

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

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UNITED STATES COAST GUARD  
Complainant

vs.

BRENDON COREY HILL  
Respondent

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Docket Number 2018-0275  
Enforcement Activity No. 5754987

**DECISION AND ORDER**  
**Issued: October 30, 2019**

**By Administrative Law Judge: Honorable Brian J. Curley**

**Appearances:**

**Ms. Sarah K. Savage**  
**Marine Safety Detachment Panama City**  
**For the Coast Guard**

**Omar Abdelghany, Esq.**  
**For the Respondent**

The United States Coast Guard initiated this Suspension and Revocation proceeding seeking revocation of Brendon Corey Hill's (Respondent) Merchant Mariner Credential (MMC) Number 000401638. This action is brought pursuant to the authority contained in 46 U.S.C. § 7704 and its underlying regulations codified at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

On August 13, 2018, the Coast Guard issued a Complaint charging Respondent with violating 46 U.S.C. § 7704(b) by being a user of dangerous drugs.<sup>1</sup> Specifically, the Complaint alleges on February 10, 2018, Respondent participated in a non-Department of Transportation (DOT) hair specimen drug screening and tested positive for marijuana metabolites. Respondent filed an Answer admitting all jurisdictional allegations and denying all factual allegations in the Complaint on August 27, 2018.

On February 12 and 13, 2019, I held a hearing in Ft. Walton Beach, Florida. I conducted the hearing in accordance with the Administrative Procedure Act (APA) as amended and codified at 5 U.S.C. §§ 551-559 and Coast Guard procedural regulations set forth in 46 C.F.R. Part 5 and 33 C.F.R. Part 20. Lineka Quijano, Esq. and Ms. Sara Savage represented the Coast Guard. Omar Abdelghany, Esq. represented Respondent. At the hearing, the Coast Guard presented the testimony of four (4) witnesses and had twelve (12) exhibits admitted into the record. Respondent presented the testimony of two (2) witnesses and had ten (10) exhibits admitted into the record. The list of witnesses and exhibits is contained in **Attachment A**.

At the close of the hearing, I permitted the parties to file post-hearing briefs. On April 19, 2019, both parties submitted post-hearing briefs, and the matter is now ripe for decision. After careful consideration of relevant statutes, regulations, case law, testimony, and documentary evidence, I find the Coast Guard **PROVED** Respondent is a user of dangerous

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<sup>1</sup> The Complaint asserts Respondent is a user of dangerous drugs pursuant to 46 U.S.C. § 7704(c). However, 46 U.S.C. § 7704 has been amended, and the language previously contained in 46 U.S.C. § 7704(c) has been moved to 46 U.S.C. § 7704(b). (Tr. Vol. 1 at 7-8).

drugs pursuant to 46 U.S.C. § 7704(b). Accordingly, for the reasons discussed below, Respondent's MMC is **REVOKED**.

### FINDINGS OF FACT

After a thorough and careful analysis of the documentary evidence, testimony of the witnesses, and the entire record taken as a whole, I make the following findings of fact:

#### **A. Employer Ordered Non-DOT Drug Test**

1. At all relevant times, Respondent held a valid Merchant Mariner Credential. (CG Ex. 01).
2. At all relevant times, Galliano Marine Service, LLC (GMS) employed Respondent as an able-bodied seaman aboard the vessel NORBERT BOUZIGA. (Tr. Vol. 1 at 33-36; Tr. Vol. 2 at 57; CG Ex. 4).
3. GMS is a subsidiary of Edison Chouest Offshore. (Tr. Vol. 1 at 22).
4. At all relevant times, GMS had a Drug and Alcohol Free Environment Policy (Drug and Alcohol Policy) applicable to its employees. (CG Ex. 04).
5. On or about January 15, 2018, Respondent reviewed and signed GMS's Drug and Alcohol Policy.<sup>2</sup> (CG Ex. 04).
6. At all relevant times, GMS's Drug and Alcohol Policy prohibited drug paraphernalia, the use of drugs, controlled substances, or any mind altering substance. (CG Ex. 04).
7. At all relevant times, GMS's Drug and Alcohol Policy prohibited any employee from having any amount of drugs or controlled substances present in his or her body while within the course and scope of his or her employment. (CG Ex. 04).
8. At all relevant times, GMS's Drug and Alcohol Policy stated employees may be required to submit to a hair specimen drug test at any time deemed appropriate by company management. (CG Ex. 04).
9. At all relevant times, GMS's Drug and Alcohol Procedure stated that in addition to random (DOT) drug testing, employees may also be subject to random non-DOT drug testing. (CG Ex. 03).
10. On February 10, 2018, the crew assigned to the vessel NORBERT BOUZIGA was selected for a random urinalysis DOT drug test. (Tr. Vol. 1 at 36).

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<sup>2</sup> The signature on the document is dated January 15, 2017. However, the parties stipulated the document was signed on or about January 15, 2018. (Tr. Vol. 1 at 43).

11. On February 10, 2018, in addition to the DOT drug test, GMS required the crew assigned to the vessel NORBERT BOUZIGA to submit to a non-DOT hair specimen drug test. (Tr. Vol. 1 at 36).

## **B. The Collection Process**

12. On February 10, 2018, Jonathan Nied was a trained hair specimen collector employed by Edison Chouest Offshore. (Tr. Vol. 1 at 47-61; CG Ex. 02, 05, 06).

13. On April 14, 2015, Jonathan Nied successfully completed the Psychomedics Sample Collection Training Program. (Tr. Vol. 1 at 48-49; CG Ex. 05).

14. On February 10, 2018, Jonathan Nied had previously completed approximately 1,000 hair specimen collections. (Tr. Vol. 1 at 50).

15. On February 10, 2018, Jonathan Nied used the following hair collection procedure for the purpose of performing a non-DOT drug test:

a. Mr. Nied began the collection process by verifying Respondent's identity. (Tr. Vol. 1 at 52).

b. Respondent did not have sufficient head hair for Mr. Nied to collect a sample from his head, so Mr. Nied collected a hair sample from Respondent's leg. (Tr. Vol. 1 at 57-59; Tr. Vol. 2 at 59-60; CG Ex. 06).

c. Mr. Nied provided Respondent with a new surgical preparation razor and placed a new piece of computer paper under Respondent's foot. (Tr. Vol. 1 at 58-59; Tr. Vol. 2 at 60-61).

d. Respondent cut a hair sample from his leg using the new surgical preparation razor, and the hair fell onto the new piece of computer paper. (Tr. Vol. 1 at 58-59; Tr. Vol. 2 at 60-61).

e. In Respondent's presence, Mr. Nied collected the hair sample, placed the hair into a piece of aluminum foil, folded it over twice, and sealed it in an envelope using tamper-evident tape. (Tr. Vol. 1 at 57-60).

f. Respondent signed the sealed envelope containing his hair sample. (Tr. Vol. 1 at 60-61).

g. Respondent signed a Psychomedics Forensic Drug Testing Custody and Control Form certifying he provided the hair specimen in the sealed envelope and consenting to the hair's testing by Psychomedics Corporation (Psychomedics). (Tr. Vol. 1 at 61; Tr. Vol. 2 at 73; CG Ex. 6).

h. Mr. Nied placed the signed envelope into a collection bag and sealed the collection bag with temper-evident tape. (Tr. Vol. 1 at 53, 61).

16. Respondent's hair specimen was sent to Psychomedics. (CG Ex. 07).

### **C. The Testing Process**

17. The Federal Drug Administration (FDA) has cleared the testing of body hair for the presence of drugs as reliable, safe, precise, and accurate. (Tr. Vol. 1 at 100).
18. At all relevant times, Psychemedics was cleared by the FDA to conduct hair specimen drug testing. (Tr. Vol. 1 at 88-89).
19. At all relevant times, Psychemedics was accredited for hair specimen drug testing by the College of American Pathologists. (CG Ex. 08; Tr. Vol. 1 at 89).
20. On February 13, 2018, Psychemedics received the envelope containing Respondent's hair specimen. (Tr. Vol. 1 at 96-97; CG Ex. 07). The envelope had its seal intact and bore the same donor identification number listed on the Psychemedics Forensic Drug Testing Custody and Control Form signed by Respondent. (Tr. Vol. 1 at 96-98; CG Ex. 07).
21. On February 13, 2018, Psychemedics tested Respondent's hair specimen. (CG Ex. 07).
22. Psychemedics performed an initial screening of Respondent's hair specimen using an enzyme immunoassay test, which involved taking a portion of Respondent's hair specimen, dissolving it into a liquid form, and then subjecting the dissolved hair to an enzyme immunoassay analysis. (Tr. Vol. 1 at 101; CG Ex. 07).
23. The enzyme immunoassay test conducted on Respondent's hair specimen was presumptive positive for marijuana. (Tr. Vol. 1 at 103).
24. Due to the presumptive positive result of the enzyme immunoassay test, Psychemedics performed a confirmatory test on Respondent's hair specimen using Gas Chromatography Mass Spectrometry (GCMS). (Tr. Vol. 1 at 103-104).
25. Psychemedics took an additional portion of Respondent's hair specimen, put it through three 30 minute phosphate wash cycles, and then tested it using GCMS. (Tr. Vol. 1 at 103-110).
26. Placing Respondent's hair specimen through three 30 minute phosphate wash cycles removed any carboxy Tetrahydrocannabinol (THC) from the outside of the hair. (Tr. Vol. 1 at 137-140).
27. The GCMS testing of Respondent's hair specimen revealed the presence of carboxy THC, a primary marijuana metabolite, in a concentration of 48.5 picograms per 10 milligrams of hair. (Tr. Vol. 1 at 110; CG Ex. 8). The FDA approved GCMS test cut-off level for marijuana metabolites is 1 picogram per 10 milligrams of hair. (Tr. Vol 1 at 110-113).
28. The enzyme immunoassay test and GCMS test used by Psychemedics are FDA-cleared as proper scientific methods for testing hair specimen for the presence of drugs. (Tr. Vol. 1 at 88-89).
29. Dr. Thomas Cairns, the Senior Scientific Advisor for Psychemedics, testified regarding the screening test, confirmatory test, and the procedures at Psychemedics. (Tr. Vol. 1 at 83-125).

30. Dr. Cairns holds a Bachelor of Science, Doctor of Philosophy in Analytical Chemistry and Biochemistry, and Doctorate of Science in Toxicology from the University of Glasgow. (Tr. Vol. 1 at 84; CG Ex. 11).
31. Dr. Cairns is licensed to practice forensic toxicology by the State of New York. (Tr. Vol. 1 at 85; CG Ex. 11).
32. Dr. Cairns published approximately 25 scientific papers regarding hair testing for the presence of drugs. (Tr. Vol. 1 at 85; CG Ex. 11).
33. The record does not indicate any abnormalities in the drug testing procedures or protocols used during the collection and testing of Respondent's hair specimen. (CG Ex. 06, 07, 10).

#### **D. Test Verification**

34. Dr. Darren J. Duet, MD is the Director of Medical Services for Edison Chouest Offshore. (Tr. Vol. 1 at 157).
35. Dr. Duet serves as the Medical Review Officer (MRO) for non-DOT tests conducted on Edison Chouest Offshore employees, including all GMS employees. (Tr. Vol. 1 at 22, 157).
36. Dr. Duet reviews approximately 500 to 1,000 non-DOT hair specimen drug tests a year. (Tr. Vol. 1 at 160).
37. At all relevant times, Dr. Duet was a licensed physician in the State of Louisiana. (Tr. Vol. 1 at 156; CG Ex. 09).
38. Dr. Duet is trained to serve as an MRO for DOT and non-DOT drug tests. (Tr. Vol. 1 at 157-158).
39. On February 10, 2018, Dr. Duet was not a DOT-certified MRO, but he had previously been a DOT-certified MRO for approximately 6 years. (Tr. Vol. 1 at 157; CG Ex. 09).
40. Dr. Duet reviewed the report for the drug testing Psychomedics conducted on Respondent's hair specimen. (Tr. Vol. 1 at 160-161; CG Ex. 7; CG Ex. 10).
41. Dr. Duet verified Respondent's hair specimen was positive for marijuana. (Tr. Vol. 1 at 162; CG Ex. 10).
42. Dr. Duet did not call Respondent to discuss a possible medical explanation for the positive drug test result. (Tr. Vol. 1 at 162-163).

### **DISCUSSION**

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have

the authority to revoke a mariner's license, certificate, or document for violations arising under 46 U.S.C. § 7704(b).

### **A. Jurisdiction**

Jurisdiction is a question of fact, which the ALJ must determine before deciding the substantive issues of the case. See Appeal Decision 2620 (COX) (2001). When a mariner is charged with use of a dangerous drug pursuant to 46 U.S.C. § 7704(b), it is the mariner's "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 . . . ." Appeal Decision 2668 (MERRILL) (2007) (brackets in original). At all relevant times, including the date of the hair specimen drug test at issue, Respondent held a valid MMC. (CG Ex. 1). Further, Respondent admitted to jurisdiction in his Answer; therefore, the undersigned has jurisdiction over the above captioned case.

### **B. Burden of Proof**

The (APA), 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation hearings before ALJs. 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d). Under Coast Guard procedural rules and regulations, the burden of proof is on the Coast Guard to prove the charges in the Complaint are supported by a preponderance of the evidence, and the respondent has the burden to prove his affirmative defenses by a preponderance of the evidence. 33 C.F.R. §§ 20.701, 20.702(a).

The term "preponderance of the evidence" is synonymous with the term "substantial evidence." Appeal Decision 2477 (TOMBARI) (1988); see also Steadman v. Sec. and Exch. Comm'n, 450 U.S. 91 (1981). Proving a fact by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the

[judge] of the fact's existence.” Concrete Pipe and Prod. of California, Inc. v. Constr. Laborers Pension Trust for S. California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-372 (1970) (Harlan, J., concurring) (brackets in original)). Therefore, the Coast Guard must prove by credible, reliable, probative, and substantial evidence that Respondent more likely than not violated 46 U.S.C. § 7704(b) by being a user of dangerous drugs.

### **C. Respondent is a User of Dangerous Drugs**

The Coast Guard alleges Respondent is a user of dangerous drugs because on February 10, 2018, he participated in a non-DOT hair specimen drug screening that tested positive for marijuana metabolites. The Coast Guard requires marine employers to conduct mandatory drug tests pursuant to DOT procedures contained in 46 C.F.R. Part 16 and 49 C.F.R. Part 40. However, a private employer may require drug testing in addition to the mandatory DOT tests, and the results of these tests may be used to prove drug use if there is evidence linking the results of the test to the mariner and proving the reliability of the test. Appeal Decision ARGAST 2720 (2018); Appeal Decision 2704 FRANKS (2014).

Here, Respondent participated in a non-DOT drug test ordered by his employer. In order to prove Respondent is a user of dangerous drugs, the Coast Guard must demonstrate 1) Respondent participated in an employer ordered drug test, 2) Respondent was the person tested for the drugs, 3) Respondent tested positive for marijuana metabolites, and 4) the non-DOT drug test results are scientifically reliable.

#### **1. Respondent Participated in an Employer Ordered Non-DOT Drug Test**

On February 10, 2018, Respondent's employer, GMS, selected the crew assigned to the vessel NORBERT BOUZIGA to participate in a random DOT drug test. (Tr. Vol. 1 at 36). Respondent was part of the crew assigned to the NORBERT BOUZIGA. In addition to the random DOT drug test, GMS required the crew to submit hair specimen for drug testing. Id. GMS ordered the additional drug test in accordance with GMS's Drug and Alcohol Policy. The



policy states GMS employees may be required to submit to a hair specimen drug test at any time deemed appropriate by company management. (Tr. Vol. 1 at 36; CG Ex. 04). Respondent reviewed GMS's Drug and Alcohol Policy and was aware GMS could order him to submit to a non-DOT drug test at any time. (Tr. Vol. 2 at 72; CG Ex. 04).

Since the DOT drug testing procedures do not include hair specimen testing, the test administered on February 10, 2018, was an employer ordered non-DOT drug test. See 46 C.F.R. Part 16; 49 C.F.R. Part 40. In this circumstance, “[since] the employer is not acting as an instrument or agent of the government, the constitutional harms that Part 16 seeks to avoid are absent . . . .” Appeal Decision 2704 FRANKS (2014). Accordingly, I find the non-DOT hair specimen drug test administered on February 10, 2018, was properly ordered and does not pose constitutional issues affecting the Coast Guard's ability to seek revocation of Respondent's MMC.

## **2. Respondent was the Person Tested for Dangerous Drugs**

On February 10, 2018, Jonathan Nied, a collector from Edison Chouest Offshore, arrived on NORBERT BOUZIGA to collect samples from the crew for drug testing. (Tr. Vol 1 at 52; Tr. Vol. 2 at 64-65). GMS required Respondent to submit to the employer ordered non-DOT drug test by providing a hair sample. (Tr. Vol. 1 at 39; Tr. Vol. 2 at 73; CG Ex. 06). Mr. Nied, a trained hair specimen collector, verified Respondent's identity prior to collecting a hair specimen from his leg. (Tr. Vol. 1 at 47-61; CG Ex. 02, 05, 06). In Respondent's presence, Mr. Nied collected the hair specimen, placed the hair into a piece of aluminum foil, folded it over twice, and sealed it in an envelope with tamper-evident tape. (Tr. Vol. 1 at 57-60). Respondent signed the envelope, and Mr. Nied placed the signed envelope into a collection bag. (Tr. Vol. 1 at 53, 60-61). Mr. Nied sealed the collection bag with temper-evident tape in Respondent's presence. Id. Respondent signed a Psychemedics Forensic Drug Testing Custody and Control Form

certifying he provided the hair sample in the envelope. (Tr. Vol. 1 at 61; Tr. Vol. 2 at 73; CG Ex. 06).

On February 13, 2018, Psychemedics received the envelope containing Respondent's hair specimen. (Tr. Vol. 1 at 96-97; CG Ex. 07). The envelope had its seal intact and bore the same donor identification number listed on the Psychemedics Forensic Drug Testing Custody and Control Form signed by Respondent. (Tr. Vol. 1 at 96-97; CG Ex. 07). Accordingly, I find the chain of custody and collection process in the case demonstrates Respondent's hair sample was the hair sample collected and sent to Psychemedics for testing.

### **3. Respondent's Hair Sample Tested Positive for Marijuana, a Dangerous Drug**

The Commandant established marijuana as a dangerous drug for purposes of 46 U.S.C. § 7704. See Appeal Decision 2529 (WILLIAMS) (1991). A dangerous drug is defined as “a narcotic drug, a controlled substance, or a controlled substance analog . . . .” 46 U.S.C. § 2101(8); 46 C.F.R. § 16.105. The Controlled Substances Act states the “term ‘controlled substance’ means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.” Marijuana is a schedule I drug. See 21 U.S.C. § 812. Therefore, marijuana is considered a dangerous drug.

As stated *supra*, Psychemedics received Respondent's sample with its seal intact. (Tr. Vol. 1 at 96-98; CG Ex. 07). Technicians reviewed the sample to ensure the proper chain of custody had been followed. (Tr. Vol. 1 at 98; CG Ex. 07). After that review, Psychemedics assigned the hair specimen a laboratory accessioning number (LAN), which was used, together with a bar code, to track Respondent's sample throughout the entire testing process. (Tr. Vol. 1 at 98; CG Ex. 07).

Initially, Psychemedics put a portion of Respondent's hair specimen through an FDA-cleared enzyme immunoassay screening; that portion tested presumptive positive for marijuana metabolites. (Tr. Vol. 1 at 101-103; CG Ex. 07). Psychemedics then took an additional portion

of Respondent's hair specimen, put it through three 30 minute phosphate wash cycles to remove any exterior contamination, and performed an FDA-cleared GCMS confirmatory test on the washed hair. (Tr. Vol. 1 at 101-110; CG Ex. 07). The confirmatory GCMS test showed the presence of carboxy THC, a marijuana metabolite, measuring 48.5 picograms per 10 milligrams of hair. (Tr. Vol. 1 at 103-110; CG Ex. 07). The confirmatory test had a cutoff level of 1 picogram per 10 milligrams of hair. (Tr. Vol. 1 at 110).

Dr. Duet, a licensed physician with MRO training, reviewed and verified Respondent's laboratory test results as positive for marijuana metabolites. (Tr. Vol. 1 at 157-162; CG Ex. 10). Dr. Duet did not call Respondent to discuss a possible medical explanation for the positive drug test result. (Tr. Vol. 1 at 62-63). However, Respondent does not assert the positive result is due to a legitimate medical explanation.

The record demonstrates the chain of custody for the hair specimen was unbroken from the time it was collected from Respondent to the time it was put through a confirmatory GCMS test. Thus, I find Psychemedics tested Respondent's hair sample, which sample yielded a positive result for marijuana metabolites, and the MRO verified the results as positive. Accordingly, Respondent's sample tested positive for marijuana, a dangerous drug.

#### **4. The Non-DOT Drug Test Respondent Submitted to is Scientifically Valid and Reliable**

Dr. Cairns, the Senior Scientific Advisor for Psychemedics, testified regarding Psychemedics' testing of body hair. (Tr. Vol. 1 at 83-125; Tr. Vol. 2 at 82-88). Dr. Cairns holds a Bachelor of Science, Doctor of Philosophy in Analytical Chemistry and Biochemistry, and Doctorate of Science in Toxicology from the University of Glasgow. (Tr. Vol. 1 at 84; CG Ex. 11). Dr. Cairns is licensed to practice forensic toxicology in the State of New York, has extensive experience with hair testing, and has published approximately 25 scientific papers regarding hair testing for the presence of drugs. (Tr. Vol. 1 at 85; CG Ex. 11). At the hearing, I

found he is an expert in forensic toxicology with respect to hair testing analysis. (Tr. Vol. 1 at 93).

Dr. Cairns testified the FDA has cleared the testing of body hair for drugs as reliable, safe, precise, and accurate. (Tr. Vol. 1 at 100). Dr. Cairns explained Psychomedics' FDA-cleared enzyme immunoassay screening of body hair looks at a group of compounds called cannabinoids. (Tr. Vol. 1 at 135). When the initial screening test yields a positive result, an FDA-cleared confirmatory test is performed using GCMS, which only looks for a marijuana metabolite called carboxy THC. (Tr. Vol. 1 at 111). Carboxy THC is only formed when a person ingests and metabolizes marijuana. (Tr. Vol. 1 at 112). Once carboxy THC is formed, it then circulates in the person's bloodstream, which feeds every hair follicle in their body. (Tr. Vol. 1 at 112). As each hair follicle grows, it "traps" the carboxy THC into its structure. (Tr. Vol. 1 at 112).

Dr. Cairns explained the GCMS test result demonstrated Respondent's hair specimen contained carboxy THC in the concentration of 48.5 picograms per 10 milligrams, significantly above the cutoff level of 1 picogram per 10 milligrams. (Tr. Vol. 1 at 110). Thus, Dr. Cairns concluded Respondent's specimen yielded a positive result for marijuana. (Tr. Vol. 1 at 110).

I find the testing Psychomedics conducted on Respondent's hair specimen is reliable. This testing was conducted at an FDA-cleared laboratory using FDA-approved scientific procedures, which included both an initial screening test and a confirmation test. There was ample credible testimony concerning the collection and testing process, which illustrated the results are accurate. Therefore, I find the hair sample drug test Respondent participated in is scientifically valid and reliable.

#### **D. Respondent's Affirmative Defenses**

Respondent offers two main arguments in his defense. First, Respondent asserts the February 10, 2018 hair specimen drug test resulted in a false positive for marijuana metabolites

due to external contamination of his leg hair and consumption of his girlfriend's bodily fluids. Second, Respondent argues the negative results of his six other drug tests demonstrate the positive result of the February 10, 2018 drug screening is incorrect. For the reasons discussed below, Respondent's arguments are not persuasive.

**1. The Results of the February 10, 2018 Non-DOT Drug Test Were Not a False Positive**

As stated *supra*, Respondent asserts the February 10, 2018 hair specimen drug test resulted in a false positive for marijuana metabolites due to external contamination of his leg hair and consumption of his girlfriend's bodily fluids. Respondent maintains his leg hair was externally contaminated by his live-in girlfriend when she smoked marijuana in their studio apartment on a daily basis. (Tr. Vol. 2 at 55-56). Further, Respondent stated he ingested his girlfriend's bodily fluids during sexual interactions with her. (Tr. Vol. 2 at 55).

In support of his position, Respondent called Mr. Barry Funck as a witness. Mr. Funck has a Bachelor of Science degree in Chemistry from the University of Florida, attended a two year extended training program in toxicology from 1975-1977, previously held a license to practice forensic toxicology (expired 2009), and worked in the forensic analysis field since 1975. (Tr. Vol. 2 at 11-13; R Ex. J). Mr. Funck does not hold any graduate degrees and has never published any academic research or peer reviewed journal articles regarding hair testing. (Tr. Vol. 2 at 30). At the hearing, I qualified Mr. Funck as an expert. (Tr. Vol. 2 at 81).

Mr. Funck testified it is possible for a hair sample to have carboxy THC on its exterior from marijuana smoke and fluid transfers that take place between a user of marijuana and another person. (Tr. Vol. 2 at 35). Mr. Funck testified laboratories put hair samples through washes to remove external contamination prior to testing the samples for the presence of drugs. (Tr. Vol. 2 at 15). Further, Mr. Funck indicated that if a laboratory properly washes a hair sample, the wash removes the external carboxy THC from the sample. (Tr. Vol. 2 at 36).

Psychemedics put Respondent's hair specimen through three phosphorus washes. (Tr. Vol. 2 at 34). However, Mr. Funck stated external contamination cannot ultimately be ruled out because after Psychemedics washed Respondent's hair specimen, it did not verify the phosphorus washes used on Respondent's hair were negative for marijuana metabolites. (Tr. Vol. 2 at 45-46).

In order to rebut Mr. Funck's testimony, Dr. Cairns stated no external carboxy THC was left on Respondent's hair specimen after Psychemedics put it through three 30 minute phosphate washes. (Tr. Vol. 2 at 86). Dr. Cairns testified the process Psychemedics used to test Respondent's hair specimen includes an FDA-cleared method of washing the hair to remove external contamination. (Tr. Vol. 2 at 87). Dr. Cairns concluded because of the extensive washing process, the presence of carboxy THC in Respondent's hair sample cannot be the result of external contamination. (Tr. Vol. 1 at 111-114).

Additionally, Dr. Cairns explained Respondent must consume "gallons and gallons" of bodily fluid from someone using marijuana for his hair sample to contain enough carboxy THC to reach the cutoff concentration of 1 picogram per 10 milligrams. Thus, Dr. Cairns concluded it is "unrealistic" to think Respondent consumed enough of his girlfriend's bodily fluids that his hair specimen contained carboxy THC in the concentration of 48.5 picograms per 10 milligrams. (Tr. Vol. 2 at 85-86).

An ALJ has broad discretion in determining the credibility of witnesses and in resolving inconsistencies in the record; "where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence." Appeal Decision 2711 (TROSCLAIR) (2015) (quoting Appeal Decision 2616 (BYRNES) (2000)). To the extent Mr. Funck's testimony and Dr. Cairns' testimony are in conflict, I find Dr. Cairns' testimony more credible. Dr. Cairns' testimony established the FDA-cleared procedure Psychemedics used to wash Respondent's leg hair removes all external contamination from the hair. Further, Dr. Cairns' testimony established that if Respondent's leg

hair had been exposed to carboxy THC through smoke and bodily fluids, Psychemedics washed all the external contamination off his hair sample before it was put through the GCMS test. Finally, Dr. Cairns' testimony established Respondent's consumption of his girlfriend's bodily fluids could not have resulted in his hair specimen containing carboxy THC in the concentration of 48.5 picograms per 10 milligrams.

Thus, based on the foregoing, I find Respondent failed to demonstrate the February 10, 2018 drug test resulted in a false positive for marijuana metabolites due to external contamination or consumption of another person's bodily fluids.<sup>3</sup>

## **2. Respondent's Six Additional Drug Tests Do Not Invalidate the Results of His February 10, 2018 Non-DOT Drug Test**

Respondent offered evidence regarding six additional drug tests he alleges he took. This evidence included documentation regarding negative test results for a urinalysis drug test conducted on February 10, 2018, the same day as the positive non-DOT hair specimen drug test at issue in this case. (R Ex. B). Respondent also offered documentation of negative test results from five other drug tests. These tests included a urinalysis drug test conducted on May 12, 2014, a urinalysis drug test conducted on January 15, 2018, a head hair analysis drug test conducted on August 22, 2018, a head hair analysis drug test conducted on January 16, 2019, and a head hair analysis drug test conducted on January 30, 2019. (R Ex. A, C, D, G, H).

For each of these six tests, Respondent submitted unsigned documentation from either Omega Laboratories or Quest Diagnostics indicating he took part in a drug test that yielded a negative result. (R Ex. A, B, C, D, G, H). Respondent did not provide any additional documentation, such as custody and control forms or laboratory litigation packages, regarding

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<sup>3</sup> Additionally, nothing in the record, including the expert testimony presented, establishes Respondent's inhalation of his girlfriend's marijuana smoke could have resulted in Respondent's hair specimen containing THC in the concentration of 48.5 picograms per 10 milligrams.

the chain of custody or testing procedures for these tests.<sup>4</sup> Due to the lack of documentation, Mr. Funck testified he was unable to evaluate the validity of the testing procedures used in any of the six tests. (Tr. Vol. 2 at 41). Additionally, Dr. Cairns stated that due to the lack of documentation, he “would have to discount the Omega hair samples as irrelevant.” (Tr. Vol. 2 at 120). The experts in this case were unable to determine whether any of the six tests were properly conducted because Respondent provided an insufficient amount of documentation regarding these tests. Therefore, I find Respondent’s negative test results lack the validity needed to find them probative.

Further, even if the six tests were properly conducted, they do not demonstrate the results of the February 10, 2018 leg hair specimen drug test are invalid. Dr. Cairns’ testimony established different types of drug tests look at drugs consumed over different periods of time. A drug test conducted on leg hair show drugs consumed 6-7 months prior to the date of collection, a drug test conducted on head hair show drugs consumed 90 days prior to the date of collection<sup>5</sup>, and a drug test conducted on urine shows drugs consumed 72 hours prior to the date of collection. (Tr. Vol. 1 at 118-119). Dr. Cairns testified that due to the difference in the “look back window” it is very common for a urine test and hair test collected on the same day to have different results, with the urine test being negative and the hair test being positive. (Tr. Vol. 1 at 118-119).

After analyzing all six tests, Dr. Cairns concluded that even if the tests were properly conducted and had negative results, they are “irrelevant” to the timeframe at issue for the February 10, 2018 leg hair specimen test because that test looked back at dates none of the other six tests did. (Tr. Vol. 1 at 121). Therefore, I find that even if the six drug tests were properly

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<sup>4</sup> For the January 30, 2019 head hair analysis drug test, Respondent submitted an affidavit from the custodian of records at Omega Laboratories stating the laboratory received Respondent’s hair specimen from ARCpoint Labs with its seal intact and tested it “in accordance with all of Omega Laboratories, Inc. Standard Operating Procedures.” (R. Ex. G).



conducted, they do not invalidate the results of the February 10, 2018 leg hair specimen drug test.

### **E. Conclusion**

Dr. Cairns testified the confirmatory testing cutoff of 1 picogram of carboxy THC per 10 milligrams of hair is indicative of multiple ingestions of marijuana. (Tr. Vol. 1 at 113). The Coast Guard demonstrated Respondent's hair specimen contained carboxy THC in the concentration of 48.5 picograms per 10 milligrams, nearly 50 times higher than the cutoff. (Tr. Vol. 1 at 103-110; CG Ex. 07). Dr. Cairns testified that to achieve a concentration of carboxy THC almost 50 times above the cutoff, a person would have to smoke several marijuana joints every week. (Tr. Vol. 1 at 127). Thus, I conclude regular marijuana use is the only plausible explanation for the high concentration of carboxy THC found in Respondent's hair specimen.

The results of the February 10, 2018 hair specimen drug test prove Respondent had marijuana metabolites in his system. As explained above, the results of this test were proved reliable and scientifically valid by a preponderance of evidence. In addition to the results of the February 10, 2018 drug test being reliable and scientifically valid, Dr. Cairns presented additional evidence connecting the levels of metabolite in Respondent's hair sample to Respondent being a user of dangerous drugs. See Appeal Decision 2704 FRANKS (2014). Dr. Cairns credibly explained the high concentration of carboxy THC in Respondent's system demonstrates regular marijuana use. Accordingly, I find Respondent is a user of dangerous drugs, specifically marijuana, and the allegations contained in the Complaint are **PROVED**.

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<sup>5</sup> Dr. Cairns testified every 1.5 inches of head hair tested shows drugs consumption going back an additional 90 days from the date of collection. (Tr. Vol. 1 at 119).

## ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times herein, Respondent held Merchant Mariner Credential Number 000401638.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. § 7704; 46 C.F.R. Parts 5 and 16; 33 C.F.R. Part 20; and the APA codified at 5 U.S.C. §§ 551-559.
3. On February 10, 2018, Respondent took an employer ordered non-DOT hair specimen drug test, and it yielded a positive result for marijuana metabolites in the amount of 48.5 picograms per 10 milligrams.
4. The February 10, 2018 non-DOT hair specimen drug test was scientifically valid and reliable.
5. The Coast Guard **PROVED** Respondent is a user of dangerous drugs by a preponderance of reliable, probative, and credible evidence pursuant to 46 C.F.R. § 5.35 and 46 U.S.C. § 7704(b).

## SANCTION

The Coast Guard asserts revocation of Respondent's MMC is the proper sanction for his use of dangerous drugs in violation of 46 U.S.C. § 7704(b). Contrarily, Respondent maintains 46 C.F.R. § 5.59(a) allows a sanction less than revocation because the results of the February 10, 2018 hair specimen drug test only demonstrate he experimented with marijuana. Respondent's reliance on 46 C.F.R. § 5.59(a) is misplaced. Title 46 C.F.R. § 5.59(a) only applies to a charge of misconduct under 46 U.S.C. § 7703, and it is therefore inapplicable to the above captioned case, which is based on a charge of use of dangerous drugs under 46 U.S.C. § 7704(b). Further, Respondent's affirmative defenses are ones of accidental ingestion and denial of use; therefore, experimentation would not be a credible assertion at the sanction portion of the case because use was denied entirely throughout the hearing.

Title 46 U.S.C. § 7704(b) states “[i]f it is shown that a holder [of an MMC] has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner’s document shall be revoked unless the holder provides satisfactory proof that the holder is cured.” Thus, unless Respondent demonstrates he is cured, I must revoke his MMC for his violation of 46 U.S.C. § 7704(b).

The Commandant established to prove cure, a mariner must 1) successfully complete a bona fide drug abuse rehabilitation program, and 2) demonstrate a complete non-association with drugs for a minimum of one year following the successful completion of a drug rehabilitation program, including participation in an active drug abuse monitoring program which incorporates random, unannounced testing during that year. See Appeal Decision 2535 (SWEENEY) (1992); Appeal Decision 2638 (PASQUARELLA) (2003); Appeal Decision 2634 (BARRETTA) (2002); Commandant Decision on Review #18 (CLAY). In addition, pursuant to 46 C.F.R. § 16.201(f), “[b]efore an individual who has failed a required chemical test for dangerous drugs may return to work aboard a vessel, the MRO must determine that the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work.” See also Id.

Respondent failed to demonstrate any participation in the cure process. There is no evidence Respondent enrolled in a bona fide drug abuse rehabilitation program, let alone successfully completed such a program. He has not participated in an active drug abuse monitoring program following the completion of a drug rehabilitation program or obtained a return to work letter from an MRO. Although Respondent did present evidence of drug tests that yielded negative test results, as stated above, there is not ample evidence to demonstrate the test results are accurate. Accordingly, taking into account all the facts and evidence of this case, I find **REVOCATION** is the appropriate sanction for Respondent’s violation of 46 U.S.C. § 7704(b).

**ORDER**

**IT IS HEREBY ORDERED** Merchant Mariner Credential Number 000401638 and all other Coast Guard licenses, certificates and documents issued to Respondent, Brendon Corey Hill, are hereby **REVOKED**.

**IT IS FURTHER ORDERED** Respondent must immediately surrender all Coast Guard issued credentials to USCG Marine Safety Detachment Panama City, 1700 Thomas Drive, Panama City, Florida 32407-8043.

**PLEASE TAKE NOTICE** service of this Order on you serves as notice of your right to appeal as set forth in 33 C.F.R. §§ 20.1001-20.1004. See **Attachment B**.



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**Brian J. Curley**  
**US Coast Guard**  
**Administrative Law Judge**

Date: October 30, 2019

## **ATTACHMENT A: WITNESS & EXHIBIT LISTS**

### **EXHIBIT LIST**

#### **Coast Guard's Exhibits**

1. Copy of Respondent's MMC
2. Employer Notification to the Coast Guard sent by Darla J. Gregory, Assistant Health, Safety and Environmental, Galliano Marine Services, LLC
3. GMS Management System Drug and Alcohol Procedure
4. Galliano Marine Service Drug and Alcohol Free Work Environment Policy
5. Jonathan Nied's Personal Certificate of Completion for Psychemedics Sample Collection Training Program
6. Custody and Control Form Specimen ID Number U824461 (Collector Copy)
7. Psychemedics Corporation Laboratory Litigation Package
8. Psychemedics Corporation Laboratory Certificate of Accreditation, Compliance and Licenses
9. Darren Jude Duet's Louisiana State Board of Medical Examiners Personal Certification
10. Custody and Control Form Specimen ID Number U824461 (MRO Copy)
11. Dr. Thomas Cairns' Curriculum Vitae
12. Timeline Diagram Prepared by Dr. Cairns (Demonstrative Evidence)

#### **Respondent's Exhibits**

- A. Omega Laboratories Hair 5 Drug Panel Test Results for Brendon Corey Hill (sample collected on August 22, 2018)
- B. Quest Diagnostics Controlled Substance Test Results for Brendon Corey Hill (sample collected February 10, 2018)
- C. Quest Diagnostics Controlled Substance Test Results for Brendon Corey Hill (sample collected on January 15, 2018)
- D. Quest Diagnostics Controlled Substance Test Results for Brendon Corey Hill (sample collected on May 12, 2014)

- E. Letter from Texas A&M Maritime Academy dated September 12, 2018
- F. Letter of Appreciation Regarding Brendon Corey Hill from Captain Michael J. Banks, M/V Norbert Bouziga.
- G. Omega Laboratories Hair 5 Drug Panel Test Results for Brendon Corey Hill (sample collected on January 30, 2019)
- H. Omega Laboratories Hair 5 Drug Panel Test Results for Brendon Corey Hill (sample collected on January 16, 2019)
- I. Letter of Recommendation Regarding Brendon Corey Hill from James P. Cleary, Master, AGT, Oceans
- J. Barry Funck's Curriculum Vitae

### **WITNESS LIST**

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

1. Billy J. Pellegrin
2. Jonathan Nied
3. Dr. Thomas Cairns
4. Dr. Darren J. Duet

#### **Respondent's Witnesses**

1. Brendon Hill (Respondent)
2. Barry Funck

**ATTACHMENT B**  
**APPEAL RIGHTS**

**33 C.F.R. § 20.1001 General.**

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
  - (1) Whether each finding of fact is supported by substantial evidence.
  - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
  - (3) Whether the ALJ abused his or her discretion.
  - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

**33 C.F.R. § 20.1002 Records on appeal.**

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
  - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
  - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

**33 C.F.R. § 20.1003 Procedures for appeal.**

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
  - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
    - (i) Basis for the appeal;
    - (ii) Reasons supporting the appeal; and
    - (iii) Relief requested in the appeal.
  - (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
  - (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If

the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

(c) No party may file more than one appellate brief or reply brief, unless --

(1) The party has petitioned the Commandant in writing; and

(2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

(d) The Commandant may accept an amicus curiae brief from any person in an appeal of an ALJ's decision.

**33 C.F.R. § 20.1004 Decisions on appeal.**

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.