

UNITED STATES OF AMERICA

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	
	:	
vs.	:	VICE COMMANDANT
	:	
LICENSE NO. 625896	:	ON APPEAL
Issued to: Scott R. Green, Appellant	:	
	:	NO. 2586

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

By order dated March 13, 1995, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant s license for four months based upon finding proved a charge of *negligence*. The single specification supporting the charge alleged that on or about September 23, 1993, Appellant failed to heed navigation information and negligently grounded his vessel and tow in the Intracoastal Waterway (ICW), near North Miami, Florida.

The hearing was held at Miami, Florida, on May 24, 1994. Appellant was represented by professional counsel and entered a response denying the charge and the specification. The hearing was continued on September 2, 1994, and December 22, 1994.

During the hearings, the Coast Guard Investigating Officer introduced into evidence 17 exhibits and the testimony of two witnesses. Appellant testified on his own behalf and offered 20 exhibits and the testimony of four witnesses. The Administrative Law Judge entered five exhibits into the record.

At the end of the hearing on December 22, 1994, the Administrative Law Judge gave the parties the opportunity to submit proposed findings of fact, conclusions of law, and closing arguments. The submissions provided by each party were added to the record. On March 3, 1995, the Administrative Law Judge informed both parties that he found the Coast Guard s case proved and requested submission of Appellant s prior record from the Coast Guard and any evidence in mitigation from the Appellant. Again, the submissions of both parties were added to the record. On March 13, 1995, the Administrative Law Judge issued a written Decision and Order which concluded that the charge and specification were found proved and suspended Appellant s license outright for four months.

Appellant timely filed a notice of appeal on April 4, 1995, and perfected it on July 7, 1995. Therefore, this appeal is properly before me for review.

APPEARANCE: Allan R. Kelley, Fowler, White, Burnett, Hurley, Banick & Strickfoot, 100 Southeast Second Street, Seventeenth Floor, Miami, Florida.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license which authorized service as operator of near coastal steam or motor vessels of not more than 1600 gross tons. On September 23, 1993, Appellant was acting under the authority of this license while serving as Master aboard the M/V COASTAL CANAVERAL, an 80 gross ton towing vessel, 54.5 feet in length with a 20 foot beam and a 6.5 foot draft. On this date, the M/V COASTAL CANAVERAL was pushing ahead the T/B COASTAL 34, a documented tank barge of 593 gross tons, 180 feet in length and with a 40 foot beam. The T/B COASTAL 34 was loaded with 450 metric tons of No. 6 oil and had a draft of 4.5 feet. The flotilla was configured such that the beam of the barge extended 10 feet beyond either side of the tug.

At approximately 0600, while heading northbound on the Intracoastal Waterway (ICW) in the vicinity of Baker s Haulover, Biscayne Bay, Miami, Florida, the M/V COASTAL CANAVERAL ran aground while being navigated by the Appellant. At the time of the grounding, the starboard side of the T/B COASTAL 34 was approximately 4 feet west of temporary buoy "7A," which had been placed in the ICW to mark an encroaching shoal. After the initial grounding of the starboard side of the tug and a subsequent shear of the barge to starboard, Appellant attempted to back down and place the barge squarely back in the channel. However, the ebb current pushed the flotilla to the east, further onto the shoal, and the tug grounded again. There was no damage to the tug or barge. The flotilla refloated at high tide and, with the help of an assist tug, turned around and headed south for Miami.

Much of the controversy in this proceeding centers around a Coast Guard Local Notice to Mariners (LNTM) issued the month preceding the grounding. It read as follows:

Severe shoaling exists in the intercoastal [sic] Waterway at Bakers Haulover. Biscayne Bay Light 7 (LLNR 41200) is in three feet of water. The Intracoastal Waterway is within approximately 30 feet of being entirely closed. The U.S. Army Corps of Engineers advises that dredging operations are scheduled for this fall.

The project width of the ICW in the vicinity of Baker s Haulover is 125 feet, with a controlling depth of 10 feet. However, the eastern part of the ICW in the vicinity of Baker s Haulover is subject to progressive shoaling. On the day of the grounding, the depth and width of the available channel was significantly less than the projected dimensions. As stated in the LNTM, the width of the available channel was approximately 30 feet. The depth was 8.5 feet. The Coast Guard had previously placed temporary buoy "7A" in the ICW to mark the progress of the shoaling. (This buoy is identified as Biscayne Bay Light 7 in the LNTM). Prior to issuing the LNTM above, the Coast Guard discovered that

the shoaling extended further into the ICW than the temporary buoy indicated. The buoy, which previously marked the edge of the shoaling, was now in three feet of water.

Prior to making his transit, Appellant calculated the tides and currents for the Baker s Haulover area of the ICW. Appellant calculated that by the time he reached the Baker s Haulover area, the tide would be approximately 1.5 feet above mean low water and the current would be ebbing towards the east and Baker s Haulover inlet.

With knowledge of the shoaling problem, both from the LNTM and prior experience transiting the area, and because the 30 foot width of the channel was less than the 40 foot width of the barge, Appellant s strategy for the transit was to hug the west side of the channel. The western edge of the channel is not subject to shoaling, but is instead lined with rock. Appellant concluded that he could make the transit if the port side of the barge proceeded along the western extreme of the ICW, and the starboard side of the tug along the eastern extreme of the channel, where the shoaling started. The remaining 10 feet of the starboard side of the barge would overhang the shoal. Appellant concluded that the extra 1.5 feet of tide, when added to the 3 feet of water in the shoaled area, would be enough to allow his barge, with a draft of 4.5 feet, to navigate through this area.

BASES OF APPEAL

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

1. The Administrative Law Judge s conclusion that the charge and specification were found proved is erroneous because the specification was deficient;
2. Three specific findings of the Administrative Law Judge are erroneous: A) that the tug grounded four feet west of Temporary Buoy "7A"; B) that the M/V COASTAL CANAVERAL grounded on a well designated shoal, which therefore raises a presumption of negligence; and C) that the Appellant failed to heed the warnings of the Local Notice to Mariners (LNTM).
3. The penalty assessed by the Administrative Law Judge was excessive; and
4. The Administrative Law Judge s refusal to schedule a separate hearing prior to suspending the Appellant s license denied the Appellant due process.

OPINION

I

Appellant asserts that the Administrative Law Judge erred in concluding that the specification and charge were found proved because the specification was insufficient. I disagree.

The relevant language of the specification reads as follows: "In that you. . . did, on or about September 23, 1993, negligently ground the M/V COASTAL CANAVERAL and its tow . . . after failing to heed navigational information contained in the Coast Guard Local Notice to Mariners 33-93, dated August 17, 1993." Appellant's interpretation of the specification is that it only alleges negligence in failure to heed the LNTM. Therefore, he asserts that since the LNTM did not specifically indicate there was a risk of grounding in the ICW, it was facially deficient and cannot be the basis for the negligence charge.

"A specification sets forth the facts which form the basis of a charge and enables the respondent to identify the act or offense so that a defense can be prepared." 46 C.F.R. § 5.25. A negligence specification must allege particular facts amounting to negligence, or sufficient facts to raise a legal presumption which will substitute for particular facts. *See Appeal Decision 2386 (LOUVIERE)*. The specification in this case does both. Appellant concedes that the specification alleges that he was negligent in failing to heed the LNTM, a particular fact that amounts to negligence. In addition, the plain language of the specification makes it clear that the general basis for the charge was the grounding. Based on the contents of the LNTM, Appellant knew, or should have known, of the obstruction that existed at the location of the grounding. The specification therefore alleges a legal presumption of negligence that accompanies a grounding and was adequate to place Appellant on notice to prepare a defense for the circumstances surrounding the grounding. During the hearing, the Administrative Law Judge ensured that Appellant knew the Coast Guard was relying not only on the failure to heed the LNTM, but also on the presumption of negligence from the grounding. [TR Vol. I at 90].

Even if the specification was based solely on the LNTM, as Appellant claims, an alleged deficiency in the LNTM does not absolve the Appellant of the negligence charge. The issue is not whether the Coast Guard could have provided more information in the LNTM, but rather what the Appellant chose to do with the information that was provided. As discussed in section II below, the information provided to the Appellant by the LNTM, was sufficient to inform the Appellant of the obstruction that existed in the ICW near Baker's Haulover and to cause a reasonable mariner in Appellant's circumstances to choose to abandon the ICW transit that resulted in the grounding of the M/V COASTAL CANAVERAL.

Therefore, I find Appellant's arguments concerning the specification to be without merit.

II

Appellant challenges three of the specific factual findings made by the Administrative Law Judge. Each of the contested findings is addressed separately below. However, they are all governed by the same standard of review on appeal. The Administrative Law Judge's determinations of credibility and the weight to be given the evidence will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. *Appeal Decisions 2570 (HARRIS)*, *aff'd* NTSB Order No. EM-182 (1996); *2541 (RAYMOND)*; *2546 (SWEENEY)*; *2522 (JENKINS)*; *2492 (RATH)*; *2333 (AYALA)*. After careful review of the record, I find that the record does not support a portion of Finding of Fact #8 [D&O at 10] that the M/V COASTAL CANAVERAL was four feet west of

temporary buoy "7A" when the grounding occurred. At the time of the tug's grounding, the T/B COASTAL 34 was approximately four feet from the buoy. On the other hand, I find that sufficient evidence exists in the record to support the findings of the Administrative Law Judge that a presumption of negligence is raised because Appellant grounded on a well designated shoal and that Appellant was negligent in not heeding the LNTM.

A

Appellant challenges both the fact of the grounding and its alleged location. Appellant claims that he did not ground, but instead "merely bumped, touched and/or whispered on the bottom" and that this is somehow distinguishable from a grounding. I find that Appellant's assertion that he did not ground is essentially a play on words and is meritless.

Appellant offers no authority to support his distinction. Although an exact definition of the verb "to ground" has not been required in my previous decisions, a grounding is generally defined as when a vessel contacts the bottom of the sea. *See Webster's Third New International Dictionary* (1976) ("to place on or cause to touch the bottom"); *The Marine Encyclopaedic Dictionary*, Eric Sullivan, (5th Ed. 1996) ("when a vessel contacts the bottom of the sea or the ground"). Appellant does not dispute that his vessel touched the bottom of the ICW. The evidence indicates that the contact was sufficient enough to impair his forward progress and cause the Appellant to back down. [TR Vol. II at 30; D&O at 11]. The terms used by the Appellant to describe the grounding only describe the severity, not whether a grounding occurred.

As to the exact location of the grounding, I agree with the Appellant and find that the uncontroverted testimony indicates that the grounding occurred when the barge was four feet from Temporary Buoy 7A, not when the tug was four feet away. [TR Vol. II at 38]. The Administrative Law Judge's finding on this issue was clearly erroneous. However, this error is not prejudicial. The fact remains that the Appellant attempted a risky transit with knowledge of severe shoaling and ran aground doing so.

B

As an alternative to the argument that the M/V COASTAL CANAVERAL did not ground, Appellant challenges the finding that the grounding on a well designated shoal raised a presumption of negligence. Appellant essentially claims that he grounded on an unknown obstruction that was within the channel and is, therefore, not negligent as a matter of law. I disagree.

The presumption of negligence may apply to a vessel grounding where it can be shown that the person responsible for the vessel's navigation knew, or should have known of the obstruction. *See Appeal Decisions 2574 (JONES); 2409 (PLACZKIEWICZ); Penzoil Prod. Co. v. Offshore Express, Inc.*, 943 F.2d 1945 (5th Cir. 1991). The evidence clearly establishes that the appellant was aware of the

information contained in the LNTM and the shoaling problem in the Baker s Haulover area of the ICW. [TR Vol. I at 27; Vol. II at 11, 23; Vol. III at 7]. Appellant knew that only 30 feet of the channel remained unobstructed by the severe shoaling on the east, and that the western edge of the ICW in that area was lined with rock. [TR Vol. II at 27, 46]. Appellant knew that a portion of the eastern part of the channel, which had previously been passable, was now only three feet deep at mean low water. [TR Vol. II at 23]. Appellant knew that the tidal predictions for the transit added 1.5 feet of water depth in the shoaled area, for a total of 4.5 feet. [TR Vol. II at 17]. Based on the width of his flotilla, Appellant knew that a successful transit would require placing the port side of the barge exactly on the unforgiving western edge of the channel, while the starboard side of the tug ran exactly along the eastern edge of the channel. [TR Vol. II at 46]. This plan was the only way that the tug, with its 20 foot width and 6.5 foot draft, and additional 10 foot barge overhang on the port side, would remain within the passable 30 foot width of the channel. Appellant deliberately left himself with no margin for error, and as the facts of this case indicate he erred because the tug ran aground. Based on these facts, the Administrative Law Judge did not err in invoking the presumption of negligence against the Appellant.

C

Appellant next contends that the Administrative Law Judge s finding that Appellant was negligent in not heeding the LNTM and in attempting to make the transit of a "hazardously shoaled" area under the existing conditions is clearly erroneous. I disagree.

Appellant s first argument on this basis of appeal is that he was aware of the LNTM and took appropriate action based on its contents, which were deficient. Although I agree that the evidence indicates that Appellant was aware of the LNTM, the actions he took in response to it were not appropriate.

The LNTM informed Appellant of essentially three facts. First, that there was severe shoaling in the ICW at the approximate location where he grounded. [CG Ex. 3b; TR Vol. II at 10, 11]. Second, that the width of the ICW, which is projected at 125 feet, was reduced to approximately 30 feet. [CG Ex. 3b; TR Vol. I at 79, Vol. II at 27]. Finally, that a light which at one time had marked the encroaching edge of the shoal into the ICW, was now in three feet of water. [CG Ex. 3b; TR Vol. II at 23]. Appellant also knew that the tide would be falling during his transit of the Baker s Haulover area, at a height of approximately 1.5 feet above mean low water, and the ebb current would be setting in the general direction of the shoal. [TR Vol. II at 17, 50]. Further, Appellant testified that he knew that the western edge of the ICW in the Baker s Haulover area was unforgiving, being lined with rock. [TR Vol. II at 46]. In light of this information, Appellant attempted to squeeze a unit with a 40 foot beam, through a 30 foot channel, knowing that he would have to hug the unforgiving western edge of the channel to even have a chance of threading this needle. Appellant deliberately left himself with a Hobson s choice in navigating the area, either hug the western edge of the channel and risk grounding on the rock lined channel edge, or favor the eastern part of the ICW which was sandy and subject to severe shoaling. [TR Vol. II at 46]. Once placed in this situation, Appellant chose the latter. However, the crux of his negligence was that he placed himself in that situation in the first place.

I find distressing Appellant's argument that he planned his transit knowing that the conditions allowed no room for error. In his brief, Appellant concedes that he knew that the depth of the shoal water over which the starboard side of the barge would transit was roughly equal to the depth of his barge. [Brief at 15]. Furthermore, Appellant also had no room for lateral error as the port side of the barge had to be on the western edge of the ICW, while the starboard side of the tug had to be on the shoaled eastern edge of the ICW. Moreover, Appellant attempted the transit when the current would be setting his flotilla in the direction of the shoal. [TR Vol. at 50]. When a mariner navigates through an area with barely adequate depth or width, making an assessment of the clearances from charted depths, predicted tide levels, and estimated channel widths, he places his vessel at risk. Even modern charts and tide tables are not always exact, and may vary appreciably from predictions. However, there is no need in this case to draw a bright line rule as to the adequate clearance required for safe navigation because the Appellant here left himself with no clearance in either direction.

Next, Appellant contends that this finding is erroneous because the words "hazardously shoaled" were not used in the LNTM. Appellant claims that the LNTM did not include such language and there was no testimony that the area was hazardously shoaled. However, the LNTM starts off with the phrase "Severe shoaling exists in the Intracoastal Waterway. . ." On its face, such wording indicates the potential for hazardous conditions to all but the most apathetic mariner. Under Appellant's theory, replacing the word "severe" with "hazardous" in the LNTM would have made a difference. I disagree. A mariner provided with information that severe shoaling exists within the confined channel he is about to transit can only assume the potential for a hazardous situation. This is especially true when the shoaling results in channel depths equal to or less than the draft of the mariner's vessel. Granted, hazards are relative to each vessel; what is hazardous to Appellant's flotilla may not be hazardous to a 15 foot pleasure craft. However, the Administrative Law Judge did not err by finding that, based on the prevailing conditions, the area was hazardously shoaled with respect to Appellant's flotilla.

Appellant also contends that the Administrative Law Judge should not have considered Appellant's evaluation of the tide and visibility conditions because these factors were not specifically included in the specification. As stated in section I, a basis of the charge in this case was the grounding. The Administrative Law Judge can properly consider any facts that relate to the grounding and there is no requirement that every potential reason for the grounding be included in the specification. It is enough that the specification indicates to the Appellant the general action for which he was charged.

III

Appellant asserts that the four month suspension ordered by the Administrative Law Judge was excessive. I disagree. It is well established that the order imposed at the end of a hearing is within the discretion of the Administrative Law Judge and will not be modified on appeal unless clearly excessive or an abuse of discretion. *See Appeal Decision 2463 (DAVIS)* (and cases cited therein), *aff'd* NTSB Order EM-155 (1989). Appellant has made no such showing here.

Although the Administrative Law Judge is not bound by the suggested range of orders found in 46 C.F.

R. § 5.569(d), the four month suspension he imposed is well within the suggested range for an offense of negligence involving duties related to navigation. In Appeal Decision 2500 (SUBCLEFF), a six month suspension was ordered based on facts similar to this case. In that case, as here, a conscious disregard of published navigation information coupled with the risk posed to the environment by the mariner's negligence, justified the length of the suspension ordered.

Appellant also claims, but offers no authority, that the Administrative Law Judge may not award a sanction more severe than the letter of warning the Coast Guard offered to Appellant at the conclusion of its investigation, but before the hearing. No regulation or prior decision supports Appellant's position. Offering this evidence in mitigation, as Appellant did, was proper. *See* 46 C.F.R. § 5.569(b) (evidence in mitigation is a factor that may affect the order). However, the Administrative Law Judge was not limited by the Coast Guard's prior offer.

IV

Finally, Appellant claims that he was denied due process because the Administrative Law Judge did not schedule a separate hearing to consider Appellant's evidence in mitigation, before suspending his license. I disagree.

Again, Appellant offers no authority, and I am aware of none, that supports the proposition that the Administrative Law Judge is required to hold a hearing to receive evidence in mitigation. The regulation only requires that the Administrative Law Judge allow the Appellant to submit evidence in mitigation. *See* 46 C.F.R. §§ 5.501, 5.565.

The Appellant availed himself of the option to submit evidence in mitigation. [Resp. Exhibit V]. In his submission, Appellant requested an additional hearing to review the mitigating evidence. However, there was no reason for the Administrative Law Judge to reassemble the parties to review the mitigating evidence. Nor did Appellant mention that he had additional evidence that could only be produced in the setting of a hearing. It was not until the submission of Appellant's brief on appeal, that Appellant alludes to additional mitigating evidence that was not provided in the initial submission, and which would have been offered at a hearing. [Brief at 19]. Even so, Appellant's brief again fails to describe this additional evidence.

Because Appellant was given an opportunity to submit mitigating evidence, and offered no reason why additional mitigating evidence could not be provided except in person at an additional hearing, this basis of appeal is without merit.

CONCLUSION

The Administrative Law Judge's finding that the location of the COASTAL CANAVERAL was four

feet from temporary buoy "7A" is not supported by the record and is hereby modified. This error was harmless. The Administrative Law Judge's remaining findings are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The Decision of the Administrative Law Judge, dated April 18, 1994, as modified by my supplemental findings, 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, D.C. this 21st day of July, 1997.