UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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	:	DECISION OF THE
vs.	:	VICE-COMMANDANT
	:	ON APPEAL
MERCHANT MARINER'S LICENSE NO. 014917	:	No. 2619
Issued to Robert John Leake	:	

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

By Decision and Order dated September 29, 1998, the Chief Administrative Law Judge ("CALJ") of the United States Coast Guard ("Coast Guard") found proved charges of *negligence* and *violation of regulation* and their supporting specifications against Robert John Leake ("Appellant"). The CALJ based this Decision and Order on a Joint Motion of Settlement and Request for Entry of Consent Order ("Joint Motion") entered into by the *pro se* Appellant and the Coast Guard on or about September 4, 1998. The Joint Motion provides, *inter alia*, that: (1) the Appellant enters a plea of "no contest" to the charges and specifications; (2) the charges and specifications are found proved; (3) the sanctions are one month outright suspension and six months suspension on a twelve month probation; (4) Appellant understands and knowingly and intentionally waives the right to challenge or contest the validity of the order entered in accordance with the agreement; (5) Appellant waives all right to judicial review or otherwise contest the validity of the consent order; (6) the order will have the same force and effect as an order

made at a full hearing; and (7) Appellant was advised of his due process rights to a hearing and knowingly and intentionally waives that right.

Appellant was charged with two specifications of *negligence*, the first for failing to monitor the position of the M/V VALIANT, and the second for posting the second mate at the helm, which kept the second mate from monitoring the fathometer. Appellant was also charged with two specifications of *violation of regulation,* the first for failing to make proper notification of a marine casualty as required by 46 C.F.R. § 4.05-1, and the second for failing to make proper notification of sailing short as required by 46 C.F.R. § 15.725.

The CALJ ordered Appellant's license suspended outright for one month, and further ordered that Appellant's license would be suspended for six months if any charge under 46 U.S.C. § 7703 or § 7704 or any other navigation or vessel inspection law was proved against Appellant for acts committed within twelve months of the date of the completion of the outright suspension.

In accordance with the September 28, 1998, Decision and Order, Appellant deposited his license with the Coast Guard on November 16, 1998, and served his one-month, outright suspension.

On January 19, 1999, Appellant, by and through counsel, filed a Petition for Reopening of Hearing or, In the Alternative, Modification of CALJ' S Decision and Order, which challenged the validity of the Joint Motion. Appellant contended that he entered into the Joint Motion under duress and that newly discovered evidence warranted a new hearing or a modification of the September 28, 1998, Decision and Order. By Decision and Order dated April 5, 1999 (D&O), the CALJ denied this motion. The D&O

was served on Appellant on April 5, 1999. Appellant, through his attorney, filed a timely notice of appeal and perfected the appeal on April 14, 1999. This appeal is properly before me.

APPEARANCE: Ms. Karen L. Manos, Esq., 1299 Pennsylvania Ave., N.W., Washington, D.C. 20004. LT Darnell C. Baldinelli was the Investigating Officer.

FINDINGS OF FACT

On July 18, 1998, at approximately 9:30 a.m. local time, the M/V VALIANT approached the Iwakuni, Japan, harbor entrance under the command of Appellant. At approximately 10:23 a.m., a Japanese harbor pilot boarded the vessel. With the assistance of two tugs, the M/V VALIANT proceeded towards the harbor. At approximately 10:40 a.m., the vessel went aground. While waiting for flood tide to raise the vessel, Appellant informed Japanese authorities of the grounding and directed the chief mate to inspect for damage. None of the cargo or ballast tanks were compromised. At some time between approximately 1:00 p.m. and 3:00 p.m.,[1] the vessel was afloat and proceeded into the harbor. Japanese divers inspected the M/V VALIANT on July 19, 1998, and minor damage was found. At 7:30 a.m. local time on July 20, 1998, approximately 45 hours after the accident, Appellant filed a Marine Accident Report, CG-2692, with the Coast Guard. The Coast Guard ordered the vessel to proceed to Henza, Okinawa, to be inspected by the American Bureau of Shipping (ABS). After the vessel arrived in Henza on July 22, 1998, ABS performed a hull and double bottom survey and used divers to inspect the underside of the hull. ABS discovered an inset in

[1] Appellant's brief states that the vessel was afloat again at 1:00 p.m. and that the vessel proceeded to an anchorage. *See* Appellant's brief at 3. The Coast Guard investigation report states that the vessel was afloat again at 3:00 p.m. and that the vessel proceeded to a harbor pier. *See* U.S. Coast Guard Investigation into the Circumstances Surrounding the Grounding of the M/V VALIANT at 1. The discrepancy is not material.

the bottom plate but no compromise of the watertight integrity of the vessel. The Coast Guard found the ABS report satisfactory and released the vessel.

On July 29, 1998, two Coast Guard investigators boarded the vessel to investigate the grounding and informed Appellant of the nature of charges that possibly would be brought against him. The Coast Guard, on or about August 10, 1998, informed Appellant telephonically that charges would be filed, and stated that the Coast Guard would be willing to negotiate a "no contest" or "admit" plea. On August 19, 1998, the Coast Guard boarded the M/V VALIANT and delivered the charges and proposed Joint Motion to Appellant. The Coast Guard and Appellant entered into the Joint Motion on or about September 4, 2000.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the D&O:

(1) Appellant agreed to the Joint Motion while under duress; and

(2) After entering the plea, Appellant learned that the Coast Guard report of the grounding incident contained misstatements and omissions of material fact and that this newly discovered evidence does not support the charges and specifications alleged.

OPINION

I.

Appellant contends that he entered into the Joint Motion under duress and without the advice or assistance of counsel. The Coast Guard, Appellant argues, placed him under duress by erroneously informing him that he had violated marine safety regulations, and by threatening him with a significantly longer period of suspension if he contested the charges. Appellant contends that, because of this duress, he was prevented

from submitting any evidence in his defense. Appellant then, offering conclusory assertions of duress, presents an affirmative defense to the effect that he was not negligent and did not violate any regulations. Because appellant has failed to show duress, evaluation of Appellant's affirmative defenses is not necessary.

I agree with the CALJ's analysis of this issue of first impression. To prove duress in this case, Appellant must show that the Coast Guard made an improper threat and that this threat left Appellant with no reasonable alternative but to agree to the Joint Motion. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175(1). The CALJ correctly concluded that, even if the Coast Guard had made an improper threat to force Appellant to accept the Joint Motion, Appellant has not shown that there was an absence of a reasonable alternative to signing the motion. The threat of commencing an ordinary civil action "does not usually amount to duress because the victim can assert his rights in the threatened action, and this is ordinarily a reasonable alternative to succumbing to the threat." RESTATEMENT (SECOND) OF CONTRACTS, § 175 cmt (b). The federal circuit courts agree. *See, e.g.,* Warner-Lambert Pharm. Co. v. Sylk, 471 F. 2d 1137 (3d Cir. 1972); Jurgensen v. Fairfax County, VA., 745 F. 2d 868 (4th Cir. 1984); Southmark Properties v. Charlie House Corp., 742 F. 2d 862 (5th Cir. 1984); Goodpasture v. TVA, 434 F. 2d 760 (6th Cir. 1970); Electrical Research Prods. v. Gross, 129 F. 2d 301 (9th Cir. 1941); International Tech Consultants v. Pilkington, 137 F. 3d 1382 (9th Cir. 1998); Board of Trustees of Nat'l Training Sch. For Boys v. O.D. Wilson Co., 133 F. 2d 399 (D.C. Cir. 1943). The CALJ correctly concluded that "[Appellant] had a clear alternative to signing the Joint Motion for Consent Order: not signing it and submitting the matter for adjudication." [D&O at 3]

The CALJ further noted that Appellant did not act under duress because he had ample time to decide whether or not to agree to the Joint Motion. On July 29, 1998, the Coast Guard informed Appellant that charges were being contemplated. On August 10, 1998, the Coast Guard offered to enter into the Joint Motion. Appellant then had nine days to decide whether to enter into the Joint Motion. [D&O at 3] "Clearly, the [Appellant] had sufficient time to decide whether to settle this matter with the Coast Guard." [D&O at 3]

Because Appellant had a clear alternative to signing the Joint Motion and because he also had an opportunity to reflect and refuse to sign the Joint Motion, Appellant has failed to provide any evidence of duress.

II.

Appellant argues that this hearing should be reopened because the Coast Guard report of the grounding incident contains misstatements and omissions of material fact and that this "fact was not known and could not with due diligence have been known by Appellant at the time he entered his plea." [Appellant's brief at 2]

An appellant may petition to reopen an administrative hearing on the basis of newly discovered evidence if the appellant can describe the newly discovered evidence and provide an explanation showing why the appellant, with due diligence, would not have discovered such evidence prior to the completion of the hearing. *See* 46 C.F.R. §§ 5.601 and 5.603; Appeal Decisions 2186 (ASCIONE); 2357 (GEESE); 2533 (ORTIZ); 2538 (SMALLWOOD). As the CALJ explained in his D&O, due diligence is defined as "such a measure of prudence, activity, or assiduity, as is properly to be expected from,

and ordinarily exercised by, a reasonable and prudent man under the particular circumstances...." BLACK'S LAW DICTIONARY at 457 (6th ed. 1990).

Appellant contends that the Coast Guard's report of the grounding incident and, more specifically, the "misstatements and omissions of material fact" in that report are newly discovered evidence that could not, with due diligence, have been discovered before Appellant signed the Joint Motion. As evidence that the report constitutes "newly discovered evidence," Appellant asserts only that the Coast Guard did not provide him with a copy of the report until after signing the Joint Motion. Appellant does not state, and it is not clear from the record, whether the Coast Guard's investigation report was completed prior to or after Appellant agreed to the Joint Motion. Assuming, *arguendo*, that the Coast Guard report was not completed until after Appellant signed the Joint Motion, and therefore the report constitutes "newly discovered evidence" (though this is by no means clear), Appellant still has failed to show that he would not have discovered the report's misstatements and omissions had he exercised due diligence.

I am in full agreement with the CALJ's clear and concise conclusion that, even if, *arguendo*, the Coast Guard's report contained misstatements and omissions, Appellant could have discovered these errors had he acted with due diligence. [D&O at 4] A reasonable and prudent person under these circumstances would have asked, prior to entering into the Joint Motion, the Coast Guard for its findings of facts on which the charges were based[2]. In his brief, Appellant does not indicate that he asked the Coast Guard for any findings of fact, though he spoke with Coast Guard investigators at least

[2] Appellant contends that his last fix, his statements to the investigators regarding the fathometer, the duties of the second made and the use of uncorrected Japanese pilot's chart are errors or omissions in the Coast Guard's report. If the Coast Guard had not erred on these items, Appellant argues, then the Coast Guard would not have had any evidence of negligence.

three times before signing the Joint Motion. Appellant provides no explanation why he, with due diligence, would not have discovered the Coast Guard's misstatements and omissions if he had asked for information regarding the Coast Guard's findings of fact. Appellant offers only conclusory assertions that due diligence would not have sufficed and therefore, Appellant's petition to reopen the hearing based on newly discovered evidence fails.

CONCLUSION

The findings of the CALJ are supported by reliable, probative and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The D&O of the Chief Administrative Law Judge dated April 5, 1999, is AFFIRMED.

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T. H. COLLINS
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 28th day of August, 2000.