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

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
vs.	:	DECISION OF THE
LICENSE NO. 713770	:	VICE COMMANDANT
	:	ON APPEAL
	:	NO. 2642
Issued To: DOMENIC RIZZO	:	

This appeal is taken in accordance with 46 USC § 7703, 46 CFR § 5.701, and 33 CFR Part 20.

By a Decision and Order (D&O) dated August 27, 2001, an Administrative Law Judge (ALJ) of the United States Coast Guard at Baltimore, Maryland, suspended Appellant's license for two (2) months outright upon finding proved a charge of *negligence*. The specifications found proved alleged that on January 30, 2000, Appellant, while serving as operator of the tug JOHN TURECAMO and while acting under the authority of the above-captioned license, navigated the tug in such a manner as to cause the barge PEQUECO II to sink in the upper Chesapeake Bay, just south of Turkey Point, resulting in approximately 100 gallons of diesel oil pollution, a five week salvage response and approximately $150,000 in damages.

PROCEDURAL HISTORY

The hearing in this matter commenced in Baltimore, Maryland, on January 23, 2001, and re-convened on January 24, 2001 and January 25, 2001. Appellant appeared with counsel and "admitted" jurisdiction, but "denied" some of the allegations stated in the charge sheet.

On January 17, 2001, the ALJ ordered the consolidation of Appellant's case with that of Mr. Dannie K. Card.[1] Following the consolidation of the case, Joint Stipulations of Fact were submitted by the parties and placed in the record by the ALJ. [D&O dated August 27, 2001, page 4] At the Hearing, eleven (11) witnesses were called, including Appellant and Mate Card. The Coast Guard introduced ten (10) exhibits into evidence and a Memorandum of Points and Authorities. Respondents Rizzo and Card, likewise, introduced ten (10) exhibits into evidence. Upon the completion of the hearing, the ALJ ordered the submission of post hearing briefs by March 23, 2001, and reply briefs twenty days thereafter, by April 13, 2001. The ALJ issued the D&O on August 27, 2001. Appellant filed his notice of appeal on September 21, 2001, and requested a 60-day extension of time within which to file his appellant brief on September 26, 2001. Appellant perfected his appeal by filing a brief on December 19, 2001, within the filing requirements set forth at 33 CFR § 20.1003 and the time allotted by the extension. Therefore, this appeal is properly before me.

APPEARANCE: Ober, Kaler, Grimes & Shriver (Geoffrey S. Tobias, Esq. and Eric M. Veit, Esq.) for Appellant, 120 E. Baltimore Street, Baltimore, Maryland 21202-1643. The U.S. Coast Guard was represented by LCDR John Nadeau and LT Russell Bowman, U.S. Coast Guard Activities Baltimore, Baltimore, Maryland.

FACTS

At all times relevant herein, Appellant was the holder of the above-captioned license, issued by the United States Coast Guard. Appellant has been the holder of this

[1] Following the loss of the barge PEQUECO II, the Coast Guard brought Suspension and Revocation proceedings against both Appellant and Dannie K. Card, who served as Chief Mate of the JOHN TURECAMO. The ALJ found both men negligent and ordered two (2) month suspensions of each of their licenses. Appellant elected to appeal the decision of the ALJ, while Mr. Card did not.

license since his graduation from the Maine Maritime Academy in 1986. [Transcript (Tr.) at 499]

On the morning of January 30, 2000, Appellant, while in the employ of Moran Towing of Pennsylvania (Moran), was instructed to tow the uninspected barge PEQUECO II from the PQ Corporation's Chester Plant, at Chester, Pennsylvania to Grace Chemical's facility in Baltimore, Maryland, via the Chesapeake and Delaware (C&D) Canal. [D&O at 6-8; Tr. at 512-513]. During the voyage, both Appellant and Mr. Card operated the JOHN TURECAMO; Appellant served as Master while Mr. Card served as Chief Mate. [Tr. at 6-7]

On January 29-30, 2000, the Coast Guard issued several Broadcast Notices to Mariners over VHF Channel 16. [D&O at 7; Stipulation 6] The notices stated that the C&D Canal was open to vessel transit, but, depending upon location, between 70 and 100 percent of the canal was covered with ice and that pack ice of up to one foot thick was present in some locations. [Stipulation 28] In addition, the Captain of the Port of Baltimore issued an advisory indicating that vessels operating between Tolchester Beach and Town Point in the Elk Neck River (near the westernmost portions of the C&D Canal) were required to have steel hulls and a minimum of 2400 horsepower twin screw. [Tr. 512-513; D&O at 7; Stipulation 28]. As a result of this requirement, the tug JOHN TURECAMO, an uninspected towing vessel rated at 3000 horsepower, was used to tow the barge PEQUECO II, rather than the barge's normal tug, the CYNTHIA MORAN. [Tr. at 512-513; D&O at 8; IO Exhibit H]

The barge PEQUECO II is a 170' x 35' x 10'6" barge used to carry sodium silicate, a Category C noxious liquid that uninspected barges may only carry on inland routes. [D&O at 8] On January 30, 2000, the barge was loaded with approximately 1072 tons of sodium silicate. [D&O at 8; IO Exhibit H]

The PEQUECO II has a single skin hull with rakes fore[2] and aft of the cargo block and three pairs of cargo tanks, each sharing one 18" x 30" rectangular vent located on the centerline. [D&O at 9; IO Exhibits H and J] The deck has some sheer at both rakes, which increases the depth of the barge from 10'6" to 11'6" at the extreme bow and stern. [D&O at 9; IO Exhibits H, J]

When Appellant arrived at the barge on January 30, 2000, it had already been loaded with sodium silicate. Neither Appellant nor his crew were responsible for loading the barge and they were given no information as to the amount of cargo loaded, its ullages, its stowage, or any safety information concerning its handling. [D& O at 10; Tr. at 34, 519-520] Furthermore, none of the fittings on the barge were labeled and no PEQUECO II personnel were present to provide information concerning either the barge or its cargo. [D&O at 10; Tr. at 519-520]

Before getting underway, Appellant listened to a Broadcast Notice to Mariners concerning the ice conditions in the C&D Canal. [D&O at 9; Tr. at 512] Upon hearing the Notice, Appellant called the canal dispatcher to determine whether the canal was open. [D&O at 9; Tr. at 512-13] In addition, he put out a general inquiry on VHF

[2] The barge's forward rake tank, of particular import in this case, is a void space between the headlog and the first cargo tank. [D&O at 9]

channel 13 to gain first-hand accounts of the conditions in the canal from other vessels that had recently transited it. [D&O at 9; Tr. at 514] Appellant spoke with at least three people concerning the canal's condition—the captain of the UTV TENACIOUS, who transited the canal the previous day; an unidentifiable captain; and deckhand Vance Holly, who had made a trip through the canal a few days earlier—and concluded that although the parties consulted agreed that conditions in the canal were "bad", the vessel nonetheless "met all the criteria…[it]…had to meet in order to get underway." [Tr. at 514]

As a further precautionary measure, Appellant inspected the barge before departing port. Appellant walked the perimeter of the barge, checked to ensure that all hatches were appropriately closed, checked the mooring lines and assisted the deckhands in securing the barge for tow. [Tr. at 520-521] While inspecting the barge, Appellant did not see any wasted metal or rust streaks around the vents. [D&O at 10; Tr. at 511] However, Appellant did note that the barge appeared to be trimmed differently than it was when he had moved it six weeks earlier. [D&O at 10; Tr. at 511] During the voyage at issue, the barge appeared to have less freeboard than it did in December and although it was even keeled for the January trip; in December, the after draft was greater than the forward draft. [D&O at 11; Tr. at 511-512]

Following the inspection of the vessel, Appellant and Mr. Card agreed to arrange the tow so that the tug JOHN TURECAMO would push the barge ahead, rather than towing it on the hip or astern. [D&O at 11; Tr. at 517-518; Stipulation 10] Both men

agreed that, under the circumstances of the voyage, this was the "preferred method" of towing. [D&O 11; Tr. at 503]

At approximately 11:30 a.m., on January 30, 2000, the JOHN TURECAMO got underway enroute Baltimore, Maryland, under Mr. Card's operation. [D&O at 12; Stipulation 8] Shortly after departing the PQ Facility, Appellant went to his room to rest before taking on the second operational shift, while Mr. Card remained in the wheelhouse for the first watch. [D&O at 12; Tr. at 522]

By all accounts, the initial stages of the voyage were uneventful. In fact, transit down the Delaware River and into the C&D Canal was faster than normal. [D&O at 11; Tr. at 402] The tug and barge (tow) entered the canal at approximately 1:18 p.m. and operated under a reduced speed of approximately 7.8-7.9 knots. [Tr. at 403; Respondent's Exhibit 1] Although there were "moderate" patches of ice present as the vessels entered the canal and ice and water washed on the PEQUECO II's deck, transit was as anticipated. [D&O at 12; Tr. at 87, 401, 416] The tow encountered its first patch of heavy ice just east of the canal dispatcher's station. [Tr. at 419] Mr. Card reduced speed before making contact with the ice and, then, increased speed to make it through the ice. [D&O at 14; Tr. at 428] Transit through the initial heavy ice went as expected.

Shortly thereafter, the tow encountered a second, heavier patch of ice west of the Chesapeake City Bridge. [D&O at 14; Tr. at 427-28] Again, Mr. Card reduced speed before impacting the ice. [D&O at 14; Tr. at 428] After passing through the ice and following an attempt to increase speed, Mr. Card noticed that the barge appeared to be down by the head and lower in the water than normal. [D&O at 14; Tr. at 428] Upon

realizing that the vessel's trim had changed, Mr. Card became concerned and awakened Appellant. [D&O at 14; Tr. at 496] When Appellant arrived at the wheelhouse, he noticed both the change in trim and that the barge was taking the same amount of water at the lower speed as it had at faster speeds earlier in the voyage. [D&O at 14; Tr. at 431] In addition, Appellant noticed a milky white substance, apparently cargo, leaking from the barge. [D&O 15; Tr. at 51, 436] Appellant and Mr. Card reduced the tow to idle speed. [D&O at 15; Tr. at 431, 524] At this point, the tow was west of Dan's Yard. [Tr. at 428] Appellant did not want to reverse the tow and return to the yard because he was afraid that doing so would "trip"[3] the tow and because he did not believe that Dan's Yard was a suitable place to tie up the tow. [D&O at 15; Tr. at 465, 497, 546] Furthermore, Mr. Card feared that Dan's Yard was not deep enough to accommodate the tow. [D&O at 15; Tr. at 465]

After informing Moran of the situation, Appellant, assisted by deckhand Vance Holly, went onto the barge and, in an attempt to lessen the weight on the bow, removed the ice that had accumulated there. [D&O at 15; Tr. at 30, 529] To remove the heavy pieces of ice that had accumulated on the bow, Appellant and Mr. Holly chopped at the ice with an axe and sledgehammer. [D&O at 16; Tr. at 89] Appellant looked at the hull, vents, running lights, and deck and observed no damage, except that two lifeline stanchions and a wire had been washed partially overboard. [Tr. at 94, 117, 531-34] Upon further inspection, Appellant determined that although the forward most portion of the bow was inaccessible, cargo was leaking from the barge's port side, approximately 35 feet aft of the bow. Appellant could not determine the exact location of the leak. [D&O

[3] As used here, "trip" means to capsize.

at 16; Tr. at 123-24, 530-35] Even after seeing what he believed to be cargo in the water, Appellant did not inspect the cargo tanks because he was unfamiliar with the characteristics of sodium silicate. [D&O at 16; Tr. at 532]

Upon returning to the JOHN TURECAMO, Appellant called Moran again. [D&O at 16; Tr. at 548-49] Appellant determined that the tow had to proceed forward to clear the canal. Although Appellant considered beaching the PEQUECO II, he believed that would be more dangerous for the crew than continuing slowly towards Baltimore. [D&O at 15; Tr. at 546, 548-53] Therefore, Appellant continued to move the vessel at the slowest possible safe speed, 2.5 to 3 knots. [D&O at 16; Tr. at 443] When the tow arrived in the area of Sandy Point, it encountered a third "solid sheet" of heavy ice. [D&O at 16; Tr. at 442-43, 557] During this encounter, Mr. Card saw a sheet of ice come across the barge's bow and break the PEQUECO II's starboard running light. [D&O at 17; Tr. at 37, 39, 442] Appellant informed Moran of the situation and suggested that he was considering beaching the barge when the canal was cleared. [D&O at 17; Tr. at 659] Moran informed Appellant that, even with one cargo tank breached, there would be enough reserve buoyancy to keep the barge afloat. [D&O at 17; Tr. at 552] Ultimately, Appellant decided that the safest option was to continue towards Baltimore, at a slow speed and reconfigure the tow when there was sufficient space to do so. [Tr. at 549-53]

The first area where Appellant could reconfigure the tow was an area known as the "triangle," near buoys 18-20, near Old Town Point. [D&O at 17] By the time the tow arrived there, only a few inches of freeboard remained at the barge's lowest point.

[D&O at 17; Tr. at 489] The tow was reconfigured so that the JOHN TURECAMO towed the PEQUECO II astern on a short hawser with the barge's stern rigged as the "working bow"[4]. [D&O at 18; Tr. at 560-61, 630] Once the tow was reconfigured, the situation appeared to be abated and the barge appeared to tow steadily without any further change in draft. [D&O at 18; Tr. at 630] The tow progressed without further incident for approximately one hour. [D&O at 18; Tr. at 121, 448] After passing Turkey Point, the barge took a sudden list to its starboard that was immediately observed by Appellant. [D&O at 18] In an attempt to clear the canal, Mr. Card turned right at maximum speed. [Tr. at 666] The tug pulled the barge for approximately fifteen minutes, until it disappeared into the water and its towline had to be cut. [D&O at 18; Tr. at 667] The PEQUECO II sank at approximately 6:10 p.m. on January 30, 2000, on the western edge of Turkey Point—Old Town Point Warf Channel. [D&O at 19]

BASES OF APPEAL

This appeal has been taken from the order imposed by the ALJ finding proved the charge of *negligence* and imposing a two (2) month suspension of Appellant's license. Appellant sets forth the following bases of appeal:

I. *The ALJ erred by ruling that Appellant acted negligently in commencing the tow and in finding the barge PEQUECO II seaworthy.*

II. *The ALJ erred by ruling that Appellant acted negligently in making up the tow so that the barge PEQUECO II was pushed by the tug JOHN TURECAMO.*

III. *The ALJ erred by ruling that Appellant, upon discovering that the barge appeared to be leaking, acted negligently in proceeding to the closest port when his supervisors had informed him that the barge would remain afloat.*

[4] In this configuration, the tow was arranged so that the barge was towed backwards.

IV. The ALJ erred by ruling that testimony and findings of surveyor William R. Tye were incredible while the testimony and findings of surveyor Kim I. Mac Cartney were credible.

OPINION

I.

The ALJ erred by ruling that Appellant acted negligently in commencing the tow and in finding the barge PEQUECO II seaworthy.

As used in 46 CFR § 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, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstance, would not fail to perform." Therefore, in order to prove the charge of negligence, it is necessary to prove that Appellant's conduct, in some manner, failed to conform to the standard of care required of the reasonably prudent master under the same circumstances confronted by Appellant. Appeal Decision 2321(HARRIS), Appeal Decision 2283 (LITTLEFIELD)

A.

Appellant first contends that the ALJ erred in finding that he acted negligently in commencing the tow. Addressing the standard of care applicable to the case at issue, Appellant asserts: "[a] prudent mariner would consult every available source in ascertaining whether the assigned trip was reasonably safe." [Brief of Appellant, at 14] Appellant contends that, before commencing the tow, he listened to the Broadcast Notice to Mariners, spoke with the Moran dispatcher and consulted with vessel captains who had recently transited the canal. In so doing, he concludes, "[n]one of these sources gave…a reason not to proceed." [*Id.*, at 15] Furthermore, Appellant notes that the Canal was

"legally and physically open" and that "it is not the job of the professional mariner to wait for perfect, or even better, conditions" when commencing tow. [*Id*.]

In holding that Appellant was negligent in commencing the tow, the ALJ disagreed with Appellant's contention that he had no reason to conclude that the barge was loaded in an improper or unseaworthy manner. The ALJ found that the "limited freeboard combined with the forecasted ice conditions on the morning of January 30, was reason enough to refuse the tow." [D&O at 31] The ALJ further found that Appellant was negligent in undertaking the tow without obtaining information as to the cargo to be transported or its stowage. [D&O at 32] Furthermore, the ALJ found that Appellant's attempt to contact other sources concerning conditions in the canal, although "inadequate," gave him "sufficient reason not to commence the voyage." [*Id.*]

I may only reverse the ALJ's decision if his findings are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), *aff'* NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE).

It is beyond question that the ultimate decision to proceed with the voyage rests with the operator of the vessel. Appeal Decisions 2293(SMITH & RUBY) and 2321(HARRIS). Furthermore, commentators have noted that:

> courts are inclined to give great weight to the discretion of the tug master in deciding whether to depart from port in light of known weather reports, or, having departed, in deciding what action should be taken to safeguard the tow. His decision should be judged in the light of conditions which existed at the time the decision was made to proceed and not by what later developed.

[Parks, The Law of Tug, Tow and Pilotage, p. 81 (1982)] The broad scope of the tug master's discretion is well developed in case law.

In the *Imoan*, the Second Circuit opined that, in judging a mariner's decision to proceed in the face of inclement weather, "to say that every master must call up the Weather Bureau for unpublished news, every time he leaves port…seems to us to demand an excessive caution." The Imoan; The Alice Moran; Frank Jacobus Transp. Co. v. Moran Towing & Transp. Co., Inc., 67 F.2d 603; 604; 1933 U.S. App. LEXIS 4563 (2nd Cir. 1933). Although the court noted that "one of the tug masters called at the trial said that he always did call up New York," it nonetheless found that "no such general custom was shown, and in the absence of proof that it had become the practice of careful mariners, we think it was unnecessary." *Id.*, at 604. Although weather warnings were not present before the commencement of the *Imoan*'s voyage, the courts have extended a tug master's discretion to situations where weather warnings are present. In *Ocean Burning*, a tug proceeded with its voyage in the face of weather warnings resulting in the loss of its tow. Ocean Burning Inc. v. Moran Towing & Transp. Co., Inc., 1974 A.M.C. 2307 (S.D.N.Y. 1974). However, even in the face of the weather warnings, the court found that the decision to proceed under the weather forecasts given was within the master's discretion. *Id*. at 2312. Indeed, citing S.C. Loveland Co., Inc., 1995 U.S. Dist. LEXIS 2732 (E.D. Pa. 1995), a court determined that the decision to proceed under weather forecasts of small craft warnings was, likewise, within the master's discretion. In Cargill, Inc., v. C & P Towing Co., Inc., 1990 U.S. Dist LEXIS 19202; 1991 AMC 101, (D. Va. 1990), the U.S. District Court, discussing the issue of the tug master's discretion, noted:

> To be held liable the decision of the master must be unreasonable under the circumstances. The rationale underlying the rule granting a master great discretion rests upon the basic principle that a court reviewing the master's decisions must judge such decisions at the time they were made and with consideration for the circumstances that preceded the decisions, not by what later developed.

[citations omitted] [*Id*. at *13]

A thorough review of these cases suggests that the ALJ should afford Appellant great discretion in his decision to commence a voyage. The record clearly shows that Appellant exercised caution in deciding to commence the voyage at issue. Appellant was aware of the Broadcast Notice to Mariners and contacted the canal dispatcher as well as other vessels that had recently transited the canal in an attempt to ascertain its condition. In so doing, he learned that although conditions in the canal were "bad," other vessels had successfully made the voyage. [Tr. at 514] Given the case law noted above, and a thorough review of the record, it is clear that the ALJ did not consider the great discretion afforded Appellant in determining whether to commence the voyage. Therefore, I find the ALJ's decision in this regard to be clearly erroneous.

Having said that, I nonetheless agree with the ALJ that Appellant should have ascertained information as to the nature of the PEQUECO II's cargo and its stowage before undertaking the voyage at issue. When a barge is carrying a noxious substance, it is imperative that the tug master in command of that vessel be aware of both the characteristics of the cargo being carried and its stowage.[5] As is evident in this case, that information is necessary not only to ensure the safety of the tug's crew should the barge begin leaking the noxious substance, but also to address any situations that have the

[5] This is particularly so in light of today's current security environment.

direct ability to affect the seaworthiness of the vessel. *Cf.* 46 C.F.R. § 153.907 (stating that the master of a tankship engaged in cargo operations is required to know specific information about the noxious substance or bulk liquid hazardous material being carried including, among other things, its name, description, any hazards associated with its handling, its quantity, and its location aboard the vessel).

The record shows that although Appellant was aware that the PEQUECO II was loaded with sodium silicate, he did not determine the amount of cargo loaded, its ullages, its stowage, or any safety information concerning its handling. [D&O at 8-10; Tr. at 34; 519-520; IO Exhibit H] Furthermore, when cargo was observed to be leaking from the barge, Appellant did not want to investigate the source or extent of the leaking cargo or sound the cargo tanks because he was unfamiliar with the characteristics of sodium silicate. [D&O at 16; Tr. at 532] Further, the ALJ noted in his D&O, "Captain Rizzo admits that information concerning the nature of the product, the barge's tank arrangement, and the vessel's loading configuration is critical to the decision making process and to the safety of his crew." [D&O at 31-32] [citations omitted] In short, I agree with the ALJ that Appellant should have learned more information about the cargo carried aboard the PEQUECO II before commencing the voyage at issue, although his failure to do so is insufficient to support a legal finding against him in this regard.

B.

Appellant next contends that the ALJ erred in finding that the barge PEQUECO II was seaworthy. I do not agree.

Appellant notes, citing Massman v. Sioux City & New Orleans Barge, 462 F. Supp. 1362, 1980 AMC 1164 (W.D. Mo. 1979), that a barge owner has a duty to furnish a seaworthy vessel and, as a consequence, a master is entitled to assume that the tendered barge was seaworthy. To that end, he contends that Appellant was not provided a seaworthy barge and, as such, Appellant was not responsible for latent defects therein. Appellant's surveyor, Mr. Tye asserts that the PEQUECO II's "vents were severely wasted [and] where welded to the deck, but that this weakening and corrosion was not visible on January 30." [Brief of Appellant, at 12] While Appellant acknowledges his own inspection of the barge, he nonetheless asserts that, because the vents were freshly painted, the wasted condition of the PEQUECO II was hidden and "[t]he negligence of PQ in concealing the wasted condition of the vents is no basis for finding…[Appellant] …at fault." [*Id.*]

In holding that the PEQUECO II was seaworthy, the ALJ found Mr. Tye's testimony "inaccurate and unrealiable" and, instead, accepted the testimony of the Coast Guard's expert, Mr. MacCartney. Mr. MacCartney determined that the damage to the forward rake tank, which ultimately caused the flooding of that tank and subsequent sinking of the barge, was the result of the barge being pushed through the ice, thereby allowing large sheets of ice to come over the barges deck, damaging the vents. [Tr. at 166]

A careful review of the record shows that the issue of seaworthiness centers on which expert the ALJ deemed credible.

Determining the weight of evidence and making credibility determinations is within the sole purview of the ALJ. Appeal Decisions 2156 (EDWARDS), 2116 (BAGGETT), and 2472 (GARDNER). In the instant case, it is true that conflicting testimony and findings exist; however, the conflicting evidence was sufficiently addressed by the ALJ in his D&O. I do not find the ALJ's determinations, in this regard, to be arbitrary, capricious, or an abuse of his discretion.

Only in exceptional circumstances, will I disturb the ALJ's resolution of conflicting evidence. The rule in this regard is well established:

> [w]hen…an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, the determination will not be disturbed unless it is inherently incredible.

Appeal Decisions 2472 (GARDNER), 2390 (PURSER), aff'd *sub nom Commandant v. Purser*, NTSB Order No. EM-130 (1986), 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), 2302 (FRAPPIER), and 2275 (ALOISE). In fact, I have long held that the findings of the ALJ need not be completely consistent with all the evidence in the record as long as sufficient evidence exists to reasonably justify the findings reached. Appeal Decisions 2492 (RATH) and 2282 (LITTLEFIELD). Therefore, upon a thorough review of the record, I find that the ALJ's findings are sufficiently supported by evidence in the record and I will not disturb them.

II.

The ALJ erred by ruling that Appellant acted negligently in making up the tow so that the barge PEQUECO II was pushed by the tug JOHN TURECAMO.

Appellant asserts that the ALJ erred by rejecting "all the evidence, both the Coast Guard's and that of the Respondent, that pushing [the barge] ahead was the safest course." [Brief of Appellant, at 16] Appellant further asserts that the ALJ erred in concluding that the PEQUECO II had a "diminished freeboard," stating that there was simply no evidence in the record to support such a conclusion. [*Id*. at 16-17] Finally, Appellant asserts that "[t]he cases cited by the Administrative Law Judge add no support to a finding of negligence…[because]…[d]ecisions addressing different barges, different tugs and different ice conditions can hardly overcome the direct testimony of the three experienced mariners, Messrs. Berg, Card and Rizzo." [*Id.* at 18] I do not agree.

It is the responsibility of the ALJ to weigh the evidence presented and to determine the weight given to conflicting evidence. Appeal Decisions 2421 (RADER) and 2319 (PAVELIC). I will not reweigh conflicting evidence on appeal when the ALJ's determinations can be reasonably supported by the record. Appeal Decisions 2504 (GRACE), 2468 (LEWIN), and 2356 (FOSTER). In the same vein, the ALJ's findings must be supported by reliable, probative, and substantial evidence. *See* 46 C.F.R. § 5.63; Appeal Decisions 2420 (LENTZ) and 2421 (RADER). Furthermore, the findings of the ALJ need not be consistent with all evidentiary material in the record. Appeal Decisions 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), and 2546 (SWEENEY). Again, I will reverse the findings of the ALJ only if they are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decisions 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996), 2390

(PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE).

Upon a thorough review of the record, I find that the ALJ's conclusion that Appellant acted negligently in making up the tow is supported by substantial evidence in the record.

There is sufficient evidence in the record to allow the ALJ to determine that the PEQUECO II was loaded heavier than normal on January 30, 2000. Mr. Bishop testified that the PEQUECO II was "loaded deeper than normal" and agreed with Appellant's counsel that it had "about one to two feet of freeboard." [Tr. at 47-48, 63] The deckhand of the tug JOHN TURECAMO also testified, when asked about the barge's freeboard, "the barge was sitting a lot lower than it usually [was]." [Tr. at 84] Furthermore, Mr. Card testified that, on the day of the incident, "she [the PEQUECO II] had about a foot, foot and a half…of freeboard midships." [*Id.* at 396] Finally, in his testimony, Appellant admitted that, on the day of the incident, the PEQUECO II was "trimmed differently" than it had been during his previous experience with the vessel. [*Id.* at 511]

In addition to the fact that the PEQUECO II had a decreased freeboard on January 30, 2000, the record also shows that the barge was not normally pushed through the canal. Discussing the typical towing configuration of the PEQUECO II, Mr. Holly testified that "we always towed the barge on the hip" and that only due to weather conditions, was that configuration changed on January 30. [Tr. at 80] Furthermore, Mr. Allen M. Dias, the traffic controller for the C&D Canal indicated, "usually always that barge [the PEQUECO II] goes through there [the canal] alongside." [Tr. at 262]

Indeed, with specific reference to the voyage of January 30, 2000, Mr. Dias testified as follows:

> Q. So it was unusual to see it [the PEQUECO II] being pushed?
> A. Yeah. That's the only time [January 30, 2000] I ever know of it to go through there [the canal] like that. Usually they always have it alongside.

[*Id.*] Furthermore, Mr. Edward D. Bishop, Chief Engineer of the JOHN TURECAMO, testified that "when you put a lot of power behind a barge, it tends to cause the barge, you know, the bow of the barge to go down in the water…from time to time." [Tr. at 35]

In light of the evidence present in the record, the ALJ did not err in concluding that Appellant was negligent when he configured the tow in a pushing configuration.

Finally, I do not agree with Appellant's contention that the decisions cited by the ALJ do not support a finding of negligence. In citing Consolidated Grain & Barge Co., Inc. v. Consolidated Towing Co., 404 F. Supp. 634 (D.C. Mo 1975) and Conners-Standard Marine Corp. v. Oil Transfer Corp., 120 F. Supp. 180 (E.D.N.Y. 1953), the ALJ sought precedent for the notion that "negligence has been found in cases where a barge is pushed through heavy ice, rather than 'towing astern.'" [D&O at 34] In *Connors-Standard*, the court noted:

> Although it may not be negligent under all circumstances for a tug to push a barge ahead of it through ice, there is authority for the view that 'towing astern is the preferred and usual method to be employed'…Here, in view of the evidence of the extremely heavy ice conditions existing on the Hudson River at this time, it was in my judgment negligent for the tug Matton to attempt to push this loaded barge ahead of it through extremely heavy ice. [Citations omitted]

[120 F. Supp 180; 182 (E.D.N.Y 1953)] It is beyond question that the facts of the cited cases are directly on point to those of the instant case. In this case, the heavily loaded barge PEQUECO II was pushed through ice, resulting in the catastrophic loss of the barge. Therefore, I find, that the cases cited by the ALJ support his conclusion of negligence in that regard.

III.

The ALJ erred by ruling that Appellant, upon discovering that the barge appeared to be leaking, acted negligently in proceeding to the closest port when his supervisors had informed him that the barge would remain afloat.

A.

Appellant contends that the ALJ "should have compared what information the Respondent [Appellant] had that Sunday afternoon with the options that were available, rather than placing undue weight on the information compiled and the arguments refined" during the aftermath of the incident. [Brief of Appellant at 20] To that end, Appellant asserts that the actions taken to save the barge were proper and in accordance with the principals of good seamanship. Appellant contends: 1) that he acted appropriately by reducing the speed of the vessel when he observed what appeared to be cargo in the vicinity of the PEQUECO II; 2) that he was not negligent in failing to communicate with Dan's Yard regarding the mooring of the apparently damaged PEQUECO II; 3) that a sounding of the barge's tanks would have "served no purpose;" 4) that his decision not to beach the barge was "not 'blindly' made, but consisted of brainstorming among the Respondent [Appellant], the Moran office and the Coast Guard;" and, 5) that the Coast Guard's involvement in Appellant's decision to continue the voyage to Baltimore was "significant." [*Id*. at 19-27]

The ALJ found Appellant's decision to continue the voyage, following his assessment of the PEQUECO II's condition, to be negligent. The ALJ noted that "an evaluation of Captain Rizzo's decisions and actions pertaining to the incident cannot be based solely on…[the facts available to Appellant on the relevant day]…and must include the information he should have known in order to properly make the critical decisions entrusted to him as master of the vessel." [D&O at 39] Further, the ALJ found that "[e]xpert witness testimony presented at the hearing supports a finding that Captain Rizzo's ultimate decision to continue the voyage to Baltimore, despite the myriad of observed problems and his feelings that the hull was breached, constitutes negligence." [*Id*. at 40] With respect to the Coast Guard's involvement in the incident, the ALJ found that "[w]ith limited second hand information, the Coast Guard is not in a position to make the crucial decisions properly entrusted to the license[d] mariners on scene." [*Id*. at 43-44] Finally, after citing specific facts developed in the record, the ALJ determined that "the evidence viewed as a whole supports a finding that the casualty involved in this case was avoidable at numerous decision points…and…must be considered…[Appellant's]… making." [*Id*. at 44]

In essence, Appellant asks that I abandon the factual findings of the ALJ in favor of his view of the incident. Because I find that there is sufficient evidence in the record to support the ALJ's determination that Appellant was negligent in continuing the voyage to Baltimore after learning of the barge's distress, I will not do so.

As I have previously noted, it is the duty of the ALJ to evaluate the evidence presented at the hearing and to make ultimate findings of fact pertaining to each specification. Appeal Decisions 2156 (EDWARDS), 2116 (BAGGETT), 2472

(GARDNER), and 2395 (LAMBERT). Therefore, I may only reverse the ALJ's findings when they are arbitrary, capricious, clearly erroneous or based on inherently incredible evidence. Appeal Decisions 2584 (SHAKESPEARE), 2570 (HARRIS), aff' NTSB Order No. EM-182 (1996), 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581 (DRIGGERS), and 2474 (CARMIENKE). Finally, the findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification. Appeal Decisions 2492 (RATH), 2282 (LITTLEFIELD), and 2395 (LAMBERT).

While Appellant's interpretation of the evidence may differ from that of the ALJ, he has not sufficiently shown that the ALJ's findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. Therefore, I will not overturn the decision of the ALJ.

IV

The ALJ erred by ruling that testimony and findings of surveyor William R. Tye were incredible while the testimony and findings of surveyor Kim I. Mac Cartney were credible.

Appellant contends that there was no foundation for the testimony of the Coast Guard's surveyor, Mr. McCartney, and concludes that his findings with respect to the barge's corrosion were "patently absurd." [Brief of Appellant at 27] Appellant, discussing the content of Mr. McCartney's testimony, contends that the testimony of his surveyor, Mr. Tye, was "more credible" and, concludes that the ALJ "misconstrued" his testimony. [*Id*.] For the same reasons noted in Opinion I, Part B, I do not find Appellant's arguments persuasive.

CONCLUSION

The findings of the ALJ, except as modified herein, are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations. Although I have determined that Appellant was not negligent in commencing the voyage in issue, given that I have found sufficient evidence to support a conclusion of negligence following the commencement of the voyage, I find the order of the ALJ to be appropriate.

ORDER

The Administrative Law Judge's Decision and Order dated August 27, 2001, is **AFFIRMED.**

//S//

T. J. BARRETT
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 29th of August, 2003.