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

UNITED STATES COAST GUARD
Complainant

vs.

KYLE ALLEN PFENNING
Respondent

Docket Number 2014-0147
Enforcement Activity No. 4807052

DECISION AND ORDER
Issued: June 22, 2015

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Mr. James D. Fayard
Sector Lower Mississippi
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For the Coast Guard

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For the Respondent

IT IS ORDERED that service of this Decision and Order upon the parties will serve as notice of appeal rights as set forth in 33 C.F.R. Subpart J, § 20.1001.

DECISION AND ORDER

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I. PRELIMINARY STATEMENT

The United States Coast Guard filed a Complaint seeking to revoke Respondent Kyle Allen Pfenning's Merchant Mariner's Credential (MMC). Through counsel, Respondent filed a timely Answer contesting the allegations. I held a hearing in this matter and, after carefully considering the testimony and evidence, find each of the three allegations **NOT PROVED**.

II. PROCEDURAL HISTORY

The Coast Guard initiated this proceeding by filing a Complaint on April 3, 2014. The Complaint alleged that Respondent provided a urine sample for drug testing on December 28, 2011 and the sample tested positive for marijuana metabolites. The Coast Guard also alleged that Respondent committed misconduct by refusing to submit to a drug test on December 17, 2013; the laboratory analysis of his urine sample showed it was incompatible with human urine and therefore substituted.

Respondent filed an Answer on April 30, 2014, admitting the jurisdictional elements but denying certain factual allegations. He asserted as an affirmative defense to Allegation One that he had a Marinol prescription. As an affirmative defense to Allegation Two, he said he was suffering from a kidney infection and a staph infection at the time of the test, and the medications he took for those conditions could account for the low creatinine levels in his urine sample.

I held a prehearing conference on June 4, 2014. James Fayard represented the Coast Guard and Donelle Ratheal, Esq. represented Respondent. At the conference, the Coast Guard indicated it wished to make some technical amendments to the Complaint. However, the amendments were in fact substantive and entailed the addition of a third allegation: that Respondent took a pre-employment drug test on May 23, 2014 which tested positive for marijuana. Respondent filed a timely Amended Answer denying the new allegation.

I convened another prehearing conference the week prior to the hearing to ensure the parties were ready to proceed, and both parties said they were prepared to present their cases. The hearing commenced on September 9 and 10, 2014 in Memphis, Tennessee. James Fayard represented the Coast Guard, assisted by William Davis and LT Katrian Hernandez. Donelle Ratheal, Esq. represented Respondent.

During their testimony, some of the Coast Guard's witnesses referred to documents which were not in evidence. I therefore ordered the Coast Guard to provide those documents as supplemental evidence. Accordingly, I left the record open to receive this evidence, as well as potential testimony from a witness who was scheduled to testify but did not appear. The Coast Guard later moved to admit EX CG-03, which had been marked for identification but not admitted at the hearing; I admitted it over Respondent's objection. The Coast Guard also informed me no additional testimony would be forthcoming, so I closed the record and set the date for the parties to file post-hearing briefs and proposed findings of fact and conclusions of law pursuant to 33 C.F.R. § 20.710. Both parties timely filed these documents and the matter is now ripe for review.

III. FINDINGS OF FACT

Preliminary Facts:

1. At all relevant times, Respondent was the holder of a Coast Guard-issued Merchant Mariner Credential (MMC).

General Facts Regarding Drug Testing:

2. Dawn M. Hahn is Director of the Laboratory and a Responsible Person at Quest Diagnostics Laboratory in Lenexa, Kansas. (Tr. Vol. I p. 119, EX CG-02 pp. 74-77).

3. Quest Diagnostics performed the analysis of the urine samples in all three tests underlying the allegations in this case. (EX CG-01, CG-02, CG-04, CG-05, and CG-09; EX R-A).

4. A documentation packet (also called a litigation packet) includes copies of the requisition that accompanies a specimen when it arrives at the laboratory; the

laboratory's internal chain of custody; the quality control data and test results from the instruments used to test the specimen; and a description of the laboratory testing processes. (Tr. Vol. I pp. 113-14).

5. Unless the accompanying paperwork indicates otherwise, the laboratory operates on the assumption that specimens arrive uncontaminated and that proper collection procedures were followed. (Tr. Vol. I pp. 129-30).

6. When a urine sample arrives at the laboratory, it is logged and assigned a unique identification number used throughout the testing process. (Tr. Vol. I p. 114).

7. The original sample bottle is always kept in the processing department; just a small portion called an aliquot is removed and tested. (Tr. Vol. I p. 121).

8. If an aliquot is compromised during testing, a new aliquot can be removed and tested because the integrity of the original bottle is intact. (Tr. Vol. I p. 121).

9. Samples are initially subjected to an immunoassay screening test. (Tr. Vol. I p. 115; EX CG-02 p. 30, CG-05 p. 54).

10. Immunoassay tests are performed on a large chemistry machine which is calibrated daily. (Tr. Vol. I p. 115).

11. Control specimens with known values are also included in each batch to ensure quality control. (Tr. Vol. I p. 115).

12. If a specimen tests positive during the initial screening, confirmatory testing is carried out on a gas chromatograph/mass spectrometry machine (GC/MS). (EX CG-02 p. 42, CG-05 p. 67).

13. The GC/MS is calibrated with every batch and quality controls are performed at both the beginning and end of the batch. (Tr. Vol. I p. 116).

14. In addition to immunoassay testing, each sample is subjected to specimen validity testing to ensure it contains human urine. (Tr. Vol. 1 p. 118).

15. Creatinine is a human byproduct of muscle breakdown. (Tr. Vol. I p.118).

16. If the specimen validity testing indicates a sample has a creatinine level below 20 milligrams per deciliter (mg/dL), the laboratory must conduct specific gravity testing, as well. (Tr. Vol. I p. 118, 135).

17. In specimen validity testing, the sample's creatinine levels and specific gravity are compared to the acceptable levels set by the DOT regulations. (Tr. Vol. I p. 118).

18. A sample is considered dilute if its creatinine level is less than 20 mg/dL. (Tr. Vol. I p. 118).

19. A dilute sample may occur if a person drinks a lot of water prior to taking a drug test or if fluid is added to the sample. (Tr. Vol. I p. 126).

20. A dilute sample is still tested for drug metabolites and the results are marked as positive or negative. (Tr. Vol. I p. 119).

21. According to the regulations, a creatinine level of less than 2 mg/dL indicates a substituted sample. (Tr. Vol. I pp. 136, 143).

22. The laboratory does not attempt to determine what substance is actually present in a substituted sample. (Tr. Vol. I p. 141).

23. An MRO must review any result that is positive, adulterated, substituted, or invalid before the result is reported. (Tr. Vol. I p. 146).

24. The MRO determines whether a medical reason for the low creatinine level and/or low specific gravity exists. (Tr. Vol. I p. 147).

25. Variations in temperature may affect the pH of a specimen. (Tr. Vol. I p. 123).

26. The laboratory stores specimens at extremely cold temperatures because this preserves them better. (Tr. Vol. I p. 125).

27. Although long-term exposure to extreme heat may cause a positive test to become negative, it will not "create drugs" or, in other words, cause a negative specimen to test positive. (Tr. Vol. I p. 125).

28. Temperature variations do not affect whether a sample is deemed dilute. (Tr. Vol. I p. 125).

Facts as to Allegation 1:

29. Respondent took a pre-employment drug test for a position with American River Transportation Company (ARTCO). (EX CG-01; EX R-A).

30. Jackie Jones is a DOT-certified collector employed at Concentra Medical Center. (Tr. Vol. I pp. 24-25).

31. Ms. Jones was familiar with the DOT regulations governing the collection of urine specimens for drug testing. (Tr. Vol. I pp. 26-30).

32. On December 28, 2011, Ms. Jones collected a urine sample from Respondent for a DOT drug test. (EX CG-01; EX R-A; Tr. Vol. I p. 32).

33. When Ms. Jones administers drug tests, she directs donors to list any medications they are taking on the back of the donor copy of the Federal Drug Testing Custody and Control Form (CCF) in case the MRO calls to discuss the results. However, she does not personally review those lists. (Tr. Vol. I pp. 30-31, 41).

34. During her testimony, Ms. Jones referred to Copy 2 of the CCF, which is the MRO copy of the five-part form. (Tr. Vol. I p. 49).

35. Quest Diagnostics received the sample on December 29, 2011. (EX CG-02 pp. 6-11; Tr. Vol. I p. 124).

36. The laboratory assigned the sample accession number 885407W. (EX CG-02 p. 5; Tr. Vol. I p. 114).

37. The immunoassay screening was presumptively positive. (EX CG-02 p. 30).

38. Confirmatory testing carried out on a gas chromatograph/mass spectrometry (GC/MS) machine resulted in finding of marijuana metabolite at 39 nanograms per milliliter (ng/mL). (EX CG-02 p. 5; Tr. Vol. I p. 117).

39. The laboratory also conducted specimen validity testing, which showed the sample was dilute. (CG-Ex. 2 p. 5; Tr. Vol. I p. 117-18).

40. The CCF shows Respondent's urine sample tested positive for marijuana metabolite at 39 ng/mL. (Tr. Vol. I p.117).

41. The CCF also shows the specimen as dilute with a creatinine level of 5.7 mg/dL and a specific gravity of 1.002. (Tr. Vol. I p.117).

42. The laboratory cannot distinguish between metabolites generated by the consumption of marijuana and those generated by the prescription drug Marinol. (Tr. Vol. I p. 131).

43. Dr. Karen Ausman, the Medical Review Officer (MRO) who reviewed the results of this test, did not testify. (Tr. Vol. II p 230; CG Motion dated 9/18/14).

44. Dr. Ausman was assigned to this review on January 3, 2012 and contacted Respondent because the results of the drug test were positive for marijuana. (EX CG-03, CG-10).

45. Respondent told Dr. Ausman he had a prescription for Marinol and had recently taken Marinol pills. (Tr. Vol. II p 103).

46. Dr. Ausman requested a copy of Respondent's prescription and proof that he had filled the prescription. (Tr. Vol. II p 103).

47. Respondent provided a copy of a Marinol prescription written by Dr. Malcolm Bridwell. (Tr. Vol. II p 103).

48. Respondent was in possession of the prescription paperwork and was unable to show it had been filled at a pharmacy because Dr. Bridwell had also given him Marinol pills simultaneously with the prescription. (Tr. Vol. II p. 95).

49. The record shows multiple contacts between Dr. Ausman and Respondent but no contact between Dr. Ausman and Dr. Bridwell. (EX CG-10; EX R-D, R-E).

50. Dr. Ausman certified the test as positive on January 18, 2012 and it was reported the following day. (EX CG-01, CG-03, CG-10; EX R-A).

51. Dr. Bridwell died while Respondent was "dealing with the Coast Guard" about this issue was therefore unavailable to testify at the hearing. (Tr. Vol. II pp. 95, 197).

Facts as to Allegation 2:

52. Steel City Marine employed Respondent as a Pilot of uninspected towing vessels. (Tr. Vol. II p. 97).

53. Dean Ference is the president of Steel City Marine. (Tr. Vol. I p. 93).

54. Steel City Marine owns two boats and operates a third. (Tr. Vol. I p. 97).

55. As president, Mr. Ference is ultimately responsible for ensuring that the company complies with all Coast Guard regulations, including those related to employee drug testing. (Tr. Vol. I p. 94).

56. Another employee of Steel City Marine, Ann Robinson, generally makes arrangements for drug testing to take place. (Tr. Vol. I p. 94).

57. Steel City Marine maintains a Drug and Alcohol Policy with an effective date of April 15, 2004 in addition to the USCG Antidrug Alcohol Misuse Policy and Prevention Plan. (Tr. Vol. I p. 95; EX CG-07).

58. The Drug and Alcohol Policy is posted on the boats and is also given to prospective employees in their application packages. (Tr. Vol. I p. 95).

59. The only accidents Respondent was involved in during his employment at Steel City Marine were very minor, so he never underwent post-casualty drug testing. (Tr. Vol. I pp. 100-01).

60. The M/V GREGORY DAVID was selected for testing on December 17, 2013 because the company tests each boat once per year and had not yet tested this one. (Tr. Vol. I p. 94).

61. No specific individual was targeted during the drug testing of the M/V GREGORY DAVID on December 17, 2013. (Tr. Vol. I p. 95).

62. When Steel City Marine orders a boat to be drug tested, all crewmembers on the boat, all who are getting off the boat, and all who are coming aboard are tested. (Tr. Vol. I p. 95).

63. Company practice is to do whole-boat drug testing, and the company does not randomly test individuals. (Tr. Vol. I p. 98).

64. The decision to test a vessel is made based on vessel availability and when someone can board it to test the employees. (Tr. Vol. I p. 107).

65. Not all of the company's employees will be tested each year under this method, but by testing each of the three boats once per year, more than 50 percent of the employees will be tested. (Tr. Vol. I p. 107).

66. Steel City ordered a whole-boat test of the M/V GREGORY DAVID on December 17, 2013. (Tr. Vol. I. p. 94).

67. Andrew D. Jones is a DOT-certified collector and is the managing partner at PCS Drug Screening. (Tr. Vol. I p. 66).

68. Mr. Jones conducted the whole-boat test of the M/V GREGORY DAVID on December 17, 2013. (Tr. Vol. I p. 79).

69. To the best of his recollection, Mr. Jones gave no less than an hour's notice to the boat pilot that he would be performing drug testing. (Tr. Vol. I p. 79).

70. Other employees aboard the M/V GREGORY DAVID were notified of the testing when Mr. Jones boarded the boat. (Tr. Vol. I pp. 79-80).

71. Mr. Jones tested eight employees on the M/V GREGORY DAVID that day. (Tr. Vol. I p. 72, EX CG-11).

72. The tests took place in the vessel's lavatory, which Mr. Jones prepared by making sure no cleaning agents were in the room and adding bluing to the commode. (Tr. Vol. I p. 80).

73. Mr. Jones did not tape off the water faucets, but told donors not to turn on the water or flush the commode until he had taken possession of the specimens. (Tr. Vol. I pp. 80, 83).

74. Mr. Jones believed he would have heard if the toilet had flushed or water taps had been turned on. (Tr. Vol. I p. 82).

75. Mr. Jones testified that the door to the lavatory is solid and you cannot see the donor's head or feet. (Tr. Vol. I p. 81).

76. Mr. Jones does not wear gloves during collections because he has an allergic reaction, but he washes his hands in between collections. (Tr. Vol. I p. 82).

77. At the conclusion of the testing, Mr. Jones gathered all the specimens and delivered them to his office, where they were placed in a lockbox for a Quest courier to pick up. (Tr. Vol. I p. 85).

78. Mr. Jones did not note anything unusual about Respondent's sample and said the specimen would have been in the correct temperature range because he did not mark down that anything was wrong. (Tr. Vol. I p. 69).

79. Mr. Jones was in possession of Copy 1, the laboratory copy, and Copy 2, the MRO copy, of the Custody and Control Form, as well as the results page from the laboratory. (Tr. Vol. I p. 70, 88).

80. Copy 5 of the Custody and Control Form is the donor copy and is supposed to be given to the donor at the time of the test. (Tr. Vol. I p. 70).

81. The Coast Guard submitted Copy 5, the donor copy, as part of its evidence. (EX CG-04).

82. The Coast Guard could not explain how Respondent's donor copy had come into its possession. (Tr. Vol. II pp. 193-96).

83. Respondent left the employ of Steel City Marine on or around December 28, 2013. (Tr. Vol. I p. 101).

84. Respondent's urine sample was received by Quest Diagnostics Laboratory in Lenexa, Kansas on December 19, 2013. (Tr. Vol. I p. 135).

85. The sample was deemed negative for drugs on the initial immunoassay test. (Tr. Vol. I p. 142).

86. Because the sample did not screen positive for a drug, no gas chromatography analysis was performed. (Tr. Vol. I p. 141).

87. The laboratory also subjected the sample to specimen validity testing. (Tr. Vol. I pp. 135-36).

88. The creatinine level of Respondent's sample was less than .05 and the specific gravity was 1.0218. (Tr. Vol. I p. 136).

89. A second aliquot was tested and also achieved results that fell into the "substituted" category. (Tr. Vol. I p. 143).

90. Dr. Horacio Marafioti was the MRO assigned to review this test. (Tr. Vol. I p. 171; EX CG-06).

91. Dr. Marafioti spoke on the phone with Respondent on December 23, 2013 to explain the test results and ask whether there was a medical explanation. (Tr. Vol. I p. 173-74; EX CG-12).

92. Respondent requested split sample testing. (Tr. Vol. I p. 175; Tr. Vol. II p. 116-17; EX CG-12).

93. Dr. Marafioti did not order split sample testing. (Tr. Vol. I p. 181; EX CG-06).

94. Dr. Marafioti reported a substituted sample, refusal to test on December 23, 2013. (EX CG-06).

Facts as to Allegation 3:

95. On May 23, 2014, Respondent took a pre-employment drug test at Pelican in Harahan, Louisiana. (EX CG-08).

96. Michelle Hall collected the urine sample for this test. (Tr. Vol. I p. 157).

97. Ms. Hall could not recall any flaws or anything unusual about this test. (Tr. Vol. I pp. 157-58).

98. The facility numbers on the CCF, which are used for billing purposes, are scratched out and altered by hand. (EX CG-08; Tr. Vol. I pp. 159-60, 164).

99. The name of the MRO reflected at the top of the form has also been changed to Dr. Benjamin Gerson, but the MRO who signed the form was Dr. Jerome Cooper. (EX CG-08; Tr. Vol. I pp. 160-61).

100. Quest Diagnostics in Lenexa, Kansas performed the testing. (EX CG-08).

101. The record does not reflect the accession number assigned to the sample.

102. The record does not reflect the immunoassay screening test resulted.

103. Dr. Cooper is an MRO with University Services. (Tr. Vol. II p. 22).

104. On June 4, 2014, Dr. Cooper contacted Respondent to discuss the results of the drug test. (EX CG-13).

105. When Dr. Cooper interviewed Respondent, he complied with the DOT protocol for identifying himself and ensuring he was speaking to the correct person. (Tr. Vol. II p. 19).

106. Dr. Cooper explained to Respondent that his sample had tested positive for marijuana and asked if there was a medical explanation. (Tr. Vol. II pp. 19-20).

107. Dr. Cooper stated the only medical explanation would be if Respondent had a prescription for Marinol, which is rarely prescribed. (Tr. Vol. II p. 20).

108. Respondent did not supply a Marinol prescription to Dr. Cooper. (Tr. Vol. II p. 20).

109. Respondent requested split sample testing, which was performed and showed a positive result for marijuana. (Tr. Vol. II p. 18; EX CG-09; EX R-K).

110. After receiving the results of split sample testing, Dr. Cooper created a document detailing his findings. (Tr. Vol. II p. 18; EX CG-09, CG-13).

111. Dr. Cooper reported the test positive for marijuana on July 1, 2014. (Tr. Vol. II p. 18; EX CG-09, CG-13).

112. Dr. Cooper based his finding on the laboratory report indicating a marijuana level of 37, which was above the 15 ng/dL cutoff. (Tr. Vol. II p. 18).

113. Dr. Cooper did not see any irregularities in the laboratory paperwork for this test. (Tr. Vol. II p. 21).

114. Dr. Cooper had no personal knowledge of the chain of custody of the urine sample that was tested, but presumed all applicable rules and regulations were followed. (Tr. Vol. II p. 31).

115. As the MRO, Dr. Cooper receives a report from the laboratory detailing the test results, but does not see the entire litigation package that includes calibration results and chain-of-custody signatures. (Tr. Vol. II pp. 37-38).

IV. DISCUSSION

A. Principles of Law

1. General Authority

The Coast Guard issues credentials to merchant mariners under 46 U.S.C. § 7101 and 46 U.S.C. § 7302. Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements under the grounds set out in 46 U.S.C. §§ 7703 and 7704. See 46 C.F.R. § 5.19(b). The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a).

Suspension and revocation proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-557. See 46 U.S.C. § 7702(a). The Coast Guard's Rules of Practice and Procedure are located at 33 C.F.R. Part 20 and the substantive rules concerning suspension and revocation of mariner credentials are at 46 C.F.R. Part 5. Decisions made by ALJs may come before the Commandant on appeal or review. "The Commandant's determinations are officially noticed, and the principles and policies enunciated therein are

binding upon all ALJs unless they are modified or rejected by competent authority." 46 C.F.R. § 5.65.

2. Standard of Proof

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order unless otherwise provided by statute. The fact-finder must consider the record as supported by "reliable, probative, and substantial evidence" before reaching a decision. 5 U.S.C. § 556(d). In administrative proceedings, the proponent must prove its case by a preponderance of the evidence, meaning the fact-finder considers the evidence and argument in the record and finds it is more likely than not a fact is true. Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993).

In a suspension or revocation case, the Coast Guard is the proponent and therefore bears the burden of proof. 33 C.F.R. § 20.702(a). Respondent may rebut the allegations by providing contrary evidence showing the allegations are more likely than not untrue. He may also present affirmative defenses, in which case the burden shifts to the respondent to prove his defense by a preponderance of the evidence.

3. Evidentiary Standard

The APA governs the admissibility of evidence in administrative proceedings and permits the fact-finder to receive any documentary or oral evidence. See 5 U.S.C. § 556(d); Gallagher v. National Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. National Transp. Safety Bd., 684 F.2d 683, 683 (10th Cir. 1982). "Federal agencies are not bound by the strict rules of evidence that govern jury trials." Gallagher at 1218, citing Sorenson at 688. The more lenient standard for administrative proceedings allows evidence to be included in the record that might be excluded under the Federal Rules of Evidence. For example, only irrelevant, immaterial, or unduly repetitious evidence need be excluded, and "evidence need not

be authenticated with the precision demanded by the Federal Rules of Evidence." Gallagher at 1218; see also Appeal Decision 2664 (SHEA) (2007).

This matter involves scientific evidence and expert testimony in the form of laboratory results and the MRO's review of those results. In Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the Supreme Court held that Rule 702 of the Federal Rules of Evidence imposes upon the trial court a gatekeeper obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589. The Court later extended this requirement to all expert testimony. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

Strictly speaking, the rule of Daubert does not apply to this proceeding, since Daubert and its progeny interpret the Federal Rules of Evidence, which do not apply to administrative hearings. See, e.g., Nat'l Taxpayers Union v. Social Sec. Admin., 302 Fed.Appx. 115, 121 (3d. Cir. 2008); Bayliss v. Barnhart, 207 F.3d 1211, 1218 n. 4 (9th Cir. 2005). Nevertheless, "the spirit of Daubert" does apply to administrative proceedings because "'[j]unk science' has no more place in administrative proceedings than in judicial ones." Lobsters, Inc. v. Evans, 346 F. Supp. 2d 340, 344 (D. Mass. 2004) (quoting Niam v. Ashcroft, 354 F.3d 652, 660 (7th Cir.2004)). See also Appeal Decision 2670 (WAIN) (2007). Thus, one major inquiry I must make in this matter is whether the scientific testimony or evidence introduced by the Coast Guard is not only relevant, but reliable.

4. Jurisdiction

Jurisdiction is critical to the validity of a suspension or revocation proceeding. Pursuant to 46 U.S.C. § 7704(c), "[i]f it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license . . . or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured." Indeed, Respondent's "status aboard

the vessel does not matter as it is his status as the **holder** of a merchant mariner's document [or license or certificate of registry] that establishes jurisdiction for purposes of suspension and revocation when use of a dangerous drug is charged." Appeal Decision 2668 (MERRILL) (2007) (emphasis added); see also Appeal Decision 2560 (CLIFTON) (1995).

To establish jurisdiction in a misconduct case under 46 U.S.C. § 7703, the Coast Guard must prove that the alleged act occurred while the mariner was "acting under the authority" of an MMC. A mariner is considered to be acting under the authority when the holding of a credential or endorsement is: (1) required by law or regulation; (2) required by an employer as a condition for employment or (3) while engaged in official matters regarding the credential or endorsement , including, but is not limited to, such acts as applying for renewal, taking examinations for raises of grade, requesting duplicate or replacement credentials, or when appearing at a suspension or revocation hearing. 46 C.F.R. § 5.57; see also Appeal Decision 2677 (WALKER) (2008).

In both his original Answer and his Answer to the Amended Complaint, Respondent admitted to all jurisdictional facts. Additionally, the record clearly establishes that Respondent was the holder of an MMC at the time he submitted the urine samples for the pre-employment tests that form the basis for Allegations One and Three. This case was taken pursuant to 46 U.S.C. § 7704(c) and the Coast Guard properly charged Respondent with "use of or addiction to the use of dangerous drugs," so Respondent's status as the holder of an MMC in and of itself affords the Coast Guard jurisdiction to institute this suspension and revocation proceeding. Accordingly, I find jurisdiction is established for Allegations One and Three. See Appeal Decision 2668 (MERRILL) (2007).

In Allegation Two, the Coast Guard specifically alleged that Respondent was acting under the authority of his credential and endorsement when the holding of such a credential was required by law or regulation. The evidence establishes that Respondent was serving as the Pilot (Master) aboard the towing vessel M/V GREGORY DAVID. Only an individual with an

appropriate endorsement on his MMC may operate such a vessel. 46 U.S.C. § 8904. 46 C.F.R. § 15.610. Accordingly, I find Respondent was operating under the authority of his MMC as required by law or regulation and jurisdiction also exists for Allegation Two.

5. Use of Dangerous Drugs, Generally

Title 46 U.S.C. § 7704(c) mandates revocation of a Coast Guard-issued credential when the Coast Guard proves by reliable, credible, and probative evidence that the holder of an MMC has used dangerous drugs. A respondent who is shown to have used drugs may avoid revocation by providing reliable, credible, and probative evidence of cure. Id.

In 1954, Congress enacted 46 U.S.C. § 239a with the clear intent of removing narcotic drug users and addicts from the merchant marine.[1] In 1983, Congress replaced § 239a with 46 U.S.C. § 7704(c) and simultaneously expanded the language to incorporate violations involving additional non-narcotic "controlled substances," such as PCP and LSD. Pub. L. 98-89, Aug. 26, 1983, 97 Stat. 546.[2] Congress's express purpose was to remove individuals who possess and use dangerous drugs from the United States merchant marine. House Report No. 338, 98th Cong., 1st Sess. 177 (1983); see also Appeal Decision 2634 (BARRETTA) (2002). As a result, 46 U.S.C. § 7704(c) now mandates revocation of MMCs in cases involving any controlled substance.

The statute does not specifically require drug testing, and it allows the introduction of other types of evidence that a respondent has used drugs.[3] Where the evidence of drug use comes from the results of federally-mandated drug testing, though, additional elements of proof arise.

[1] Pub. L. 83-500, July 15, 1954, 68 Stat 484. This section says the "Secretary may take action … based on a hearing before a Coast Guard [ALJ] under hearing procedures prescribed by the Administrative Procedure Act… to revoke the seaman's document of …any person who, unless he furnishes satisfactory evidence that he is cured, has been, subsequent to the effective date of this Act, a user of or addicted to the use of a narcotic drug."
[2] This took place as part of a major recodification of U.S. Shipping laws in Title 46 of the U.S.Code.
[3] See Appeal Decisions 2570 (HARRIS) (1995) and 2538 (SMALLWOOD)*)* (1992) (admissions by a respondent); 2451 (PAULSEN) (1987) and 2424 (CAVANAUAGH) (1986) (observation by others); and 2026 (CLARK) (1975) and 1833 (ROSARIO) (1971) (medical treatment for use or addiction).

6. Drug Testing of Merchant Mariners under the Federal Transportation Workplace Drug Testing Programs

The Coast Guard's regulations implementing the Federal Transportation Workplace Drug Testing Programs are found at 46 C.F.R. Part 16 and follow the procedures set forth by the Department of Transportation (DOT) in 49 C.F.R. Part 40. Today, most Coast Guard cases brought under 46 U.S.C. § 7704(c) relate to the drug tests mandated in 46 C.F.R. Part 16 and conducted in accordance with 49 C.F.R. Part 40.

Allegations One and Three allege Respondent used marijuana. The definition of "dangerous drug" in 46 U.S.C. § 2101(8a) is "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))." This Act defines a "controlled substance" as "a drug or other substance . . . included in schedule I, II, III, IV, or V of part B of this subchapter" but not distilled spirits, wine, malt beverages, or tobacco. 21 U.S.C. § 802(6). Marijuana is controlled under Schedule I of the Act (21 U.S.C. § 812) and is a dangerous drug for the purposes of 46 U.S.C. § 7704(c).

The Commandant recognizes that requiring a person to undergo drug testing may pose constitutional issues. Thus, in an effort to "safeguard the constitutional rights of affected mariners" the Coast Guard may mandate only the following types of drug tests: pre-employment, periodic, random, serious marine incident and reasonable cause. Appeal Decisions 2704 (FRANKS) (2014) and 2697 (GREEN) (2011).

In order to establish a *prima facie* case of drug use based on a Part 16 urinalysis test, "the Coast Guard **must** prove three elements: (1) that Respondent was tested for a dangerous drug, (2) that Respondent tested positive for a dangerous drug, and (3) that the test was conducted in accordance with **46 C.F.R. Part 16.**" Appeal Decision 2697 (GREEN) (emphasis added); see also Appeal Decision 2603 (HACKSTAFF) (1998) (discussing these elements and the proof

required to establish them). However, "minor technical infractions of the drug testing regulations do not violate due process unless the infraction breaches the chain of custody or violates the specimen's integrity." Appeal Decision 2685 (MATT) (2010); see also Appeal Decisions 2668 (MERRILL) and 2546 (SWEENEY), aff'd sub nom NTSB Order No. EM-176 (1994).

According to Hackstaff, to satisfy the first element the Coast Guard must show that the respondent was the person tested for dangerous drugs. This necessarily involves proof of the following: the identity of the person providing the specimen; a link between that person and the identification number assigned to the sample which follows it throughout the testing process; and adequate testing of that specific sample. Proof of the second element—that the respondent failed the drug test—necessitates submission of the test results and the MRO's status and qualifications; proof that the MRO reviewed the results; and submission of an MRO report certifying the results as "positive." The third element requires that the test was conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40. The Coast Guard must prove that it was properly collected; the chain of custody was unbroken; the specimen was properly handled and shipped to the testing facility; and the laboratory was qualified to conduct the testing.

In practice, this third element is inextricably entwined with the first two. For instance, an ALJ cannot determine that a test was properly conducted without first considering whether the test administered under the first prong is a type required by 46 C.F.R. Part 16. The ALJ must also consider whether the laboratory and MRO substantially followed the requirements in 49 C.F.R. Part 40 when analyzing the specimen and verifying the results. This analysis may become complex, particularly if the laboratory and/or MRO have deviated in some way from the Part 40 requirements.

Moreover, Appeal Decision 2704 (FRANKS) has clearly expanded the third element to include the reason why the test was conducted. The Commandant held that when a private employer conducts drug testing to comply with 46 C.F.R. Part 16, the employer acts as an

instrument or agent of the government. "A government-mandated drug test must be both properly ordered (in accordance with 46 C.F.R. Part 16) and properly conducted (in accordance with 49 C.F.R. Part 40). If it is not, the test cannot form the basis for suspension and revocation proceedings." Id. at 7. "Under this rule, 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. at 10. However, Franks does not prescribe exactly what evidence is sufficient to demonstrate the test was properly ordered.

In the wake of Franks, it appears the *prima facie* test could be laid out more succinctly: (1) a holder of an MMC has submitted to a properly ordered, federally-mandated drug test; (2) a properly trained collector obtained the sample in accordance with Part 40 rules; (3) a SAMHSA-certified laboratory tested the sample and reported an adverse result to the MRO as prescribed by the Part 40 rules; and (4) the MRO reviewed the results according to the Part 40 Subpart G rules and verified the adverse result. While I have structured the discussion here as a three-pronged inquiry according to the requirements of Hackstaff, my analysis thoroughly considers each of these factors.

In two of the allegations here, Respondent took pre-employment drug tests. These were federally mandated because "[n]o marine employer shall engage or employ any individual to serve as a crewmember unless the individual passes a chemical test for dangerous drugs for that employer." 46 C.F.R. § 16.210. An employer may waive a pre-employment test only if a job applicant provides satisfactory evidence of passing a chemical test for dangerous drugs within the previous six months, or proof of satisfactory participation in a federally required random testing program under 46 C.F.R. 16.230.

The other allegation involved random testing pursuant to 46 C.F.R. § 16.230. This regulation requires marine employers to establish programs to test crewmembers for dangerous drugs on a random basis:

> 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.
>
> 46 C.F.R. § 16.230(c).

Respondent worked aboard uninspected towing vessels. The rules require testing of crewmembers on uninspected vessels who (1) are required by law or regulation to hold a license or MMC endorsed as master, mate, or operator in order to perform their duties on the vessel; (2) perform duties and functions directly related to the safe operation of the vessel; (3) perform the duties and functions of patrolmen or watchmen; or (4) are specifically assigned the duties of warning, mustering, assembling, assisting, or controlling the movement of passengers during emergencies. 46 C.F.R. § 16.230(b).

There is a regulatory presumption that an individual who has failed a Part 16 drug test is a user of dangerous drugs. 46 C.F.R. § 16.201(b). This presumption arises only if the Coast Guard establishes its *prima facie* elements by substantial, reliable, and probative evidence, but the Commandant has not said precisely how any given element must be proven. The presumption is also rebuttable: a respondent "faced with overcoming the presumption of use of a dangerous drug 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. If this evidence is sufficient to rebut the original presumption, then the burden of presenting evidence returns to the Coast Guard." Appeal Decision 2560 (CLIFTON) (1995).

7. Misconduct: Refusal to Take a Drug Test.

Misconduct is defined as "human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 C.F.R. § 5.27. Here, misconduct is premised on 49 C.F.R. § 40.191(b), which states that an employee has refused to take a drug test "if the MRO reports that you have a verified adulterated or substituted test result." DOT rules also state that "if you refuse to take a drug test, you incur the consequences specified under DOT agency regulations for a violation of those DOT agency regulations." 49 C.F.R. § 40.191(c).

The Commandant holds that drug test refusals under 49 C.F.R. § 40.191 constitute misconduct. Appeal Decision 2690 (THOMAS) (2010), Appeal Decision 2675 (MILLS) (2008). One form of refusal is a substituted specimen, which DOT rules define as a "urine specimen with creatinine and specific gravity values that are so diminished or so divergent that they are not consistent with normal human urine." 49 C.F.R. § 40.3. DOT rules require Drug Testing Laboratories to conduct specimen validity testing, which is "the evaluation of the specimen to determine if it is consistent with normal human urine. The purpose of validity testing is to determine whether certain adulterants or foreign substances were added to the urine, if the urine was diluted, or if the specimen was substituted." 49 C.F.R. § 40.89.

A laboratory "must consider the primary specimen to be substituted when the creatinine concentration is less than 2 mg/dL and the specific gravity is less than or equal to 1.0010 or

greater than or equal to 1.0200 on both the initial and confirmatory creatinine tests and on both the initial and confirmatory specific gravity tests on two separate aliquots." 49 C.F.R. § 40.93. An MRO must then review and validate the laboratory results involving adulteration or substitution. 49 C.F.R. § 40.145. The MRO must consider whether there is a legitimate medical explanation for the laboratory findings for the specimen. If there is no legitimate explanation, the MRO will report the test as a verified refusal to test because of adulteration or substitution.

The Coast Guard's *prima facie* case when alleging misconduct for refusal to test is similar to a *prima facie* case of drug use based on a Part 16 urinalysis test. The Coast Guard must prove three elements: (1) while acting under the authority of a merchant mariner credential, a respondent was tested for a dangerous drug, (2) the respondent's specimen was found to be adulterated or substituted under the requirements of 49 C.F.R. Part 40, and (3) the test was conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.[4]

8. Basic Requirements of Drug Testing Laboratories

All drug testing laboratories that process federal drug tests must be certified under the Department of Health and Human Services' National Laboratory Certification Program. 49 C.F.R. 40.81(a). The Substance Abuse and Mental Health Services Administration (SAMHSA) is the agency responsible for federal drug testing programs and publishes a list of accredited laboratories in the Federal Register each month. These laboratories are highly regulated and are subject to "mandatory guidelines" regarding their policies and procedures.

Quest Diagnostics in Lenexa, Kansas performed the testing for each allegation in this case. At the hearing, Respondent's counsel questioned whether Quest is a SAMHSA-certified facility,

[4] Although these precise elements have not been set forth in a prior Appeal Decision, in Franks the Commandant held that "the [46 C.F.R. § 16.201(b)] presumption is the source from which were drawn the prima facie case elements discussed herein." Id. at 5. Thus, it stands to reason that, for any allegation based on a drug test mandated by Part 16, the Coast Guard must prove the respondent was tested, the test result was adverse to the respondent, and the test was properly conducted. The particular requirements will vary based on the actual nature of the charge, e.g. a use of dangerous drugs allegation versus a misconduct allegation based on refusal to test.

as it does not appear under that name in the relevant Federal Register publications. I take official notice that on each relevant date, it was listed as LabOne, Inc. d/b/a Quest Diagnostics [Formerly Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.]. See 76 Fed. Reg. 75889 (Dec. 5, 2011); 78 Fed. Reg. 72685 (Dec. 3, 2013); 79 Fed. Reg. 26445 (May 8, 2014). It was therefore qualified to conduct the testing for each drug test forming the basis for an allegation in this case.

9. Basic Requirements of Medical Review Officers

The basic responsibilities of a Medical Review Officer (MRO) include (1) acting as an independent and impartial "gatekeeper" and advocate for the accuracy and integrity of the drug testing process; (2) providing a quality assurance review of the drug testing process for the specimens under their purview; (3) determining whether there is a legitimate medical explanation for confirmed positive, adulterated, substituted, and invalid drug tests results from the laboratory, and (4) performing all MRO functions in compliance with Part 40 and other DOT agency regulations. See 49 C.F.R. § 40.123; 46 C.F.R. § 16.203(b).

The Coast Guard further requires an MRO to review the record of an individual who has been shown to have used dangerous drugs and has completed the required rehabilitation programs. The MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs is sufficiently low to justify a return to work. 46 C.F.R. § 16.201(f).

B. Analysis: Allegation One

The first allegation in the Complaint states that Respondent took a pre-employment drug test on December 28, 2011; provided a urine specimen to the collector, Jackie Jones of Concentra Urgent Care; and signed a CCF. Quest Diagnostics analyzed that specimen using procedures approved by the Department of Transportation. The specimen tested positive for

marijuana metabolites, and the Medical Review Officer, Dr. Patricia J. Ausman, verified the test as positive.

1. Issues Presented

This allegation presents the following issues for me to decide:

> 1. Is MRO testimony necessary where the MRO has certified a drug test result as positive despite the respondent's claim of a legitimate medical reason for the result?
>
> 2. Has the Coast Guard proved that Respondent is a user of, or addicted to, dangerous drugs?

2. The Parties' Arguments

The Coast Guard asserts there were no irregularities related to the collection or the lab testing and says the MRO report (EX CG-03) and MRO Detail Report (EX CG-10) have been admitted and are un-contradicted. According to the Coast Guard, "Respondent does not dispute the results reported to him and his explanation offered to the MRO was totally rejected as per the MRO's report." (CG Brief).

Respondent argues that he provided to Dr. Ausman a legitimate medical explanation for the positive result, a prescription for Marinol. Dr. Ausman did not testify at the hearing, so Respondent was unable to cross-examine her regarding her review of the December 28, 2011 drug test, her conversation with him, or her ultimate findings.

3. Did the Collection and Testing Procedures Comply with the Regulations?

The record establishes that Respondent submitted to a pre-employment drug test as required by 46 C.F.R. Part 16. The test was documented by a CCF with Respondent's name and signature. (EX CG-01). The collector testified, and the record supports, that she followed the DOT procedures for identifying Respondent, collecting the urine sample, and shipping it to an approved laboratory.

Quest Diagnostics received, processed and tested the specimen in accordance with 49 C.F.R. Part 40 requirements and reported that the sample was both dilute and positive for marijuana metabolites. (EX CG-02; Tr. Vol. I pp. 114-31). The initial test produced a presumptive positive result and the confirmatory GC/MS test found a concentration of 39 ng/mL of marijuana metabolites, which is higher than the cutoff of 15 ng/mL. The laboratory reported the positive result to the MRO.

The evidence establishes that the laboratory complied with its testing obligations under the regulations. There is a Laboratory Documentation Package (also known as a Litigation Package) in the record, and Dawn Hahn, the Director of the Laboratory and a Responsible Person at Quest Diagnostics, also testified about both general laboratory procedures and this specific test. Thus, the primary issues are whether MRO testimony is necessary to establish that this is a positive test, and whether the MRO acted in accordance with the DOT rules.

4. If the MRO Rejects a Medical Explanation for a Positive Test, Must the Record Contain an Explanation?

Although the Coast Guard initially placed the MRO on its witness list, she did not testify at the hearing.[5] Thus, the only evidence of a verified positive test is documentary: the Medical Review Officer Drug Test Results, dated January 19, 2012 (EX CG-03) and MRO Detail Report, which chronicles the calls between Dr. Ausman and Respondent from January 3 through 18, 2012 (EX CG-10).

According to the MRO Detail Report, Dr. Ausman contacted Respondent on January 3, 2012 and he told her he had a prescription for Marinol. The record shows he provided her with a photocopy of the prescription. (Tr. Vol. II pp. 103-4). Dr. Ausman noted she would consider

[5] Initially, the Coast Guard asserted that Dr. Ausman had been issued a subpoena but refused to comply. I held the record open to allow the Coast Guard to enforce the subpoena and was prepared to take Dr. Ausman's testimony at a later date. However, after the hearing the Coast Guard informed me the subpoena was not properly served and they would not continue to seek Dr. Ausman's testimony, and moved to close the record without it.

THCV (tetrahydrocannabivarin) testing[6] to determine whether the metabolites came from marijuana or Marinol, but the record does not show she ever ordered THCV testing. It is also clear Dr. Ausman asked Respondent for proof he had filled the prescription. Her decision to certify the test as positive implies she was not satisfied with the explanation or evidence she received, but the Detail Report does not explain why. Dr Ausman then certified that Respondent's urine sample was positive for marijuana metabolites and dilute.

Under DOT rules if a MRO does not report test results using Copy 2 of the CCF, the MRO must provide a written report (e.g., a letter) for each test result. This report must, as a minimum, include the following information:

> (1) Full name, as indicated on the CCF, of the employee tested;
> (2) Specimen ID number from the CCF and the donor SSN or employee ID number;
> (3) Reason for the test, if indicated on the CCF (e.g., random, post-accident);
> (4) Date of the collection;
> (5) Date you received Copy 2 of the CCF;
> (6) Result of the test (i.e., positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;
> (7) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;
> (8) For cancelled tests, the reason for cancellation; and
> (9) For refusals to test, the reason for the refusal determination (e.g., in the case of an adulterated test result, the name of the adulterant).
>
> 49 C.F.R. § 40.163.

The Medical Review Officer Drug Test Results (EX CG-03) substantially meets the above requirements. However, this document does not mention the Marinol prescription or give any reasoning for the positive verification. The regulations require an MRO to "review and take all reasonable and necessary steps to verify the authenticity of all medical records the employee

[6] This type of testing will result in a positive THCV urinalysis from smoking a plant cannabis product, whereas the oral ingestion of therapeutic THC should result in a negative THCV urinalysis, allowing for discrimination between pharmaceutical THC products and illicit marijuana products. See Delta9-tetrahydrocannabivarin as a marker for the ingestion of marijuana versus Marinol: results of a clinical study, El Sohly MA, deWit H, Wachtel SR, Feng S, Murphy TP. J Anal Toxicol. 2001 Oct; 25(7):565-71. PMID: 11599601, available at http://www.ncbi.nlm.nih.gov/pubmed/11599601.

provides" if an employee asserts that the presence of a drug or drug metabolite the specimen results from taking prescription medication. 49 C.F.R. § 40.141. In doing so, the MRO "may contact the employee's physician or other relevant medical personnel for further information." Id. If the MRO determines that there is a legitimate medical explanation, the MRO must verify the test result as negative; otherwise, the MRO must verify the test result as positive. 49 C.F.R. § 40.137.

The MRO Detail Report shows that Respondent had substantial contact with Dr. Ausman and she was aware of the Marinol prescription. (EX CG-10). She also appears to have considered whether additional testing to determine the source of the metabolites was warranted. However, it also appears she placed the onus of proving that the prescription had been filled on Respondent and did not attempt to contact his prescribing physician. Thus, I cannot conclude from the record before me that the MRO took all necessary and reasonable steps to verify the authenticity of Respondent's prescription. The record establishes only her final conclusion; it is devoid of her reasoning for ultimately discounting Marinol as a legitimate medical explanation.

MRO testimony is not always required in Coast Guard drug cases. In Appeal Decision 2657 (BARNETT) (2006), the MRO responsible for the handling of the case did not testify at the hearing, but the Commandant found the record contained other evidence to support the ALJ's conclusion that Respondent's drug test was conducted in accordance with 49 C.F.R. Part 40.

In the case at hand, though, MRO testimony was critical. Respondent raised the issue of a legitimate medical explanation for a positive drug test result. The documentary evidence lacks sufficient detail for me to determine whether the MRO followed the requirements of 49 C.F.R. Part 40, Subpart G in verifying the sample as positive. In these circumstances, the MRO would have to testify or other evidence would have to clearly explain the reasoning for the positive verification. Although the Coast Guard called a medical records professional from the company where Dr. Ausman worked when she verified this test to testify, this testimony was not an

adequate substitute for Dr. Ausman's. The employee who testified had no direct knowledge of this case and testified solely as to the manner in which company records are kept. Thus, Dr. Ausman's reasoning is entirely absent from the administrative record before me.

5. Conclusion as to Allegation One

The Coast Guard has brought the allegations against Respondent and consequently bears the burden of proof. The Coast Guard intended to call Dr. Ausman and I held the record open after the hearing so they could compel her testimony, but ultimately they moved to close the record without her testimony. The evidence the Coast Guard has placed in the record is inadequate to show what factors Dr. Ausman considered in determining that no legitimate medical explanation existed and whether she followed the requirements of 49 C.F.R. Part 40, Subpart G. In the absence of this crucial evidence, I cannot find that the Coast Guard has satisfied the second or third elements of its *prima facie* case and must find this allegation **NOT PROVED**.

C. Analysis: Allegation Two

The Coast Guard alleges that on December 17, 2013, Respondent's marine employer informed him that he had been selected for a random drug test. Andrew Jones of PCS Drug Screening conducted the testing and Quest Diagnostics analyzed Respondent's urine sample using procedures approved by the Department of Transportation. The MRO, Dr. Horacio Marafioti, subsequently reported the specimen "substituted." The MRO's determination of "Substituted" is deemed a Refusal as described by 49 C.F.R. § 40.191(b) and constitutes an act of Misconduct as described by 46 C.F.R. § 5.27.

1. Issues Presented

I must decide the following issues stemming from this allegation:

1. Was this a random drug test administered in compliance with 46 C.F.R. § 16.230?

2. Were there significant flaws in the collection process?

3. Was the MRO review conducted in accordance with 49 C.F.R. Part 40?

4. Was the MRO credible?

5. Has the Coast Guard proved that Respondent committed Misconduct by refusing to take a drug test?

2. The Parties' Arguments

The Coast Guard contends the "random process as utilized by the employer, Steel City Marine, comports to the 'Randomness' requirements in 46 C.F.R. §16.203(c). Respondent does not contest the randomness of the testing or assert that the testing was manipulated or that he was singled out." (CG Brief). It also says there were no irregularities related to the collection or the lab testing. The Coast Guard argues that "the testimony of the MRO should be sufficient to the elements establishing a *prima facie* case, and shifting to the Respondent the burden of production to rebut the presumption." Id.

In response, Respondent argues that the selection was not random. He also argues that the Coast Guard failed to prove that the collector followed the Part 40 requirements in collecting the December 17, 2013 specimen because he could not remember whether any possibility of contamination existed and there was an improper door for the testing bathroom. Respondent further argues that the collector failed to provide him with Copy No.5, the Donor Copy, of the CCF. Finally, Respondent says he requested a split specimen test for his December 17, 2013 test but the MRO failed to order that test.

3. Was this a Random Test in Compliance with 46 C.F.R. § 16.230?

The record establishes that Respondent's marine employer selected the crew of the M/V GREGORY DAVID for drug testing on December 17, 2013 and Respondent was aboard the

vessel at the relevant time. Dean Ference, president of Steel City Marine Transport, testified about his company's drug testing program and said they managed their own program instead of using a third party administrator. Steel City Marine did not randomly test individual mariners but rather used "whole boat testing," meaning it selected a vessel and tested all crewmembers on board at the time. In 2013, the company owned two vessels and operated a third. Mr. Ference managed the program himself, with assistance from his office employees, and tested each vessel at random once per year.

In early December, Mr. Ference noticed the M/V GREGORY DAVID had not yet been tested. He therefore determined a time when the vessel was available and someone from the testing company he uses, PCS Drug Screening, was available to administer the tests. (Tr. Vol. I p. 109). It is clear from Mr. Ference's testimony that the M/V GREGORY DAVID was the only vessel considered for testing in December 2013. The issue before me is whether this process is consistent with the requirements of 46 C.F.R. § 16.230(c).

The principal source of the random testing requirements for marine employers is 46 C.F.R. § 16.230, though 46 C.F.R. §§ 16.113 and 16.203 and 49 C.F.R. Part 40, Subpart B also apply. In addition, the Coast Guard publishes a document entitled "Marine Employers Drug Testing Guidance" which says "[a]ny person serving aboard a commercial vessel that meets the definition of a crewmember or performs a safety sensitive function is required to be enrolled in a random drug test program." Guidance p. 25. As noted above, though, the Commandant has not described what an employer must do to establish compliance with a random testing program.

It is clear that marine employers must ensure random drug tests are unannounced. Guidance p. 26. The regulations require each covered crewmember to have an equal chance of being tested each time selections are made and for his or her chance of being selected to continually exist throughout his or her employment. 46 C.F.R. § 16.230 (c). This means each crewmember is eligible for testing every time a selection is made, "regardless if they have

already been selected earlier in the year. That is why it is possible to have one person selected several times while another may not be selected at all." Guidance p. 27. "The idea is that crewmembers should have the feeling that on any given day, they could be called up to provide a specimen. This feeling will only happen when crewmembers see random testing being conducted throughout the year, with no patterns." Guidance p. 26. Additionally, the mariner cannot have any control over when and where drug testing is administered. See, e.g., Appeal Decisions 2669 (LYNCH) (2007); 2657 (BARNETT), 2652 (MOORE).

The Commandant has held that random testing is specifically authorized by Coast Guard regulation and may be conducted without notice or any suspicion of drug use, provided the random selection process used by the marine employer to select a mariner for random testing satisfies all regulatory requirements. See Appeal Decisions 2641 (JONES) (2003); 2697 (GREEN); and 2704 (FRANKS). Two recent ALJ decisions have dismissed the allegations after considering selection criteria in the context of random drug testing. In one, the Coast Guard admitted that the marine employer did not comply with 46 C.F.R. Part 16.[7] In the other, USCG v. Hopper, 2013-190 (Sept. 10, 2014), a random number generator was used by a third-party administrator to select a vessel for testing and personnel who used the generator in managing the testing program testified about its validity.

In Hopper, the ALJ rejected the testimony and found that no evidence was presented to establish the random number generator as "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)." Id. The ALJ concluded that the "Coast Guard did not prove that the [vessel] was randomly selected by a scientifically valid method, thus, the Coast Guard could not prove that Respondent was randomly selected by a scientifically valid

[7] *USCG v. Green*, 2010-0372 (July 2, 2012).

method. Thus the court is 'required to dismiss' the matter as per Appeal Decision 2704 (FRANKS) (2014)." Id.

The decisions of other ALJs are not binding on me but can be persuasive. However, I do not concur with the ALJ in Hopper that scientific evidence is required to prove the validity of a particular selection method. The regulation gives two examples of valid methods for selecting mariners for testing: a "random number table" and a "computer-based random number generator." 46 C.F.R. § 16.230. If the Coast Guard shows that one of these methods was used, no further proof of validity is required.

In any event, both this case and Hopper involved the selection of entire vessels, not individual mariners. The pertinent rule does not require a "scientifically valid method" for vessel selection, but rather states "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." Accordingly, I do not find Hopper persuasive as to whether the test in this matter met the requirements for random testing.

It is clear from this record that Respondent had no knowledge of or control over when and where this drug testing was administered. However, Steel City's selection process was nevertheless deficient. The company operated three vessels, only one of which was considered for selection in December 2013. The test was unannounced, but each crewmember covered by Steel City's program did not have an equal chance of being tested because no crewmembers aboard the other two boats were eligible for selection at that time. Moreover, once a boat had been tested, the crew may have been aware that they would not be selected again that year as

long as they remained crewmembers on that particular vessel.[8] While management believed the program complied with 46 C.F.R. § 16.230, it is clear that the selection process was not consistent with the rules.

Minor technical infractions of the drug testing regulations may not violate due process if the infraction does not breach the chain of custody or violate the specimen's integrity. The question here is whether or not the flawed method of selecting Respondent for random testing is a minor technical infraction which can be excused.

In Green, the Commandant held that use of an improper selection method warrants dismissal; I believe Franks likewise requires dismissal where a Part 16-mandated (government-ordered) test forms the basis for a suspension and revocation action and the Coast Guard fails to show that the relevant drug test was properly ordered under 46 C.F.R. Part 16. This is because the third element of the *prima facie* case fails. Franks at 10. "The drug-testing regulatory regime imposed on maritime employers enumerates reasons for testing, and requires employer compliance with those reasons." Id. at 8. Here, I have reviewed the record, the Part 16 rules, the employer's drug program, and Coast Guard guidance to marine employers and I find the employer's method of selecting vessels for drug testing did not comply with the rules. Accordingly, dismissal of Allegation Two is warranted. I do, however, note that this is an issue of first impression and I will therefore also consider the other potential violations of the drug testing rules relating to this allegation.

4. Were There Significant Flaws in the Collection Process?

A certified collector, Andrew D. Jones of PCS Drug Screening, administered tests to all crew members, including Respondent, on board the M/V GREGORY DAVID. He documented

[8] Even if a crewmember transferred from a boat that had been drug tested previously to one that had not, **all** of the company's employees would not have been equally subject to testing; only the crewmember who transferred would be subject to an additional test during that calendar year.

the collection on a CCF that has Respondent's name and signature. However, my review of the evidence shows that there were several flaws in the collection process. While these flaws, standing alone, may not prove fatal to the allegation, I must nevertheless consider the extent to which they affect the validity of the testing.

This test took place on board the M/V GREGORY DAVID. The requirements for a test facility are described in 49 C.F.R. § 40.41. Tests may be conducted in a variety of locations, including on board a vessel, provided the facility meets the requirements of this section. 49 C.F.R. § 40.41(g). Based on the testimony, the M/V GREGORY DAVID appears to be a generally appropriate collection site.

Among other things, the regulations require a collector to secure "all sources of water and other substances that could be used for adulteration and substitution" by turning off water inlets or taping faucet handles. 40 C.F.R. §§ 40.41(e)(2) and 40.43(b)(1). Mr. Jones testified there was a sink inside the M/V GREGORY DAVID's lavatory but he did not tape off or otherwise secure the water faucets and that he used the sink to wash his hands in between collections. He stated he would have heard the water if the tap had been turned on.

The requirement to secure water sources is primarily meant to ensure that the urine sample is not surreptitiously adulterated by the donor. Mr. Jones's failure to properly secure the water source introduced a way for to the sample to be substituted or adulterated. However, I note violations of similar requirements have been found not to constitute fatal flaws in the collection process. See, e.g., Appeal Decisions 2522 (JENKINS) (1991); 2541 (RAYMOND) (1992), and 2688 (HENSLEY) (2010).

Next, there is a significant issue with the CCF for this collection. The regulations require a collector to complete the CCF, "ensure that all copies of the CCF are legible and complete," and "remove Copy 5 of the CCF and give it to the employee." 40 C.F.R. § 40.73(2)-(4). This must be done in the donor's presence. Here, it is clear that this was not done, as Respondent's

employer was in possession of Copy 5 and supplied a copy to the Coast Guard. No satisfactory explanation was given, and Respondent could not remember whether he had received the form after giving his sample. This error did not breach the chain of custody, but it raises concerns as to the integrity of the test because, without that form, Respondent had no way to verify the details of the test, including the specimen number. Standing alone, I would not find this error so serious as to violate Respondent's due process rights, but given the cumulative flaws, I find the collector did not substantially comply with the regulations.

5. Was the MRO Review Conducted in Accordance with Part 40?

Quest Diagnostics received, processed and tested the specimen in accordance with 49 C.F.R. Part 40 and reported that the sample was substituted. (EX CG-02). The initial testing showed a low creatinine level in Respondent's urine, and subsequent specimen validity testing showed a creatinine level of less than .05 and a specific gravity of 1.0218. For Coast Guard drug testing purposes, the laboratory test alone does not equate to a finding of a substituted specimen; an MRO must review the results and make the determination before the test is considered "substituted."

Dr. Horacio Marafioti was the MRO for this test and testified at the hearing via telephone. The MRO copy of the CCF, Copy 2, was the form he used to report results and is in the record. Dr. Marafioti testified that when he received Respondent's test results, he had his assistant telephone Respondent and transfer the call to him. Dr. Marafioti then spent 19 minutes explaining to Respondent that his specimen had undergone validity testing and was determined to have low creatinine levels. He asked Respondent if there was a medical reason, such as kidney disease, and Respondent denied having kidney problems. However, Respondent did say he had been hydrating more. (Tr. Vol. 1 p. 174). Respondent also testified at the hearing that he was on

medications for a staph infection that made him thirsty and was drinking a lot of water, but there is no evidence he told Dr. Marafioti about this. (Tr. Vol. II p. 172).

Dr. Marafioti told Respondent he would have to verify the sample as substituted and report a refusal to test. He also informed Respondent that split specimen testing was available. According to Dr. Marafioti, Respondent "requested that the split sample would be tested. Also, he stated that he will be asking his personal physician to check on his kidney and do an overall check-up." (Tr. Vol. I p. 175). In conflicting testimony, Dr. Marafioti later said his assistant held a conversation with Respondent, during which Respondent either said to cancel the split specimen testing (Tr. Vol. I p. 185) or said he would get back to them regarding the split specimen but never called back (Tr. Vol. I p. 199). Although Dr. Marafioti said his assistant had written him an email about this, he did not produce it. (Tr. Vol. I p. 200; EX CG-12). Dr. Marafioti's notes of the conversation and Copy 2 of the CCF clearly substantiate his initial testimony that Respondent requested split sample testing. (EX CG-12). Nevertheless, the record shows the testing was never carried out and Dr. Marafioti reported the test as a refusal to test, substituted. Id.

The failure to test a split sample when requested to do so, or to properly document a request to cancel the split sample testing, is a severe flaw. The DOT drug testing procedures give a respondent 72 hours from notification that a test is suspected to be substituted or adulterated to request split sample testing. 49 C.F.R. § 40.171. All indications in the record are that Respondent made a timely request. An MRO must then "immediately provide written notice to the laboratory that tested the primary specimen, directing the laboratory to forward the split specimen to a second HHS-certified laboratory. You must also document the date and time of the employee's request." 49 C.F.R. § 40.171(c). Because Dr. Marafioti failed to follow this regulation, I cannot find that the test as a whole was conducted in accordance with Part 40.

6. Was the MRO Credible?

The credibility of the MRO was also at issue in this allegation. As a witness, Dr. Marafioti often provided non-responsive answers that bordered on hostile when questioned by Respondent's counsel. However, he gave somewhat better answers to questions posed by the Coast Guard and by me. Dr. Marafioti also emphasized he had spent 19 minutes talking to Respondent when notified him of the laboratory results, but after listening to Dr. Marafioti's testimony, I have concerns about the quality of his explanations. Coupled with his inability to explain the discrepancy regarding the split sample testing, I find Dr. Marafioti less than fully credible as a witness. Though I recognize there are inherent disadvantages to having a witness testify by telephone rather than in person, Coast Guard regulations permit telephonic testimony and I am not convinced the quality of the testimony would have improved if Dr. Marafioti had appeared in person.

7. Conclusion as to the Second Allegation

In order to establish a *prima facie* case, the Coast Guard must prove that the drug test was conducted "as required by [46 C.F.R. Part 16] and in accordance with the procedures detailed in 49 CFR part 40." 46 C.F.R. § 16.201(a). "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 to maintain the system." Appeal Decision 2631(SENGEL) (2002). Here, the marine employer failed to follow the random selection process required by 46 C.F.R. § 16.230(c) and the MRO failed to order a split specimen testing under 49 C.F.R. § 40.171. Either violation is sufficient to warrant dismissal of this allegation. There were also significant flaws in the collection process. The second allegation is **NOT PROVED**.

D. Analysis: Allegation Three

The third allegation is that on May 23, 2014, Respondent took a pre-employment drug test. A urine specimen was collected by Michelle Hall of Pelican State Outpatient Center. Quest Diagnostics analyzed the specimen using procedures approved by the Department of Transportation. That specimen subsequently tested positive for Marijuana Metabolites, as verified by the Medical Review Officer, Jerome W. Cooper.

1. The Parties' Arguments Regarding Allegation Three

Respondent argues that (1) the collector improperly altered the CCF, and (2) the record of the chain of custody is not complete because the Coast Guard produced neither the litigation packet, which documents the integrity of the chain of custody from receipt to the laboratory result, nor the certifying scientist to authenticate the packet, confirm the integrity of the chain of custody throughout the process, and testify as to the laboratory's compliance with the federal testing requirements. "Plainly put, USCG arguably satisfied Step 1 and Step 3 of the first prong, but failed to satisfy Step 2, creating a fatal gap in the chain of custody." (Respondent's Brief).

Respondent avers he was prevented from cross-examining the certified laboratory scientist regarding the May 23, 2014 drug test and was unable to cross-examine the supporting documents for the May 23, 2014 drug test that relate to the integrity of the sample and the chain of custody. He says that, given the multiple errors at the collection point, the lack of the laboratory documentation to prove that the sample tested was indeed his own is a fatal flaw.

The Coast Guard argues that the MRO is charged with "acting as an independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process." Further, pursuant to 49 CFR § 40.129, the MRO must verify the test result as positive, consistent with the requirements of 49 C.F.R. §§ 40.135 through 40.145, 40.159, and 40.160. Therefore, the

testimony of the MRO should be sufficient to prove the elements of the *prima facie* case, and shifting to the Respondent the burden of production to rebut the presumption.

Additionally, the Coast Guard relies on Kime v Sweeney, NTSB Order No. EM-176 (1992), arguing that the National Transportation Safety Board (NTSB) "validated the essential role played by the MRO by stating that the laboratory report itself, once it was signed by the MRO, constituted proof adequate to shift to appellant the burden of going forward with evidence that the positive finding of marijuana metabolites in his urine was not the product of a wrongful use of the drug." Accordingly, the Coast Guard contends no laboratory litigation package is necessary.

2. Is Copy 1 of a Custody and Control Form Sufficient to Establish a Laboratory's Compliance with the Regulations?

The testimony and evidence establishes that Respondent provided a urine specimen for pre-employment drug testing to Michelle Hall, a certified collector on May 23 2014. (EX CG-07; Tr. Vol. II pp. 156-58). Pre-employment testing is federally mandated. (EX CG-07; Respondent's Answer to Amended Complaint at 1). There are substantial handwritten alterations to the CCF and the name of the MRO is incorrect. Ms. Hall testified, and the document reflects, that she made changes to billing codes but did not alter the donor identification number. I find Ms. Hall substantially followed DOT collection procedures and the alterations she made to the form are not fatal flaws. "Notwithstanding the noted minor deficiencies, the form meets the essential provisions of the regulations, promulgated to ensure the identification and protection of the integrity of the specimen, and contains the required certifications." Appeal Decision 2537 (CHATHAM) (1992).

Quest Diagnostics processed the test and reported it positive for marijuana metabolites. (EX CG-07). Dr. Jerome Cooper, an MRO, contacted Respondent on June 4, 2014 to discuss the positive drug test results, then verified the positive test on that date. (EX CG-07 and CG-08; Tr.

Vol. II pp. 16-40). Although Dr. Cooper was not the MRO initially listed on the form, he is nevertheless qualified to perform these functions and I do not find the discrepancy significant. The record is also clear that the MRO followed the requirements of 49 C.F.R. Part 40, Subpart G in verifying the test result.

However, Respondent's argument that the Coast Guard did not satisfy all three prongs of its *prima facie* case has merit. In contrast to the other allegations, the Coast Guard did not offer a laboratory documentation package for this allegation and did not call a representative from the laboratory to testify. Thus, the record does not contain any detail about the internal chain of custody, the initial screening tests, specimen validity testing, or GC/MS testing. I am unable to ascertain who performed what function in the screening process and whether they were qualified, and I cannot verify that the chain of custody was unbroken from the time the sample arrived at the laboratory until the results were sent to the MRO.

The Commandant has recently emphasized that, for government-mandated tests, it is crucial for the Coast Guard to prove that every prong of the three-prong *prima facie* case is satisfied. Appeal Decision 2704 (FRANKS). "Both aspects of the drug testing process, the 'why' and the 'how' . . . are therefore fundamental in the establishment of a case of drug use based on government-mandated drug testing. Thus, a government-mandated drug test must be both properly ordered (in accordance with 46 C.F.R. Part 16) and properly conducted (in accordance with 49 C.F.R. Part 40). If it is not, the test cannot form the basis for suspension and revocation proceedings." Id. at 9.

When drug testing is not compelled by regulation, a test that does not comply with Part 16 may be used to establish drug use. Franks at 11. Here, the laboratory reported a non-negative result to the MRO via a legible, fully-completed Copy 1 of the CCF signed by the certifying

scientist. In the absence of contrary evidence,[9] this is sufficient under DOT rules to establish that Respondent tested positive for a dangerous drug. 49 C.F.R. § 40.97. If this test was ordered by Respondent's employer independent of Part 16, it could clearly form the basis for a suspension or revocation proceeding. Because the test underlying this allegation was government-mandated, though, I am bound to consider whether the evidence the Coast Guard has offered—consisting solely of Copy 1 of the CCF and the MRO's testimony—is adequate to provide substantial evidence that the laboratory's portion of the testing was conducted in accordance with 46 C.F.R. Part 16 and 49 C.F.R. Part 40.

The procedures used for processing specimens, conducting validity testing, and reporting results are in Subpart F of 49 C.F.R. Part 40. A laboratory participating in the DOT drug testing program must comply with the requirements of Part 40 and must also comply with all applicable requirements of HHS in testing DOT specimens. 49 C.F.R. § 40.81. Subpart K of the Mandatory Guidelines for Federal Workplace Drug Testing Programs contains detailed requirements for laboratories for processing specimens, which go the integrity of the drug testing program.

The Coast Guard argues that the MRO verification is sufficient to prove that the laboratory complied with the applicable requirements. I disagree. Under 49 C.F.R. § 40.129(a), the MRO's role is limited. Upon receiving a positive, adulterated, substituted, or invalid drug test result from a laboratory, before verifying the result, the MRO must:

> (1) Review Copy 2 of the CCF to determine if there are any fatal or correctable errors that may require you to cancel the test (see §§ 40.199 and 40.203). Staff under your direct, personal supervision may conduct this administrative review for you, but only you may verify or cancel a test.
> (2) Review Copy 1 of the CCF and ensure that it is consistent with the information contained on Copy 2, that the test result is legible, and that the certifying scientist signed the form. **You are not required to review any other documentation generated by the laboratory during their**

[9] Despite Respondent's argument that he could not know whether the test was properly conducted in the absence of a litigation package, he did not submit evidence of any fatal flaws. He could have obtained the litigation package on his own if he wished to attack the chain-of-custody or testing procedures.

analysis or handling of the specimen (e.g., the laboratory internal chain of custody).

49 C.F.R. § 40.129(a) (emphasis added).

For purposes of this case, the fact that the MRO does not review the laboratory's internal procedures is critical, as it means the MRO is not competent to testify about whether those internal procedures were satisfactory.

From the time each specimen is received until it is destroyed, the laboratory generates records to detail the chain of custody; metabolite testing processes and results; and specimen validity testing and results, including the names of responsible employees at each step of the process. In a drug case, the Coast Guard generally presents "testimony and documentary evidence on the collection and testing of Respondent's urine sample." Appeal Decision 2653 (ZERINGUE) (2005). The Coast Guard is not obligated to introduce testimony from every individual who handled a sample to prove a proper chain of custody, but should offer pertinent documentation into evidence. See Appeal Decision No. 2527 (GEORGE) (1991). After conducting a comprehensive review of Appeal Decisions, I note this documentation is usually in the form of the litigation package. See, e.g., Appeal Decisions 2637 (TURBERVILLE) (2003) and 2562 (BEAR) (1995).

The Coast Guard also generally introduces testimony from certain key figures in the drug testing process, such as the person who ordered the test, the collector, the drug testing laboratory director and/or certifying scientist, and the MRO to "corroborate the documentary evidence, identify the documentary evidence as having been made within the regular course of the collection, processing and testing procedures, and ultimately support the integrity of the chain of custody." Appeal Decision 2598 (CATTON) (1998); see also 2653 (ZERINGUE). Significantly, I found that a witness knowledgeable about the practices, procedures, and SAMHSA requirements of laboratories usually testifies.

Sufficient evidence of the third element involves proof of the collection process, proof of the chain of custody, proof of how the specimen was handled and shipped to the testing facility, and proof of the qualifications of the laboratory. Appeal Decision 2632 (WHITE) (2002). In Appeal Decision 2571 (DYKES) (1995), the Commandant vacated a decision where the sole evidence on the record regarding testing was copies of the Urine Drug Testing Custody and Control Forms. The Commandant reasoned that those forms "do not indicate the type of tests conducted or the manner in which they were conducted. There is an attestation on the laboratory copy of the form that, at the laboratory, the specimen was handled and analyzed 'in accordance with applicable federal requirements.' These federal requirements are not specifically identified on the form." Id.

In this matter, the Coast Guard provided laboratory documentation packages for Allegations 1 and 2. The first (EX CG-02) was 86 pages long and contained (1) a general overview of the laboratory procedures, (2) custody and control forms, (3) initial test information including screening test calibrations, aliquot chain of custody for the screening test, and screening test results, (4) confirmation test information, (5) specimen validity test information, (6) certification information, including the laboratory report, (7) specimen storage information and (8) the qualifications of the certifying scientist and responsible person for this test. The package relating to Allegation Two contained the same types of information. (EX CG-05). Additionally, the Coast Guard offered testimony from the Laboratory Director about both packages and the testing process generally. (Tr. Vol. I pp. 112-44).

These records should have also been available for Allegation Three. Under DOT rules, a laboratory must maintain "all records pertaining to each employee urine specimen for a minimum of two years." 49 C.F.R. § 40.109. Among those records are chain-of-custody documents. The CCF only documents chain of custody through arrival at the laboratory. Thereafter, the laboratory uses internal chain of custody documents. A laboratory must "provide,

within 10 business days of receiving a written request from an employee, and made through the MRO, the records relating to the results of the employee's drug test (i.e., laboratory report and data package).” 49 C.F.R. § 40.329(b). If requested by a Federal, state or local safety agency with regulatory authority over the employee, the laboratory must provide drug test records concerning the employee. 49 C.F.R. § 40.331.

At the hearing, the Coast Guard alluded that it had not had sufficient time to procure the Documentation Package before the discovery deadline. Discovery was initially due in June 2014 and the hearing was not held until September 2014, so the Coast Guard should have had ample opportunity to order, receive and review, and share the documents with Respondent’s counsel prior to the hearing. Moreover, in an order I issued regarding discovery in this matter, I reminded the parties of their continuing obligation to supplement the record with any new evidence they received even after the discovery deadlines had passed. In a prehearing conference the week before the hearing commenced, both parties confirmed that they were fully prepared to go forward with the hearing. If at any time the Coast Guard had tried and failed to obtain the Documentation Package from the laboratory, it should have informed me and I would have considered whether a continuance was warranted. I note that the Coast Guard also argued that Documentation Packages are expensive and they prefer not to spend the money if they are not required to do so, thus I am unsure whether the Coast Guard even made a serious attempt to procure the package for this allegation.

Even if the Coast Guard was unable or unwilling to introduce the documentation package for Allegation Three, it could have introduced other evidence to satisfy its burden. The same laboratory tested Respondent’s urine samples for each of the three tests at issue here. Ms. Hahn testified about the tests underlying Allegations One and Two, and would have been an appropriate witness to testify about the laboratory’s role and details of the testing for Allegation Three. However, the Coast Guard did not ask her any questions relating to Allegation Three.

As the Coast Guard has relied on Kime v. Sweeney to support its position that MRO testimony is sufficient, I must determine whether that decision is controlling. I find it is not. In that case, the appellant argued on appeal that the Coast Guard had not carried its burden of proof "because it did not establish the qualifications of various individuals involved in the testing and analysis of the urine." The NTSB affirmed, saying the ALJ's decision "recounted in painstaking detail" evidence about the collection of the appellant's urine sample, the testing it was subjected to, the individuals involved in the collection and testing processes and a description of what each of them had actually done, and the chain-of-custody procedures. This record lacks equivalent evidence.

The NTSB continued, "in the absence of any particularized challenge at the hearing level to the qualifications of any of the laboratory personnel or the MRO," the Coast Guard did not need to show each of them was competent to perform their responsibilities and that, to the contrary, the MRO report was adequate to shift the burden of proof. This statement is problematic insofar as it is contrary to the three-pronged test set out by the Commandant, but it is also dicta and therefore not binding.

Moreover, Respondent here did not challenge the personnel qualifications at the hearing level, but did specifically challenge whether the testing was conducted in accordance with DOT rules. There is no evidence in the record to show whether or not it was properly conducted. The MRO testified he has no direct knowledge of the chain of custody at the laboratory, and presumes compliance with the regulations. On the facts of this case, I cannot find Kime v. Sweeney persuasive. Moreover, I note that the NTSB does not follow this dicta in its own aviation cases, as it routinely considers testimony from laboratory certifying scientists and/or litigation packages.

3. Conclusion as to Allegation Three

The third element of a *prima facie* case for Federal Drug Testing is proof that the drug test was conducted "as required by [46 C.F.R. Part 16] and in accordance with the procedures detailed in 49 CFR part 40." 46 C.F.R. § 16.201(a). The testing therefore must comply with both 46 C.F.R. Part 16 and 49 C.F.R. Part 40. "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 to maintain the system." Appeal Decision 2631 (SENGEL) (2002). The presumption will not arise if the evidence does not establish that the drug test complied with the procedures.

Despite the fact that SAMHSA-certified laboratories are highly regulated and are mandated to follow the procedures and guidelines governing their operations, I cannot simply presume compliance for this specific urine sample. Standing alone, the laboratory copy of the CCF, Copy 1, does not provide substantial evidence for purposes of a suspension or revocation proceeding that the test was conducted in accordance with the requirements of 49 C.F.R. Part 40, Subpart F. The form alone does not indicate the type of tests conducted, the manner in which they were conducted, or the qualifications of the laboratory and its personnel. Nor can MRO testimony fill in these gaps, since the MRO's role does not include oversight of the laboratory's internal processes.

Accordingly, the Coast Guard has not submitted sufficient evidence under Franks to establish that the procedures outlined in 49 C.F.R. Part 40 were followed by the laboratory. The Coast Guard had the authority to order production of records and witnesses to establish facts sufficient to prove this element. The Coast Guard bears the burden of proof and has not met it in regards this element. Accordingly, Allegation Three is **NOT PROVED**.

V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

Generally Applicable Facts and Conclusions:

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the undersigned in accordance with 46 U.S.C. § 7703, 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's Credential and is bound to adhere to the regulatory scheme applicable to credentialed mariners.

Facts and Conclusions as to Allegation 1:

1. On December 28, 2011, Respondent took a pre-employment drug test which the laboratory subsequently determined was positive for THC, a component of the dangerous drug marijuana.

2. When the MRO contacted him, Respondent offered a legitimate medical explanation for the test results, a prescription for the drug Marinol.

3. Without explanation, the MRO discounted Respondent's explanation and reported the test as positive.

4. Where a Respondent has claimed a legitimate medical explanation for a positive test result, the Coast Guard must present MRO testimony or other evidence demonstrating the MRO's reasons for certifying a drug test result as positive in spite of the explanation.

5. Based on the evidence presented as to this allegation, the Coast Guard has not met its burden of showing Respondent is a user or, or addicted to, dangerous drugs and the allegation is therefore NOT PROVED.

Facts and Conclusions as to Allegation 2:

1. On December 17, 2013, Respondent gave a urine sample which was subsequently determined by the drug testing laboratory to be substituted.

2. The reason for the laboratory's determination was a creatinine level so low as to be incompatible with normal human urine.

3. Although this test was purported to be a random test under 46 C.F.R. § 16.230, the marine employer's method of selecting Respondent for testing did not comply with the regulatory requirements for random tests.

4. There were flaws in the collection process, including the collector's failure to properly secure water sources and failure to provide Respondent with Copy 5 of the CCF, but neither were fatal flaws.

5. When the MRO contacted Respondent to discuss the test results, Respondent requested split sample testing but it was never performed.

6. Failure to perform split sample testing when a donor has requested it is a fatal flaw in the testing process under 49 C.F.R. Part 40.

7. The MRO's testimony at the hearing was not fully credible.

8. Based on the evidence presented as to this allegation, the Coast Guard has not met its burden of showing Respondent committed misconduct by refusing to take a drug test and the allegation is therefore NOT PROVED.

Facts and Conclusions as to Allegation Three:

1. On May 23, 2014, Respondent took a pre-employment drug test which the laboratory subsequently determined was positive for THC, a component of the dangerous drug marijuana.

2. The Coast Guard did not introduce a laboratory documentation package or testimony from laboratory personnel regarding the May 23, 2014 drug test.

3. An MRO is not competent to testify about the laboratory's internal procedures for maintaining custody and control of samples and for conducting drug testing on those samples.

4. The Federal Drug Testing Custody and Control Form, standing alone, is not sufficient documentation of the laboratory's internal custody and control or testing procedures.

5. Based on the evidence presented as to this allegation, the Coast Guard has not met its burden of showing Respondent is a user of, or addicted to, dangerous drugs and the allegation is therefore NOT PROVED.

VI. CONSIDERATION OF APPROPRIATE ORDER

"When the finding is not proved, the Administrative Law Judge issues an order dismissing the proceeding with or without prejudice to refile." 46 C.F.R. § 5.567(a). The first allegation was not proved because the Coast Guard did not call the MRO to explain her findings despite some evidence of a viable explanation for the positive result. Accordingly, it appropriate to dismiss that allegation with prejudice. As to the second allegation, the random testing was not conducted in accordance with regulations and the verification process by the MRO was flawed. Dismissal with prejudice is warranted.

The final allegation deals with a failure to produce sufficient evidence that the laboratory conducted the test in accordance with DOT standards. It is likely this evidence exists, and the Coast Guard was aware of it and could have obtained it. However, the Coast Guard did not seek a continuance to acquire this evidence and confirmed it was ready to present its case less than a week before the hearing commenced. During the hearing, the Coast Guard did not move to withdraw this allegation until after the collector had testified. The laboratory is obligated to provide the documentation package to the Coast Guard upon request, and the Coast Guard bears the burden of proving each allegation it brings. Accordingly, dismissal with prejudice is also appropriate for this allegation. However, as discussed below, the requirements of 46 C.F.R. 16.201(f) still apply as to this allegation.

VII. STATUS OF RESPONDENT'S CREDENTIAL

Although I have found all three of the allegations in this case Not Proved, Respondent nevertheless failed a federally-mandated drug test. To fail a drug test is defined as "the result of a chemical test conducted in accordance with 49 CFR 40 was reported as 'positive' by a Medical Review Officer because the chemical test indicated the presence of a dangerous drug at a level equal to or exceeding the levels established in 49 CFR part 40." 46 C.F.R. § 16.105. While a failed drug test may lead to a suspension or revocation proceeding, it may also have broader implications. Both Coast Guard and DOT rules mandate that employers take actions based on failed drug tests, regardless of the outcome of any subsequent administrative proceeding against the employee.

If an individual holding an MMC fails a drug test, Coast Guard regulations require marine employers to either deny that individual employment as a crewmember or remove him from duties directly affecting the safe operation of the vessel as soon as practicable. 46 C.F.R. § 16.201. Similarly, the DOT rules instruct an employer who receives a verified positive drug test

result to "immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test." 49 C.F.R. § 40.23(a). While Coast Guard regulations are silent as to the impact of refusals to test, under DOT rules an employer who receives a verified adulterated or substituted drug test result must consider this a refusal to test and immediately remove the employee involved from performing safety-sensitive functions. 49 C.F.R. § 40.23(b).

These employer responsibilities are separate from suspension and revocation proceedings under 46 C.F.R. Part 5. Neither the Coast Guard nor DOT rules describe the impact of administrative proceedings on these responsibilities. However, if a later proceeding finds a test was defective, it is logical that the defective test can longer be the basis for keeping a mariner from performing safety sensitive duties. The evidence has established that the tests in Allegation One and Allegation Two did not conform to DOT standards and therefore they no longer mandate any employer responsibility.

The test underlying Allegation Three, however, was generally conducted and reported as required by DOT rules.[10] The Coast Guard's failure of proof under Franks means the test cannot form the basis for a suspension or revocation proceeding, but it nevertheless remains a failed drug test under both DOT and Coast Guard regulations. I note that the holding in Franks is limited to suspension or revocation proceedings and does not extend to other possible implications of a failed drug test, such as employer responsibilities. Accordingly, the requirements of 46 C.F.R. § 16.201(c), (e) and (f) and 49 C.F.R. § 40.23 (a), (b) and (d) still apply.

[10] The DOT rules do not require additional documentary proof or testimony about the laboratory's internal procedures: the laboratory is only required to provide a fully completed, legible CCF Copy 1 to the MRO. 49 C.F.R. § 40.97. The MRO must report results on either a fully completed, legible CCG Copy 2 or a written report meeting the requirements of 49 C.F.R. § 40.163(c). Both of these documents were present for the May 23, 2014 test and, if not for Franks, I would have found Allegation Three proved.

Under DOT rules, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, the employer "must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part." 49 C.F.R. § 40.23(d). Under Coast Guard rules, the mariner may not be re-employed aboard a vessel until the requirements of 46 C.F.R. § 16.201(f) and 46 C.F.R. Part 5, if applicable, have been satisfied. See 46 C.F.R. § 16.201(e). Here, I have dismissed the proceedings under 46 C.F.R. Part 5, but the requirements of 46 C.F.R. § 16.201(f) must still be separately satisfied.

The return-to-duty process for mariners requires an MRO determination that the individual is drug-free and at low risk of subsequent use of dangerous drugs, as well as increased unannounced drug testing for a minimum of 6 tests during the first year the mariner is back to work and for up to 60 months if the MRO believes it is warranted. 46 C.F.R. § 16.201(f). While I cannot take action against Respondent's MMC or order him to procure a return-to-work letter and submit to the required number of unannounced follow-up drug tests, he should be aware that an affected marine employer could violate the regulations by employing him before he completes the return-to-duty process.

ORDER

Each allegation is **NOT PROVED**. This proceeding is **DISMISSED** with prejudice to refile.

George J. Jordan
US Coast Guard Administrative Law Judge

Date: June 22, 2015

APPENDIX A: WITNESS AND EXHIBIT LISTS

Coast Guard Witnesses:

Jackie Jones	Collector
Androw D. Jones	Collector
Dean Ference	President, Steel City Marine
Dawn Hahn	Laboratory Director, Quest Diagnostics
Michelle Hall	Collector
Horacio Marafioti	Medical Review Officer
Dr. Jerome Cooper	Medical Review Officer
Monica Cobb	Employee, eScreen

Respondent's Witnesses:

Kyle Allen Pfenning	Respondent
Shonda Thrash Pfenning	Respondent's Wife
Dr. James Bugg	Expert Witness

Coast Guard Exhibits:

CG-01	Custody and Control Form Copy 2 for Dec. 28, 2011 Test
CG-02	Laboratory Documentation Package for Dec. 28, 2011 Test
CG-03	Medical Review Officer Drug Test Results Form for Dec. 28, 2011 Test
CG-04	Custody and Control Form Copy 5 for Dec. 17, 2013 Test
CG-05	Laboratory Documentation Package for Dec. 17, 2013 Test
CG-06	MRO Results of DOT Controlled Substances Test for Dec. 17, 2013
CG-07	Steel City Marine Transport, Inc. USCG Antidrug and Alcohol Misuese Policy and Prevention Plan Dated Apr. 15, 2004
CG-08	Custody and Control Form Copy 2 for May 23, 2014 Test
CG-09	Medical Review Officer Final Report for May 23, 2014 Test
CG-10	Emails between James Fayard and Monica Cobb regarding Dr. Ausman; MRO Detail Report
CG-11	Steel City Marine Transport Logbook Entries for M/V GREGORY DAVID, Dec. 17, 2013; additional copies of CG-06 and CG-07
CG-12	Custody and Control Form Copy 1 for Dec. 17, 2013 Test
CG-13	Medical Review Officer Worksheet for May 23, 2014 Test; Custody and Control Form Copies 1 and 2 for May 23, 2014 Test; Subpoena to Dr. Cooper; additional copy of CG-09
CG-14	Screenshots of Respondent's Marinol Prescription and Location Data

Respondent's Exhibits:

R-A	Respondent's Marinol Prescription

R-B	Custody and Control Form Copy 2 for Dec. 28, 2011 Test
R-C	Not Offered
R-D	Phone Log Legend for Exhibit R-E
R-E	Respondent's Phone Records for 12/21/11 to 1/20/12
R-F	Not Offered
R-G	Not Offered
R-H	Not Offered
R-I	Not Offered
R-J	Not Offered
R-K	Respondent's Correspondence with University Services Regarding Split Specimen Testing for May 23, 2014 Sample
R-L	Photocopies of Prescription Labels for Various Medications Taken by Respondent

APPENDIX B:
33 C.F.R. PART 20- APPEALS
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 thirty (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 such 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 appeal 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 sixty (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 thirty-five (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 mail 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.