

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

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UNITED STATES COAST GUARD  
Complainant

vs.

NELSON GREG HOPPER  
Respondent

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Docket Number 2013-0190  
Enforcement Activity No. 4596583

**DECISION AND ORDER**

Date Issued: September 10, 2014

Issued By: Honorable Bruce Tucker Smith  
Administrative Law Judge

**Appearances:**

**For the Complainant**

Gary Ball, Esq.  
U.S. Coast Guard S & R National Center of Expertise

LT Takila Powell, Investigating Officer  
U.S. Coast Guard Sector New Orleans

**For the Respondent**

William B. Hidalgo, Esq.

## **I. STATEMENT OF THE CASE**<sup>1</sup>

On May 21, 2013, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Nelson Greg Hopper (Respondent), seeking revocation of his Coast Guard-issued Merchant Mariner's Credential (MMC or credential). The Complaint charged Respondent with use of, or addiction to, dangerous drugs pursuant to 46 U.S.C. §7704(c) and 46 C.F.R. §5.35. Specifically, the Complaint alleged Respondent participated in a random drug screening and tested positive for cocaine metabolites. On June 13, 2013, Respondent filed an Answer admitting all jurisdictional allegations, but denying all factual allegations.

The hearing commenced on January 21, 2014 in New Orleans, Louisiana, and continued on January 22, 2014, and May 6, 2014. Gary Ball, Esq. and LT Takila Powell appeared on behalf of the Coast Guard; William Hidalgo, Esq. appeared on behalf of Respondent, who was also present. The Coast Guard presented the testimony of seven witnesses and offered sixteen exhibits, fifteen of which were admitted into the record.<sup>2</sup> Respondent presented the testimony of one witness and also testified on his own behalf. Respondent offered twelve exhibits at the hearing, all of which were admitted into the record.

At the conclusion of the hearing, the court asked the parties to submit written briefs addressing the "randomness" of Respondent's drug test. Upon receipt of the parties' written submissions, the court closed the administrative record.

The principal legal issue for the court's consideration in this case is whether Respondent's selection for drug testing was truly random for the purposes of 16 C.F.R. §16.230

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<sup>1</sup>The court acknowledges and thanks student-legal externs Whitney Jansta and Joshua Hall, of the Norman Adrian Wiggins School of Law, Campbell University, Raleigh, North Carolina, for their research contributions in this case.

<sup>2</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: CG 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.). A list of all exhibits offered and admitted, together with the names of the parties' respective witnesses, are set forth in Attachment A.

and Appeal Decision 2704 (FRANKS) (2014). In this case, the court finds that the Coast Guard did not prove Respondent's selection was truly random.

Thus, after careful review of the entire record, including witness testimony, applicable statutes, regulations, and case law, the court finds the allegations in the Complaint **NOT PROVED**. See 46 C.F.R. §5.567. Hence, the Coast Guard **DID NOT PROVE** Respondent's use of, or addiction to the use of dangerous drugs.

## **II. FINDINGS OF FACT**

Pursuant to the authority described in 33 C.F.R. §§20.701, 902, the court makes the following Findings of Fact based on the preponderance of the evidence after thorough and careful analysis of the documentary evidence, testimony of witnesses, stipulations made by the parties, if any, and the entire record taken as a whole.

1. At all relevant times, Respondent was a holder of a validly issued Coast Guard-issued Merchant Mariner's Credential. (Tr. Vol. II at 171).
2. At all relevant times herein, GIS Marine employed Respondent as Captain and Master of the crew boat GIS BLAKELY. (Tr. Vol. I at 190 – 191).
3. GIS Marine 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. GIS Marine employs the services of DISA Global Solutions (DISA)<sup>3</sup>, a third-party consortium, for management of GIS Marine's drug and alcohol program. (Tr. Vol. I at 191).
5. GIS Marine begins its quarterly "random" drug tests by submitting a list of all of its vessels to DISA. (Tr. Vol. I at 191, Vol. II at 80 – 83).
6. DISA, in turn, generates "random" lists by using a computer program called "DISAWorks" – a computer software application based upon a Microsoft program called "Visual Basic 6." (Tr. Vol. III at 27 – 28).
7. In late March, 2013, a DISA employee named Darlene Weaver accessed the DISA computer and generated a list of vessels owned and operated by GIS Marine. (Tr. Vol. II at 80).

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<sup>3</sup> "DISA" is an acronym that no longer has a specific meaning. (Tr. Vol. III at 19).

8. GIS Marine provided Ms. Weaver with a number of vessels to be selected by the DISA Computer. She then activated the computer/software and received a list of numbers from the DISA computer. (Tr. Vol. II at 80).
9. Ms. Weaver does not know how or why the DISA computer/software generates the list of numbers she was asked to provide and which she eventually did provide to GIS Marine. (Tr. Vol. II at 98 – 106).
10. Ms. Weaver does not know the scientific or mathematic basis for the DISA computer/software selection process or the validity of the underlying computer program which generated the list of GIS Marine vessel numbers. (Tr. Vol. II at 98 – 106).
11. Jason Welsh is the Senior Director of Information Technology at DISA, with responsibility for oversight of all IT matters at DISA. (Tr. Vol. III at 20, 23).
12. Mr. Welsh did not author or create a document called “Random Selection Procedure and Probabilities” which DISA provides to its customers. (Tr. Vol. III at 29; CG Ex. 6).
13. The DISA document called “Random Selection Procedure and Probabilities” makes no reference to either “DISAWorks” or the Microsoft program called “Visual Basic 6.” (CG Ex. 6).
14. The DISA document called “Random Selection Procedure and Probabilities” contains mathematical equations and formulae and purports to validate the mathematical processes described in the document by reference to a “Bernoulli trial.” (CG Ex. 6).
15. In regard to the DISA document called “Random Selection Procedure and Probabilities,” Mr. Welsh only “read it over a few times over the years” and that he neither understands nor is able to perform a “Bernoulli trial.” (Tr. Vol. III at 29, 40 – 41; CG Ex. 6).
16. Mr. Welsh admitted that the Microsoft program, “Visual Basic 6,” is an “off the shelf program” purchased and used by DISA. (Tr. Vol. III at 37).
17. Mr. Welsh does not know any of the details of the mathematics of the random number generating function of the Microsoft program, “Visual Basic 6” and that the “details of the inner workings would have to be provided by Microsoft.” (Tr. Vol. III at 37).
18. Mr. Welsh admitted that DISA purchased the Microsoft program, “Visual Basic 6,” then only “plugs the numbers in” as part of the “random” selection process. (Tr. Vol. III at 38).

19. No employee of DISA actually knows the background or mathematical basis for the functioning of the random number generating function of “Visual Basic 6.” (Tr. Vol. III at 38).
20. No employee of DISA knows how the random number generating function of “Visual Basic 6” produces the numbers it produces. (Tr. Vol. III at 38).
21. Once a “randomly” selected vessel is dockside, all persons aboard that vessel are subject to testing. (Tr. Vol. I at 193).
22. On April 1, 2013, GIS Marine notified four vessels for testing: the GIS PEARL, the GIS ASHLEY, the M/V BRODY PAUL, and the GIS BLAKLEY. (Tr. Vol. I at 194-95).
23. On April 13, 2013, Respondent’s assigned vessel, the GIS BLAKELY, was dockside. Davis Arceneaux, Sr., then Health, Safety and Environment Administrator of GIS Marine, informed Respondent and the crewmembers they had been selected for a random drug test. (Tr. Vol. I at 197).
24. On April 13, 2013, Todd Hebert, a Department of Transportation (DOT)-certified urine specimen collector employed by GIS Marine, boarded the GIS BLAKELY to conduct marine employee drug testing. (Tr. Vol. I at 216 – 225; CG. Ex. 7).
25. On April 13, 2013, Mr. Hebert identified Respondent by his Louisiana state driver’s license and thereafter administered Respondent’s individual urine specimen collection. (Tr. Vol. I at 227 – 232, 244 – 252; CG. Ex. 8).
26. Mr. Hebert documented Respondent’s collection process on a Custody Control Form (CCF). (Tr. Vol. I at 238 – 239; CG. Ex. 8).
27. The CCF documenting Respondent’s collection bears the signature of Respondent, his Social Security number, and a unique Specimen ID Number, to wit: 57597039. (Tr. Vol. I at 233; CG Ex. 8).
28. Mr. Hebert divided Respondent’s urine specimen into two specimen bottles, labeled “A” and “B.” (Tr. Vol. I at 248).
29. Mr. Hebert witnessed Respondent sign the CCF and write his initials on the labels of both specimen bottles. (Tr. Vol. I at 248 – 252; Resp. Ex. C, D).
30. On April 13, 2013, Mr. Hebert sent Respondent’s urine specimen bottles, via FedEx, to Alere Toxicology Services (Alere) in Gretna, Louisiana for chemical testing. (Tr. Vol. I at 252 – 253; CG Ex. 8).
31. On April 16, 2013, Alere received two urine specimen bottles and their associated CCFs, both bearing Respondent’s unique Specimen ID Number: 57597039. (Tr. Vol. II at 124).

32. Alere is a DOT-approved laboratory, certified to conduct scientific testing on human urine samples for the purpose of detecting the presence of illegal drugs. (Tr. Vol. II at 122 – 123; CG Ex. 1A).
33. On or about April 16-17, 2013, Alere tested the bottle “A” sample of the urine specimen bearing Specimen ID Number 57597039. The initial test revealed 515 nanograms per milliliter of benzoylecgonine, a cocaine metabolite; the cut off level for a positive initial test is 150 nanograms per milliliter. (Tr. Vol. II at 135; CG Ex. 10).
34. On or about April 16-17, 2013, Alere tested the bottle “A” sample of the urine specimen bearing Specimen ID Number 57597039. The confirmatory test revealed 323 nanograms per milliliter of benzoylecgonine; the confirmatory cut off level is 100 nanograms per milliliter. (49 C.F.R. Part 40; Tr. Vol. II at 134 – 135; CG Ex. 10).
35. ElSohly Laboratories, Inc. of Oxford, Mississippi, is the DOT-certified laboratory, tested the “B” bottle of Respondent’s specimen. (Tr. Vol. II at 141; CG Ex. 14).
36. On or about July 10, 2013, ElSohly Laboratories, Inc. tested the “B” bottle of Respondent’s specimen. The specimen again tested positive for the presence of the cocaine metabolite. (Tr. Vol. III at 62 – 63; CG Ex. 1A, 14).

### **III. PRINCIPLES OF LAW**

#### **A. Suspension & Revocation Proceedings**

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. §7701(a). Such proceedings are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. 46 C.F.R. § 5.5. Under 46 U.S.C. §7704(c), a Coast Guard issued credential shall be revoked if it is proven that the holder of the credential has been a user of or addicted to the use of dangerous drugs, unless the holder provides satisfactory proof that the holder is cured. Administrative Law Judges therefore have the authority to revoke a mariner’s credential for violations arising under 46 U.S.C. §7704. See 46 C.F.R. §5.19(b).

#### **B. The Coast Guard’s Burden of Proof**

The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation proceedings. 46 U.S.C. §7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. §556(d). Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden to prove the charges are supported by a preponderance of the evidence.<sup>4</sup> 33 C.F.R. §§20.701, 20.702(a).

### **C. Employer-Ordered Random Drug Cases**

Title 46 C.F.R. Part 16 mandates that employers conduct five specific types of drug testing programs: 1) Pre-employment drug testing; 2) Periodic drug testing; 3) Random drug testing; 4) Serious marine incident drug testing; and, 5) Reasonable cause drug testing. 46 C.F.R. §§16.210-16.25.

Title 46 C.F.R. §16.201 provides, in pertinent part, as follows:

(a) Chemical testing of personnel must be conducted as required by this subpart [i.e., Subpart B - Required Chemical Testing - 1) pre-employment, 2) periodic, 3) random, 4) post-serious marine incident, and 5) reasonable cause drug testing] and in accordance with the procedures detailed in 49 CFR part 40..

(b) If an individual fails a chemical test for dangerous drugs under this part, [Part 16, which includes testing in accordance with the procedures in 49 CFR Part 40] the individual will be presumed to be a user of dangerous drugs. (emphasis added).

The presumption of drug use or addiction described in 46 C.F.R. §16.201, above, is a highly significant evidentiary factor in a Suspension and Revocation hearing. The presumption arises when the Coast Guard proves a prima facie case by a preponderance of the evidence and

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<sup>4</sup> A preponderance of the evidence “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.’” Concrete Pipe and Products of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)).

the burden then shifts to the respondent to produce persuasive evidence to rebut the presumption. 46 C.F.R. §16.201(b).<sup>5</sup>

At the trial of this case, the Coast Guard tried to prove a prima facie case that Respondent either used, or is addicted to, a dangerous drug.<sup>6</sup> To trigger the 46 C.F.R. §16.201(b) presumption, thus establishing a prima facie case of dangerous drug use, the Coast Guard must prove the following:

(1) that the respondent was the person tested for dangerous drugs, (2) that the respondent failed the test, and (3) that the test was conducted in accordance with 46 C.F.R. Part 16. Proof of those three elements establishes a prima facie case of use of a dangerous drug (*i.e.*, a presumption of drug use), which then shifts the burden of going forward with evidence to the respondent to rebut this presumption. If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone. Appeal Decisions 2592 (MASON); 2584 (SHAKESPEARE); 2560 (CLIFTON); 2555 (LAVALLAIS); 2379 (DRUM) and 2279 (LEWIS).

Appeal Decision 2603 (HACKSTAFF) (1998) at 4.

Appeal Decision 2704 FRANKS (2704) (2014), restated the above prima facie case elements and further clarified element 3 to establish a prima facie case (and thus trigger the presumption), the drug test must be conducted as required by 46 C.F.R. Part 16. Part 16 requires testing not only in accordance with the procedures in 49 CFR Part 40, but also the reason the drug test was conducted; that is, 1) pre-employment, 2) periodic, 3) random, 4) post-serious marine incident, and 5) reasonable cause drug testing.

In FRANKS, the Complaint alleged Respondent was a user of or was addicted to the use of dangerous drugs. The ALJ found Respondent tested positive for cocaine metabolites but determined the employer did not conduct the drug test in accordance with 46 C.F.R. Part 16

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<sup>5</sup>A respondent faced with overcoming the presumption of dangerous drug use “may rebut the presumption by producing evidence (1) that calls into question any of the elements of a 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 2560 (CLIFTON) (1995).

<sup>6</sup> A prima facie case is one in which the facts as alleged will prevail until contradicted and overcome by other evidence. See Black’s Law Dictionary 1189 (6<sup>th</sup> ed. 1990).



because one element of the prima facie case was missing – evidence showing the test met the regulatory requirements for a Periodic test. 16 C.F.R. §16.220. The ALJ therefore found the Coast Guard’s Complaint Not Proved and dismissed the matter with prejudice. On appeal, the Vice Commandant in FRANKS held “when the test was ordered pursuant to the regulations but the justification for it is not consonant with the regulations, or the test is not conducted in accordance with 49 C.F.R. Part 40 and is therefore unreliable, there is no prima facie case proved.” Id. “Because the Coast Guard failed to show that the relevant drug test was properly ordered fewer than 46 C.F.R. Part 16, it failed to establish the third element of its prima facie case and the ALJ was correct to dismiss the matter.” Id. at 12.

FRANKS recognized Part 16 implicates the Fourth Amendment because drug testing undertaken by private employers that must comply with federal regulatory requirements constitutes Government action. Id. at 7. As restated on pages 5-7 in FRANKS and summarized herein for the sake of brevity, the Fourth Amendment protects individuals against unreasonable searches and seizures conducted by or mandated by the government. For a search to be considered reasonable the government must demonstrate that, on balance, the public's legitimate interest in conducting the search outweighs the individual's legitimate expectation of privacy. Thus, the courts must “. . . consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” Id. at 6, (quoting from the Final Rule, Drug and Alcohol Testing of Commercial Vessel Personnel, 53 Fed. Reg. 47,064, 47,065-66 (Nov. 21, 1988) (internal citations omitted)).

The public’s legitimate interest in conducting the search stems from its interest in making sure commercial vessel personnel performing duties directly affecting a vessel’s navigational or operational safety do so free of prohibited substances. But, when searches are undertaken in situations where individualized suspicion is lacking, other safeguards must be relied upon to

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ensure that the discretion of the party conducting the search is properly defined and the scope of the search is limited. Id. (emphasis added).

The other safeguards consist of the Part 16 constraints placed on an employer's discretion in conducting mandated drug testing as well as ensuring minimal invasion of privacy of those tested. For example, selecting an employee for random testing must be made in accordance with the prescriptions in 46 C.F.R. §16.230(c), noted below. Requirements for reasonable cause (46 C.F.R. §16.250), or post-accident (46 C.F.R. §16.240) testing are also severely circumscribed to limit an employer's discretion in administering these tests to employees. Id.

### **Requirements for a Random Test**

To qualify as a "Random drug test," 46 C.F.R. §16.230(c) provides, as follows:

(c) 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 that is matched with crewmembers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee's chance of selection shall continue to exist throughout his or her employment. 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.

Here, the Coast Guard bears the burden of showing by a preponderance of the evidence that the employer selected Respondent's vessel (and, hence, Respondent) for a random drug test in accordance with 46 C.F.R. Part 16, specifically, §16.230(c).

## **IV. ANALYSIS**

### **A. Elements of the Prima Facie Case for Employer-Ordered Drug Tests**

In the instant case, the Coast Guard charged Respondent with use of, or addiction to the use of, dangerous drugs because his urine tested positive for cocaine metabolites following an April 13, 2013, employer-ordered, random drug test. 46 C.F.R. §16.230.

Thus, it is appropriate to analyze the facts of this case in light of the three elements of a prima facie case, described above.

**1. Element One: Was Respondent the person tested for dangerous drugs?**

Proof of this element of the prima facie case “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).

The Coast Guard established that on April 13, 2013, Mr. Hebert, who is DOT-certified, collected Respondent’s specimen. (Tr. Vol. I at 244-247; CG Ex. 7). Mr. Hebert testified he made a positive identification of Respondent prior to collecting the specimen. (Tr. Vol. I at 227 – 232, 244 – 252; CG. Ex. 8). Mr. Hebert subsequently ensured Respondent’s urine specimen was assigned unique specimen identification number: 57597039. (Tr. Vol. I at 238 – 239; CG. Ex. 8). Mr. Hebert capped and sealed the specimen bottles, then witnessed Respondent sign the Custody Control Form (CCF) and affix his handwritten initials to the bottle labels. (Tr. Vol. I at 40, 149-150, 248 – 252).

On April 16, 2013, Alere received Respondent’s urine specimen and corresponding CCFs, both bearing unique Specimen ID Number: 57597039. (Tr. Vol. II at 124). Alere thereupon assigned Respondent’s urine specimen a unique laboratory bar coded number 81586828, and processed the sample for testing. (CG Ex. 10).

At hearing, Respondent contested the allegation that initials on the “A” and “B” bottle were his, suggesting the initials had been forged. (Tr. Vol. I at 140; Resp. Ex. C, D). In support

of this contention, Respondent offered the testimony of handwriting expert, Mr. Curt Baggett. (Tr. Vol. I at 178; Resp. Ex. C, D, I, J, K).

Mr. Baggett testified the initials placed on the two specimen vials (the “A” sample and the “B” sample) depicted in Respondent’s Exhibits C and D, were not written by Respondent. (Tr. Vol. II at 229). Mr. Baggett stated he came to this conclusion after comparing sixteen known exemplars of Respondent’s signature/initials against photocopies of the labels affixed to the “A” and “B” sample bottles. (Resp. Ex. K).

The clear implication of Mr. Baggett’s testimony – and Respondent’s argument – is that if the initials on the “A” and “B” sample bottles were forged, then there exists the potential that the contents of the sample bottles did not belong to the Respondent and, thus, it was not Respondent’s urine that was chemically tested.

The court finds Mr. Baggett’s conclusion unreliable for three reasons. First, Mr. Baggett did not examine the original, allegedly-forged initials. (Resp. Ex. K). Instead, he relied solely on photocopies of the questioned initials. The court notes that Mr. Baggett could not, therefore, check forensic clues such as the relative pressure applied to the paper by the writing instrument, or make any chemical analysis or comparison of the inks used on the labels and the ink used on the CCF.

Second, Mr. Hebert, the specimen collector, testified that he witnessed Respondent sign the CCF and affix his handwritten initials to the labels on the “A” and “B” specimen bottles containing his urine specimen. (Tr. Vol. I at 248 – 252). In this regard, the court found Mr. Hebert to be a generally credible witness.

Third, at the hearing, Respondent admitted that he placed his initials on two specimen sample bottles. (Tr. Vol. II at 185). As such, the court concludes there is no probative evidence, beyond speculation, that the initials on Respondent’s samples were placed there by anyone other than the Respondent himself. An ALJ is not required to infer any deliberate acts of tampering in

the handling of a specimen when none has been shown. Appeal Decision 2560 (CLIFTON) (1995) (citing Gallagher v. Nat'l Transp. Safety Bd., 953 F.2d 1214, 1218 (10th Cir. 1992)). As such, the Coast Guard proved by a preponderance of the evidence that Respondent was the person who was tested for dangerous drugs on April 13, 2013.

## **2. Element Two: Did Respondent Fail the Drug Test?**

At hearing, Dr. David A. Green, Laboratory Director of Alere Toxicology Services (Alere), testified that between April 13 and April 17, 2013, his laboratory received two urine specimen bottles, each bearing Specimen ID Number: 57597039, a number which is unique to Respondent's urine samples. Dr. Green further testified that Alere processed the "A" sample of Specimen ID Number: 57597039 for the presence of illegal drugs.

The initial test of Respondent's "A" sample revealed 515 nanograms per milliliter of benzoylecgonine, a cocaine metabolite; the cut off level for a positive initial test is 150 nanograms per milliliter. 49 C.F.R. §40.87(a). The confirmatory test revealed 323 nanograms per milliliter of benzoylecgonine; the confirmatory cut off level is 100 nanograms per milliliter. Id. (Tr. Vol. II at 134 – 135; CG Ex. 10). Alere, a DOT-approved laboratory, then sent the results to the Medical Review Officer (MRO). (Tr. Vol. II at 143).

Dr. Jerome Cooper, a board certified MRO, testified he received the laboratory test results from Alere for specimen number identification number 57597039/laboratory number 81586828. (Tr. Vol. II at 12-15, 20-22; CG Ex. 13). On April 17, 2013, Dr. Cooper spoke with Respondent over the phone and informed him that he had tested positive for cocaine. (Tr. at Vol. II at 22; CG Ex. 13). After speaking with Respondent, Dr. Cooper determined there was no valid medical reason for the positive test result. (Tr. Vol. II at 23). Dr. Cooper offered Respondent the opportunity to have the split sample tested, which Respondent accepted. (Tr. Vol. II at 22).

Dr. Cooper also testified that the split, or "B" sample, was sent to ElSohly Laboratories, Inc. of Oxford, Mississippi (ElSohly) for testing. ElSohly tested Respondent's "B" sample and

confirmed the original positive result. (Tr. Vol. II at 30, Vol. III at 62 – 63; CG Ex. 1A, 14; CG Ex. 14).

Dr. Barry Sachs, also a board certified MRO, reviewed the documentation associated with the urine specimen bearing identification number 57597039/laboratory number 81586828. (Tr. Vol. III at 57 – 59; CG Ex. 15). Dr. Sachs concluded the “B” (or “split”) sample also tested positive for cocaine. (Tr. Vol. III at 63).

Thus, the court is satisfied that the Coast Guard established that Respondent failed the drug tests performed on his urine specimen. Thus, the Coast Guard established the second element of the three-part prima facie test.

**3. Element Three: Was Respondent Properly Ordered to Test Under 46 C.F.R. Part 16 and was Respondent’s Drug Test Conducted in Accordance with 49 C.F.R. Part 40?**

The Complaint alleges Respondent failed a random drug test, as defined in 46 C.F.R. §16.230(c). In this case, Respondent was not individually selected. Rather, the Coast Guard alleges that Respondent’s vessel, the GIS BLAKELY, was randomly selected, thus subjecting all members of the crew to testing.

The evidence in this case revealed that in late March 2013, Darlene Weaver, an employee of DISA Global Solutions (DISA), provided Respondent’s employer, GIS Marine, with a computer generated list of vessels owned and operated by that company. (Tr. Vol. II at 80).

Ms. Weaver explained how she obtained the computer generated list of vessels:

All I do is, I’ll get a number of vessels that need to be – they provide me with a number – the client or GIS Marine provides me with a number of vessels. I put that number in, and what happens next is, it’s just an automated service. The system sends out the random – the boats generated at random to the client.

(Tr. Vol. II at 80).

Ms. Weaver was unable to explain the scientific or mathematic basis for the selection process or the validity of the underlying computer program which generated the list of vessels. (Tr. Vol. II at 98 – 106).

Nevertheless, the GIS employees aboard those vessels were then tested per the provisions of 46 C.F.R. §16.230. One of those vessels selected for testing was the GIS BLAKELY, aboard which Respondent served as captain. (Tr. Vol. I at 191 – 202; Tr. Vol. II at 79 – 88).

In support of its contention that the instant selection process was in fact, mathematically random, the Coast Guard offered testimony from Mr. Jason Welsh, Senior Director of Information Technology at DISA Global Solutions. (Tr. Vol. III at 20).<sup>7</sup>

Mr. Welsh testified that his company generates “random” lists by using a computer program called “DISAWorks” – a computer software application based upon a Microsoft program called “Visual Basic 6.” Mr. Welsh testified that in his 15 years of experience in the IT field, the random number generating function of “Visual Basic 6” is “generally accepted as meeting [IT] industry standards.” (Tr. Vol. III at 28 – 29; CG Ex. 5, 6).

The court hastens to point out that “general acceptance,” without proof of a scientific or mathematic basis, is entirely insufficient for the purposes of the 4<sup>th</sup> Amendment. In order to meet the required threshold that Respondent’s selection was by a “scientifically valid method,” set forth in 46 C.F.R. §16.230(c,) it would have been helpful for the Coast Guard to establish the expertise of the witness or witnesses who could testify about the scientific or mathematic basis for Respondent’s selection.

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<sup>7</sup> Respondent’s counsel was precluded from interviewing Mr. Welsh prior to the hearing by legal counsel for DISA. Thus, counsel’s first opportunity to speak with Mr. Welsh was during cross-examination. (Tr. Vol. III at 5). The Coast Guard played no part in DISA’s unfortunate refusal to allow counsel to speak with Mr. Welsh. In fact, Gary Ball, Esq., attorney for the Coast Guard, attempted to persuade DISA to allow Respondent’s counsel to interview Mr. Welsh, but to no avail. (Tr. Vol. III at 6). Inasmuch as the Vice Commandant recognized in FRANKS that drug testing performed in accordance with 46 C.F.R. Part 16 is tantamount to government action, one would think that those commercial entities who participate in both the selection and testing of mariners would be obliged to cooperate with counsel as part of the pre-trial preparation process.

In evaluating such a scientific or mathematic evidentiary proof, it is absolutely essential that the court assess the academic credentials and professional expertise of the witness who purports to establish such a foundation.

In this case, Mr. Welsh testified that his baccalaureate education was from the University of Texas in “management information systems” – not in mathematics, or even computer science. (Tr. Vol. III at 20). The Coast Guard did not offer any proof that established that Mr. Welsh’s degree in “management information systems” qualified him, academically or professionally, to explain how the “Visual Basic 6” component of “DISAWorks” actually works or whether that program generates numbers by a “scientifically valid means.”

Hence, Mr. Welsh lacks the appropriate academic background to assist the court in evaluating a scientific or mathematic foundation for the validity of the selection method. 46 C.F.R. §16.230(c).

The Coast Guard asked Mr. Welsh to explain a document used by DISA, entitled “Random Selection & Probabilities” – ostensibly, a two page primer on how random selections of mariners and/or vessel are made by DISA. (CG Ex. 6)<sup>8</sup>.

A cursory review of Coast Guard Exhibit 6 reveals several algebraic formulae and equations and tables which probably make general sense to a mathematician. What is starkly absent from Coast Guard Exhibit 6 is any reference to either “DISAWorks” or Microsoft’s “Visual Basic 6.” Hence, the Coast Guard did not establish any connection between its Exhibit 6 and either “DISAWorks” or Microsoft’s “Visual Basic 6.”

Mr. Welsh admitted that he didn’t author Coast Guard Exhibit 6, that he had only read that document “a few times over the years” and that he neither understands nor is able to perform the “Bernoulli trial” referenced in the document. (Tr. Vol. III at 29, 40 – 41; CG Ex. 6).

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<sup>8</sup> Coast Guard Exhibit 6 was originally ruled inadmissible on the basis of relevance. However, upon further review by the court, Coast Guard Exhibit 6 was admitted into evidence, over Respondent’s objection.



Hence, Coast Guard Exhibit 6 is of little evidentiary value to the court. The document is, at best, a primer (to those capable of deciphering the math) on how random selections are made – in a generic sense. It is the kind of generic document one could easily download from the Internet. However, there was no evidence or testimony that Coast Guard Exhibit 6 related in any way to the DISA computer/software or the means by which DISA actually selects vessels or mariners.

Mr. Welsh admitted that the Microsoft program, “Visual Basic 6,” is an “off the shelf program” purchased and used by DISA. (Tr. Vol. III at 37).

He further admitted that he did not know any of the details of the mathematics of the random number generating function of the Microsoft program, “Visual Basic 6” and that the “details of the inner workings would have to be provided by Microsoft.” (Tr. Vol. III at 37). More particularly, Mr. Welsh conceded that Microsoft does not allow the purchaser to “actually let you look at the basics of the program that tell you how the random number is generated.” (Tr. Vol. III at 39).

Moreover, Mr. Welsh admitted that he did personally not know how “Visual Basic 6” actually works:

Q. So you basically – or DISA buys a program that Microsoft says is a random generator, and then you plug the numbers in?

A. Yes.

Q. And no one at DISA actually knows the background of the program, correct?

A. Correct.

Q. And doesn't know anything about the details of how it reaches its final random number?

A. Right. Yes, I don't know how it does that, you know, under the hood.

(Tr. Vol. III at 38).

Clearly, neither Mr. Welsh, nor Ms. Weaver, nor any DISA employee, could provide testimony or evidence that establishes a “scientifically valid method” for vessel selection or that “each vessel subject to the marine employer’s test program remains (mathematically) equally subject to selection.” 46 C.F.R. §16.230(c). Otherwise stated, the court specifically finds that the marine employer’s use of “DISAWorks,” an application based upon a Microsoft program called “Visual Basic 6,” was not proved to be a “scientifically valid method” of selection.

Because the Coast Guard failed to establish that Respondent’s selection was, in fact, random, it could not prove the first half of the third required element of its prima facie case. Hence, the Coast Guard cannot prove that “the relevant drug test was properly ordered under 46 C.F.R. Part 16 and the “test cannot form the basis for suspension and revocation proceedings.” Thus, the “ALJ [would be] correct to dismiss the matter” at this juncture. Appeal Decision 2704 (FRANKS) (2014).

Although Respondent was not properly ordered to submit to a drug test (46 C.F.R. Part 16) his sample was properly tested in accordance with 49 C.F.R. Part 40, and properly classified as positive in accordance with the same. See 49 C.F.R. §40.87. As discussed above, Mr. Hebert, who is DOT-certified, collected, sealed and shipped Respondent’s urine specimen. (Tr. Vol. I at 216 – 222; CG. Ex. 7). Mr. Hebert followed all DOT procedures, including identifying Respondent by his Louisiana state driver’s license. (Tr. Vol. I at 227 – 232, 244 – 252; CG. Ex. 8).

Dr. David A. Green, Laboratory Director of Alere Toxicology Services (Alere), testified that between April 13 and April 17, 2013, his laboratory received the two urine specimen samples, each bearing Specimen ID Number: 57597039. He further testified that Alere processed the “A” sample of Specimen ID Number: 57597039 for the presence of illegal drugs.

The initial test of Respondent’s “A” sample revealed 515 nanograms per milliliter of benzoylecgonine, a cocaine metabolite; the cut off level for a positive initial test is 150

nanograms per milliliter. 49 C.F.R. §40.87(a). The confirmatory test revealed 323 nanograms per milliliter of benzoylecgonine; the confirmatory cut off level is 100 nanograms per milliliter. Id. (Tr. Vol. II at 134 – 135; CG Ex. 10). Alere, a DOT-approved laboratory, then sent the results to the Medical Review Officer (MRO). (Tr. Vol. II at 143).

Respondent offered no evidence which suggested Alere failed to conduct the testing in accord with 49 C.F.R. Part 40.

Dr. Jerome Cooper, a board certified MRO, testified he received the laboratory test results from Alere for specimen number identification number 57597039/laboratory number 81586828. (Tr. Vol. II at 12-15, 20 – 22; CG Ex. 13). On April 17, 2013, Dr. Cooper spoke with Respondent over the phone and informed him that he had tested positive for cocaine. (Tr. at Vol. II at 22; CG Ex. 13). After speaking with Respondent, Dr. Cooper determined there was no valid medical reason for the positive test result. (Tr. Vol. II at 23). Dr. Cooper offered Respondent the opportunity to have the split sample tested, which Respondent accepted. (Tr. Vol. II at 22).

Dr. Cooper offered no testimony which suggested Alere failed to conduct the testing in accord with 49 C.F.R. Part 40.

Dr. Cooper also testified that the split, or “B” sample, was sent to ElSohly Laboratories, Inc. of Oxford, Mississippi (ElSohly) for testing. ElSholy tested Respondent’s “B” sample and confirmed the original positive result. (Tr. Vol. II at 30, Vol. III at 62 – 63; CG Ex. 1A, 14; CG Ex. 14).

Dr. Barry Sachs, also a board certified MRO, reviewed the documentation associated with the urine specimen bearing identification number 57597039/laboratory number 81586828. (Tr. Vol. III at 57 – 59; CG Ex. 15). Dr. Sachs concluded the “B” (or “split”) sample had also tested positive for cocaine. (Tr. Vol. III at 63).

Respondent offered no evidence which suggested ElSholy failed to conduct the testing in accord with 49 C.F.R. Part 40. Neither did Dr. Sachs offer any testimony which suggested El Sholy failed to conduct the testing in accord with 49 C.F.R. Part 40.

Thus, the court is satisfied that the Coast Guard established compliance with 49 C.F.R. Part 40, subparts C, D, E, F, G, and H. Hence, the Coast Guard proved the second half of the third element of the three-part prima facie test.

## **V. CONCLUSION**

The Coast Guard has not established a prima facie case by a preponderance of the evidence. The Coast Guard did not prove that the GIS BLAKELY was randomly selected by a scientifically valid method, thus, the Coast Guard could not prove that Respondent was randomly selected by a scientifically valid method. Thus the court is “required to dismiss” the matter as per Appeal Decision 2704 (FRANKS) (2014).

Accordingly, the court finds the Coast Guard has not proved that Respondent is a user of, or addicted to the use of, dangerous drugs in accordance with 46 U.S.C. §7704(c) and 46 C.F.R. §5.35.

## **VI. ULTIMATE FINDINGS OF FACT**

1. At all relevant times, Respondent was a holder of Coast Guard-issued Merchant Mariner’s Credential.
2. The GIS BLAKELY was not randomly selected by a scientifically valid method wherein each vessel in the marine employer’s fleet was equally subject to selection.
3. Respondent underwent a urinalysis April 13, 2013, which followed the guidelines set for drug testing by the Department of Transportation in 49 C.F.R. Part 40.
5. The initials on Respondent’s “A” and “B” urine samples were written by Respondent. The initials were not forged.
6. Respondent’s “A” and “B” urine samples were tested at Department of Transportation-approved laboratories.

7. Respondent's "A" and "B" urine samples tested was positive for cocaine metabolites.

## VII. CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7704(c); 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§ 551-59.
2. Respondent was not properly ordered to submit for testing in accordance with 46 C.F.R. Part 16 in that he was not randomly selected.
3. Respondent was the individual who was tested for dangerous drugs.
4. Respondent's urine specimen tested positive for dangerous drugs
5. Respondent's drug test was conducted in accordance with 49 C.F.R. Part 40.
6. Respondent is not a user of, or addicted to the use of. dangerous drugs. 46 U.S.C. §7704(c); 46 C.F.R. §5.35.

## VIII. DECISION


The allegations as set forth in the Complaint are found **NOT PROVED**.

## IX. ORDER

The Complaint is hereby **DISMISSED WITH PREJUDICE** per 46 C.F.R. 5.567.

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

**IT IS SO ORDERED.**


<b>Bruce Tucker Smith</b> <b>US Coast Guard</b> <b>Administrative Law Judge</b>
Date: <input type="text" value="September 10, 2014"/>

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

### **Coast Guard Exhibits**

1. Appellate cases
- 1A. Fed Register
2. DISA Report
3. E-mail from DISA – NOT ADMITTED
4. Letter to USCG; positive result
5. DISA Selection letter
6. Random selection process
7. Hebert's certification
8. CCF – collector's copy
9. CCF, copy 1
10. Photocopy of specimen bottle
11. MRO certification
12. CCF, MRO copy
13. MRO notes
14. CCF, split sample
15. MRO certification, Dr. Sachs

### **Respondent Exhibits**

- A. Baggett CV
- B. Baggett case list
- C. Photocopy of specimen vials
- D. Color photocopy of specimen vial, signature
- E. CCF, copy 2
- F. CCF, copy 2
- G. MRO worksheet
- H. Instructions for mock collections
- I. Color photocopy of specimen vial blue gloved hand
- J. Mortgage
- K. Baggett report
- L. Hidalgo letter with attachments

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

1. Davis Arceneaux
2. Todd Hebert
3. Dr. Jerome Cooper
4. Darlene Ann Weaver
5. Dr. David Green
6. Jason Welch
7. Dr. Barry Sachs

### **Respondent's Witnesses**

1. Curt Baggett
2. Nelson Greg Hopper

## **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.