U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
	:	
	:	VICE COMMANDANT
vs.	:	
	:	ON APPEAL
License No. 601260 Issued to: JOHN F. COULON, Appellant.	:	
	:	NO. 2585

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By order dated July 6, 1993, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's license for three months, based upon finding proved, a charge of *negligence*. The single specification supporting the charge alleged that, while serving as Captain aboard the M/V EARLY BIRD on August 23, 1992, the Appellant negligently moored to a Conoco oil and gas platform by failing to adhere to the posted sign indicating not to tie up to the platform.

The hearing was held at New Orleans, Louisiana, on December 15, 1992, January 13, 1993, and March 2, 1993. Appellant was represented at the hearing by professional counsel. At the hearing, Appellant entered an answer of "deny" to the specification and the charge. The investigating officer introduced four exhibits and the testimony of two witnesses into evidence. In defense, the Appellant offered into evidence seven exhibits, the testimony of three witnesses and his own testimony.

After the hearing, the Administrative Law Judge concluded that the charge and specification were proved. He served a written order on Appellant suspending the captioned license, and all other licenses issued to the Appellant by the Coast Guard for a period of three months. The entire decision was served on July 6, 1993. Appeal was timely filed.

The hearing was reopened on May 2, 1995, to comply with my order of remand in Appeal Decision 2565 (COULON). I ordered the hearing reopened because none of the eleven exhibits

received into evidence were contained in the case file on appeal. All exhibits were resubmitted, and the case file is now complete and properly before me on appeal.

APPERARANCE: Attorney David E. Cole, P.O. Box 99, Marrero, Louisiana, 70072.

FINDINGS OF FACT

On August 23, 1992, Appellant was serving as the Master of the M/V EARLY BIRD under the authority of Coast Guard license No. 601260. Appellant's license authorized service as master of near coastal steam and motor vessels of not more than one hundred gross tons. On August 23, 1992, Appellant accepted paying passengers on board the M/V EARLY BIRD, a 46-foot charter fishing vessel, for a fishing trip in the Gulf of Mexico. On that fishing trip, Appellant moored the M/V EARLY BIRD to an unmanned Conoco oil and gas platform located in West Delta, Block 30 and designated as platform 45-G. Platform 45-G displayed three signs. Two of the signs read, "DANGER HIGH PRESSURE PIPELINE" and one sign read "BLOWDOWN DO NOT TIE UP."

The Appellant moored the M/V EARLY BIRD to the platform in close proximity to two signs, one reading "DANGER HIGH PRESSURE PIPELINE" and the other "BLOWDOWN DO NOT TIE UP." The Appellant allowed the passengers on board the M/V EARLY BIRD to smoke cigarettes in the vicinity of the blowdown pipe. Appellant did not warn or otherwise direct his passengers not to smoke. Flammable gases were emitted from the platform's blowdown valve onto the M/V EARLY BIRD. A resulting explosion burned seven passengers and one deckhand. Several of the passengers were hospitalized for injuries received by the explosion.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

I. The Administrative Law Judge erroneously considered facts and allegations outside the scope and the specification of the charge;

II. The Administrative Law Judge's findings of fact and opinions are erroneous and not supported by the record or evidence;

III. It was an error to deny Appellant's motion to dismiss at the conclusion of the Coast Guard's case;

IV. It was an error for the Administrative Law Judge to reject the expert testimony of

Captain William Key and Louis Thornton;

V. It was an error for the Administrative Law Judge not to have referred to the transcript of the hearing;

VI. The order of an outright suspension was excessive.

OPINION

I

Appellant contends that the Administrative Law Judge erred because he considered facts and allegations not part of the charge and not part of the casualty. Specifically, Appellant contends the Administrative Law Judge considered the language from the sign reading, "DANGER HIGH PRESSURE PIPELINE," and relied on that sign to form part of the basis for negligence. I find that the Administrative Law Judge properly considered the language on both of the signs displayed on platform 45-G, under which the Appellant moored the M/V EARLY BIRD.

Appellant was charged with *negligence*, supported by a single specification. The fact that the specification does not quote the language, "DANGER HIGH PRESSURE PIPELINE," and the fact that the sign was considered by the Administrative Law Judge does not constitute reversible error. A specification must be adequate to enable the respondent to identify the act or offense alleged so that a defense can be prepared. Appeal Decisions 2521 (FRYER); 2504 (GRACE); 1792 (PHILLIPS). The purpose of pleadings is to provide notice and not to make a ritualistic recitation of the details. Appeal Decision 2568 (SANCHEZ et al.); 2326 (McDERMOTT), *citing* Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C.Cir. 1950). Furthermore, "[f]indings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the Appellant has actual notice and the questions are litigated." Appeal Decisions 2581 (DRIGGERS); 2422 (GIBBONS), *citing* Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950); 1792 (PHILLIPS). The record shows that the Appellant understood that the substance of the charge was mooring to an oil and gas platform that had posted warning signs. [Transcript (TR) Vol. I at 25 - 32, 118, 119, 127; 128, TR Vol. II at 52, 54, 59, 62-67, 71, 72; Investigation Officer (I.O.) Exhibits 1 & 3].

Indeed, Appellant based his argument both at the hearing and on appeal, on the premise that the displayed signs conveyed no discernible warning, or that they conveyed a warning not to tie up to the specific blowdown pipe itself. This indicates that the Appellant understood the substance of the charge against him was the failure to adhere to the posted warning signs and that he was afforded an opportunity to prepare a defense where he sought to justify his conduct. The Appellant claims he was not negligent, because he did not tie up to the blowdown pipe itself. The

Administrative Law Judge clearly rejected this argument and any contention that the signs conveyed the meaning not to tie up to the blowdown pipe itself. Decision and Order (D&O) at 18. The record of the hearing shows that the meaning of both signs was actually litigated by the parties, regardless of the omitted language in the specification. [TR Vol. I at 25 - 32, 118, 119, 127; 128, TR Vol. II at 52, 54, 59, 62-67, 71, 72; I.O. Exhibits 1 & 3].

II

Appellant claims that the Administrative Law Judge's findings of fact are erroneous and not supported by the record. With one exception, discussed below, I find the Administrative Law Judge's findings of fact are supported by substantial evidence in the record.

Charges and supporting specifications in suspension and revocation proceedings must be proved by reliable, probative, and substantial evidence. 46 C.F.R. § 5.63. It is well established that the evidentiary determinations of the Administrative Law Judge will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Appeal Decision 2570 (HARRIS) *aff'd* NTSB Order No. EM-182 (1996); 2581 (DRIGGERS);2456 (SWEENEY); 2541 (RAYMOND); 2522 (JENKINS); 2492 (RATH); 2333 (AYALA). Furthermore, conflicting evidence will not be reweighed on appeal where the Administrative Law Judge's determinations can be reasonably supported. Appeal Decision 2504 (GRACE); 2468 (LEWIN); 2390 (PURSER) *aff'd sub nom.* Commandant v. Purser,NTSB Order EM-130 (1986); 2356 (FOSTER); 2344 (KOHAJDA); 2340 (JAFFE), 2333 (AYALA).

Appellant claims that the Administrative Law Judge misinterpreted the testimony of his expert, Mr. Leslie Bennett, when he (the ALJ) found that the signs mean the blowdown line could emit flammable gases and that they clearly and adequately convey the message that mooring a vessel to the platform is prohibited and clearly warn of the potential dangers associated with mooring a vessel to the platform. D&O at 7. Appellant contends that
Mr. Bennett testified to the following: the sign which stated "BLOWDOWN DO NOT TIE UP" means do not tie up to the pipeline itself; the blowdown line would be considered dangerous only if further marked with additional warning signs such as "flammable atmosphere, catch fire"; a member of the public that was not familiar with offshore oil and gas operations could construe the sign to mean various things; the "DANGER" sign is separate from the "BLOWDOWN" sign; and there is no defined safe distance from the blowdown line, even if one was aware of it.

However, after a thorough review of the record, I find the Administrative Law Judge's conclusions, with regard to the testimony of Mr. Bennett, to be based on reliable and substantial evidence in the record of hearing. Mr. Bennett did testify that the sign, "BLOWDOWN DO NOT TIE UP" conveyed that the blowdown line could emit flammable gases. [TR Vol. I at 173-175]. Mr. Bennett did not testify that the blowdown line would be considered dangerous "only if"

marked with further signs, but simply that it would be more explicit if the sign said "flammable." [TR Vol. I at 176]. Mr. Bennett also was unable to testify as to what would constitute a safe distance from the blowdown line. [TR Vol. I at 177]. Furthermore, his opinion as to how the public at large would view the signs is irrelevant. The standard of review for negligence is based on a similarly situated individual and not the public at large. 46 C.F.R. § 5.29.

The Appellant claims it was an error for the Administrative Law Judge to find that platform 45-G was the only platform in the West Delta area containing signs reading danger, high pressure pipeline. Appellant misinterprets the finding of the Administrative Law Judge in regard to the signs displayed on the platform. The Administrative Law Judge did not find that platform 45-G was the only platform in the West Delta area displaying signs reading danger, high pressure pipelines, but that 45-G was the only platform in the area to exhibit the three specific signs at issue in the case. Two of the signs read, "DANGER HIGH PRESSURE PIPELINE," and one sign read, "BLOWDOWN DO NOT TIE UP." D&O at 7.

Appellant argues that the platform owners were solely responsible for the casualty, because of their failure to locate the blowdown valve in some other manner. Thus, the Appellant claims he should be absolved of all responsibility. However, suspension and revocation proceedings are administrative and remedial in nature and, therefore, the negligence of third parties is not a defense. Appeal Decisions 2581 (DRIGGERS); 2380 (HALL); 2319 (PAVELEC). Issues of proximate cause of a related casualty are not relevant nor are fault determinations necessary. Appeal Decision 2581 (DRIGGERS) *citing* Appeal Decisions 2166 (REGISTER); 2012 (HERRINGTON); 1822 (EVANS). The only issue is whether Appellant was negligent in mooring to platform 45-G. Therefore, whether the platform owners also violated some law or regulation is irrelevant to these proceedings. Id.

With respect to the forgoing, I find that the Administrative Law Judge’s findings were not clearly erroneous, arbitrary, or capricious. Nor did he base his findings on inherently incredible evidence. Therefore, I will not disturb them on appeal.

Appellant argues there is no evidence in the record to support the Administrative Law Judge’s finding that platform 45-G was owned by various oil companies. In this regard, I agree. The only support for this finding are the proposed findings of fact submitted by the Coast Guard Investigating Officer; however, these proposed findings are not evidence. Therefore, it was an error for the Administrative Law Judge to incorporate this as a finding of fact. D&O at 6. However, the Appellant makes no showing that this finding is prejudicial to him. Therefore, I find this does not constitute reversible error as it had no bearing on whether the charge of negligence was found proved.

III

Appellant asserts that the Administrative Law Judge improperly refused to dismiss the charge after the presentation of the Coast Guard's case because the Coast Guard failed to establish a standard of negligence. I disagree.

Such a motion to dismiss will only be granted if no evidence is introduced in support of at least one of the required elements of the government's case. Appeal Decisions 2581 (DRIGGERS); 2461 (KITTRELL); 2321 (HARRIS); 2294 (TITTONIS). Negligence is defined in 46 C.F.R. § 5.29 as, "the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." Here, the Appellant is charged with negligence in mooring to a platform with posted signs, warning against mooring to that platform.

The standard of care was established by the posted signs on the platform and through the testimony of the Coast Guard's expert witness, Captain Hardison. Captain Hardison testified that he would not tie up to platform 45-G with the signs posted as they were. [TR Vol. I at 93, 103]. Appellant's attempt to characterize Captain Hardison's testimony differently is specious. Appellant argues that the Coast Guard did not establish a standard of care because Captain Hardison testified he would tie up to a cleat next to high pressure pipelines. Appeal at 9. The question Captain Hardison responded to was, "So you have tied to cleats which are right next to the high-pressure gas line?" [TR Vol. I at 101]. This question bears no relation to the charge of negligence and the specification in this case, namely disregarding posted warning signs. Captain Hardison's testimony satisfied the burden of the Investigating Officer to introduce evidence that another similarly situated charter vessel captain, would not have acted in the same way under the circumstances. [TR Vol. I at 91-93, 103]. Therefore, the Administrative Law Judge was proper in refusing to grant the motion to dismiss the charge.

IV

Appellant argues that the Administrative Law Judge erred in rejecting the testimony of expert witnesses Captain William Key, a supply and crew boat operator, and Captain Louis Thornton, a commercial fisherman. Captain Thornton testified that he had moored to platform 45-G in the past. Captain Key testified that he would have tied up to platform 45-G if ordered to do so. According to the ALJ, Captain Thornton's own negligence does not in anyway absolve the respondent. Captain Key was rejected as an expert because he was not a fishing boat captain and because he was never ordered to tie up to platform 45-G. As the trier of fact, the Administrative Law Judge is entitled to accept or reject evidence which he feels is not competent or persuasive. Appeal Decision 2294 (TITTONIS). The testimony of expert witnesses, even though it may be

uncontradicted, may be disregarded after careful consideration because of its improbability or the interests of the witness. Appeal Decisions 2294 (TITTONIS); 2030 (RIVERA). The Decision and Order of the Administrative Law Judge shows he carefully considered the testimony of the Appellant's experts but found it unconvincing. D&O at 8. Accordingly, it was not error for the Administrative Law Judge to discredit the testimony of the Appellant's expert witnesses.

V

Without further explanation, the Appellant claims the Administrative Law Judge was in error, not to have referred to a transcript of the hearing since one was in existence. There is no requirement that the Administrative Law Judge refer to a transcript, thus it is not error for not having done so.

VI

Appellant argues that the suspension order for three months was excessive. I disagree. The promotion of safety of life at sea and the welfare of individual seamen continue to be of paramount concern to the Coast Guard in making decisions on appropriate sanctions. Appeal Decisions 2570 (HARRIS) *aff'd* NTSB Order No. EM-182 (1996); 2661 (LEVENE); 2017 (TROCHE). Furthermore, the order imposed at the conclusion of a case is exclusively within the discretion of the Administrative Law Judge, and will not be modified unless clearly excessive or an abuse of discretion. Appeal Decision 2475 (BOURDO); 2362 (ARNOLD). The suspension period is within the guidance table provided in 46 C.F.R. § 5.569(d). Given the nature of the violation, the fact that people were injured, and the fact that the Administrative Law Judge carefully weighed all of the factors involved, I do not find a three month suspension to be excessive.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature, with the exception of the ownership of platform 45-G, which I have determined to be harmless error. The hearing was conducted in accordance with applicable law and regulations. I find no error in the Administrative Law Judge's application of the law or award of suspension for three months.

ORDER

The decision of the Administrative Law Judge dated July 6, 1993, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

	/S/ R.D. HERR Vice Admiral, U.S. Coast Guard Vice Commandant

Signed at Washington, DC, this 21st day of July, 1997.