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
v.	:	ON APPEAL
	:	NO. 2729
MERCHANT MARINER CREDENTIAL	:	
Issued to: ROBERT KELVIN COOK III	:	

APPEARANCES

For the Government:
Lineka N. Quijano, Esq.
LT Charles W. Taylor

For Respondent:
Jeffery S. Moller, Esq.

Administrative Law Judge:
Walter J. Brudzinski

This appeal is taken in accordance with 46 U.S.C. Chapter 77, 46 CFR Part 5 and 33 CFR Part 20.

On November 1, 2018, an Administrative Law Judge (ALJ) of the United States Coast Guard issued a Decision and Order (D&O), finding proved the Coast Guard's Complaint against the Merchant Mariner Credential of Respondent Robert Kelvin Cook III, and ordering the revocation of Respondent's credential.

The Coast Guard complaint charged Respondent with use of a dangerous drug, based upon a positive result in a government-mandated random drug test. The D&O found the charge

proved and revocation appropriate, and directed Respondent to surrender his credential. However, because Respondent had already made substantial progress toward cure, the D&O provided for a future hearing to evaluate Respondent's evidence of cure. Respondent filed a notice of appeal from the D&O.

On April 17, 2019, the ALJ issued a Cure Order, finding Respondent had demonstrated cure from the use of a dangerous drug by completion of a drug rehabilitation program and demonstration of twelve months of non-association. The Cure Order directed the return of Respondent's credential, and converted the period of revocation served to a period of outright suspension. The Coast Guard appealed.

Both Respondent's appeal from the D&O and the Coast Guard's appeal from the Cure Order are now ripe for decision.

FACTS & PROCEDURAL HISTORY

At all times relevant to these proceedings, Respondent was the holder of a Merchant Mariner Credential (MMC) issued to him by the United States Coast Guard. Respondent is a member of the Pilots' Association of the Bay and River Delaware (Pilot Association), and serves as a Delaware River Pilot.

In 2015, Respondent, who suffers from chronic knee pain, visited a store in Colorado selling natural remedies, where he purchased a "pen" dispenser of cannabinoid ointment manufactured by "Mary's Medicinals." This was a legal, over-the-counter purchase in the state of Colorado. The store clerk informed Respondent that the ointment had no psychotropic effects, and would not result in a positive drug test. The Mary's Medicinals label states that the ointment is "accurately formulated to contain 100 milligrams of CBD and 10 mg of THC . . . it is infused with marijuana. The intoxicating effects of this product may be delayed by two or more hours. The effects will be felt within fifteen minutes and have a lasting effect of four to eight hours depending on body composition and metabolism . . . do not drive a motor vehicle or operate heavy machinery while using marijuana." Respondent did not immediately use the Mary's Medicinals ointment.

In October 2017, for the first time, Respondent used the topical Mary's Medicinals ointment on his knee. Respondent treated his knee with the Mary's Medicinals ointment on the night of October 10, 2017.

On October 11, 2017, Respondent provided a urine sample for a random drug screen, as directed by the Pilot Association, and in compliance with federal maritime workforce drug testing regulations. [D&O at 5-6.] Respondent's sample was tested and found to be positive for marijuana metabolites. [D&O at 6.] On October 17, 2017, the medical review officer (MRO) called Respondent and conducted a verification interview regarding the positive test result. Respondent told the MRO that he had used a topical cannabinoid pain-relief ointment and denied using marijuana in any other form. [*Id.*] At Respondent's request, his reserved split urine sample was tested. [*Id* at 6.] The split sample test confirmed the presence of marijuana metabolite in Respondent's urine. [*Id.* at 7.]

On direction of the Pilot Association, Respondent met with a substance abuse professional (SAP), and completed a four-hour drug abuse education program. [D&O at 20.] On November 22, 2017, the MRO issued a "return to duty" letter, stating that Respondent had completed a SAP evaluation and complied with the recommendations of that evaluation, and had passed a return-to-duty drug test administered on November 16. [Cure Order at 8.] The return to duty letter provided that Respondent was eligible to return to duty, in a safety-sensitive function, subject to the requirement that he undergo at least twelve random, unannounced drug tests over the next twelve months. [*Id.*] Respondent was placed back on the Pilot Association's active duty list by December 2017, and, after reinstatement, continued to operate as a pilot for much of 2018.

The Coast Guard served a complaint against Respondent's MMC on November 28, 2017. The complaint alleged use of a dangerous drug, based upon the positive result of the October 11 random drug test, and sought revocation of Respondent's MMC. Respondent submitted an answer to the complaint on December 18, 2017, admitting all jurisdictional allegations and many

factual allegations. Respondent denied that he was a user of a dangerous drug, and requested a hearing.

Hearing was held on March 6, 2018, in Philadelphia, Pennsylvania, before the Coast Guard ALJ. At hearing, the ALJ found that the Coast Guard had presented evidence sufficient to establish a *prima facie* case of drug use against Respondent. [Mar. 6 Tr. at 16.] Respondent presented both rebuttal evidence and evidence of cure. Respondent's rebuttal evidence did not seek to invalidate the evidence supporting the Coast Guard's *prima facie* case, but instead presented, as an affirmative defense, evidence that the Mary's Medicinals ointment was not a "dangerous drug," and that Respondent was therefore not a "user of a dangerous drug," in the regulatory sense. At the close of hearing, the ALJ reserved judgment as to whether or not Respondent's rebuttal evidence had overcome the Coast Guard's *prima facie* case of drug use. [*Id.* at 161.] Respondent retained his credential at the close of hearing.

The ALJ issued the D&O on November 1, 2018, finding that Respondent's rebuttal evidence was insufficient to overcome the established presumption of drug use, and that Respondent's evidence of cure was likewise insufficient. Therefore, the charge of use of a dangerous drug was found proved and the mandatory sanction of revocation imposed. However, because Respondent had demonstrated substantial involvement in the cure process, the order of revocation was stayed, to allow Respondent additional time to demonstrate cure. [D&O at 20.] The D&O specified that a hearing on cure would be held on December 19, 2018. [*Id.* at 21.] Respondent appealed.

Respondent deposited his MMC with the Coast Guard on November 7, 2018. [Cure Order at 14.] On November 12, 2018, the MRO issued a second letter, supplementing the November 2017 return to duty letter, and certifying that the MRO was satisfied by Respondent's compliance with the requirements for random testing. [*Id.* at 8.]

On December 19, 2018, the cure hearing was convened by telephonic conference. Respondent presented additional documentary evidence of cure, including negative drug test results and the November 2018 MRO letter stating that Respondent had met the regulatory

requirements for cure. After argument by the parties, the ALJ reserved judgment on the question of cure. The revocation order remained in effect, though stayed, and Respondent's MMC remained in the possession of the Coast Guard.

The ALJ issued a Cure Order on April 17, 2019, finding that Respondent had demonstrated the elements of cure. The Cure Order directed the Coast Guard to return Respondent's MMC. The period that Respondent's credential had been deposited with the Coast Guard, pursuant to the D&O, was converted to a period of outright suspension. [Cure Order at 17.] The Coast Guard appealed.

Respondent perfected his appeal from the D&O by filing an appellate brief on May 29, 2019. The Coast Guard combined its reply brief with its own brief on appeal from the Cure Order, and filed the combined brief on July 3, 2019. Respondent filed a reply on August 7, 2019, and these consolidated appeals are now properly before me.

This opinion will first address Respondent's appeal from the D&O, before turning to the Coast Guard's appeal from the Cure Order.

BASES OF RESPONDENT'S APPEAL

Respondent raises the following issues on appeal from the D&O:

I. *The CBD ointment Respondent used should not be considered a "dangerous drug."*

II. *There should be an exception to the cure standard developed by SWEENEY and subsequent Decisions on Appeal, for cases where the respondent did not suffer from a substance-use disorder.*

OPINION AS TO RESPONDENT'S APPEAL

I.
The CBD ointment Respondent used should not be considered a "dangerous drug."

Respondent's appeal argues that the Mary's Medicinals ointment should not be considered a "dangerous drug." [Respondent Appellate Brief at 8.]

46 U.S.C. § 7704(b) provides, "If it is shown that a holder has been a user of, or addicted to, a dangerous drug, the license, certificate of registry, or merchant mariner's document shall be revoked unless the holder provides satisfactory proof that the holder is cured."[1] For the purposes of federally-mandated merchant marine drug testing, a dangerous drug is "a narcotic drug, a controlled substance, or a controlled substance analog . . . ." 46 U.S.C. § 2101(8); 46 CFR § 16.105. Under the Controlled Substances Act (CSA), 21 U.S.C. § 802(6), "'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 listed under schedule I in 21 U.S.C. § 812, and it is well-settled that, therefore, marijuana is a dangerous drug for purposes of 46 U.S.C. § 7704. *See, e.g., Appeal Decision 2529 (WILLIAMS)* at 3, 1991 WL 11007461 at 2.

Here, Respondent argues that a non-intoxicating, marijuana-derived pain relief ointment is not a "dangerous drug." In this respect, Respondent's characterization of the record on appeal is disingenuous. Respondent asserts that "[h]e presented unrebutted testimony that that ointment was not intoxicating." [Respondent Appellate Brief at 13.] As already quoted by this opinion, the ointment's label, read unchallenged into the record at hearing, provides that the ointment is "accurately formulated to contain 100 milligrams of CBD and 10 mg of THC . . . it is infused with marijuana. The intoxicating effects of this product may be delayed by two or more hours. The effects will be felt within fifteen minutes and have a lasting effect of four to eight hours depending on body composition and metabolism . . . do not drive a motor vehicle or operate heavy machinery while using marijuana." [Mar. 6 Tr. at 77-78.] Accepting Respondent's testimony that the Colorado store clerk informed him that the ointment had no intoxicating effects, the plain language printed on the ointment container gives rise to considerable doubt as to the reliability of the store clerk's assertion.

Moreover, commercial representations as to the ointment's intoxicating properties (or lack thereof) are entirely irrelevant to the outcome of this case. While recent years have seen

[1] At the time of the Coast Guard Complaint in this matter, this language was codified at 46 U.S.C. § 7704(c). Effective August 18, 2018, this subsection was re-designated as 46 U.S.C. § 7704(b). Pub. L. 115-232, Div. C, Title XXXV, § 3545(b), Aug. 13, 2018, 132 Stat. 2326. This opinion cites to the currently effective subsection.

significant changes in the availability of marijuana-derived products in many states, including Colorado, these state-law developments have had no effect on federal law, including 46 U.S.C. § 7704, and accordingly no effect on the Coast Guard's enforcement of federal drug testing requirements for U.S. merchant mariners. Both the Coast Guard and the Department of Transportation (DOT)[2] have taken steps to publicize the continuing enforcement of federal drug laws, applicable to marijuana, in light of recent state legalization efforts:

> Recent changes to Federal and State laws have resulted in a surge in the availability of over-the-counter hemp products and CBD products throughout the United States. . . . In some cases, product manufacturers market these products as low in THC, or THC-free. Mariners should be aware that over-the-counter hemp products and CBD products have not been approved as medications by the U.S. Food and Drug Administration (FDA) and are not regulated by the FDA. Therefore, users lack federal assurances of their ingredients, THC-content, quality, effectiveness, or safe use. As a result, mariners using these products put themselves at risk of having a THC-positive drug test result.
>
> It remains unacceptable for any U.S. Coast Guard credentialed mariner or other safety-sensitive worker working aboard a vessel that is subject to U.S Coast Guard drug testing regulations to use THC. *Claimed use of hemp products or CBD products is not an acceptable defense for a THC positive drug test result.*

U.S. Coast Guard Marine Safety Advisory 01-20 (February 10, 2020) (emphasis added). *See also* CG Ex. 15 (DOT Office of Drug & Alcohol Policy Compliance Notice (Oct. 22, 2009); U.S. Coast Guard Marine Safety Information Bulletin 02-14 (Jan. 14, 2014).

In this case, the Mary's Medicinals label disclosed the ointment's THC content, and warned of its intoxicating and psychotropic effects. The quoted Coast Guard advisory makes clear that, even had Respondent used a CBD product that disclaimed any THC content or psychotropic effect, such use would provide no defense to a positive drug test result. *Cf. Administrator v. Siegel*, NTSB Order No. EA-5838 at 11, 2018 WL 2733938 at 5 ("The facts in this case are inconsistent with a comparison to non-psychoactive, commercially produced hemp products. Instead, the edibles in question were intentionally infused with THC . . . . The plain language of the CSA includes in Schedule 1(c) 'any material . . . which contains any quantity of [THC].'").

[2] DOT administers the technical drug testing regulations applicable in mariner testing, at 49 CFR Part 40.

Respondent seems to assert that his over-the-counter purchase of the ointment, legal under Colorado state law, has some prophylactic effect on his legal jeopardy in this federal administrative proceeding: "He failed the test because he rubbed legally obtained ointment on his knee." [Respondent Appellate Brief at 13.] The particulars of how he obtained the drug are immaterial: "marijuana remains a drug listed in Schedule I of the Controlled Substances Act. It remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation's drug testing regulations to use marijuana." DOT Office of Drug & Alcohol Policy Compliance Notice (Dec. 3, 2012), available at https://www.transportation.gov/odapc/dot-recreational-marijuana-notice.

The law is clear: marijuana is a schedule I controlled substance—a dangerous drug—and discovery of marijuana metabolites in a merchant mariner's urine supports a finding of dangerous drug use. In light of changing state law provisions on marijuana, the Coast Guard and DOT have endeavored, in recent years, to advise mariners of the professional and safety risks of consuming any marijuana- or hemp-derived product. Respondent's case provides a vivid illustration of those risks.

II.

There should be an exception to the cure standard developed by SWEENEY and subsequent Decisions on Appeal, for cases where the respondent did not suffer from a substance-use disorder

Respondent argues for a new exception to the cure standard developed by *SWEENEY* and subsequent Decisions on Appeal:

> It is time to recognize a discrete exception to the rule established by *Appeal Decision 2535 (SWEENEY)* (1992). . . . [T]he imposition of a requirement of 12 months' worth of testing has no support in the wording of 46 U.S.C. § 7704. . . . In the face of highly persuasive testimony from a certified psychiatrist that the Respondent was not in need of any cure, it is entirely unreasonable for the Coast Guard to impose revocation.

[*Id.* at 11.] Respondent's argument to establish a new "exception" to the *SWEENEY* cure standard is unpersuasive.

The two-part *SWEENEY* cure standard requires a mariner to (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 the drug abuse program. *Appeal Decision 2535 (SWEENEY)* at 5, 1992 WL 12008768 at 4. This standard was derived from the provisions of 46 CFR § 5.901(d), a subsection that prescribes analogous requirements for waiver of the three-year waiting period prior to reapplication for a credential, where a mariner lost his or her credential as a result of use or simple possession of dangerous drugs. Respondent argues that this standard should not apply to him, in light of expert testimony that Respondent does not, and did not in October 2017, have a drug abuse problem. [Respondent Appellate Brief at 11.]

The *SWEENEY* cure standard, like 46 CFR § 5.901(d), is a blunt instrument. It is undoubtedly both over- and under-inclusive. There are certainly mariners, and Respondent is quite possibly among them, who will reach the desired, lasting state of "cure" prior to the expiration of twelve months non-association, and for these mariners it may seem that waiting the full span of time before having the opportunity to resume service is unjust. But it is precisely because we cannot know, *ex ante*, which mariners who are sober at four months, or ten months, will remain so at twelve, that the rule is inflexible. Undoubtedly, and regrettably, there are, contrariwise, mariners who prove "cure" to the *SWEENEY* standard, only to fall back into drug use some time after their credentials have been reinstated. I am satisfied that the *SWEENEY* standard provides a reasonable degree of certainty as to a mariner's genuine cure from drug use, and, just as important, a rational and uniform basis for ALJs to determine whether a drug user will be allowed to return to sea service. Nothing in Respondent's submissions convinces me otherwise.

Respondent proposes an "exception" to the existing *SWEENEY* cure standard for mariners, like himself, who can present credible evidence that they do not suffer from a substance abuse disorder, and who therefore, by his logic, do not require any cure. 46 U.S.C. § 7704(b) requires that a merchant mariner's credential be revoked "[i]f it is shown that a holder has *been a user of, or addicted to* a dangerous drug . . . unless the holder provides satisfactory proof that the holder is cured." (Emphasis added.) Respondent's proposal would require a showing of cure only from the drug addict, effectively reading the alternative "user of . . . a

dangerous drug" out of the statute.[3] The *SWEENEY* cure standard applies equally to the mariner who, like Respondent, is a simple "user," and to the mariner who is an addict (or, in more clinical parlance, suffers from a substance abuse disorder).[4] (46 CFR § 5.901(d) makes no reference to addiction; by its terms, it is not available to a person whose credential was revoked for addiction.) Respondent's proposed "exception" to *SWEENEY* is rejected.

The ALJ's D&O was consistent with law, regulation, and public policy. Respondent's appeal of that Order, seeking modification of longstanding Coast Guard and DOT policies and practices, as to dangerous drug use in the merchant marine, does not succeed.

BASES OF COAST GUARD APPEAL

The Coast Guard raises the following issues on appeal from the Cure Order:

III. Returning Respondent's MMC to his possession at the end of the March 6, 2018, hearing was an abuse of discretion.

IV. The ALJ's finding that Respondent's positive drug test was caused solely by the use of a topical marijuana-derived pain-relief ointment was not supported by substantial evidence.

V. The ALJ erred in finding cure proved, where Respondent completed much of the twelve-month non-association period while in possession of his credential.

OPINION AS TO COAST GUARD APPEAL

III.
Returning Respondent's MMC to his possession at the end of the March 6, 2018, hearing was an abuse of discretion.

The Coast Guard contends that the ALJ erred by allowing Respondent to retain possession of his MMC at the termination of the March 6, 2018, hearing, because the ALJ had, as of that date, held that a *prima facie* case of drug use had been established. *See* 46 CFR

[3] As a practical matter, evidence of addiction without use is extremely unlikely; given evidence of use, any attempt to prove addiction would not be worth the candle.

[4] The ALJ in this case was clearly cognizant of the distinction between addict and user: "The criteria used to establish if a person is a "substance abuser" pursuant to the DSM-5 [Diagnostic and Statistical Manual for Mental Disorders] [versus] a "user of dangerous drugs" under Coast Guard law and regulations are separate and distinct. Just because a person is not a "substance abuser" in accordance with the DSM-5, does not preclude them from being a "user" under Coast Guard law." [D&O at 13 n. 3.]

§ 5.521(b). This argument was not raised on March 6, when the ALJ returned Respondent's credential at the close of hearing. Nor was it raised by the Coast Guard's post-hearing brief, nor in the December 19, 2018 hearing where the ALJ considered Respondent's proffered evidence of cure. It was first raised by the Coast Guard's appellate brief.

The Coast Guard waived this issue by failing to request the retention of Respondent's credential at hearing. "It is a well established rule that in order to preserve an issue on appeal, there must have been a valid motion or objection made at the hearing."[5] *Appeal Decision 2610 (BENNETT)* at 14-15, 1999 WL 33595178 at 8, *aff'd*, NTSB Order No. EM-187, 2000 WL 967428. Considering this question for the first time on appeal would be unfairly prejudicial to Respondent, who was given no opportunity to respond to the invocation of 46 CFR § 5.521(b) at hearing. Even if the Coast Guard had preserved the question of § 5.521(b) credential retention, there is no remedy for an ALJ's failure to retain a credential, where the elements of cure have already been completed, and Respondent's credential has been reinstated.[6]

Notwithstanding the waiver and absence of remedy, the issue calls for discussion.

Where a mariner fails a drug test mandated by 46 CFR Part 16, the mariner is presumed to be a user of dangerous drugs. 46 CFR § 16.201(b). In these suspension and revocation (S&R) proceedings, the Coast Guard may establish a rebuttable presumption of drug use by introducing evidence to support a *prima facie* case of drug use. *Appeal Decision 2560 (CLIFTON)* at 8, 1995 WL 17010110 at 7. A *prima facie* case has three elements: (1) the respondent was the person

[5] At the time of hearing in *BENNETT*, 46 CFR § 5.701(b)(1) specifically provided that an ALJ's rulings on motions or objections were only subject to appeal if "not waived during the proceedings." That language was not included in a 1999 revision of the regulations. *See* "Rules of Practice, Procedure, and Evidence for Administrative Proceedings of the Coast Guard," 64 Fed. Reg. 28054, 28075 (May 24, 1999). While the current regulations omit discussion of waiver on appeal, the policy of waiver in these proceedings remains the same: it is a well settled rule of appellate proceedings that, if a party failed to make a motion or objection at hearing, that issue has been waived on appeal. *See, e.g., Appeal Decisions 2708 (SOLOMON)* at 6-7, 2015 WL 13752830 at 4 ("I find that Respondent waived any argument that her request included the audio recording of the other telephone conversation, when she did not address that during the discussion of the request at the hearing."). *Cf. Administrator v. Freiwald*, NTSB Order No. EA-5774 at 10, 2016 WL 1660313 at 4 ("Respondent did not raise this issue at the hearing; therefore, it is deemed waived on appeal.").

[6] The Coast Guard links this argument, regarding the ALJ's failure to retain Respondent's credential, to its argument that the elements have cure cannot be completed while a mariner is in possession of his credential. The Coast Guard suggests that the remedy for both alleged errors is, therefore, for Respondent's credential to be again revoked, pending completion of further proof of cure. I reject this proposed remedy, as explained in section V, *infra*.

who was tested for dangerous drugs, (2) the respondent failed the test, and (3) the test was conducted in accordance with Coast Guard drug testing regulations at 46 CFR Part 16 and applicable Department of Transportation (DOT) regulations at 49 CFR Part 40. *Id.; Appeal Decision 2704 (FRANKS)* at 9, 2014 WL 4062506 at 7. If the Coast Guard presents substantial, reliable, and probative evidence as to these three elements, a presumption of drug use has been established, and the burden shifts to the respondent to provide evidence rebutting the presumption of drug use. *Appeal Decision 2603 (HACKSTAFF)* at 4, 1998 WL 34073115 (citing *Appeal Decision 2592 (MASON)* at 5, 1997 WL 33480820 at 4). "If the respondent produces no evidence in rebuttal, the ALJ may find the charge proved on the basis of the presumption alone." *Id.* (citing *Appeal Decision 2555 (LAVALLAIS)* at 3, 1994 WL 16009226 at 2).

At the initial hearing on this matter, on March 6, 2018, after the joint stipulations of fact were read into the record, the Coast Guard moved for partial summary decision, establishing a *prima facie* case of drug use against Respondent [Mar. 6 Tr. at 13-14.] The ALJ granted this motion, over Respondent's objection, and concluded that the Coast Guard was entitled to a rebuttable presumption of drug use against Respondent. [*Id.* at 16.] Respondent presented extensive rebuttal evidence, and, at the close of hearing, the ALJ reserved judgment on the question of whether Respondent's evidence had been sufficient to rebut the presumption of drug use. The ALJ noted the unusual difficulty of the case before him, and both parties expressed their intent to submit post-hearing briefs. [*Id.* at 164.] Respondent's MMC was returned to his possession, and he continued to operate as a Delaware River pilot, pending the ALJ's decision.[7]

The Coast Guard predicates its argument on 46 CFR § 5.521(b): "When a hearing is continued or delayed, the Administrative Law Judge returns the credential to the respondent: unless a *prima facie* case has been established that the respondent committed an act or offense which shows that the respondent's service on a vessel would constitute a definite danger to public health, interest or safety at sea." As noted, the ALJ found, on March 6, 2018, that the

[7] Respondent's service as a state-licensed pilot to foreign-flag vessels does not require a Coast Guard-issued MMC, but the Delaware Bay and River Pilots' Association requires, as a matter of internal policy, that its state-licensed pilots hold valid federal MMCs. [*See* Mar. 6 Tr. at 57; Respondent Appellate Reply Brief, Ex. A.] While Respondent's MMC was on deposit with the Coast Guard, his name was removed from the Pilot Association's active-duty list. [Respondent Appellate Reply Brief, Ex. A.]

Coast Guard had established a *prima facie* case of drug use against Respondent, though he reserved judgment as to whether Respondent had successfully rebutted that presumption. [*See* March 6 Tr. at 16.]

Decision on Review 18 (CLAY) at 2 (1992) held that "where a *prima facie* case of drug use is established by the Investigating Officer to the satisfaction of the Administrative Law Judge, sufficient cause exists to withhold return of the license and/or document pursuant to the provisions of 46 CFR 5.521(b)." *See also Appeal Decision 2638 (PASQUARELLA)* at 6-8, 2003 WL 1891872 at 4-5 (applying *CLAY* and clarifying that, where a mariner's drug use is proved, ALJs lack discretion to return credential prior to proof of cure).

Here, the ALJ himself correctly characterized the conclusion of the March 6, 2018, hearing as a continuance, where the S&R hearing was continued pending submission of post-hearing briefs and eventual issuance of a written decision. [*See* Cure Order at 4.] Because the hearing was continued, § 5.521(b) was plainly applicable, calling for retention of Respondent's credential. I conclude that, considering the public safety function of these proceedings, § 5.521(b)'s injunction against return of a credential to any mariner against whom a *prima facie* case of drug use has been established, prior to proof of cure, applies equally in these circumstances, where a respondent presents rebuttal evidence, and an ALJ requires additional time to arrive at a ruling on that rebuttal evidence.

Obviously, this interpretation may result in a circumstance where an ALJ withholds a mariner's credential, only to eventually accept the mariner's rebuttal evidence as sufficient, and find the Coast Guard's case not proved. Such was the case in *U.S. Coast Guard v. Voorheis*, CGALJ-2004-0507, 2005 WL 8149335, *aff'd, Appeal Decision 2662 (VOORHEIS)*, 2007 WL 3033576. In that scenario, a mariner had been deprived of his or her credential only to be ultimately cleared. On the other hand, in the case of any eventually proved suspension and revocation action where the Coast Guard did not seek expedited scheduling, a merchant mariner retains his or her credential pending hearing, only to be ultimately found permanently or temporarily ineligible to hold that credential. These are the inevitable results of our adjudicative process; so long as that process is adhered to, these are acceptable compromises between the

Coast Guard's public safety mandate and mariners' constitutionally protected property interest in their credentials.

Applying the foregoing to this case, Respondent's credential indeed ought to have been retained by the Coast Guard at the close of the March 6 hearing. The ALJ erred in returning Respondent's credential at the conclusion of that hearing.[8] However, as noted, there is no remedy available in this case: the Coast Guard's objection to the return of credential is moot as well as waived.

I note that, while it is appropriate for the Coast Guard to rely on § 5.521(b) to withhold the credentials of mariners who pose a definite public safety risk as elucidated by caselaw, it is incumbent upon the Coast Guard to make such a plea to the ALJ at hearing, and not, as here, some months or years later on appeal. The Coast Guard's advocacy role in this respect is set forth in the instructions of the Coast Guard Marine Safety Manual, pursuant to § 5.521(b),

> In *CDOA 2535 (SWEENEY)* and *CDOR 18 (CLAY)*, the Commandant determined that when the Coast Guard proves use of an illegal drug, the mariner poses a threat to public health, public safety, and safety of life at sea until he has proven he is cured. *Therefore, in drug use cases IOs should enter a motion requesting the ALJ to retain the MMC(s) during the continuance or adjournment.*

Commandant Instruction M16000.10A, Vol. V, para. 4-F-15.

IV.

The ALJ's finding that Respondent's positive drug test was caused solely by the use of a topical marijuana-derived pain-relief ointment was not supported by substantial evidence.

The Coast Guard argues that the ALJ's finding of fact as to the cause of Respondent's positive drug test was not supported by substantial evidence, in that the ALJ's finding relied on testimony of an unqualified expert witness. [CG Appellate Brief at 22-23.] The witness in question was a psychiatrist who specializes in substance abuse disorders. The Coast Guard concedes the doctor's expertise as to addiction medicine, but maintains that he was unqualified

[8] I specifically disapprove the Cure Order's interpretation of § 5.521(b): "none of the language in *CLAY, BARRETTA, PASQUARELLA*, or 46 CFR § 5.521(b) required that I take Respondent's credentials during the continuance of the hearing/briefing period and prior to deciding whether Respondent rebutted the presumption of drug use." [Cure Order at 14.]

to offer an opinion on the likely source of the THC in Respondent's positive drug test, as the witness was admittedly neither a toxicologist nor a pharmacologist.

I find no impropriety in the ALJ's reliance on the expert's testimony. The witness in question is, undisputedly, a psychiatrist and substance abuse disorder specialist, who examined Respondent. [D&O at 13.] It was established, during his testimony at hearing, that he held no qualifications as a toxicologist or pharmacologist, and could not offer expert testimony on rates of transdermal chemical absorption or other technical questions relating to Respondent's reported use of the Mary's Medicinals ointment and the marijuana metabolites detected in Respondent's urine.

> The Coast Guard objects to the following characterization of the expert's testimony:
>
> Upon examining Respondent, Dr. Cornish determined Respondent did not have the profile for being a substance abuser, was not an addict, and did not need treatment for substance abuse pursuant to the criteria set forth in the Diagnostic and Statistical Manual for Mental Disorders (DSM-5). (Tr. at 95-99). Dr. Cornish testified that given his many years of experience in the drug abuse field, he thinks it is reasonable that Respondent tested positive because he used the CBD ointment. (Tr. at 100-01, 110). I find Dr. Cornish's testimony credible, and given his expertise in the field, I give his testimony great weight.
>
> Given the preponderance of the evidence presented, I conclude Respondent's positive drug test was a result of him using the CBD ointment. While it is possible the positive drug test resulted from Respondent using marijuana recreationally, the evidence does not support this inference. Instead, given the longevity of Respondent's unblemished career, the character testimony, and the expert witness testimony, the CBD ointment very plausibly caused the positive drug test. I find the positive drug test was a result of him using the CBD ointment.

[D&O at 13 (footnote omitted).] "[T]he Court's decision to assign significant weight to Dr. Cornish's opinion that the CBD ointment was the cause of Mr. Cook's positive drug test was erroneous and an abuse of discretion because Dr. Cornish did not have the education, training, or experience to render that opinion." [CG Appellate Brief at 14.]

The Coast Guard's characterization of the D&O is erroneous. As quoted, the ALJ did give "great weight" to the expert's testimony. However, there is no suggestion, in the D&O or

elsewhere, that the ALJ improperly ascribed toxicological or pharmacological expertise to this witness. I take the ALJ's assessment at face value: Dr. Cornish gave credible and valuable testimony as to his psychiatric evaluation of Respondent. Dr. Cornish further offered his expert, informed opinion that Respondent's proffered explanation for the positive drug test was "reasonable."

The ALJ relied, in part, on this expert testimony to conclude that Respondent's positive drug test was the result of his topical CBD ointment use. The ALJ did not discount the *possibility* of recreational marijuana use by Respondent, and did not rely on Dr. Cornish's testimony as conclusive proof that the ointment was the only source of THC in Respondent's urine. Rather, as is his responsibility, the ALJ evaluated the credibility and weight of all of the evidence before him, and reached a reasoned conclusion. There is no reason to discredit Dr. Cornish's testimony, limited, as it was, to his psychiatric expertise and examination of Respondent.

In any event, the purpose of these appellate proceedings is to correct errors of law and abuses of discretion that are material to the findings and sanction. The Coast Guard essentially concedes in its appellate brief that the error in the finding, if any, was harmless ("irrelevant" in light of the issues). [CG Appellate Brief at 16.] A party's mere displeasure with some or all of an ALJ's findings is not, of itself, a proper ground for appeal, even if that party is the Coast Guard. If the issue in dispute had no effect on the outcome of the case, there is no issue for appeal. Furthermore, the Coast Guard purports to appeal from the April 17, 2019, Cure Order, but the ALJ's only citation of the expert testimony that is the subject of this basis of appeal was in the November 1, 2018, D&O (from which the Coast Guard made no appeal).

For all of the foregoing reasons, I dismiss the Coast Guard's second basis of appeal.

V.

The ALJ erred in finding Respondent cured, where Respondent retained his credential for much of the required twelve-month non-association period.

The Coast Guard argues that a mariner's credential must remain on deposit with the

Coast Guard for the duration of the twelve-month non-association period required for showing of cure by *SWEENEY* and subsequent appeal decisions.

The Coast Guard quotes *Appeal Decisions 2638 (PASQUARELLA)*, 2003 WL 1891872, and *2667 (THOMPSON)*, 2007 WL 3033590, as binding authority that "when the Coast Guard proves use of an illegal drug," a mariner is perforce a risk to public safety whose credential must be retained by the Coast Guard for the full pendency of the cure process. While the statement is still good law, the cases are distinguishable from the present case—they address an ALJ's disposition of a mariner's credential *after* determination that a charge of drug use was proved. It does not follow that the cure process cannot begin until after the credential has been deposited with the Coast Guard.

Mariners are not required to complete the entire twelve-month non-association period while deprived of their credentials. As the ALJ in this case noted,

> *SWEENEY* recognizes that a mariner could appear at the hearing showing substantial involvement in the cure process, and further recognizes the mariner can undergo part of the cure process between the time the Complaint is filed and the hearing on the merits. More importantly, because the Coast Guard cannot usually take a mariner's credential at the time the Complaint is filed, mariners may begin the cure process and begin satisfying cure during this period while holding their credential.

[Cure Order at 11.] I agree entirely with this point of the ALJ's analysis. *SWEENEY* clearly contemplated that a mariner could make progress toward cure prior to hearing, even though in most cases the entire process might not be completed by that time: "In most cases which are docketed in a timely manner, at the time when the charge of drug use is found proved, sufficient time may not have elapsed to evidence cure under the above guidelines." *Appeal Decision 2535 (SWEENEY)* at 5, 1992 WL 12008768 at 4.

Mariners found to have used dangerous drugs are deprived of their credentials while they try to prove cure in order to protect the public, not in order to punish the mariner. If a mariner is unable to prove cure, the revocation becomes permanent, but neither is this a punitive measure. The mariner who does not prove cure is not necessarily more blameworthy than the mariner who used drugs, then showed him or herself cured; the uncured mariner simply continues to present a

danger to public safety, so his or her credential cannot be reinstated. To insist that a mariner can only start on the path of proving twelve months of non-association after depositing his or her credential is to transpose *SWEENEY*'s twelve-month non-association requirement from a remedial to a punitive measure. No such requirement exists in the law as it stands, and I do not see any reason to impose one.

The Coast Guard's concern may arise from the admittedly unusual circumstances of this case. Here, as explained, Respondent retained his credential from November 28, 2017, when the Coast Guard filed its complaint, until November 7, 2018, when he deposited it in compliance with the November 1 D&O. Respondent's evidence of cure included an MRO letter attesting that Respondent had completed the twelve-month non-association period, post-rehabilitation, by November 22, 2018. Indeed, Respondent continued to sail as a pilot for much of 2018, having been returned to active duty by the Pilot Association in December 2017. For at least ten months, while pursuing cure, Respondent was not only in possession of his credential, but piloting some of the sea's largest ships in some of our nation's narrowest commercial channels. Such an outcome is not desirable.

However, such an outcome might have been avoided, had the Coast Guard moved for the retention of Respondent's credential at the close of the March 6, 2018, hearing. Making no such motion, the Coast Guard allowed Respondent to walk out of that hearing with license in hand, without argument on the wisdom of that course of action. To insist now, after Respondent has completed all the elements of cure, that he has somehow not served his time, so to speak, is unactionable and beside the point.

The ALJ's error in returning Respondent's credential after finding a *prima facie* case of drug use proved, and the Coast Guard's oversight in not insisting on retention of it, had the foreseeable result of Respondent completing those months of cure while in possession of his credential. I will not punish him for the government's failings in this case.

In short, the Coast Guard has presented no cognizable grounds for reversing or amending the Cure Order, and the Coast Guard appeal from that Order is denied in its entirety.

CONCLUSION

The ALJ's findings and decision were lawful, based on correct interpretation of the law, and supported by the evidence. The Decision and Order's finding of proved as to a charge of drug use against Respondent was consistent with applicable law and public policy, and the mandatory sanction of revocation was properly ordered. The Cure Order's finding of cure, and conversion of the order of revocation into one of outright suspension was justified. No further action against Respondent's credential is warranted in these circumstances.

ORDER

The ALJ's Decision and Order of November 1, 2018, as modified by the Cure Order of April 17, 2019, is AFFIRMED.

Signed at Washington, D.C., this 6 day of JULY, 2020.