

The Investigating Officer introduced four exhibits and the testimony of two witnesses into evidence. In defense, the Appellant offered seven exhibits in evidence, the testimony of three witnesses, and his own testimony.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved. He served a written order on Appellant suspending license No. 601260 and all other licenses issued to the Appellant by the Coast Guard for a period of three months.

The entire decision was served on July 6, 1993. Appeal was timely filed.
APPEARANCE: Attorney David E. Cole of Marrero, Louisiana.

FINDINGS OF FACT

On 23 August 1992, Appellant was serving as Operator on board the M/V EARLY BIRD under the authority of the above captioned license. He accepted paying passengers on board the M/V EARLY BIRD for a fishing trip. Appellant moored his vessel to a Conoco gas and oil platform located in West Delta, Block 30 and designated 45G. Platform 45G contains several signs, which read: "DANGER HIGH PRESSURE PIPELINE" and "BLOWDOWN DO NOT TIE UP".

The appellant tied his vessel to the platform in close proximity to the warning signs and allowed his passengers to smoke as they fished. The appellant never warned his passengers not to smoke in the area. A resulting explosion occurred burning seven passengers and one deckhand. Several passengers that were injured required hospitalization.

There was a record of hearing made by a qualified reporter in this case. The Administrative Law Judge's Decision and Order of 6 July 1993 referenced eleven exhibits received into evidence, none of which are contained in the case file on appeal.

BASES OF APPEAL

Appellant advances a number of bases for appeal. Due to the disposition of this case, these will not be addressed.

OPINION

Suspension and revocation hearings are governed by the Administrative Procedure Act, 5 U.S.C. § 551 et seq., and the Coast Guard regulations in 46 C.F.R. Part 5 promulgated pursuant to 46 U.S.C. Chapter 77. The Administrative Procedure Act requires that agency decisions be based on the record which includes a transcript of the hearing and exhibits. 5 U.S.C. § 556(e). The hearing transcript, together with all papers and exhibits filed, shall constitute the record for decision on appeal. 46 C.F.R. § 5.701(b). By statute and regulation Appellant is entitled to appeal from the decision of the Administrative Law Judge and to have his appeal considered on the record of the hearing including the transcript and exhibits. 46 U.S.C. § 7702(b), 46 C.F.R. § 5.701, Appeal Decisions 2399 (LANCASTER), 2394 (ANTUNEZ) and 2540 (ALFOLDI).

The National Transportation Safety Board has previously held that where several exhibits had been lost, a remand to the Administrative Law Judge below to reopen the proceeding in order

to replicate the missing exhibits was consistent with the requirement of administrative due process. Engen v. Perry, 5 N.T.S.B. 2070 (1987). The exhibits in Perry were; 1) a hand sketch by a witness of air traffic patterns, 2) a tape recording of radio transmissions, and 3) a transcript of the radio transmissions. The Board concluded that these exhibits could be accurately replicated because the witness could recreate the traffic pattern sketch and a duplicate tape of the radio transmission existed. *Id.* The replications would not deprive the respondent of administrative due process. *Id.*

In the present case, all exhibits introduced into evidence are missing. Exhibits introduced by the Investigating Officer were: I.O. Exhibit #1) photo of platform 45G located in West Delta block 30; I.O. Exhibit #2) photocopy of the M/V EARLY BIRD; I.O. Exhibit #3) photo of signs on platform; and I.O. Exhibit #4) photo of M/V EARLY BIRD taken 5 days after the incident. Exhibits introduced by the Appellant missing from the record are: Respondent Exhibit A) curriculum vitae for William C. Key; Respondent Exhibit B) photo of West Delta block 45G, showing blowdown pipe; Respondent Exhibit C) publication, "Fishing Offshore Platforms Central Gulf of Mexico" USDI, April 84; Respondent Exhibit D) photo West Delta block 45G; Respondent Exhibit E) affidavit of Mr. Schicktanz dated 2 FEB 1993; Respondent Exhibit F) letter dated 20 NOV 92 to Donald C. Howard from Ed. G. Schicktanz; and Respondent Exhibit G) letter dated 21 NOV 92 from Ed. G. Schicktanz to Donald C. Howard.

I find that this case is not distinct from Perry. Reopening the hearing in order to receive replicated exhibits would comport

with the requirement of administrative due process. It is my understanding that copies of the original photographs do exist. Copies of the other exhibits should be obtained for review to complete the record.

CONCLUSION

I conclude that a proceeding, reopened and with the record, and the copies of exhibits entered, is both practicable and in compliance with the requirements of administrative due process.

ORDER

This proceeding is remanded for further proceedings consistent with this order.

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

Signed at Washington, D.C. this 11th day of April, 1995.