MORSE

U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
vs.	:	VICE COMMANDANT
License No. 637389	:	ON APPEAL
Issued to: Bruce W. MORSE, Appellant	:	NO. 2572

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

By order dated 28 April 1993, an Administrative Law Judge (ALJ) of the United States Coast Guard at Houston, Texas, suspended Appellant's merchant mariner's license outright for three months, with a further six months' suspension on 24 months' probation,

upon finding proved a charge of *negligence*. The charge was supported by three specifications. All three specifications concerned Appellant's actions while serving under the authority of his license as Master of the small passenger vessel MAALAEA KAI II, O.N. 900366, on 18 December 1992, while the vessel was underway off Molokini Crater near the island of Maui, Hawaii. The three specifications alleged that Appellant failed to take action to avoid a collision with the vessel IDLE WILD; failed to sound a danger signal; and failed to keep a safe distance from the moored dive boat ONELOA which then had divers in the water.

A hearing was held at Wailuku, Maui, Hawaii, on 3 and 4 March 1993. The case was heard in joinder with related proceedings against the license of Phillip A. Sykes, who had operated the small passenger vessel IDLE WILD, the other vessel involved in the collision. Appellant Morse was present at the hearing and represented by counsel throughout the proceedings.

Appellant denied all three specifications. The Investigating Officer (IO) introduced 24 exhibits and the testimony of 9 witnesses. Appellant testified on his own behalf and introduced 29 exhibits.

At the close of the hearing, the ALJ reserved decision until all parties could submit written briefs. The ALJ then rendered a written decision on 28 April 1993 in which he found that the

charge and all specifications were proved. The ALJ's decision and order were served on Appellant and his counsel by certified mail, return receipt requested, on 29 April 1993. Appellant filed notice of appeal on 14 May 1993. He received a copy of the transcript on 1 July 1993 and perfected his appeal by filing a brief on 30 August 1993, within the filing requirements of 46 C.F.R. 5.703(c). This case is therefore properly before me for appeal.

Appearance: Appellant *pro se*.

FINDINGS OF FACT

At all times relevant herein, Appellant was acting under the authority of his Coast Guard license, captioned above, endorsed as Master of Near Coastal Auxiliary Sail vessels of not more than 100 gross tons. Throughout the date in question, 18 December 1992, Appellant served as Master of the auxiliary sail passenger vessel MAALAEA KAI II, official number 900366, a 40' trimaran of 12 gross tons inspected as a small passenger vessel.

Molokini Crater is a popular diving spot about nine and a half miles from Maalaea Harbor, Maui, in the Alalakeiki Channel between the islands of Maui and Kahoolawe. Appellant's vessel is one of many small vessels that regularly visit the crater from ports on Maui. Another such vessel is the 34' auxiliary sail catamaran IDLE WILD, operated by Phillip Sykes. Both Appellant and Mr. Sykes sail to the crater almost daily with passengers

aboard. Because of regular weather conditions, Molokini Crater is usually visited only in the morning. As a result, traffic is often congested as vessels converge upon the crater in the morning or depart from it around midday. The vessel operators who frequent the crater are accustomed to maneuvering in close quarters with one another.

On 18 December 1992, at about 0845, the MAALAEA KAI II took aboard 14 passengers at Maalaea Harbor Maui, Hawaii, and proceeded towards Molokini Crater. The IDLE WILD had set out similarly about half an hour before.

The two vessels' relative positions varied during the trip. When the MAALAEA KAI II was about 2 miles from the crater, Appellant noted IDLE WILD on a similar course about a half mile distant on Appellant's starboard beam. By the time both vessels were about to enter the crater, both were operating under power. They were less than 100 feet apart and IDLE WILD was overtaking MAALAEA KAI II from Appellant's starboard quarter. Ahead and about 50 feet to the right of Appellant's course was a moored dive boat, ONELOA, with dive flags displayed and divers in the water.

As MAALAEA KAI II and IDLE WILD converged, MAALAEA KAI II was the stand-on vessel with IDLE WILD overtaking from the stern quarter. Mr. Sykes, operator of the IDLE WILD, called "Sea room!" or the equivalent to Appellant, who replied "Privileged!" or the

equivalent. Shortly thereafter the IDLE WILD's port bow struck the MAALAEA KAI II's starboard quarter.

The vessels separated without further incident. There was no loss of life or injury from the incident, but both vessels sustained some damage. At no time did either vessel sound the five-blast danger signal.

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ. Appellant has presented a lengthy brief on appeal, naming 3 bases of appeal as such, but with a number of subordinate arguments:

I. The Administrative Law Judge (ALJ) erred in admitting a police report in evidence (Coast Guard exhibit 14).

II. The ALJ erred in how he arrived at many of his conclusions.

III. The ALJ erred in that the order he imposed is too severe.

OPINION

I

Appellant urges that the Administrative Law Judge (ALJ) erred in admitting a police report in evidence (Coast Guard exhibit 14).

This basis of appeal is without merit. Even if, as Appellant argues, the report lacked relevance, this was at most harmless error: there is no indication that the ALJ relied on the exhibit in any way whatsoever in arriving at his findings of fact or his decision and order. *See* Appeal Decisions (2487 (THOMAS)),

(2531 (SERRETTE)).

II

Appellant asserts multiple errors in how the ALJ arrived at his conclusions as discussed below:

A

Appellant argues that the ALJ erred in concluding that Appellant was negligent in not taking "early and substantial action to avoid collision." I agree in part.

The first specification supporting the charge of *negligence* against Appellant alleged that Appellant "wrongfully fail[ed] to take action to avoid a collision [....]" Decision and Order (D & O) at 3. Appellant argues at great length that, as the stand-on vessel in an overtaking situation, he was entitled to presume that the other vessel would comply with the Rules of the Road by keeping clear. Up to a point, the argument is sound. *See, e.g.,* J. Griffin, The American Law of Collision (Griffin on Collision) 17; F. Bassett & R. Smith, Farwell's Rules of the Nautical Road, *6th ed., p. 313* (Farwell).

Action to avoid collision is the subject of Rule 8 of the International Regulations for the Prevention of Collisions at Sea (72 COLREGS; 33 U.S.C. 1601 *et seq*.). However, it is clear on the record that Appellant's vessel was the stand-on vessel being overtaken by Mr. Sykes's vessel IDLE WILD. D & O at 9, Finding of Fact 22. Hence Rule 8 only applies through the lens of Rule 17, Action by Stand-On Vessel. 72 COLREGS, *supra*.

The ALJ found that Appellant "failed to take early and substantial action to avoid the collision." D & O at 13-14, Findings of Fact nos. 33 and 35. However the phrase "early and substantial action" [to keep well clear] appears only in Rule 16, Action by Give-Way Vessel. 72 COLREGS, *supra*. It cannot, therefore, set a standard of care for Appellant, as the ALJ found his to be the Stand-On vessel. D & O at 9. Thus the ALJ's Findings of Fact nos. 33 and 35, as they relate to "early and substantial" action by Appellant, must be reversed. That does not end the inquiry, however, because both the specification and the ultimate findings are phrased without the "early and substantial" language, but merely in terms of "action to avoid collision." D & O at 3, 15. I turn, therefore, to Rule 17, Action by Stand-On Vessel. 72 COLREGS, *supra*.

Rule 17 clearly divides its rubric according to three phases of an overtaking situation. *Id*. First, under Rule 17(a)(i), the overtaken vessel *shall* keep her course and speed. *Id*. (Emphasis added.) This section of the Rule governs that period where the other vessel "is to keep out of the way." *Id*. It therefore describes that period of time beginning when approaching vessels take the form of an overtaking situation.

Secondly, under Rule 17(a)(ii), the overtaken vessel *may* depart from her course and speed "as soon as it becomes apparent to her

that the vessel required to keep out of the way is not taking appropriate action in compliance with these Rules." *Id*. (Emphasis added.) This section of the Rule clearly links immediately to its predecessor, identifying the time when Rule 17(a)(i) ceases to govern -- *viz*., when it becomes "apparent" that the other vessel is not complying with the rules. Finally, under Rule 17(b), if the overtaken vessel determines that collision "cannot be avoided by the action of the give-way vessel alone, she *shall* take such action as will best aid to avoid collision." *Id*. (Emphasis added.) Similarly, this section denotes the end of Rule 17(a)(ii)'s application -- *viz*., when the vessels are so close that only action by the stand-on vessel can avoid collision.

Rule 17 thus identifies four phases in the encounter between Appellant's vessel and the IDLE WILD: first, before Rule 17 applied (i.e., where the approaching vessels had not yet taken on the roles of stand-on and give-way vessel), either was free to maneuver under Rule 8 so as to abort the encounter. Second, where the overtaking situation had taken form, Appellant was obliged to maintain his course and speed. Third, where it "became apparent" that the IDLE WILD was not operating as the Rules required, Appellant was *permitted* to act unilaterally to avoid collision. Finally, where the vessels were so close that

IDLE WILD could not avoid collision by her own action alone, Appellant was *required* to act "as [would] best aid to avoid collision" *See* W. Crawford, Mariner's Rules of the Road (1983) at 81.

The first phase is not at issue here: the fact that the overtaking (and indeed, the collision) took place makes it clear that the encounter was not aborted.

Negligence will not lie under Rule 17(a)(i) except for failure to maintain course and speed, which is not what happened in the instant case: the period governed under Rule 17(a)(i) was not the subject of the charge here.

The third phase, under Rule 17(a)(ii), is permissive rather than mandatory ("the overtaken vessel *may* depart . . ."), according discretion to the vessel's master. Neither the specifications of negligence nor the facts of this case involve such a departure, so the third period governed under Rule 17 is also not in issue here.

The last phase, under Rule 17(b), returns to mandatory language: if the give-way vessel is so close that she cannot avoid collision by her action alone, the stand-on vessel "*shall take* such action as will best aid to avoid collision." *Id*. (Emphasis added.) This is the rule implicated by Specification 1, for it is the only obligation of avoidance imposed under Rule 17. It is undisputed on the record that Appellant took no action

whatsoever to avoid collision, but merely maintained course and speed on the argument that by so doing he was minimizing the impact of collision. TR at 433. That argument is misplaced in that it ignores the mandatory command of Rule 17(b). 72 COLREGS, *supra*. Appellant's choice is prudent only where collision is unavoidable. In his testimony, Appellant described abandoning his course and speed as one of several "options." TR at 432. Appellant is mistaken: Rule 17(b) is not an "option" but a clear obligation.

Even under Appellant's version of the facts, he was negligent. When he and the vessel IDLE WILD were 35-40 feet apart, Appellant called for Mr. Sykes to keep clear. TR at 426. Mr. Sykes replied by yelling "Sea room" and continuing on course. *Id*. A prudent navigator would necessarily conclude that the IDLE WILD was not keeping clear. Thus Rule 17(a)(ii) applied, permitting Appellant to abandon course. Had Appellant come hard left at that point, it is unlikely there would have been a collision, considering the nimble handling to be expected of such vessels as these. Even if the vessels had collided, Appellant would likely have fulfilled his duty of avoidance under Rule 17(b).

Instead, Appellant chose to maintain his course and speed. He was entitled to do so: Rule 17(a)(ii) is permissive. But at some point after his exchange with Mr. Sykes, but before the

collision, Rule 17(a)(ii) was superseded by Rule 17(b). Precisely where that point was does not matter; its position is a function of weather, vessel characteristics, and other factors. What does matter is that Appellant then became obliged to act to aid in avoiding collision, and he failed to do so. For the purpose of these suspension and revocation proceedings, violation of a navigation rule is negligence *per se*. Appeal Decisions (2386) ((LOUVIERE)), (2358 (BUISSET)). Appellant's only rebuttal, discussed *supra*, was no rebuttal at all because it accounts only for the time *after* Rule 17(b) should have been obeyed. Appellant was obliged to act *before* collision became inevitable.

B

Appellant next argues that the ALJ erred in finding that there were two collisions rather than one prolonged collision. Appeal at B2. I disagree. This finding does not go directly to any of the specifications, but merely weighed in the ALJ's evaluation of Appellant's credibility. That there were two collisions has ample support on the record and will not be disturbed on appeal.

C

Appellant next argues that the ALJ was illogical in finding Appellant's testimony contradictory. Appeal at B6. As this argument does not impugn any essential finding of fact, I deem it irrelevant to the appeal and therefore decline to explore it further.

D

Appellant next argues that the ALJ was illogical in finding Witness Kirk's testimony credible. Appeal at B8. As I have repeatedly held, credibility determinations are peculiarly within the province of the ALJ and will not be disturbed on appeal unless they are clearly in error or have no support in the record. Appeal Decisions (2503 (MOULDS)); (2156 (EDWARDS)); (2212) ((LAWSON)); (2340 (JAFFEE)), *et al*. The ALJ's determination in this case had support as the ALJ noted. D & O at 22. I therefore decline to disturb it.

E

Appellant next argues that the ALJ's reference to the Senior Investigating Officer's (SIO's) argument lacks support by findings of fact. Appeal at B11. This argument is without merit. The ALJ was simply paraphrasing an argument that the SIO made in his written closing argument. USCG Closing Argument at 7; D & O at 30. Appellant has argued that he was entitled to maintain "course and speed right to the end." Appeal at B11. As discussed *supra*, I agree with the SIO and the ALJ that Appellant misunderstood his obligations under the COLREGS. The record clearly showed that Appellant violated Rule 17. It is not error for the ALJ to adopt the SIO's argument to that effect.

F

Appellant next argues that the second specification of negligence, for failure to sound the danger signal, is unfounded.

I disagree.

Appellant argues that shouts between the vessels alerted both masters to the danger of collision, so that his failure to sound the danger signal is rebutted by eliminating any causal relationship it may have had to the collision. Appeal at C1, *citing* **Yang-Tsze Ins. Ass'n. v. Furness, Withy & Co**., *215 F. 859 (2nd Cir. 1914).*

Appellant misunderstands the nature of these remedial proceedings. Appellant was charged with negligence. Negligence is defined as committing an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the converse failure to act. 46 C.F.R. 5.29. Fault, liability, or even the fact of a casualty or collision, are not elements of negligence as defined above.

When Appellant and the vessel IDLE WILD were 35-40 feet apart, Appellant called for Mr. Sykes to keep clear, and Mr. Sykes replied by yelling "Sea room" and continuing on course. TR at 426. A prudent navigator would certainly entertain doubt whether sufficient action was being taken to avoid collision. Rule 34(d) then imposes a duty to sound the danger signal. 72 COLREGS, *supra*. All the witnesses testified that no danger signal was sounded. TR, *passim*. The ALJ made a corresponding finding of fact. D & O at 15. Appellant was thus in violation of a

navigation rule. D & O at 16.

As I stated *supra*, for the purpose of these suspension and revocation proceedings, violation of a navigation rule is negligence *per se*. Appeal Decisions (2386 (LOUVIERE)), (2358) ((BUISSET)). Appellant's only rebuttal, discussed *supra*, goes only to causality. As such it is irrelevant to the issue of negligence in these proceedings.

G

Appellant next argues that the third specification of failing to keep a safe distance from the dive boat ONELOA is without support in the record. I agree.

The ALJ found that Appellant came within 50 feet of the moored dive boat ONELOA. D & O at 10. The ALJ also found that Appellant was "about," rather than "within," 50 feet of ONELOA. D & O at 27, 28. However, the record fails to establish any standard of care with respect to this specification except to say that divers must surface within 50 feet of their dive vessel. I.O. Exhibit 9. Appellant, on the other hand, introduced evidence that all divers from the boat ONELOA surfaced by ascending the vessel's anchor chain, so that they surfaced within very few feet of the vessel. TR at 122-23. The 50 foot surfacing requirement means that a prudent navigator might plan his course based upon a 50 foot radius from dive boats. Hence it was not negligent for Appellant to follow a course such that his closest point of approach to a moored dive boat was "about 50

feet" in these circumstances.

H

Appellant next argues that witnesses Pilling, Claypool, and Sykes gave "contradictory and false testimony." Appeal at E1-E11. These assertions avail Appellant nothing. As I have repeatedly held, and as I have already explained, section II.D, *supra*, it is the function of the ALJ to resolve conflicts and inconsistencies in the evidence before him. Credibility determinations are a part of that function. Absent clear error by the ALJ in performing that function, of which Appellant makes no showing here, the mere fact of inconsistent evidence does not constitute a basis for appeal.

III

Finally, Appellant argues that the ALJ's order was overly severe. Appeal at G1. I disagree.

The sanction imposed in these hearings is exclusively within the authority and discretion of the ALJ. Appeal Decisions (2427) ((JEFFRIES)), (2362 (ARNOLD)). The ALJ's order will not be modified on appeal unless it is clearly excessive. Appeal Decision (2455) (Wardell) (*Aff'd sub nom.* Commandant v. Wardell, NTSB Order No. EM-149); Appeal Decision (2391 (STUMES)). The range of orders for negligence in performing vessel navigation duties, which describes the first two specifications of this case, is two to four months' suspension per act. This case amounts to one of the

most dangerous and reprehensible situations possible:

> ". . . two bull-headed navigators, each determined not to give way to the other, and as a result, taking or persisting in action which was almost certain to end up in collision." *The Jan Laurenz*, Q.B. (Adm. Ct.) [1972], 1 Lloyd's Rep. 404, *quoted in* Farwell, *supra*, at 251.

While I have vacated the ALJ's finding with respect to the third specification, the order the ALJ imposed was lenient by comparison with the Table of Average Orders. The ALJ obviously took account of Appellant's clear prior record. However, I note that the ALJ specifically considered the third specification, which I have vacated, as aggravating the incident. D & O at 31. Therefore, even in light of the overall lenity of the ALJ's order, I consider it appropriate to adjust the period of outright suspension.

CONCLUSION

Except as modified herein, the findings and conclusions of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with applicable law and regulations. Except as noted, I find no legal error in the proceedings or the ALJ's findings, nor has Appellant shown any. The ALJ's order, as modified below, is not excessive.

ORDER

The findings of the Administrative Law Judge with respect to Specifications 1 and 2 are AFFIRMED. With respect to Specification 3 they are VACATED. The ALJ's order is MODIFIED hereby from 3 months' OUTRIGHT suspension to 2 months' OUTRIGHT suspension, and the balance of 6 months' suspension on 2 years of probation AFFIRMED.

/S/ A. E. HENN
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 17th day of November 1995.

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