UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
MERCHANT MARINER DOCUMENT and MERCHANT MARINER LICENSE	:	No. 2679
Issued to: CHRISTOPHER J. DRESSER	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq*., 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated June 14, 2005, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at New York, New York, revoked Respondent's merchant mariner credentials upon finding proved a charge of *use of a dangerous drug*. The single specification supporting the charge alleged that on November 13, 1997, Respondent had marijuana metabolites present in his body as was revealed through a pre-employment drug test.

PROCEDURAL HISTORY

The initial hearing was held in New Orleans, Louisiana on April 29, June 11, 12, and 24, 1998, before The Honorable Archie R. Boggs, ALJ, now retired, who found the charge proved. Respondent appealed the decision alleging several errors. In particular, Respondent argued that the ALJ was disqualified because he had an *ex parte*

conversation with his son about a products liability lawsuit that Respondent filed against the manufacturer of the hemp seed oil that Respondent claims he ingested and that made him test positive for marijuana/THC metabolite. The ALJ's son represented a party in Respondent's civil suit. This conversation took place after the hearing, but before a decision was rendered, and the ALJ immediately disclosed the conversation. The Commandant rejected all alleged errors and affirmed the decision of the ALJ. *See* Appeal Decision 2626 (DRESSER).

Respondent appealed the Commandant's decision to the National Transportation Safety Board (hereinafter "NTSB") which found that the ALJ should have recused himself based on an appearance of impropriety, not because there was any actual bias on the part of the ALJ. Dresser, NTSB Order No. EM-195. The NTSB remanded the case to the Commandant for further proceedings consistent with its opinion and order. Thereafter, Respondent appealed the NTSB's decision to the U.S. Circuit Court of Appeals for the D.C. Circuit which denied his petition because the NTSB remand was not final agency action. Dresser v. NTSB, No. 03-1169, slip op. (D.C. Cir. Oct. 1, 2003).

ALJ Walter J. Brudzinski was assigned to preside over the proceedings on remand. The Coast Guard filed a pre-hearing Motion to Stand on the Record which Respondent opposed. Respondent filed numerous pre-hearing motions including several to disqualify the ALJ, for dismissal, for a *de novo* hearing, for return and renewal of his license and document, and for supplementary oral testimony and additional evidence. The remanded hearing was held on December 7, 2004, in New Orleans, Louisiana, where Respondent appeared with counsel. Both parties had the opportunity to introduce exhibits and witness testimony. The Coast Guard Investigating Officer introduced into

evidence the testimony of one witness and one exhibit. Respondent introduced into evidence eleven exhibits and called three witnesses. After the hearing, both parties filed post-hearing briefs in lieu of final arguments. The ALJ's D&O was served on Respondent on June 14, 2005, and Respondent filed his Notice of Appeal on June 20, 2005. Thereafter, on July 5, 2005, Respondent filed his Appellate Brief in the matter. After several time extensions were granted to the Coast Guard, it properly filed a Reply Brief on November 14, 2005. Considering litigation which had been ongoing in this matter, on February 12th, 2008, Respondent was invited via letter to submit any supplemental filings or briefs he would like considered as permitted by 33 C.F.R. § 20.1003(c). Respondent replied on February 19th, 2008, and claimed that the Commandant had "no statutory or regulatory authority to consider additional information" and chose not to file any additional information. Therefore, this appeal is properly before me.

APPEARANCES: Respondent was represented by J. Mac Morgan, Esq., 801 St. Anthony St., Suite E, Lake Charles, Louisiana 70601. The Coast Guard was represented by LCDR Shannon Gilreath and LT Boris Towns**,** from the U.S. Coast Guard Marine Safety Office New Orleans, Louisiana.

FACTS

At all relevant times, Respondent was the holder of a Coast Guard issued Merchant Mariner License and Merchant Mariner Document. [D&O at 11]

On November 13, 1997, a Medical Technician with Shore Works, Easton Memorial Hospital, Easton, Maryland, collected a urine sample from Respondent as part of a pre-employment drug test while Respondent was attending the Marine Engineers

Beneficial Association ("MEBA") Engineering School District I. [D&O at 12] After Respondent provided the urine samples and certified they were his, the specimens were sent to Quest Diagnostics, Inc. a Substance Abuse and Mental Health Services Administration certified laboratory, where the sample tested positive for marijuana. [*Id.*] A review of the record reveals that Respondent's sample was properly collected, tested, and analyzed. [D&O at 12-14]

Quest Diagnostics sent Respondent's positive drug test results to the Medical Review Officer for MEBA District I, Greystone Health Services Corp. [D&O at 13] Greystone's President and supervisor of all Medical Review Officers ("MROs") at Greystone, reviewed the documents regarding Respondent's drug test, concluded that there had been no breaks in the chain of custody. [*Id.*] Greystone's President subsequently sent a letter to a colleague MRO at Greystone who concluded that there was not a false positive test result. [*Id.*] In addition, Greystone's Senior Vice President, attempted to contact Respondent. [D&O at 14] On different dates and at different times, the Senior Vice President left five different messages on Respondent's telephone answering machine at the MEBA School and at his home in Clearwater, Florida, informing Respondent that he should contact the MRO, but not informing him of the positive drug test results. [*Id.*] Respondent did not contact the MRO. [*Id.*] Coast Guard regulations at the time provided that if an MRO is unable to reach an individual whose specimen tested positive after fourteen days, the MRO can declare the test positive without having spoken to the individual. 49 C.F.R. § 40.33(c)(5)(2) (1997).

On December 15, 1997, twenty-five days after the Senior Vice President of Greystone first attempted to contact Respondent, the MRO concluded that there was no

reasonable medical explanation for the presence of marijuana metabolites in Respondent's body. [D&O at 14] The MRO then sent written notification of the positive drug test to the Coast Guard Marine Safety Office Baltimore because MEBA does not handle positive drug tests on behalf of its members. [D&O at 15] Consequently, there is no "designated employer representative" as described in 49 CFR § 40.33 (1997) for Respondent. [*Id*.]

On or about December 20, 1997, after listening to his voice mail messages from Greystone, but before learning of the positive test result, Respondent contacted MEBA to request an attorney. [D&O at 15] On January 15, 1998, Respondent's attorney requested that an aliquot from Respondent's urine specimen be sent for confirmation testing to Northwest Toxicology in Salt Lake City, Utah. [*Id*.] This confirmation test was also positive for marijuana metabolites. [*Id*.]

Respondent raised the affirmative defense of hemp seed oil use to rebut the presumption of drug use. [D&O at 16] He offered two empty hemp seed oil containers as evidence of his consumption. [*Id*.] Respondent's mother also testified that she saw him drink from a bottle similar to one of those containers. [D&O at 22] The owner of a hempery and board member of the National Organization for the Reformation of Marijuana Laws (NORMAL), testified that all hemp seed oil products contain some level of THC. [D&O at 16] Concentrations of THC within hemp seed oil products vary even within the same company or the same seed lot. [*Id*.] The witness also testified that on or about December 5, 1997, an order was received by the hempery requesting that a catalog be delivered to Respondent's home in Clearwater, Florida. [D&O at 17]

The President of Health from the Sun, testified that his company produces about fifty essential fatty acid oil products, including hemp seed oil. [D&O at 17] After being made aware that Hemp Liquid Gold could result in positive drug tests, his company tested people who had taken the product and had found no THC present. [*Id*.] He further testified that hemp seed oil sales are small in comparison to other dietary supplements containing the same essential fatty acids and hemp seed oil is more expensive than other supplements. [*Id*.] The record shows that on December 24, 1997, Respondent ordered Health from the Sun's Hemp Liquid Gold from the Nature's Food Patch, a health food store located a half of a mile from his home. [D&O at 18, 24]

BASES OF APPEAL

This appeal is taken from the ALJ's D&O finding proved the charge of *use of, or addiction to the use of, dangerous drugs* and ordering the revocation of Respondent's merchant mariner credentials. On appeal, Respondent raised numerous issues which have been consolidated for clarity and reduction of redundancy and set forth as:

I. *The ALJ violated the NTSB's Opinion and Order for a new hearing and clearly erred when he granted the Coast Guard's Motion to Stand on the Record;*

II. *The ALJ clearly erred when he denied Respondent's motions to dismiss;*

III. *The ALJ clearly erred when he denied Respondent's motions to disqualify the ALJ;*

IV. *The Coast Guard failed to carry its burden of proof;*

V. *The ALJ could not disregard the parties stipulation;*

VI. *The ALJ clearly erred when he wholesale adopted as his own the Coast Guard's proposed findings of fact and conclusions of law;*

VII. *The ALJ applied an incorrect standard of proof;*

VIII. The transcript was not properly certified;

IX. The ALJ clearly erred when he ruled that the urine specimen was taken in accordance with federal rules and regulations;

X. It was clear error to deny Respondent's motion for a mistrial;

XI. The ALJ clearly erred by denying Respondent's objections to the telephonic testimony of the Coast Guard's witnesses;

XII. The original ALJ clearly erred by limiting Respondent's cross-examination of Coast Guard witnesses;

XIII. The original ALJ clearly erred by denying Respondent's motion to disqualify him;

XIV. Respondent's rights to fundamental fairness and due process were clearly denied by the manner in which the original ALJ conducted the proceedings;

XV. The ALJ's Final Decision and Order was arbitrary, capricious, clearly erroneous or based on inherently incredible evidence.

OPINION

I.

The ALJ violated the NTSB's Opinion and Order for a new hearing and clearly erred when he granted the Coast Guard's Motion to Stand on the Record.

These two assignments are grouped together because each asserts the same essential challenge: that the method by which the proceedings were handled on remand from the NTSB was improper. This challenge is without merit both because its foundational premise is incorrect and because it ignores the extent to which the Respondent was actually afforded a new hearing and was in fact provided an opportunity to present live testimony and introduce new exhibits to the ALJ.

Respondent's argument is grounded in the premise that the NTSB's Opinion and Order strictly required the Coast Guard to "start all over again and build a fresh record free of the errors that [he] claimed had occurred during the original hearing."

[Respondent's Appeal Brief at 2] While Respondent accurately quotes an excerpt from the NTSB's Opinion and Order stating that it was remanding the case for a new hearing before a different ALJ, the actual Order was that the docket was "remanded to the Commandant for further proceedings consistent with this Opinion and Order." Dresser, NTSB Order No. EM-195, 2003 WL 21360877 (2003) at 5. The Order does not specify the nature of the further proceedings which could have included a number of possible options, *e.g.*, the Coast Guard could have dismissed the charge or the parties could have agreed that a new hearing was unnecessary. The NTSB remanded the case because it found that when the original ALJ learned that his son was representing a party being sued by Respondent in a products liability civil case involving Respondent's use of hemp seed oil, the ALJ should have recused himself so that "the resolution of the Respondent's fate in the adjudication" could be decided by an ALJ who did not appear to have a personal interest in the outcome of the case. [*Id.*] The original ALJ only learned of his son's involvement in the civil suit after the hearing had been completed, but before he issued his decision. [*Id*. at 2-3] The NTSB's opinion indicates that re-assignment of the case to a new ALJ at that point would have cured the error that required remand. [*Id*. at 4] Consequently, there is nothing in the literal language of the Order nor in the rationale of the Opinion that would require wiping the slate clean and building a completely new record.

Since the NTSB Opinion and Order did not mandate a *de novo* hearing, the next question is whether any case law, statutory or regulatory authority requires a *de novo* hearing. Respondent has cited no such statute or regulation, and I am aware of none. This issue has not arisen in a Coast Guard S&R proceeding previously; however, a small

body of federal case law exists concerning substitution of an administrative adjudicator, such as the ALJ in this case, after a hearing, but prior to a decision, or on remand. Unsurprisingly, the cases agree that in such a circumstance, the new adjudicator may decide the case based on the written record without a *de novo* hearing if the parties agree. *See, e.g.*, Van Teslaar v. Bender, 365 F.Supp. 1007 (D. Md. 1973). If one party objects, some cases hold that when credibility is an issue, a substituted fact-finder must engage in a *de novo* hearing. *See* Appalachian Power Co. v. Federal Power Commission, 328 F.2d 237 (4th Cir. 1964), *cert. denied*, 379 U.S. 829, 85 S.Ct. 59 (1964); Art National Manufacturers Distributing Co. v. FTC, 298 F.2d 476 (2d Cir.), *cert. denied*, 370 U.S. 939, 82 S.Ct. 1588 (1962); Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106 (8th Cir. 1954). If a party objects, the fact finder can make "appropriate provision for the appearance or reappearance of any critical witnesses." Pigrenet v. Boland Marine and Manufactoring Co., 656 F.2d 1091, 1095 (5th Cir. 1981) *quoting* W. R. B. Corp. v. Geer, 313 F.2d 750, 752 (5th Cir. 1963), *cert. denied*, 379 U.S. 841, 85 S.Ct. 78 (1964). In other words, a substituted fact finder should take the testimony of critical witnesses *de novo* where credibility is at issue. In contrast, the substitute fact finder may rely on the record for the testimony of non-critical witnesses, witnesses to facts not at issue, or witnesses whose credibility is not at issue. When a substituted fact finder bases a decision on uncontroverted evidence not involving credibility and provides the parties with an opportunity to supplement the record, there is no error. Art National Manufacturers Distributing Co., 298 F.2d at 477.

In this case, the Coast Guard was required to establish a *prima facie* case of use of a dangerous drug. This can be accomplished by showing that the Respondent was tested

for a dangerous drug, that the test result was positive, and that the test was conducted in accordance with 46 CFR Part 16. Appeal Decision 2584 (SHAKESPEARE). The fact that Respondent submitted a urine specimen that tested positive for marijuana metabolites was not a fact at issue in this case. Since the facts required to establish a *prima facie* case were neither in dispute nor were there any dispositive witness credibility determinations which would inform the establishment of a *prima facie* case, the ALJ's decision to permit the Coast Guard to stand on the existing record was not in conflict with the case law. *See* Appalachian Power Co. v. Federal Power Commission, 328 F.2d 237 (4th Cir. 1964), *cert. denied*, 379 U.S. 829, 85 S.Ct. 59 (1964); Art National Manufacturers Distributing Co. v. FTC, 298 F.2d 476 (2d Cir.), *cert. denied*, 370 U.S. 939, 82 S.Ct. 1588 (1962); Gamble-Skogmo, Inc. v. FTC, 211 F.2d 106 (8th Cir. 1954).

Once a *prima facie* case of drug use is established, the burden shifts to the Respondent to produce persuasive evidence to rebut the presumption of use of a dangerous drug. *See, e.g.*, Appeal Decision 2584 (SHAKESPEARE). A review of the record shows that the ALJ did not limit Respondent to the existing record in his efforts to rebut the presumption. In granting the Coast Guard's Motion to Stand on the Record, the ALJ permitted the parties to present supplemental oral testimony and additional documentary evidence. When the Coast Guard objected to the Respondent's proposed supplemental testimony and documentary evidence, the ALJ decided to reserve any ruling on those objections until after the testimony and evidence was received. [Transcript on Rehearing (hereinafter "Tr.") at 4-5] At the hearing, Respondent presented testimony from three witnesses and offered supplementary exhibits A – K and Respondent was permitted to present any witnesses and evidence he felt were critical to

his case which the ALJ considered. Therefore, the procedure followed by the ALJ was proper.

One final point on this issue must be clarified. Respondent argues in his brief that part of the ALJ's reasoning for allowing the Coast Guard to stand on the original record was that the ALJ believed Respondent's testimony in the original hearing that he had not smoked marijuana. [Respondent's Appeal Brief at 9] This argument is disingenuous and nonsensical. First, if the ALJ had already made a determination that Respondent had testified truthfully that he had not smoked marijuana, he likely would not have held a hearing — he may have simply dismissed the charge. Second, this argument completely mischaracterizes the ALJ's statements at the hearing. Respondent quotes with emphasis part of one sentence, " . . . I believe what the, what the Respondent has said," while ignoring the preceding, qualifying clause "I thought I gave the opinion or created the impression that I believe what the, what the Respondent has said." [*Id.*] Worse still, Respondent ignores the following comments made by the ALJ specifically to eliminate any erroneous impression:

> I didn't want to give the impression that, yes, I believe your client. That, that's highly improper. I, I don't want to do that and I don't want to alter the, the way in which you're trying your case now.
>
> * * *
>
> …that doesn't mean that I, I find at this point one witness more credible than another.
>
> * * *
>
> So, I'm, I'm not, I haven't said I don't believe him, I haven't said I do believe him and that's what I want to make sure.
>
> * * *
>
> Its just that, that some of the, the comments either you made or I made or—I think created the impression that, that it was already found as a fact that, that I believe Respondent and, and I can't do that.

[Tr. at 110-113] In the face of these clear statements that the ALJ had not made a determination as to whether he believed Respondent, Respondent's argument to the contrary is therefore wholly unpersuasive and without merit.

II

The ALJ clearly erred when he denied Respondent's motions to dismiss.

In two separate motions Respondent presented three reasons for dismissing the Complaint. First, Respondent argues that the over seven year time period for completing the proceedings violated his due process rights. Second, Respondent contends that he could not receive a fair hearing because he was mentioned by name in a policy memorandum from the Chief Administrative Law Judge which he characterizes as labeling him as an unbelievable witness. [Respondent's Appeal Brief at 14-17] Finally, Respondent argues that because the original ALJ's decision and order was vacated by the NTSB, Respondent was never able to take advantage of rights under 46 CFR § 5.901 to apply for a new license after compliance with the ALJ's D&O. [*Id*.] I will address these arguments in reverse order.

Respondent's argument that the original ALJ provided incomplete and inaccurate information regarding his potential disqualification and that the Coast Guard failed to investigate thereby denying him the ability to take advantage of his rights under 46 CFR § 5.901 fails on two factual bases. First, Respondent never identifies how the original ALJ's disclosure was incomplete or inaccurate. Second, Respondent could have applied for a new license under 46 CFR § 5.901 since the NTSB's decision remanding the case in June, 2003, was more than three years after the original ALJ's February 4, 1999, Decision and Order. Third, to the extent that he argues the absence of an ALJ decision

preventing him from exercising these rights, it also meant that there was no decision revoking his license. Respondent never sought a new license or a waiver of the time limitations. Since Respondent never sought to exercise his rights, he was not prejudiced.

With regard to the Chief Administrative Law Judge's policy memorandum, the ALJ stated clearly that this memorandum would not apply in Respondent's case because it could only be applied prospectively. [D&O at 10] With regard to the memorandum's characterization of Respondent's credibility, it does not describe him as unbelievable, rather Respondent's case is listed as one of three cases in which insufficient evidence of "accidental or inadvertent ingestion of food product containing THC" was produced to overcome the presumption of use to the satisfaction of the first ALJ. [Chief ALJ's Memorandum, 16722, dated October 22, 2001] In any event, since the ALJ stated that the memorandum did not apply in this case and there is no evidence that he used it as a basis for his opinion and order, this argument is without merit. [D&O at 10]

In support of his claim that his rights have been prejudiced by the delay in processing this case, Respondent cites Appeal Decision 2064 (Wood). A review of the record shows that, contrary to Respondent's assertion, *Wood* is not on point. As noted by the ALJ, the charges were dismissed in *Wood* partly because they were not filed until twenty-seven months after the incident. [Order Denying Respondent Dresser's Motion for Dismissal, May 4, 2004 at 2-3] Mr. Wood was prejudiced by that delay because he was hindered in preparing his defense since a number of witnesses had disappeared, one witness had died, and every witness expressed difficulty recalling the events. [*Id.*]

The record of these proceedings shows that the Coast Guard brought its charge against Respondent within a few months of learning of the positive test result, and, by

that point, Respondent had already commenced mounting his defense including having a portion of his sample sent to an independent laboratory. Respondent has not claimed any prejudice in presenting his case, and I likewise find none. Respondent also complained about the delay in resolving his first appeal to the Commandant in this case noting in particular that three appeals filed after his were decided before his appeal, but providing no other points of comparison. [Respondent's Appeal Brief at 14-15] None of these appeals involved as many assignments of error as were raised by Respondent in this appeal or contained supplemental briefs and motions to disqualify the Commandant. Given the extent of the record, the time taken to process his first appeal was not unreasonable. As such, Respondent's second assignment of error is, likewise, without merit.

III

The ALJ clearly erred when he denied Respondent's motions to disqualify the ALJ.

Following remand from the NTSB, Respondent filed three motions to disqualify the ALJ. The first motion argued that the ALJ must disqualify himself because he had reviewed the record in these proceedings including the proceedings before ALJ Boggs "in violation of the letter and spirit of the Opinion and Order of the NTSB." [Respondent's Appeal Brief at 21] This argument has already been rejected under Assignment of Error I. The second and third motions to disqualify the ALJ are premised on the theory that there was an appearance that the ALJ was biased against Respondent because the Chief Administrative Law Judge had issued a policy memorandum regarding hemp oil cases in which Respondent's case was mentioned. As discussed in Assignment of Error II, the ALJ stated clearly that this memorandum would not apply in Respondent's case because

it could only be applied prospectively. Furthermore, the ALJ noted that Respondent's case was merely cited as an example and did not label Respondent as an unbelievable witness. [D&O at 9] Consequently, there was no reason to believe that the ALJ would be "influenced by the statements of his boss" since no statement regarding Respondent's credibility had been made. As such, this assignment of error is without merit.

IV

The Coast Guard failed to carry its burden of proof.

Respondent argues that since the Coast Guard did not offer the record from the original hearing into evidence at the December 7, 2004, hearing, the record from the original hearing does not constitute a record of the proceedings in accordance with 33 C.F.R. § 20.903(a) and, therefore, could not be relied upon by the ALJ since his ruling must be based on the "whole record of the proceedings." [Respondent's Appeal Brief at 23-24] On review, it is apparent that this argument is really just another form of Respondent's general argument that the NTSB order required a *de novo* hearing. Nevertheless, prior to the December 7th hearing, the Coast Guard made a motion to stand on the record which was granted by the ALJ. The record of proceedings includes not just the transcript and exhibits, but all motions and rulings. 33 C.F.R. § 20.903(a). Consequently, the record from the original hearing was part of the record of the proceedings and could be relied upon by the ALJ in determining that the Coast Guard had established a *prima facie* case of use of a dangerous drug. Therefore, this assignment of error is without merit.

V

The ALJ could not disregard the parties' stipulation.

A review of the record shows, contrary to Respondent's assertion, that the ALJ did not disregard the parties' stipulation. During the proceedings, the Coast Guard stipulated that all oil hemp seed oil manufactured during the relevant time frame, including the hemp seed oil that Respondent claimed to have ingested, contained some unknown amount of THC. [Tr. at 87-88] However, the Coast Guard refused to stipulate that Mr. Dresser actually ingested the hemp seed oil. [*Id*.] The ALJ found that the "hemp seed oil produced during the time frame that Respondent claims to have taken it does contain some amount of THC." [D&O at 29] This assignment of error therefore is factually incorrect and is, as a result, without merit.

VI

The ALJ clearly erred when he wholesale adopted as his own the Coast Guard's proposed findings of fact and conclusions of law.

On appeal, Respondent contends that "the new ALJ's wholesale adoption of the Coast Guard's proposed findings and conclusions and his outright rejection of Mr. Dresser's, was arbitrary, capricious or clearly erroneous." [Respondent's Appeal Brief at 50] A careful review of Respondent's argument, however, reveals that Respondent recognizes that this assignment of error mischaracterizes the facts since he acknowledges that the ALJ rejected three of the Coast Guard's fifty-seven proposed findings of fact. [*Id*. at 49] Furthermore, a review of the record shows that the ALJ only partially accepted or re-characterized as conclusions of law another eight of the Coast Guard's proposed findings of fact. [D&O at 53-60] In addition, the ALJ could not have accepted any proposed findings of fact from Respondent since he did not submit any; however, the ALJ did partially accept two of the arguments in Respondent's post hearing

memorandum. [*Id*.] Finally, a review of the ALJ's D&O shows that it is not simply a regurgitation of the Coast Guard's proposed findings of fact and conclusions of law. The acceptance and rejection of the proposed findings of fact and post hearing memorandum is merely an attachment to the ALJ's D&O. The ALJ's analysis carefully examines the evidence presented by the parties and can in no way be considered as simply an adoption of text proposed by the Coast Guard.

In support of his argument, Respondent cites Gimbel v. Commodity Futures Trading Com'n, 872 F.2d 196 (7th Cir. 1989) which disapproved of the practice of adopting the findings of one party and rejecting all of those of the other. [Respondent's Appeal Brief at 50] While disapproving of the practice, *Gimbel* did not find error based on it. In fact, the Supreme Court has held that "even when the trial judge adopts proposed findings of fact verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Anderson v. City of Bessemer, 470 U.S. 564, 572 (1985). Far from a verbatim adoption of proposed findings, this case reflects the careful, independent analysis of the ALJ. As such, Respondent's assignment of error is not persuasive.

VII

The ALJ applied an incorrect standard of proof.

Respondent next asserts, citing the ALJ's additional reasons for rejecting his hemp seed oil defense, that "the ALJ concluded that…[he]…failed to rebut the presumption of drug use because he failed to corroborate his testimony on his consumption of hemp seed oil." [Respondent's Appeal Brief at 51] Respondent asserts that, in so doing, the ALJ "placed a heightened burden of proof on him in excess of the

preponderance of the evidence standard" and "[i]n effect, with his requirement of corroboration, the new ALJ analyzed…[Respondent's]…evidence under a 'clear and convincing' evidentiary standard in violation of the standard which he stated he was supposed to apply." [*Id*.] On this basis, Respondent concludes that "the ALJ's decision which required…[Respondent]…to submit corroborating evidence was arbitrary or capricious or clearly erroneous" and must be reversed. [*Id*.] I disagree.

Contrary to Respondent's assertion, the record shows that the ALJ did not apply a higher standard of proof. As Respondent admits, the ALJ correctly stated the proper evidentiary standard. [*Id*. at 51] The ALJ noted that the positive test result created a presumption of drug use. [D&O at 20-21] As described more completely above, the ALJ then considered all the evidence presented by the Respondent and the Coast Guard before determining that the Respondent had not overcome the presumption. [*Id*. at 20-26] In no way does this effectively create a "clear and convincing" evidentiary standard.

VIII

The transcript was not properly certified.

On appeal, Respondent notes that Ms. Sheri E. Young attended the December 7, 2004, hearing as the court reporter on behalf of Maryland Court Reporters. [Respondent's Appeal Brief at 52; D&O at 60; Tr. at 261-62] Sometime after the hearing, a dispute between Ms. Young and Maryland Court Reporters arose regarding her compensation for prior work. [Respondent's Appeal Brief at 52] As a result, she sent the digital audio recording of the hearing and her notes to Maryland Court Reporters where another court reporter transcribed the hearing. [*Id*.] By mistake, the unsigned certification page originally listed Ms. Young as having created the transcript. This was corrected with a signed certificate from the court reporter who transcribed the hearing

after the error was pointed out by Respondent. [D&O at 60; Tr. II at 261-62] Respondent argues that the Federal Rules of Civil Procedure require the original court reporter to certify the transcript and states that this failure raises a question of whether the transcript is accurate; however, he has not specified any errors in the verbatim hearing transcript. [Respondent's Appeal Brief at 52-53] Finally, Respondent argues that the initial "fraudulent" certification creates an appearance of impropriety as to whether he received a fair hearing. [*Id*. at 53]

Coast Guard S&R hearings are governed by the Administrative Procedure Act and the provisions of 33 CFR Part 20, not the Federal Rules of Civil Procedure, although those rules may be used to supplement gaps in the applicable regulations. *See* 46 U.S.C. § 7702 & 33 C.F.R. § 20.103(c). Neither the APA nor Coast Guard regulations specifically require that only the court reporter present at the hearing certify the transcript. The closest provision simply states that when "the hearing was recorded by a Federal contractor, the contractor will provide the transcript." 33 C.F.R. § 20.1002(b)(2). Absent any regulation precluding a second court reporter from certifying the transcript of the hearing, there is no error.

Even if the preparation of the transcript constituted error, there was no prejudice to Respondent's rights. As the Supreme Court has stated, the purpose of a trial record is to provide the Respondent a "record of sufficient completeness' to permit proper consideration of (his) claims.'" Draper v. Washington, 372 U.S. 487, 496 (1963). In federal appellate practice, when a dispute arises as to the contents of the trial record, the parties may seek a correction or modification of the record from the presiding court. Fed.R.App.P. 10(e). Here, Respondent has been provided with a verbatim record of the

hearing with no noted defects. Consequently, there is no issue as to the completeness or accuracy of the transcript. As such, if any error occurred, Respondent was not prejudiced so this assignment of error is without merit.

IX – XIV

Respondent's assignments of error IX through XIV are the same assignments of error, and relate to the same timeframe and events, that Respondent previously raised and were addressed in substance in Appeal Decision 2626 (DRESSER). Those assignments of error in Appeal Decision 2626 (DRESSER) which relate to assignments of error IX through XIV raised, noted and consolidated in this appeal, which pertain to events related to the first hearing held in this matter, are fully incorporated by reference as if fully set forth herein. For the reasons set forth in Appeal Decision 2626 (DRESSER), I find the current assignments of error IX through XII and XIV to be without merit. Assignment of error XIII was mooted upon the reassignment of this case to a new ALJ following the order in Dresser, NTSB Order No. EM-195.

XV

The ALJ's Final Decision and Order was arbitrary, capricious, clearly erroneous or based on inherently incredible evidence.

Finally, Respondent makes numerous allegations attacking the merits of the ALJ's decision. Understanding who ultimately bore the burden of persuasion in this case is important to analyzing the ALJ's decision. Once the Coast Guard presented its *prima facie* case, the burden shifted to Respondent to overcome the presumption of use of a dangerous drug. The ALJ determined that he did not. [D&O at 19]

To meet his burden, Respondent offered evidence both that consumption of hemp seed oil can result in a positive urinalysis test and that he consumed hemp seed oil

because he feared that he might suffer a fatal heart attack like his father. [D&O at 22-26] While evidence was presented that consumption of hemp seed oil might under certain circumstances result in a positive test result, I find that the ALJ did not commit error by determining that the record as a whole casts serious doubt on Respondent's use of hemp seed oil. [*Id*. at 28-29] To support his findings, the ALJ noted that Respondent's arguments and evidence presented at both the 1998 and 2004 hearings were not persuasive. [*Id*. at 26] The ALJ stated that Respondent failed to present evidence that he followed the dosage instructions when taking the hemp seed oil and failed to demonstrate that he took it on a scheduled or regular basis. [*Id*.] In addition, even though Respondent claimed that he was taking hemp seed oil because of his significant concern over heart disease, he did not take any remedial actions regarding the other substantial risk factors for heart diseases such as smoking, alcohol consumption, diet, etc. [*Id*. at 27] In addition to this behavior, the ALJ determined that it was reasonable to infer that Respondent, having previously tested positive for marijuana metabolites in 1994 and completing the Coast Guard's rehabilitation program, would avoid substances, such as hemp seed oil, which potentially could contain THC and render a positive finding on a drug test. [*Id*. at 27-28]

I have long stated that I will only reverse the decision of the ALJ if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM- 182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN). The ALJ's determination that he found the arguments and evidence presented by the Respondent to

be insufficient to overcome the presumption of drug use was based on reliable, substantial and credible evidence in the record. [D&O at 23-29] The record amply supports the ALJ's finding that the Coast Guard met its burden to establish a *prima facie* case, and is sufficient for me to conclude that the ALJ's conclusion that the Respondent failed to provide a persuasive explanation to rebut the presumption of use of a dangerous drug was not arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. I conclude that there is no basis to reverse the decision of the ALJ.

CONCLUSION

The findings of the ALJ had a legally substantial basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. I find the Respondent's bases of appeal without merit.

ORDER

The Administrative Law Judge's Decision and Order of June 14, 2005 is AFFIRMED.

/S/

Signed at Washington, D.C., this 2nd day of April, 2008.

be insufficient to overcome the presumption of drug use was based on reliable, substantial and credible evidence in the record. [D&O at 23-29] The record amply supports the ALJ's finding that the Coast Guard met its burden to establish a *prima facie* case, and is sufficient for me to conclude that the ALJ's conclusion that the Respondent failed to provide a persuasive explanation to rebut the presumption of use of a dangerous drug was not arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. I conclude that there is no basis to reverse the decision of the ALJ.

CONCLUSION

The findings of the ALJ had a legally substantial basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. I find the Respondent's bases of appeal without merit.

ORDER

The Administrative Law Judge's Decision and Order of June 14, 2005 is AFFIRMED.

V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 3rd day of April 2008.