

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

---

UNITED STATES COAST GUARD,

Complainant

v.

J. CARWIN TERRELL,

Respondent

---

Docket Number 2013-0076  
Enforcement Activity No. 4532785

**DECISION & ORDER**

Date Issued: September 6, 2013

Issued By: Honorable Bruce Tucker Smith  
Administrative Law Judge

**Appearances:**

**For the Complainant**

LT Parris Stratton

LT Laura Williams

U.S. Coast Guard Sector New Orleans

**For the Respondent**

J. Carwin Terrell, pro se

## I. PRELIMINARY STATEMENT

On February 13, 2013, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent J. Carwin Terrell (Respondent) seeking revocation of Respondent's Coast Guard-issued Merchant Mariner's License (MML or credential) alleging use of, or addiction to the use of, dangerous drugs under 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. More particularly, the Complaint alleged that Respondent submitted to a random drug test and provided a urine sample that subsequently tested positive for marijuana metabolites.

On March 18, 2013, Respondent filed his Answer admitting all jurisdictional allegations and admitting all factual allegations; however, Respondent set forth an affirmative defense, to wit: "if it was in my system I guarantee it was not by my hand."

On May 3, 2013, the Coast Guard filed a Motion for Summary Decision. On May 30, 2013, the court issued an Order Denying Motion for Summary Decision.

On June 4, 2013, the hearing of this matter commenced in the ALJ Courtroom, Hale Boggs Federal Building, New Orleans, Louisiana. Non-attorneys LT Parris Stratton and LT Laura Williams represented the Coast Guard; Respondent appeared pro se. Both parties appeared and presented their respective cases. Four witnesses testified as part of the Coast Guard's case-in-chief.<sup>1</sup> The Coast Guard offered 13 exhibits into evidence, all of which were admitted.

Respondent testified on his own behalf and did not call additional witnesses. Respondent did not offer any exhibits into evidence.

---

<sup>1</sup> 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: Coast Guard 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.).

At the conclusion of the hearing, the court requested the parties submit written briefs addressing the randomness of the test at issue. Upon receipt of the parties' written submissions on July 1, 2013, the court closed the administrative record.

## II. FINDINGS OF FACT

1. Respondent J. Carwin Terrell (Respondent) holds a Coast Guard-issued Merchant Mariner's License. Respondent has held a Coast Guard issued license for approximately 35 years. (Tr. at 147-148).
2. On November 29, 2012, Respondent J. Carwin Terrell was employed by Kathryn Rae Towing as a Captain aboard the M/V SHELLEY. (Tr. at 24).
3. Kathryn Rae Towing is a marine employer as defined at 46 C.F.R. §16.105 and thereby required to abide by chemical testing regulations as set forth at 46 C.F.R. Part 16 Subpart B.
4. On November 29, 2012, Respondent J. Carwin Terrell was directed by his marine employer Kathryn Rae Towing to submit to a random drug test. (Tr. at 25, 120).
5. On November 29, 2012, Respondent J. Carwin Terrell submitted a urine specimen to a certified drug collector. (Tr. at 55).
6. The urine specimen submitted by Respondent J. Carwin Terrell on November 29, 2012, tested positive for a dangerous drug, to wit: marijuana metabolites. (Tr. at 28, 72, 75, 79, 107-108, 110; CG Ex. 7, 15).
7. On November 29, 2012, the process by which Respondent J. Carwin Terrell was selected to submit to a drug test was not random. (Tr. at 40-48).

## III. DISCUSSION

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. §7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to revoke a mariner's license, certificate or document for violations arising under 46 U.S.C. §7704. See 46 C.F.R. §5.19(b). Under 46 U.S.C. §7704(c), a Coast Guard issued license, certificate or document shall be revoked if the holder of that license or certificate has been a user of or addicted to dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. Id.; Appeal Decisions 2634 (BARETTA) (2002); 2535 (SWEENEY) (1992)

(*rev'd on other grounds*); see also Appeal Decision 2546 (SWEENEY) (1992) (reaffirming the definition of cure established in Appeal Decision 2535 (SWEENEY)).

The Coast Guard chemical drug testing laws and regulations require marine employers to conduct pre-employment, periodic, random, serious marine incident, and reasonable cause drug testing to minimize the use of dangerous drugs by merchant mariners. See 46 C.F.R. Part 16.

The Coast Guard charged Respondent with use of, or addiction to the use of, dangerous drugs because Respondent's urine tested positive for marijuana metabolites in a November 29, 2012, random drug test. Accordingly, the Coast Guard seeks revocation of Respondent's license in accordance with 46 C.F.R. §5.569.

## **A. 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.” Appeal Decision 2025 (Armstrong) (1975). Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decisions 2677 (WALKER) (2008); 2656 (JORDAN) (2006).

In Suspension and Revocation cases wherein use of dangerous drugs has been charged, jurisdiction is established by the respondent's status as a holder of a Coast Guard-issued credential. See Appeal Decision (CLIFTON) (1995). Respondent is a holder of a Coast Guard-issued credential (Tr. at 147-148), accordingly, jurisdiction is appropriately situated.

## **B. Burden and Standard of Proof**

### **1. Generally**

Suspension and Revocation proceedings are remedial, not penal in nature and are “intended to help maintain the standards of competence and conduct essential to the promotion

of safety at sea.” 46 C.F.R. §5.5. The Commandant delegated to ALJs the authority to suspend or revoke a license, certificate, or merchant mariner’s document for violations arising under 46 U.S.C. §§ 7703 and 7704. See 46 C.F.R. §5.19. In the instant matter, the Coast Guard charged Respondent under 46 U.S.C. §7704(a) and 46 C.F.R. §5.35 alleging use of, or addiction to the use of, dangerous drugs. Consequently, the Coast Guard seeks revocation of Respondent’s credential.

It is important to note that determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. Appeal Decision 2640 (PASSARO) (2003). Also, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Appeal Decision 2639 (HAUCK) (2003).

## **2. Prima Facie Case Involving a Dangerous Drug Use Allegation**

The instant case was brought, inter alia, under the provisions of 46 C.F.R. Part 16. 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.” See Appeal Decisions 2697 (GREEN) (2011); 2662 (VOORHEIS) (2007); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2584 (SHAKESPEARE) (1996); 2583 (WRIGHT) (1995); 2529 (WILLIAMS) (1991); 2379 (DRUM) (1985); and 2282 (LITTLEFIELD) (1982).

Furthermore, when the Coast Guard’s case is based solely upon urinalysis test results, a prima facie case can be made if and only if the Coast Guard initially establishes three required elements by a preponderance of the evidence. See Appeal Decisions 2697 (GREEN) (2011); 2662 (VOORHEIS) (2007).

A prima facie case of the use of a dangerous drug is made when the following three elements are established: 1) the respondent was the person who was tested for dangerous drugs;

2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decisions 2697 (GREEN) (2011); 2668 (MERRILL) (2007); 2662 (VOORHEIS) (2007); 2657 (BARNETT) (2006); Appeal Decision 2653 (ZERINGUE) (2002); Appeal Decision 2603 (HACKSTAFF) (1998).

If the Coast Guard proves its prima facie case, a presumption then arises that Respondent used dangerous drugs and the burden of rebuttal then shifts to Respondent. Appeal Decisions 2603 (HACKSTAFF) (1998); 2589 (MEYER) (1997); 2592 (MASON) (1997); 2584 (SHAKESPEARE) (1996); and 2379 (DRUM) (1985). If Respondent does not produce any persuasive evidence in rebuttal, the ALJ may find the allegation of dangerous drug use proved on the basis of this presumption alone. 33 C.F.R. §20.703; Appeal Decisions 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998).

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. Appeal Decision 2662 (VOORHEIS) (2007).

The instant case is based solely upon the results of a random urinalysis test. The Coast Guard only proved two of the required three elements of a prima facie drug case by a preponderance of the evidence. Accordingly, the Coast Guard cannot rely upon the presumption that Respondent used or was addicted to dangerous drugs.

After careful consideration of the testimony at the hearing and of the entire record, the court finds that the Coast Guard did **NOT PROVE** by a preponderance of the evidence that Respondent used, or was addicted to the use of, dangerous drugs.

### **C. Use of, or Addiction to the use of, Dangerous Drugs**

As recited supra, to establish a prima facie case based solely on a urinalysis test, the Coast Guard must show that: 1) the respondent was the person who was tested for dangerous drugs; 2) the respondent failed the drug test; and 3) the test was conducted in accordance with 46

C.F.R. Part 16. Appeal Decisions 2697 (GREEN) (2011); 2662 (VOORHEIS) (2007); 2603 (HACKSTAFF) (1998); 2592 (MASON) (1997); 2589 (MEYER) (1997); 2598 (CATTON) (1996); 2584 (SHAKESPEARE) (1996); and 2583 (WRIGHT) (1995). Each of the three elements is discussed in turn, as each relates to Respondent herein.

**1. Element One: The Respondent Was the Individual Who Was Tested for a Dangerous Drug**

Proof of the first element “involves proof of the identity of the person providing the specimen; proof of a link between the respondent and the sample 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 the sample.” Appeal Decisions 2662 (VOORHIES) (2007); 2603 (HACKSTAFF) (1998).

Here, the uncontroverted proof established that on or about November 29, 2012, Respondent was directed by his marine employer, Kathryn Rae Towing, to submit to a random drug test. (Tr. at 24-25).

Glenn Zetsch (Zetsch), a certified drug collector and trainer employed by West Jefferson Industrial Medicine since February 1, 2008, testified that on November 29, 2012, he collected a urine specimen from Respondent. (Tr. at 50-58; CG Ex. 5, 6).

Zetsch further testified that on November 29, 2012, he made positive identification of Respondent and thereafter collected a urine specimen from Respondent. (Tr. at 55-57; CG Ex. 6). Zetsch subsequently ensured that Respondent’s urine specimen was assigned unique specimen identification number: 57758703. The urine specimen collection procedures utilized by Zetsch relative to urine specimen number 57758703 were conducted in accordance with Department of Transportation (DOT) regulations codified at 49 C.F.R. Part 40. After Respondent’s urine specimen was collected, it was thereupon sent via FedEx to Alere Toxicology (Alere or lab). (Tr. at 55-58; CG Ex. 6). On December 1, 2012, Alere received

Respondent's urine specimen number 57758703. (Tr. at 72; CG Ex. 7). Alere thereupon assigned Respondent's urine specimen a unique laboratory bar coded number of 81206175 and submitted the sample for testing. (Tr. at 74; CG Ex. 7).

Thus, the Coast Guard proved by a preponderance of the evidence that Respondent was the person who was tested for a dangerous drug on November 29, 2012.

## **2. Element Two: Test Results Show That a Party Has Tested Positive for the Presence of a Dangerous Drug**

Here, the Coast Guard offered sufficient evidence that a urine sample provided by Respondent and identified by the unique identification number 57758703 tested positive for the marijuana metabolite.

Specifically, the uncontroverted proof established that Alere is a DOT "approved" laboratory; meaning that facility has met the federally-mandated standards to engage in urine drug testing for federal agencies. (CG Ex. 2).

David Green, Ph.D. (Green), Alere's laboratory director, testified that on December 1, 2012, Alere received a specimen bearing identification number 57758703. (Tr. at 71-72; CG Ex. 7). Green further testified that specimen was then given a unique laboratory bar coded number of 81206175. (Tr. at 71; CG Ex. 7). According to Green, the specimen bearing identification number 57758703/laboratory number 81206175 tested positive for marijuana metabolites. (Tr. at 73; CG Ex. 7). Green testified that the sample bearing the identification number 57758703/laboratory number 81206175 was subject to both an initial and a confirmatory testing procedure. (Tr. at 78-79; CG Ex. 8). Green testified that the initial screening of the sample, by immunoassay, revealed that specimen number identification number 57758703/laboratory



number 81206175 contained 72 nanograms per milliliter, well in excess of the 50 nanograms per milliliter cutoff level established by the Department of Transportation. (Tr. at 73-75; CG Ex. 7). Green further testified that confirmatory testing, via gas chromatography/mass spectrometry (GCMS), revealed that specimen identification number 57758703/laboratory number 81206175 contained 72.61 nanograms per milliliter, which is in excess of the 15 nanograms per milliliter cutoff level established by the DOT. (Tr. at 88-89; CG Ex. 8).

The results of the testing of specimen number identification number 57758703/laboratory number 81206175 were then reported to a medical review officer (MRO). (Tr. at 81).

Brian Heinen, M.D., a board certified MRO, reviewed the documentation associated with specimen number identification number 57758703/laboratory number 81206175 and spoke with Respondent. (Tr. at 100-107; CG 9, 10, 11). Dr. Heinen spoke with Respondent and determined there was no valid medical reason to explain the positive test. (Tr. at 107). Dr. Heinen offered Respondent the opportunity to have the split sample retested, which Respondent accepted. (Tr. at 107). Dr. Heinen testified the split sample was retested at a second lab, which confirmed the positive result. (Tr. at 107-108; CG Ex. 10). Accordingly, Dr. Heinen reported specimen number identification number 57758703/laboratory number 81206175 as positive for marijuana metabolites. (Tr. at 110; CG Ex. 11).

Respondent's Answer admits all factual allegations within the Complaint. However, in Appeal Decision 2697 GREEN (2011), the Commandant expressly told ALJs to ensure the rights of pro se litigants are protected:

[t]he federal courts grant wide latitude in construing the pleadings and papers of pro se litigants. SEC v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992) (citing Maldonado v. Garza, 579 F.2d 338, 340 (5th Cir. 1978)). See also Haines v. Kerner, 404 U.S. 519, 520 (1972) (Allegations set forth in a pro se complaint are held to less stringent standards than formal pleadings drafted by lawyers). More generally, "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of

important rights because of their lack of legal training.” Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983).

Id. (emphasis added).

Respondent herein appeared pro se. Accordingly, Respondent’s “admission” in his Answer is disregarded for all purposes in this litigation.

However, based upon the evidence presented in court, the Coast Guard has met its burden of proof to establish by a preponderance of the evidence relative to the second element: that Respondent’s urine specimen tested positive for the presence of a dangerous drug.

**3. Element Three: The Drug Test Was Conducted in Accordance with 49 C.F.R. Part 16**

It was the Coast Guard’s responsibility to prove that the urine specimen testing procedures were accomplished in compliance with the rules set forth in 49 C.F.R. Part 16. See 33 C.F.R. §§20.701, 702.

46 C.F.R. Part 16, subpart B specifies five circumstances under which a marine employee is subject to drug testing: (1) Pre-employment testing; (2) Periodic testing; (3) Random testing; (4) Testing following a serious marine accident; and (5) Testing following reasonable cause. 46 C.F.R. §§16.210, 16.220, 16.230, 16.240, and 16.250. Here, the Coast Guard specifically alleged that Respondent failed a random drug test.

Pursuant to 46 C.F.R. §16.230, “Random testing requirements,”

The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator . . . . As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by this section, provided that each vessel subject to the marine employer’s test program remains equally subject to selection.

Id. (emphasis added).

In the instant matter, Keith Savoie (Savoie), former Safety Director for Kathryn Rae Towing, testified that on November 29, 2012, he utilized the random number generator on Microsoft's Excel program to create a list of employees to be randomly tested. (Tr. at 25-26). Savoie testified that "there's a number which corresponds to each name, and the program selects the number next to that name." (Tr. at 26). Savoie further testified that every employee is eligible for selection each time he creates a random list. (Id.). Savoie then directed West Jefferson Industrial medicine to conduct a random DOT test. (Id.).

On November 29, 2012, Kathryn Rae Towing operated 12 vessels and employed approximately 101 persons. (Tr. at 35). On November 29, 2012, all 101 employees of Kathryn Rae Towing were subject to random testing. (Id.). As Savoie testified, "by the Coast Guard, we're required to test 50% of our crews. . . . [E]veryone who was a crew member on any of the boats was subject to random testing." (Tr. at 36). On November 29, 2012, Savoie obtained 20 randomly generated names using the random number generator function on Excel. (Tr. at 41). On November 29, 2012, "[Savoie] needed 14 of those 20 names to test to get to the 50 percent." (Id.). Savoie testified he was concerned employees would be absent from work, thereby unable to test and, thus, cause the company to not reach the mandated 50% testing. (Tr. at 42). Accordingly, to ensure the 50% benchmark was obtained, Savoie "called the collection agent and said, look, instead of doing like we normally do it, let's just test everyone on the boat. That way with five boats, I'm testing 20 something." (Id.). Savoie further testified that he instructed the collection agent to "in addition to [testing] the people that were named . . . whoever else was on the boat that was not on the list, just go ahead and do a random test on them also." (Tr. at 43). Savoie's later testimony is particularly instructive on how employees were selected for the November 29, 2012, "random" test.

Q. Hello again, Mr. Savoie. When you selected the crew to be tested randomly, you used your computer-based program, is that correct?

A. That's correct.

Q. Do you have everybody associated with a separate identification number on this list?

A. Yes, I do.

Q. Does it select those individuals randomly as far as --

A. Yes, it does.

Q. The vessels that the employees that were selected on, were the vessels selected by the crew members that were selected by your computer-based program? In other words, these people, were they on the Motor Vessel SHELLEY?

A. They were on several vessels.

Q. So in turn, did you have all these vessels selected for drug testing?

A. They were all subject to drug testing, yes.

Q. What percentage of Kathryn Rae Towing is required to have annual drug testing?

A. Fifty percent.

Q. In accordance with?

A. Coast Guard regulations.

Q. Did you know that Mr. Terrell was on the Motor Vessel SHELLEY on November 29, 2012?

A. Yes, I did.

Q. **Did you personally select him to be selected for drug testing?**

A. **He was not on the list selected by the computer program.** I think there were 6 or 10 other employees on the vessels at the time of the drug testing, and **I told the drug collection to collect everyone who was on board**, which everyone did willingly.

Q. **So you selected a group of people to get drug tested?**

A. **Correct.**

Q. And this group of people were on several vessels, is that correct?

A. Correct.

**Q. So you requested all personnel on these vessels to be tested?**

**A. Yes, those 20 that were selected, and additionally whoever else was on board is basically what it was. I believe I had sent you a copy of the spreadsheet. There's typed by the program and there's written numbers. The written numbers were the additional crew members that were on board that were not selected by the program.**

Q. Were you specifically trying to get Mr. Terrell tested?

A. No, sir.

(Tr. at 118-120) (emphasis added).

The Coast Guard, in its Closing Brief, argues that the test at issue herein was random and in accordance with the applicable regulations. According to the Coast Guard's line of reasoning, "Respondent's marine employer had the names of all individuals subject to testing in a testing pool. Once the names were selected, the marine employer determined which vessels those individuals were onboard and tested the entire crew of those vessels. As a result, the marine employer was randomly selecting the vessels and testing everyone onboard the vessels."

Assuming *arguendo* that the marine employer's use of a randomize function in Excel to generate 20 names for testing was a scientifically valid method for selection as required by 46 C.F.R. §16.230(c), Respondent's name was not one of the randomly generated names. (Tr. at 40, 120).

Pursuant to 46 C.F.R. §16.230(c), "[a]s an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers . . . provided that each vessel subject to the marine employer's test program remains equally subject to selection."

On November 29, 2012, Kathryn Rae Towing had a fleet of 12 vessels. However, the "random" testing performed on November 29, 2012, was limited to 5 of its vessels. (Tr. at 42-43). Those 5 vessels were tested due Savoie's personal intervention into the process. (Tr. at 40-

43, 120). Had Kathryn Rae Towing adhered to the dictates of the regulations, all 12 vessels would have been equally subject to testing. See 46 C.F.R. §16.230(c). However, the vessels were selected based upon the individual names previously generated by the Excel randomizer function. (Tr. at 40-43, 120). This is not a permissible interpretation of the regulation. Kathryn Rae Towing improperly limited the field such that each employee/crew member **was not** equally subject to random testing.

The Coast Guard also contends in its Closing Brief that the marine employer's actions were "a good faith effort to follow the regulations." The Coast Guard cites no relevant authority for such a proposition. The applicable regulations make no provision for "good faith" efforts as excusing noncompliance.

As discussed supra, when the Coast Guard's case is based solely upon urinalysis test results, a prima facie case can be made if and only if the Coast Guard initially establishes three required elements by a preponderance of the evidence. See Appeal Decisions 2697 (GREEN) (2001); 2662 (VOORHEIS) (2007). As the Commandant stated in Appeal Decision 2697 (GREEN) (2011), "[w]hen randomness is at issue, if it is not shown that a respondent was selected for testing by a scientifically valid random method, the drug test has not been shown to have been conducted in accordance with 46 C.F.R. Part 16 and one of the elements of a prima facie case has not been established." Because the Coast Guard failed to establish the third required element of its prima facie case, the presumption that Respondent is a user of dangerous drugs **does not** arise and Respondent is relieved of his burden of rebuttal. See Appeal Decision 2662 (VOORHEIS) (2007).

#### **D. Respondent Denies Use of, or Addiction to the Use of, Dangerous Drugs**

At the hearing of this matter, Respondent testified "I know I didn't do it" and that the last time he used illegal drugs, including marijuana was 1985. (Tr. at 153-155).

Also at the hearing, MRO Dr. Heinen testified that he spoke with Respondent about the results and asked, “Did you use it? . . . Did you use marijuana?” Dr. Heinen further testified that “[Respondent’s] answer was ‘no.’” Dr. Heinen then inquired whether Respondent used marijuana in the past to which Respondent answered “[y]ears ago.” (Tr. at 117; CG Ex. 10).

Finally, Savoie (former Safety Director for Kathryn Rae Towing) testified that prior to November 29, 2012, the he has “known [Respondent] for about 20 years[.]” prior to Respondent’s hiring in “May of ’09.” (Tr. at 129). Savoie further testified that he “never” had any reason to suspect Respondent used a dangerous drug or intoxicant. (Tr. at 129-130). Savoie testified he “was actually shocked when the positive [result] came.” (Tr. at 130). Savoie described Respondent as possessing an “[e]xemplary, excellent” safety record and that Respondent’s “attendance was good, his performance was good. . . . He’s a top-notch captain, he really is.” (Tr. at 131).

Accordingly, the court must consider Respondent’s sworn testimony, supported by witnesses, that he was not a drug user, balanced against the bare evidence of a positive urinalysis does did not enjoy the benefit of an evidentiary presumption.

After careful consideration of the testimony at the hearing and of the entire record, the court finds that the Coast Guard did **NOT PROVE** by a preponderance of the evidence that Respondent used, or was addicted to the use of, dangerous drugs.

#### **IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent J. Carwin Terrell holds a Coast Guard-issued Merchant Mariner’s Credential.
2. On November 29, 2012, Respondent J. Carwin Terrell submitted a urine specimen for drug testing. Respondent J. Carwin Terrell’s urine specimen was collected and subsequently tested in accordance with all applicable Department of Transportation regulations.
3. The urine specimen submitted by Respondent J. Carwin Terrell tested positive for the presence of a dangerous drug, to wit: marijuana metabolites.

4. Respondent J. Carwin Terrell's marine employer did not conduct the November 29, 2012, test in accordance with 46 C.F.R. Part 16.

## V. CONCLUSION

After careful consideration of the testimony and documentary evidence offered at the hearing, and of the entire record, the court finds that the Coast Guard met its burden to establish that: (1) the Respondent was tested for a dangerous drug, and that (2) the Respondent tested positive for a dangerous drug. However, the Coast Guard failed to establish that (3) the test was conducted in accordance with 46 C.F.R. Part 16. Hence, a presumption of illegal drug use is not established. Respondent denied using dangerous drugs. Upon a balancing the facts before the court, this matter is therefore resolved in favor of Respondent. Thus, the allegations contained in the Coast Guard's Complaint are **NOT PROVED**.

**WHEREFORE,**

## VI. ORDER

**IT IS HEREBY ORDERED**, that Respondent J. Carwin Terrell shall retain his Coast Guard-issued Merchant Mariner's License.

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



**Bruce Tucker Smith**  
**US Coast Guard Administrative Law Judge**

Date: September 06, 2013



## **VII. ATTACHMENT A: LIST OF WITNESSES & EXHIBITS**

### **Coast Guard Exhibits**

1. 46 C.F.R. Part 16; 46 C.F.R. §5.569
2. Federal Register Vol. 77, No. 224 (November 20, 2012)
3. Federal Register Vol. 77, No. 232 (December 3, 2012)
4. Heinen Medical Review: Report to Kathryn Rae Towing of Positive Result
5. Glenn Zetsch: Certified Professional Collector Trainer certificate
6. Federal Drug Testing Custody and Control Form, Copy 3
7. Federal Drug Testing Custody and Control Form, Copy 1
8. Alere Laboratory Litigation Package
9. Verification of Brian Heinen, M.D.'s certification as a Medical Review Officer
10. Heinen Medical Review/MRO Verification Worksheet
11. Federal Drug Testing Custody and Control Form, Split Sample Results
12. None offered
13. None offered
14. BMC Toxicology Lab Split Specimen Report
15. Alere Drug Test Report

### **Respondent Exhibits**

None

### **ALJ Exhibits**

none

### **Coast Guard's Witnesses**

Keith Michael Savoie  
Glenn Sidney Zetsch  
David Austin Green, Ph.D.  
Brian Nicholas Heinen, M.D.

### **Respondent Witnesses**

J. Carwin Terrell

## VIII. ATTACHMENT B: SUBPART J, APPEALS

### 33 C.F.R. 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 C.F.R. 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 C.F.R. 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 C.F.R. 7.45.

### 33 C.F.R. 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 C.F.R. 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.