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

UNITED STATES COAST GUARD
Complainant

vs.

MARK WILLIAM MOWERY

Respondent

Docket Number 2012-0546
Enforcement Activity No. 4500529

DECISION AND ORDER
Issued: October 29, 2013

By Hon. Parlen L. McKenna

Appearances:

LT Arthur F. Loughran
Sector Los Angeles/Long Beach

For the Coast Guard

MARK WILLIAM MOWERY, Pro se

For the Respondent

The United States Coast Guard (Coast Guard) brought this proceeding against Respondent Mark William Mowery's Merchant Mariner Credential pursuant to 46 U.S.C. § 7704(c) and Coast Guard regulations found at 46 C.F.R. Part 5. The case was conducted under the Administrative Procedure Act (5 U.S.C. § 551 et seq.) and the Coast Guard's procedural and evidentiary rules found at 33 C.F.R. Part 20.

The Coast Guard sought to revoke Respondent's Coast Guard-issued credential for Respondent's alleged use of, or addiction to the use of, dangerous drugs. See 46 U.S.C. §

7704(c); 46 C.F.R. § 5.35. Specifically, the Coast Guard alleged that Respondent took a pre-employment drug test, which tested positive for cocaine metabolites. Respondent made various arguments why the test should be disregarded. First, Respondent argued the test was unlawful under 46 C.F.R. Part 16 as he was only called to take a second "pre-employment" drug test due to his employer's error in removing him from the company's random drug testing program. Respondent claimed that the company removed him from this program despite Respondent's continuous employment with the company. Second, Respondent asserted that the positive test result occurred due to his unknowing ingesting of a coca-based product, Agwa de Bolivia, a liqueur made from botanical ingredients, which could have triggered the result. Third, Respondent opined that the positive test could have occurred from dermal exposure to cocaine on paper money. Finally, Respondent argued that the positive drug test was not valid due to possible problems with the accuracy of the testing laboratory's equipment and levels of detection.[1]

After carefully reviewing the record evidence, I find Respondent's arguments must be rejected. Therefore, for the reasons given in this Decision and Order, the allegations against Respondent are found **PROVED** and Respondent's Coast Guard-issued credential is **REVOKED**.

I. PROCEDURAL BACKGROUND

On December 13, 2012, the Coast Guard filed a Complaint under the authority of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. The Coast Guard alleged the following factual allegations:

1. On 11/30/2012, Respondent took a pre-employment drug test.
2. A urine specimen was collected by Nancy Simon of OHS.
3. The Respondent signed a Federal Drug Testing Custody and Control Form.

[1] Respondent made these arguments at the hearing and cross-examined the Coast Guard's witnesses on these subjects. However, because Respondent elected not to submit a post-hearing brief, I have summarized here Respondent's main rebuttal arguments given during the hearing.

4. The urine specimen was analyzed by Quest Diagnostics, Inc., using procedures approved by the Department of Transportation.
5. That specimen subsequently tested positive for cocaine metabolites, as determined by the Medical Review Officer, James Vanderploeg.

The Coast Guard proposed revocation as the appropriate sanction for Respondent's alleged violation.

On January 1, 2013, Respondent filed a request for a ten day extension of time to file an Answer. On January 3, 2013, I granted Respondent's request in my capacity as the Acting Chief Administrative Law Judge and gave him until January 17, 2013 to file an Answer. On January 18, 2013, the Coast Guard ALJ Docketing Center received a letter from George M. Jones, Esq., requesting a second extension for Respondent to file an Answer. On January 22, 2013, Respondent's second request for an extension was granted and he was allowed until January 25, 2013 to file an Answer.

On January 24, 2013, Respondent filed an Answer. Respondent admitted all jurisdictional allegations but denied the Complaint's factual allegations. Respondent also raised the following affirmative defenses: 1) unknowing ingestion; 2) the drug test was not performed under 46 CFR [sic]; and 3) the ordered test was not per 46 CFR [sic].[2]

On January 25, 2013, this case was assigned to me for review and disposition. On February 7, 2013, I issued a Scheduling Order and Notice of Hearing that ordered the hearing to take place on March 6, 2013 in Long Beach, California.

On February 19, 2013, the Coast Guard filed its Notice of Expected Witnesses and Exhibits. On February 20, 2013, the Coast Guard filed Motions for Telephonic Testimony, all of which were granted.

[2] Given Respondent's arguments at the hearing, I can only surmise that he intended to challenge both the jurisdictional basis of the Coast Guard's case under 46 C.F.R Part 16 and the actual adherence to the DOT drug testing rules at 49 C.F.R. Part 40.

On February 20, 2013, Mr. Jones filed a Notice of Withdrawal of Representation, which indicated that he would not be representing Respondent any further. On February 21, 2013, I issued an Order and Notice of Continuance of Hearing that moved the hearing date to March 26, 2013.

On March 14, 2013, the Coast Guard filed a Notice of Amended Expected Witnesses and Exhibits. On March 24, 2013, Respondent filed his Witness and Exhibit List.

On March 26, 2013, the hearing took place as scheduled in Long Beach, California. The Coast Guard presented the testimony of 6 witnesses and offered 22 exhibits into evidence. Respondent testified in his own behalf and offered 11 exhibits into evidence. The witnesses who testified at the hearing and the exhibits entered into evidence are identified in **Attachment A** to this Decision and Order.

On March 27, 2013, Respondent voluntarily took a DOT drug test at OHS Health & Safety Services, the results of which were negative. Respondent submitted the results of this drug test to the Court on March 28, 2013. See Judge's Exhibit A.

On May 6, 2013, I issued a Scheduling Order for the Submission of Respondent's Expert Witness and Further Lab Testing of the Liqueur. That Order 1) gave Respondent two weeks to arrange for the telephonic testimony of Respondent's expert witness[3]; 2) directed that Respondent submit the initial results of the lab testing of the liqueur; and 3) gave Respondent two weeks to arrange for and pay further testing of the liqueur at his own expense at a second laboratory of his choosing.

On June 10, 2013, Respondent submitted an e-mail to the Court stating the initial testing of the liqueur was negative for the presence of cocaine. See Judge's Exhibit B. Apparently,

[3] Respondent gave notice that he intended to offer the testimony of a toxicology expert, Dr. Parent, at the hearing. However, due to the length of other witnesses' testimony and the presentation of the Coast Guard's case in chief, Dr. Parent was not able to be called during that hearing. At the end of the hearing, I gave Respondent the opportunity to call Dr. Parent at a later date. However, Respondent was unable to arrange for Dr. Parent's testimony, despite having over three months to arrange for Dr. Parent to appear or obtain the services of another expert.

Respondent sent the liqueur to another laboratory for testing, but Respondent did not provide any information concerning the results of such testing, which he believed would be available within one week of the e-mail dated June 10th. Id. Furthermore, Respondent indicated that he was unable to arrange for the testimony of his expert witness and that the expert was apparently unwilling to testify. Id.

On June 20, 2013, I issued a Scheduling Order for Submission of Post-Hearing Briefs. That Order gave the parties 30 days to submit initial post-hearing briefs with proposed findings of fact and conclusions of law and 15 days from the submission of any such post-hearing brief to submit a reply. That Scheduling Order also closed the record.

On June 26, 2013, Respondent submitted the results from the second laboratory's testing of the liqueur, along with a copy of a journal article dealing with coca tea consumption and the effects on urine testing from the *European Journal of Emergency Medicine* 13:340-341 (2006). See Judge's Exhibit C.[4]

On July 12, 2013, the Coast Guard filed its Post-Hearing Brief including Proposed Findings of Fact and Conclusions of Law. Respondent did not file a post-hearing brief. Rulings on the Coast Guard's Proposed Findings of Fact and Conclusions of Law are contained in **Attachment B**.

This Decision and Order, including all findings of fact and conclusions of law, is based upon my analysis of the entire record, applicable statutes, regulations and case law. Each exhibit entered, although perhaps not specifically mentioned in this Decision, has been carefully examined and given thoughtful consideration.

[4] Judge's Exhibits A, B, and C are hereby admitted into evidence.

II. FINDINGS OF FACT[5]

1) Respondent served as licensed captain for Electra Cruises, Inc. (Electra Cruises) on an independent contractor basis. Tr. at 49:23-50:5.

2) Respondent took an initial pre-employment drug test before working for Electra Cruises on November 22, 2011, the results of which were negative. Tr. at 11:22-12:7; 32:13-20; CG Exh. 22.

3) Electra Cruises' business is seasonal in nature with slow periods generally lasting from January through April, during which time the company does not require as many personnel, including licensed captains. Tr. at 53:6-12.

4) Respondent was the fourth or fifth captain Electra Cruises would call upon to captain its vessels, as generally captains with greater seniority would be called first. Tr. at 53:10-21.

5) Electra Cruises uses the Maritime Consortium, Inc. (Maritime Consortium) as a third party provider to ensure the company's compliance with Coast Guard drug testing regulations and requirements, including random drug testing. CG Exh. 2.

6) Electra Cruises first enrolled Respondent in the Maritime Consortium on November 21, 2011. Tr. at 30:19-24; CG Exh. 5.

7) Electra Cruises' captains are required to be part of the Maritime Consortium to work in that capacity for the company. Tr. 89:24-90:1.

8) On May 9, 2012, Ms. Heather Gunther, Electra Cruises' office manager and drug program manager requested Respondent's removal from the Maritime Consortium drug testing program. Tr. at 33:15-23; 62:5-15; 65:9-15; CG Exh. 5

9) In that request, Ms. Gunther asked that two captains (Respondent and Ms. Andrea Bill) and three servers be deleted from the Maritime Consortium. Tr. at 65:16-22.

10) Ms. Gunther's practice and procedure involved deleting individuals who did not work for Electra Cruises for some months from the Maritime Consortium. Tr. at 82:19-83:21.

11) Ms. Gunther directed that these individuals be deleted from the drug testing program because it was Electra Cruises' slow season and the two captains (including Respondent) had not been driving boats for the company for awhile. Tr. at 66:6-9.

12) The employer, not the Maritime Consortium, is responsible for informing an employee that they have been removed from the Maritime Consortium. Tr. at 38:7-17.

13) Following Respondent's removal from the Maritime Consortium on May 9, 2012, Respondent continued to serve as a captain for Electra Cruises for approximately 22 trips, from May 2012 through November 2012. Tr. at 51:2-5; 55:11-19; 66:10-67:7; CG Exh. 3.

[5] References to the transcript take the form of "Tr. at [page #:line#]" and references to the parties' exhibits are "CG Exh. [#]" for the Coast Guard's exhibits and "Resp. Exh. [#]" for Respondent's.

14) Electra Cruises acknowledged that deleting Respondent from the Maritime Consortium was an error. Tr. at 57:1-19.

15) On December 14, 2012, the Coast Guard issued a Warning Letter in Lieu of Civil Penalty to Electra Cruises in connection with Electra Cruises continuing to employ Respondent despite his removal from the Maritime Consortium's drug testing program. CG Exh. 4.

16) Ms. Gunther recalled requesting the Maritime Consortium to delete Respondent, but she never really thought about the deletion after that, and so Electra Cruises then mistakenly continued to employ Respondent. Tr. at 81:1-14.

17) On or about November 19, 2012, Ms. Gunther discovered that Respondent was not listed on the Maritime Consortium's list of covered mariners, so she requested the Maritime Consortium add Respondent back into the drug testing program. Tr. at 70:21-71:2; 79:1-3; CG Exh. 6.

18) Between May 9, 2012 and November 19, 2012, Respondent was not covered under the Maritime Consortium's drug testing program because Electra Cruises had deleted him. Tr. at 79:14-20.

19) In November 2012, Ms. Gunther contacted Respondent and stated that his name was no longer present on the approved captains list for the Maritime Consortium. Tr. at 86:11-16.

20) Ms. Gunther told Respondent that he would need to take another drug test to continue working for Electra Cruises as a captain. Tr. at 86:17-25.

21) Respondent replied that he had already taken a pre-employment drug test approximately six months prior. Tr. at 87:1-5.

22) Respondent then brought paperwork related to his first pre-employment test in November 2011 to Ms. Gunther. Tr. at 87:17-20.

23) Ms. Gunther gave Respondent the drug testing slip and said that he had to take the test because it was required to work as a captain for Electra Cruises. Tr. at 88:2-9; 89:6-13.

24) On November 30, 2012, Respondent submitted a urine sample to be analyzed under DOT drug testing rules for the presence of drugs. CG Exh. 16; CG Exh. 17; CG Exh. 21.

25) Respondent stipulated that the collection was in accordance with DOT procedures. Tr. at 159:18-160:1.[6]

26) Quest Diagnostics, Inc. (Quest Diagnostics) analyzed Respondent's sample given on November 30, 2012. CG Exh. 11.

27) Quest Diagnostics is a SAMHSA certified laboratory and the testing of Respondent's sample comported with the requirements of 49 C.F.R. § 40. CG Exh. 11.

[6] Because Respondent stipulated the collection was done in accordance with all the required procedures under 49 C.F.R. Part 40 and there were no chain of custody issues with the collection, the specimen collector, Ms. Simon, was not called to testify at the hearing.

28) Quest Diagnostics first uses an immunoassay test for the presence of the five drugs subject to DOT testing. Tr. at 168:4-10.

29) If the results indicate a positive presence of one of those drugs, the laboratory then uses a gas chromatography mass spectrometer (GCMS) machine to conduct the confirmatory test. Tr. at 168:14-172:9.

30) The GCMS equipment is calibrated every day to ensure that it is operating within 20 percent of known values. Tr. at 172:10-22.

31) The confirmatory test revealed that Respondent's sample tested positive for the presence of cocaine metabolite at 168 ng/mL, which exceeds the confirmatory cutoff of 100 ng/mL. Tr. at 177:21-24. See also 49 C.F.R. § 40.87 (indicating the initial cutoff is 150 ng/mL for cocaine metabolites and 100 ng/mL for the confirmatory test).

32) On the day of the analysis of Respondent's sample, Quest Diagnostics' GCMS machine measured out at 8.86% (on the high sample) and 6.4% (on the low sample) off the known target respectively for the calibration samples. Tr. at 184:17-25; 188:18-194:21; 196:16-24.

33) Dr. Vanderploeg is employed by the University of Texas Medical Branch in Galveston and is a certified medical review officer (MRO). Tr. at 97:22-98:6; see also CG Exh. 15.

34) Dr. Vanderploeg was the MRO for Respondent's November 30, 2012 drug test. Tr. at 98:11-14; CG Exh. 17.

35) Dr. Vanderploeg verified the test results as positive following the testing of Respondent's split sample as required by the regulations at 49 C.F.R. Part 40. Tr. at 109:19-23; CG Exh. 19.

36) During the MRO's verification call with Respondent, Respondent denied using cocaine and speculated that the positive result might have resulted from his consumption of a liqueur called Agwa de Bolivia, which he claimed contains botanical ingredients, including coca leaves. Tr. at 108:18-109:5; 110:5-15; CG Exh. 20.

37) Dr. Vanderploeg replied that even if the liqueur contained such botanicals, the MRO was not allowed to invalidate the test on that basis under 49 C.F.R. § 40.151(f). Id.

38) At the hearing, Respondent claimed that he obtained the liqueur in approximately 2002 or 2003 as a gift from one of his employers. Tr. at 133:7-16.

39) Respondent also claimed that he consumed some of the liqueur in the fall of 2012 because he was having some sleeping problems. Respondent stated that he would take a snifter (approximately 2-3 ounces) of the liqueur after dinner and believed he consumed the liqueur two to three days prior to his drug test. Tr. at 133:20-134:17.

40) The range of a positive test for cocaine depends primarily on how concentrated or diluted a particular specimen is but can range from a low of the cutoff of 100 ng/mL to as high as several thousand, but Dr. Vanderploeg stated that he typically sees positive ranges in the hundreds of ng/mL not the multi-thousand ng/mL. Tr. at 114:16-22.

41) Dr. Vanderploeg testified that it is not possible to determine on the basis of the test result as to what the source was, how long ago the drug was used, how much was used – i.e., the tested level depends upon both the concentration of the drug consumed and the amount of time that has passed from consumption. Tr. at 115:1-16.

42) Nevertheless, Dr. Vanderploeg opined that Respondent's test result of 168 ng/mL was on the "low end" of what he typically sees for a positive cocaine result. Tr. at 115:17-116:1.

43) Dr. Vanderploeg also opined that any cocaine in the liqueur from coca leaves would metabolize in the body the same as the drug cocaine. Tr. at 113:17-23.

44) Dr. Vanderploeg acknowledged that dermal exposure to cocaine through the handling of paper money has been reported. Tr. at 119:16-23.

45) Dr. Jasbir Singh is employed by the Veterans Affairs Medical Center in Minneapolis, Minnesota and has been the chief of the clinical chemistry and toxicology laboratory since April 1995. Tr. at 139:5-8; 140:8-14. See also Coast Guard Exh. 12.

46) Dr. Singh's laboratory tested Respondent's split sample and confirmed the presence of cocaine metabolites. CG Exh. 18.

47) The Veterans Affairs Medical Center is a certified SAMHSA laboratory and the testing of Respondent's split sample was done in accordance with the requirements of 49 C.F.R. Part 40. Id.

48) Dr. Singh stated that benzoylecgonine is a metabolite of cocaine, so if one consumes cocaine, one finds that product in the individual's body. Tr. at 147:6-11.

49) Dr. Singh opined that if there was coca leaves in a product, one could expect the presence of benzoylecgonine. Tr. at 148:5-22.

50) Respondent had the contents of the liqueur Agwa de Bolivia (Resp. Exh. E) tested for the presence of cocaine following the hearing, but the results were negative for the presence of cocaine. See Judge's Exh. B.[7]

51) Respondent also had the contents of Resp. Exh. E tested at a laboratory on or about June 13, 2014, the results of which indicated the presence of cocaine and cocaine metabolite at the following levels respectively: 204,661 ng/mL and 4,098 ng/mL. Judge's Exh. C.

III. DISCUSSION

A. Jurisdiction

The Coast Guard brought charges against Respondent under the authority of 46 U.S.C. § 7704(c), which provides:

[7] Respondent never submitted the actual results from the first testing of the liqueur and made various claims calling into question the laboratory's results. See Judge's Exh. C.

> If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured.

See also 46 C.F.R. § 5.35. Alleged violations of 46 U.S.C. § 7704(c) are thus "holder offenses" in that the mariner need not have been acting under the authority of his credentials in order to be subject to the Coast Guard's jurisdiction. Jurisdiction is established for the purposes of suspension and revocation proceedings when the use of a dangerous drug is charged, so long as respondent is a current holder of any Coast Guard-issued credentials. See Appeal Decision 2668 (MERRILL) (2007). Here, it is uncontested that Respondent is the holder of a Merchant Mariner Credential (and was such a holder at the time of the November 2012 drug test) and thus jurisdiction is established. See CG Exh. 1.

B. Burden and Standard of Proof

Under the Coast Guard's Rules of Practice, Procedure, and Evidence, "the party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence." 33 C.F.R. § 20.701. In these proceedings, the Coast Guard bears the burden of proof, except with respect to any affirmative defenses raised by a respondent, who then bears the burden. 33 C.F.R. § 20.702. A preponderance of the evidence is generally defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

Black's Law Dictionary (9th ed. 2009). "Thus, a party proves a fact by a preponderance of the evidence when he proves that the fact's existence is more likely than not." Greenwich Colleries v. Director, Office of Workers' Compensation Programs, 990 F.2d 730, 736 (3d Cir. 1993).

C. Violations of Section 7704(c) and the Presumption Established by a Positive DOT Drug Test

Congress enacted 46 U.S.C. 7704 with the express purpose of removing those individuals possessing and using drugs from service in the United States merchant marine. House Report No. 338, 98th Cong., 1st Sess. 177 (1983); Appeal Decision 2634 (BARRETTA) (2002). The definition of dangerous drug originally found in 46 U.S.C. § 7704(a) was later moved to 46 U.S.C. § 2101(8a) and provides that "'dangerous drug" means a narcotic drug, a controlled substance, or a controlled substance analog (as defined in section 102 of the Comprehensive Drug Abuse and Control Act of 1970 (21 U.S.C. § 802)). Cocaine is included among those controlled substances and is one of the five drugs Coast Guard regulations mandate be tested for in a mariner's specimen. See 46 C.F.R. § 16.113(b).

The Complaint alleges that Respondent took a pre-employment drug test and the specimen subsequently tested positive for cocaine metabolites, as determined by the Medical Review Officer. Evidence of drug use by a respondent based upon such a urinalysis test can lead to a presumption of drug use under 46 C.F.R. § 16.201(b). That section provides "[i]f an individual fails a chemical test for dangerous drugs under [46 C.F.R. Part 16], the individual will be presumed to be a user of dangerous drugs". Id.

This presumption arises when the Coast Guard establishes: 1) respondent was tested for a dangerous drug; 2) respondent tested positive for a dangerous drug; and 3) the test was conducted in accordance with 46 C.F.R. Part 16. Appeal Decision 2603 (HACKSTAFF) (1998). Once these three elements are established, a prima facie case of a respondent's use of a dangerous drug is established. However, the presumption is not irrebuttable, and once established, the burden of going forward with evidence shifts to the respondent. Id.

A respondent faced with overcoming the presumption "may rebut the presumption by producing evidence 1) that calls into question any of the elements of the prima facie case, 2) that indicates an alternative medical explanation for the positive test result, or 3) that indicates the use was not wrongful or not knowing." Appeal Decision (CLIFTON) (1995). "If this evidence is

sufficient to rebut the original presumption, then the burden of presenting evidence returns to the Coast Guard." Id.

The Coast Guard implemented the Federal Transportation Workplace Drug Testing as part of its drug testing requirements through its regulations in 46 C.F.R. Part 16. See 46 C.F.R. § 16.113(a) ("Drug testing programs required under this part must be conducted in accordance with 49 CFR part 40"). To be valid, the drug test thus must comport both with 46 C.F.R. Part 16 and the requirements of 49 C.F.R. Part 40. See Appeal Decision 2631 (SENGEL) (2002) ("In the interest of justice and the integrity of the entire drug testing system, it is important that the procedures outlined in 49 C.F.R. Part 40 are followed").

D. Respondent was Subject to a Drug Test Required by 46 C.F.R. Part 16

Marine employers are required to conduct five specific types of drug testing: 1) pre-employment testing; 2) periodic testing; 3) random testing; 4) serious marine incident testing; and 5) reasonable cause testing. See 46 C.F.R. §§ 16.210-16.250; Appeal Decision 2697 (GREEN) (2011). However, precedent clearly establishes that a drug test need not be one of the types enumerated under Part 16 for the Coast Guard to rely on it, provided the tested sample is given voluntarily. See, e.g., Appeal Decisions 2633 (MERRILL) (2002); 2635 (SINCLAIR) (2002); 2545 (JARDIN) (1992).

Here, one issue is whether Respondent's test was ordered in accordance with 46 C.F.R. Part 16, or if not, whether he submitted to the test on a voluntary basis. Pre-employment testing occurs when a mariner is entering maritime employment, and such mariners must either undergo a drug test, show that they have passed a D.O.T. drug test within the previous six months with no subsequent negative tests, or prove that for the past 185 days they were subject to random testing under § 16.230 for at least 60 days and did not fail or refuse to take a drug test. 46 C.F.R. §16.201.

Respondent argued that he had taken and passed a pre-employment drug test in November 2011, prior to his working for Electra Cruises. Respondent maintained that he worked continuously as an independent contractor for Electra Cruises from that time until he was told he had to take a second pre-employment test in November 2012. The record reveals that Respondent is correct. See Coast Guard Exh. 3. Respondent did work on a periodic basis from November 2011 through November 2012. Id.

However, the record also reveals that Electra Cruises removed Respondent from its drug testing program, administered by its third party provider, the Maritime Consortium, on May 9, 2012. See CG Exh. 5. Electra Cruises acknowledged that removing Respondent from the drug testing program was a mistake in that the company continued to use Respondent as a captain for its boats on and off between May and November 2012. Nevertheless, it is a fact that between May 9, 2012 and November 2012, Respondent was not subject to a random drug testing program, as the Maritime Consortium did not have him listed as a captain subject to Electra Cruises' drug testing program. Id.

Respondent argued at the hearing that the evidence was lacking concerning his removal from the Maritime Consortium. Specifically, Respondent questioned the fact that if he was removed, his Maritime Consortium card should have been collected, which it was not. Furthermore, Respondent questioned the documents from Electra Cruises and the Maritime Consortium, which purportedly indicated that he was removed from the program on May 9, 2012.

Respondent is correct the document indicating the removal of Electra Cruises' employees on May 9, 2012 does not specifically identify Respondent as one of those removed. See CG Exh. 5. Nevertheless, Ms. Gunther credibly explained that she specifically recalled requesting the Maritime Consortium to delete Respondent and another captain, along with three servers on that date. Tr. at 65:16-22; 66:6-9; 82:19-83:21. The Maritime Consortium memorandum of

February 11, 2013 also confirms Respondent was in fact removed from the drug testing program on May 9, 2012. CG Exh. 5. Furthermore, the Coast Guard investigated this matter, discovered that Respondent was not subject to the drug testing program, and issued a Warning Letter to Electra Cruises for its continued employment of Respondent without his being subject to the required drug testing program. CG Exh. 6.

All of this record evidence indicates that Respondent was in fact deleted from the Maritime Consortium on May 9, 2012. The fact that his Maritime Consortium card was not collected is not indicative of his continued membership in the program, as it is the employer's responsibility to inform an employee of such removal. Tr. at 38:7-17. Ms. Gunther explained that she did not specifically think about her deletion of Respondent from the Maritime Consortium after doing it, and so she continued to employ him as a captain in the months that followed. Tr. at 81:1-14. Given Electra Cruises' error, Respondent was thus not subject to random drug testing from May 9, 2012 through November 2012 when he was directed to take a pre-employment test. Electra Cruises undoubtedly made a mistake in deleting Respondent from the drug testing program and continuing to employ him as a captain in violation of the regulations. See CG Exh. 4.

This mistake cannot obviate the need to have Respondent drug tested in November 2012. The mandates of 46 C.F.R. § 16.210 are clear. A marine employer is prohibited from engaging or employing an individual to serve as a crewmember unless the individual passes a drug test for that employer. 46 C.F.R. § 16.210. Under Section 16.210(b), this requirement can be waived if the individual has either passed a drug test within the previous six months with no subsequent positive drug test during that six-month period or during the previous 185 days had been subject to a random drug testing program required by § 16.230 for at least 60 days and did not fail or refuse to participate in a required drug test. Id. The regulations require any individual employed

or engaged in a safety-sensitive position as a crewmember to be subject to the company's random drug-testing program. 46 C.F.R. § 16.230.

Here, through no fault of his own, Respondent was not subject to the required random drug-testing program for a period from at least May 9, 2012 (the date he was deleted from the Maritime Consortium) through November 19, 2012 (the date Electra Cruises requested he be added back into the program). See CG Exhs. 5, 6. Thus, for at least 194 days, Respondent was not subject to the random drug testing regime, and had not taken a drug test in the prior six months. See CG Exh. 22. No exception to the requirements of 46 C.F.R. § 16.210 applies to Respondent's situation.

Given these facts, the regulations required Respondent to take another "pre-employment" drug test to be enrolled again in the Maritime Consortium and thus be subject to Electra Cruises' mandated drug testing program. I thus find that the November 2012 drug test was required under applicable Coast Guard regulations and was not an unlawful test that might deprive the Coast Guard of jurisdiction.[8]

E. The Coast Guard Established a Presumption that Respondent was a User of Dangerous Drugs

Given that the November 2012 drug test was required, by 46 C.F.R. Part 16, the question becomes whether the Coast Guard established the presumption of Respondent's drug use on the basis of that test or otherwise established Respondent's use of, or addiction to the use of, a dangerous drug. For the reasons explained below, the Coast Guard clearly established that presumption.

1. Respondent was Tested for a Dangerous Drug

It is undisputed that Respondent took a DOT-drug test on November 30, 2012 by submitting a urine sample to a trained collector and that sample was tested by a SAMHSA

[8] Given this ruling, resolving the question of whether Respondent voluntarily submitted to the test is unnecessary.

certified laboratory for the presence of the dangerous drugs required by 46 C.F.R. Part 16. CG Exhs. 11, 21; see also Tr. at 9:3-18 (Respondent's admission of the allegations concerning the drug test and its collection); Tr. at 159:18-160:1 (Respondent's stipulation as to the collection process).

2. Respondent Tested Positive for a Dangerous Drug

Both the initial test results and the confirmatory test results on Respondent's split sample indicate Respondent's sample tested positive for cocaine metabolites at a level of 168 ng/mL on the confirmatory GCMS test – well in excess of the 100 ng/mL confirmatory cutoff for a positive test. CG Exhs. 11, 14, 16, 18; see also Tr. at 9:24-10:12 (Respondent admitting the correctness of the positive test for cocaine metabolites but asserting that he has an affirmative defense as to the result). Respondent questioned the accuracy of Quest Diagnostics' GCMS machine on the day in question in an attempt to account for the level of cocaine metabolites found in his sample. However, the laboratory's director of operations confirmed that on the day of analysis, the GCMS machine was operating within the required accuracy parameters and was registering known samples within 6.4% to 8.86% of the known values. Tr. at 184:17-25; 188:18-194:21; 196:16-24. Even assuming the GCMS machine measured Respondent's sample with an error of 8.86% variance on the high side, the level of cocaine metabolites in Respondent's sample would only be reduced by 14.88 ng/mL. That "corrected" level (153.12 ng/mL) still exceeds the confirmatory cutoff of 100 ng/mL and even exceeds the initial cutoff level of 150 ng/mL.[9]

3. The Drug Test Complied with 46 C.F.R. Part 16 and 49 C.F.R. Part 40

The MRO verified the test results in accordance with the procedures outlined in 49 C.F.R. Part 40. CG Exhs. 17, 19, 20, 21. Respondent made no allegation that either the

[9] While the MRO acknowledged that Respondent's positive test was on the "low end" of a positive result, the MRO also explained that the test result is merely a snapshot of the then-current level of drug metabolites in the body and does not indicate either the amount consumed or how long ago such drug was consumed. Tr. at 114:16-22; 115:1-116:1.

collection or the testing of his sample, including the split sample, failed to comply with these requirements. See Tr. at 9:3-10:12; 159:18-160:1 (Respondent's stipulation as to the collection process). The record evidence indicates no fatal flaws occurred requiring the test to be cancelled. See 49 C.F.R. § 40.199. The chain of custody for Respondent's specimen was unbroken and the laboratory used proper procedures to analyze Respondent's urine sample as appropriately verified by the MRO. CG Exhs. 17, 19, 20, 21 Given that the Coast Guard established all three of the necessary elements for the presumption under 46 C.F.R. § 16.201(b), I find that the Coast Guard is entitled to a presumption Respondent is a user of, or addicted to the use of, a dangerous drug given the results of his November 30, 2012 drug test.

F. Respondent Failed to Establish his Affirmative Defenses by a Preponderance of the Evidence

Once the Coast Guard established this presumption, the burden shifted to Respondent to rebut that presumption. Respondent tried several avenues of rebuttal. However, for the reasons given below, each of these must be rejected.[10]

Respondent's primary rebuttal effort involved his claim that the positive test result occurred because of his consumption of the liqueur Agwa de Bolivia, which he asserted contained botanicals including coca leaves. See Resp. Exhs. C, D, F. Both the MRO and Dr. Singh admitted that any cocaine in the liqueur from coca leaves would metabolize in the body the same as the drug cocaine. Tr. at 113:17-23; 147:6-11; 148:5-22. However, the MRO correctly declined to invalidate the positive test results based on Respondent's denial of cocaine

[10] Respondent's questioning of the accuracy of the test results is rejected for the reasons given in the analysis above. The levels of accuracy for the GCMS analysis were well within the required standards mandated by HHS guidelines for certified laboratories and even accounting for the level of specific inaccuracy on the date in question, Respondent's sample would be positive at the required threshold for cocaine at both the initial and confirmatory levels.

use and explanation from the consumption of this liqueur. See 49 C.F.R. §§ 40.151(d), (f); see also Appeal Decision 2632 (WHITE) (2002).[11]

The Coast Guard took custody and control of the liqueur bottle (Resp. Exh. E) following the hearing and met Respondent at the collection site with the bottle so that the bottle's contents could be tested at a laboratory for the presence of cocaine. This test was conducted by Pacific Toxicology Laboratories, a SAMHSA certified laboratory. See http://workplace.samhsa.gov/DrugTesting/pdf/CLabList_Oct2013.pdf. Respondent paid for the test, and the initial results did not indicate the presence of cocaine. See Judge's Exh. B. Respondent did not provide the results of this test as ordered but instead merely stated that the test was negative. Id. This statement is an admission against interest.

Respondent subsequently had the liqueur tested again at a different laboratory, National Toxicology Labs, Inc., another SAMHSA certified laboratory. Judge's Exh. C; http://workplace.samhsa.gov/DrugTesting/pdf/CLabList_Oct2013.pdf. The results of this second test indicated the presence of cocaine and cocaine metabolite in the bottle's contents at the following levels: cocaine – 204,661 ng/mL and benzoylecgonine (cocaine metabolite) – 4,098 ng/mL. Id.

A significant procedural problem arises with Respondent's submission of these second laboratory results, as they were submitted after the record was closed on June 20th. Respondent failed to show good cause why this evidence should be admitted or considered in rendering this Decision. Additionally, Respondent did not file a motion to reopen the record. Respondent had more than enough time to get this second test conducted and reported within the timeframes allowed and yet failed to do so. Under these circumstances, Respondent's submission of extra-record evidence could be excluded from consideration. However, in the interests of justice and

[11] While the MRO is prohibited by the regulations from considering such alternative explanations, the judge is not so bound and I have fully considered Respondent's claimed use of this product based on the record evidence presented.

due process, I will nevertheless consider the second test results and these results are hereby admitted for consideration.[12]

After fully considering the results of this second test, I find this evidence to be unreliable in several respects. First, the inconsistency between the first negative test result and the second positive test result is not reasonably explained. As discussed above, Respondent did not offer the actual results of the first test despite an explicit order to provide such results within three days of the May 6, 2013 Scheduling Order. Instead, Respondent only submitted his interpretation of the negative results on June 10, 2013. See Judge's Exh. B. Respondent characterized the tests results from the first SAMHSA lab as negative and it is reasonable to conclude that these results accurately reflected the laboratory's results and the contents of the bottle at that time.

Nevertheless, Respondent claimed that such results were "biased" and not reliable. See Judge's Exh. B. Respondent's claims of bias must be rejected. No bias is evident in the documentation Respondent provided and his assertions of such bias are not supported by any record evidence. The e-mail exchange Respondent highlights with respect to the liqueur's testing merely reflects a fundamentally accurate depiction of the facts at issue, i.e., an employee tested positive for "coke" in his urine; the employee claimed a bottle of liqueur had coca leaves in it; and the judge ordered the bottle tested to determine if there was coca in it. Id. The contents were then apparently tested for both cocaine and cocaine metabolite. Id. Respondent presented no basis to consider the laboratory biased against him so that the testing would have been improper.[13]

Rather, by Respondent's own admission, the laboratory results are negative for the presence of cocaine in the liqueur. Id. Respondent also questioned the fact that the laboratory

[12] Had I been persuaded as to the rebuttal effects of this second test, I would have reopened the record to provide the opportunity for the Coast Guard to submit further argument and evidence. For the reasons provided, I do not find the second test results persuasive to counter the Coast Guard's prima facie case.

did not provide the "control tests" for the testing. Judge's Exh. B. Respondent has failed, however, to explain why such "control tests" are relevant or material to question the admitted negative results.[14]

Second, significant custody and control problems manifest themselves. For the first testing, the Coast Guard assumed custody of the liqueur bottle (Resp. Exh. E) at the hearing and one of the investigating officers, accompanied by Respondent, delivered the bottle to the collection facility, which then shipped the bottle to the laboratory for testing.[15] The results of the test were negative. Judge's Exh. B. It was only after Respondent himself retrieved the bottle and shipped it to another laboratory for further testing that the test came back positive for the presence of both cocaine and cocaine metabolite at levels that on their face would have been hard for the first laboratory to have missed in its testing. The formal chain of custody was thus broken despite Respondent's claims that he simply shipped the sealed box containing the bottle to the second laboratory. Respondent had unfettered access to the bottle and its contents before submitting it to the second laboratory for testing.

Third, the presence of the cocaine metabolite – benzoylecgonine – is problematic as the record evidence indicates that such a metabolite is created by the body's consumption and processing of cocaine. Tr. at 146:20-148:22. Respondent presented no evidence to show that this metabolite can be produced through any other means. Respondent has not explained how or why any metabolized cocaine should be found in the liqueur itself; much less at the levels reported, which far exceed the cutoff levels for a confirmatory test and which were not found by

---

[13] One must also remember this was a SAMHSA certified laboratory and any biased conduct from the laboratory would surely jeopardize the laboratory's certification if proven. It simply strains all credulity to think that the laboratory was biased against Respondent or somehow did not conduct the test as requested.

[14] The evidence indicates that the first laboratory was requested to test the bottle's contents for the presence of cocaine. See Judge's Exh. B. Respondent provided no credible reason why the first laboratory's testing would have failed to register the amount of cocaine/cocaine metabolite apparent in the second test results.

[15] There are significant pre-existing custody and control problems with the liqueur bottle in the first instance as well. The bottle had been opened and in Respondent's custody and control presumably from the time he tested positive until the time of the hearing.

the first laboratory. The presence of the human body-processed metabolite of cocaine in the liqueur bottle is puzzling and leads one to question the rebuttal effect of the second test results. [16]

Finally, even had there been some amount of cocaine or coca leaf in the liqueur, Respondent would have had to produce preponderant evidence based on his claimed consumption of that product to explain the amount of cocaine metabolite found in his positive drug test.[17] Respondent did not do so and has not offered sufficient evidence to explain the presence of cocaine metabolites in his November 30, 2012 drug test on the basis of his claimed consumption of Agwa de Bolivia liqueur.

As an affirmative defense, Respondent bore the burden to demonstrate the presence of cocaine in the liqueur in sufficient quantity to trigger the positive drug test. See 33 C.F.R. § 20.702(a). Respondent failed to do so despite being given months to have the liqueur tested (twice) and given almost three months to call a toxicology or biochemistry expert to support his affirmative defense.[18]

Additionally, Respondent attempted to explain the presence of cocaine metabolites in his urine sample by referring to the fact that cocaine residue can be found on paper money, which he handles as part of his job. See also Resp. Exh. K. The MRO acknowledged that dermal exposure to cocaine through the handling of paper money has been reported. Tr. at 119:16-23. Respondent did not, however, present any evidence as to the quantity of such exposure or how his particular handling of paper currency would have led to the levels reported in the positive test

[16] Even the presence of non-decocanized coca leaves is questionable. Respondent argued that his particular bottle of Agwa de Bolivia predated the decocanized product. See Resp. Exhs. C, D, F. However, given 1) the custody and control issues surrounding the bottle and 2) the inconclusive date of production for the particular Agwa de Bolivia, the claims that the liqueur, as originally produced, contained non-decocanized coca leaves remain subject to some doubt.

[17] Respondent attempted to explain the amount of cocaine metabolite found based on titration levels and generated a chart purporting to show the levels of cocaine from the liqueur over time (see Resp. Exh. G). Such explanations are not convincing and do not arise to a level sufficient to rebut the Coast Guard's presumption of drug use. Respondent is not a trained toxicologist or biochemist and his calculations are subject to serious question despite his admirable efforts in asserting his defenses. Additionally, evidence indicating that the liqueur's asserted cocaine contents (even assuming the integrity of the second test, disregarding the first results) would register a positive test based on Respondent's admittedly rather limited consumption is not present. See Judge's Exh. C; Tr. at 133:20-134:17.

of November 30, 2012. Respondent's efforts on this front are simply too speculative and lacking in evidentiary foundation to rebut the presumption. Respondent's affirmative defenses thus failed to counter the presumption of drug use based on the positive drug test.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard in accordance with 46 U.S.C. § 7704(c), 46 C.F.R. Part 5, and 33 C.F.R. Part 20.

2. Respondent is the holder of a United States Coast Guard-issued Merchant Mariner Credential and was such a holder at the time of the November 30, 2012 drug test.

3. On November 30, 2012, Respondent took a pre-employment drug test required under Coast Guard regulations at 46 C.F.R. Part 16.

4. The drug test was collected and analyzed using D.O.T.-mandated procedures that complied with 49 C.F.R. Part 40.

5. Respondent's urine sample tested positive for cocaine metabolites.

6. Respondent did not successfully rebut the Coast Guard's prima facie case by showing that the test was not conducted in accordance with the procedures at 46 C.F.R. Part 16 or 49 C.F.R. Part 40; or by showing there was an alternative medical explanation for the positive test; or by showing that the drug use was not wrongful or unknowing.

7. Respondent has been shown to be a user of, or addicted to the use of, dangerous drugs under 46 U.S.C. § 7704(c).

8. Respondent has not provided satisfactory proof that he is cured as required by 46 U.S.C. § 7704(c).

8. The allegations in the Coast Guard's Complaint are therefore found **PROVED**.

V. SANCTION

Under Coast Guard procedural rules, the judge must include any appropriate order in the disposition of the case. 33 C.F.R. § 20.902(a)(2). Here, the Coast Guard has proposed an order of revocation. Having found the Coast Guard's allegations against Respondent proved, I must enter an order against Respondent. Title 46 U.S.C. § 7704(c) requires revocation of a

[18] The hearing ended on March 26, 2013 and the record was closed on June 20, 2013.

respondent's credentials unless satisfactory proof of cure is provided. Likewise, 46 C.F.R. § 5.59 requires revocation in this matter. Respondent has provided no evidence of cure and accordingly, I find revocation of any and all of Respondent's Coast Guard-issued credentials is required.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED THAT Judge's Exhibits A, B, and C are **ADMITTED** into evidence.

IT IS HEREBY FURTHER ORDERED THAT the allegations in the Complaint are found **PROVED** and Respondent thereby violated 46 U.S.C. § 7704(c) as evidenced through the drug test of November 30, 2012 that tested positive for cocaine metabolites.

IT IS HEREBY FURTHER ORDERED THAT all of Respondent Mark William Mowery's Coast Guard-issued credentials are **REVOKED**.

IT IS HEREBY FURTHER ORDERED THAT Respondent immediately surrender any and all of his Coast Guard-issued credentials to the Coast Guard's Investigating Officer.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties serves as notice of appeal rights set forth in 33 C.F.R. § 20.1001 – 20.1004, a copy of which can be found in **Attachment C**.

SO ORDERED.

/s/ Parlen L. McKenna
Hon. Parlen L. McKenna
US Coast Guard Administrative Law Judge

Date: October 29, 2013

Attachment A – List of Witnesses and Exhibits

Coast Guard Witnesses

1. Heather Lynn Spurlock, Maritime Consortium, Inc.
2. Eric Jason Goodman, Electra Cruises, Inc.
3. Heather Gunther, Office Manager, Electra Cruises, Inc.
4. Dr. James M. Vanderploeg, Medical Review Officer
5. Dr. Jasbir Singh, Chief of Clinical Chemistry and Toxicology, Minneapolis Veterans Affairs Medical Center
6. Ted Johnson, Director of Operations, Quest Diagnostics

Respondent Witnesses

1. Mark William Mowery

Coast Guard Exhibits

1. Copy of Respondent's Merchant Mariner Credential
2. Maritime Consortium, Inc. notification to U.S. Coast Guard of positive drug test
3. Respondent's pay stubs from Electra Cruises, Inc.
4. Letter of Warning issued to Electra Cruises, Inc. by the U.S. Coast Guard
5. Maritime Consortium, Inc.'s membership report for Respondent
6. Maritime Consortium Statement issued to Electra Cruises
7. Maritime Consortium letter of December 4, 2012 notifying Electra Cruises of Respondent's positive drug test
8. Maritime Consortium letter of December 10, 2012 notifying Electra Cruises of Respondent's positive drug test for the split sample
9. Training certificate for Nancy G. Simon
10. C.V. of Ted Johnson
11. Litigation package from Quest Diagnostics
12. C.V. of Jasbir Singh
13. Qualifications of Minneapolis Veterans Affairs Medical Center Certifying Scientist
14. Minneapolis Veterans Affairs Medical Center litigation package
15. C.V. of James Vanderploeg
16. Quest Diagnostics Lab Report to MRO
17. MRO notification of positive test to Maritime Consortium, Inc.
18. Minneapolis Vesterans Affairs Medical Center's notification to MRO regarding testing of split sample
19. MRO notification of positive split sample result to Maritime Consortium, Inc.
20. MRO Verification Worksheet
21. Custody and Control Form
22. Respondent's negative pre-employment drug test given on 11/22/2012

Respondent Exhibits

A. Website printout from the Maritime Consortium, Inc.
B. Add/delete form from the Maritime Consortium, Inc.
C. 3/25/13 email from distributor of liqueur

D. Agwa de Bolivia website homepage
E. Bottle of partially consumed Agwa de Bolivia (not retained)
F. Agwa de Bolivia website printout
G. Chart of asserted metabolite titration
H. Portion of Drug Testing Book
I. Copy of Respondent's Maritime Consortium, Inc.'s membership card
J. C.V. of Richard Parent
K. Article printed from CNN Health News regarding traces of cocaine on U.S. paper money

Judge's Exhibits

A. Respondent's Drug Test Results from March 28, 2013
B. E-mail with Attachments from Respondent to Judge McKenna's Attorney-Advisor and Paralegal and the Coast Guard's Investigating Officers dated June 10, 2013
C. E-mail with Attachment from Respondent to Judge McKenna's Attorney-Advisor and Paralegal and the Coast Guard's Investigating Officers date June 26, 2013

Attachment B – Rulings on Proposed Findings of Fact and Conclusions of Law

Coast Guard Proposed Findings of Fact

1. The Respondent, Mark William Mowery, and the subject matter of this proceeding are within the jurisdiction of the U.S. Coast Guard vested under the authority of 46 U.S.C. Chapter 77.

RULING: Accepted and Incorporated.

2. On 30 November 2012, the Respondent was a holder of Coast Guard issued MMC 000119867. [CG Exhibit 01]

RULING: Accepted and Incorporated.

3. The Respondent was removed from Electra Cruise's random drug testing program on 9 May 2013. [CG Exhibit 05]

RULING: Accepted and Incorporated.

4. On 19 November 2012, Electra Cruises ordered a test for the Respondent to add him into their [drug testing] program. [CG Exhibit 06]

RULING: Accepted and Incorporated as Modified.

5. On 30 November 201[2], the Respondent submitted to a pre-employment drug test conducted in accordance with 46 C.F.R. Part 16. [CG Exhibit 21]

RULING: Accepted and Incorporated as Modified.

6. On 30 November 201[2], the Respondent's urine specimen was collected by a trained and experienced human urine specimen collector at Operational Health Services. Prior to providing the specimen, the Respondent placed his signature on a Federal Drug Testing Custody and Control Form along with his date of birth, date of the test and telephone number. The Respondent's specimen was assigned Specimen ID Number 5136556, a unique identifying number specific to his urine specimen. The collector followed all applicable Department of Transportation procedures set forth in 49 C.F.R. Part 40 in collecting the urine specimen of the Respondent. [CG Exhibits 09, 21]

RULING: Accepted and Incorporated as Modified.

7. A courier employed by Quest Diagnostics picked up the samples and transported them directly to the Quest facility in West Hills, CA on 01 December 2012 for testing. Quest Diagnostics is a laboratory certified by SAMHSA and approved by the Department of Transportation to conduct chemical testing. [CG Exhibit 11]

RULING: Accepted and Incorporated.

8. The Respondent's urine specimen (Specimen ID Number 5136556) tested positive for cocaine metabolites. [CG Exhibits 2, 5, 7, 8, 11, 14, 20]

RULING: Accepted and Incorporated.

9. At the Respondent's request, a split specimen was forwarded to a second SAMHSA certified, Department of Transportation approved laboratory, Minneapolis Veterans Affair Hospital in Minneapolis, MN. The ensuing split specimen analysis reconfirmed the Respondent's positive test result for cocaine metabolites. [CG Exhibit 14]

RULING: Accepted and Incorporated.

10. The Medical Review Officer (MRO), Dr. James Vanderploeg, reviewed the results from both labs and personally interviewed the Respondent. Based on his thorough review of the documentation forwarded to him by the labs and his interview with the Respondent, the MRO found no credible medical or other excuse for the Respondent's urine sample to have tested positive for cocaine metabolites. The MRO also found no flaws or irregularities in the laboratory documentation he reviewed. [Exhibit CG 16-21]

RULING: Accepted and Incorporated.

11. Based on the testimony of the MRO, the positive test results were verified in accordance with 49 C.F.R. Part 40. [TR 98-113, 120]

RULING: Accepted and Incorporated.

12. The Respondent admitted to all jurisdictional and factual allegations during the administrative hearing which occurred in Long Beach, California 26 March 2013. [Transcript (TR) 9-10]

RULING: Accepted and Incorporated.

13. Based on the un-rebutted finding that the Respondent is a user of dangerous drugs, the only sanction available to the Administrative Law Judge in this matter is revocation under 46 U.S.C. 7704(c).

RULING: Accepted and Incorporated. Pursuant to the mandates of 46 U.S.C. § 7704(c) – revocation was required as Respondent has not demonstrated cure.

Coast Guard Proposed Conclusions of Law

1. The admission to all jurisdictional and factual allegations, along with the uncontroverted evidence provided by the Coast Guard, establishes the presumption that the Respondent is a user of dangerous drugs.

RULING: Accepted and Incorporated in Part and Rejected in Part. The Coast Guard established the presumption of Respondent's dangerous drug use or addiction to a dangerous drug for the reasons given in this Decision and Order. However, Respondent did not admit to all factual allegations.

2. There was no valid medical explanation for the positive test result and the Respondent failed to provide evidence to rebut this presumption.

RULING: Accepted and Incorporated.

Attachment C – Appeal Rights

33 C.F.R. Part 20, Subpart J

§ 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.

§ 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.

§ 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.

§ 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.