations asserted in the Amended Complaint. Additionally, Respondent included the following handwritten notation as an alternative affirmative defense "Do not do drug did not know I was taking anything."

On September 1, 2009, the instant matter was assigned by the Chief Administrative Law Judge (CALJ) to the undersigned Administrative Law Judge (ALJ) for adjudication. On October 1, 2009, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed.¹

On December 15, 2009, this matter came on for hearing at the U.S. Tax Court, located in the Claude Pepper Federal Building, in Miami, Florida. The proceeding was conducted in

¹ Initially, the court announced the hearing would be held in Fort Myers, Florida, on December 15, 2009. On November 9, 2009, the parties filed a Joint Motion for Change of Venue requesting the court set the hearing in a more convenient location. On November 10, 2009, the court denied the Joint Motion for Change of Venue as suitable courtroom space was not readily available in the greater Miami-area. However, the court subsequently located a suitable courtroom in the Claude Pepper Federal Building in downtown Miami and the hearing was thereupon relocated.

accordance with the Administrative Procedure Act (APA), as amended and codified at 5 U.S.C. §§551-59 and the Coast Guard procedural regulations located set forth at 33 C.F.R. Part 20. Coast Guard Investigating Officers (IOs) LT Michelle M. Schopp and LT Eric Rivera of Sector Miami appeared on behalf of the Coast Guard; Respondent appeared on his own behalf.

Both parties appeared, presented their respective cases and rested. Three (3) witnesses testified as part of the Coast Guard's case-in-chief and the Coast Guard offered twelve (12) exhibits into evidence, all of which were admitted. Although Respondent was afforded to opportunity to cross-examine all witnesses called by the Coast Guard, Respondent declined. Respondent did not call any witnesses to testify on his behalf; however, Respondent did take the stand and offer his own testimony. Respondent offered three (3) exhibits into evidence, all of which were admitted.²

At the conclusion of the December 15, 2009, hearing, the court permitted the parties to present their respective closing arguments prior to closing the administrative record.

II. 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, including party stipulations.

1. At all relevant times mentioned herein Respondent Larry George Pearce (Respondent) was the holder of a Coast Guard-issued Merchant Mariner's License (MML). (CG Ex. 1).
2. On or about June 2, 2009, Respondent was directed by his employer, IDIVE, Inc., to submit to a random drug screen. (Tr. p. 118).
3. On or about June 3, 2009, Respondent presented to Quest Diagnostics in Del Ray Beach, Florida, a urine specimen collection facility, and submitted a urine specimen. (Tr. at 109; CG Ex. 4).

² Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations referring to Agency Exhibits are as follows: Investigation Officer followed by the exhibit number (CG Ex. 1, etc.); Respondent's Exhibits are as follows: Respondent followed by the exhibit letter (Resp. Ex. A, etc.); ALJ Exhibits are as follows: ALJ followed by the exhibit Roman numeral (ALJ Ex. I, etc.).

4. On or about June 3, 2009, LaSonya Miller, an employee of Quest Diagnostics, collected Respondent's urine specimen. (Tr. at p. 22-23; CG Ex. 4).
5. At all relevant times mentioned herein, LaSonya Miller was properly trained and certified as a urine specimen collector for substance abuse testing in accordance with Department of Transportation (DOT) rules and regulations. (Tr. at p. 14-16; CG Ex. 3).
6. On or about June 3, 2009, Ms. Miller, properly collected a urine specimen from Respondent, separated the specimen into two (2) samples, packaged the samples, and then placed the packaged samples for pickup by courier. (CG Ex. 3).
7. At the time Ms. Miller collected Respondent's urine specimen, each step of the collection process was recorded upon a Federal Drug Testing Custody and Control form. The Federal Drug Testing Custody and Control form assigned the unique specimen identification number of 6179642 to Respondent's sample. (Tr. 22-25; CG Ex. 4).
8. On or about June 3, 2009, Respondent signed the Federal Drug Testing Custody and Control Form certifying the urine specimen he submitted was unadulterated. (CG Ex. 4).
9. The chain of custody of Respondent's urine specimen was properly maintained from the time of collection to analysis. (Tr. at 64, 90; CG Ex. 7, 8).
10. The urine specimen submitted by Respondent was received for analysis by Quest Diagnostics, Incorporated, in Atlanta, Georgia, Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA) approved laboratory facility. (CG Ex. 5; CG Ex. 7).
11. The urine specimen submitted by Respondent was subsequently analyzed by Quest Diagnostics in Atlanta, Georgia, using procedures approved by the Department of Transportation. (CG Ex. 7).
12. Lennox B. Abbott, Ph.D., director of laboratory operations for the forensics laboratory in Quest Diagnostics, Incorporated in Atlanta, Georgia, and board-certified by the American Association of Clinical Chemistry, is an expert witness in the field of forensic toxicology. (Tr. at 56; CG Ex. 6).
13. Results of the initial screen of Respondent's specimen indicated a positive result for cocaine metabolites. (Tr. at 68-69; CG Ex. 7 at p. 26).
14. Respondent's specimen was submitted for to confirmatory testing by gas chromatography/mass spectrometry (GC/MS). Confirmatory testing revealed Respondent's specimen indicated the presence of cocaine metabolites at a

- level of 309.34 nanograms per milliliter (ng/ml); well above the DOT-specified cutoff level of 150 ng/ml. (Tr. at 70; CG Ex. 7 at p. 61).
15. James M. Vanderploeg, M.D., is certified as a Medical Review Officer (MRO) by the Medical Review Office Certification Council and the American Association of Medical Review Officers. (Tr. at 81; CG Ex. 9).
 16. On or about June 5, 2009, in his capacity as MRO, Dr. Vanderploeg informed Respondent via telephone the certified, positive test results. (Tr. at 88-89). Respondent offered no reason why his specimen had tested positive for cocaine metabolites. (Id.).
 17. Upon notification of the positive test result, Respondent requested his split urine specimen tested at a separate laboratory. (Tr. at 89).
 18. On or about June 10, 2009, Quest Diagnostics shipped Respondent's split urine specimen to the Minneapolis Veterans' Affairs Medical Center for testing. (CG Ex. 7). The Minneapolis Veterans' Affairs Medical Center laboratory is approved by the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration (SAMHSA). (CG Ex. 5).
 19. Confirmatory testing of the split sample verified the positive test results for cocaine metabolites previously yielded. (CG Ex. 8).
 20. Dr. Vanderploeg subsequently reviewed the results of the testing performed on the split specimen and properly completed step 7 of the Federal Drug Testing Custody and Control Form, copy 2. (Tr. at 93; CG Ex. 12).
 21. In his capacity as MRO, on June 6, 2009, Dr. Vanderploeg notified the maritime consortium responsible for managing Respondent's maritime employer's drug testing programs by letter of the results of Respondent's drug test (Tr. 90-91; CG Ex. 11). Dr. Vanderploeg again notified the maritime consortium by letter on June 17, 2009, of the results of Respondent's drug test on the split specimen. (Tr. 93-94; CG Ex. 12).
 22. On or about June 17, 2009, the results of the split sample testing were reported to Respondent via telephone. (CG. Ex. 10).

III. SUMMARY OF DECISION

The Coast Guard **PROVED** by a preponderance of reliable, probative, and credible evidence that Respondent is a user of, or addicted to the use of, dangerous drugs as contemplated by 46 U.S.C. §7704(c) and 46 C.F.R. §5.35.

For the reasons set forth *infra*, the Merchant Mariner's License, as well as any and all other credentials issued by the U.S. Coast Guard to Respondent are hereby **REVOKED**.

IV. DISCUSSION

A. General

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 section 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. 46 U.S.C. §7704(c); Appeal Decisions 2634 (BARRETTA) (2002); 2535 (SWEENEY) (1992) (*rev'd* on other grounds); 2546 (SWEENEY) (1992) (*aff'd on reh'g* the definition of cure established in 2535 (SWEENEY) (1992)).

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.

A marine employer's drug testing program must be in accordance with the applicable statutes, regulations and Appeal Decisions. *See generally* 49 C.F.R. Part 40 and 46 C.F.R. 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* Appeal Decisions 2662 (VOORHEIS) (2007); 2667 THOMPSON (2006).

In the instant matter, the Coast Guard has charged Respondent with use of, or addiction to the use of, dangerous drugs as a result of Respondent testing positive for cocaine metabolites in a random drug test taken on June 3, 2009. The Coast Guard seeks revocation of Respondent's license in accordance with 46 CFR §5.35. For the reasons discussed *infra*, the court hereby finds

that the Coast Guard has **PROVEN** the allegation that Respondent is a user of, or addicted to the use of, a dangerous drug as contemplated by 46 U.S.C. §7704(c) and 46 C.F.R. §5.35.

B. Due Process Concerns

At the outset of hearing of this matter, the parties herein submitted a Joint Motion to Stipulate (Motion). Upon receipt of said Motion, the court inquired whether Respondent read the entire document prior to signing; whether Respondent understood the significance of signing the document; and whether Respondent understood the meaning and truth of the statements contained within the document. (Tr. at 10-11). Respondent answered in the affirmative to each inquiry posed. Accordingly, the Motion was entered into evidence as Coast Guard Exhibit 2. Although Coast Guard Exhibit 2 is a Joint Motion by the Parties and Respondent expressed his understanding of the significance of the Motion, the court is nonetheless reticent to assign controlling probative weight great deal of weight to this document.

During the course of the hearing, the court expressed concern with regard to Respondent's due process rights *vis à vis* a Coast Guard witness. Specifically, the court was concerned with the issue of notice. The forensic scientist scheduled to testify was unable to appear telephonically due to an unforeseeable medical emergency. The Coast Guard arranged for the director of the lab to testify in the forensic scientist's stead. The court explained to both parties that Respondent was entitled to know in advance who all of the witnesses are that will be testifying against him so that he may prepare his defense. (Tr. at 41). Accordingly, the court advised the parties that, "we've going to have to continue this case unless, Mr. Pearce, you are adamant that you want to proceed, that knowing this legal issue exists, and you want to waive it and move beyond it and keep going. If you want to do that, then we can proceed and take this doctor's testimony. But I've identified for you the legal issue. If you want a continuance, I'll grant it. If you want to proceed, we can do that as well." (Tr. at 45). A brief recess was taken to allow Respondent to consider his options. Upon returning to the proceeding, Respondent

advised he wished to waive his right to continue the case. The court found Respondent “knowingly, intelligently, and voluntarily waived his rights to continue this case if he so desires.” (Tr. at 47).

C. Jurisdiction

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) (quoting Appeal Decision 2025 (ARMSTRONG) (1975)). Where an Administrative forum acts without jurisdiction its orders are void. *Id.* Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER) (1986). *See, Appeal Decision 2025 (ARMSTRONG)* (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

Jurisdiction in proceedings alleging the use of, or addiction to the use of, dangerous drugs is established by a Respondent’s status as a holder of a Coast Guard-issued credential and not his status aboard a vessel. Appeal Decisions 2668 (MERRILL) (2007); 2560 (CLIFTON) (1995), *appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton*, NTSB Order No. EM-180 (1995). Coast Guard Exhibit 1 establishes Respondent is the holder of a Coast Guard-issued credential—more specifically, a Merchant Mariner’s License. Therefore, because the instant case was taken pursuant to 46 U.S.C. §7704(c) and the Coast Guard properly charged Respondent with “use of or addiction to the use of dangerous drugs,” Respondent's status as the holder of the above-captioned mariner credentials, in and of itself, affords the Coast Guard jurisdiction to institute the instant suspension and revocation proceeding.

D. Burden of Proof

The Administrative Procedure Act (APA), 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 imposition of 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 upon the Investigating Officer to prove the charges are supported by a preponderance of the evidence. 33 CFR §§20.701, 20.702(a). Similarly, a respondent bears the burden of proof in asserting his affirmative defense by a preponderance of the evidence. 33 C.F.R. §§701; 702; Appeal Decisions 2640 (PASSARO) (2003); 2637 (TURBEVILLE) (2003). “[T]he term ‘substantial evidence’ is synonymous with ‘preponderance-of-the-evidence’ as defined by the Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988). 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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970)) (Harlan, J., concurring) (brackets in original). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more-likely-than-not committed the violation charged.

“Congress enacted 46 U.S.C. §7704 with the express purpose of removing those individuals possessing or using drugs from service in the United States Merchant Marine.” Appeal Decision 2638 (PASQUARELLA) (2003). If it is shown at a hearing that a holder of a merchant mariner’s document has been a user of a dangerous drug, the merchant mariner’s document shall be revoked unless the holder provides satisfactory proof that the holder is cured. 46 U.S.C. §7704.

The law is well settled that in order “to prove use of a dangerous drug, the Coast Guard must establish a *prima facie* case of drug use by the mariner.” Appeal Decisions 2668 (MERRILL) (2007); 2662 (VOORHEIS) (2007); 2657 (BARNETT) (2006); 2632 (WHITE)

(2002); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2584 (SHAKESPEARE) (1996); 2583 (WRIGHT) (1995); 2529 (WILLIAMS) (1991); 2379 (DRUM) (1985); and 2282 (LITTLEFIELD) (1982).

The Coast Guard may establish a *prima facie* case of dangerous drug use by showing that: (1) Respondent was tested for a dangerous drug, (2) Respondent tested positive for a dangerous drug, and (3) the test was conducted in accordance with 49 C.F.R. Part 40. Appeal Decisions 2668 (MERRILL) (2007); 2633 (MERRILL) (2002); 2632 (WHITE) (2002). In considering proof of these elements, minor technical infractions of the regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity. Id.

Proof of these three prongs will result in the creation of a presumption illegal drug use and shifts to the Respondent the burden to rebut the presumption by producing persuasive evidence. Appeal Decision 2632 (WHITE) (2002); 2591 (WYNN) (1997). However, such a presumption of dangerous drug use is not an irrebuttable presumption. A respondent may rebut the presumption by producing evidence that: (1) calls into question any elements of the *prima facie* case; (2) indicates an alternative medical explanation for the positive test result; or (3) indicates the use was not wrongful or not knowing. 46 CFR § 16.201(b); Appeal Decision 2560 (CLIFTON) (1995), *appeal dismissed sub. nom. Robert E. Kramek v. Richard W. Clifton*, NTSB Order No. EM-180 (1995). Otherwise, the individual will be presumed to be a user of dangerous drugs. Id. If a respondent produces no evidence in rebuttal, the presiding Administrative Law Judge may find the allegation of dangerous drug use proved on the basis of the presumption alone. Id. *A fortiori*, if the Coast Guard does not prove a *prima facie* case of illegal drug use, no presumption arises – and Respondent is relieved of his burden of rebuttal.

The instant case is based solely upon the results of a urinalysis test. The Coast Guard met its burden of proof and established all elements of the *prima facie* case. A presumption therefore

arose that Respondent used or was addicted to the use of dangerous drugs and the burden of rebutting such presumption fell to Respondent. After careful consideration of the testimony at the hearing and of the entire record, the court finds that Respondent failed to rebut this presumption. With regard to Respondent's affirmative defense, Respondent failed to adduce any credible evidence supporting his contention he unknowingly ingested cocaine. Accordingly, the charge that Respondent used, or was addicted to the use of, dangerous drugs is therefore found to be **PROVED**.

E. *Prima facie* Case of Dangerous Drug Use Established by the Coast Guard

As noted *supra*, the Coast Guard may establish a *prima facie* case of dangerous drug use by establishing the following three elements by a preponderance of the evidence: (1) Respondent was tested for a dangerous drug, (2) Respondent tested positive for a dangerous drug and (3) the test was conducted in accordance with 49 C.F.R. Part 40. Appeal Decision 2632 (WHITE) (2002).

Each of the three elements is discussed *infra*, as each relate to Respondent herein.

1. Respondent was Tested for a Dangerous Drug

The first prong of a *prima facie* case "necessarily involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample number or Drug Testing Custody and Control number which is assigned to the sample and which identifies the sample throughout the chain of custody and testing process; and proof of the testing of that sample." Appeal Decisions 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998).

The Coast Guard has alleged that on June 3, 2009, Respondent submitted to a random drug test. (Complaint, July 23, 2009). In support of this allegation, the Coast Guard produced Ms. LaSonya Miller, a properly trained and qualified urine specimen collector for substance abuse testing pursuant to guidelines set forth by the Department of Transportation. (CG Ex. 3). The Coast Guard elicited a broad swath of testimony from Ms. Miller concerning both general

urine specimen collection procedures and her collection of Respondent's urine specimen on June 3, 2009. (Tr. at 18-29). Ms. Miller's testimony regarding the collection of Respondent's urine specimen was properly authenticated by personal identification of her signature in Block 4 of the Federal Drug Testing Custody and Control Form, copy 2. (Tr. at 17-18; CG Ex. 4).

Respondent presented to the Quest Diagnostic facility in Del Ray Beach, Florida, on June 3, 2009, for drug testing. As a certified and trained urine specimen collector, Ms. Miller was responsible for the proper collection of Respondent's urine specimen. (Tr. at 22-23; CG Ex. 4) Respondent was assigned the unique specimen identification number 6179642, which identified the Respondent's specimen throughout the chain of custody and testing process. (Tr. at 24; CG Ex. 4).

Respondent provided one urine specimen to Ms. Miller, who verified the specimen was within the correct temperature range and then proceeded to split Respondent's specimens into two (2) samples, sealed the split samples and properly shipped them to Quest Laboratories, a Department of Transportation (DOT)-approved laboratory. (Tr. at 18-29; CG Ex. 4, 5). Proof of testing Respondent's specimen was established through the introduction of testimony by Lennox B. Abbott, Ph.D., as described more fully, *infra* and Coast Guard Exhibit 7, the Documentation Package, which details the chain of custody and testing of Respondent's specimen.

The regulations provide that a random drug test is a 46 C.F.R. Part 16 drug test. The documentary evidence admitted, as well as the testimony elicited at the hearing of this matter, confirms that Respondent submitted a urine specimen on June 3, 2009, for a random drug testing by a DOT-approved laboratory. Therefore, the Coast Guard proved by a preponderance of the evidence that Respondent was tested for a dangerous drug on June 3, 2009.

2. Respondent Tested Positive for a Dangerous Drug

The second prong requires proof that the respondent tested positive for a dangerous drug. Accordingly, this element of the *prima facie* case necessarily involves proof of the test results;

proof of the MRO's status and qualifications; proof of the test results reviewed by the MRO; and proof of the MRO's report of the results as positive. Appeal Decision 2603 (HACKSTAFF) (1998). Here, the Coast Guard offered sufficient evidence in the form of exhibits and oral testimony that the urine specimen submitted by Respondent tested positive for cocaine metabolites.

Lenox B. Abbott, Ph.D., director of laboratory operations for the Quest Diagnostics, Inc., forensic laboratory in Atlanta, Georgia, is an appropriately-trained and educated toxicologist and therefore was certified by the court as an expert witness in the field of forensic toxicology. (Tr. at 56; CG Ex. 6). Dr. Abbott's testimony was based, in large part, upon his review of Coast Guard Exhibit 7, the Documentation Package provided by Quest Diagnostics.

Dr. Abbott testified a five-panel DOT drug test was conducted on Respondent's specimen, identified as specimen number 6179642. Dr. Abbott explained "[t]he five-drug panel include amphetamines; cocaine metabolites; marijuana; opiates; and phencyclidine, PCP."³ (Tr. at 66). Results of the initial screen indicated a positive result for cocaine metabolites. (Tr. at 68-69; CG Ex. 7 at p. 26). Due to the positive results of the initial screen, Respondent's specimen was subjected to confirmatory testing by gas chromatography/mass spectrometry (GC/MS). Dr. Abbott testified that the confirmatory testing revealed Respondent's specimen indicated the presence of cocaine metabolites at a level of 309.34 nanograms per milliliter (ng/ml); well above the DOT-specified cutoff level of 150 ng/ml. (Tr. at 70; CG Ex. 7 at p. 61). Based on the foregoing, the court finds the Coast Guard has sufficiently established the test results at issue.

The Coast Guard next offered the telephonic testimony of certified Medical Review Officer (MRO) James Vanderploeg, M.D. Proof of Dr. Vanderploeg's MRO status and qualifications was appropriately established by the Coast Guard. (Tr. at 81-83; CG Ex. 9). In his capacity of a MRO, Dr. Vanderploeg testified that he personally reviews "every non-negative

result, positive or invalid or otherwise and conducts an interview with the donor of that specimen to determine if there is any medical explanation for the test results.” (Tr. at 82). Dr. Vanderploeg testified custody and control forms concerning non-negative results are received from both the collection site and the analyzing laboratory. (Id.) Specimen identification numbers are matched with the test result received by the analyzing laboratory to ensure accurate review by the MRO. (Tr. at 83). Dr. Vanderploeg’s testimony regarding the receipt and review of Respondent’s results was properly authenticated by personal identification of his signature in Block 6 of the Federal Drug Testing Custody and Control Form, copy 2. (Tr. at 84-85; CG Ex. 4).

In accordance with the dictates of 49 C.F.R. Part 40, Dr. Vanderploeg conducted a telephonic interview with Respondent and informed Respondent his urine specimen yielded a positive result for cocaine metabolites. Dr. Vanderploeg made a specific inquiry of Respondent whether there was any valid medical-legal reason for the positive result. However, Respondent was unable to provide a valid medical reason to Dr. Vanderploeg’s inquiry of Respondent. Dr. Vanderploeg then inquired “how long it had been since he had last used cocaine.” (Tr. at 88). Dr. Vanderploeg testified Respondent denied any recent use and advised it had been at least 15 years since his last use. (Tr. at 88).

Upon notification of the positive test result, Respondent requested his split urine specimen tested at a separate laboratory. (Tr. at 89). In support of his testimony, an “MRO Verification Worksheet” containing Dr. Vanderploeg’s notes related to results of Respondent’s drug test and his subsequent interview with Respondent was entered into evidence as Coast Guard Exhibit 10.

On June 10, 2009, Quest Diagnostics shipped Respondent’s split urine specimen to the Minneapolis Veterans’ Affairs Medical Center for testing. Confirmatory testing verified the positive test results for cocaine metabolites previously yielded. Dr. Vanderploeg subsequently

³ The parameters of the five-panel test are set forth in 49 C.F.R. Part 40.

reviewed the results of the testing performed on the split specimen and properly completed step 7 of the Federal Drug Testing Custody and Control Form, copy 2. Based upon the foregoing, the Coast Guard has sufficiently proven the MRO reviewed the results of Respondent's drug test as required by 49 C.F.R. Part 40.

In his capacity as MRO, on June 6, 2009, Dr. Vanderploeg notified the maritime consortium responsible for managing Respondent's maritime employer's drug testing programs by letter of the results of Respondent's drug test (Tr. 90-91; CG Ex. 11). Dr. Vanderploeg again notified the maritime consortium by letter on June 17, 2009, of the results of Respondent's drug test on the split specimen. (Tr. 93-94; CG Ex. 12).

Accordingly, the Coast Guard has established the second element of their *prima facie* case.

3. The Drug Test was Conducted in Accordance with 49 C.F.R. Part 40

Title 46 Code of Federal Regulations Section 16.201 states that all chemical testing must be conducted in accordance with 49 C.F.R. Part 40. Here, Respondent participated in a random drug test, as provided by 46 C.F.R. §16.203, by submitting a urine specimen. In order for Respondent's drug test to be conducted in accordance with 46 C.F.R. Part 16, Respondent's urine specimen must have been tested in accordance with the testing requirements found in 49 C.F.R. Part 40. Accordingly, the third element of establishing a *prima facie* case requires the introduction of evidence involving the collection process; the chain of custody; how the specimen was handled and shipped to the testing facility; and proof of the qualifications of the laboratory.

The Coast Guard offered meaningful proof that the test-at-issue was conducted in accordance with 49 C.F.R. Subpart f, §40.81, *et. seq.* through witness testimony and documentary evidence.

Ms. Miller, a certified urine specimen collector, provided extensive testimony involving the collection process; chain of custody requirements; and how the specimen was handled and shipped to the testing facility. In support of Ms. Miller's testimony, the Coast Guard introduced Coast Guard Exhibit 4, copy 2 of the Federal Drug Testing Custody and Control Form, which establishes proper collection; chain of custody from collection site to the analyzing laboratory; as well as handled and shipped to the analyzing laboratory.

Dr. Abbott, director of laboratory operations for forensic laboratory of Quest Diagnostics, provided extensive testimony relating to the chain of custody of the specimen and the qualifications of the Quest laboratory. In support of Dr. Abbott's testimony, the Coast Guard introduced Coast Guard Exhibit 7, the documentation package containing all documents generated relating to Respondent's drug test of June 3, 2009. Dr. Abbott authenticated the documentation package reflected an accurate and secure chain of custody of Respondent's specimen. (Tr. at 64; CG Ex. 7, 8). Proof of the analyzing laboratory's qualifications was appropriately established by the introduction of Coast Guard Exhibit 5, a listing of laboratories meeting minimum standards required to engage in urine drug testing for federal agencies. The analyzing laboratory herein, Quest Diagnostics, Incorporated, is listed on page 3 as one of the approved laboratories.

For these reasons, I conclude that the Coast Guard has proven that the drug test(s), herein, were conducted in accordance with the dictates 49 C.F.R. Part 40.

A *prima facie* case of use of, or addiction to the use of, dangerous drugs having been established by the Coast Guard, thus the burden of persuasion shifted to Respondent. Here, Respondent testified he was "surprised" he tested positive for cocaine. (Tr. at 105). Respondent testified he thought about how cocaine could have been present in his system and admitted that "a friend of mine had given me some fish oil pills to take because he said it lowered the cholesterol. And the bottle that he had put the pills in actually had cocaine in it. . . . It was

residue.” (Id.). In support of his testimony, Respondent produced a notarized letter from his friend who had given him the bottle. (Resp. Ex. A). The letter by Michael David Trujillo, purported friend of Respondent and signatory to Respondent’s Exhibit A, claims that cocaine powder had been in the same bottle that he gave to Respondent containing the fish oil capsules. It is highly unlikely that some cocaine residue in a bottle transferred to fish oil would result in a positive drug test as described herein. Respondent was unable to secure Mr. Trujillo’s presence at the hearing of this matter and the veracity of his written statements are highly suspect. Respondent also produced letters from his employer, IDIVE, Inc., and Palm Beach County Reef Rescue, attesting to his character. (Resp. Ex. B, C). These were of no probative value. The oral testimony and documentary evidence offered by Respondent is of *de minimus* value; Respondent failed successfully rebut the Coast Guard’s *prima facie* case.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times herein, and specifically on June 3, 2009, Respondent Larry George Pearce was the holder of a Coast Guard-issued Merchant Mariner’s License.
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 C.F.R. Part 5; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§551-59.
3. On June 3, 2009, Respondent, at the direction of his employer, participated in a random test for the use of dangerous drugs by submitting a urine specimen.
4. The collection and testing performed by Quest Diagnostics, Incorporated upon Respondent’s urine specimen was in accordance with the dictates of 49 C.F.R. Part 40 and 46 C.F.R. Part 16.
5. Testing performed by the Minneapolis Veterans’ Affairs Medical Center upon Respondent’s split sample was in accordance with 49 C.F.R. Part 40.
6. The positive results for the presence of cocaine in the samples tested by Quest Diagnostics and the Minneapolis Veterans’ Affairs Medical Center created the presumption that Respondent is the user of dangerous drugs.
7. The Coast Guard established a *prima facie* case of dangerous drug use by Respondent.

8. Respondent's assertion that he was unaware he had innocently ingested cocaine is not credible.
9. Respondent failed to rebut the presumption that he is a user of dangerous drugs.
10. The factual allegation "use of, or addition to the use of, a dangerous drug" against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.

VI. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** its allegation that Respondent's is a user of, or addicted to the use of, dangerous drugs.

WHEREFORE,

VII. ORDER

IT IS HEREBY ORDERED, that the Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials issued by the U.S. Coast Guard to Larry George Pearce are **REVOKED OUTRIGHT**.

IT IS FURTHER ORDERED, that Larry George Pearce shall immediately tender his Coast Guard-issued Merchant Mariner's Documents, Merchant Mariner's Licenses, and all other credentials to the nearest United States Coast Guard office or to United States Coast Guard, Sector Miami, Investigations Division, 100 MacArthur Causeway, Miami, Florida 33139.

IT IS FURTHER ORDERED, that Larry George Pearce is hereby prohibited from serving aboard any vessel requiring a Merchant Mariner's Document or Merchant Mariner's License issued by the U.S. Coast Guard.

PLEASE TAKE NOTE, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.



Honorable Bruce Tucker Smith
U.S. Coast Guard Administrative Law Judge

Date: February 24, 2010

ATTACHMENT A – EXHIBIT & WITNESS LIST

COAST GUARD EXHIBITS

1. Certified copy of U.S. Coast Guard Merchant Mariner's License issued to Respondent Larry George Pearce (2 pages)
2. Joint Motion to Stipulate dated October 13, 2009 (3 pages)
3. Certificate of Completion and Certificate of Training issued by Quest Diagnostics to LaSonya Miller (2 pages)
4. Federal Drug Testing Custody and Control Form Copy 2-Medical Review Officer Copy (1 page)
5. Department of Health and Human Services: Substance Abuse and Mental Health Services Administration: Current List of Laboratories Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies. Federal Register Online via GPO Access: June 16, 2009, Volume 74, Number 114, pages 28507-28509 (4 pages)
6. *Curriculum Vitae* of Lenox B. Abbott, Ph.D., Quest Diagnostics Inc., Director of Laboratory Operations and National Standards (9 pages)
7. Documentation Package, Quest Diagnostics, Inc. (85 pages)
8. Federal Drug Testing Custody and Control Form Copy 1-Laboratory Copy (1 page)
9. Medical Review Officer Certification Counsel certificate issued to James M. Vanderploeg, M.D., M.P.H.; American Association of Medical Review Officers verification of certification of good standing of James M. Vanderploeg, M.D. (2 pages)
10. MRO Verification Worksheet (1 page)
11. Results of Controlled Substance Testing correspondence dated June 6, 2009, to The Maritime Consortium, Inc. (MARITIME) signed by James M. Vanderploeg, M.D. (1 page)
12. Correspondence dated June 17, 2009, to Heather Spurlock, The Maritime Consortium, Inc., signed by James M. Vanderploeg, M.D. (1 page)

COAST GUARD WITNESSES

1. LaSonya Miller
2. Lenox B. Abbott, Ph.D.
3. James M. Vanderploeg, M.D., M.P.H.

RESPONDENT EXHIBITS

- A. Notarized letter dated November 11, 2009, signed by Michael David Trujillo (1 page)
- B. Letter dated October 9, 2009, signed by Craig Smart (1 page)
- C. Letter dated October 16, 2009, signed by Ed Tichenor, Director, Palm Beach County Rescue (1 page)

RESPONDENT WITNESSES

- 1. Larry George Pearce

ALJ EXHIBITS

None

ALJ WITNESS LIST

None