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
vs.	:	VICE COMMANDANT
LICENSE NO. 80607	:	ON APPEAL
Issued to: Bruce Driggers, Appellant	:	NO. 2581

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

By order dated February 17, 1995, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license based upon finding proved the charge of *violation of law or regulation*. The single specification supporting the charge alleged that on June 12, 1993, while serving as operator of the M/V MARGARET BRENT, Appellant failed to maintain a proper lookout by all available means, in violation of 33 C.F.R. Part 81, Appendix A.

The hearing began on December 14, 1993, and was held for four consecutive days at Davenport, Iowa. Appellant was represented by professional counsel and entered a response denying the charge and specification.

The Coast Guard Investigating Officer introduced into evidence 19 exhibits and the testimony of eight witnesses. In defense, Appellant offered into evidence 19 exhibits and the testimony of seven witnesses, including himself. The Administrative Law Judge entered one exhibit into evidence.

Both parties submitted proposed findings and were given the opportunity to submit written closing arguments. The Appellant chose not to submit a closing argument. The Administrative Law Judge issued a written Decision and Order (D&O) on February 17, 1995. It

concluded that the charge and specification were found proved and suspended Appellant's

license outright for a period of three months, with a three month additional suspension, remitted after 18 months of probation. Appellant filed a timely notice of appeal on March 6, 1995. The appeal was perfected on April 24, 1995, after Appellant received an extension. Therefore, this appeal is properly before me for review.

APPEARANCE: Frank S. Thackston, Jr., Lake Tindall and Thackston, P.O. Box 918, 127 South Poplar Street, Greenville, MS 38701.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above captioned license which authorized service as operator of uninspected towing vessels upon the Great Lakes or inland waters. On Saturday, June 12, 1993, Appellant was acting under the authority of this license while serving as operator on the M/V MARGARET BRENT, a 150 foot uninspected towing vessel that is required by law to be under the control of a licensed operator while underway. At approximately 1130, while the MARGARET BRENT was proceeding upbound on the Mississippi River, somewhere between mile 414.5 and mile 414.6, it collided with a pleasure craft operated by Mr. Toomire. A passing pleasure boater captured the events before and immediately after the collision on a video tape.

The facts below trace the separate chain of events that transpired for each vessel, leading up to the collision. The record indicates that the current in the vicinity of the collision was swift, estimated at 7-8 miles per hour. The record also contains many references to approximate vessel speeds, which have been estimated in miles per hour over the ground, as opposed to knots.

The M/V MARGARET BRENT

On the day in question, the MARGARET BRENT was pushing a barge flotilla consisting of 15 empty grain barges, configured three wide and five long, with a sixteenth barge on the port hip. The distance from the wheelhouse of the MARGARET BRENT to the head of the flotilla was approximately 1000 feet. At 1057, the MARGARET BRENT departed Lock 18, which lies at mile marker 410.5 on the Mississippi River, and Appellant brought the MARGARET BRENT up to full throttle, approximately 8-10 miles per hour.

Due to the configuration of MARGARET BRENT's flotilla, and the 16 foot freeboard of the barges, the Appellant was unable to see approximately 1000 feet of the waterway in front of the flotilla. Such a blind spot is not uncommon for tug flotillas transiting the Mississippi River. Respondent's employer had issued a company policy addressing the blind spot and requiring a lookout to be posted on the head of the tow in areas with a high concentration of pleasure boats. Upon leaving the lock, Appellant was aware that pleasure boats were locking through behind him; however, he determined that there was no traffic in the visible waterway ahead. Appellant did not place a lookout at the head of the tow. Instead, he acted as lookout from the wheelhouse. At the same time, he was also piloting the vessel, filling out the logs, and talking on the radio.

The Appellant was aware that the Coast Guard had established a restricted zone, from mile marker 414 to 416, for a scheduled marine event near the riverside town of Oquawka, Illinois. The restricted zone was in effect from 0900 until 1600 and vessels were prohibited from transiting through this area. When Appellant overheard on the radio that the scheduled boat races were delayed, he requested and was granted permission from the Coast Guard to proceed through the restricted area, provided he could clear mile marker 416 by noon.

Appellant testified that, just before he received permission to enter the restricted zone, he reduced the speed of the MARGARET BRENT from 8-10 miles per hour to 2-3 miles per hour. At the approximate time of the collision, the MARGARET BRENT had noticeable prop wash at its stern but was not producing a noticeable bow wake.

The pleasure boats that locked through Lock 18 behind the MARGARET BRENT eventually caught up with her. The first time Appellant was aware that these pleasure

boats were in his immediate vicinity was when he noticed several boats overtaking him on both the port and starboard sides. About this same time, another licensed operator entered the wheelhouse to begin the relief process with Appellant. Appellant alleges that once he noticed the passing boats, he directed the first mate on watch to proceed to the head of the tow to act as bow lookout. Before proceeding forward, the mate went below to obtain a life preserver and a radio. As the MARGARET BRENT was configured that day, it would have taken three to five minutes for the mate to walk from the tug to the head of the tow.

Appellant first became aware of a potential problem when he observed people in the pleasure boats waving their arms. Appellant immediately pulled the throttles to idle and then to reverse. By this time, the mate had proceeded almost halfway to the head of the tow. The mate eventually informed Appellant that the MARGARET BRENT had collided with, and run over, a pleasure boat, and that people were in the water. Appellant continued backing down and the pleasure boat eventually resurfaced.

The Pleasure Boat

The pleasure boat involved in the collision was operated by Mr. Toomire, and was carrying a total of six persons. The Toomire boat, along with eight other upbound pleasure boats, arrived at Lock 18 while the MARGARET BRENT was in the process of locking through, and awaited their turn at the southern end of the lock. The pleasure boats locked through as a group and departed the lock 18 minutes after the MARGARET BRENT, at approximately 1115. The Toomire boat proceeded upriver at approximately 25-30 miles per hour and passed the MARGARET BRENT. The Toomire boat stopped briefly, when it was one-half to three-quarters of a mile ahead of the MARGARET BRENT, to socialize with other boats that had also stopped. A rear facing passenger in the Toomire boat testified that, when the Toomire boat first stopped, she could see the wheelhouse of the MARGARET BRENT, but as the distance between the two vessels closed, the wheelhouse disappeared behind the barges. Appellant testified that the Toomire boat never came out of the blind spot.

In any event, after this brief stop ahead of the MARGARET BRENT, the other pleasure boats began their upriver transit again, but the Toomire boat stalled. Mr. Toomire made several attempts to start the engine, all of which failed. Because of the swift current, the Toomire boat was quickly set downriver towards the MARGARET BRENT, and eventually collided with the MARGARET BRENT's tow. Five of the passengers in the boat jumped off before the collision, Mr. Toomire remained on the boat. One of Mr. Toomire's passengers was killed while the others survived with injuries.

The Appellant was unaware that the Toomire boat was having mechanical problems and drifting on a collision course with the head of the tow. Appellant did not take any evasive maneuver prior to the collision.

BASES OF APPEAL

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

1. Selective enforcement of the Rules of the Road violations against commercial mariners violates the equal protection component of the Fifth Amendment;

2. The Administrative Law Judge improperly refused to dismiss the charge after the Coast Guard presented its case;

3. The evidence was insufficient to support a finding that Appellant's lookout was not proper;

4. The evidence was insufficient to support a finding that the lookout on the MARGARET BRENT was not proper at the time the vessel departed Lock 18; and

5. The evidence was insufficient to support three of the specific findings of the Administrative Law Judge: that the collision occurred between mile 414.5 and 414.6; that the speed of the MARGARET BRENT at the time of the collision was 8-10 miles per hour; and that the Toomire boat passed out of the MARGARET BRENT's blind spot

before stopping in the water.

OPINION

I

Before proceeding to the merits, I find it necessary to address the statutory basis of the specification.

Because the Appellant was charged with *violation of law or regulation,* the specification must state a specific statute or regulation. 46 C.F.R. 5.33. Although the specification states an inland navigation rule, it incorrectly cites 33 C.F.R. Part 81, Appendix A, which contains the international navigation rules. The correct citation for the inland lookout rule is 33 U.S.C. 2005 ("Rule 5").

The fact that the specification cites the incorrect law does not constitute reversible error in this case. The wording of the lookout rule is identical for both the inland and the international rules. *Compare* 33 U.S. C. foll. 1602 Rule 5 (International Rules) *with* 33 U.S.C. 2005 (Inland Rules). 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 Decision 2422 (GIBBONS), *citing* Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D. C. Cir. 1950); Appeal Decision 1792 (PHILLIPS). The record clearly shows that the Appellant understood that the substance of the charge was his failure to maintain a proper lookout while underway on inland waters. [Transcript (TR) Vol. I at 37-38; Appellant's Brief (Brief) at 6]. This is the offense that was actually litigated by the parties, and decided upon by the Administrative Law Judge, regardless of the incorrect citation in the specification. [TR Vol. I at 37-38; D&O at 6]. Moreover, Appellant did not object to the wording of the specification, either at the hearing or on appeal. Therefore, there was no prejudice to Appellant and the specification need not be set aside. Appeal Decision 2386 (LOUVIERE).

II

Appellant's first basis of appeal asserts that the alleged Coast Guard policy of enforcing Rules of the Road violations against commercial mariners, and not against recreational boaters, violates his Constitutional rights of equal protection. Appellant's basis is not timely raised. In order for me to consider an issue on appeal, a valid motion or objection must be made at the hearing, or there must be clear error on the record. 46 U.S.C. 5.701(b); Appeal Decisions 2458 (GERMAN), 2376 (FRANK). Therefore, because Appellant did not raise this defense at the hearing, and there is no clear error, he is precluded from raising it for the first time on appeal. Appeal Decisions 2400 (WIDMAN), 2376 (FRANK).

III

Appellant asserts that the Administrative Law Judge improperly refused to dismiss the charge after the presentation of the Coast Guard's case. I disagree.

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 2461 (KITTRELL); 2321 (HARRIS); 2294 (TITTONIS) . Appellant claims that, because the Coast Guard did not produce a witness to testify, nor any document to state, that Appellant was in violation of Rule 5, it failed to introduce any reliable, probative, or substantial evidence.

However, the determination of what constitutes a proper lookout is based on the facts and circumstances

of each case. *See* Appeal Decisions 2503 (MOULDS); 2474 (CARMIENKE); 2421 (RADER); 2414 (HOLLOWELL); 2319 (PAVELEC). In making out a *prima facie* case that the Appellant violated Rule 5, the Coast Guard was only required to submit evidence that some circumstances existed which indicated that Appellant was not maintaining a proper lookout. In this case, the Coast Guard introduced substantial evidence, most notably the existence of a significant blind spot in front of the flotilla and the lack of a bow lookout. [TR Vol. I at 69, 109, 168, 172, 175]. Therefore, the Administrative Law Judge properly refused to grant Appellant's motion to dismiss the charge.

IV

The crux of this appeal is the assertion that the evidence was insufficient to support the Administrative Law Judge's finding that the Appellant failed to maintain a proper lookout as required by Rule 5. I disagree with this assertion.

From Appellant's brief, I am able to identify three arguments in support of this basis of appeal. First, Appellant claims that the Administrative Law Judge incorrectly refused to accept, as uncontradicted proof, the testimony of Appellant's experts. Second, Appellant challenges the relevance of the facts and circumstances relied upon by the Administrative Law Judge in making her decision and cites authority to support the position that a bow lookout is not mandatory. Finally, Appellant argues that the Toomire boat violated the Rules of the Road, and therefore its negligence caused the collision. I shall address each of these arguments in order.

A

Appellant claims that the opinions of his experts are "uncontradicted proof" that Appellant maintained a proper lookout under the circumstances and therefore the Administrative Law Judge was bound to decide in concert with the experts' opinions. [Brief at 18]. I disagree.

I do agree with Appellant's claim that the adequacy of a lookout is a question of fact to be determined by the facts and circumstances of each case. Appeal Decisions 2503 (MOULDS); 2474 (CARMIENKE); 2421 (RADER); 2414 (HOLLOWELL); 2319 (PAVELEC). However, as a matter of law, the person who shall determine whether, under the facts and circumstances of this case, Appellant maintained a proper lookout, is the Administrative Law Judge, not the experts. *Id.*; 46 C.F.R. 5.563. She is not bound by expert opinion. Appeal Decisions 2302 (FRAPPIER); 2294 (TITTONIS).

The facts upon which the Administrative Law Judge based her decision were not disputed by Appellant's experts. The experts only offered their opinion that, in the same set of circumstances, they too would not have posted a bow lookout any sooner than Appellant did. The testimony of these experts obviously did not convince the Administrative Law Judge that Appellant was not in violation of Rule 5, nor does it convince me that the Administrative Law Judge's decision was in error.

Although not directly argued on appeal, Appellant's brief implies that it is a custom among tug boat

operators to operate with a significant blind spot and no bow lookout. What the industry does, or does not do, is not the standard imposed by the navigation rules; a custom in violation of a positive statutory enactment will not be enforced. Appeal Decision 2070 (PAYNE), *aff'd* NTSB Order EM-64; Burns v. Anchor-Wate Co., 1973 A.M.C. 215, 221 (5th Cir. 1972); LeHigh Coal & Navigation Co. v. Compagnie Generale Transtlantique, 12 F.2d 337 (2d Cir. 1926); *See also* Appeal Decision 2261 (SAVOIE) (duty to ensure compliance with regulation overrides established custom); J.W. Griffin, The American Law of Collision, 253 (1949). Under the facts and circumstances of this case, such a "custom" would neither allow an operator to make a full appraisal of the situation nor a full appraisal of the risk of collision. Therefore, the Administrative Law Judge properly rejected the expert opinion.

B

Appellant asserts that the Administrative Law Judge erred in determining that, under the circumstances present on June 12, 1993, Appellant was required to post a bow lookout. First, Appellant claims that the facts relied upon by the Administrative Law Judge do not support her finding that Appellant should have posted a bow lookout. Second, Appellant cites authority which he claims supports the proposition that a bow lookout was not mandatory in this case. I disagree with both claims.

The determination of whether Appellant failed to maintain a proper lookout, as

required by Rule 5, falls within the province of the Administrative Law Judge and her findings will not be overturned on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *affd* NTSB Order No. EM-182 (1996); 2546 (SWEENEY); 2541 (RAYMOND); 2522 (JENKINS); 2492 (RATH); 2333 (AYALA).

The Administrative Law Judge identified the following circumstances present that should have indicated to the Appellant that he could expect to encounter numerous pleasure boats during his transit north from Lock 18. The alleged violation occurred in good weather, on a Saturday, and during the summer months. [D&O at 3]. The violation occurred within the immediate vicinity of a planned marine event. [D&O at 3, 8-9]. The location of the marine event was in the vicinity of the riverside town of Oquawka, Illinois, which has a recreational boat harbor. [D&O at 4, 8-9]. And finally, Appellant was aware that some recreational boats were locking though Lock 18 behind the MARGARET BRENT and would eventually overtake him. [D&O at 4, 9].

In addition to the expectation of pleasure boats, two other significant facts influenced the Administrative Law Judge's decision. First, the Appellant was piloting a flotilla with a configuration that resulted in a 1000 foot blind spot ahead. [D&O at 4]. Second, the Appellant was allegedly acting as his own lookout from the wheelhouse while he was also piloting, keeping logs, talking on the radio, and being relieved by the oncoming watch. [D&O at 6].

Appellant does not challenge the existence of these facts and circumstances, only the Administrative Law Judge's determination that these facts warranted a bow lookout. Appellant argues that none of these

facts individually warrant the requirement for a bow lookout. Herein lies Appellant's first error. The Administrative Law Judge must consider the facts in total, not separately. Although one isolated fact may not itself support a determination that a bow lookout is required, the Administrative Law Judge determined that the totality of the circumstances did require a bow lookout. There is ample evidence on the record, as discussed above, to support such a determination. Hence, Appellant has not shown error.

I will now address Appellant's specific arguments concerning the findings that the Administrative Law Judge relied on in making her determination that a bow lookout was required.

Appellant first claims that the Administrative Law Judge's finding that he knew of several upbound pleasure boats behind him, and likely to overtake him, does not mandate posting a bow lookout because he could not anticipate that these pleasure boats would cut in front of the barge. Similarly, Appellant claims that the existence of the 1000 foot blind spot only requires a bow lookout if the operator anticipates that another vessel will enter the blind spot. Therefore, Appellant asserts, since he never anticipated that any of the upbound pleasure boats would overtake him and enter his blind spot, a bow lookout was not required. [Brief at 40-51].

Appellant offers no authority to support this assertion and I decline to accept it. The purpose of a lookout is to provide the operator with information so he can "make a full appraisal of the situation and the risk of collision." 33 U.S.C. 2005. Information on the unanticipated maneuvers of other vessels is paramount to making a full appraisal of the situation. Neither the statute nor the legislative history conditions the lookout requirement on the operator's subjective anticipation of the actions of other vessels. 33 U.S.C. 2005; S. Rep. No. 979, 96th Cong., 2nd Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN NEWS 7068.

Appellant also asserts, without any supporting authority, that the existence of a marine event in the vicinity of the violation only supports a finding that a bow lookout is required if boats were actually navigating in and out of the restricted zone at the time the MARGARET BRENT was transiting through. As the facts of this case point out, recreational motor boats are generally much faster and far more maneuverable than a tug and barge flotilla. Appellant's mate testified that it could take up to five minutes to walk to the head of the flotilla. [TR Vol. I at 211]. In five minutes, a recreational boat travelling at 30 miles per hour covers 2.5 miles. Therefore, the fact that Appellant saw no boats in the immediate area, does not indicate that his situation did not require a bow lookout.

Finally, Appellant claims that the existence of a boat harbor, almost two miles upriver at Oquawka, was too far to require a bow lookout in the vicinity of the violation. However, pleasure boats do not just operate in the immediate vicinity of their originating boat harbor and it is easy to conceive that a boat could have left the boat harbor and transited to Appellant's location before he had the opportunity to have a bow lookout in place.

I find that the Administrative Law Judge's determination that the Appellant failed to maintain a proper lookout by not posting a bow lookout is supported by substantial evidence, and is not clearly erroneous,

arbitrary, capricious, or based on inherently incredible evidence.

Appellant also cites numerous negligence cases to support the general proposition that a bow lookout is not mandatory. [Brief at 19]. However, not only are the facts and circumstances of Appellant's cases substantially different from this case, but this is not a negligence case. Moreover, the cases cited by Appellant suggest that a lookout is required on the bow if the view from the wheelhouse is obstructed or if a lookout in the wheelhouse cannot actually observe what a bow lookout could see. *See, e.g.*, China Union Lines, Ltd. v. A.O. Anderson & Co., 364 F.2d 769, 781-2 (5th Cir. 1966) (fault for not having a bow lookout was not proximate cause of collision when wheelhouse lookout saw everything bow lookout would have seen); The Mamei, 152 F.2d 924, 929 (3d Cir. 1945) (pilothouse lookout on 355 foot vessel not improper if unobstructed view and presence of bow lookout would not have prevented collision); Williamson v. The Carolina, 158 F. Supp. 417, 421 (D.N.C. 1958) (bow lookout not required on flotilla with only one 210 foot barge, excellent observation from the wheelhouse, and light traffic); Oliver J. Olson & Co. v. The Marine Leopard, 152 F. Supp. 197, 204 (N.D. Ca. 1957) (absence of bow lookout not a proximate cause of the collision when wheelhouse lookout had unobstructed view and positioning lookout on the bow would not have enhanced observation). Clearly, in the instant case, a bow lookout would have had a different, and better, view than Appellant had from the wheelhouse.

The most persuasive authorities in this instance are the prior Appeal Decisions which hold that the existence of a blind spot or visual obstruction may require posting a lookout on the bow, instead of in the wheelhouse. *See* Appeal Decisions 2482 (WATSON); 2421 (RADER); 2414 (HOLLOWELL). Other Appeal Decisions establish that failure to see what ought to be seen is conclusive evidence of a deficient lookout. Appeal Decisions 2046 (HARDEN); 1007 (POWELL). Finally, the Senate Report that accompanied the Inland rules, which was cited by the Administrative Law Judge, clearly states the circumstances allowing the watch officer to also serve as lookout. "On vessels where there is an *unobstructed all-around view provided at the steering station* . . . or where there is no impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout." S. Rep. No. 979, 96th Cong., 2nd Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN NEWS 7068, 7075 (emphasis added). There is no question in this case that Appellant did not have an unobstructed view from the wheelhouse and that he failed to see what he should have seen.

Although I agree that Rule 5 does not specify a location for the lookout, the overwhelming weight of authority, including Appellant's cases, suggests that lookouts should ordinarily be on the bow and that a pilot steering the vessel is not a proper lookout unless a bow lookout would add no additional information. *See, e.g.*, The Ottawa, 70 U.S. 268 (1865); Chamberlin v. Ward, 62 U.S. 548 (1859); The Spica, 6 F.3d 193 (4th Cir. 1993); Tug Ocean Prince, Inc. v. United States, 584 F.2d 1151 (2d Cir. 1978); Bunge Corp. v. M/V Furness Bridge, 558 F.2d 790 (5th Cir. 1977); Dwyer Oil Transport Co. v. The Edna M. Malton, 255 F.2d 380 (2d Cir. 1958); The Supply No. 4, 109 F.2d 101 (2d Cir. 1940); St. Philip Offshore Towing Co., Inc. v. Wisconsin Barge Lines, Inc., 466 F. Supp. 403 (E.D. La. 1979); Oil Transfer Corp. v. Diesel Tanker F.A. Verdon, Inc., 192 F. Supp. 245 (S.D.N.Y. 1960); *See also* the authorities assembled at Osaka Shosen Kaisha, Ltd. v. The Elene, 190 F. Supp. 201, 204 (D. Md. 1961); *See also* Griffin, *supra* at 107; F.E. Bassett & R.A. Smith, Farwell's Rules of the Nautical Road, 361-365 (6th ed. 1982); A.M. Knight, Knight's Modern Seamanship, 24.2 (John V. Noel, Jr. ed., 18th ed. 1989);

A.L. Parks & E.V. Cattell, Jr., The Law of Tug, Tow, and Pilotage, 150 (3d ed. 1994). Furthermore, at least one court has held that a blind spot created by the makeup of a tow mandates posting a lookout at the head of the flotilla. Taylor v. Tiburon, 1975 A.M.C. 1229 (E.D. La. 1974).

C

Finally, Appellant alleges, several times in his brief, that the Toomire boat was negligent for cutting into the blind spot of the MARGARET BRENT before completing the overtaking maneuver. Appellant cites several cases that stand for the general proposition that the navigation rules apply to all vessels and each vessel may assume the other vessel will abide by the rules. Therefore, he asserts, the Toomire boat violated the navigation rules and this negligence absolves Appellant of any fault for not maintaining a proper lookout. I disagree.

Suspension and revocation proceedings are administrative and remedial in nature and therefore the negligence of third parties is not a defense. Appeal Decisions 2380 (HALL); 2319 (PAVELEC). Issues of proximate cause are not relevant nor are fault determinations necessary. The only issue is whether Appellant was in violation of Rule 5. Therefore, whether the Toomire boat also violated the Rules of the Road is irrelevant to these proceedings . *See* Appeal Decisions 2166 (REGISTER); 2012 (HERRINGTON); 1822 (EVANS).

V

Appellant asserts that the evidence was insufficient to support the Administrative Law Judge's separate finding in her opinion that the lookout on the MARGARET BRENT was improper from the time the vessel departed Lock 18, at mile marker 410.5. I disagree.

The offense Appellant was charged with alleges failure to maintain a proper lookout at "about 1130 hours . . . at approximately [mile marker] 414.3." [D&O at 2]. The Administrative Law Judge could not determine whether this charge was proved without first determining what constituted a proper lookout aboard the MARGARET BRENT under the circumstances. The finding challenged by the Appellant did just this.

The Administrative Law Judge determined that a proper lookout aboard the MARGARET BRENT required Appellant to station a lookout on the bow, and that this requirement arose when the Appellant departed Lock 18 and continued until the time and location specified in the charge. This finding was based on substantial evidence in the record regarding the circumstances known to Appellant when he departed Lock 18. This evidence included Appellant s knowledge that the MARGARET BRENT had an extensive blind spot, that nine recreational boats were locking through behind the MARGARET BRENT and would be shortly overtaking the flotilla due to their much greater speed, and that he would be transiting an area where more recreational boats could be expected.

It is well established that the Administrative Law Judge s evidentiary determinations will be upheld on

appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *affd* NTSB Order No. EM-182 (1996); 2546 (SWEENEY); 2541 (RAYMOND); 2522 (JENKINS); 2492 (RATH); 2333 (AYALA). The Administrative Law Judge's finding that the lookout was improper at the time the MARGARET BRENT left Lock 18 is supported by substantial evidence and is not clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence.

VI

Appellant asserts that three of the specific findings of the Administrative Law Judge were unsupported by the record. This basis of appeal is governed by the same standard as the previous section; the Administrative Law Judge s findings will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. *Id.* After review of the record, I find that sufficient evidence exists in the record to support the findings of the Administrative Law Judge on the location of the collision and the location of the Toomire boat when it stopped. On the other hand, I find that the record does not support the finding that the MARGARET BRENT was proceeding at 8-10 miles per hour at the time of the violation.

A

The Administrative Law Judge found that the collision occurred between mile 414.5 and 414.6, abreast of Long Island. [D&O at 6]. This finding was based partially on the testimony of two Army Corps of Engineers experts who, after viewing the video, estimated the position of the collision based on their knowledge of the local landmarks. [TR Vol. II at 192, Vol. IV at 159; CG Exhibits 18, 22, 23]. One of the landmarks the experts used was a grain elevator located at mile marker 415.5. [TR Vol. II at 186]. Appellant's brief incorrectly claims that this grain elevator is located at mile marker 414.5, and therefore, since the video shows the grain elevator to be upriver from the site of the collision, the collision could not possibly have occurred at 414.5. However, Appellant misread the record. The testimony of Mr. Pettis was that the grain elevator was located at mile 415.5, as opposed to 414.5. *Id*. Therefore this basis of appeal is without merit.

In any event, the finding on the approximate location of the collision is relevant to the charge only because it establishes that the violation occurred within the restricted zone of the marine event. Based on this, the Administrative Law Judge found that Appellant should have anticipated spectator boats in this area. Whether the collision actually occurred at mile marker 414.25, as alleged by Appellant, or mile marker 414.5, as alleged by the Coast Guard, is therefore not relevant as both locations are within the restricted zone. [D&O at 3].

B

The Administrative Law Judge based her finding that the speed of the MARGARET BRENT was 8-10 miles per hour on the testimony of Messrs. Neff and Pettis, the video, and other evidence. [D&O at 10].

Mr. Neff testified that because he could see "water turning in the back of the boat" he believed the MARGARET BRENT was traveling at 8-10 miles per hour. [TR Vol. II at 168]. My review of the record reveals no testimony by Mr. Pettis concerning the speed of the MARGARET BRENT. However, Mr. Toomire testified that he believed the MARGARET BRENT was not proceeding at a no-wake speed at the time he passed down her starboard side, claiming that the "churning of water was terrific." [TR Vol. II at 31, 44]. Yet, Mr. Toomire also testified that he observed no bow wake just prior to the collision. [TR Vol. II at 87].

Of all the evidence concerning the speed of the MARGARET BRENT, the video is most conclusive. Although propeller wash is present at the MARGARET BRENT's stern, there is no sign of any wake from the barges. [CG Exhibit 18]. An expert testified that a tug proceeding at 8-10 miles per hour against a 7-8 miles per hour current would necessarily have a bow wake. [TR Vol. II at 308]. Experts also testified that the observed propeller wash was normal for a vessel proceeding at slow speed against a swift current and that the conditions observed on the video were those of a vessel proceeding at no-wake speed. [TR Vol. II at 316, Vol. IV at 19]. Further, Mr. Toomire's testimony about the speed of the MARGARET BRENT must be limited to the time frame of his passing; the collision occurred after he passed and the MARGARET BRENT could have slowed further. Therefore, the record does not support the Administrative Law Judge's finding that the speed of the MARGARET BRENT was 8-10 miles per hour at the time of the accident.

This error does not affect the outcome of this case because the speed of the vessel was not considered by the Administrative Law Judge as one of the factors requiring a lookout. *See* Section IV, *supra*. There were many other circumstances that mandated a lookout on the bow, regardless of the MARGARET BRENT's speed at the time of the violation.

C

Finally, Appellant asserts that the Administrative Law Judge's finding that the Toomire boat reached a point one-half to three-quarters of a mile ahead of the flotilla is unsupported by the evidence. Appellant claims that when the Toomire boat passed the MARGARET BRENT, it entered the 1000 foot blind spot and never came out. I disagree.

There was conflicting evidence on the location of the Toomire boat when it stopped. Mr. Toomire testified that he was one-half to three-quarters of a mile ahead of the MARGARET BRENT flotilla when he stopped. [TR Vol. II at 107-8]. Mrs. Toomire, a rear facing passenger in the Toomire boat, testified that the boat was at least one-half mile ahead of the flotilla when the boat stopped. [TR Vol. II at 121, 131]. She also testified that when the Toomire boat initially stopped, she could see both the tug and the barges behind her, but that by the time Mr. Toomire began experiencing mechanical difficulties, the tug disappeared behind the barges. [TR Vol. II at 123-4]. Appellant claims that none of the pleasure boats that passed him, including the Toomire boat, ever passed out of his blind spot. [TR Vol. III at 48].

It is well established that questions involving the credibility of a witness are best decided by the

Administrative Law Judge who presides at the hearing. Appeal Decisions 2017 (TROCHE), *aff'd* NTSB Order No. EM-49 (1976); 2253 (KIELY); 2279 (LEWIS); 2290 (DUGGINS). The Administrative Law Judge's credibility determinations will be upheld absent a demonstration that they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *affd* NTSB Order No. EM-182 (1996); 2546 (SWEENEY); 2541 (RAYMOND); 2522 (JENKINS); 2492 (RATH); 2333 (AYALA). Appellant makes no such showing.

Appellant also argues that, based on speed-time-distance calculations, it was not physically possible for the Toomire boat to proceed one-half mile ahead of the

MARGARET BRENT before stopping. The problem with this argument is that Appellant attempts to support this unequivocal claim with calculations that are only based on estimates from the record. For instance, Appellant's calculations assume that the Toomire boat was travelling at 25 miles per hour. However, the record reflects, and the Administrative Law Judge found, that the speed of the Toomire boat was within the range of approximately 25-30 miles per hour. [D&O at 4; TR Vol. I at 210, Vol. II at 30, 105]. Further, the Administrative Law Judge found that the collision occurred between 1125 and 1134, a nine minute range. [D&O at 5]. Appellant's calculations assume the collision occurred at 1125. [Brief at 55]. Appellant makes no attempt to establish a range of possibilities based on the outer limits of the various estimates found in the record.

Therefore, the Administrative Law Judge s finding concerning the location of the Toomire boat is supported by the record and not inherently incredible.

VI

Although not listed as a separate basis of appeal, one final issue deserves brief attention. Interwoven throughout Appellant's brief is the assertion that the Administrative Law Judge based her conclusion, that Appellant failed to maintain a proper lookout, solely on the fact that a collision occurred. This assertion illustrates an important point. I am not concerned in this proceeding with determining liability or fault for the collision. Appeal Decision 1822 (EVANS). Therefore, the fact that Appellant's violation may have contributed to the collision is not pertinent to this case, nor are the actions of the Toomire boat. The casualty in this case was merely the event which prompted the investigation. Appeal Decision 2277 (BANASHAK). The Administrative Law Judge correctly limited herself to considering the facts and circumstances that directly pertain to whether Appellant failed to maintain a proper lookout, and not to whether Appellant's actions caused the collision.

CONCLUSION

As discussed in Section I of my Opinion, the specification is properly amended to cite 33 U.S.C. 2005 ("Rule 5"). The Administrative Law Judge's finding that the speed of the MARGARET BRENT at the

time of the violation was 8-10 miles per hour is not supported by the record and is hereby vacated. 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 and conclusions, 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 31st day of December, 1996.