

SERVED: November 5, 2008

NTSB Order No. EM-205

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of November, 2008

_____)	
THAD W. ALLEN,)	
Commandant,)	
United States Coast Guard,)	
)	
)	
v.)	Docket ME-181
)	
)	
JOHN C. McCARTHY, III,)	
)	
Appellant.)	
)	
_____)	

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Vice Commandant (Appeal No. 2680, dated April 8, 2008), which affirmed a bifurcated Decision and Order that Coast Guard Administrative Law Judge Peter A. Fitzpatrick issued on November 29 and December 28, 2006, following evidentiary hearings conducted on September 20 and 21, and December 20, 2006.¹ The

¹ Copies of the decisions of the Vice Commandant and the law judge are attached.

law judge sustained allegations of misconduct and negligence, under 33 C.F.R. § 162.65(b)(3) and Marine Safety Information Bulletin (MSIB) 13-05, related to appellant's speed while passing a liquid natural gas (LNG) facility.²

The alleged violations took place as appellant was navigating the tank vessel CHARLESTON and giving engine orders and rudder commands as he passed the LNG terminal at 14.2 knots while proceeding inbound on the Savannah River, thereby causing the LNG tankship GOLAR FREEZE to surge into the dock, resulting in damage to the GOLAR FREEZE and to shore structures, and posing a risk related to the active LNG transfer being conducted. The law judge ordered that appellant's pilot's license be immediately

² The Coast Guard theory is that appellant engaged in misconduct as defined by 46 C.F.R. § 5.27, which states in pertinent part:

Misconduct ... violates some formal, duly established rule. Such rules are found in ... statutes, regulations, the common law, the general maritime law, ... and similar sources. It is an act which is forbidden or a failure to do that which is required.

The Coast Guard alleges that appellant violated 33 C.F.R. § 162.65(b)(3), which states, in pertinent part, that, "[v]essels shall proceed at a speed which will not endanger other vessels or structures...."

The theory regarding negligence is that appellant was negligent, as that term is defined, in pertinent part, by 46 C.F.R. § 5.29:

Negligence is the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit....

In this regard, the Coast Guard alleges that appellant violated "minimum safe speed," as established by MSIB 13-05, Interim Policy for LNG Tankship Operations, issued by the Coast Guard Captain of the Port of Savannah, Georgia, which provides, in pertinent part, that, "[v]essels 1600 gross tons or greater shall ... transit that area [1,000 yards on either side of the liquid natural gas facility slip] at minimum safe speed when an LNG tankship is present within the slip." See Exh. R-K.

suspended for 8 months, followed by a 12-month probation period, during which, if he committed another violation, the Coast Guard would suspend his license for an additional 12 months. As we find no valid basis in appellant's assignments of error for overturning the Vice Commandant's affirmation of the law judge's decision and order, we deny appellant's appeal.

The relevant facts for the purposes of our review of this appeal are essentially undisputed.³ On March 14, 2006, appellant was serving as pilot on board the tank ship CHARLESTON, 635 feet in length and almost 28,000 gross tons, while the CHARLESTON was transiting the Savannah River. Appellant boarded the CHARLESTON at the mouth of the Savannah River, and thereafter served as pilot for the transit inbound on the Savannah River to the ConocoPhillips facility. As is the norm, the CHARLESTON's master retained overall command of the vessel, and appellant, as local pilot, navigated the vessel and issued the requisite engine orders and rudder commands. Appellant did not slow as he passed the LNG Terminal, where the LNG tankship GOLAR FREEZE was moored and in the process of an LNG transfer. At the time, appellant's last engine order was "full ahead." He did not establish communications with the LNG Terminal or the GOLAR FREEZE at its slip before passing at full ahead.

The Savannah River is 700 to 1,000 feet wide at the LNG Terminal. The CHARLESTON was 300 to 500 feet from the LNG Terminal when it passed at full ahead. As a result of that

³ A more detailed recitation of the record evidence can be found in the law judge's decision and order.

passing, the GOLAR FREEZE surged along the dock face, damaging mooring lines and the ship's gangway, and breaking LNG transfer hoses and other equipment.

At the time appellant boarded the CHARLESTON, the master and appellant had a pilot-master conference and discussed whether the CHARLESTON would need to slow before passing the LNG Terminal because of the LNG tankship moored within its slip. Appellant indicated that he believed that "minimal requirements" for the passing existed, that the new slip had been built to counteract the effect of any surge, and that two "standby" tugs would conduct operations to control any surge. Based on these beliefs, appellant planned for the CHARLESTON to proceed at full ahead, despite the moored tankship. After slowing to pass the Coast Guard and Pilot Stations, and then reaching full speed and passing another vessel, appellant made a security broadcast, announcing his intended course. Before reaching the GOLAR FREEZE, appellant spoke to the captain of the tugboat TARPON, who was outbound, towing an asphalt barge. Appellant arranged to pass the TARPON after passing the LNG facility.

Appellant argues that contributory negligence on the part of the Coast Guard, the master of the CHARLESTON, and those associated with the LNG facility caused damage to the GOLAR FREEZE and the LNG facility or, in the alternative, may have exacerbated appellant's negligence or misconduct. He argues that the Coast Guard should have taken action against those parties, and that we should consider others' negligence as mitigating factors. Such an argument is unavailing, as our Rules of

Practice provide that we will consider only whether a material factual finding or a necessary legal conclusion is erroneous; whether "a substantial and important question of law, policy, or discretion is involved"; or whether a prejudicial procedural error has occurred. 49 C.F.R. § 825.15. In this regard, we reject invitations to review the Coast Guard's exercise of its prosecutorial discretion, as the issue before us for review is whether appellant was at fault, not whether anyone else was also at fault.⁴ See, e.g., Appeal Decision 2319 (Pavelec) (holding that contributory negligence is not a defense to the regulatory violation of negligence); see also Appeal Decision 2166 (Register) (same). The law judge correctly noted that the issue is whether appellant's "actions or non-actions breached the applicable standard of care." The law judge also stated that the "proper speed and standard of care in this case was around 6 knots, less than half [appellant's] speed," and appellant does not dispute this assessment. See Appeal Decision 2680 (McCarthy)

⁴ Appellant's brief later includes a "request to overrule 'Coast Guard Law' and to require the Coast Guard to acknowledge United States Supreme Court precedent," in seeking a "rule of law holding that contributory negligence constituting superceding [sic] cause by other parties is a defense to negligence and misconduct charges." Although his argument is an implicit admission that the law is against him, appellant cites Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830 (1996), for the proposition that the law judge's finding, that the CHARLESTON's surge was "a cause" of the damage, "disregarded United States Supreme Court precedent, which ... would have resulted in a review of the relative actions of all – not just one – of the actors involved in this incident." We reject appellant's request, and note that Exxon addresses issues regarding tort, proximate cause, and damages, and is therefore inapplicable to this case. Appellant similarly requests a "rule of law holding that evidence of contributory negligence by other parties and superceding [sic] cause constitutes evidence in mitigation of sanctions." We reject this argument as moot, given our rejection of appellant's

at 28-29 (citing Appeal Decisions 2415 (Marshburn), 2380 (Hall), and 2175 (Rivera)). We find that the law judge and the Vice Commandant correctly found that appellant violated the standard of care, and that any alleged negligence on the part of others is irrelevant to the charges against appellant.

Appellant also contends that the conditions and factors present in the circumstances that he faced as he approached the LNG facility raise the error of judgment defense, and argues that the law judge and the Vice Commandant erred in rejecting this affirmative defense. The error in judgment defense recognizes that:

[T]here are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgment in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not the measure of compliance.

Appeal Decision 2173 (Pierce), *aff'd* Commandant v. Pierce, 3 NTSB 4422 (1980). In reviewing the circumstances based upon which a mariner asserts the error in judgment defense, the Vice Commandant has recognized that the issue for review in such cases "is whether a competent licensed officer might reasonably have chosen the ill-fated alternative from among those choices available at the time." Appeal Decision 2500 (Subcleff). Here, the record indicates that appellant had several alternatives available in determining how to pass the LNG terminal. Instead of taking advantage of a safer alternative, such as passing the

(..continued)
proposed contributory negligence defense.

LNG facility at a safe speed of 6 knots, appellant chose to proceed full ahead past the LNG facility at 14 knots.

We reject appellant's error in judgment defense, and agree with the Vice Commandant's assessment of appellant's defense, in which the Vice Commandant determined that proceeding at full ahead was not a reasonably prudent alternative. Appeal Decision 2680 (McCarthy) at 10. We reject appellant's contention that the law judge and Vice Commandant erred in finding that appellant ignored safer alternatives, and find that this contention misconstrues their determinations. The law judge and the Vice Commandant did not find that appellant ignored safer alternatives, but concluded that appellant was negligent and that he violated the minimum safe speed of about 6 knots. Appellant argues that there is no evidence in the record that he had any knowledge that LNG was in the process of being discharged. This argument is irrelevant to the issue of whether appellant fulfilled his duty to exercise care under the cited regulations and safety bulletin, and to operate the vessel at the appropriate speed when passing a moored ship. Overall, the evidence supports the determination that proceeding at full ahead was not a reasonably prudent alternative.

We also find that appellant's procedural arguments are unavailing. Appellant's argument concerning a pre-hearing discovery issue is untimely, as appellant did not raise this issue at the hearing. See Appeal Decisions 2463 (Davis), 2376 (Frank), 2610 (Bennett). Appellant also inserts an issue regarding amendment of the complaint. However, if the parties

actually litigated the issues, as they did here, and there was no genuine surprise as to the substance of the allegation, then a party may not subsequently challenge such issues. See Appeal Decision 2396 (McDowell).

In addition, appellant's arguments concerning the language of the Vice Commandant's decision are not persuasive. Appellant's contention that the Vice Commandant erred in determining that the evidence showed that the TARPON and CHARLESTON could have passed at a different location is unavailing, as appellant's brief concedes that the point at which the passage occurred was not the only available place for passage; moreover, this argument is irrelevant to the issue of whether his speed in passing the LNG ship was negligent. Similarly, appellant's argument that the Vice Commandant erred in finding that appellant could have ordered the TARPON to slow down mischaracterizes the Vice Commandant's statement, in which he stated that appellant could exercise control over the place at which the CHARLESTON and TARPON met by slowing his own speed, and by asking the TARPON's captain to slow the speed of the TARPON. Appeal Decision 2680 (McCarthy) at 9. Likewise, appellant's argument that the Vice Commandant's statement "'minimum safe speed' is synonymous with 'bare steerageway'" is not helpful to appellant, as even if the law judge erred in equating the terms "minimum safe speed" and "bare steerageway," the error would have had no impact on his decision, based on testimony at the hearing regarding the appropriate speed, and other evidence that establishes that appellant violated the standard of care.

Finally, we find no reversible error in the Vice Commandant's decision on appeal, and discern no basis to disturb his decision to sustain the charges of negligence and misconduct.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal is denied⁵; and
2. The Vice Commandant's decision affirming the decision and order of the law judge is affirmed.

ROSENKER, Acting Chairman, and HERSMAN, HIGGINS, SUMWALT, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

⁵ We note that appellant's brief also included a request for oral argument. The issues have been fully briefed by appellant and oral argument is not necessary. Therefore, the request for oral argument is denied. See 49 C.F.R. § 825.25(b).

UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA :
UNITED STATES COAST GUARD :

vs. :

MERCHANT MARINER LICENSE :

Issued to: JOHN C. McCARTHY, III :

DECISION OF THE
VICE COMMANDANT
ON APPEAL
NO. 2680

This appeal is taken in accordance with 46 U.S.C. § 7701-7705, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a bifurcated Decision and Order dated November 29, 2006 (hereinafter "D&O I"), and December 28, 2006 (hereinafter "D&O II"), Judge Peter A. Fitzpatrick, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard at Norfolk, Virginia, found that Mr. John C. McCarthy (hereinafter "Respondent") had committed acts of *negligence* and *misconduct* and ordered that Respondent's merchant mariner license be suspended, outright, for eight months followed by a suspension of twelve months stayed on twelve months probation.

The specification supporting the *negligence* charge alleged that Respondent operated the TVV CHARLESTON negligently by exceeding the minimum safe speed in Savannah Harbor on March 14, 2006. The specification supporting the *misconduct* charge alleged that Respondent violated 33 C.F.R. § 162.65(b)(3) by proceeding at a

dangerous speed that was not consistent with the Inland Waterways Navigation Regulations for waterways tributary to the Atlantic Ocean south of Chesapeake Bay.

PROCEDURAL HISTORY

On April 27, 2006, the Coast Guard filed a Complaint against Respondent. [D&O I at 5] The Complaint alleged that Respondent violated 46 U.S.C. § 7703, 46 C.F.R. § 5.29 and 46 C.F.R. § 5.33 by failing to operate the T/V CHARLESTON at a safe speed. [Id.] On May 16, 2006, Respondent filed an Answer to the Complaint wherein he denied negligently operating the vessel. [Id.] On June 13, 2006, the Coast Guard filed an Amended Complaint alleging that that Respondent violated 46 U.S.C. § 7703 by committing *misconduct* and *negligence* under 46 C.F.R. § 5.27 and 46 C.F.R. § 5.29, respectively, based on essentially the same factual allegations. [Id.] Having received an extension of time, Respondent filed his Answer to the Amended Complaint on July 7, 2006, asserting a defense of error in judgment. [D&O I at 6] A hearing was held in Savannah, Georgia, on September 20-21, 2006, at which the Coast Guard called seven witnesses and introduced twelve exhibits into evidence. [Id.] Respondent called three witnesses and introduced seventeen exhibits into evidence. [Id.] The ALJ issued his Order in the case on November 29, 2006, and issued his Final Decision and Order on Sanction on December 28, 2006. Respondent filed his Notice of Appeal in the matter on January 4, 2007 and perfected his appeal by filing his Appellate Brief on February 26, 2007. The Coast Guard filed a timely Reply Brief in the matter on April 2, 2007. Accordingly, this appeal is properly before me.

APPEARANCE: Respondent was represented by Charles H. Raley, Jr. The Coast Guard was represented by CWO Bernard Tufts, CWO Terry Roberts, and Petty Officer Michael Rohlfand, of U.S. Coast Guard Marine Safety Office Savannah, Georgia.

FACTS

At all times relevant herein, Respondent was the holder of the Coast Guard issued merchant mariner license at issue in these proceedings and was acting under the authority of that license by serving as a federally mandated pilot. [D&O I at 7, 37; IO Exhibit 1] The remaining pertinent facts in this case are undisputed.

At approximately 0300 on March 14, 2006, Respondent boarded the inbound T/V CHARLESTON in the vicinity of the sea buoy for the Savannah River. [D&O I at 8] After an initial meeting with the Master, Respondent proceeded to pilot the CHARLESTON up the Savannah River at full ahead. [Id.] While inbound, Respondent made passing arrangements with the pilot of the KOBE EXPRESS, and the two vessels successfully passed at Bloody Point. [Transcript (hereinafter "Tr.") at 334] Respondent reduced his speed to slow ahead while passing the Coast Guard and Pilot stations. [Tr. at 338] Respondent slowed the CHARLESTON at this point to avoid potential damage that the CHARLESTON's surge could do to the unattended vessels moored there. [Tr. at 441-42] Respondent then increased speed to full ahead. [Tr. at 339] On the CHARLESTON, slow ahead produces a speed of approximately 6 knots while full ahead produces a speed of approximately 14 knots. [Tr. at 490-3] The CHARLESTON continued upriver on about a half knot flood tide with light winds, calm seas and clear visibility. [D&O I at 7]

After passing the Coast Guard and pilot boat stations, Respondent made the second of two required security radio-broadcasts on VHF Channels 13 and 16. [Tr. at

339] Savannah River Pilot Captain Spencer Edelman, aboard the outbound tug TARPON pushing an asphalt barge, responded. The two captains agreed to meet and pass below the Fig Island Turning Basin, after the CHARLESTON would have passed the LNG facility on Elba Island where the tankship GOLAR FREEZE was moored. [Tr. 164-5, 67] In determining where to pass each other, the captains were constrained by the following factors: (1) the interim policy in effect for the Regulated Navigation Area (hereinafter "RNA") prohibited meeting or overtaking within 1,000 yards of the LNG facility, (2) a Chatham County ordinance prohibited passing near a dredge and the dredge ARLINGTON was moored off Elba Island,¹ and (3) it was not desirable to pass in the Bight Channel as the River curved around Elba Island. [Tr. at 345] After the CHARLESTON passed through this area where it would be difficult or prohibited to pass the TARPON, the CHARLESTON traveled another two nautical miles before it reached the Fig Island Turning Basin. [Respondent's Exhibit D] Captain Edelman testified, and the ALJ found, that the Fig Island Turning Basin would have been the best place to pass under the circumstances, but the vessels could have passed at another location on the river. [Tr. at 168-69]

At approximately 0418, the CHARLESTON passed the moored GOLAR FREEZE still at full ahead. [D&O I at 7] The surge from the CHARLESTON caused the GOLAR FREEZE to surge along the dock parting mooring lines, damaging the gangway, and causing an emergency shutdown of the LNG transfer operations. [Id.] The interim policy governing the RNA required that vessels such as the CHARLESTON transit the area within 1,000 yards of the LNG facility at minimum safe speed. [Respondent's

¹ Respondent was not aware of the ordinance at the time, but both pilots agreed that passing near the dredge

Exhibit K] The policy also required the LNG facility to have two standby towing vessels while a LNG tankship was moored in the slip. [Id.]

BASES OF APPEAL

Respondent appeals both the findings that *negligence* and *misconduct* were proved and the sanction imposed by the ALJ on the following basis:

- I. *The ALJ abused his discretion by finding that "minimum safe speed" is the equivalent of "bare steerageway" in determining the standard of care in this case;*
- II. *With regard to the error of judgment defense, the ALJ abused his discretion by (a) finding that Respondent had actual knowledge of the active LNG transfer, (b) refusing to acknowledge that the Respondent had three speed choices as he approached the LNG slip, (c) by refusing to consider all the circumstances facing the Respondent at the time he made his decision to proceed at full speed, (d) by applying a hindsight standard in determining the reasonableness of Respondent's speed decision, (e) by finding that the Respondent was required to presume that the LNG Bridge Watch Tender would violate positive regulatory duties and (f) by refusing to credit Captain Edelman's testimony regarding areas in which it was safe to pass;*
- III. *The misconduct count is subsumed by the Negligence count since both arise from the same operative facts;*
- IV. *The sanction of eight months suspension outright is excessive.*

OPINION

I.

The ALJ abused his discretion by finding that "minimum safe speed" is the equivalent of "bare steerageway" in determining the standard of care in this case.

On appeal, Respondent argues that the term "minimum safe speed" is undefined, and that the ALJ abused his discretion in determining that minimum safe speed and bare steerageway are synonymous. Instead, Respondent argues that minimum safe speed must take into account numerous other factors including his passing arrangements with the tug

should be avoided.

TARPON. This assignment of error fails on two accounts. First, the ALJ's understanding of minimum safe speed is a reasonable definition consistent with how the other pilots testifying at the hearing used the term. Second, and more important, the ALJ analyzed the facts "as if minimum safe speed encompasses a range of factors" as proposed by Respondent and still found the allegations proven. Consequently, even if the ALJ erred in equating the two terms, that error had no impact on his decision.

The term bare steerageway is commonly understood to mean the slowest speed a vessel can maneuver without being out of control. *See, e.g., Trice Marine Assets Inc. v. Diamond B Marine Services Inc.*, 332 F.3d 779, 784 (5th Cir. 2003). Consequently, at a speed below bare steerageway, a vessel could not be controlled. In other words, such a speed would not be safe. Since minimum is defined as the least possible quantity, amount or value,² the minimum safe speed is the same as the lowest speed at which a vessel can safely operate. As the ALJ found, the two terms are linguistically synonymous, and the pilots who testified in this case understood them to mean the same thing. [Tr. at 112, 113, 136, 162] This included Captain Harvey, who testified on behalf of Respondent that minimum safe speed "is different on every vessel that you go on, so there's no definition other than maybe the slowest speed you could go and have complete control over the vessel." [Tr. at 503]

It is well settled that the decision of the ALJ may only be reversed if his findings are arbitrary, capricious, clearly erroneous, or based upon inherently incredible evidence. Appeal Decisions 2570 (HARRIS), aff'd NTSB Order No. EM-182 (1966), 2390 (PURSER), 2363 (MANN), 2344 (KOHADJA), 2333 (AYALA), 2581 (DRIGGERS),

² Funk & Wagnalls Standard College Dictionary 1973.

2474 (CARMENKE), 2607 (ARIBS), and 2614 (WALLENSTEIN). The 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 support their justification. Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSEN), 2506 (SYVERSTEN), 2424 (CAVANAUGH), 2282 (LITTLEFIELD) and 2614 (WALLENSTEIN). The standard of proof for suspension and revocation proceedings is that the ALJ's findings must be supported by reliable, probative, and substantial evidence. Appeal Decisions 2584 (SHAKESPEARE), 2592 (MASON), 2603 (HACKSTAFF), and 2575 (WILLIAMS). Given the common sense equivalence of the terms "bare steerageway" and "minimum safe speed" and their interchangeable use in the maritime community, the ALJ did not err in finding them synonymous.

Even if the ALJ accepted Respondent's argument that minimum safe speed could only be determined by considering all applicable factors including his passing arrangements with the TARPON, a careful review of the record shows that the ALJ did not err in holding that Respondent failed to operate CHARLESTON at the minimum safe speed. Indeed, during testimony at the hearing, Respondent admitted as follows:

Q. You could have still cut it back to half passed [sic] the terminal and still achieved your objective of passing [TARPON] in that section of the river that you wanted to pass him in, is that right or not?

A. I could, in hindsight you can.

[Tr. at 433] Later, Respondent again admitted that he could have reduced speed and still passed TARPON in a safe place, but chose not to because standby tugs and a Docking Pilot were at the LNG terminal. [Tr. at 451-52] This was consistent with Captain

Edelman's testimony that the two vessels could still have passed in a safe place if Respondent had slowed CHARLESTON to pass the LNG terminal. [Tr. at 169] As the ALJ pointed out, both vessels could also have slowed if necessary to ensure the meeting took place in a safe part of the river. [D&O at 24] The record shows that Respondent felt that given the CHARLESTON's light load, the minimal wake that it was throwing, and the presence of the standby tugs, he could safely pass the LNG terminal at full ahead; however, even if full ahead was a safe speed, by his own admissions it was not the *minimum* safe speed. Accordingly, Respondent's first assignment of error is not persuasive.

II.

With regard to the error of judgment defense, the ALJ abused his discretion by (a) finding that Respondent had actual knowledge of the active LNG transfer, (b) refusing to acknowledge that the Respondent had three speed choices as he approached the LNG slip, (c) by refusing to consider all the circumstances facing the Respondent at the time he made his decision to proceed at full speed, (d) by applying a hindsight standard in determining the reasonableness of Respondent's speed decision, (e) by finding that the Respondent was required to presume that the LNG Bridge Watch Tender would violate positive regulatory duties and (f) by refusing to credit Captain Edelman's testimony regarding areas in which it was safe to pass.

Respondent next argues that the ALJ abused his discretion in reaching a number of factual findings or in applying certain evidentiary standards in connection with his error of judgment defense. Although I find that the ALJ did not abuse his discretion,³ none of the allegations matter because the ALJ concluded that the error of judgment defense simply does not apply in this case, and I agree.

³ As for the specific allegations raised by Respondent, they either mischaracterize the ALJ's findings, or are irrelevant, or both. For example, the ALJ found that Respondent was "aware of the LNG tankship's presence in the slip and of the impending transfer" not that he was aware of an actual transfer. In addition, the requirement to transit the area at minimum safe speed was triggered when an LNG tankship was present in the slip regardless of whether transfer operations were underway.

Error in judgment is an affirmative defense to negligence. It recognizes that:

there are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgement [sic] in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not the measure of compliance.

Appeal Decision 2173 (PIERCE), *aff'd* NTSB Order EM-81. *See also* Appeal Decisions 2500 (SUBCLEEF), 2325 (PAYNE) and 1940 (HUDDLESTON). Error of judgment, however, does not apply in this case since the evidence shows that the position in which Respondent found himself was one of his own making, and that he did not respond in a reasonable fashion. *See, e.g.,* Appeal Decision 2601 (MCCARTHY) (evidence shows that the position in which Respondent found himself upon entering the squall was one of his own making, and that he did not respond in a reasonable fashion).

On appeal, Respondent argues the factors that went into his decision to pass the LNG facility at full ahead were not of his own making. I do not agree. The characteristics of Bight Channel, the presence of the LNG ship and the dredge, and the need to pass other vessels are not circumstances of Respondent's making, but they are the everyday aspects of a Savannah River pilot's working environment. Respondent had the ability to exercise control over the place where the CHARLESTON and the TARPON met by slowing his speed and also by asking Captain Edelman to slow TARPON's speed, and his decisions placed the vessel in his charge and himself in the precarious position that is the subject of this action.

More importantly, the record supports a conclusion that Respondent did not choose between reasonable alternatives but rather ignored the prudent alternative

available to him. Respondent and Captain Edelman both testified that Respondent could have slowed the CHARLESTON and still arranged to meet the TARPON in a safe place, thereby reducing the potential for damaging the GOLAR EXPRESS without increasing the risk of a collision with the TARPON. [D&O at 11, 24; Tr. at 169; 451-452] In addition, passing the LNG facility at full ahead was not a prudent alternative since the same interim requirements that prohibited passing within 1,000 yards of the facility also mandated transiting that area at the minimum safe speed. [Marine Safety Unit Charleston Marine Safety Information Bulletin 13-05 dated December 20, 2005] Finally, several Savannah River pilots testified that their procedure for passing a moored vessel such as the LNG ship was to maintain bare steerageway. [Thompson Tr. at 102, 104; Edelman Tr. at 162; Brown Tr. at 192.]

In sum, Respondent did not simply err in a choice between two reasonably prudent alternatives after being placed in a position not of his making. Instead, although he had the option to reduce his speed while passing the LNG facility and still pass TARPON in a safe place, Respondent chose to maintain full ahead, ignoring the requirement to maintain minimum safe speed, because he believed that it was safe enough to proceed at full ahead. This was not a reasonably prudent alternative. Accordingly, I find that the ALJ correctly found that the error of judgment defense did not apply.

III.

The Misconduct count is subsumed by the Negligence count since both arise from the same operative facts.

Respondent listed this as a basis for appeal, but provided no supporting argument other than improperly characterizing Misconduct as "a lesser included offense" of

Negligence. A lesser included offense is a concept of criminal law in which all the elements of the lesser offense are included in the greater offense and the common elements are identical. Misconduct is human behavior which violates some formal, duly established rule whereas negligence is an act that a reasonably prudent person under the same circumstances would not commit. 46 C.F.R. §§ 5.27 and 5.29. Since the "elements" of these two charges differ, Misconduct cannot be characterized as a lesser included offense of Negligence. Nevertheless, I will consider the fact that the gravamen of both charges is piloting the CHARLESTON at excessive speed past the LNG facility in considering whether the sanction imposed is excessive.

IV.

The sanction of eight months suspension outright is excessive.

Respondent's final assertion of error centers on the eight-month outright suspension imposed by the ALJ. Respondent asserts that "[i]n rejecting the Coast Guard's request for revocation...the ALJ necessarily rejected the concept that Respondent is a threat to marine safety." [Appeal Brief of Respondent at 27] In addition, Respondent notes that the Coast Guard's Chief ALJ expressly noted the "depth and sincerity of Respondent's remorse" in his Order that Granted Respondent a Temporary License during the pendency of this case. [Id.] At the same time, after noting that the ALJ elected to treat Respondent as a "First-Time Offender," Respondent asserts based on his analysis of enforcement actions taken after other incidents on the Savannah River, that there is a "lack of parity" in cases that result from incidents on the Savannah River and, as such, contends that Respondent "has been discriminated against (due to his status as a federal-only pilot)...in terms of the sanction levied by the ALJ." [Appeal Brief of

Respondent at 29] Respondent concludes by noting that the sanction imposed as a result of the catastrophic EXXON VALDEZ oil spill was only one month greater than the sanction imposed in this case and asserts that because only \$110,000 in property damage occurred as a result of the incidents given rise to this case—not an actual disaster and billions of dollars in environmental and other losses—the record supports a conclusion that the sanction imposed by the ALJ was “impermissibly penal in nature.” [Appeal Brief of Respondent at 27-30] I do not agree.

In Coast Guard suspension and revocation cases, the sanction imposed in a particular case is exclusively within the authority and discretion of the ALJ. See 46 C.F.R. § 5.569(a); Appeal Decisions 1998 (LE BOEUF), 2543 (SHORT), 2609 (DOMANGUE), 2618 (SINN), and 2622 (NITKIN). While the ALJ may look to 46 C.F.R. Table 5.569 for information and guidance as to the typical order associated with a charge, he may increase or decrease the sanction as he sees fit. See 46 C.F.R. § 5.569(d); Appeal Decisions 2173 (PIERCE), 2362 (ARNOLD), 2391 (STUMES), 2455 (WARDELL), 2618 (SINN), and 2622 (NITKIN). As a result, on appeal the sanction imposed by the ALJ will only be modified if it is clearly excessive or involves an abuse of discretion. Appeal Decisions 2245 (MATHISON), 2256 (BURKE), 2313 (STAPLES), 2362 (ARNOLD), 2366 (MONAGHAN), 2391 (STUMES), 2422 (GIBBONS), 2423 (WESSELS), and 2618 (SINN).

In this case, the record shows that the ALJ carefully considered the issue of sanction. Indeed, the record shows that to do so, the ALJ took the extraordinary step of holding a second hearing to allow both Respondent and the government the opportunity to submit evidence in aggravation and mitigation. After hearing such argument and

noting his inherent authority to select an appropriate order in the case, the ALJ stated as follows with regard to the sanction:

In this case, the Coast Guard is seeking revocation. In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider a Respondent's prior records. As previously discussed, since there was no evidence that Respondent has had a prior incident less than ten years ago, he will be treated as a first time offender for the strict purpose of determining the appropriate sanction in this case. For first time offenders and without considering other factors, the Table of Average Orders suggests a suspension of up to six months for negligently performing duties related to vessel navigation and up to three months for misconduct predicated on a failure to comply with U.S. law or regulations.

In this case, the damage and potential damage that Respondent caused by his actions must be weighed against Respondent's good record and apparent remorse for his actions. Respondent's actions indeed caused significant damage, and I cannot stress enough that Respondent's actions could have resulted in massive disaster. However, Respondent's good track record and apparent remorse are sufficient to convince me that he is not a danger to life and property at sea. While not enough to reduce the sanction to a warning as Respondent proposed, these mitigating factors are sufficient to keep the sanction within the standard range of sanctions for these offenses as contemplated by the Table of Average Orders. Revocation is therefore not appropriate in this case. (citations omitted)

[D&O II at 5-6]

Therefore, the record shows that although revocation was a permissible sanction, the ALJ chose to exercise leniency and impose only an eight month suspension. Since the sanction imposed by the ALJ is within the range articulated by the Coast Guard's Table of Average Orders and because the record shows that the ALJ considered all aggravating and mitigating evidence presented in settling on the appropriate duration of the sanction, I do not find it to be either excessive or involving an abuse of the ALJ's discretion. Accordingly, Respondent's final argument is wholly unpersuasive.

CONCLUSION

The findings of the ALJ had a legally sufficient basis. The ALJ's decision was not arbitrary, capricious, or clearly erroneous. Competent, substantial, reliable, and probative evidence existed to support the findings of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

The orders of the ALJ, issued at Norfolk, Virginia, on November 29, 2006, and December 28, 2006, are **AFFIRMED**.



V. S. CREA
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 8th of April, 2008.

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

JOHN C. MCCARTHY III

Respondent.

Docket Number: CG S&R 06-0192
CG Case No. 2616092

ORDER

Issued: November 29, 2006

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

CWO Bernard Tufts
CWO Terry Roberts
PO Michael Rohland
United States Coast Guard
Marine Safety Unit
100 W. Oglethorpe Avenue
Savannah, GA 31401

For Respondent

Charles H. Raley, Jr. Esquire
Portman & Raley, LLC
P.O. Box 9087
Savannah, GA 31412

I.

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II.

PRELIMINARY STATEMENT

On April 27, 2006, the United States Coast Guard ("Coast Guard") filed a complaint against Respondent, Captain John C. McCarthy III ("Captain McCarthy" or "Respondent") alleging that he violated 46 U.S.C. 7703, 46 CFR 5.29, and 46 CFR 5.33 by failing to operate the tank vessel CHARLESTON at a safe speed on the Savannah River. The essence of the Coast Guard's claim is that Respondent should not have navigated the CHARLESTON past the Southern Liquid Natural Gas, Inc. ("LNG") facility at full ahead while there was an LNG tankship within its slip. The Coast Guard sought twelve (12) months outright suspension followed by six (6) months suspension remitted on twelve (12) months probation.

On May 16, 2006, Respondent filed an Answer to the Coast Guard's complaint which denied that he operated negligently by failing to operate at a safe speed. Respondent also denied that his actions were the sole cause of the alleged damage and denied the paragraph regarding requested penalty. Respondent admitted all other paragraphs. Respondent affirmatively alleged the defense of "other" and specified that the Respondent's actions amount to a mere error in judgment. Respondent requested a hearing and proposed a location and dates. Respondent requested settlement discussions.

On June 13, 2006, the Coast Guard filed an Amended Complaint alleging that Respondent violated 46 U.S.C. 7703 by committing Misconduct and Negligence under 46 CFR 5.27 and 46 CFR 5.29 respectively. The underlying factual allegations were essentially the same in that the Coast Guard alleged that Respondent failed to operate the tank vessel CHARLESTON at a safe speed on the Savannah River past the LNG tankship within its slip. The Coast Guard did not amend its proposed sanction at this time.

Following a grant for an extension of time, Respondent filed his Answer to the Coast Guard's Amended Complaint on July 7, 2006. Respondent denied various numbered paragraphs contained therein and indicated the defense of "other" in that his actions constituted an error in judgment. Finally, he stated that the Coast Guard's allegations concerning damage are not relevant and should be stricken from the amended complaint.

This matter was set for hearing on September 20, 2006 at 9:30 am in Savannah Georgia. This date, location, and time were amenable to all parties involved as was evident from an August 8, 2006 prehearing conference call and from various other requests and filings. On that date, the hearing convened as scheduled and spanned two days. CWO Bernard Tufts, CWO Terry Roberts, and PO Michael Rohland represented the Coast Guard, and Charles H. Raley, Jr. represented Respondent.

At the hearing, the Coast Guard called seven (7) witnesses and introduced into evidence twelve (12) exhibits. Respondent called three (3) witnesses and introduced into evidence seventeen (17) exhibits. The undersigned took official notice of two (2) documents. The parties also filed Joint Stipulations of Facts prior to the hearing and Proposed Findings of Facts and Conclusions of Law after the hearing.¹

It is worthy to note that both parties filed numerous Motions, Motion Withdrawals, Oppositions, Briefs, and Responses during the course of this proceeding. Each filing has been given careful consideration and appropriate weight in deciding the outcome of this case. Only the relevant filings will be discussed in this Decision and Order.

¹ Coast Guard exhibits are identified as "Ex. IO" using numerical numbers. Respondent's exhibits are identified as "Ex. R" using alphabetic letters. Documents the undersigned has taken official notice of are identified as "ON" using numerical numbers. Filings prior to and post hearing are identified as "ALJ" using numerical numbers. All citations to the official transcript are designated by "TR." followed by the applicable page numbers.

III.

FINDINGS OF FACT

A. Stipulated Facts

On September 15, 2006, the parties filed the following Joint Stipulations of Agreed Facts:

1. That the tank ship CHARLESTON is 635.5 ft in length and 27,798 GT.
2. That the CHARLESTON is an officially documented vessel of the United States, (O.N. 658493).
3. That on March 14, 2006, the respondent, JOHN C. MCCARTHY III, was serving as Pilot on board the CHARLESTON, as required by 46 Code of Federal Regulations (CFR) § 15.812 (a).
4. That the respondent, JOHN C. MCCARTHY III did sign the T/V CHARLESTON's Pilot Card dated 3-14-2006 along with the Master.
5. That the T/V CHARLESTON's Pilot Card states engine RPM for maneuvering engine orders ranging from full astern to full ahead. The minimum RPM is 30 (5.5 knots).
6. That the respondent, JOHN C. MCCARTHY III, did slow the CHARLESTON to slow ahead while passing the Coast Guard and the Pilot Stations along the Savannah River on March 14, 2006.
7. That on March 14, 2006, at approximately 0418, the CHARLESTON was transiting the Savannah River.
8. That on March 14, 2006, at approximately 0418, the CHARLESTON was enroute to Conoco Phillips.
9. That on March 14, 2006, at approximately 0418, there was a .5 or a half - knot flood current.
10. That on March 14, 2006 at approximately 0418 the LNG tank ship GOLAR FREEZE was moored at the LNG Terminal located on Elba Island.
11. That the respondent, JOHN C. MCCARTHY III, while transiting the Savannah River and having the conn of the CHARLESTON did not slow the CHARLESTON down while passing by the moored LNG tank ship GOLAR FREEZE at approximately 0418 on the morning of March 14, 2006.
12. That the T/V CHARLESTON piloted by respondent, JOHN C. MCCARTHY III, did pass by the moored LNG tank ship GOLAR FREEZE at approximately 0418 under an engine order of full ahead.
13. That on March 14, 2006, at approximately 0418, the moored LNG tank ship GOLAR FREEZE did surge along the dock face after the T/V CHARLESTON passed by at full ahead.
14. That on March 14, 2006 at approx 0418 the weather conditions on the Savannah River included clear skies, visibility of at least 10 nautical miles and winds of less than 15 mph.
15. That after embarking the T/V CHARLESTON, respondent, JOHN C. MCCARTHY III gave two security broadcasts each on VHF Channels 13 and 16; the first broadcast

was given while the CHARLESTON was entering the Tybee Range and the second was given while the CHARLESTON was entering the Long Island Crossing Range.²

ALJ 1.

B. Other Facts of Record

After careful consideration of the entire record and the testimony at the hearing, the undersigned finds the following facts.

1. On March 14, 2006 at approximately 0418, the tank vessel CHARLESTON under Captain McCarthy's engine order of full ahead navigated inbound on the Savannah River past the LNG terminal with an LNG tankship within its slip. ALJ 1 para. 11, 12. At this exact time or immediately thereafter, the LNG tankship surged along the dock face and damage ensued. ALJ 1 para. 13; TR. 213.
2. At the time of the incident, Respondent, Captain John C. McCarthy III was the holder of a Coast Guard issued License number 1042660 expiring May 2008. Respondent's license has the following endorsements: Master of Towing Vessels upon the Great Lakes, inland waters in the western rivers; Mate of towing vessels upon near coastal waters; First Class Pilot of vessel of any gross tons upon the waters of the Savannah River, Georgia, from the principal harbor entrance buoy to Port Wentworth turning basin; Radar Observer Unlimited on vessels under 200 gross tons, domestic tonnage, 500 gross tons, ITC tonnage, on domestic voyages only. TR. at 7; ALJ 1 para. 3; ALJ 2 para. 1; ALJ 3 para. 4.
3. At approximately 0300 on the day in question, Captain McCarthy boarded the tankship CHARLESTON in the vicinity of the sea buoy where the Savannah River meets the

² The parties originally stipulated that Respondent gave the second broadcast as he was entering the Lower Flats Range. Respondent indicated at the hearing that this was a mistake and moved to replace Lower Flats Range with Long Island Crossing Range. The amendment was made without objection. TR. 29-30.

Atlantic Ocean. TR. 65. He served as Pilot on board the CHARLESTON as 46 CFR 15.812(a) requires and served aboard for his local knowledge of the Savannah River for the transit inbound on the Savannah River to Conoco Philips. ALJ 1 para. 3, 7-8; TR. 65, 96.

4. The CHARLESTON is a tankship 635.5 feet in length, 27,798 gross tons, and an officially documented vessel of the United States, (O.N. 658493). ALJ 1 para. 1-2.
5. On the day in question, Captain Gregory Maxwell was serving as Master onboard the CHARLESTON. TR. 63-64. Captain Maxwell holds a U.S. Coast Guard Master's license for Unlimited Tonnage on the Oceans. TR. 59. He has been a Coast Guard licensed captain for three and a half years. TR. 64.
6. Captain Maxwell was in overall charge of the CHARLESTON, but Captain McCarthy was navigating the vessel on the Savannah River and giving engine orders and rudder commands because of his local knowledge. TR. 64-65.
7. At the time of the incident, the LNG tankship GOLAR FREEZE was moored at the LNG Terminal located on Elba Island along the Savannah River and was in the process of an active liquid natural gas transfer. ALJ 1 para. 10.
8. Shortly after Captain McCarthy embarked the CHARLESTON, but before approaching the LNG terminal, Captain Maxwell and Captain McCarthy had an initial Pilot-Master conference. TR. 67. At that time, they discussed whether the CHARLESTON would need to slow before passing the LNG terminal because of the LNG tankship moored within its slip. Id. Captain McCarthy indicated that there were minimal requirements and that they would proceed at full ahead despite the LNG tankship moored within its slip. TR. 333.

9. After starting inbound on the Savannah River, but prior to passing the moored LNG tankship, Captain McCarthy slowed the CHARLESTON to slow ahead while passing the Coast Guard and Pilot Stations. ALJ 1 para. 6; TR. 338. Captain McCarthy slowed the CHARLESTON at this point to avoid potential damage the CHARLESTON's surge could cause to unattended vessels moored there.
10. The engine setting slow ahead on the CHARLESTON produces approximately 6 knots. TR. 493.
11. After passing the Coast Guard and Pilot Stations, but before reaching the point on the Savannah River where the LNG tankship GOLAR FREEZE was moored, Respondent gave the engine order full ahead and the CHARLESTON began increasing speed. TR. 339.
12. After reaching speed at full ahead, but before reaching the LNG terminal, the CHARLESTON made radio contact with the KOBE EXPRESS. Captain McCarthy made passing arrangement with its Pilot and the two vessels successfully passed at Bloody Point on the Savannah River. TR. 334.
13. After passing the KOBE EXPRESS, but before reaching the LNG facility, Captain McCarthy made the second of two security broadcasts each on VHF Channels 13 and 16 announcing his presence and intended course up the Savannah River. He gave the first broadcast while the CHARLESTON was entering the Savannah River at the Tybee Range. ALJ 1 para. 15; TR. 66.

14. After the second broadcast, but before reaching the LNG tankship GOLAR FREEZE, Captain Spencer Edleman spoke with Captain McCarthy to agree upon a passing arrangement between the CHARLESTON and the Tug TARPON.³ TR. 163.
15. Captain Edleman has been a Savannah River Pilot for 22 years and was piloting the Tug TARPON at the time in question. TR. 162-3. The Tug TARPON was outbound on the Savannah River and had an asphalt barge in tow. TR. 164. The two captains formed a passing arrangement by which the CHARLESTON and the TARPON would meet and pass below the Fig Island Turning Basin. TR. 164. The Fig Island Turning Basin is a zone of the Savannah River the CHARLESTON would reach after passing the LNG facility. Ex. IO-D.
16. Captain Edleman testified that the TARPON "is not that big." TR. 169. He further testified that because of this the TARPON and barge in tow could have easily met and passed the CHARLESTON at another agreed upon point on the Savannah River even if the CHARLESTON slowed while passing the LNG tankship. TR. 169.
17. Shortly thereafter at approximately 0418, the CHARLESTON passed the moored LNG tankship GOLAR FREEZE under Captain McCarthy's engine order of full ahead. ALJ 1 para.13. Captain McCarthy did not make contact with the LNG terminal or the GOLAR FREEZE at its slip before passing at full ahead.
18. The CHARLESTON's full ahead engine setting generally produces approximately 14 knots. TR. 490. The CHARLESTON's half ahead engine setting generally produces approximately 10 knots. TR. 355.

³ The transcript refers to this tug as the "TARPIN." The correct spelling is TARPON.

19. At this exact time or immediately after the CHARLESTON passed the LNG facility, the LNG tankship surged along the dock face and damage to the LNG tankship's lines and gangway ensued. ALJ 1 para. 13; TR. 213. The CHARLESTON's surge was a cause of this damage.
20. At the time in question, the weather conditions on the Savannah River included clear skies, visibility of at least 10 nautical miles, and winds of less than 15 mph. ALJ 1 para. 14.
21. At the time of the incident, there were no vessels crossing, meeting, or overtaking the CHARLESTON. TR. 94.
22. Captain Robert Thompson is and has been a river Pilot for Savannah for five years. TR. 100. Captain Thompson's general practice is to pass any moored vessels as slow as possible as to not cause a surge. TR. 101. His practice when passing the LNG terminal with an LNG tankship within its slip is to give the engine order of dead slow or stop as to pass as slow as possible and not cause a surge. TR. 101-4. Captain Thompson could not testify as to the specifics of why the LNG terminal is dangerous when there is an LNG tankship within its slip. TR. 104. Rather he has a general knowledge of the relative danger and thus proceeds with caution when passing. TR. 104.
23. A vessel can create a surge under the surface without any visible wake. TR. 102.
24. Captain Robert Thompson observed the CHARLESTON on his AIS system passing by the LNG terminal at the time in question at 14.2 knots. AIS is a tracking system and provides information on vessels in the area based on a global positioning system. It plots the vessel name, the location, course, speed, draft length, and other vessel information. TR. 107-8.

25. Captain Robert Thompson remembered the CHARLESTON's exact speed at the time in question because he was surprised and apprehensive that a tankship was about to pass an LNG tankship moored at the LNG facility at 14.2 knots. TR. 108.
26. Captain Robert Thompson believes that bare steerageway is the same as minimum safe speed. TR. 112.
27. Douglass G. Logan is a first class Pilot for the bar and harbor of Charleston, South Carolina. TR. 135. He has been a licensed Pilot since 2000. Id. His belief is that the most important thing to consider when passing a moored vessel is speed. He slows to bare steerageway when passing any moored vessel.
28. The docking pilot on duty at the LNG facility observed the CHARLESTON traveling at 14.8 knots on his GPS system when it passed the LNG facility at the time in question. TR. 226.
29. On December 20, 2005, the U.S. Coast Guard Captain of the Port Savannah issued a Marine Safety Information Bulletin ("MSIB") setting policy for certain vessels when passing the LNG terminal under certain conditions. Ex. R-K. The MSIB states that when an LNG tankship is present within the slip, vessels 1600 gross tons or greater shall transit at "minimum safe speed." Ex. R-K. After the day in question, the U.S. Coast Guard Captain of the Port Savannah amended MSIB 13-05 replacing the term minimum safe speed with the term "bare steerageway." Ex. R-L.
30. Captain McCarthy had knowledge that minimum safe speed was the prevailing standard of care for the CHARLESTON to pass the LNG terminal at the time in question. TR. 355.

31. The term minimum safe speed is not defined or assessed a specific numerical value and varies from vessel to vessel. TR. 148, 503. Mariners navigating the Savannah River understand the term to mean bare steerageway. TR. 112, 503.
32. Captain McCarthy believes that his speed was hypothetically negligent had bare steerageway been the prevailing standard of care for the CHARLESTON to pass the LNG facility with an LNG tankship moored within its slip. TR. 366.
33. Richard Knox is a cross functional technician at the LNG terminal. TR. 208. He is in charge of operation and maintenance of the LNG terminal. TR. 208.
34. Passing the LNG terminal with an LNG tankship within its slip is more dangerous than passing other moored vessels. TR. 153.
35. Liquid natural gas is regular natural gas condensed 600 times converting it from a gas form to a liquid form by cryogenically freezing it to minus 260 degrees. TR. 217-19. This is done to increase shipping efficiencies. TR. 218. If liquid natural gas is exposed to the environment, its vapors are highly inflammable. TR. 220. Liquid natural gas coming in contact with human skin would cause instant frost bite and could result in loss of appendages. TR. 220.
36. The Savannah River is approximately 700 to 1000 feet wide at the LNG terminal. TR. 507. The CHARLESTON was approximately 300 to 500 feet from the LNG terminal when it passed at full ahead. TR. 507.
37. A surge from a passing vessel can cause a vessel moored in the LNG slip to thrust forward and back and disrupt a liquid natural gas transfer by breaking transfer hoses and other equipment. TR. 227-28. The faster a vessel travels, the more surge it creates. TR. 125.

38. At 14.2 knots, CHARLESTON's surge can be felt from two and one half miles away.
TR. 319.
39. Captain McCarthy thought there was a possibility that the GOLAR FREEZE would hold in the terminal had standby tugs been in place. TR. 449.
40. Captain McCarthy believed there would be standby tugs in place bases on an alleged prior conversation with the docking pilot by which the docking pilot apparently told him that there would be standby tugs in place twenty four hours per day. TR. 334.
41. There is general knowledge in the Savannah maritime community that it is prudent to navigate slowly and with great caution past the LNG terminal when there is an LNG tankship within its slip. TR. 162-3.
42. Captain Edleman makes a practice of passing any moored vessel at dead slow. TR. 162.
He makes a practice of passing the LNG terminal at no faster than 6 knots when there is an LNG tankship within its slip. TR. 162.
43. Captain Logan has previously piloted the CHARLESTON and makes a practice of reducing his speed to no more than 6 knots when passing any moored vessel. TR. 138.
Captain Logan testified that 12-14 knots was too fast for the CHARLESTON to pass the LNG terminal with an LNG tankship within its slip. TR. 151.
44. Captain McCarthy believes that the LNG terminal is a hazard to navigation when there is an LNG tankship within its slip and no tugs on standby. TR. 365.
45. The CHARLESTON was putting out minimal wake at the time in question. TR. 337.
46. Captain Steve Harvey had previously worked on the CHARLESTON. He was not intimately familiar with the Savannah River as he is primarily a Florida Pilot. TR. 479.

Captain Harvey has never passed the LNG terminal or worked on standby in Savannah. TR. 501.

47. Captain McCarthy previously passed the LNG facility with an LNG tankship within its slip with the CHARLESTON at full ahead with no incident. TR. 323. Captain McCarthy believes that the reason there was no incident on this voyage was that there were standby tugs pushing the LNG tankship. TR. 323.

IV.

DISCUSSION

A. General

This Suspension and Revocation proceeding is remedial and not penal in nature and is “intended to help maintain the standards of competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5. The Coast Guard has jurisdiction over Respondent and this matter pursuant to 46 U.S.C. § 7703, which states that a merchant mariner’s document may be suspended or revoked if the mariner has committed an act of misconduct or negligence while acting under the authority of such document. The Coast Guard has the burden of proving the allegations of the Complaint by a preponderance of the evidence. 33 CFR 20.701-02. See also Appeal Decision Nos. 2468 (LEWIN); 2477 (TOMBARI); Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994); Steadman v. SEC, 450 U.S. 91, 101-3 (1981).

To prevail under this standard, the Coast Guard has the burden to establish that it is more likely than not that the Respondent committed the violations alleged in the complaint. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983); 33 CFR 20.701-702(a). To satisfy the burden of proof, the Coast Guard may rely on direct and/or circumstantial evidence. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The

proceeding is conducted under the provisions in 33 CFR Parts 20, 46 CFR Part 5, and the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*

B. Allegations

The Coast Guard charged Respondent with Negligence and Misconduct under 46 CFR 5.27 and 5.29 respectively. The Coast Guard alleges that on March 14, 2006, Respondent navigated the vessel CHARLESTON at an excessive speed on the Savannah River past the LNG terminal while an LNG tankship was present within its slip and in the process of a liquid natural gas transfer. (Cite to Amended Complaint Here).

These charges cannot be found proved unless the Coast Guard establishes that Respondent was acting under the authority of his Coast Guard license during the alleged Negligence and Misconduct. 46 U.S.C. 7703(1). "A person employed in the service of a vessel is considered to be acting under the authority of a license . . . when the holding of such license . . . is [r]equired by law or regulation." 46 CFR 5.57. The parties have stipulated that Respondent was serving as Pilot on board the CHARLESTON as required under 46 CFR 15.812 on March 14, 2006 during the alleged Negligence and Misconduct. Respondent was therefore acting under the authority of his Coast Guard license at all relevant times.

C. Negligence

The Coast Guard alleges that Respondent was negligent in navigating the vessel CHARLESTON at an excessive speed past the LNG terminal while an LNG tankship was present within its slip and in the process of a liquid natural gas transfer. Respondent admits he was aware of the LNG tankship's presence in the slip and of the impending transfer, but maintains that his engine order of full ahead did not produce an excessive speed. TR. 67, 333.

The first question is Respondent's actual speed at the time in question. Respondent did not stipulate to and was not certain of his actual speed while passing the LNG terminal. ALJ 1. Respondent did, however, testify that the CHARLESTON was at full ahead and that the CHARLESTON runs at 10 knots at half ahead. TR. 355. Full ahead on the CHARLESTON must therefore be well in excess of 10 knots.

Indeed, Coast Guard witness Robert Thompson, a riverboat captain, testified that he followed the CHARLESTON on his global positioning system at the actual time in question and recalled that Respondent's speed was 14.2 knots. TR. 108. Captain Thompson's testimony was that he remembered the CHARLESTON's exact speed because he was shocked that a large tanker was about to pass the LNG terminal at 14.2 knots with an LNG tankship within its slip. Captain Thompson's testimony is consistent with Respondent's witness Captain Steve Harvey's testimony that the CHARLESTON runs at "about 14" knots at full ahead on the Savannah River. TR. 491. Since Respondent stipulated and freely admits that the CHARLESTON was at full ahead, and in light of the aforementioned testimony at hearing, one can reasonably find by the facts presented in this case by a preponderance of the evidence that the CHARLESTON's actual speed at the time in question was 14.2 knots. The outcome of this case then depends on whether it was negligent for Respondent to navigate past the LNG terminal with an LNG tankship within its slip at 14.2 knots under the prevailing circumstances.

I. General

In Coast Guard cases, 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." 46 CFR 5.29. In order to "prove the charge of

negligence, it is necessary to prove that [Respondent's] conduct, in some manner, failed to conform to the standard of care required of the reasonably prudent master under the same circumstances." Appeal Decision 2642 (RIZZO) (2003), Appeal Decision 2321 (HARRIS) (1983), Appeal Decision 2282 (LITTLEFIELD) (1982).

The Coast Guard asserted two alternative theories of standard of care. In the Coast Guard's Amended Complaint, it alleged that Respondent exceeded "minimum safe speed" as set forth in a MSIB. At the beginning of the hearing, the Coast Guard amended its Amended Complaint to remove the language regarding "minimum safe speed" as the MSIB requires and added language that Respondent was negligent because he did not proceed at a "safe speed" as Rule 6 requires. This amendment at hearing came without objection. At the hearing both sides offered extensive evidence and testimony regarding both theories of standard of care.

II. Pleading

It is important to note that this proceeding is not "rigidly bound by the procedural rules governing criminal and civil trials." Appeal Decision 2639 (HAUCK) (2003) (citing Kuhn v. C.A.B., 183 F.2d 839 (D.C. Cir. 1950)). With respect to pleadings, the "purpose . . . is to provide notice and not make a ritualistic recitation of the details." Appeal Decision 2585 (COULON) (1997). It is, however, important that the allegations "must be adequate to enable the respondent to identify the act or offense alleged so that a defense can be prepared." Appeal Decision 2585 (COULON) (1997). Thus, "[f]indings leading to an order of suspension or revocation of a document can be made without regard to the framing of the original specification as long as the [Respondent] has actual notice and the questions are litigated." Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2422 (GIBBONS) (1982).

In this case, it is clear that Respondent had notice to identify the act or offense alleged and to prepare an adequate defense under both theories of standard of care. The amendment removing the language regarding "minimum safe speed" came at the actual hearing. Respondent therefore had actual notice and could prepare an adequate defense for "minimum safe speed" as the applicable standard of care. Respondent offered multiple exhibits and indeed put on a vigorous defense regarding this issue. With respect to preparing a defense for Rule 6 "safe speed" as the applicable of standard of care, Respondent put on a vigorous defense to this theory standard of care as well and in fact did not object to the amendment. He must have therefore anticipated this amendment or at least that the issue would arise. In any case, the question of whether Respondent had adequate notice for preparing a defense to violating Rule 6 is moot as discussed in the following section. Thus, a technical and narrow reading of the Complaint will not be dispositive in this matter and the undersigned will analyze this case under both theories respectively.

III. Rule 6

The Coast Guard amended its Complaint at the hearing to allege that Respondent "negligently operated the tank vessel CHARLESTON by failing to operate at a safe speed appropriate to the prevailing circumstances in violation of Rule 6 of the Inland Navigational Rules." Rule 6 requires that "[e]very vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions." 33 U.S.C. § 2006 (Rule 6). Rule 6 goes on to give a number of factors that ought to be taken into account in determining safe speed. Id. The plain language of Rule 6 limits its applicability to situations involving the risk of collision. The risk of collision refers to the risk of collision between vessels.

There was credible testimony and the Coast Guard does not dispute that there were no vessels crossing, meeting, or overtaking the CHARLESTON at the time in question. TR. 94. Rather the facts of this case involved the vessel CHARLESTON allegedly navigating at an excessive speed causing surge damage to a moored shore vessel and impending liquid natural gas transfer. There was therefore no risk of collision and a Rule 6 analysis is not applicable in determining the appropriate standard of care. The Coast Guard's allegation of Negligence based on a violation of Rule 6 is hereby **DISMISSED**.

IV. Minimum Safe Speed

To establish the proper standard of care, the Coast Guard pointed to a MSIB the Captain of the Port Savannah issued on December 20, 2005. The MSIB states that when an LNG tankship is present within the LNG slip, vessels of 1600 gross tons or greater shall transit at "minimum safe speed." Ex. R-K. This document's legal effect for establishing the proper standard of care was not disputed at hearing and indeed appears reliable. In fact, Respondent concedes that minimum safe speed was the prevailing standard of care in this case. Respondent likewise concedes that he had knowledge of this document, that the vessel CHARLESTON was more than 1600 gross tons, and that there was an LNG tankship within the slip. TR. 355. The meaning of minimum safe speed is in dispute.

1. General Meaning

The term "minimum safe speed" is not defined or assessed a specific numerical value and varies from vessel to vessel. TR. 148, 503. However, there are several cases and Commandant Appeal Decisions on point in which the term is used and help illustrate its fundamental meaning. Most commonly, the term is used to describe bare steerageway. See, e.g., Wenzel v. U.S., 291 F.Supp. 978, 980 (D. N.J.1968) (The same instructions advised that feathering is the first action

to be taken if initiated prior to the approach of the RPM (revolutions per minute) to overspeed range. If such range has been reached before the propeller can be feathered, the throttles should be closed, the nose pulled up to a minimum safe speed, and the attempt to feather the propeller resumed.); People v. Bogner, 20 Misc.2d 465, 189 N.Y.S.2d 777 (1959) (That the speed at which he was traveling was not excessive and that the minimum safe speed at which such a boat had to be operated in order to maintain control of the same was six miles per hour.). Bare steerageway is the slowest speed a vessel can possibly navigate without being out of control. Trico Marine Assets Inc. v. Diamond B Marine Services Inc., 332 F.3d 779, 784 (5th Cir. May 28, 2003); TR. 136. Under this definition the only question of safety regards maintaining rudder control.

The term is used in another case to describe the speed an engine order of dead slow would produce, and in another case, the term is used in connection with a speed of 4.5 knots. Bank Line v. Texas Co., 251 F.2d 329, 330 (2nd Cir. 1958) (libellant does not contest the finding below that the speed of dead slow ahead was the minimum safe speed for the Texas); Appeal Decision 2390 (PURSER) (1986) (In his brief, Appellant asserts that the vessel and tow were making a speed of only 4 to 5 knots. He also states that the minimum safe speed necessary for the M/V SATOCO to maintain steerageway was 4.5 knots and that this was the only safe speed under the circumstances.). The usage of the term in these cases is consistent with the testimony at hearing that minimum safe speed is in fact understood in the maritime community to mean bare steerageway and that any distinction between the two terms amounts to semantics. TR. 112, 113, 503. The undersigned will first analyze the case as if the two terms are synonymous.

2. CHARLESTON's Specific Minimum Safe Speed

There was testimony at the hearing regarding the CHARLESTON's minimum safe speed under the circumstances. Captain Harvey testified that slow ahead on the CHARLESTON

produces 6 or 7 knots and that dead slow produces 4.5 to 5 knots. TR. 493. Captain McCarthy himself testified that he slowed the CHARLESTON to slow ahead when previously passing the Coast Guard station, which amounted to 6 knots. Captain McCarthy did not mention any loss of rudder control at this speed. In fact, Respondent does not dispute that the CHARLESTON can maintain rudder control at slow ahead or even dead slow. In light of the aforementioned testimony and reasonable inferences, one can find that based on the preponderance of the evidence, the CHARLESTON's minimum safe speed under the circumstances was around 6 knots, if the term is equivalent to bare steerageway.

3. Breach of Minimum Safe Speed

As previously discussed, Captain McCarthy navigated past the LNG terminal with an LNG tankship within its slip at 14.2 knots under an engine order of full ahead. Under the theory that minimum safe speed amounts to bare steerageway, Respondent was navigating at least double the proper speed. Captain McCarthy himself testified at the hearing that if the MSIB indicated that bare steerageway was the proper speed instead of minimum safe speed, then "we wouldn't be here" because he would be clearly be in breach of that standard. TR. 366. Under this theory then, and without any regard to the relative danger of the CHARLESTON passing the LNG terminal under these conditions at 14.2 knots, Respondent unquestionably breached the applicable standard of care of minimum safe speed of approximately 6 knots.

4. Respondent's Definition of Minimum Safe Speed

On the other hand, Captain McCarthy argued at the hearing that minimum safe speed encompasses additional factors such as safe passing arrangements with other vessels and is not limited to maintaining rudder control. His primary support for this argument was that the terms must not be synonymous because the Coast Guard subsequently issued a revised MSIB

substituting one term for the other. Indeed, the Coast Guard issued the aforementioned revision to the MSIB. Without some additional support, however, it would be erroneous to conclude minimum safe speed encompasses factors such as safe passing arrangements based on an assumption the terms are not synonymous. In any case, the facts will be analyzed as if minimum safe speed encompasses a range of other factors.

Captain McCarthy argued that he was traveling at the minimum safe speed because if he slowed the vessel, it would force him to later pass an outbound vessel at a dangerous location. The outbound vessel was the Tug TARPON and its captain was Captain Spencer Edleman. Captain Edleman testified that the two vessels could have easily met and made a safe pass whether the CHARLESTON slowed its speed or not. TR. 169. He testified that his tug and barge in tow were not that large and that the CHARLESTON slowing its speed would not have caused a passing problem. TR. 169. He further testified that an easy and safe pass could have been accomplished even if slowing the CHARLESTON inevitably caused the two vessels to meet in an undesirable passing point on the Savannah River. Respondent did not contest this point during cross examination.

There was nothing to show that the tug's speed was a fixed variable in Captain McCarty's calculation as to what engine order to give. Even if Captain McCarthy's testimony was accurate that slowing the CHARLESTON would cause the vessels to meet at an unsafe passage point, there is no reason why slowing both vessels would not have resolved this problem. There is therefore no apparent justification to offset the inherent risk in navigating past the LNG terminal during an active transfer at this speed.

Even if it were true that slowing the CHARLESTON would inevitably cause the two vessels to meet at an unsafe passing point, this scenario would be immensely preferable to the

CHARLESTON passing the LNG terminal in the process of a liquid natural gas transfer at 14.2 knots. There was extensive testimony at the hearing as to the relative danger associated with passing the LNG terminal at high speeds with an LNG tankship within its slip.

Coast Guard witness Richard Knox was the cross functional technician on staff at the LNG terminal at the time in question. He testified that liquid natural gas is regular natural gas condensed 600 times, converting it from gas form to liquid form by cryogenically freezing it to minus 260 degrees. TR. 217-219. This greatly increases shipping efficiencies but at the same time creates a substance that requires extreme care in handling. Mr. Knox testified that liquid natural gas coming into contact with human skin would cause instantaneous frost bite that could result in loss of appendages. TR. 220. He further testified that liquid natural gas vapors could catch fire at the flash point and result in a massive fire. TR. 220. Because of the properties of liquid natural gas, the importance of not disturbing a transfer any way is obvious.

Respondent's witness Captain Harvey testified that the Savannah River is only approximately 1000 feet wide at the LNG terminal and that the CHARLESTON was only around 300 to 500 feet from the terminal when it passed. TR. 509. Coast Guard witness Richard Knox testified that passing vessels at this distance causes a disturbance in the water called a surge, which can cause a transfer to go completely awry. TR. 227-228. He testified that such a disturbance can cause the transferring vessel to thrust forward and back in the slip and cause transfer hoses to break loose and other damage potentially resulting in cataclysmic consequences. TR. 227-28. The testimony was clear that the faster a vessel travels, the greater the surge effect. This is the very reason the Coast Guard issued the MSIB restricting passage of an LNG tankship within the LNG terminal slip to minimum safe speed. Ex. R-K.

Captain McCarthy testified that vessels up to two and one half miles away could feel the CHARLESTON's surge at the speed that the CHARLESTON passed the LNG tankship. TR. 319. Captain McCarthy and the CHARLESTON were approximately 300 to 500 feet from the LNG tankship and impending liquid natural gas transfer when passing at full ahead producing 14.2 knots. TR. 507. Mr. Knox testified that a surge at this distance could thrust the LNG tankship forward and back in the slip and cause transfer lines and other equipment to break. TR. 227-28. As previously discussed, this sort of disruption of a liquid natural gas transfer could set in motion a chain of events potentially creating a massive disaster. Every single witness at the hearing testified that they were aware of this danger. Even Captain McCarthy testified that the LNG slip was dangerous and in fact was "a hazard to navigation and should have never been built." TR. 365. This is an immense risk that does not compare with the minimal risk of passing a tow at an undesirable passing point on the Savannah River. As such, 14.2 knots is no where near minimum safe speed by any reasonable definition of the term.

With respect to the instant case, it is undisputed that the CHARLESTON traveling at full ahead under Respondent's control in fact created a strong surge. It is also undisputed that the CHARLESTON's surge caused the LNG tankship to thrust forward and back in the slip resulting in line breakage and damage to the gangway.

Respondent argues and has a valid point that damage does not guarantee a negligence finding. Appeal Decision 2585 (COULON) (1997), Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2395 (LAMBERT) (1985). In this case however, it is a very strong indicator that the CHARLESTON passing the LNG terminal at this speed was extremely dangerous under the circumstances. As such, it defies logic that a prudent mariner would choose to pass the LNG terminal with an LNG tankship within its slip at 14.2 knots merely to avoid a

supposed unsafe passing arrangement with an oncoming tug. The speed of 14.2 knots is therefore nowhere near minimum safe speed under any reasonable definition if the term even when weighed against the risk of passing a tug at an undesirable location. Perhaps it was Respondent's erroneous belief that he would be subject to a mere \$100 fine that contributed to this disregard for navigating prudently past the LNG facility. TR. 425.

Captain McCarthy therefore breached the standard of care of minimum safe speed under any reasonable definition and was negligent in passing the LNG terminal with an LNG tankship within its slip at 14.2 knots.

V. General Defenses to Negligence

1. Previous Passing Without Incident

Respondent maintains that his speed should be regarded as safe because he has previously passed the LNG terminal with an LNG tankship within its slip at a similar speed without incident. The law is well settled in this area and as Respondent has previously pointed out, the lack of damage or incident is never dispositive in Coast Guard negligence cases. Appeal Decision 2585 (COULON) (1997), Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2395 (LAMBERT) (1985). It could very well be that Captain McCarthy was negligent previously and was simply lucky that he escaped damage or incident. The standard of care was around 6 knots and Captain McCarthy clearly breached this standard of care in navigating past the terminal at 14.2 knots.

Secondly, navigating past the LNG terminal with an LNG tankship within its slip during an active transfer procedure at 14.2 knots could never be considered safe under any conditions. Even assuming arguendo that 14.2 knots could somehow be safe under these conditions, it is inconceivable that the vessel's highest engine setting producing its top speed of 14.2 knots was

minimum in any respect. Thus, even if his speed was in the range of "safe," which it clearly was not, Captain McCarthy's speed in no way falls into any reasonable definition of minimum safe speed. The fact remains that he could have slowed the vessel considerably without compromising safety and his speed therefore was not "minimum."

2. Reliance Defenses

Respondent asserts two reliance defenses. Respondent argues that he should be entitled to rely on a bridge watch tender on duty at the LNG facility to tell him to slow down. Respondent sent out two radio broadcasts, indicated that his surge could be felt from two miles away, and that the bridge watch tender should have seen him coming. Respondent argues that the bridge watch tender therefore should have contacted Respondent if the speed was going to be a problem. In the alternative, he argues that he should be entitled to rely on standby tugs to push the LNG tankship negating the effect of the CHARLESTON's surge. According to Respondent, had the standby tugs been doing their job, there would have been no incident. Nevertheless, the fact remains that Respondent could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed, even if it were true that the bridge watch tender should have told Respondent to slow down, that there should have been tugs, that this would have prevented the incident, or that Respondent was somehow entitled to rely on these factors.

In any case, it is well settled Coast Guard law that contributory negligence or the negligence of a third party is never a defense to a Coast Guard negligence claim. Appeal Decision 2639 (HAUCK) (2003), Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2319 (PAVELEC) (1983). The only issue present herein is whether or not Respondent's actions or non-actions breached the applicable standard of care. Appeal Decision 2415 (MARSHBURN) (1985), Appeal Decision 2380 (HALL) (1985), Appeal

Decision 2175 (RIVERA) (1980). As previously discussed, the proper speed and standard of care in this case was around 6 knots, less than half Captain McCarthy's speed.

In support of his argument that he should have been entitled to rely on the bridge watch tender, Respondent relies on Magnolia Towing Co. v. Atchison, Topeka & Santa Fe Railway in which a vessel allided with a draw bridge. 764 F.2d 1134 (5th Cir. 1985). The facts were that in dense fog a draw bridge operator twice told an oncoming vessel that he would raise the bridge but then failed to do so causing the allision. Id. at 1135. The Pilot was not found negligent where, in light of the bridge operator's assurances, any possible hazard was totally unanticipated and not within the intended protection of the excessive speed rule. Id. at 1138.

The facts of this case are quite distinct. In that case, there was an affirmative communication and actual agreement between the bridge operator and the oncoming vessel's captain that the bridge tender would open the draw. In this case, Respondent sent out a general broadcast that he was approaching the LNG terminal at full ahead and did not receive a response from the bridge watch tender. It does not follow that he should be entitled to assume this lack of response was an affirmative communication or actual agreement that Respondent's speed would not be a problem. Even if there were such an agreement in this case, it would not likely change the outcome for at least two reasons. First, having an agreement with the bridge watch tender would not vary the applicable standard of care for which a reasonable prudent mariner would navigate a vessel. The testimony and evidence was clear that the proper standard of care and corresponding speed under these circumstances is around 6 knots. Captain McCarthy clearly breached this speed by navigating at 14.2 knots. Secondly, an agreement with the bridge watch tender does not change the fact that Captain McCarthy could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed.

Respondent makes a similar argument regarding his reliance that tugs would be pushing the LNG tankship. He argues that there is a regulatory requirement that tugs should be on standby and pushing. According to Respondent, there would have been no incident had the tugs been there and doing their job. Indeed the MSIB itself appears to require or reiterate another requirement that standby tugs be in place at the LNG terminal during a liquid natural gas transfer. Ex. R-K. As previously stated, however, contributory negligence is not a defense in Coast Guard negligence cases. Appeal Decision 2639 (HAUCK) (2003). As long as Respondent breached the standard of care, which in this case is a speed of around 6 knots, the question of damages or whether others could have prevented or even contributed to the damage is irrelevant. Appeal Decision 2581 (DRIGGERS) (1996), Appeal Decision 2380 (HALL) (1985), Appeal Decision 2319 (PAVELEC) (1983). The fact remains that Captain McCarthy was navigating at more than twice the proper speed regardless of whether others may have contributed to causing this accident.

As with the previous reliance argument, this argument again only focuses on safe speed, and says nothing about minimum safe speed. Even if the tugs somehow would have made Respondent's speed "safe" and that he was entitled to rely on their presence, the fact remains that Respondent could have slowed the vessel CHARLESTON without reducing safety. Respondent was therefore not traveling at minimum safe speed. Indeed the testimony was clear that the tugs should have been there as added protection in the case of an emergency. Even so, it is well settled that negligence can still follow in Coast Guard cases regardless of whether damage ensues as long as the standard of care of what a reasonable mariner would or would not do is breached. Appeal Decision 2639 (HAUCK) (2003). The testimony is clear that mariners view the tugs as protection in case of an emergency and would not intentionally pass at this speed in reliance that

the tugs would negate the emergency. Furthermore, Captain McCarthy should have anticipated the possibility that the tugs would not be on standby even if they were required to do so given the extreme danger of their absence.

The situation in this case is analogous to a lifeguard required to be on duty at a swimming pool. No reasonable person would push a small child into a swimming pool in reliance on the lifeguard making a save. That child could drown whether the lifeguard is on duty or not and it would be unreasonable to assume the lifeguard would save the day. It is similarly unreasonable to navigate past the LNG slip in reliance on the tugs saving the LNG transfer from catastrophe. In any case, Respondent does not provide anything to support his argument that he should be entitled to rely on others whether they are required to do their job or not. Even if he had support, it would not likely change the outcome of this case because the fact remains that Respondent could have slowed the CHARLESTON and was therefore not traveling at minimum safe speed.

3. Error in Judgment Defense

Respondent quotes the following passage in support of his error in judgment defense. "There are occasions where an individual is placed in a position, not of his own making, where he has to choose between apparently reasonable alternatives. If the individual responds in a reasonable manner and uses prudent judgment in choosing an alternative he is insulated from any allegation of negligence. Hindsight may show that the choice was poor under the circumstances; but hindsight is not a measure of compliance." Kime v. Hawker, N.T.S.B. EM-173 (1993), (citing Appeal Decision 1755 (HAWKER)). As previously discussed, passing the LNG terminal at this speed during an active liquid natural gas transfer could have cataclysmic consequences. Thus, there would have to be some intervening emergency near the same level of danger before

the CHARLESTON passing at this speed could be considered anything close to a reasonable alternative.

The only counter balancing factor Respondent provided to justify this risk was his assertion that slowing down could cause an unsafe passing point between the CHARLESTON and an oncoming tug. As previously discussed, the risk associated with an unsafe passing arrangement is miniscule compared to the risk of disrupting an active transfer of liquid natural gas. Captain McCarthy himself testified that the LNG slip was a hazard to navigation and was extremely dangerous. In any case, the oncoming tug's captain testified that passing would not be a problem even if the CHARLESTON slowed its speed. From the testimony at hearing, it is clear that a reasonable prudent mariner would do just about anything short of creating an inevitable head on collision in order to avoid passing the LNG terminal with an LNG tankship within its slip at this speed. The error in judgment defense is therefore rejected.

VI. General Practice for Speed near the LNG Terminal

While not specifically alleged in the Complaint as a basis for establishing the applicable standard of care, the Coast Guard provided several local Pilots who testified to the proper speed under the circumstances of this case. As previously discussed, this proceeding is not bound by the rigid procedural requirements of criminal and civil trials and the pleadings will therefore not be dispositive. The local knowledge of Pilots the Coast Guard provided as witness will establish the applicable standard of care in the event that the MSIB designating minimum safe speed as the proper speed is not the applicable standard of care.

These witnesses' testimony was in accord that it is general knowledge in the Savannah maritime community that a vessel should proceed very slowly and with caution past the LNG terminal when an LNG tankship is within its slip. Coast Guard witness Captain Edleman's

testimony was that he makes a practice of passing the LNG terminal with an LNG tankship within its slip at no faster than 6 knots. TR. 162. In fact, his practice is to pass any moored vessel at dead slow as to not create a surge. TR. 162. Coast Guard witness Captain Logan testified that even 12 knots was too fast to pass the LNG terminal with an LNG tankship within its slip, but that slow speeds are appropriate. TR. 151.

Coast Guard witness Captain Thompson's testimony was in accord with Captain Edleman's in that his general practice for passing any moored vessel is to proceed as slow as possible as to not create a surge. TR. 101. He likewise testified that he cuts the engine to dead slow or stop when passing the LNG terminal under these conditions with a ship similar to the CHARLESTON. TR. 101-04. As previously discussed, the very reason Captain Thompson remembered the CHARLESTON's exact speed after following it at on his global positioning system at the time in question was that he could not believe that someone was about to pass the LNG terminal with a LNG tankship within its slip at that speed. TR. 226. According to local mariners then, the standard of care was somewhere near 6 knots, which is nothing close to 14.2 knots.

Respondent testified that the CHARLESTON was throwing out minimal or no wake and stressed that he would not have rocked a kayak and that his speed was therefore safe. Again, the question is not whether damage will ensue; the question is whether Captain McCarthy breached the standard of care. The standard of care was minimum safe speed, which in this case amounted to around 6 knots. Captain McCarthy navigated at more than double this speed.

In any case, the testimony was undisputed that wake was only half the equation and surge is the other. Surge is a displacement of water that essentially travels under the surface. This is what caused the accident in question. As such, Respondent could be correct in that he may not

have rocked a kayak because a kayak floats on top of the water surface whereas surge travels below it. Since the CHARLESTON was putting out minimal wake, its surge theoretically could have passed below a kayak with little or no effect. The GOLAR FREEZE on the other hand is a tankship. Unlike a kayak, any tankship's hull sits down far below the water surface. The CHARLESTON, for instance, had a draft of around 26 feet on the day in question, which Captain McCarthy considered light. TR. 329. Thus, the CHARLESTON surely would have and in fact did affect the GOLAR FREEZE with its surge. Respondent should have anticipated this and slowed the CHARLESTON.

Respondent offered a single witness who testified that 14.2 knots is a safe speed under these circumstances. However, findings "need not be consistent with all evidentiary materials in the record as long as there is sufficient material in the record to support their justifications." Appeal Decision 22642 (RIZZO) (2003), Appeal Decision 2492 (RATH) (1989), Appeal Decision 2282 (LITTLE FIELD) (1982), Appeal Decision 2395 (LAMBERT) (1985). In this case, there is overwhelming evidence that 14.2 knots is nothing close to safe under these circumstances and is more than double the proper speed. Even if the speed was safe, which it clearly was not, Respondent could have slowed the CHARLESTON and was therefore in excess of minimum safe speed.

In any case, Respondent's witness was Captain Steve Harvey. Captain Harvey had worked on the CHARLESTON previously but was unfamiliar with this portion of the Savannah River as he primarily navigates in Florida. Captain Harvey could not testify as to the specifics of the Savannah River or the prevailing standard of care for navigating the CHARLESTON past the LNG terminal with an LNG tankship within its slip. As such, and as common sense dictates, it is

unimaginable that 14.2 knots would be safe a safe speed to pass the LNG terminal under the circumstances.

Captain McCarthy's speed was therefore not safe in any respect under the prevailing circumstances, and was nothing close to minimum safe speed as the MSIB requires and was likewise in breach of any theory of standard of care. The Coast Guard's claim that Respondent was negligent in navigating past the LNG terminal with an LNG tankship within its slip at an excessive speed is therefore found **PROVED**.

D. Misconduct

As discussed previously, Captain McCarthy was the holder and acting under the authority of his Coast Guard license at all relevant times.

The Coast Guard has charged Respondent with two counts of Misconduct in connection with the events of March 14, 2006. Misconduct is defined as a "behavior which violates some formal, duly established rule. Such rules are found in . . . statutes, regulations, the common law, the general maritime law, . . . and similar sources. It is an act which is forbidden or a failure to do that which is required." 46 CFR 5.27. The Coast Guard alleged in count one that Respondent violated a local ordinance containing a speed limit for passing the LNG terminal. The Coast Guard alleged in count two that Respondent violated 33 CFR 162.65(b)(3).

I. Coast Pilot

The Coast Guard provided an excerpt from the Coast Pilot manual in support of count one of Misconduct. This excerpt is directly on point and clearly states that the speed limit in this case would be 6 knots. The facts are clear Respondent was navigating at 14.2 knots and at first blush, this would seem to be dispositive regarding misconduct. However, Respondent maintains that this manual is out of date and lacks legal authority. Respondent offered a local attorney who

testified that the manual might in fact be out of date and could contain mistakes. There is therefore significant doubt as to whether the speed limit contained in the Coast Pilot manual qualifies as a duly established rule for the purposes of misconduct. However, the undersigned will not rule on the legal effect of this manual or whether it is in fact obsolete. The Coast Guard has not established by a preponderance of the evidence that Respondent committed Misconduct with respect to count one because the legal effect of this passage of the Coast Pilot is in doubt.

II. 33 CFR 162.65(b)(3)

The Coast Guard alleges that Respondent committed Misconduct by violating 33 CFR 162.65(b)(3). This regulation mandates that “[v]essels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with any work in progress incident to maintaining, improving, surveying or marking the channel.” Id. Respondent navigated past the LNG terminal with an LNG tankship within its slip at 14.2 knots. There was extensive testimony at hearing that this speed caused damage to the LNG tankship’s mooring lines and gangway. The testimony was that the CHARLESTON put out a surge which caused the LNG tankship to thrust forward and back severing lines and causing damage to the gangway. Clearly this speed was excessive and endangered other vessels and structures, namely the LNG terminal and the LNG tankship within its slip. As such, Respondent violated 33 CFR 162.65(b)(3) by navigating at an excessive speed as to endanger other vessels and structures.

Respondent argues that this regulation is not applicable because its scope is limited to protecting vessels and structures engaged in maintaining, improving, surveying or marking the channel. This argument is rejected on its face because Respondent is requesting the regulation be interpreted counter to its plain meaning. The regulation clearly states that “[v]essels shall proceed at a speed which will not endanger other vessels or structures and will not interfere with

any work in progress incident to maintaining, improving, surveying or marking the channel.” 33 CFR 162.65(b)(3) (emphasis added). By the plain language of the regulations, the Respondent’s speed must satisfy two factors to avoid violation. It must not endanger other vessel or structures, and it must also not interfere with work in progress incident to maintaining, improving, surveying or marking the channel.

The testimony is undisputed that Respondent’s speed in navigating the CHARLESTON endangered shore structures and shore vessels. Respondent actually caused the LNG tankship to thrust forward and back, causing significant damage to transfer equipment and the vessel’s gangway. Respondent also pointed to a passage of the Maritime Guide to Safe Navigation which states that “safe speed” encompasses a range of factors. As previously discussed, the risk associated with passing an active liquid natural gas transfer at 14.2 knots far outweighs any other factor asserted in this case and could therefore never be considered safe under these circumstances.

Respondent traveled at an excessive speed to endanger other vessels and shore structures and the Coast Guard’s claim that Respondent therefore committed Misconduct is hereby found **PROVED.**

V.

ULTIMATE FINDINGS AND CONCLUSIONS OF LAW

1. Captain John C. McCarthy III is the holder a Coast Guard issued Pilot’s license.
2. At all times pertinent to this case, Captain McCarthy was acting under the authority of his Coast Guard issued License as Pilot on the CHARLESTON.

3. At all times pertinent to this case, Captain McCarthy was navigating the CHARLESTON and giving engine orders and rudder commands because of his local knowledge of the Savannah River.
4. On March 14, 2006 at approximately 0418, the CHARLESTON was under Captain McCarthy's engine order of full ahead and traveling at 14.2 knots while proceeding inbound on the Savannah River.
5. At this time, the CHARLESTON passed the LNG terminal at 14.2 knots while an LNG tankship was within its slip.
6. At this time or immediately thereafter, the LNG tankship GOLAR FREEZE surged along the dock and damage ensued.
7. The CHARLESTON's surge was a cause of this damage.
8. The charge of Negligence against Captain McCarthy based on him violating Rule 6 "safe speed" as the applicable standard of care is found **NOT PROVED**.
9. The charge of Negligence against Captain McCarthy based on him violating "minimum safe speed" found in a Coast Guard Marine Safety Information Bulletin as the applicable standard of care is found **PROVED**.
10. The charge of Misconduct against Captain McCarthy based on him violating provisions found in the Coast Pilot manual is found **NOT PROVED**.
11. The charge of Misconduct against Captain McCarthy based on him violating Section 162.65(b)(3) of the Code of Federal Regulations is found **PROVED**.

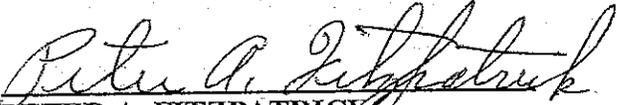
VI.

ORDER

IT IS HEREBY ORDERED that the second part of this bifurcated hearing will occur on December 20, 2006 in Savannah Georgia. On that date, both parties will have an opportunity to present evidence in aggravation and mitigation bearing on the appropriate sanction. The precise location and time to be announced.

IT IS HEREBY ORDERED that both parties are to file with the undersigned and serve on one another their intended witness and exhibit lists by close of business on December 13, 2006.

PLEASE TAKE NOTE that issuance of this Decision and Order serves as the parties' right to appeal under 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as a Attachment E.


PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on November 29, 2006 at
Norfolk, VA

UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD

Complainant

vs.

JOHN C. MCCARTHY III

Respondent.

Docket Number: CG S&R 06-0192
CG Case No. 2616092

FINAL DECISION AND ORDER ON SANCTION

Issued: December 28, 2006

Issued by: Peter A. Fitzpatrick, Administrative Law Judge

Appearances:

For Complainant

CWO Bernard Tufts
CWO Terry Roberts
PO Michael Rohland
United States Coast Guard
Marine Safety Unit
100 W. Oglethorpe Avenue
Savannah, GA 31401

For Respondent

Charles H. Raley, Jr. Esquire
Portman & Raley, LLC
P.O. Box 9087
Savannah, GA 31412

I.

PROCEDURAL HISTORY

On September 20, 2006, I conducted a hearing in the above-captioned case. The hearing concluded immediately after the parties litigated matters relevant to whether or not the charges were proved. I indicated to the parties that, if any of the charges were proved, an additional session would be reconvened at a later date and that both parties would then have a chance to offer evidence in aggravation and mitigation. In my Decision and Order dated November 29, 2006, I found that Respondent was both Negligent and committed Misconduct in passing the Liquid Natural Gas ("LNG") terminal with an LNG tankship within its slip at 14.2 knots. The Negligence charge was predicated on Respondent's breach of minimum safe speed and the Misconduct charge was predicated on his violating 33 CFR 162.65(b)(3), which requires vessels to proceed at a speed as to not endanger other vessels or structures.

On December 20, 2006, I conducted a second hearing in the above-captioned case. The Coast Guard offered evidence that Respondent has a prior record with the Coast Guard, that Respondent's actions resulted damages totaling \$109,500.00, and that his actions could have resulted in cataclysmic consequences. Respondent offered evidence that he has a reputation for being a conscientious and skilled mariner, that he has a good record, and that he has learned his lesson. In this Order, I make a determination as to the appropriate sanction.

II.

AGGRAVATION EVIDENCE

A. Prior Disciplinary Record

In determining an appropriate sanction for acts or offenses for which revocation is not mandatory, an Administrative Law Judge ("ALJ") may consider the prior disciplinary record of

the Respondent considering the period of time between prior acts and the act or offense at issue in the present case. 46 CFR 5.569(b)(2). It is important to note that the prior disciplinary record of a Respondent only includes acts or offenses less than ten years old. 33 CFR 1315(a). Thus, acts or offenses ten years old or older are not part of a Respondent's prior disciplinary record and thus are not to be considered as aggravating evidence in determining the appropriate sanction.

At the hearing, the Coast Guard offered into evidence several exhibits regarding Respondent's prior disciplinary record. After careful consideration of the aforementioned exhibits and of the testimony at the hearing, it is apparent that none of these prior incidents regarding Respondent occurred less than ten years ago. The Coast Guard did offer evidence of one incident that was less than ten years old. However, it did not involve a charge against Respondent. In fact, it did not even name Respondent as sharing the blame for an accident.¹ As such, none of the Coast Guard's submissions regarding Respondent's prior disciplinary record will be considered as aggravating evidence.

To the contrary, there was credible evidence at the hearing indicating that Respondent has not had a marine casualty in the past ten years. Respondent will, therefore, be considered to have no prior disciplinary record for the strict purpose of determining the appropriate sanction in this case.

B. Damage and Potential Damage

As discussed in my November 29, 2006 Decision and Order, Respondent navigated the CHARLESTON past the LNG terminal with an LNG tankship within its slip at 14.2 knots. This was more than double the proper speed under the circumstances and caused the LNG tankship to surge along the dock and damage ensued. The Coast Guard offered into evidence a detailed

¹ The Coast Guard offered this as Exhibit 18. This exhibit was not admitted into evidence.

report from Southern LNG regarding the actual damage resulting from Respondent's Negligence and Misconduct on March 14, 2006. The report indicated that Respondent's speed and corresponding surge caused \$75,000.00 worth of damage to the south dock gangway alone. The report indicated that the total damage Respondent caused amounted to \$109,500.00. Respondent did not dispute the validity of this report. While small compared to the potential damage that could have resulted from Respondent's conduct, \$109,500.00 is sufficient damage to be weighed as an aggravating factor in determining the appropriate sanction.

As discussed in my November 29, 2006 Decision and Order, navigating past an active LNG transfer with a large ship such as the CHARLESTON at 14.2 knots could have resulted in cataclysmic consequences. The potential damage, destruction, injury, or loss of life that could have resulted from Respondent's actions is staggering. This weighs against Respondent.

III.

MITIGATING EVIDENCE

On the other hand, Respondent offered into evidence several affidavits of other pilots attesting to Respondent's reputation for safety in the maritime community. Respondent also called several witnesses who testified that Respondent is not a danger to life and property at sea, but instead that Respondent is and has been a very safety conscious and skilled mariner. One witness described Respondent as "second to none." These statements are well taken on Respondent's behalf, but the most compelling mitigating evidence came when Respondent took the stand on his own behalf.

Respondent testified that he has sailed the Savannah River approximately one hundred times per year for the last ten years. He further testified that he has not had a single incident during that time and that he has never had a problem with speed. The Coast Guard did not

dispute this, and only offered evidence of Respondent's prior disciplinary record for incidents occurring more than ten years ago.² I find that Respondent has, therefore, successfully navigated the Savannah River at least one thousand times without a single incident. As previously discussed, this particular incident is extremely troubling on its face and its potential consequences make this a very serious mistake. However, one mistake out of one thousand trials is an impressive statistic and is a very strong indicator that Respondent is a very skilled and conscientious pilot and mariner. It is conceivable that this incident was an aberration.

Another fact that weighs in mitigation is that Respondent appears to have a new outlook on speed. He showed remorse at the hearing and assured the court that he will never have a speed problem again. He also testified that he has a new appreciation for the dangers of navigating past the LNG terminal at high speeds. This is also weighted in Respondent's favor.

IV.

SANCTION

The selection of an appropriate order is the responsibility of the ALJ. 46 CFR 5.569(a). In this case, the Coast Guard is seeking revocation. In determining whether revocation is the appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider a Respondent's prior records. 46 CFR 5.569(b)(2). As previously discussed, since there was no evidence that Respondent has had a prior incident less than ten years ago, he will be treated as a first time offender for the strict purpose of determining the appropriate sanction in this case. For first time offenders and without considering other factors, the Table of Average Orders suggests a suspension of up to six months for negligently performing duties related to vessel navigation

² The Coast Guard did offer into evidence a case regarding charges against a company Respondent owned at the time of a marine safety incident. Captain McCarthy was not named as a Respondent and there were no allegations that Respondent had contributed in any way to the incident.

and up to three months for misconduct predicated on a failure to comply with U.S. law or regulations. 46 CFR 5.569.

In this case, the damage and potential damage that Respondent caused by his actions must be weighed against Respondent's good record and apparent remorse for his actions. Respondent's actions indeed caused significant damage, and I cannot stress enough that Respondent's actions could have resulted in a massive disaster. However, Respondent's good track record and apparent remorse are sufficient to convince me that he is not a danger to life and property at sea. While not enough to reduce the sanction to a warning as Respondent proposed, these mitigating factors are sufficient to keep the sanction within the standard range of sanctions for these offenses as contemplated by the Table of Average Orders. Revocation is therefore not appropriate in this case.

V.

ORDER

IT IS HEREBY ORDERED that Respondent's Coast Guard issued license is suspended outright for eight (8) months followed by a suspension of twelve (12) months stayed on twelve (12) months probation. This sanction will take effect immediately.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR Part 20, Subpart J. A copy of Subpart J is provided as an Attachment.


PETER A. FITZPATRICK
Administrative Law Judge
United States Coast Guard

Done and Dated on December 28, 2006 at
Norfolk, VA

ATTACHMENT A – ADDITIONAL WITNESS AND EXHIBIT LIST

A. Witness Lists

I. Agency's Witnesses

The Coast Guard did not call any witnesses.

II. Respondent's Witnesses

1. Captain Samuel J. Meyer
2. Captain Carl Griffith
3. Captain John C. McCarthy III

B. Exhibit Lists

I. Agency Exhibits

13. Decision and Order for USCG v. McCarthy. Case no.: 16722/0013/90
14. Coast Guard Report of Investigation
15. Decision and Order for USCG v. McCarthy. Case no. PA95001668
16. Appeal Decision 2601 (McCarthy) (1996)
17. Case of Ingraham v. Citgo
18. Report of accident to Patrick Ingraham (not admitted)
19. Outcome of charges against Respondent
20. Damage report from Southern LNG

II. Respondent's Exhibits

- R. Marine Safety and Security Bulletin 21-06
- S. Letter from Randy Cornwell
- T. Affidavit of Captain Richard Wigger
- U. Affidavit of Captain Arthur Kirk
- V. Letter from Scot A. Couturier
- W. Letter from Captain Russell Gregg

ATTACHMENT B - SUBPART J

33 CFR 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

33 CFR 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.

(b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

- (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
- (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

33 CFR 20.1003 Procedures for appeal.

(a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

- (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;
 - (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

33 CFR 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

Certificate of Service

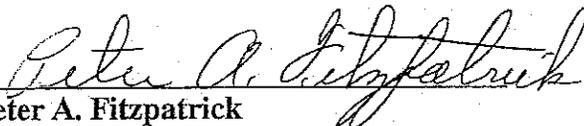
I hereby certify that I have this day served the foregoing Order by Fed Ex upon the following parties and limited participants (or designated representatives) in this proceeding at the address indicated:

CWO Tufts
United States Coast Guard
Marine Safety Unit
100 W. Oglethorpe Avenue
Savannah, GA 31401
Fax: 912-652-4052

Charles H. Raley, Jr. Esquire
Portman & Raley, LLC
P.O. Box 9087
Savannah, GA 31412
Fax: 912-234-6430
(Attorney for Respondent)

David F. Sipple, Esquire
Hunter, MacLean, Exley & Dunn, P.C.
200 E. St. Julian Street
P.O. Box 9848
Savannah, GA 31412
Fax: 912-232-3253
(Attorney for witness Southern LNG, Inc.)

T. Langston Bass, Jr.
Brennan, Harris & Rominger LLP
2 East Bryan Street, Suite 1300
P.O. Box 2784
Savannah, GA 31402
Fax: 912-236-4558
(Attorney for witness Captain Tommy Parker)


Peter A. Fitzpatrick
Administrative Law Judge
United States Coast Guard

Done and Dated on December 28, 2006 at
Norfolk, VA