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. 790411	:	NO. 2630
Issued to David Baarsvik	:	

This appeal is taken in accordance with 46 USC 7702, 46 CFR 5.701, and 33 CFR Part 20.

By a Decision and Order (D&O) dated March 27, 2000, an Administrative Law Judge (ALJ) of the United States Coast Guard suspended Respondent's above-captioned license for 30 days in addition to placing Respondent on a three month probationary period based upon finding proved one charge of *negligence* and one charge of *misconduct*. At the time of the hearing, there was one specification under the charge of negligence and one specification under the charge of misconduct. Under the charge of misconduct, the specification alleged that the Respondent wrongfully navigated the M/V KATAMA in conditions of restricted visibility by failing to comply with 33 USC 1602, International Regulations for Preventing Collisions at Sea, (COLREGS) Rule 6 – Safe Speed, contributing to the grounding of the M/V KATAMA outside the marked channel. Under the charge of negligence, the specification alleged that the Respondent, while serving as master of the M/V KATAMA on January 15, 1999, negligently operated the

M/V KATAMA by failing to operate at a safe speed. These charges were brought on July 9, 1999.

The hearing was held in Providence, Rhode Island, on 14 – 15 and 20 December, 1999. The Respondent appeared with counsel and entered a response denying the charges and specifications. The Coast Guard Investigating Officer introduced into evidence the testimony of five witnesses and nine exhibits. At the close of the Coast Guard's case, the Respondent moved for a directed finding or, alternatively, for dismissal of the charges. The ALJ denied the motion. The Respondent introduced into evidence his own testimony, six additional witnesses and eleven exhibits.

As discussed *infra*, on January 18, 2000, the Coast Guard Investigating Officer sought leave of the Court to amend its complaint for purposes of adding an additional specification under the charge of negligence alleging a failure to navigate with due caution and due regard for existing conditions. The Respondent opposed the Coast Guard's motion to amend the complaint. On February 1, 2000, the ALJ granted the Coast Guard's motion to amend.

On March 13, 2000, the Respondent filed a motion for leave of the court to submit a supplemental memorandum of law in support of his motion for involuntary dismissal of the charges and specifications. On March 17, 2000, the ALJ denied this motion of Respondent.

The ALJ issued his D&O on March 27, 2000. The Respondent filed a Notice of Appeal on April 7, 2000, and also filed a Motion for Stay of Decision and Issuance of a temporary license in accordance with 46 CFR 5.707. On April 12, 2000, the ALJ issued a Supplemental Order, clarifying the sanction imposed by his D&O of March 27, 2000. In the ALJ's Supplemental Order, the Respondent's motion for a temporary license was

granted. The Respondent perfected his appeal on May 30, 2000. The Coast Guard submitted a reply brief on June 30, 2000. This appeal is properly before me.

Appearance: William Hewig, III, of Kopelman and Paige, P.C., 31 St. James Avenue, Boston, MA 02116, for Respondent. LT Dawn Kallen and LT J. G. Luba for the Coast Guard.

FACTS

Respondent served under the authority of his license aboard the M/V KATAMA at all relevant times. All of the events relative to the casualty occurred in Lewis Bay near Hyannis, Massachusetts, a body of water subject to the international rules pursuant to 33 C.F.R. 80.145. As such, the applicable statute under the misconduct complaint is 33 U.S.C. 1602.

On January 15, 1999, at approximately 1:45 p.m., the M/V KATAMA departed the Woods Hole, Martha's Vineyard and Nantucket Steamship Authority docks on Lewis Bay bound for Nantucket Island under the command of the Respondent. The M/V KATAMA is a twin-screw, steel passenger vessel measuring approximately 215.8 feet and 99 gross tons. The M/V KATAMA got underway in dense fog, with visibility less than one-eighth of a mile. TR II at 148.[1] The wind speed in the area measured 15 miles per hour or 13 knots with gusts up to 23 miles per hour or 20 knots. CG Ex. #2. In that particular geographic area, fog was a condition frequently encountered and it was not considered unusual by any of KATAMA's experienced deck watchstanders for the KATAMA to get underway in the fog and wind conditions prevailing on January 15, 1999. TR II at 20, 54, 149 and TR III at 7.

[1] All citations to the transcript of the hearing will be reflected as "TR" followed by the volume and page number of the transcript.

As the M/V KATAMA proceeded along the channel en route to Nantucket, the vessel experienced radar trouble shortly after passing buoy 22, losing radar contact with buoy 19. TR II at 161-165. Buoy 19 is on the southern edge of the channel and is the starting point of a right hand turn in the channel. TR II at 10, 271-272. At all times prior to the grounding, KATAMA's speed was no higher than bare steerageway or "in the notches." TR II at 154, 165, 57; TR III at 8-9. Several witnesses gave estimates of how fast "bare steerage" or "in the notches" means for this vessel.[2] Those estimates included 2 ½ or 3 knots;[3] 4 knots;[4] and up to 5 or 6 knots.[5] The stopping distance of the M/V KATAMA when traveling at bare steerageway was estimated at 50 or 75 feet. TR III at 53. Soon after the Respondent lost radar contact with buoy 19, the starboard engine was taken out of notch speed and placed into neutral. TR II at 171. When buoy 19 still did not come into view, the Respondent then put the port engine into neutral. TR II at 173. Although the vessel seemed to slow in its forward progress, the vessel nevertheless continued forward. Id. At this point, the Respondent was aware of the vessel's precarious situation as evidenced by his testimony that "we were going to see [buoy 19] any second or we were going to run aground." Id. Just after placing the port engine in neutral, buoy 19 was spotted fifty feet dead ahead from the vessel's bow by the lookout who was standing on the starboard bridge wing. TR II at 23, 177, 178, 245. Upon hearing the lookout's warning, the Respondent also made visual contact with the buoy at which time he placed both engines astern in the notches and engaged KATAMA's bow thruster to port in order to avoid colliding with buoy 19 which ultimately passed down the starboard side of the vessel without touching the vessel. TR II at 178,179, 181- 184.

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[2] Both phrases mean the slowest possible engine speed next to neutral.
[3] TR III at 8.
[4] TR II at 154, 165.

Because the bow thruster did not seem to be responding, the Respondent asked the Chief Engineer to check it. The Respondent then used the bow thruster and engines to make the turn around buoy 19 to the right, running the bow thruster hard, causing the vessel to shake. TR II at 184-186. During this maneuvering, KATAMA's bow thruster smokestack began to emit heavy black smoke and red hot cinders. TR II at 195, 196. Because of the stack fire and the possibility of fire among wood chips in a trailer on deck just below the thruster's stack, the bow thruster was shut down. TR II at 205. After shutting down the bow thruster, the vessel quickly swung hard to the right and ran aground in the vicinity of buoy 19 with the starboard stern section of the vessel positioned approximately 150 feet out of the channel. TR I at 25; TR II at 206.

While the M/V KATAMA was transiting in restricted visibility, the Respondent did not take navigational fixes on the navigational chart on the bridge. TR II at 236-237. The Respondent did not utilize a functioning Global Positioning System (GPS) receiver on the bridge while transiting in restricted visibility. TR II at 237-240. The Respondent did not reposition his lookout (an ordinary seamen) from the freight deck to the bow to observe the aids to navigation while in restricted visibility. TR II at 241-242.

OPINION

This appeal has been taken from the D&O imposed by the ALJ. Respondent raises four bases for appeal.[6] However, because of the disposition of this case and for the

[5] TR I at 217.

[6] The bases for appeal raised by Respondent are:

reasons discussed below, it is not necessary at this time to discuss all of the Respondent's bases for appeal. Further, pursuant to the authority granted me at 46 CFR 5.801, I will first address an additional question *sua sponte*. That question is whether the ALJ exceeded the permissible limits in allowing the Investigating Officer to amend the charge sheet by adding a broader allegation of negligence one month after the hearing had ended and, if so, what remedy is appropriate.

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), 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), 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* NTSB Order No. EM-182 (1996) 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE), 2607 (ARIES), and 2614 (WALLENSTEIN).

I.

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1. It was error of law for the ALJ to find that the bow thruster casualty did not constitute inevitable accident.
2. It was error of law for the ALJ to find negligence against Respondent for proceeding at an unsafe speed.
3. It was error of law for the ALJ to deny Appellant's motions for directing findings or involuntary dismissal.
4. It was error of law for the ALJ to find misconduct for violation of the safe speed rule.

On January 18, 2000, approximately one month after the hearing concluded, but before judgment had been made on the merits, the Coast Guard Investigating Officer, citing 33 CFR 20.305 and Fed R. Civ. P. 15(a)(b), motioned the Court for leave to amend its complaint for purposes of adding an additional specification under the charge of negligence. The new specification alleged that the Respondent failed to navigate the vessel with due caution and regard for existing conditions of restricted visibility due to dense fog and wind speeds in excess of 12 knots, gusting to 20 knots, while approaching a turn at buoy number 19 in Hyannis Channel and subsequently losing radar contact with said buoy, which contributed to the grounding of the M/V KATAMA outside the marked channel in Lewis Bay.

The Respondent opposed the Coast Guard's motion to amend on three grounds. First, the Respondent claimed that he had not been afforded notice of the proposed amendment and thus did not have an opportunity to confront the evidence relevant to the amendment. Second, the Respondent asserted that the proposed amendment was so vague that it failed to give him sufficient notice of the conduct upon which the Coast Guard based its amended charge of negligence. Third, the Respondent argued that the Coast Guard's motion to amend was made in bad faith insofar as the Investigating Officer knew of the substance of the amended charge prior to the hearing and during the hearing, yet delayed presenting its motion until one month after the hearing had ended, when all litigation was effectively over.

Amendments made after conclusion of a hearing are not unprecedented. Appeal Decision 2393 (STEWART).[7] The test of whether a pleading may be amended is not

[7] The amendment made in the Stewart case was minor and did not make a substantial change to the offense originally alleged, i.e., the phrase "undocking master" was substituted for "pilot".

based on the timing of the amendment but on whether there has been notice and an opportunity to litigate the amended charge. Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841 (D.C. Cir. 1950); Appeal Decisions 2326 (McDERMOTT); 1956 (HANSON); 2393 (STEWART); 2209 (SIEGELMAN). In Kuhn, the court stated that notice was the thrust of modern pleading, especially in administrative proceedings, citing Fed. R. Civ. P. 15(b) which provides that pleadings may be amended to conform to the proof. In Appeal Decision 1792 (PHILLIPS), the Commandant relied on the Kuhn decision in finding that the ALJ has authority to make necessary amendments to conform specifications to the proof. Consistent with Kuhn, 33 CFR 20.305 states:

> " . . . no amendment or supplement may broaden the issues without an opportunity for any other party or interested person both to reply to it and to prepare for the broadened issues."

A grounding raises a presumption of negligence. Appeal Decision 2173 (PIERCE) aff'd NTSB Order EM-81; 2113 (HINDS); 2177 (HOMER). However, in this case, the negligence charge, as originally pleaded, was expressly limited to an allegation of unsafe speed which, unlike a grounding case, does not invoke a presumption of negligence. In other words, the Coast Guard charged the Respondent with negligence for failing to operate at a safe speed and was thus required to prove that Respondent operated at an unsafe speed; the Coast Guard could not rely on a presumption to prove the allegation of negligence. As amended, however, the negligence charge was broadened beyond the issue of safe speed, i.e. failing to navigate with due caution and regard for existing conditions of restricted visibility due to dense fog and wind speeds in excess of 12 knots, gusting to 20 knots, while approaching a turn at buoy number 19 in Hyannis Channel and subsequently losing radar contact with said buoy, which contributed to the grounding of the vessel outside the marked channel in Lewis Bay.

Insofar as the Rule 6 factors closely correspond to the allegations contained in the amended charge,[8] it is possible that the amended charge may be considered not to have significantly broadened the offense that was originally alleged if such change did not add a presumption of negligence. The amended complaint however invoked a presumption of negligence and thus significantly broadened the issues to be litigated.

Pursuant to the Kuhn doctrine and 33 CFR 20.305, this amendment is permissible only if the Respondent had notice and an opportunity to litigate the issue. The ALJ found that the Respondent had sufficient notice of this expanded theory of negligence at the time of the hearing. I do not agree.

The issue of whether the Respondent had notice and litigated the additional negligence charge is muddled by the overlap of factors that establish unsafe speed and the factors that establish negligence for failing to operate with due care which contributed to the grounding of the vessel. Based on my review of the record, when the Coast Guard and the Respondent raised factors in support of each of their respective cases, it is not clear whether each is subjectively dealing with safe speed or negligence for failing to

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Rule 6 Factors	**Amended Negligence Charge**
State of Visibility	Conditions of restricted visibility-fog
Traffic Density	
Maneuverability of vessel with special reference to stopping and turning ability in prevailing conditions	
At night the presence of background light, etc…	
The state of the wind, sea and current and the proximity of navigational hazards	Wind speeds 12 knots and gusts to 20 knots while approaching a turn at Buoy Number 19
The draft in relation to available depth of water	
And as to vessels with operational radar:	
The characteristics, efficiency and limitation of the radar equipment	Subsequently losing radar contact with said buoy.
Any constraints imposed by the radar range scale in use	
The effect on radar detection of the sea state, weather and other sources of interference	
The possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range	
The number, location and movement of vessels detected by radar	
The more exact assessment of visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.	

operate with due care based on the existing conditions. In his ruling, the ALJ relied on three factors in concluding that the Respondent had notice and litigated the broader allegation of negligence. First, the ALJ concluded that the Coast Guard's opening statement established that the Coast Guard's case was based on a broader allegation of negligence for failing to operate with due care arising from the grounding of the vessel. My reading of the transcript, however, persuades me that, subjectively, the Coast Guard was out to prove a violation of Rule 6 and was listing factors that would establish that violation.[9] This interpretation is bolstered by the fact that the Coast Guard did not amend the Complaint before the hearing, during the hearing, nor even at the conclusion of the hearing. The Coast Guard did not seek to amend its Complaint until one month had elapsed after completion of the hearing.

Second, the ALJ pointed to the affirmative defenses raised by the Respondent and concluded that the Respondent raised these defenses in an attempt to rebut the presumption associated with a charge of negligence arising from the grounding of the vessel. While this conclusion is not entirely without merit, it would result in a bad precedent to hold that the Respondent had notice of a new charge because he raised alternative reasons for the grounding. Indeed, it is entirely possible that the Respondent raised the defense of inevitable accident, for example, for the sole reason that, if the ALJ agreed with his contention, then he may not find the charge of negligence for failing to operate at a safe speed proved.

[9] "The Coast Guard will prove the cause of the grounding was negligence on behalf of Captain Baarsvik in the operation of the KATAMA. Captain Baarsvik committed an act of negligent [sic] **by traveling at normal operating speeds in known adverse weather conditions**." TR I at 4. C*ompare with* COLREGS Rule 6 (ii) state of visibility and (v) the state of wind, sea and current, and the proximity of navigational hazards.

Third, the ALJ pointed to his Order of November 23, 1999, in which he allowed the Respondent to amend his Answer to include two affirmative defenses. In that Order, the ALJ stated that "[w]hile [Respondent's] claims are characterized as affirmative defenses, they take on the character of rebuttal to an inference or presumption of negligence arising from the grounding of the vessel." Order at 1. I hold that that was not an appropriate conclusion. It would be unfair to hold that Respondent had notice of the additional specification under the charge of negligence simply because he offered generalized affirmative defenses that might be applicable to more than one particular specification under a charge of negligence. It is clear that the nature of the initial charge of negligence and the specification contained thereunder had morphed as the case progressed in a way that could be confusing to any of the participants. For example, in his November 23, 1999, Order the ALJ wrote: "Here the [Respondent] is alleged to have been negligent in the operation of a vessel at an unsafe speed in conditions of restricted visibility, which contributed to the grounding of the vessel outside the marked channel. Proof of the grounding creates a rebuttable presumption of negligence." Yet, on the other hand, in his February 1, 2000, Order granting the Coast Guard's motion to amend the charge, the ALJ wrote: "I cannot see how having tried the safe speed rule factors, that somehow [Respondent] is confronted with substantial prejudice. No new witnesses need to be called and no additional documentary evidence needs to be presented. *All that remains is the question whether the Coast Guard has proven its case of negligence in violation of Rule 6-Safe Speed, or not. That is the essence of the briefing to come, and nothing more."* (Emphasis supplied) Order dated February 1, 2000, at 5. From this statement, it appears that the ALJ assumed that the Coast Guard had the burden of proving the Respondent was negligent for failing to operate his vessel at a safe speed.

Not only is it unclear what the ALJ thought the initial charge was from his November 23, 1999, Order, the D&O is also confusing. After allowing the Coast Guard to amend the negligence complaint, the ALJ later found "the charge of negligence for violation of Rule 6 of the Inland Rules proven." D&O at 10.

Regarding the issue of whether the additional charge of negligence was litigated, I agree with the Respondent that all of the issues surrounding the additional charge may not have been raised at the hearing.[10] Presumably, the Respondent prepared his defense, including cross-examination of the Coast Guard's witnesses, to address the issues raised by the original specification. According to the Respondent's motion opposing the Coast Guard's motion to amend the complaint,[11] the Respondent would have expanded his questioning of both the fact and expert witnesses had he known that the allegation of negligence was no longer limited to the question of safe speed.

Based on the foregoing, I find that the Respondent was not given notice and an opportunity to be heard on the issues related to the amended (new) complaint with a additional specification of negligence of January 18, 2000.

I am therefore remanding this case to the ALJ pursuant to 33 C.F.R. 20.1004 to afford the ALJ an opportunity to remedy the procedural due process issues arising from the amended (new) complaint of negligence of January 18, 2000.

II.

The question that remains is whether the ALJ erred in finding proved the charge of misconduct based on a violation of Rule 6 of the COLREGS. I conclude that he did, because of a misapplication of the "half distance" rule. The half-distance rule is a well-

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[10] See the Respondent's motion dated January 31, 2000.
[11] Id.

recognized interpretation of the statutory rule for determining the proper speed at which a vessel should proceed in a fog. Union Oil Co. v. The SAN JACINTO.[12] As explained in Union Oil at 146:

> Such rule is premised on the notion that when a ship is travelling under foggy weather conditions in waters in which other ships might be proceeding on intersecting courses, the speed of each ship must be such as to enable her to stop within half the distance separating the ships when they first sight each other.

The rule is further explained by the U.S. Supreme Court in The Nacoochee:[13]

> [The ship] was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog.

As yet further explained in *Griffin on Collision:*[14]

> As applied to vessels sighting each other head and head, this means that each must be able to stop within half the visible distance. As applied to a vessel approaching another at anchor, it means that she must be able to stop before reaching the anchored vessel.

As described in *Griffin* and consistent with The Nacoochee, in the case of a vessel approaching another at anchor, the "half-distance rule" becomes, in effect, the "full-distance rule"-- the point being that the underway vessel must be able to stop at engines full astern before colliding. The case of a vessel approaching a buoy is more akin to the case of a vessel approaching another ship at anchor than to two vessels underway and approaching each other head to head. The correct rule to apply in this case is that the *KATAMA* must have been able to stop before alliding with buoy 19. In his D&O, the ALJ made the following findings:

[12] 409 U.S. 140 (1972).
[13] 137 U.S. 330, 339 (1890).
[14] John Wheeler Griffin, *Griffin on Collision*, § 117 (2d ed. 1962).

> The Katama was capable of coming to a complete stop within 50 to 75 feet traveling at bare steerageway (4-6 knots). Identifying buoy 19, fifty feet dead ahead, Katama was unable to stop within 25 feet or one half of the distance to the buoy. . . . Two of [the] conditions present here were severely limited visibility of about 100 feet, and the Katama traveling at 4-6 knots, which could only come to a complete stop within 50 feet. . . . [Captain Baarsvik] must have known the Katama's ability to stop at the speed at which she was progressing (4-6 knots per hour) [sic] was likely too fast to come to a complete stop given the 100 foot visibility and the timing and location of buoy 19 dead ahead only 50 feet. Theoretically, the Katama at that speed would have had to stop dead in the water within the next 25 feet to avoid the buoy or a grounding. . . . At the time of the commencement of the trip the visibility was about 660 feet and the vessel's radar disclosed buoy 19. As time passed, visibility got worse and was down to between 50 to 100 feet . . . . D&O at 6-7.

The ALJ concluded that the Respondent was required to stop within 25 feet, or half the distance to the buoy. This finding of law was a cornerstone of the ALJ's ultimate decision regarding the misconduct charge. However, under the facts of this case, the Respondent had a duty to stop the vessel before reaching buoy 19, or within approximately 50 feet. Because of the ALJ's incorrect finding of law, the charge cannot stand.

As an aside, the facts also show that the Respondent was able to nearly stop or slow to the point where allision with buoy 19 did not occur and was not an issue at the time Respondent commenced the turn that ultimately led to the grounding. TR II at 178-179, 181-184. Indeed, Respondent accomplished this stopping or slowing action with the KATAMA's engines "in the notches" astern. *Id.* Had he put the engines full astern as described in The Nacoochee, the stopping action would undoubtedly have been more pronounced.

Although not addressed in the briefs, the fact that the ALJ adjudicated the misconduct charge under Inland Rule 6 at 33 USC 2006 rather than the applicable COLREGS rule at 33 U.S.C. 1602 is not material to this determination.

CONCLUSION

In reviewing the D&O, it is clear that the ALJ found the Respondent negligent for failing to operate at a safe speed only because of the ALJ's application and reliance on the time-honored presumption of negligence arising from the grounding. D&O at 2, 8. Based on my review of the record as a whole, I have determined that the Coast Guard did not meet its burden of proving negligence for failing to operate at a safe speed absent a reliance on the presumption. The finding of the ALJ regarding negligence was therefore an error of law. The presumption of negligence does not attach to an allegation of unsafe speed, thus Respondent was denied fair notice of the amended negligence charge. The ALJ's finding proved the original charge of negligence is REVERSED. In finding that the Respondent violated Rule 6 of the COLREGS because he was unable to stop his vessel within ½ the distance to buoy 19, I find that the ALJ erred as a matter of law. The ALJ's finding proved the charge of misconduct for violation of Rule 6 is REVERSED.

The only remaining issue is the amended complaint of January 18, 2000.

ORDER

The Decision of the Administrative Law Judge dated March 27, 2000, is REVERSED regarding the original charge of misconduct with one specification (July 9, 1999) and the original charge of negligence with one specification (July 9, 1999) and REMANDED with respect to the amended (new) complaint of negligence (January 18, 2000).

T. J. Barrett
Vice Admiral, U. S. Coast Guard
Vice-Commandant

Signed at Washington, D.C., this 6th day of August, 2002.