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

UNITED STATES COAST GUARD
Complainant

vs.

CLARENCE EUGENE LOCKWOOD

Respondent

Docket Number 2010-0176
Enforcement Activity No. 3691906

DECISION AND ORDER

Issued: March 11, 2011

By Administrative Law Judge: Honorable Michael J Devine

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of Clarence Eugene Lockwood's (Respondent) Merchant Mariner License (MML). This action is brought pursuant to the legal authority contained in 46 U.S.C. 7704 and the underlying regulations published at 46 C.F.R. Part 5.

The Coast Guard issued a Complaint on April 16, 2010, which alleged Respondent used or is addicted to the use of dangerous drugs, a violation of 46 C.F.R. § 5.35. The Complaint's factual allegations state:

1. On January 27, 2010, Respondent took an employer mandated drug test.
2. A hair specimen was collected by Shelia Webb, RN of Marathon Petroleum Company, LLC.
3. The Respondent signed a Drug Testing Custody and Control Form.
4. The hair specimen was analyzed by Psychemedics Corporation, Culver City, CA 90230.
5. That Specimen subsequently tested positive for Marijuana as determined by the Medical Review Officer, BRIAN J LINDER.
6. On February 5, 2010, Respondent submitted an additional hair specimen for testing to confirm or refute the results of the January 27th test.
7. Analysis of the February 5, 2010 specimen confirmed the result of the previous positive test.
8. Based on the result of the original and confirmation drug tests noted above, Respondent has been the user of dangerous drugs.

The Coast Guard seeks revocation of Respondent's MML. Respondent obtained counsel and counsel filed a timely answer that denied the jurisdictional allegations and certain factual allegations.

On May 4, 2010, this case was assigned to the undersigned judge for adjudication. On May 12, 2010, the parties participated in a pre-hearing telephone conference during which time preliminary matters were discussed and a hearing date was set for August 3, 2010. On June 10, 2010, Respondent filed a Motion for Summary Decision and argued the Coast Guard's reliance

on hair drug testing is contrary to Department of Transportation (DOT) regulations and reliance on a hair drug test, as the only means of proof, should result in a Summary Decision dismissing the charge. On July 1, 2010, the undersigned issued an Order denying the Motion for Summary Decision. While there is no dispute that the hair analysis evidence is not a chemical test in compliance with DOT regulations in 49 CFR Part 40, that fact does not preclude the Coast Guard from presenting evidence that such a test is sufficiently reliable and can be considered as evidence of use of dangerous drugs. The Order issued by the Court resolving that motion remains the ruling of the Court on that issue.[1] Respondent has also attempted to raise some issues on whether Marathon Petroleum Company, LLC somehow violated its own policy in regard to the evidence of Respondent's positive hair test. As ruled prior to the hearing, the exclusionary rule does not apply to these proceedings. See Appeals Decision 2625 (ROBERTSON) (2002); Appeals Decision 2135 (FOSSANI) (1978). Additionally, whether Respondent may seek some sort of legal action against his former employer is a private matter and attempting to use the testimony of Coast Guard employees engaged in public service for private actions concerns is limited by law and regulation and is not relevant to these proceedings. 6 CFR 5.44; United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1952); In Re Boeh, 23 F.3d 761(9th Cir. 1994). Accordingly, the Court rejected Respondent's effort to call the investigating officer for testimony unrelated to the matters required to resolve this matter.

Upon a Motion filed by the Coast Guard and agreed to by Respondent, the hearing was continued from the originally scheduled date of August 3, 2010 and took place in Charleston, West Virginia on October 21, 2010. The proceeding was conducted in accordance with the

[1] Although the court finds hair testing admissible it is not a test conducted in accordance with 49 CFR Part 40, therefore the presumption contained in 46 CFR 16.201 does not apply in this matter.

Administrative Procedure Act, as amended and codified at 5 U.S.C. § 551-59 and Coast Guard procedural regulations located at 33 CFR Part 20. Lieutenant Adam Cooley and Gary Ball, Esq., represented the Coast Guard. Respondent appeared at the hearing and was represented by Todd Powers, Esq. Three (3) witnesses testified on behalf of the Coast Guard and three (3) witness, including Respondent himself, testified on behalf of Respondent at the hearing. Testimony of a fourth witness for Respondent was provided by later deposition. (Resp. Ex. K).

Prior to the hearing the Coast Guard provided notice of eight (8) Exhibits (CG Ex.) in discovery. At the hearing, all eight (8) exhibits were offered and entered into evidence. Respondent provided notice of ten (10) exhibits during discovery. At the hearing Respondent's Exhibits (Resp. Ex.) A thru J were offered and admitted into evidence.[2] As addressed in a post-hearing Order issued on November 4, 2010, it was noted that Resp. Ex. G consisted of only a cover page indicating, "[d]ocuments necessary for rebuttal or impeachment." Since no documents were presented for rebuttal or impeachment, the parties agreed that Resp. Ex. G would be withdrawn and not entered into evidence. During the hearing Respondent requested that official notice be taken of the Federal Register excerpt entered as Resp. Ex. J and that request was granted. (Tr. at 165-167, 197). Additionally, the recent revision to Procedures for Transportation Workplace Drug and Alcohol Testing Program, as published at 75 Fed Reg. 49850 (Aug. 30, 2010), was identified as a legal reference, discussed by the undersigned and was entered into the record as Court Exhibit I. (Tr. at 197-99, 254). The parties were invited to consider this reference and if desired address it and any other legal references regarding drug testing in their post hearing briefs.

[2] These exhibits were originally marked as Respondent's Exhibits 1 thru 10, but during the hearing were remarked as Respondent's Exhibits A thru J. The Coast Guard's electronic docketing system (MISLE), requires that Coast Guard Exhibits be marked numerically and respondent exhibits be marked alphabetically. (See Attachment A)

Although the hearing had been scheduled well in advance, both the Coast Guard and Respondent had expert witnesses that were unavailable to testify on the scheduled date and time for the hearing. In order to obtain their testimony, the parties agreed that depositions could be conducted after the hearing and the transcripts of those depositions would be entered into the record. On November 22, 2010, Respondent filed a copy of the deposition transcript of their expert witness, Alfred Staubus, Ph.D. The deposition transcript is entered into the record as Respondent Exhibit K. The Coast Guard decided against conducting a deposition of their additional expert witness, Dr. Thomas Cairns, and instead chose to rely on testimony already presented at the hearing. The Coast Guard also submitted a Motion on November 22, 2010 seeking to have certain matters that are published in the Federal Register regarding drug testing procedures recognized as part of the official record and have the Court take official notice of these matters. As noted in the Motion some of these matters were presented by Respondent at the hearing. Respondent submitted a reply indicating no objection to the Coast Guard Motion therefore the request for official notice is **GRANTED.** 33 CFR 20.806. Specifically, the Court takes official notice of (1) Proposed Revisions to Mandatory Testing Guidelines for Federal Workplace Drug Testing Programs, 69 Fed. Reg. 19673-19732 (Apr. 13, 2004); (2) Mandatory Guidelines for Federal Workplaces Drug Testing Programs, 73 Fed. Reg. 71858-71907 (Nov. 25, 2008); and (3) Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 75 Fed. Reg. 49850-49864 (Aug. 16, 2010).

On December 15, 2010, the Coast Guard submitted a post hearing brief. This post hearing brief contained enumerated Proposed Findings of Fact and Conclusions of Law. Rulings on the proposed findings and conclusions are found in Attachment B. Also on December 14, 2010, Respondent filed a post hearing brief and separate filing of enumerated

Proposed Findings of Fact and Conclusions of Law. The proposed findings and conclusions have been ruled upon and are listed in Attachment B.

After careful review of the facts and applicable law in this case, the undersigned finds the Coast Guard did not present sufficient evidence to meet the burden of proof of a preponderance of reliable and credible evidence, of the allegations contained in the Complaint.

II. FINDINGS OF FACT

The Findings of Fact are based on documentary evidence, witness testimony, and the entire record as a whole.

1. Respondent holds a current merchant mariner license that was issued on January 17, 2008 and expires on January 17, 2013. (CG Ex. 1).
2. On January 27, 2010, Respondent was an employee of Marathon Petroleum Company, LLC. (Marathon Petroleum). (Tr. at 233-234).
3. On January 27, 2010, Marathon Petroleum had more than one random drug testing program. (Tr. at 90-91). One program was intended to comply with the Coast Guard requirements in 46 CFR Part 16. (Id.). A separate company-administered program used hair testing to determine whether employees were using illicit drugs. (Id.).
4. On January 27, 2010, Respondent submitted a hair specimen for chemical analysis as part of Marathon Petroleum's employer-mandated non-DOT drug-testing program. (Tr. at 4; CG Ex. 5; Answer.).
5. The hair specimen testing was conducted by Psychemedics Corporation. (Id.).
6. The initial hair analysis was tested by both Radioimmunoassay (RIA) and Gas Chromatography/Mass Spectrometry/Mass Spectrometry (GC/MS/MS). (CG Ex. 7 at 3).

7. The results of the January 27, 2010 initial RIA test indicated the sample to be presumptively positive for Marijuana. (CG Ex. 7 at 3).
8. The results of the January 27, 2010 initial GC/MS/MS test confirmed the presence of marijuana metabolite (Carboxy THC) in Respondent's hair at a level of 1.8 picograms (pg) per 10 milligrams (mg). (Tr. at 64; CG Ex. 7 at 3).
9. Psychemedics Corporation's cutoff level for the presence of marijuana metabolite during GC/MS/MS testing is 1 pg/10mg. (CG Ex. 7 at 4). Any results at or above this level are considered to be "positive" for ingestion of Marijuana. (Id.).
10. On February 5, 2010, Respondent submitted a hair sample as part of a follow-up test to confirm or refute the results of the January 27th test. (Tr. at 73-75; CG Ex. 3 & 5). This testing was conducted by using GC/MS/MS. (CG Ex. 7 at 3).
11. The follow-up test results indicated the presence of marijuana metabolite (Carboxy TCH) in Respondent's hair to be at a level of 1.6 pg/10 mg of hair. (Tr. at 73-74; CG Ex. 3 and 5).
12. On May 7, 2010, Respondent submitted a hair sample as part of a drug test for Omega Laboratories. (Resp. Ex. D). This hair analyses resulted in a negative result, indicating that none of the drugs tested, to include THC metabolite, were detected at a concentration greater than their listed cutoff levels. (Id.).
13. Omega Laboratories uses a confirmation cut off of 3 pg/10mg of hair for THC metabolite testing. (Tr. at 170-171; Resp. Ex. K at 14-16).
14. On April 13, 2004 the Substance Abuse and Mental Health Services Administration (SAMSHA) in the Department of Health and Human Services (HHS) proposed revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs to include hair

and other types of specimen testing but the alternative types of testing have not been approved. 69 Fed. Reg. 19673.

15. On August 16, 2010 the Department of Transportation (DOT) amended some of its drug testing procedures but indicated that since the Department of Health and Human Services had not yet approved any specimen testing except urine, DOT would not consider alternative specimens at this time. 75 Fed. Reg. 49852.
16. Although recommended standards were proposed in the Federal Register there are currently no approved Federal standards for hair testing. (Tr. at 126-127; 158, 167, 171).

III. DISCUSSION

a. Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). The Coast Guard has jurisdictional authority to suspend or revoke a mariner's credentials if the mariner is shown to be a user of, or addicted to, a dangerous drug. 46 U.S.C. § 7704(c). Marijuana is a "dangerous drug" as contemplated by 46 U.S.C § 7704 (c). See 46 U.S.C. 2101(8a). In this case, Respondent's Answer contended the Coast Guard lacked jurisdiction since a DOT approved drug test was not conducted. However, as stated by Respondent's counsel during the hearing, Respondent is no longer contesting the jurisdictional allegations and did not dispute that he is the holder of a Merchant Marine Credential. (Tr. at 9). Therefore, in accordance with 46 U.S.C. § 7704(c), if Respondent is found to be a user of or addicted to marijuana, the Coast Guard has jurisdictional authority to revoke or suspend Respondent's Coast Guard issued merchant mariner credentials.

b. Allegations

i. Burden of Proof

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701. To assist in this goal, Coast Guard Administrative Law Judges (ALJs) have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. Ch. 77. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 CFR § 20.701-702; see also Appeal Decision 2485 (YATES) (1989). In this case, the Coast Guard seeks to prove, by a preponderance of the evidence, that Respondent is the user of or is addicted to the use of dangerous drugs.

In the single violation asserted, the Coast Guard alleged Respondent submitted to an employer mandated drug test, he subsequently tested positive for marijuana, and based upon those results, the Coast Guard asserts it has been shown he is the user of dangerous drugs. The minimum elements necessary to prove use of or addition to dangerous drugs, under 46 C.F.R. § 5.35, requires the Coast Guard prove by a preponderance of the evidence:

(1) The respondent is a holder of a merchant marine document or license, and
(2) The respondent was the user of or addicted to a dangerous drug.

In the typical case involving a DOT approved chemical test alleging use of dangerous drugs, the Coast Guard presents evidence of a positive urinalysis test. In a drug case based solely upon positive urinalysis evidence, "a prima facie case of a dangerous drug is shown when three elements are proved: (1) that the party is tested for use of a dangerous drug; (2) that test results shows that the party tested positive for the presence of a dangerous drug; and (3) that the drug test is conducted in accordance with the procedures set forth in 49 C.F.R. Part 40." Appeal Decision 2657 (BARNETT) (2006). In this matter, there is no dispute the drug test performed

was by hair analysis and was not a urinalysis drug test conducted in accordance with the DOT regulations set forth in 49 C.F.R. Part 40. As such, a prima facie case of dangerous drug use cannot be established using the presumption of 46 CFR 16.201 and as discussed in Appeals Decision BARNETT because it only applies to tests conducted in accordance with 49 CFR Part 40.

However, as explained in the July 1, 2010 Order Denying Respondent's Motion for Summary Decision, the fact that this matter is not based on DOT approved urinalysis testing does not eliminate the ability of the Coast Guard to prove Respondent is a user of dangerous drugs by other means. Drug use can be detected by a variety of "chemical tests," to include tests that analyze an "individual's breath, blood, urine saliva, bodily fluids, or tissues for evidence dangerous drug or alcohol use." See 46 C.F.R. § 16.105. Nothing in the regulations prohibits employers from using other non-DOT tests for their own purposes. If the Coast Guard can prove the test used for hair specimen testing was sufficiently reliable, its results could be considered as evidence of use of dangerous drugs. At the same time, Respondent is permitted to present evidence that he is not a drug user and/or that the test relied upon for the Coast Guard's case is unreliable or insufficient.

ii. Coast Guard's Evidence

In this case, Responded submitted a hair specimen on January 27, 2010, as part of a random drug test for his employer Marathon Petroleum Company, LLC. (Marathon Petroleum). At that time, Marathon Petroleum had two random drug testing programs. (Tr. at 90-91). One program was intended to comply with DOT drug testing requirements founding in 46 CFR Part 16. (Id.). Although 46 CFR 16.105 defines the term "chemical test" to include scientifically recognized tests which analyzes an individual's breath, blood, urine, saliva, bodily fluids, or

tissues for evidence of dangerous drug or alcohol use, the only chemical testing for dangerous drugs currently approved under the DOT regulations in 49 CFR Part 40 is by urinalysis. A company-administered program, which is separate from the DOT mandated drug testing program, used hair testing to determine whether employees were using illicit drugs. (Id.). On the date in question, Respondent submitted a hair specimen for chemical analysis as part of Marathon Petroleum's employer-mandated non-DOT drug-testing program. (CG Ex. 4, 5).

On January 27, 2010, a registered nurse, employed by Marathon Petroleum, collected a sample of Respondent's chest hair to be used for the drug analysis. (Tr. at 31-37; CG Ex. 2, 4). The nurse had been trained in hair specimen collection and had collected hundreds of hair samples since the hair testing program began in 1996. (Id.). She followed the collection procedures and completed the chain-of-custody documents upon taking the sample. (Id.). The nurse sealed the hair sample in a clinical pack and mailed it via Federal Express to Psychemedics Corporation for testing. (Tr. at 37-39.).

Psychemedics Corporation conducted an initial analysis of Respondent's hair sample by using both Radioimmunoassay (RIA) and Gas Chromatography/Mass Spectrometry/Mass Spectrometry (GC/MS/MS). (CG Ex. 7 at 3). Psychemedics Corporation has received several certifications and professional endorsements attesting to the accuracy of these tests. (Tr. at 155-57). The RIA test indicated the sample to be presumptively positive for Marijuana. (Id.). The GC/MS/MS test confirmed the presence of marijuana metabolite (Carboxy THC) in Respondent's hair to be at a level of 1.8 picograms (pg) per 10 milligrams (mg). (Tr. at 64, 149; CG Ex. 7 at 3). Psychemedics Corporation's cutoff level for the presence of marijuana metabolite during GC/MS/MS testing is 1 pg/10mg. (CG Ex. 7 at 4). Any results at or above the cutoff level are considered "positive" for ingestion of Marijuana. (Id.). Psychemedics

Corporation laboratory director[3] testified that it was his opinion that a result of 1.8 pg/10mg could only have resulted from the use of marijuana many times over the period of several months (Tr. at 150- 151, 169). Dr. Schaffer testified that the difference between Psychemedics Corporation's cutoff level and Omega Lab's cutoff level was apparently due to Psychemedics having better or more accurate equipment. (Tr. at 162, 171-172).

Following the results of a positive test, Marathon Corporation's chief medical officer, Dr. Brian Linder, reviewed the documentation and contacted Respondent. In this capacity, Dr. Linder acted as a Medical Review Officer (MRO) by reviewing the integrity of the drug testing protocols. (Tr. at 68-74, 82). As an MRO, Dr. Linder ensured the chain-of-custody for the drug testing process was intact. (Tr. at 68-70). He then contacted Respondent, informed him of the positive drug test and attempted to determine if there was a legitimate reason for the positive test. (Id.). Dr. Linder determined no legitimate medical explanation existed for the test and he reported the results back to management. (Id.). At that time, Respondent requested a follow-up test be conducted. On February 5, 2010, Respondent submitted a second hair sample as part of a follow-up test to confirm or refute the results of the January 27th test. (Tr. at 74-75; CG Ex. 3 & 5). This testing was conducted by using GC/MS/MS. (CG Ex. 7 at 3). The follow-up test results indicated the presence of marijuana metabolite (Carboxy TCH) in Respondent's hair to be at a level of 1.6pg/10mg of hair. (Tr. at 73-74; CG Ex. 3 and 5). Dr. Linder is confident the test was conducted properly and determined the hair sample was positive for the presence of marijuana metabolite. (Tr. at 73-76). Relying upon Dr. Linder's determination and the evidence presented above, the Coast Guard initiated the Complaint asserting Respondent had used dangerous drugs.

[3] Michael Schaeffer, Ph.D. (Doctorate in Toxicology and Pharmacology). (Tr. at 138).

c. Respondent's Rebuttal

Respondent rebuts the Coast Guards evidence on several fronts. First, Respondent denied using marijuana and argues he is a person of good character who does not use marijuana, but has been around people who use marijuana and experienced passive inhalation. Second, Respondent contends the Psychemedics Corporation test results were inaccurate because the standard of controls were outside the accepted ranges. Third, Respondent argues that because of a lack of scientific study, the hair analysis used to determine a positive result in this case is not reliable; specifically because, no scientific studies have been used to develop a generally accepted standard cutoff level.

i. Character Evidence and Respondent Testimony

During the hearing, Respondent introduced the testimony of two (2) witnesses who testified about Respondent's character. Mr. Allan Hall had known Respondent for approximately twenty (20) years and had employed Respondent for eight (8) years. (Tr. at 206-07). Mr. David Smith has been acquainted with Respondent for more than thirty (30) years and worked with Respondent on several occasions. (Tr. at 213). Both witnesses testified to the fact that Respondent is a man of good character, that they had not known him to do drugs, and that he was a reliable and competent mariner. (Tr. at 213-14). While these witnesses do not claim to be privy to all of Respondent's actions in his personal life, they do help establish that Respondent has served as a reasonably competent mariner throughout his career.

Respondent also testified about his own character during the hearing and stated he has never used marijuana since obtaining his license in 1978. (Tr. at 230). Respondent did testify he has been around people who have used marijuana. (Tr. at 230-31). Specifically, he testified that he took a vacation with some friends prior to January 2010 and that while he was with those

friends in an enclosed car, they smoked marijuana. (Id.). Respondent also testified his wife had been a user of marijuana and smoked around Respondent. (Tr. at 230-31, 248). Respondent testified that while he had been around people that used marijuana, he never used himself. (Id.). Respondent's testimony is self serving and of limited credibility in blaming the positive test results on his wife and friends who smoked marijuana and allegedly exposed him to passive inhalation. However, the court does not find his testimony to constitute an admission of marijuana use. Whether his admission that he has been associating with friends and family that use dangerous drugs might or might not constitute a basis for action by a private employer is not relevant to these proceedings. The admission of association might be considered to impact the credibility of his denial of use of marijuana, but under the applicable law and regulations for these proceedings, an admission of association with others that use dangerous drugs is not enough to prove use by an individual. The court does not consider Respondent's assertion he never used marijuana as persuasive. However, Respondent does not bear the burden to disprove he was a user. Instead, the regulations place the burden of proof on the Coast Guard. 33 CFR 20.702.

ii. Accuracy of Tests

In keeping with the agreement of the parties the deposition testimony by Respondent's Expert witness, Alfred Staubus, Ph.D. is admitted to the Record as Exhibit K. References to his testimony will be identified as Resp. Ex. K at "page number." Alfred Staubus, was presented as an expert with a Doctor of Pharmacy degree and experienced in forensic toxicology. Dr. Staubus testified regarding problems in the testing process he identified that may have affected the reliability of the test results performed by Psychemedics Corporation. (Resp. Ex. K at 19). Specifically, Dr. Staubus' opinion was that some of the controls were outside the accepted ranges

and this indicates a quality control problem with the samples. (Id. at 20). Dr. Staubus testified there have been no governmental standards set for the actions laboratories should take if they determine a standard is out of the accepted range in regard to hair testing. (Id. at 20-22). Dr. Staubus also questions the reliability of the methodology and test results from the February 2010 follow-up test. (Resp. Ex. K at 27). Based upon his review of materials in this matter, Dr. Staubus' opinion was that the reported test results were not reliable enough to demonstrate intentional use of marijuana. (Resp. Ex. K at 16-17). In contrast to Dr. Staubus' testimony, Dr. Schaffer testified on behalf of the Coast Guard and attested to the accuracy of the tests. Dr. Schaffer testified to the fact that while a test calibration might be out of standard, it is appropriate to re-inject the standard and retest. (Tr. at 175-78). Upon reviewing the lab litigation package and reviewing the issues raised by Respondent, Dr. Schaffer testified he was confident of the validity of the results. (Tr. at 192-93).

The subsequent and previous negative tests presented by Respondent do not negate the validity of the previous hair test results by Psychemedics Corporation. Neither party has disputed that over a period of time the human body will eventually eliminate substances and test results later in time and of different means (head hair versus chest hair) can result in different results. Tr. at 105, 172-173; E.g. Appeals Decision 2635 (SINCLAIR) (2002). It may be of some value in regard to the credibility of Respondent's assertions of non-use of dangerous drugs. Respondent's evidence contained in Exhibits B, C, D, E and I have been considered but are of limited value in this matter because the tests were conducted months after the initial test in this matter.

While mentioned in Respondent's post-hearing brief, the Court finds that the general issue of scientific validity of hair testing is not the critical question in this case. Instead, the

sufficiency of the evidence in regard to an appropriate cutoff level is the proper focus. In this case, two experts provide two differing opinions. Dr. Staubus expresses some concerns over the accuracy of the tests used by Psychemedics Corporation and Dr. Schaffer testified he is confident of the reliability of the results. However, the professionalism and accreditations of Psychemedics Corporation has not been effectively challenged in this matter. Evidence has been introduced attesting to Psychemedics Corporation's certifications and professional endorsements. (Tr. at 155-57). Three (3) tests, an initial RIA and GC/MS/MS conducted on the January 2010 sample and a GC/MS/MS conducted on the February 2010 sample, where conducted by Psychemedics Corporation on Respondent's hair samples. Each test came back positive for containing the marijuana metabolite (THC). I do not find any of the testimony by Dr. Staubus or anything else presented by Respondent to show each of these three (3) tests were inaccurate in regards to finding the presence of the marijuana metabolite in Respondent's hair samples at the levels demonstrated in the documents presented. I find that hair testing is an appropriate and scientifically supported method of testing and the evidence regarding hair testing for dangerous drug use is admissible in these proceedings. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999); United States v. Bush, 47 MJ 305 (U.S. CAAF 1997), cert. denied 118 S.Ct. 1048 (1998). The evidence of hair testing and the testimony of each of the experts presented by the parties has been fully considered. It is noted that Dr. Staubus acknowledged that the science of GC/MS testing was solid. (Resp. Ex. K at 40-41). However, the Coast Guard's reliance on Appeals Decision Shakespeare 2584 (1997) and any other authority that relies on the presumption permitted for urinalysis testing is of no significant value in this matter where the presumption is not applicable.

iii. Cutoff Levels

Respondent's hair sample was tested by Psychemedics Corporation in keeping with that company's protocols and standards. When testing for the marijuana metabolite (Carboxy THC), Psychemedics Corporation has a cutoff level of 1pg/10mg. Since Respondent's initial hair sample was found to have marijuana metabolite in the amount of 1.8pg/10mg, Respondent's sample was determined to be positive. Respondent asserts that Psychemedics' cutoff level is too low and believes a level is 3pg/10mg is more appropriate so as to exclude passive exposure. On cross examination by Respondent, Dr. Schaffer indicated that Omega Laboratories uses a cutoff level of 3pg/10mg when testing for the marijuana metabolite but indicated that Psychemedics Corporation has more advanced equipment to support their cutoff level and that Omega was in the process of obtaining similar equipment which would permit them to measure at the levels now used by Psychemedics. (Tr. at 165-172). It was not disputed if Respondent's initial hair sample had been tested by Omega Laboratories with a resulting metabolite level of 1.8pg/10mg, Omega Laboratories would have found Respondent's sample negative because of their higher cutoff level. (Tr. at 170-71). Neither party called a witness from Omega Laboratories to provide any additional information regarding their testing process. While private entities may take action based on their own company policy and guidelines, Federal Government action is limited by applicable law and regulations. Respondent contends that there is insufficient evidence to support the cutoff level used by Psychemedics Corporation so as to prove use of a dangerous drug under the procedures and standards contained in 33 CFR Part 20 and 46 CFR Part 5.

Unlike DOT urinalysis drug tests, which have specific published cutoff levels, no standard cutoff levels have yet been approved for hair analysis testing. See 49 CFR § 40.83-40.87; (Tr. at 99-100; 171; Resp. Ex. K at 11-12). One of the reasons for developing proper cutoff levels is to ensure passive inhalation of dangerous drugs do not result in a positive test.

(Id.). Coast Guard witnesses Dr. Linder and Dr. Schaffer both testified that passive inhalation could not have resulted in Respondent's hair specimens testing positive. (Tr. at 71; 115-17, 169). On cross-examination, Dr. Linder admitted he was unaware of any scientific publications supporting the 1pg/10mg cutoff level and he relied upon Psychemedics Corporation in setting an appropriate cutoff level. (Tr. at 116-18). Dr. Linder was unsure how Psychemedics Corporation set their cutoff level. (Tr. at 118-19). Dr. Schaffer, Psychemedics Corporation's laboratory Director, testified that the 1pg/10mg cutoff level had been developed fifteen (15) to twenty (20) years ago. (Tr. at 150). While Dr. Schaffer was confident this was a sufficient cutoff level he did not explain how it was developed. Dr Schaeffer did not identify any particular method of developing the cutoff level and he also could not reference any scientific studies or peer reviewed articles to support his conclusion. (Tr. at 169-72).

In support of the Psychemedics Corporation's 1 pg/10mg marijuana metabolite cutoff level, the Coast Guard cites to the 2004 Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs. See 69 Fed. Reg. 19673 (Apr. 13, 2004). Within those proposed revisions, the use of hair sample drug testing was recommended and a cutoff level of 1pg/mg was suggested for marijuana metabolites, which is lower than the 1pg/10mg in use by Psychemedics Corporation. Id. at 19697. However, the Guidelines citied by the Coast Guard have only been "proposed." On November 25, 2008, the current final version of Mandatory Guidelines for Federal Workplace Drug Testing Programs (Guidelines) was issued. 73 Fed. Reg. 71858 (Nov. 25, 2008). Within the summary of that final action, the Substance Abuse and Mental Health Services Administration (SAMHSA) said "[w]ith regards to the use of alternative specimens including hair . . . in Federal Workplace Drug Testing Programs, significant issues have been raised by Federal agencies during the review process which require further

examination, and may require additional study and analysis." Id. SAMHSA indicated that scientific, legal, and public policy information for hair analysis was not as complete as with urine testing. Id. While advancements had been made by industry, concerns including testing accuracy were present, and further testing of hair and other alternative specimens was needed prior to implementation. Id. This position was further stated in the DOT's 2010 Procedures for Transportation Workplace Drug and Alcohol Testing Programs. See 75 Fed. Reg. 49850 (Aug. 16, 2010). In that amendment to DOT drug testing procedures, DOT stated that some people would like DOT to consider alternative specimens when testing for drugs, such as hair analysis. Id. at 49852. However, DOT reiterated the concerns found by SAMHSA in their 2008 Guidelines and DOT determined they could not yet adopt the use of alternative specimens such as hair testing for DOT tests for dangerous drug use. Id.

Highlighting what was stated in the 2008 Guidelines issued by SAMHSA, Respondent's expert witness Dr. Alfred Staubus testified that few scientific studies have been conducted establishing standards for drug hair testing. (Resp. Ex. K. at 13-14). Dr. Staubus stated an opinion that until sufficient studies have been conducted, "we cannot establish with any degree of reliability what the cutoff level should be." (Id.). He also testified that chest hair grows at a much slower rate than head hair and therefore you would expect higher drug concentrations in chest hair. (Id. at 16-17). So, in the instant case, considering that Respondent's level was relatively low (below the Omega cutoff level and 60 to 80% above the Psychemedics cutoff level) and considering it was chest hair, Dr. Staubus testified in his opinion the results are not sufficient to show intentional use versus passive exposure. (Id. at 14-19). His opinion was that since neither Psychemedics Corporation, nor Omega Laboratories, or anyone else has a cutoff

developed from actual human data, we do not know what the exact cutoff levels should be. (Resp. Ex. K at 16-19).

d. Evidence Regarding What Cutoff is Appropriate to Prove Intentional Drug Use

In this case, the Coast Guard's only evidence of dangerous drug use is by hair testing, a non-DOT chemical test. As such, the Coast Guard bears the burden of proof to show there is a scientific and supportable basis for the evidence to support a finding of drug use. This includes ensuring the test excludes the potential for false positives. While I do not find Respondent's testimony blaming his wife and friends for passive exposure to be persuasive so as to exclude dangerous drug use by Respondent, his statements of association with others who used marijuana is evidence of poor judgment but does not constitute proof of use of a dangerous drug. It is the Coast Guard's burden to prove dangerous drug use.

The evidence presented to the Court in this matter does not present a sufficient scientific basis to support the Coast Guard's proposed cutoff level of 1pg/10mg used by Psychemedics as more appropriate or convincing from a scientific basis than the Respondent's proposed cutoff level of 3pg/10mg used by Omega. There was no dispute that for some reason Omega Laboratory uses a 3pg/10mg standard and if that standard were used Respondent's test would be considered negative. The difference may be that Omega Lab's equipment is not as good as Psychemedics equipment as was raised by Dr. Schaffer's testimony. However, there was no specific evidence presented on how the Psychemedics Corporation 1 pg/10mg cutoff level was determined and why it should be considered as sufficient proof of intentional use of marijuana. While there might exist a sufficient scientific basis for either one of the cutoff standards, I am limited to rendering a decision based on the evidence presented in the record. Appeal Decision (SHAKESPEARE) 2584 (1997). The evidence in the record does not provide a sufficient basis

to conclude that the Coast Guard's proposed cutoff level of 1pg/10mg is the proper cutoff level instead of Respondent's proposed cutoff level of 3pg/10mg. Whatever standard is adopted should be the equivalent of the urinalysis standard which was developed to ensure that the level for a confirmed positive was such that it provides a clear standard for proof of intentional use of a dangerous drug.

Coast Guard experts at least implied that Omega used less accurate equipment or process but no evidence was presented through a witness from Omega or elsewhere that fully explained the differences and no specific standard has been adopted by SAMSHA. Without having sufficient scientific proof of a cutoff level that demonstrates intentional dangerous drug use this case essentially results in a tie with neither standard supported by sufficient scientific explanation of its validity. In Coast Guard Suspension and Revocation proceedings the Coast Guard bears the burden of proof in keeping with 33 CFR 20.702. The Court is constrained by the limits of the evidence in the record and the requirements of the regulations for the Coast Guard to bear the burden of proof of a violation. This decision is limited to the unique facts and limited circumstances of this case. I do not find sufficient proof of the 1 picogram standard as being valid to demonstrate use of marijuana instead of the 3 picogram standard that is presented as an alternative standard in the record in this case. The Coast Guard's case seeking revocation can only be proven if the record is supported by a legally sufficient basis. Cf. Appeal Decision DESIMONE (2683) (2009). I find the evidence presented shows that there are two available cutoff standards and there is no clear basis to approve the Psychemedics cutoff instead of the Omega cutoff. Since use of the Omega cutoff would result in a negative test result indicating an insufficient level to prove intentional use of marijuana the Court finds that the violation alleged was not proved. This ruling does not preclude the use of hair analysis testing in Coast Guard

suspension and revocation cases. To the contrary, the use of hair analysis testing was considered, just as all relevant evidence can be considered and weighed. However, the Coast Guard did not meet the burden of proof, by providing sufficient reliable and persuasive evidence, that Respondent is a user of dangerous drugs.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all times relevant to this proceeding, Respondent was the holder of a Coast Guard issued merchant mariner license.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. §§ 7703-7704, 46 CFR Part 5, and 33 CFR Part 20.
3. Sufficient evidence was **NOT** presented to establish that the cutoff level used by Psychemedics Corp., 1pg/10mg, was the appropriate standard to prove intentional use of a dangerous drug (marijuana) and excluded the possibility of passive ingestion instead of the 3pg/10mg standard used by Omega Lab which would result in a negative test.
4. The Coast Guard has **NOT PROVED**, by a preponderance of reliable and credible evidence, the allegations contained in the Complaint.

WHEREFORE,

VI. ORDER

IT IS HEREBY ORDERED that the charge against Respondent is **DISMISSED.**

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 C).

Michael J Devine
US Coast Guard Administrative Law Judge

Date: March 11, 2011

ATTACHMENT A - WITNESS AND EXHIBIT LISTS

WITNESS LISTS

Coast Guard Witnesses

CG Witness 1	Sheila K. Webb
CG Witness 2	Brian Linder, M.D.
CG Witness 3	Michael Schaffer, Ph.D.

Respondent Witnesses

Resp. Witness 1	Allan P. Hall
Resp. Witness 2	David K. Smith
Resp. Witness 3	Clarence E. Lockwood
Resp. Witness 4	Alfred Staubus, Ph.D. (by deposition Resp. Ex. K)

EXHIBIT LIST

Coast Guard Exhibits

CG Ex. 1	Copy of Clarence Eugene Lockwood's Merchant Mariner Credential
CG Ex. 2	Collector's Training Certificate
CG Ex. 3	Collector's Course Material
CG Ex. 4	Custody & Control Form dated 27 JAN 2010
CG Ex. 5	Custody & Control Form dated 05 Feb 2010
CG Ex. 6	Collector's Affidavit
CG Ex. 7	Lab Data Package
CG Ex. 8	Senior Scientific Advisor's Curriculum Vitae

Official Notice (33 CFR 20.806) is taken of:

(1) Proposed Revisions to Mandatory Testing Guidelines for Federal Workplace Drug Testing Programs, 69 Fed. Reg. 19673-19732 (Apr. 13, 2004)

(2) Mandatory Guidelines for Federal Workplaces Drug Testing Programs, 73 Fed. Reg. 71858-71907 (Nov. 25, 2008)

(3) Procedures for Transportation Workplace Drug and Alcohol Testing Programs, 75 Fed. Reg. 49850-49864 (Aug. 16, 2010).

Respondent Exhibits

Resp. Ex. A	Curriculum Vitae of Alfred E. Staubus, Pharm. D., Ph.D.
Resp. Ex. B	Negative DOT urine test result from Drug Testing Centers of America, dated 5/14/10 (date of specimen collection 5/13/10)
Resp. Ex. C	Negative DOT test results from Florida Drug Screening dated 5/11/10 (date of specimen collection 5/7/10)
Resp. Ex. D	Negative hair test results from OMEGA Laboratories dated 5/10/10 (date of specimen collection 5/7/10).
Resp. Ex. E	Negative DOT test result from Physical Exams, Inc. dated 3/22/10 (date of specimen collection 3/18/10)
Resp. Ex. F	Marine Employer Drug Testing Guidance published by the Coast Guard
Resp. Ex. G	Documents for Rebuttal or Impeachment (Withdrawn)
Resp. Ex. H	Marathon Drug & Alcohol Misuse Prevention Policy
Resp. Ex. I	DOT drug test results for tests performed by Marathon during Respondent's employment
Resp. Ex. J	Mandatory Guidelines for Federal Workplace Drug Testing Programs, 73 Fed. Reg. 71858 (Nov. 25, 2008).
Resp. Ex. K	Deposition transcript of testimony by Alfred Staubus, Ph.D.

Court Exhibit

Court Ex. I	Procedures for Transportation Workplace Drug and Alcohol Testing Program, as published at 75 Fed Reg. 49,850 (Aug. 30, 2010)

ATTACHMENT B - PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COAST GUARD – PROPOSED FINDINGS OF FACT

1. Respondent's current license No. 1209959 was issued on January 17, 2008 and expires on January 17, 2013. At all times relevant to this proceeding, Respondent was the holder of a Coast Guard-issued license. CG-01.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. On January 27, 2010, Respondent was an employee of Marathon Petroleum Company, LLC.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

3. At the time of the testing involved in this case, Marathon Oil Company had more than one random drug testing program. One program was intended to comply with the Coast Guard requirements in 46 CFR Part 16. A separate company-administered program used hair testing to determine whether employees were using illicit drugs. Hearing Transcript (TR) at 90-91.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

4. On January 27, 2010, Respondent submitted a hair specimen for chemical analysis as part of the company's employer-mandated non-DOT drug-testing program. CG-07 at 4.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

5. The results of the January 27, 2010 test indicated the presence of marijuana metabolite (Carboxy THC) in Respondent's hair at a level of 1.8 picograms (pg) per 10 milligrams (mg). CG-07 at 4.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

6. Psychemedics Corporation, which performed the drug test analysis on Respondent's samples, classifies a sample with the presence of marijuana metabolite at a level at or above 1.0 pg/ 10 mg to be a "positive" sample.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

7. On February 5, 2010, Respondent submitted a hair sample as part of a "safety net" test to confirm or refute the results of the January 27th test.

   ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

8. The safety net test results confirmed the presence of the marijuana metabolite at a level above the limit of detection (LOD). The actual level of marijuana metabolite in Respondent's safety net sample was 1.6 pg/10mg. CG 07 at 3 & 5.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

9. Psychemedics Corporation's confirmation (GC/MS/MS) hair test for marijuana only tests for the presence of the marijuana metabolite. Detection of marijuana metabolite in a person's hair is produced when the donor's body (liver) metabolizes the parent compound into Carboxy THC and is an indication that the specimen donor has ingested marijuana. TR at 149-150; Staubus Deposition Transcript (Staubus TR) at 38.

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

10. The hair test conducted on the Respondent covered a period of time from 6-8 months prior to the test. TR at 103; 172.

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

11. At some point, during 6-8 months preceding the January 27, 2010 hair test, Respondent ingested marijuana. CG-07 at 3-5, TR at 149-150; Staubus TR at 38.

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Evidence was presented that Respondent ingested marijuana in some manner.

12. Presence of Carboxy THC in a hair specimen above the 1 pg/ 10 mg level is an indication that the specimen donor ingested marijuana by means other than passive exposure to marijuana smoke. TR at 71; 115-116; 169.

REJECTED, as provided in the Decision and Order.

COAST GUARD – PROPOSED CONCLUSIONS OF LAW

1. Marijuana is a "dangerous drug" as contemplated by 46 U.S.C § 7704 (c). See, e.g., Appeal Decision 2679 (DRESSER)

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. While the holder of a Coast Guard license, Respondent was the user of a dangerous drug (marijuana).

REJECTED, as provided in the Decision and Order.

RESPONDENT – PROPOSED FINDINGS OF FACT

1. Respondent, Clarence Eugene Lockwood ("Lockwood"), is a Merchant Marine Officer duly licensed as a Master of Towing Vessels upon Western Rivers (Mariner # 1209959). (U.S. Coast Guard Exhibits, Exhibit 1).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

2. Lockwood was employed as a licensed Merchant Marine Officer by Marathon Petroleum Company, LLC ("Marathon").

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

3. On January 27, 2010, Lockwood submitted a chest hair specimen as part of a random drug test initiated and conducted on behalf of his employer, Marathon. (U.S. Coast Guard Exhibits, Exhibit 4).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

4. On February 5, 2010, Lockwood again submitted a chest hair specimen as part of random drug test initiated and conducted on behalf of his employer, Marathon. (U.S. Coast Guard Exhibits, Exhibit 5).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

5. On March 30, 2010, the hair specimen drug test results reported by Psychemedics Corporation indicated "Positive for Marijuana." (U.S. Coast Guard Exhibits, Exhibit 7).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

6. Based upon Psychemedics Corporation's test results, Lockwood's employer, Marathon, informed him that he could resign or be terminated. (Transcript of Proceedings, October 21, 2010, pp. 234-235).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Any employment dispute between Respondent and Marathon is a private matter not relevant to this proceeding.

7. Psychemedics Corporation's Laboratory Data Package, dated March 30, 2010, indicating A Positive for Marijuana," fails to discuss or interpret the test results based upon passive versus active exposure to marijuana. (U.S. Coast Guard Exhibits, Exhibit 7).

   NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

8. Psychemedics Corporations' Laboratory Data Package, dated March 30, 2010, indicating "Positive for Marijuana," fails to offer standards or scientific analysis to explain why the test results indicate use of marijuana as opposed to passive exposure to marijuana. (U.S. Coast Guard Exhibits, Exhibit 7).]

   NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

9. Unbeknownst to Lockwood, and without any written or legal authorization or prompting, Marathon contacted the U.S. Coast Guard and transmitted the hair specimen drug test results of Psychemedics Corporation to the U.S. Coast Guard. (Transcript of Proceedings, October 21, 2010, p. 234).

   NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Any employment dispute between Respondent and Marathon is a private matter not relevant to this proceeding.

10. On March 18, 2010, May 7, 2010, and May 13, 2010, Lockwood submitted three different urine specimen for pre-employment drug tests requested. (Respondent's Exhibits, Exhibit B, Exhibit C, and Exhibit E).

    ACCEPTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

11. The results of the March 18, 2010, May 7, 2010, and May 13, 2010 urine specimen drug tests were all negative. (Respondent's Exhibits, Exhibit B, Exhibit C, and Exhibit E).

    ACCEPTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

12. On May 7, 2010, Lockwood submitted a hair specimen to Omega Laboratories for a 5 panel drug test. (Respondent's Exhibits, Exhibit D).

ACCEPTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. On May 10, 2010, the test results from the hair specimen submitted by Lockwood to Omega Laboratories were reported as negative. (Respondent's Exhibits, Exhibit D).

ACCEPTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

14. On April 16, 2010, the U. S. Coast Guard filed allegations of use of, or addiction to the use of a dangerous drug" against Lockwood pursuant to 46 United States Code ("U.S.C.") § 7704. (Complaint, filed April 16, 2010).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

15. On May 3, 2010, Lockwood answered the Complaint against him and denied all allegations of drug use. (Answer, filed May 3, 2010).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

16. Lockwood specifically testified that he was passively exposed to the marijuana by both his wife and friends who were active users of the drug. (Transcript of Proceedings, October 21, 2010, pp. 230-231, 245).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

RESPONDENT – PROPOSED CONCLUSIONS OF LAW

1. The failure to use Department of Transportation ("DOT") Chemical Testing standards as prescribed in 46 C.F.R. § 16.105 and 46 C.F.R. Part 40, precludes the presumption of use of a dangerous drug set forth in 46 C.F.R. § 16.201(b). (Transcript of Proceedings, October 21, 2010, pp. 222-223).

ACCEPTED IN PART, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

2. It is undisputed that hair specimen drug testing is not a scientifically accepted method of drug testing and is not authorized by the Department of Health and Human Services ("HHS"), the Department of Transportation ("DOT"), or the Substance Abuse and Mental Health Services Administration ("SAMHSA"). (Transcript of Proceedings, October 21, 2010, pp. 81-82, 157-158, 178).

ACCEPTED IN PART AND REJECTED IN PART, as provided in the Decision and Order HHS has considered but not approved a specific program for hair or other specimen testing. The Court rejects the proposed conclusion regarding hair testing. As provided in the Decision and Order the Court ruled that hair testing is a scientifically accepted method of drug testing.

3. The Coast Guard specifically does not accept hair specimen testing for drugs. (Coast Guard Publication: "Marine Employers Drug Testing Guidance", Respondent's Exhibit F, p. 46).

ACCEPTED IN PART AND REJECTED IN PART, as provided in the Decision and Order hair specimen testing is not considered to comply with DOT drug testing standards, but hair specimen testing is allowed to be considered to determine if there was use of dangerous drugs in S&R proceedings.

4. The only drug test accepted by the Coast Guard for compliance with 46 C.F.R. Part 16 is the 5-panel urine Department of Transportation test, both collected and analyzed in accordance with the procedures established in 49 C.F.R. Part 40. (Coast Guard Publication: "Marine Employers Drug Testing Guidance", Respondent's Exhibit F, p. 46).

ACCEPTED IN PART AND INCORPORATED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. Respondent Exhibit F is not a regulation. The Decision and Order is based on the evidence as a whole and the applicable law and regulations.

5. Drug test results based on a hair specimen, offered to refute evidence of drug use obtained by the Coast Guard, were specifically and categorically disallowed and rejected during a Merchant Mariner's License revocation hearing. (NTSB Order No. EM-183, (WILLIAMS), 1997 WL 780249, attached as Exhibit A to Respondent's Post-Hearing Brief).

NEITHER ACCEPTED NOR REJECTED, reference to other cases may be considered for whatever precedent or persuasive value they may have. However, other cases with facts different from the matter before the court may be of limited value. The weight of any evidence including testimony during the hearing is to be determined

by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

6. The Department of Health and Human Services, the Department of Transportation and the Coast Guard regulations all provide for drug testing only by way of urine specimens. (NTSB Order No. EM-183, (WILLIAMS), 1997 WL 780249 at *14, attached as Exhibit A to Respondent's Post-Hearing Brief).

ACCEPTED

7. No other tests, including those based on hair or DNA specimen, are authorized by any regulation. (NTSB Order No. EM-183, (WILLIAMS), 1997 WL 780249 at *14, attached as Exhibit A to Respondent's Post-Hearing Brief).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

8. Drug test results based on a hair specimen are not reliable evidence. (NTSB Order No. EM-183, (WILLIAMS), 1997 WL 780249 at *14, attached as Exhibit A to Respondent's Post-Hearing Brief).

REJECTED, As provided in the Decision and Order. Hair specimen analysis may be considered as reliable scientific evidence. However, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

9. Reports and studies on radioimmunoassay ("RIA") hair analysis for the presence of drug use have concluded that it is an unproven procedure unsupported by scientific literature or well-controlled studies and clinical trials. (NTSB Order No. EM-183, (WILLIAMS), 1997 WL 780249 at *14, attached as Exhibit A to Respondent's Post-Hearing Brief).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

10. Reports and studies point out serious problems with RIA hair analysis interpretation of results and the lack of generally accepted studies verifying the technology. (Appeal Decision (WILLIAMS), 1996 WL 33408496 at p. 5, attached as Exhibit B to Respondent's Post-Hearing Brief).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

11. Test results from hair specimen are unreliable in the scientific community. (Appeal Decision (SINCLAIR), 2002 WL 32061810 at p. 4, attached as Exhibit C to Respondent's Post-Hearing Brief).

REJECTED, As provided in the Decision and Order, hair specimen analysis may be considered as reliable scientific evidence. However, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

12. Hair testing, is not presently provided for by statute, and the DOT is specifically authorized to use only testing methods that have been approved by the Department of Health and Human Services, which, to date, includes only urine specimens. (Federal Register, Vol. 75, No. 157, p. 49852, August 16, 2010 (Rules and Regulations)).

ACCEPTED IN PART AND REJECTED IN PART, as provided in the Decision and Order. As provided in the Decision and Order other testing methods and evidence of drug use are admissible in suspension and revocation proceedings. Hair specimen analysis may be considered as reliable scientific evidence. However, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

13. The DOT concludes that it "cannot consider alternative specimens at this particular point in time. In fact, the DOT would not desire to do so without the HHS [Department of Health and Human Services] scientific and laboratory certification processes being in place." (Federal Register, Vol. 75, No. 157, pp. 49852B49853, August 16, 2010 (Rules and Regulations)).

ACCEPTED IN PART, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

14. The Medical Review Officer, Dr. Brian Linder, was unable to provide any peer reviews or scientific publications to support his opinion that the metabolite levels are consistent with use rather than passive inhalation. (Transcript of Proceedings, October 21, 2010, pp. 116-117).

ACCEPTED IN PART, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

15. Dr. Linder admittedly relies upon the credibility of the laboratory, here Psychemedics, and its self-established metabolite cutoff levels in reaching the opinion that

Lockwood's hair specimen test results represent use rather than passive inhalation. (Transcript of Proceedings, October 21, 2010, pp. 117-118).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

16. Dr. Lindner admitted that he had no knowledge as to how Psychemedics establishes its cutoff levels. (Transcript of Proceedings, October 21, 2010, pp. 118, 119).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

17. Dr. Linder could not rule out passive exposure as a possible explanation for the hair specimen test results without reliance upon the determination made by Psychemedics based on its self-established cutoff levels. (Transcript of Proceedings, October 21, 2010, p. 121).

NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. Dr. Linder testified that there are no publications discussing standards, and no specific standards or cutoff levels that have been established, pertaining to hair specimen testing. (Transcript of Proceedings, October 21, 2010, p. 126).

NEITHER ACCEPTED NOR REJECTED, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

19. Other laboratories have different and higher cutoff levels than those presently used by Psychemedics. (Transcript of Proceedings, October 21, 2010, pp. 103-106, 162, 170-171; Staubus depo., p.15).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

20. Psychemedics' Director of its Laboratory, Dr. Michael Schaffer, testified that he was unaware of any specific studies, peer reviews, or scientific publications which supported his opinion that passive inhalation could not cause a false positive under Psychemedics' cutoff levels. (Transcript of Proceedings, October 21, 2010, pp. 169-170).

ACCEPTED AND INCORPORATED, as provided in the Decision and Order.

21. Alfred Staubus, Ph.D., a forensic toxicologist, confirmed the fact that hair specimen drug testing is neither approved nor accepted by either the Department of Transportation or the Department of Health and Human Services. (Staubus depo., pp. 5-7, 9).

ACCEPTED IN PART AND REJECTED IN PART, as provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

22. Hair specimen drug testing is not accepted because the standards, cutoff levels, and procedures are still being studied and thus not reliable enough for general use. (Staubus depo., pp. 9-10).

REJECTED, As provided in the Decision and Order.

23. Dr. Staubus testified that he was unable to find any peer-reviewed publications or specific studies that would substantiate any standards or uniform cutoff levels for hair specimen drug testing. (Staubus depo., pp. 12-13).

NEITHER ACCEPTED NOR REJECTED, The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. .

24. Until studies have been performed and published, it is impossible to establish with any degree of reliability the appropriate cutoff levels for hair specimen drug testing. (Staubus depo., p. 14).

NEITHER ACCEPTED NOR REJECTED, The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial. .

25. The test results compiled by Psychemedics are not indicative of the use of marijuana by Lockwood. (Staubus depo., p. 16).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

26. Due to the lack of any reference to actual human data and/or studies that might establish indicators of passive versus active exposure to marijuana, Psychemedics' test results indicate nothing more than levels of considered low or borderline exposure to marijuana. (Staubus depo., pp. 16-17).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

27. Significant differences can occur in hair specimen drug testing where, as here, the specimen is taken from chest hair as opposed to head hair. (Staubus depo., p. 18).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

28. Based upon the significant differences in the length of time it takes for chest hair and head hair to grow, and to accumulate Carboxy THC, drug concentrations twofold or greater can appear in chest hair as opposed to head hair. (Staubus depo., p. 18).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

29. Had Lockwood's specimen been head hair instead of chest hair it is likely that Psychemedics' test results would have been one-half the reported figures, and thus, even below Psychemedics' own cutoff levels. (Staubus depo., pp. 18-19).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

30. soThere were several problems in Psychemedics' testing procedures, including its decision only to run a single test on the specimen. (Staubus depo., pp. 19-21, 22-23, 25).

REJECTED, as provided in the Decision and Order.

31. The reliability of Psychemedics' methodology is highly questionable and unreliable in the testing and results of each of Lockwood's specimen. (Staubus depo., pp. 26-28).

REJECTED, as provided in the Decision and Order.

32. Based upon the low levels reported in Psychemedics' test results and the testimony of Lockwood, the hair specimen test results correlated with passive exposure rather than actual use of marijuana. (Staubus depo., pp. 28-30).

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

33. Based on the foregoing, the Coast Guard has failed to prove the charge of use of or addiction to a dangerous drug. For this reason, the Complaint of the U.S. Coast Guard is dismissed, with prejudice.

NEITHER ACCEPTED NOR REJECTED, the weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

ATTACHMENT C - 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.