U N I T E D S T A T E S O F A M E R IC A
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	VICE-COMMANDANT
LICENSE NO. 626596 Issued to John B. GOLDEN	:	ON APPEAL
	:	NO. 2594

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

By order dated March 2, 1995, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license based upon finding proved two specifications of *negligence*. The first specification alleged that on June 7, 1993, Appellant failed to properly navigate an integrated tug and barge (ITB) on the Cuyahoga River, causing an allision between the ITB and the M/V AGAWA CANYON (CANYON). The second specification alleged that, approximately one hour later, Appellant failed to properly navigate the ITB, causing an allision between the ITB and the M/V SEAGULL (SEAGULL).

The hearing was held on October 21, 1993. Appellant entered a response denying the charge and specifications.

The Coast Guard Investigating Officer offered into evidence ten exhibits and the testimony of three witnesses. Appellant offered into evidence four exhibits and his own testimony. The Administrative Law Judge offered into evidence the testimony of one witness.

The Administrative Law Judge issued a written Decision and Order on March 2, 1995. It concluded that the charge of negligence and the two supporting specifications were found proved. The Administrative Law Judge suspended Appellant's license outright for a period of two months, with a two month additional suspension, remitted after 12 months of probation.

Appellant filed a timely notice of appeal on March 21, 1995. The appeal was perfected on June 3, 1996, after Appellant received an extension.

APPEARANCE: Geoffrey H. Longenecker, 202 N. Jefferson Street, P.O. Box 1296, Covington, LA 70434.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned license while serving as pilot and operator of the ITB. The ITB consisted of the tug OLIVE L. MOORE and the barge MCKEE SONS. The ITB measured approximately 703 feet in length. [Investigating Officer (I.O.) Exhibit 1]. Appellant's license authorized him to serve, in pertinent part, as first class pilot of steam or motor vessels upon the Great Lakes and its connecting and tributary waters. [Transcript (TR) at 5].

On June 7, 1993, the ITB was proceeding down-bound on the Lower Cuyahoga River. [Respondent (R.) Exhibit S, TR at 37]. At approximately 2255, the ITB passed under the West 3rd Street Bridge and allided with the CANYON causing minor damage. [Stipulated Fact (S.F.) 8]. The CANYON was moored to the Cleveland Building Supply Dock. The ITB proceeded down river and, after passing under the Carter Street Bridge, allided with the SEAGULL. [S.F. 9]. The SEAGULL, a 68-foot sailing vessel, was moored on the left descending bank. [TR at 85]. The damage from the allision caused the SEAGULL to immediately sink. [TR at 80]. No injuries resulted from either allision. [TR at 80, 201].

At the time of both allisions, Appellant, acting as pilot, was with the master of the ITB in the wheelhouse located forward on the barge. [TR at 155-156]. Appellant, prior to the allisions, posted port, stern and bow lookouts. [TR at 156]. The port lookout communicated with Appellant via a hand-held radio. The lookout changed the radio's batteries after the first allision and prior to the second. [TR at 64].

The weather consisted of an overcast sky and a faster-than-normal river current caused by earlier rain.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the Decision and Order of the Administrative Law Judge:

1. The application of the presumption of fault that results from an allision violated Appellant's due process and equal protection rights.

2. The presumption of negligence applied only to the vessel, not to personnel aboard the vessel.

3. The Administrative Law Judge erroneously allowed testimony of a witness to be taken over the telephone.

4. The Coast Guard presented no evidence showing that the ITB allided with the CANYON.

5. Even if the ITB allided with the CANYON, Appellant was not at fault because the cause of the allision was the fact that the CANYON had repositioned itself into the channel.

6. Because the port lookout had to change batteries in the hand-held radio, Appellant was not at fault for the allision with the SEAGULL because he was not notified that the ITB was approaching the SEAGULL with enough time to react.

OPINION

I

Appellant contends that application of the presumption of fault that results from an allision violated Appellant's due process and equal protection rights and was thus unconstitutional.

First, Appellant raises constitutional issues inappropriately in this forum. The purpose of these proceedings is remedial in nature and the proceedings are intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 U.S.C. § 7701; 46 C.F.R. §§ 5.3, 5.5. Appellant confuses legal terms and appears to equate this administrative proceeding with civil and criminal actions. The exercise of the Coast Guard's authority over mariner licenses and documents is governed by the Administrative Procedure Act. *See* 5 U.S.C. § 551 *et seq*.; 46 C.F.R. § 5.1(a); Appeal Decision 2490 (PALMER). An administrative proceeding does not address civil liability or criminal guilt. In his appeal brief, Appellant used the terms 'presumed innocent,' 'presumption of guilt,' and 'convicted.' These terms simply do not apply to the instant proceeding. These proceedings "are not criminal trials". Appeal Decision 2374 (JETER). In finding the two specifications of negligence proved against Appellant, the Administrative Law Judge found that Appellant's actions fell within the defined scope of the term "negligence" in that Appellant "committed an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit," or that Appellant "failed to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform." *See* 46 C.F.R.
§ 5.29. Appellant was not convicted of a crime. As such, neither the Administrative Law Judge nor the Commandant are vested with the authority to decide constitutional issues; that is exclusively within the purview of the Federal courts. Appeal Decisions 2546 (SWEENEY), 2560 (CLIFTON).

Having addressed the issue of authority to address constitutional issues, Appellant is entitled to due process as established for administrative proceedings and it is on this basis that I will address the arguments with regard to the presumption of fault arising from an allision. It is well settled that a presumption of fault arises when a moving vessel collides with a fixed object and that this presumption suffices to establish a *prima facie* case of negligence against the moving vessel. *See* Woods v. U.S., 681 F.2d 988 (5th Cir. 1982); Commandant v. Murphy, NTSB Order No. EM-139 (1987); Appeal Decisions 2211 (DUNCAN), 2418 (DOUGHERTY), 2455 (WARDELL), 2457 (YOUNG), 2524 (TAYLOR), *aff'd,* NTSB Order No. EM-174 (1993). The reason for this presumption is that allisions "simply do not occur in the ordinary course of things unless the vessel has been mismanaged." Patterson Oil Terminals v. The Port Covington, 109 F.Supp. 953, 954 (E.D. Pa.1952), *aff'd,* 208 F.2d 694 (3d Cir. 1953).

The Supreme Court has held that "[p]resumptions are permissible [in administrative hearings] unless they are unreasonable, arbitrary, or invidiously discriminatory." Lavine v. Milne, 424 U.S. 577, 582 (1975). If the presumption being applied meets the articulated standard, then due process is satisfied. *See* Chung v. Park, 514 F.2d 382, 387 (3rd Cir.), *cert. denied*, 423 U.S. 948 (1975); Dawson v. Myers, 622 F.2d 1304, 1314 (9th Cir. 1980); Appeal Decision 2560 (CLIFTON). There was no evidence presented by Appellant that the presumption was arbitrary or invidiously discriminatory. However Appellant did argue that the application of the presumption of fault was unreasonable. This argument must fail as the reasonableness of the presumption in question has been well tested over time. Federal courts have consistently applied the presumption of fault to find the navigator of a vessel involved in an allision to be negligent. *See* The Oregon, 158 U.S. 186 (1894); Seaboard Airline R. Co. v. Pan American Petroleum and Transp. Co., 199 F.2d 761 (5th Cir. 1952), *cert. denied*, 345 U.S. 909; Ford Motor Co. v. Bradley Transp. Co., 174 F.2d 192 (4th Cir. 1949); The Severance, 152 F.2d 946 (4th Cir. 1945), *cert. denied*, 328 U.S. 853; Carr v. Hermosa Amusement Corp., 137 F.2d 983 (9th Cir. 1943); Sabine Towing and Transp. Corp. v. St. Joe Paper Co., 297 F. Supp. 748 (N.D. Fla. 1968).

Additionally, the Federal courts have explicitly stated that the pilot, as opposed to the master, who navigates a vessel and causes an allision with a fixed object may be found negligent; "when we consider the value of the lives and property committed to [the pilots'] control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations...this very class of skill, we do not think we fix the standard too high. Atlee v. Packet Co., 88 U.S. 389 (1874); *see also* The Framington Court v. United British S.S. Co., 69 F.2d 300 (5th Cir. 1934); Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 F. 845 (S.D.N.Y. 1894). My review of the record confirms that the application of the presumption to Appellant was not unreasonable, arbitrary, or invidiously discriminatory and, thus, was validly applied.

Appellant contends that the presumption at issue is the antithesis of the ideal that a respondent should be presumed innocent of the charges "like every common criminal." [Appeal Brief at 11]. In making this argument, Appellant fails to recognize both that an administrative hearing, as discussed above, is not a criminal trial and that the burden of proof remained with the Coast Guard throughout the administrative hearing. *See* 46 C.F.R. § 5.39; Appeal Decisions 2379 (DRUM), 2266 (BRENNER), 2264 (McKNIGHT). The establishment of the presumption of fault and the associated proof of a *prima facie* case of negligence does not alter the fact that the burden to prove the charge against Appellant always rested with the Coast Guard. *See* Appeal Decision 2211 (DUNCAN). Nor is the presumption of fault an irrebuttable presumption. As the Administrative Law Judge correctly pointed out in her decision, Appellant could have rebutted the presumption by presenting sufficient credible and reliable proof of the intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence. [D&O at 5]. If evidence of that kind had been introduced by the appellant, the burden would have been on the Coast Guard to rebut such evidence.

Appellant also contends that the presumption forced him to testify and present evidence on his own behalf, also in contravention of administrative due process. The respondent in a Coast Guard suspension and revocation hearing has a right to either testify or to remain silent. *See* 46 C.F.R. § 5.521; Appeal Decisions 2279 (LEWIS), 2174 (TINGLEY). The Administrative Law Judge explained this right to Appellant, stating that no inferences would be drawn if Appellant chose not to testify. [TR at 8-9]. My review of the record shows that Appellant was not ‘forced’ to present evidence on his own behalf but instead decided on his own to do so. Appellant’s contention that the Administrative Law Judge should be reversed because he was allowed to present evidence on his own behalf is without merit.

II

Appellant contends that the presumption of fault that arises from an allision applies only to the vessel and not to persons on board the vessel and, therefore, the presumption cannot be invoked against him. I disagree. In Commandant v. Pierce, NTSB Order No. EM-81 (1980), the National Transportation Safety Board specifically addressed this issue, stating that the presumption at issue is applicable equally to the vessel and to the "licensed officer directing the vessel’s navigation at the time."

Appellant also contends that he was ‘singled out’ by the Coast Guard, and that, in light of the fact that many individuals are involved with the navigation of the vessel, the master and other crew members could or should also have been charged. Such a conclusion is incorrect and inconsistent with my prior decisions. My decisions have consistently stated or implied that the presumption of negligence at issue applies solely to the person navigating the vessel at the time of the allision.

See Commandant v. Murphy, NTSB Order No. EM-139 (1987); Appeal Decisions 2211 (DUNCAN), 2418 (DOUGHERTY), 2455 (WARDELL), 2457 (YOUNG), 2524 (TAYLOR), *aff'd*, NTSB Order No. EM-174 (1993), 2500 (SUBCLEFF), 2501 (HAWKER), 2492 (RATH), 1200 (RICHARDS), 2402 (POPE), 2380 (HALL), 2284 (BRAHN), 2379 (DRUM), 2415 (MASHBURN). The standard for pilots is similar to the standard used to hold a master at fault, that is "a Master is not strictly liable for the actions of those aboard that person's vessel...The Master must be negligent himself..." Appeal Decision 2395 (LAMBERT). As Appellant testified that he was the navigator of the vessel at the time of the allisions, [TR at 155], the Administrative Law Judge correctly found that the presumption of fault applied solely against Appellant.

Appellant cites Klatt v. U.S., 965 F.2d 743 (9th Cir. 1992), to support his contention that the presumption of fault arising from an allision should not be applicable to the pilot of the moving vessel. I find that the decision in Klatt is irrelevant to the facts of this case. In Klatt, the Coast Guard attempted to revoke a master's license based solely on the fact that his vessel discharged oil in violation of the Clean Water Act. The Ninth Circuit held that a master's license cannot automatically be revoked based solely on a breach of a no-fault statute. Appellant's situation is different from the master's in Klatt because an allision, far from being based on a no-fault statute, actually gives rise to a presumption of fault. Furthermore, for the reasons discussed above, that presumption has been historically applied so as to presume the pilot of the moving vessel was at fault. Thus, I find Appellant's appeal on this issue baseless and affirm the decision of the Administrative Law Judge.

III

Appellant contends that the Administrative Law Judge erroneously allowed the testimony of a witness to be taken over the telephone. I disagree.

The Administrative Law Judge may take the testimony of a witness by telephone conference call, when testimony would otherwise be taken by deposition. *See* 46 C.F.R. § 5.535(f). The testimony of this witness could otherwise have been taken by deposition. *See* 46 C.F.R. § 5.553(a). It is well settled that telephonic testimony is proper in these proceedings. *See* Appeal Decision 2476 (BLAKE), *aff. sub nom.* Yost v. Blake, NTSB Order No. EM 156 (1989), *aff. sub nom.* Blake v. Department of Transportation, NTSB, No. 90-70013 (9th Cir. 1991). My review of the record finds that the Administrative Law Judge acted properly in allowing this telephonic testimony.

Appellant also contends that the Coast Guard agreed to subpoena documents from this witness and that its failure to present the documents violated Appellant's due process rights. I disagree. There is no evidence in the record that indicates that the Investigating Officer agreed to supply Appellant with these documents. More importantly, "[s]ervice of subpoenas on behalf of [Appellant] is the responsibility of [Appellant]...[unless] the Administrative Law Judge finds

[Appellant] physically unable to effect service."
46 C.F.R. § 5.303. During the hearing, the Administrative Law Judge stated that Appellant was responsible to serve his own subpoenas. [TR at 187]. Therefore, I find Appellant's contention baseless.

IV

Appellant contends that the Coast Guard presented no evidence showing that the ITB allided with the CANYON. I disagree.

The parties submitted stipulated facts. One of the stipulated facts stated that the "starboard outflow vent of the [barge] came into contact with the [CANYON]...." [SF 8]. These stipulated facts were introduced into evidence by the Administrative Law Judge without objection. [TR at 126]. Therefore, because Appellant stipulated to the fact that the ITB came into contact with the CANYON, I find that the Coast Guard presented ample evidence showing that the ITB allided with the CANYON.

V

Appellant alternatively argues that, even if the ITB allided with the CANYON, Appellant was not at fault because the cause of the allision was the fact that, just prior to the allision, the CANYON repositioned itself into the channel.

I have consistently held that the Administrative Law Judge is in the best position to determine the facts. *See* Appeal Decisions 2421 (RADER), 2319 (PAVELIC). The Administrative Law Judge found as a matter of fact that the CANYON was moored prior to the incident and, thus, had not repositioned itself into the channel. [D&O at 3]. The Administrative Law Judge's findings must be supported by reliable, probative, and substantial evidence. *See* 46 C.F.R. § 5.63; Appeal Decisions 2420 (LENTZ), 2421 (RADER). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *aff'd*, NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), 2474 (CARMIENKE). Furthermore, conflicting evidence will not be reweighed on appeal when the Administrative Law Judge's determinations can be reasonably supported. *See* Appeal Decisions 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER). Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decisions 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY). Upon review of the record, I find nothing to show that the finding of the Administrative Law Judge on this matter was arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Thus, the finding of the Administrative

Law Judge is upheld.

VI

Appellant contends that, because the port lookout had to change batteries in the hand-held radio, Appellant was not notified that the ITB was approaching the SEAGULL sufficiently in advance to prevent the allision. The Administrative Law Judge found that the lookout changed the batteries in a matter of seconds and that the failed batteries did not contribute to the allision. My review of the record, specifically the testimony of the lookout [TR at 63-64], finds that this determination is not arbitrary, capricious, clearly erroneous or unsupported by law, and I will not upset it on appeal.

CONCLUSION

The findings of the Administrative Law Judge are supported on the record by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable law.

ORDER

The Decision and Order of the Administrative Law Judge dated March 2, 1995, is AFFIRMED.

Signed at Washington D.C., this 1st day of December, 1997.

/S/

R. D. HERR
Vice Admiral, U.S. Coast Guard
Vice Commandant