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
	:	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 811332	:	NO. 2639
Issued to William C. Hauck	:	

This appeal is taken in accordance with 46 U.S.C. § 7702, 46 C.F.R. § 5.701, and 33 C.F.R. Part 20.

By a Decision and Order (D&O) dated October 2, 2001, an Administrative Law Judge (ALJ) of the United States Coast Guard suspended Respondent, William C. Hauck's, above-captioned license outright for a period of twelve (12) months based upon finding proved one charge of *negligence* and three charges of *violation of law or regulation*. At the time of the hearing, there was one specification under the charge of negligence and one specification under each of three charges of violation of law or regulation. Under the charge of negligence, the specification alleged that the Respondent, while serving as master of the M/V ST. LUCIE on July 29, 2000, negligently operated the M/V ST. LUCIE by failing to navigate the vessel with due caution, contributing to an allision with Bethel Bank Daymarker Number 19 (LLNR 12497), causing substantial damage. Under the first charge of violation of law or regulation, the specification alleged that on July 29, 2000, while serving as Master of the M/V ST. LUCIE, the Respondent failed to maintain a proper look-out for the prevailing circumstances and conditions, by failing to comply with 33 U.S.C. § 2005, Inland

Navigation Rules, Rule 5 – Look-out, resulting in the allision of the M/V ST. LUCIE with the charted aid to navigation, causing substantial damage. Under the second charge of violation of law or regulation, the specification alleged that on July 29, 2000, while serving as Master of the
M/V ST. LUCIE, the Respondent allided with Bethel Bank Daymarker Number 19 (LLNR 12497), in Marathon, Florida, in violation of 33 C.F.R. Part 70, Interference with or Damage to Aids to Navigation, causing substantial damage to the Daymarker. Under the third charge of violation of law or regulation, the specification alleged that on July 29, 2000, Respondent, as the Marine Employer and owner of Key West Steamboat Company, Inc., failed to ensure compliance with 46 C.F.R. Part 16 by failing to enroll one of his crew members, Ms. Chatlada Ketkaew, in a chemical testing program. These charges were brought on March 20, 2001.

The hearing was held in Key West, Florida, on June 21, 2001. The Respondent appeared without counsel and entered a response denying all the charges and specifications. The Coast Guard Investigating Officer introduced into evidence the testimony of eight witnesses, including the Respondent, and 13 exhibits. The Respondent introduced into evidence his own testimony, one additional witness and three exhibits.

During the hearing, an issue arose as to the exact location of the replaced Bethel Bank Daymarker No. 19. In order to settle the controversy, the ALJ ordered the Investigating Officer to have the Coast Guard pinpoint the coordinates of the marker and submit the results in evidence. On June 29, 2001, a 10-page document was submitted and served on Respondent. No objection to that document was received. Accordingly, it was marked as Exhibit IO-14 and admitted.

The ALJ issued his D&O on October 2, 2001. The Respondent filed a Notice of Appeal on October 31, 2001. On November 26, 2001, the Respondent sought and was granted an extension of time to file his Appellate Brief. The Respondent perfected his appeal on January 3, 2002. The Coast Guard submitted a reply brief on February 13, 2002. This appeal is properly before me.

Appearance: Respondent, William C. Hauck, *pro se*. LT Steven R. Keel, LT Mark Hammond and Chief Warrant Officer W. L. Wiggins for the Coast Guard.

FACTS

Respondent served under the authority of his Coast Guard license aboard the M/V ST. LUCIE at all relevant times. All of the events relative to the casualty occurred in the vicinity of Bethel Bank and the waters north of the city of Marathon, Florida. William C. Hauck is the holder of Merchant Mariner's License Number 811332 issued by the United States Coast Guard on April 23, 1997. It authorizes Mr. Hauck to serve as "MASTER NEAR COASTAL STEAM OR MOTOR VESSELS OF NOT MORE THAN-100-GROSS TONS."

The M/V ST. LUCIE (D1036416) is 64.5 feet in length and displaces 51 gross tons. Exhibit IO-11.[1] The vessel is owned and operated by Key West Steamboat Co. Inc., Marathon, Florida. A Certificate of Inspection was issued to the vessel on November 9, 1999. The manning requirements set out thereon include a Coast Guard licensed Master and two authorized deckhands. The vessel is configured as a paddle wheel steamboat and is restricted to operation in the ". . . Atlantic Ocean and Gulf of Mexico between Melbourne, Key West and Cape Romano Florida, not more than three (3) miles from shore." Id.

[1] All citations to the transcript of the hearing will be reflected at "Tr." followed by the page number of the transcript. Coast Guard exhibits are marked "IO" for Investigating Officer.

Mr. Hauck is the owner of Key West Steamboat Co., Inc. and the M/V ST. LUCIE. Exhibit IO-13 and Tr. at 176-77, 213.

On July 29, 2000, at approximately 1905, the M/V ST. LUCIE departed the Buccaneer Resort in Marathon, Florida for a two-hour sunset cruise to Moser Channel. Tr. at 150 and Exhibit IO-12. The Master of the M/V ST. LUCIE during the excursion was the Respondent, William C. Hauck. Tr. at 150. The other members of the crew were deckhands Bruce A. Lord and Chatlada Ketkaew. Tr. at 104, 114 and Exhibit IO-1. There were six other persons aboard the vessel, including four "paying" passengers and two "free" riders. Tr. at 175.

Captain Hauck was in the wheelhouse and in command of the vessel as it proceeded three to four miles toward Moser Channel where the passengers watched the sunset. The vessel then turned around and came back. Tr. at 62, 106. During the excursion, a squall was encountered and the crew took shelter behind the wheelhouse. Tr. 105-106. Neither of the two deckhands were called to assist the Respondent in the wheelhouse or ordered to act as a lookout prior to the allision. Tr. at 106, 115.

The weather became windy and rainy and the Respondent closed the pilothouse windows on the port side. Tr. at 151. Respondent steered the vessel with his head out the starboard window because there were no windshield wipers on the vessel. Tr. at 152.[2] At that point, the vessel was proceeding at approximately six knots and it hit Bethel Bank Daymarker No. 19 on the port bow, causing the vessel to list. Tr. at 73 and Exhibit IO-1. The Daymarker was bent over and impaled into the vessel's hull at a 30 to 40 degree angle. Tr. at 32-33.

[2] The Coast Guard regulations do not require windshield wipers on small passenger vessels.

The Bethel Bank Daymarker is marked on NOAA Chart 11452, Florida Keys Alligator Reef to Sombrero Key, 19th Edition, November 22, 1997. Exhibit IO-2. The Daymarker had been on station since at least October 20, 1997, when Officer Stephen Golden, Florida Fish and Wildlife Conservation Commission, entered its coordinates into his GPS receiver. Tr. at 62.

Immediately after the allision, the Respondent notified the Coast Guard Station at Marathon, Florida. BM2 Bryan McCloskey received the call at approximately 2100. Five minutes later, two response vessels got underway. Tr. at 72. McCloskey arrived on the scene approximately 13 minutes after he received the call. Tr. at 85. During this time, the weather was clear, it was dark and the seas were less than a foot. Tr. at 73. At the scene, the Coast Guard took nine people off the vessel while one of the Coast Guardsmen boarded the vessel to inspect the damage. Tr. at 73.

LT Douglas Campbell, Supervisor of Marine Safety Detachment Marathon, Florida, was notified of the incident at approximately 2200 and arrived on scene one to one and one-half hours later. Tr. 38-39. At that time, the weather was clear with a light breeze and intermittent clouds. Evidence of passing thunderstorms could be seen in the distance. Tr. at 33. LT Campbell did an inspection of the entire vessel and stated, "…I didn't notice any charts out, I didn't notice any spotlights, any additional equipment that night." Tr. at 34. The M/V ST. LUCIE did not have a compass on board at any time during the excursion prior to the allision. Tr. at 157. [3]

As part of the casualty investigation, the Coast Guard determined that Chatlada Ketkaew, a member of the crew, did not have a drug free certificate at the time of the

[3] The requirement for a compass on small passenger vessels is set forth in 46 C.F.R. § 184.402(a); Except as otherwise provided in this section every vessel must be fitted with a suitable magnetic compass designed for marine use, to be mounted in the primary operating station. A vessel operating on short restricted routes on lakes, bays or sounds is not required to be fitted with a compass pursuant to 46 C.F.R.

excursion and had not taken a pre-employment drug test. Tr. at 116. She took the drug test a few days later on August 2, 2000, after the subject incident. Exhibit IO-3.

The vessel was ultimately towed to a shipyard at Ft. Lauderdale, Florida, where the damage to the vessel from the allision amounted to $124,458.75. Tr. at 96. The cost of replacement of the Bethel Bank Daymarker No. 19 was $12,869.46. Exhibit IO-10. No persons were injured in the allision and no oil was spilled into the water. D&O page 9.

BASES OF APPEAL

Respondent asserts the following bases for appeal from the decision of the ALJ:

I. The ALJ erred in concluding the Respondent failed to rebut the presumption of negligence.

II. The application of the presumption of negligence that arises when a moving vessel strikes a fixed object is inappropriate in this case.

III. The ALJ erred in admitting certain evidence and basing findings thereon.

IV. The Coast Guard's investigating officer failed to conduct the investigation of this incident in accordance with applicable regulations.

OPINION

I

This appeal has been taken from the D&O imposed by the ALJ. Respondent raises four bases of appeal that apply to the charge of negligence and the charge of violation of law or regulation for failing to maintain a proper lookout.

Respondent does not appeal the finding that Respondent's vessel allided with the Bethel Bank Daymarker No. 19 and damaged it in violation of 33 C.F.R. Part 70 or the finding that Respondent as the Marine Employer and owner of Key West Steamboat

§ 184.402(b)(3). LT Douglass Campbell testified that the vessel was required to have a compass, although

Company, Inc. failed to ensure compliance with 46 C.F.R. Part 6 by failing to enroll one of his crew members, Ms. Chatlada Ketkaew, in a chemical testing program. I will not take up these charges in my opinion. Since the period for appeal has run pursuant to 33 C.F.R. § 20.1001(a), the ALJ's decision on those issues is final.

At the outset, a brief discussion of the standard of review is necessary. The ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH), and 2614 (WALLENSTEIN). Findings of the ALJ need not be consistent with all the evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD), and 2614 (WALLENSTEIN).

Nonetheless, I will reverse the decision if the findings are arbitrary, capricious, unsupported by law, clearly erroneous, or based on inherently incredible evidence. Appeal Decisions 2570 (HARRIS), *aff'd,* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN).

Respondent contends that, assuming the presumption of negligence applies, the ALJ erred in concluding the Respondent failed to rebut the presumption. I disagree.

The ALJ found that, the investigating officer established a *prima facie* case of negligence, resulting in a presumption of negligence, by showing that the M/V ST. LUCIE struck a stationary navigational aid. The ALJ correctly stated that a presumption of negligence, once established, requires Respondent to produce evidence to rebut it.

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this requirement may have been overlooked during the vessel's last marine inspection. Tr. at 41.

D&O page 11. The Respondent can rebut the presumption by showing a "creditable, non-fault explanation" for the allision, which "defeats the presumption and obligates the Coast Guard to go forward with evidence to counter the seaman's explanation or to show that he was, nevertheless, guilty of some specific act of negligence." *Commandant v. Murphy*, NTSB Order No. EM-139 (1987) pg. 2., *reconsideration denied*, NTSB Order No. EM-144 (1987), See also, Appeal Decision 2588 (LASCORA).

In an attempt to rebut the presumption, Respondent argues that the rain squall arose so quickly and was so intense that the accident was inevitable. In similar circumstances, the Commandant has stated:

> An accident is said to be "inevitable" not merely when caused by *vis major* or the Act of God, but also when all precautions reasonably to be required have been taken and the accident has occurred notwithstanding. Appeal Decision 2419 (MURPHY), Appeal Decision 2217 (QUINN)

GILMORE AND BLACK, THE LAW OF ADMIRALTY, 2ND EDITION, p. 486.

The burden of establishing inevitable accident is a heavy one. *Boudin v. J. Ray McDermott & Co.*, 281 F.2d 81 (5th Cir. 1960) (unexpected severity of forecast hurricane does not establish inevitable accident). Parties claiming the accident was inevitable must show that they did all that reasonable care required. *Id*. at 88. The burden of persuasion is on the party against whom the presumption operates. *James v. River Parishes Co.*, 686 F. 2d 1129, 1132-1133 (5th Cir. 1982).

Respondent implies that no reasonable action could have been taken to avoid this casualty. However, the ALJ found that the Respondent did not do all that reasonable care required. The Coast Guard showed that the Respondent continued to make way at six knots under conditions where visibility was near zero; and he did so without posting a dedicated lookout. He navigated with only dead reckoning, which proved to be

inadequate under the circumstances. He attempted to maintain his course even though the vessel did not have a compass, GPS or loran to assist with navigation. While underway during reduced visibility, the Respondent was unable to accurately determine the vessel's course or position. When asked: "What were you navigating with? What were you using to guide you, to navigate, while you were making your voyage?" Respondent stated: "Flat seat of the pants, as it said in my answer to you." Tr. at 157. When asked if he had a chart, Respondent replied: " Yes, I had a chart in front of me. But I don't have any GPS or loran that's required to be on the boat, or a compass for that matter to aid me in utilizing the chart." Tr. at 157.

The Respondent testified that on the return voyage, the weather got lousy with gusts to 40-plus knots. Tr. at 151. Visibility was reduced to 50 feet in squalls. Tr. at 152. Just before the allision, the vessel was making about six knots, as well as being blown sideways at about 10 to 12 knots. Tr. at 153. The ALJ evaluated the Respondent's testimony and description of the weather along with the testimony of other witnesses and the evidence presented. Where there is conflicting testimony, it is the function of the ALJ, as fact-finder, to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. See *Charles A. Grahn, Respondent*, 3 N.T.S.B. 214 (Order EA-76, 1977); Appeal Decisions 2424 (CAVANAUGH), 2386 (LOUVIERE), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2116 (BAGGETT), and 2460 (REED). The premise that it is exclusively within the province of the fact-finder to weigh the credibility of witnesses is well accepted. See *United States v. Oregon State Medical Soc.*, 343 U.S. 326, 72 S. Ct. 690, 96 L. Ed. 978 (1952); *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 53 S. Ct. 391, 77 L. Ed. 819 (1933); *Chesapeake & O. R. Co. v. Martin*, 283 U.S. 209, 51 S. Ct. 453, 75 L. Ed. 983 (1931); *United States v.*

Caldwell, 820 F.2d 1395 (5th Cir. 1987); *United States v. Bales*, 813 F.2d 1289 (4th Cir. 1987); *Carter v. Duncan-Higgins, Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984).

Furthermore, an appellate reviewing body should not substitute its own determination of credibility for that of the fact finder. See *Martin v. American Petrofina Inc.*, 779 F.2d 250 (5th Cir. 1985); *Knapp v. Whitaker*, 757 F.2d 827 (7th Cir. 1985); *Government of Virgin Islands v. Gereau*, 502 F.2d 914 (3rd Cir. 1974), *cert. denied* 420 U.S. 909, 95 S. Ct. 829, 42 L.Ed.2d 839 (1975); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U.S. 1126 (1973).

The underlying rationale for these rules is that the fact-finder can be influenced by the witness's demeanor, his tone of voice, his body language, and other matters that are not captured within the pages of a cold appellate record. See *Charles A. Grahn, Respondent*, 3 N.T.S.B. 214 (Order EA-76, 1977); *Reagan v. United States*, 157 U.S. 301, 15 S. Ct. 610, 39 L. Ed. 709 (1895); *Government of Virgin Islands v. Gereau*, 502 F.2d 914 (3rd Cir. 1974), *cert. denied* 420 U.S. 909, 95 S. Ct. 829, 42 L. Ed.2d 839 (1975). The fact-finder can also balance the bias or interest of a witness in determining credibility. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U.S. 401, 19 S. Ct. 233, 43 L. Ed. 492 (1899); *Reagan v. United States*, 157 U.S. 301, 15 S. Ct. 610, 39 L. Ed. 709 (1895).

The ALJ found the Respondent did not produce sufficient creditable evidence to show that the allision was inevitable. Nor did the Respondent show that his vessel was without fault or that the incident was occasioned by the fault of a third party. Thus, in light of the rules concerning credibility of witnesses, the finding that Respondent did not rebut the presumption of negligence is supported by substantial evidence of a reliable and probative nature and will not be reversed on appeal.

Respondent was also charged with a violation of law or regulation, for failing to maintain a proper look-out for the prevailing circumstances and conditions. I will discuss the charge here because the ALJ found that Respondent's failure to post a lookout and to proceed blindly ahead constituted negligence under the circumstances. D&O page 12. As noted previously, all of the events relative to the casualty occurred in the vicinity of Bethel Bank and waters north of the city of Marathon, Florida. This body of water is subject to the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) pursuant to 33 C.F.R. § 80.740. As such, the applicable statute under the first violation of law or regulation is 33 U.S.C. § 1602, *et seq*. Although not addressed in the briefs, the Coast Guard charged this violation under Inland Rule 5 rather than the applicable 72 COLREGS Rule 5 at 33 U.S.C. § 1602. I find that this error is harmless because the text of both rules is identical and the Respondent was fully informed of the nature of the charge in order to prepare his defense.

Suspension and revocation proceedings are intended to be remedial in nature. They affix neither criminal nor civil liability. These proceedings are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. See 46 C.F.R. § 5.5. Administrative pleadings in these matters are not rigidly bound by the procedural rules governing criminal and civil trials. *Kuhn v. CAB*, 183 F.2d 839 (D.C. Cir. 1950). "It is sufficient if the [Appellant] 'understood the issue' and 'was afforded full opportunity' to justify [his] conduct." *Citizens State Bank of Marshfield, MO v. FDIC*, 752 F.2d 209 (8th Cir. 1984); *NLRB v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 58 S. Ct. 904, 82 L.Ed. 1381 (1938); *Aloha Airlines v. CAB*, 598 F.2d 250 (D.C. Cir. 1979). I find that in this case, the specification set forth the facts that formed the basis of the charge and enabled the Respondent to identify the act or offense so that a defense could be prepared.

The Coast Guard showed that the Respondent did not post a dedicated look-out. The ALJ found that a dedicated look-out should have been posted. Respondent argues that under the circumstances of this case, as watch officer and helmsman, he could properly serve as lookout. I disagree. Rule 5 of the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), 33 U.S.C.§ 1602, requires that: "Every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and of the risk of collision." The adequacy of a look-out on board a vessel underway is a question of fact to be determined in light of the existing facts and circumstances. *See* Appeal Decisions 2421 (RADER) and 2319 (PAVELEC). *See also* Appeal Decisions 2390 (PURSER) and 2046 (HARDEN). The ALJ considered whether the facts and circumstances of the case permitted Respondent to serve as a proper look-out.

A review of the legislative history shows that Congressional intent when writing this rule, as expressed in Senate Report No. 96-979 (1980), which accompanies Rule 5, was to permit the watch officer or helmsman to serve as the sole look-out in certain circumstances. However, the report states in pertinent part:

> On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. **Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards**. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety.

> S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980), reprinted in 1980 U.S. CODE CONG. & ADMIN. NEWS 7068, 7075. (Emphasis added).

The ALJ addressed the factors that supported his conclusion that under the circumstances, a look-out other than the Respondent was required to enhance safety. The ALJ's findings concerning Respondent's failure to maintain a proper look-out as required by Rule 5 are supported by reliable, probative, and substantial evidence and will not be disturbed on appeal. *See* Appeal Decisions 2468 (LEWIN), 2420 (LENTZ), 2421 (RADER), and 1758 (BROUSSARD).

Respondent argues that the Coast Guard did not prove that failing to post an additional lookout caused the allision. A specification supporting a charge of violation of law or regulation must adhere to the guidelines set forth in 46 C.F.R. § 5.33, as follows:

> Where the proceeding is based exclusively on that part of title 46 U.S.C. section 7703, which provides as a basis for suspension or revocation a violation or failure to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or to protect navigable waters, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated.

Likewise, a specification supporting a charge of negligence must adhere to 46 C.F.R. § 5.29, as follows:

> Negligence is 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.

The assertion in each specification that Respondent's action contributed to the allision is not a necessary element to support a finding of proved, but rather an aggravating circumstance. In Appeal Decision 2415 (MARSHBURN), the

Commandant concluded: "It is not, however, improper to allege and prove the consequence of a negligent act. The consequence, such as a collision or an allision, though unnecessary to support a decision finding negligence, may be an aggravating factor, or the lack thereof may be a mitigating factor, and hence it may be proved whether or not it is alleged." *See also*, Appeal Decisions 2515 (COUSINS) and 2129 (RENFRO). Failure to prove such an aggravating circumstance does not render the specification defective, nor does it create a defense to the charge and specification. Appeal Decision 2319 (PAVELEC). Therefore, it is not necessary that the Coast Guard prove that the failure to post a look-out "caused" the allision, only that it was negligent under the circumstances to fail to do so.

Respondent argues that the position of Bethel Bank Daymarker No. 19 was uncertain since various charts and reports indicate different coordinates and that therefore actions and omissions of the Coast Guard caused the collision. Contributory negligence is not a defense in suspension and revocation proceedings pursuant to 46 U.S.C. § 7701. These proceedings are remedial in nature. *See* 46 CFR § 5.5. The only issue is whether Respondent's actions and omissions were negligent. *See* Appeal Decisions 2415 (MARSHBURN), 2380 (HALL), 2175 (RIVERA), 2096 (TAYLOR/WOODS), and 1670 (MILLER). Furthermore, the ALJ determined that there was no indication prior to the allision that the daymarker was off station. Nor was there any reliable evidence submitted at the hearing that the location of the Daymarker on NOAA Chart 11452 was incorrect. D&O page 17.

II

The Respondent challenges the presumption of negligence which arises when a moving vessel allides with a fixed object. Respondent contends that such a presumption

is inappropriate in this case because the allision was caused by an unpredictable storm and the result of an unavoidable accident or act of God. This argument is without merit. It is well settled that a presumption of negligence may be invoked in Suspension and Revocation proceedings. Appeal Decisions 2373 (OLDOW), *aff'd sub nom. Commandant v. Oldow*, NTSB Order EM-121 (1985); 2368 (MADJIWITA), *aff'd sub nom. Commandant v. Madjiwita*, NTSB Order EM-120 (1985); 2272 (PITTS), *modified sub nom. Commandant v. Pitts*, NTSB Order EM-98 (1983); 2174 (TINGLEY), *aff'd sub nom. Commandant v. Tingley*, NTSB Order EM-86 (1981); 2173 (PIERCE), *aff'd sub nom. Commandant v. Pierce*, NTSB Order EM-81 (1980); and *Woods v. United States*, 681 F.2d 989 (5th Cir. 1982). As Judge Rubin, writing for the Fifth Circuit in *Woods*, stated:

> When a moving vessel collides with a fixed object there is a presumption that the moving vessel is at fault, and this presumption suffices to make out a prima facie case of negligence against the vessel. *Brown and Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F.2d 724, 726 (5th Cir. 1967). The burden of disproof of fault by the moving vessel requires demonstration that its operator did all that reasonable care required. *Id*. The presumption of negligence applies to the operator as well as to the vessel. It works against all parties participating in the management of the vessel at the time of contact. (Citations omitted.)

Id at 990.

III

Respondent argues that the ALJ improperly admitted certain evidence and based his findings thereon. The argument is without merit. Respondent did not specify what evidence was improperly admitted in his appeal brief, however, he did object to the admissibility of witness testimony and documentary evidence in his hearing reply brief. Respondent objected to the testimony of Officer Steven Golden and LT Douglas Campbell. In the D&O, the ALJ determined that both Officer Steven Golden and

LT Douglas Campbell were on the Coast Guard's witness list and their testimony was admissible. D&O page 16. Respondent also objected to the admission of NOAA Chart 11452, Alligator Reef to Sombrero Key, 19th edition, printed 1997. The chart was admitted on motion at the hearing. The Respondent did not object during the hearing. Tr. at 184. When the Respondent subsequently objected to the chart in his hearing reply brief, the ALJ found that the objection was untimely. Relevant and material evidence is admissible in suspension and revocation proceedings. 46 C.F.R. § 5.20-95(a). Appeal Decision 2288 (GAYNEAUX). "It is the duty of the Administrative Law Judge to evaluate the evidence and testimony presented at the hearing." Appeal Decision 2378 (CALICCHIO). Where the ALJ's determination as to the admissibility and relevance of evidence is not clearly erroneous or arbitrary and capricious, it will not be disturbed on appeal. *See CALICCHIO, supra*. *See also O'Kon v. Roland*, 247 F. Supp. 743 (S.D.N.Y. 1965).

IV

The Respondent contends that the ALJ erred in refusing to consider evidence of alleged misconduct on the part of the Coast Guard investigating officer who investigated this casualty and who subsequently preferred the charge and presented the Coast Guard's case before the ALJ. The Respondent alleges that the investigating officer failed to abide by the rules and regulations pertaining to the investigation of marine casualties. The Respondent did not specify what rules and regulations were allegedly violated and did not otherwise describe the alleged misconduct in his appeal. I have reviewed the record and find that this argument is without merit.

Suspension and revocation proceedings are procedurally distinct from pre-hearing investigations. Appeal Decision 2216 (SORENSON). Concerning this issue, the Commandant has held:

> [W]hen a party has been accorded all his rights in a Part [5] proceeding, when evidence properly excludable has been excluded, and when the procedural requirements for a hearing under the part have been met, no alleged error in a proceeding under Part [4], nakedly and without more, constitutes a bar to hearing under Part [5].
> Appeal Decision 2004 (LORD), *See also* Appeal Decision 2158 (MCDONALD).

CONCLUSION

The actions of the Administrative Law Judge had a legally sufficient basis. The Administrative Law Judge's decision was not arbitrary and capricious and was not clearly erroneous. Competent, substantial, reliable and probative evidence existed to support the findings and order of the Administrative Law Judge. I find the Respondent's bases of appeal are without merit.

ORDER

The Decision and Order of the Administrative Law Judge, dated October 2, 2001, is AFFIRMED.

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THOMAS J. BARRETT
Vice Commandant

Signed at Washington, D.C., this 10th day of March, 2003.