

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD,
Complainant,

vs.

MAYLON E. GREEN,
Respondent

Docket Number: 00-0826
Case Number: PA00002131

DECISION AND ORDER

BEFORE: JOSEPH N. INGOLIA,
Chief Administrative Law Judge

APPEARANCES:

FOR THE COAST GUARD

LCDR John Nadeau,
LT Russell E. Bowman, and
PO Eric Crumble
2401 Hawkins Point Road
Baltimore, MD 21226

FOR THE RESPONDENT

James P. Gillence, Jr., Esq. And
Eric B. London
McGuire Woods, LLP
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I. PRELIMINARY STATEMENT

The United States Coast Guard ("Coast Guard) initiated this administrative action seeking a six (6) month outright suspension of Merchant Mariner's License Number 867686 issued to respondent Maylon Everett Green. This administrative action was brought pursuant to the legal authority contained in 46 U.S.C. § 7703 and its underlying regulations codified at 46 C.F.R. Part 5. The Coast Guard issued a complaint on December 4, 2000, which charged respondent Green with Negligence, resulting from the collision between the water taxi, INDOMITABLE, and the harbor shuttle, PHOENIX, in Baltimore, Maryland's Inner Harbor on August 12, 2000.

The negligence charge against respondent Green is supported by five offenses. The charge and underlying offenses read as follows:

First Offense - Violation of Law (33 U.S.C. § 2005)

1. While underway, you failed to maintain a proper look-out so as to make a full appraisal of the situation and the risk of collision between the INDOMITABLE and the water taxi PHOENIX, a violation of 33 U.S.C. § 2005 (Rule 5 of the Inland Navigation Rules, "Look-out").

Second Offense - Violation of Law (33 U.S.C. § 2007)

1. You were approaching another power-driven vessel, the PHOENIX, on reciprocal or nearly reciprocal courses.

2. You failed to properly evaluate the meeting situation between the INDOMITABLE and PHOENIX to determine the risk of collision, a violation of 33 U.S.C. § 2007 (Rule 7 of the Inland Navigation Rules, "Risk of Collision").

Third Offense - Violation of Law (33 U.S.C. § 2014)

1. You were approaching another power-driven vessel, the PHOENIX, on reciprocal or nearly reciprocal courses so as to involve risk of collision.

2. You failed to alter course to starboard so that you could pass on the port side of the PHOENIX, a violation of 33 U.S.C. § 2014 (Rule 14 of the Inland Navigation Rules, "Head-on Situation").

Fourth Offense - Violation of Law (33 U.S.C. § 2008)

1. You were approaching another power-driven vessel, the PHOENIX, on reciprocal or nearly reciprocal courses so as to involve risk of collision.
2. Your actions to avoid a collision with the PHOENIX were not made in ample time and, in that they did result in passing at a safe distance, were ineffective, a violation of 33 U.S.C. § 2008 (Rule 8 of the Inland Navigation Rules, "Action to Avoid Collision").

Fifth Offense - Negligence

1. You failed to maintain a proper look-out, failed to properly evaluate the meeting situation and determine the risk of collision, and failed to alter course to starboard to allow a port to port passage with the PHOENIX.

2. Your failure to commit these actions contributed to the collision that occurred with the water taxi PHOENIX, seriously injuring one of your passengers and endangering the other passengers on your vessel, as well as approximately 60 persons on board the PHOENIX.

Respondent Green filed an answer to the Coast Guard's complaint and requested a hearing. More specifically, respondent admitted all jurisdictional allegations contained in the complaint and denied all allegations under all five offenses. The hearing in this matter was initially set for February 22, 2001.

Pursuant to the Coast Guard's unopposed Motion to Postpone the Hearing, the proceeding was continued and rescheduled for hearing on March 20, 2001.

The hearing convened on March 20, 2001, in Baltimore, Maryland before the Honorable Joseph N. Ingolia, Chief Administrative Law Judge of the United States Coast Guard. The hearing was conducted in accordance with the Administrative Procedure Act as amended and codified at 5 U.S.C. §§551-559 and the Coast Guard procedural regulations located at 33 C.F.R. Part 20. The United States Coast Guard was represented at the hearing by Lieutenant Commander John Nadeau, Petty Officer Eric Crumble, and Lieutenant Russell E. Bowman. Respondent Green also appeared at the hearing accompanied by counsel, James P. Gillence, Jr., Esq. and Eric B. London, Esq. of McGuire Woods, LLP.

A total of thirteen (13) witnesses, including respondent Green, testified in this proceeding. At the hearing, the Coast Guard introduced three (3) exhibits

into evidence, together with its Memorandum of Points and Authorities.

Respondent introduced two (2) exhibits into evidence at the hearing.

After careful review of the facts and applicable law in this case, I find that the Coast Guard has established by a preponderance of reliable and credible evidence that respondent Maylon E. Green committed an act of negligence on August 12, 2000 by violating the Inland Navigation Rules requiring him, as operator of a vessel, to maintain a proper lookout, to assess the risk of collision with an approaching vessel, and to initiate evasive maneuvers in a timely fashion. In doing so, respondent negligently contributed to the collision between the water taxi INDOMITABLE and the harbor shuttle PHOENIX.

II. FINDINGS OF FACT

1. Respondent Maylon Green is the holder of U.S. Coast Guard License No. 867686. He has held a Coast Guard license for approximately twenty years and has never previously been involved in a suspension and revocation proceeding. (*Transcript ("Tr.") 234*).
2. In the late afternoon, on August 12, 2000, Respondent Green was serving as master aboard the water taxi INDOMITABLE, which is owned by Harbor Boating, Inc., when the vessel collided with the water taxi PHOENIX in the vicinity of the Constellation Pier in Baltimore's Inner Harbor. (*Entire Transcript*). Respondent Green has worked part-time for

Harbor Boating as a master aboard its water taxis for approximately ten years. (*Tr. 234*).

3. At all relevant times on August 12, 2000, the water in the Inner Harbor was calm and it was a sunny day with clear, unlimited visibility. (*Tr. 11, 61*).
4. At approximately 5:00 p.m. on August 12, 2000, Captain Green boarded the INDOMITABLE at Fells Point, relieving the first shift captain of his duties. (*Tr. 235*). The INDOMITABLE is a water taxi, which operates between various tourist attractions in Baltimore's Inner Harbor. (*Tr. 145, 158, 189, 214*).
5. At approximately, 5:15 p.m., the INDOMITABLE, under the command of Captain Green, departed Fells Point and traveled inbound to the Inner Harbor, carrying approximately eighty passengers to the Baltimore Harbor Place Pavilion. (*Tr. 14, 145, 158, 189, 214, 235*).
6. Once the INDOMITABLE reached Pier 3, which is a nearby aquarium, Captain Green called the pier to inform an already docked vessel to get underway. At this point in time, Captain Green observed another harbor shuttle getting underway so he placed the INDOMITABLE in neutral and reversed slowly to reduce the forward momentum. Once the harbor shuttle passed the INDOMITABLE, Captain Green proceeded on toward the Harbor Place Pavilion. (*Tr. 236*).

7. There was heavy boat congestion around the Constellation Pier. (*Tr. 146-147*).
8. As the INDOMITABLE passed the Constellation Pier, Captain Green observed that another vessel was leaving the dock, so he put the engine into neutral once again to decrease the speed of the INDOMITABLE and allow the other vessel to clear the area. (*Tr. 215, 224-225, 237*). Although the engine was in neutral, the INDOMITABLE maintained a slight forward momentum. (*Tr. 190, 215, 225*).
9. Since there was heavy boat traffic in the harbor, the INDOMITABLE proceeded slowly towards the Harbor Place Pavilion after stopping and starting its engines for a second time. (*Tr. 218*).
10. As the INDOMITABLE was traversing the Inner Harbor, the harbor shuttle PHOENIX slowly backed out from its dock at the Harbor Place Pavilion, sounding the appropriate whistle signals. The PHOENIX then turned around and headed outbound into the Inner Harbor, increasing its speed to approximately 4 knots. (*Tr. 26, 45*).
11. The PHOENIX is part of the Seaport Shuttle System and was carrying approximately sixty passengers on August 12, 2000. (*Tr. 14*).
12. The acting mate on board the INDOMITABLE first noticed the PHOENIX as it backed out from its dock, but he did not continuously watch the vessel because he was preoccupied with collecting money from passengers and stamping their hands. (*Tr. 190, 205-206*). He did not

notice the PHOENIX again until roughly four to five seconds before the collision, at which point, the PHOENIX was approximately twenty-five to fifty feet away. (*Tr. 194, 198, 207*).

13. Several passengers on board the INDOMITABLE also observed the PHOENIX as it left its dock, approximately seventy to eighty feet away from the INDOMITABLE. Other passengers did not notice the PHOENIX until it was considerably closer, roughly fifty yards away and

approximately twenty to forty seconds before the collision. (*Tr. 27, 33, 55-56, 130-131, 153*).

14. Captain Green noticed the PHOENIX when it was approximately forty feet away from the Constellation Pier. (*Tr. 238*).

15. As the passengers aboard the INDOMITABLE watched the PHOENIX approach head-on, they feared the vessels would collide. (*Tr. 26-27, 29*).

As a matter of fact, one lady passenger brought her arm into the INDOMITABLE and edged closer to her husband. (*Tr. 130, 141-142*).

16. As the PHOENIX continued to draw near, Captain Green thought that the captain of the vessel was coming over to tell him something. (*Tr. 239*). It is customary practice in Baltimore's Inner Harbor for two captains to bring their vessels close enough together to provide for brief conversation in passing. (*Tr. 248*).

17. As the two water taxis continued to draw closer, Captain Green was unsure of the PHOENIX's course of action and he expressed concern to

the mate on board the INDOMITABLE. (*Tr.* 237-238, 239, 244). Although Captain Green felt uneasy about the situation, he did not alter the INDOMITABLE's speed until approximately one second before the collision, at which time, he increased the speed and turned the stern sharply to the left and then to the right, but the PHOENIX struck the INDOMITABLE on the port side. (*Tr.* 57, 204, 239).

18. The collision between the INDOMITABLE and the PHOENIX occurred south of the Constellation dock, along the edge of the pier. (*Tr.* 170).
19. Neither vessel sounded warning or danger signals prior to the collision. (*Tr.* 30, 45, 57, 72, 123, 132, 204).
20. After the accident, the PHOENIX continued on to Fells Point, whilst the INDOMITABLE stopped dead in the water for a couple of minutes to attend to an injured female passenger, who was struck on the head by a fender hanging from the INDOMITABLE. After tending to the injured female passenger, the INDOMITABLE headed for port. (*Tr.* 32, 46, 58, 167, 243).
21. Only two to five minutes elapsed between the time PHOENIX backed out of its port and collided with the INDOMITABLE. (*Tr.* 55-56, 130-131, 227).
22. Although the INDOMITABLE was equipped with a radio, which could only be monitored by the Harbor Boating and the Water Taxi, the vessel did not have a VHF radio which would allow the captain to communicate with other vessels. (*Tr.* 244).

23. The water taxis and shuttles in the harbor do not travel specific routes.

The captains are expected to be flexible and to deviate from their course if necessary to avoid traffic. (*Tr.* 247).

III. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Maylon Everett Green and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. §§ 6301 and 7703 (West Supp. 2000); 46 C.F.R. Part 5 (2000); and 33 C.F.R. Part 20 (2000).
2. At all relevant times, respondent Green was the holder of and acted under the authority of his U.S. Coast Guard License No. 867686 while serving as master aboard the vessel INDOMITABLE (D544943) on August 12, 2000.
3. The testimony of Captain Maylon Green that the INDOMITABLE stopped dead in the water as it waited for heavy boat congestion to clear around the Constellation Pier is not deemed credible. The testimony from several witnesses aboard both vessels involved in the casualty, who observed the bow wake behind the INDOMITABLE as it maintained a forward momentum, is considered a more accurate representation of the facts.
4. The testimony of Gregory J. Fortman, Jr., a former employee of Harbor Boating who was on board the PHOENIX at the time of the accident, that

Captain Green sounded a short warning blast just prior to impact is not deemed credible. The testimony from several witnesses aboard both the INDOMITABLE and PHOENIX that neither vessel sounded warning or danger signals prior to the collision is considered a more accurate representation of the facts.

5. The evidence in the record as a whole demonstrates that respondent Green, as master of the INDOMITABLE on August 12, 2000, was responsible for the vessel's safe passage in the Inner Harbor and he failed to conform to the standard of care required of a reasonably prudent mariner under the circumstances by failing to acknowledge the approach of the harbor shuttle PHOENIX sooner, assess the risk of collision, and initiate an evasive maneuver in a timely fashion so as to avoid the collision.
6. The charge of "**NEGLIGENCE**" against the respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
7. The first offense under the charge of Negligence is **PROVED** by a preponderance of the evidence.
8. The second offense under the charge of Negligence is **PROVED** by a preponderance of the evidence.
9. The third offense under the charge of Negligence is **PROVED** by a preponderance of the evidence.

10. The fourth offense under the charge of Negligence is **PROVED** by a preponderance of the evidence.

11. The fifth offense under the charge of Negligence is **DISMISSED**.

IV. OPINION

~~As a preliminary matter, and although not mentioned by respondent~~
Green's counsel, I find that the fifth offense under the charge of negligence is subject to dismissal because it is duplicative or identical to the first four offenses under the charge of negligence. More specifically, the fifth offense charges the respondent with failing to maintain a proper look-out, failing to properly evaluate the meeting situation and determine the risk of collision, and failing to alter course to starboard to allow a port-to-port passage with the PHOENIX, and thus contributing to the collision. This fifth offense merely summarizes or reiterates what has already been independently identified as a breach of the standard of care under the first four enumerated offenses. Accordingly, the fifth offense is dismissed. See Appeal Decision 1860 (McGarry); Appeal Decision 2358 (Buisset).

As to the merits of this case, the purpose of a suspension and revocation proceeding is to protect lives and property at sea against actual and potential danger. See 46 U.S.C. § 7701 (West Supp. 2000). The purpose is not to assess

blame for marine casualties. See Appeal Decision 1755 (Ryan). In these proceedings, a Coast Guard issued license or document is subject to suspension or revocation if the holder is found to have committed an act of negligence in performing his duties relating to the vessel. See 46 U.S.C. § 7703(1)(B) and 46 C.F.R. § 5.569. The burden of proof is on the Coast Guard to establish a prima facie case of negligence by a preponderance of the evidence. See 5 U.S.C. § 556(d); 33 C.F.R. §§ 20.701-20.702 (2000); see also Appeal Decision 2485 (Yates).

Negligence is defined in 46 C.F.R. § 5.29 as “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.” The inquiry is limited to whether the respondent acted negligently, and it does not matter whether the negligence leads to a collision. See Appeal Decision 2277 (Banashak); see also Appeal Decision 2492 (Rath); and Appeal Decision 2380 (Hall). The collision is merely an event that prompts the investigation into the respondent’s actions. See (Banashak), *supra*. Therefore, a mariner is negligent if he failed to take the precautions a reasonably prudent mariner would take in the same circumstances, regardless of whether or not his conduct or failure to act was the proximate or a contributing cause of the casualty. See Appeal Decision 1755 (Ryan).

In addition, contributory negligence is not a defense in these proceedings, and the possible fault or negligence of another person or vessel in no way

mitigates the respondent's negligence or contribution to the collision. See Appeal Decision 2031 (Cannon); see also (Rath); (Hall) supra. Although the causal connection is necessary to establish liability for negligence in a civil proceeding for damages, it is not an element of negligence for the purposes of a suspension and revocation action. See Appeal Decision 2358 (Buisset); see also Appeal Decision 2438 (Turner). The alleged fault of the PHOENIX's captain relating to the marine casualty will not serve to excuse any negligence on the part of respondent Green in this hearing.

Moreover, in a suspension and revocation proceeding, a violation of a navigation rule is, of itself, negligence. See Appeal Decision 2386 (Louviere); see also (Buisset) supra. Pursuant to 46 C.F.R. § 5.33, a violation of law is defined as any failure to comply with a regulation prescribed under 46 U.S.C. subtitle II or any other law or regulation intended to promote marine safety or protect navigable waters.

Here, the Coast Guard has established that the respondent acted negligently by breaching the Inland Navigation Rules on August 12, 2000, thereby failing to avoid a collision with an approaching power-driven vessel. More specifically, respondent Green is negligent because he failed to initiate the following required safety procedures required when two vessels meet in a head-on situation. The violations, which will be addressed in further detail, include:

- I) Failing to maintain a proper lookout;
- II) Improperly assessing the risk of collision; and

- III) Failing to avoid a head-on collision and initiate evasive maneuvers in ample time.

The respondent's violation of the Inland Navigation Rules contributed to the collision with the harbor shuttle PHOENIX, seriously injured one passenger, and jeopardized the safety of all other passengers aboard both vessels.

I. Captain Green Failed to Maintain a Proper Lookout While Underway

The respondent contends that the Coast Guard presented no evidence to establish that Captain Green failed to maintain a proper lookout. In support of this contention, the respondent argues that there were two mates aboard the INDOMITABLE at the time of the incident and that, as captain of the vessel, he could not be the lookout within the meaning of maritime law.

The respondent is grossly mistaken in his assessment of the navigational rule requiring that a proper lookout be maintained. The applicable statute, Rule 5 of the Inland Navigation Rules, 33 U.S.C. § 2005, provides:

Every vessel underway must at all times maintain a proper lookout by sight and hearing as well as prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.

Senate Report 96-979, which accompanies the Inland Navigation Rules, expresses Congressional intent concerning lookouts:

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain pleasure craft, fishing boats, and towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the water officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety.

See S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980).

It is well-established law that the term "maintain" means "to see to it that a proper lookout is on duty," and under certain conditions, an operator of a vessel may also act as lookout. See Appeal Decision 2421 (Rader); see also Appeal Decision 2420 (Lentz). However, the adequacy of a lookout on board a vessel is a question of fact to be resolved under all existing facts and circumstances. See Appeal Decision 2390 (Purser); see also Appeal Decision 2482 (Watson); (Radar). Therefore, each situation must be considered independently.

In the case at hand, the evidence presented as a whole indicates that a proper lookout was not maintained under the circumstances. First, Mr. Blaine Driscoll, who was acting mate on board the *INDOMITABLE* at the time of the incident, testified that he was not keeping continuous watch, as he was preoccupied with collecting money from passengers and stamping their hands.

(Tr. 190, 206). Second, the record is devoid of any evidence that a lookout duty was assigned to any crewmember aboard the INDOMITABLE. Clearly, Captain Green was responsible for navigating the vessel while maintaining a proper lookout. Yet, the fact that Captain Green did not see the PHOENIX approaching in time to properly assess the oncoming danger and avoid the collision remains unexplained. It was a calm, sunny day with clear, unlimited visibility. (Tr. 11, 61). There appears to have been no difficulty in seeing the approaching vessel, as several passengers aboard the INDOMITABLE observed the PHOENIX up to eighty (80) feet away and watched for approximately five minutes as it steadily drew closer. (Tr. 55-56, 130-131). Some witnesses, including the acting mate, even noticed the PHOENIX for the first time as it left its dock, backed out, and turned around into the harbor. (Tr. 130-131, 205). Moreover, despite the boat traffic around the Inner Harbor, Captain Green was able to observe other vessels getting underway. (Tr. 236). In fact, Captain Green testified that it was just past the Constellation Pier when he noticed the PHOENIX approaching at an angle. (Tr. 237).

When a mariner fails to see a vessel, which proper watchfulness would have disclosed, the unexplained fact that the vessel was not conspicuously seen is conclusive evidence of a defective lookout. See The New York, 175 U.S. 187, 204 (1899). Since no reason is given why the approaching vessel was not noticed in time to avoid the collision, Captain Green's inability to see the PHOENIX is inexplicable, except upon the theory that no sufficient lookout was maintained.

See The New York, 175 U.S. at 204. Thus, respondent Green is found to have violated 33 U.S.C. § 2005 (Rule 5 of the Inland Navigation Rule) by failing to maintain a proper look-out and the first offense under the charge of negligence is found proved by a preponderance of the reliable and credible evidence.

II. Respondent Improperly Assessed the Risk of Collision Under the Circumstances

The respondent contends that, based on nineteenth century case law, a vessel better able to control her movements should give way to the other vessel, and that a vessel lying still in water is under no duty to an approaching vessel other than to remain in position. See Philadelphia & R.R. Co. v. Adams, 89 Pa 31 (1879); see also, The John D. Dailey, 260 F. 241 (D.C. N.Y. 1919). The respondent alleges that, in this case, the PHOENIX was underway while the INDOMITABLE remained stationary in the water, and, therefore, the PHOENIX was solely responsible for giving way to the INDOMITABLE.

Respondent's use of antiquated case law that deals specifically with vessels within the protection of the Steering and Sailing Rules is neither applicable nor persuasive. The issue in Philadelphia & R.R. Co. was whether the admiralty rule requiring a steamer to keep out of the way of a sailing vessel applies to a rowboat. The Supreme Court of Pennsylvania found that there was no occasion

for a steamer to avoid a rowboat, whose course can readily be changed. See Philadelphia & R.R. Co. v. Adams, 89 Pa 31. In the case at hand, a collision occurred between two power-driven vessels. It has been found as fact that both vessels were underway in inland waters. (*Findings of Fact Nos. 8 and 10; Ultimate Findings of Fact, No. 3*). As such, the Inland Navigation Rules, which were enacted on December 24, 1980¹ to regulate modern navigational issues, apply. Specifically, Rule 7 of the of the Inland Navigation Rules, 33 U.S.C. § 2007, provides:

Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

A “vessel” includes every description of watercraft that is used or is capable of being used as a means of transportation on water. See Rule 3(a) of the Inland Navigation Rules, 33 U.S.C. § 2003. Therefore, both the INDOMITABLE and the PHOENIX, which operate as water taxis in Baltimore’s Inner Harbor, are governed by these navigation regulations, regardless of their specific design or model.

Moreover, respondent is incorrect in his assertion that because the INDOMITABLE was stationary or moving dead slow in the water it was not underway, and, therefore, had no duty to the approaching vessel other than to remain in position. Rule 3(h) of the Inland Navigation Rule defines “underway”

¹ The Inland Navigation Rules became effective for all inland waters except the Great Lakes on December 24, 1981.

as any vessel that is not anchored, made fast to the shore, or aground. See *Id.* Passengers aboard both the INDOMITABLE and PHOENIX testified at the hearing that the bow wake behind the INDOMITABLE was observed as it maintained a forward momentum. (*Tr. 190, 215, 225*). Although, Captain Green may have placed the vessel's engine into neutral while he waited for the heavy boat congestion to clear the area, the INDOMITABLE continued to move in the water. (*Tr. 190, 215, 225*). Given, the INDOMITABLE was "underway" at the time of the collision.

Because the PHOENIX was a power-driven vessel underway in inland waters at the time of the incident, Captain Green had a duty to properly assess the risk of collision between the PHOENIX and the INDOMITABLE. A belief that the captain of the other vessel was approaching closer than normal in an effort to communicate with the respondent, will not excuse the respondent's failure to initiate appropriate safety precautions. Although it is not unusual for two captains navigating within Baltimore's Inner Harbor to bring their vessels close together to allow a brief conversation in passing, custom and usage do not serve as an adequate defense to a charge of negligence in this case. See Appeal Decision 2581 (Driggers). Caution in evaluating the risk of collision between two vessels approaching head-on is so imperative that any disregard, by custom and usage of a trade, will not meet the necessary standards of care. See Appeal Decision 2261 (Savoie); see also Appeal Decision 2416 (Moore). Respondent as

captain of the vessel had the duty to insure compliance with the Inland Navigation Rules and his failure to do so was properly chargeable negligence.

Moreover, the undersigned is not convinced that Captain Green's failure to properly evaluate the meeting situation between the approaching vessels was based on his belief that the captain of the PHOENIX wished to communicate. Although this belief may have been included among Captain Green's thoughts as he watched the PHOENIX steadily approach, additional concerns included the fear that the vessels would collide. Respondent testified at the hearing that he was unsure of the PHOENIX's course of action and expressed his concerns to the acting mate. (*Tr.* 237-238, 239). Clearly, there was doubt in Captain Green's mind as to whether the risk of collision existed. As such, respondent was obligated to assume that the risk of collision did exist and that he should act accordingly. See 33 U.S.C. § 2007.

In light of his confusion, prudent action by Captain Green would have included, at a minimum, sounding five short and rapid blasts on the whistle. Specifically, Rule 34(d) of the Inland Navigation Rules, 33 U.S.C. § 2034 provides:

When vessels in sight of one another are approaching each other and from any cause either vessel fails to understand the intentions or actions of the other, or is in doubt whether sufficient action is being taken by the other to avoid collision, the vessel in doubt shall immediately indicate such doubt by giving at least five short and rapid blasts on the whistle. This signal may be supplemented by a light signal of at least five short and rapid blasts.

In this case, Captain Green failed to make the required whistle sounds to signal an approach, agreement, passage, or danger. (*Tr.* 109). None of the passengers aboard the *INDOMITABLE* or the *PHOENIX* who testified at the hearing heard either vessel sound any signals as the two vessels approached each other. (*Tr.* 30, 45, 57, 72, 123, 132, 204). According to the testimony of a former employee of Harbor Boating who was on board the *PHOENIX* at the time of the accident, Captain Green sounded a short warning blast just prior to impact. (*Tr.* 226). Even if that were true, a single blast moments before a collision does not comply with the required navigational procedure or standard care required of a prudent mariner. As such, the evidence viewed as a whole indicates that respondent violated 33 U.S.C. § 2007 (Rule 7 of the Inland Navigation Rule) by failing to properly ascertain the risk of collision and failed to sound the required danger signals when faced with the uncertainty of a collision. Thus, the second offense under the charge of negligence is found proved.

III. Captain Green Failed to Initiate Evasive Maneuvers in Ample Time To Avoid a Head-On Collision

The respondent argues that the time period in which it becomes necessary to begin precautionary measures to prevent a disaster cannot be precisely defined and must always depend on the circumstances surrounding the

occasion. In this case, the respondent alleges that he was paying attention to the surroundings and when it became apparent that the approaching vessel was not going to alter course or speed, he took immediate evasive action. He states that due to the INDOMITABLE's stationary position against the pier, he was unable to avoid the collision. Captain Green further contends that he was entitled to presume the approaching vessel would act lawfully and pursue the customary course regulating its actions so as to avoid danger.

The undersigned is not convinced that action taken by the respondent was made in ample time to assess the situation and avoid a collision. The evidence viewed as a whole indicates that Captain Green noticed the approaching vessel in time to initiate evasive action, but chose to remain stationary until the last second; thereby contributing to the collision. Captain Green testified that he noticed the PHOENIX sliding down towards the left at an angle, but did not know which direction to turn because the INDOMITABLE was approximately forty feet away from the Constellation Pier. (*Tr.* 238). Captain Green felt that he could not turn the vessel to the right due to the close proximity of the pier; however, he knew that if the INDOMITABLE remained stationary, it would collide with the approaching vessel. (*Tr.* 238). Captain Green also testified that he was unsure of the PHOENIX'S course of action and his anxiety increased as he watched the PHOENIX steadily approach. (*Tr.* 237-238, 239). As a matter of fact, respondent Green voiced his concern about the unknown intentions of the captain of the PHOENIX when he exclaimed to the acting mate, "Look at this

guy. What the is he doing?" (Tr. 237). In addition, passengers aboard the INDOMITABLE observed the PHOENIX's head-on approach and shared Captain Green's concern up to five minutes before the collision. Within that time frame, one passenger reacted by bringing her arm into the INDOMITABLE and edging closer to her husband. (Tr. 130). Captain Green's apprehension should have sparked a similar reaction that, made in ample time, would have avoided the collision.

Timely action to avoid a collision are specified in Rule 8 of the Inland Navigation Rules, 33 U.S.C. § 2008, which provides in pertinent part:

- (a) Any action taken to avoid collision, shall, if the circumstances of the case admit, be positive, made in ample time and with due regard to the observance of good seamanship.
- (b) Any alteration of course or speed to avoid collision shall, if the circumstances of the case admit, be large enough to be readily apparent to another vessel observing visually or by radar; a succession of small alterations of course or speed should be avoided.
- (c) If there is sufficient sea room, alteration of course alone may be the most effective action to avoid a close-quarters situation provided that it is made in good time, is substantial and does not result in another close-quarters situation.
- (d) Action taken to avoid collision with another vessel shall be such as to result in passing at a safe distance. The effectiveness of the action shall be carefully checked until the other vessel is finally past and clear.

Passing at a safe distance ideally should remove all risk of collision. The risk to be eliminated includes the possibility that two vessels could safely pass in

close proximity to one another even if an emergency occurred in either vessel. See CAPT. RICHARD SMITH, FARWELL'S RULES OF THE NAUTICAL ROAD, at 81 (7th ed. 1994). Thus, the passing distance must be sufficient to allow recovery time from a casualty or detect and react to unexpected dangers. See. CAPT. RICHARD SMITH, FARWELL'S RULES OF THE NAUTICAL ROAD, at 81. In this case, Captain Green failed to initiate evasive action in ample time to pass at a safe distance, the small alteration of speed was insufficient, and his decision to turn the stern sharply to the right resulted in another close-quarter situation.

Although the respondent asserts that the INDOMITABLE's stationary position in close proximity to the Constellation Pier prevented him from acting sooner, there were no special circumstances warranting any departure from the Inland Navigation Rules necessary in order to avoid immediate danger. A departure from the usual rules of navigation due to special circumstances does not apply to vessels in an ordinary head-on situation that sight each other at an ample distance to comply with the applicable rules. See Appeal Decision 1353 (Smith). In this case, the situation was not one in extremis; the INDOMITABLE was not hindered in her ability to apply the navigation rules, nor was there a proposed departure from the usual rules agreed to by the other vessel. Therefore, an exception under the rule of special circumstances does not apply here because there was no reason why the proper application of the meeting rules would have resulted in any danger. See (Smith).

In addition to commencing evasive measures upon recognizing a head-on situation with the PHOENIX, the respondent was required to alter course to starboard and safely pass on the port side of the approaching vessel. Unless otherwise agreed, when two power-driven vessels meet on reciprocal courses so as to involve the risk of collision, each shall alter course to starboard and pass on the port side of the other. See Rule 14 of the Inland Navigation Rules, 33 U.S.C. § 2014. A passing agreement binds each operator to specific actions that will result in the vessels passing each other safely. Each operator, in turn, relies on the agreement and has a duty to conform his actions accordingly. See Appeal Decision 2479 (Branch). A prior agreement is not negated by a change of course by one operator because the remaining operator still has a duty to abide by the agreement. See (Branch). Because the obligation to alter course was mutual in its application, the respondent will not be absolved from negligent operation and navigation of a vessel by claiming he was waiting for the other vessel to change course first. Since respondent failed to alter course and pass on the port side even though the INDOMITABLE and the PHOENIX were on reciprocal courses and he did not take evasive action in ample time so as to avoid a collision, he violated 33 U.S.C. §§ 2014 (Rule 14 of the Inland Navigation Rule) and 2008 (Rule 8 of the Inland Navigation Rule). Thus, offenses three and four, respectively under the charge of negligence are found proved.

V. CONCLUSION

The preponderance of evidence in the record supports a finding that the respondent acted negligently with respect to the navigation of the INDOMITABLE. Specifically, respondent failed to comply with the Inland Navigation Rules requiring him, as operator of a vessel, to maintain a proper lookout, to properly assess the meeting situation and determine the risk of collision, and to alter course to starboard and allow a port to port passage with an approaching vessel. In doing so, respondent negligently contributed to the collision between the water taxis the INDOMITABLE and the PHOENIX, which resulted in serious injury to one passenger and the endangerment of all other passengers aboard both vessels.

It is well within the power of the undersigned to order any of a variety of sanctions, including suspension. See 46 C.F.R. § 5.569; see also Appeal Decision 2569 (Taylor). The Table of Suggested Range of an Appropriate Order codified in 46 C.F.R. § 5.569(d) recommends an order of 2 to 6 months suspension for negligence related to vessel navigation. In this case, the U.S. Coast Guard has proposed that the respondent receive a six (6) month outright suspension. The undersigned, however, is not bound by the Table of an Appropriate Order. See, (Taylor). The Table of an Appropriate Order merely serves as guidance to an ALJ, and consideration of mitigating or aggravating factors may justify a lower

or higher order than the range suggested in the appropriate order table. 46

C.F.R. § 5.569(d).

In light of all the circumstances and facts surrounding this case, a more appropriate sanction is deemed to be a two (2) month outright suspension. Captain Green is held in high regard among his peers in terms of reputation, background, and experience. He appears to be a highly responsible person who was operating a water taxi in a very busy harbor - - a difficult and demanding occupation. Moreover, this case does not involve a respondent who has a prior record of violations. This case involves an unfortunate, isolated incident wherein the respondent acted in a negligent manner that the undersigned feels will not again be repeated. Consequently, the minimal suspension period set forth in the Table of Orders is the appropriate sanction. WHEREFORE,

V. ORDER


IT IS ORDERED that the charge of Negligence against Maylon E. Green and the supporting offenses thereunder are **PROVED**, and it is further,

ORDERED that the Merchant Mariner's License, No 86786, issued to the respondent is hereby **SUSPENDED** for a period of two (2) months to begin upon surrender. Respondent is ordered to immediately surrender his Merchant

Mariner's License to the Investigating Officers at Activities Baltimore, Maryland.

It is hereby further,

ORDERED that the service of this Decision on the respondent's counsel will serve as notice to the respondent of his right to appeal, the procedure for which is set forth in 33 C.F.R. §§ 20.1001-20.1003. (Attachment A)



JOSEPH N. INGOLIA
Chief Administrative Law Judge
U.S. Coast Guard

Dated this 27th day of August, 2001
Baltimore, MD

Copy:

Activities Baltimore, Attn: Investigations Department
James P. Gillence, Jr., Esq., Counsel for Respondent
Eric B. London, Esq., Counsel for Respondent