

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

UNITED STATES COAST GUARD
Complainant

vs.

GARY ELLSWORTH VAN AUKEN
Respondent

Docket Number 2019-0060
Enforcement Activity No. 5762462

DECISION AND ORDER
Issued: April 01, 2020

By Administrative Law Judge: Honorable George J. Jordan

Appearances:

Jennifer Mehaffey, Esq.
Suspension and Revocation National Center of Expertise
CWO Larry W. Goade
Sector Puget Sound
For the Coast Guard

GARY ELLSWORTH VAN AUKEN, Pro se
For the Respondent

I. BACKGROUND

The United States Coast Guard (Coast Guard) brought this administrative action under 46 U.S.C. § 46 USC 7703(1)(A) and its underlying regulations at 46 C.F.R. Part 5, seeking to revoke Respondent Gary Van Auken's Merchant Mariner Credential (MMC or Credential). On February 21, 2019, the Coast Guard filed a complaint against Respondent, alleging he 1) violated 46 U.S.C. §7703(1)(A) and 46 C.F.R. §5.33 by operating the towing vessel JOHN BRIX while under the influence of alcohol in violation of 33 C.F.R. §95.045(b) and 2) committed an act of negligence under 46 U.S.C. §7703(1)(B) and defined by 46 C.F.R. §5.29 by grounding the JOHN BRIX in a well charted area while operating the vessel under the influence of alcohol.

The Coast Guard temporarily suspended Respondent's MMC, triggering an expedited proceeding under 33 C.F.R. Part 20, Subpart L. I held a prehearing conference on February 26, 2019 at which Respondent elected to waive the expedited procedures have the case cases heard simultaneously with another pending case against him, Docket 2018-0411. Respondent entered into a Good Faith Deposit Agreement with the Coast Guard on February 27, 2019. (Good Faith Deposit Agreement dated Feb. 27, 2019).

Following completion of discovery, I held the hearing in this matter on May 14-15, 2019. Jennifer Mehaffey, Esq. represented the Coast Guard. Respondent represented himself, assisted by his wife, Shauna Van Auken. The Medical Director of the Coast Guard's National Maritime Center testified in the companion case, Docket 2018-0411, but all parties were aware that her testimony related to both cases and would be adopted for purposes of this case. The parties agreed it was not necessary for her to resume the stand to give duplicative testimony, but she remained subject to recall if any additional facts elicited in this case necessitated supplementary testimony. See Docket 2018-0411 Tr. at 12-13. Accordingly, the Medical Director's testimony at pages 15-37 of the transcript 2018-0411 is hereby adopted for purposes of this case

Following the hearing, I provided the transcript to both parties and gave them the opportunity to file post-hearing briefs containing proposed findings of fact, proposed conclusions of law, and argument supporting their positions. The Coast Guard filed a timely brief but Respondent did not. After the briefing deadline had passed, Respondent inquired of my staff if he could still submit proposed findings of fact and conclusions of law, and my staff informed him that he could file a motion explaining why he had not filed a timely submission and the Coast Guard would have the opportunity to respond, after which I would consider the issue. Respondent neither replied nor filed such a motion.

I have carefully reviewed the entire record in this case, including the testimony, exhibits, applicable statutes, regulations, and case law, and find the allegation **PROVED**. The Coast Guard's proposed findings of fact and conclusions of law are generally accepted as supported by the evidence and, to the extent they are relevant, are incorporated into this Decision and Order.

II. FINDINGS OF FACT

1. Respondent is, and was at all times relevant to this proceeding, the holder of a Coast Guard-issued MMC. (Ex. CG-01).
2. On June 30, 2017, the Medical Director of the Coast Guard National Maritime Center issued Respondent a medical waiver for alcohol abuse, which would be invalidated by any incidents involving any type of substance abuse. (Ex. CG-14; Tr. Docket 2018-0411 at 24).
3. On January 27, 2019, Pacific Tug Company/Billeter Marine (Pacific Tug) employed Respondent as a master of an ocean-going tug JOHN BRIX. (Tr. Vol. 2 at 12).
4. The Pacific Tug vessel JOHN BRIX (ON 293323) is a United States flagged towing vessel over 26 feet in length and subject to inspection, under 46 U.S.C. Chapter 33. (Ex. CG-02).
5. The JOHN BRIX was scheduled to pick up a barge and transit through the Isthmus Slough in Coos Bay, OR. (Ex. CG-03, CG-16; Tr. Vol. 2 11–12, 27).
6. On the morning of January 27, 2019, both the owner of Pacific Tug and the Port Engineer observed Respondent operating the vessel JOHN BRIX in an unusual manner. (Tr. Vol. 2 at 12–13, 18-19; Ex. CG-13).

7. On January 27, 2019, at approximately 1148, Respondent grounded the JOHN BRIX at 43° 21.763 N - 124° 12.060 W, a well charted area. (CG Ex. 12, 14, 16; Tr. Vol. 2 at 17–21, 22-23).
8. On January 27, 2019, the owner of Pacific Tug, the Port Engineer, and the Port Captain all observed Respondent to be lethargic, slow to react, and slurring his speech. (CG Ex. 3; Tr. Vol. 1 at 59; Tr. Vol. 2 at 13–14, 16, 28–30, 67).
9. Pacific Tug’s Safety Director/Designated Employer Representative (DER) directed Respondent to undergo a reasonable cause chemical test. (CG Ex. 3, 9; Tr. Vol. 2 at 15, 32).
10. At approximately 1300 the Port Engineer administered a reasonable cause chemical test for alcohol to Respondent, observed by the DER. (CG Ex. 3, 9, 10; Tr. Vol. 2 at 32-33).
11. The test showed a blood alcohol concentration level (BAC) of 0.12. (Ex. CG-03, CG-09, CG-10; Tr. Vol. 2 at 32-33).
12. Company personnel removed Respondent from the vessel and ultimately terminated his employment with Pacific Tug. (Tr. Vol. 1 at 37, Tr. Vol. 2 at 18).

III. DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. 46 U.S.C. § 7701(a). In furtherance of this goal, Administrative Law Judges (ALJs) have the authority to suspend or revoke Coast Guard-issued credentials or endorsements. See 46 C.F.R. § 5.19(b). These proceedings are conducted under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.* 46 U.S.C. § 7702(a).

A. Burden of Proof

Under the APA, the fact-finder must consider the “whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence” before assessing a sanction. 5 U.S.C. § 556(d). The standard of proof in administrative proceedings is the “preponderance of the evidence” standard, meaning a party must prove that “a fact’s existence is more likely than not.” Steadman v. SEC, 450 U.S. 91, 98 (1981); Greenwich

Collieries v. Dir., Office of Workers' Comp. Programs, 990 F.2d 730, 736 (3d Cir. 1993); see also Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994).

Section 7(c) of the APA places the burden of proof on the proponent of a rule or order, unless otherwise provided by statute. In a suspension or revocation hearing, the Coast Guard bears the burden of proof. 33 C.F.R. § 20.702(a).

Evidentiary rules under the APA are less strict than in jury trials, and only irrelevant, immaterial, or unduly repetitious evidence need be excluded. See 5 U.S.C. § 556(d); Gallagher v. Nat'l. Transp. Safety Bd., 953 F.2d 1214, 1214 (10th Cir. 1992); Sorenson v. Nat'l. Transp. Safety Bd., 684 F.2d 683, 688 (10th Cir. 1982). Moreover, evidence “need not be authenticated with the precision demanded by the Federal Rules of Evidence” in order to be admissible in an administrative proceeding. Gallagher at 1218; Appeal Decision 2664 (SHEA) (2007).

B. Jurisdiction

Respondent admitted to all jurisdictional elements relating to the remaining allegations. However, the burden of establishing jurisdiction nevertheless remains. See 33 C.F.R. § 20.310(c); Appeal Decision 2656 (JORDAN) (holding that even though the respondent admitted the charged offense, an appeal must be granted where jurisdiction is not established). Since this case involves a violation of marine safety law or regulation, in order to establish jurisdiction the Coast Guard must prove the alleged violation occurred while Respondent was “acting under the authority” of a Merchant Mariner Credential. See 46 U.S.C. § 7703. A vessel employee is considered to be acting under the authority of a credential or endorsement when they are required to hold it by either law or regulation, or by their employer as a condition of employment. 46 C.F.R. §5.57(a).

The record does not contain any testimonial or documentary evidence establishing that Respondent was required to hold an MMC or endorsement as a condition of his employment. However, as a towing vessel over 26 feet in length, the JOHN BRIX must “be under the

direction and control of a person holding a MMC endorsed as master or mate (pilot) of towing vessels . . .” 46 C.F.R. 15.535(b); see also 46 C.F.R. 15.805(a)(5) (setting out the requirements for Masters of towing vessels at least 8 meters in length). Thus, it is clear the regulations required Respondent to hold an MMC with a Master’s endorsement while he was in control of the JOHN BRIX. The Coast Guard established jurisdiction in this case.

C. Violation of Law or Regulation

The Coast Guard may seek to suspend or revoke a credential if the holder was acting under the authority of the MMC when he or she violated or failed to comply with 46 U.S.C. subtitle II, a regulation prescribed under that subtitle, or any other law or regulation intended to promote marine safety or protect navigable waters. 46 U.S.C. § 7703(1)(A) and 46 C.F.R. § 5.33. A mariner acts under the authority of an MMC when he or she is required to hold one by law or regulation; or by an employer as a condition for employment. 46 C.F.R. § 5.57(a). See Appeal Decision 2687 (HANSEN) (2010). The Coast Guard charged Respondent with a violation of 33 C.F.R. §95.045(b), alleging he was acting under his authority while operating the towing vessel JOHN BRIX while under the influence of alcohol.

D. Narrative of Events

On January 27, 2017, the crew of the JOHN BRIX was scheduled to tow a barge under the local railroad bridge at slack tide, which required getting underway by 1100. (Ex. CG-05). When Port Captain Jamie Hill boarded the vessel around 0930, Respondent was still in his bunk, so Captain Hill woke him and informed him they needed to get moving. (Tr. Vol. 1 at 13). Port Engineer Lucas Murphy testified this was unusual, as the crew is generally up by 0630 or 0700 on a departure day. (Id. at 15, 47). Respondent and Captain Hill then went to the back deck for the crew’s pre-departure meeting. (Id. at 13). Mr. Murphy noticed that Respondent seemed confused about what was going on; he mistook what side of the vessel to make up on and was unsure of his words. (Tr. Vol. 1 at 14, 15). Mr. Murphy thought perhaps Respondent was still

tired from just waking up, but noted his symptoms were also consistent with intoxication. (Id. at 15–16).

As the vessel got underway, Captain Hill and Mr. Murphy were in the wheelhouse of the PACIFIC EAGLE, which was going to be tied up to the JOHN BRIX. A support boat called the CASEY H. was standing by with Captain Peter Billeter as its captain. (Tr. Vol. 1 at 14). After the barge was freed, the CASEY H began pulling it out of its berth into the middle of the channel where the JOHN BRIX was floating. (Tr. Vol. 1 at 12, 18). Respondent was at the aft control station on the JOHN BRIX's Texas deck, meaning the second level deck, while two deckhands were on the main deck. (Id. at 18–19). As the JOHN BRIX was not coming tight with its line and there was no response on the radio, Captain Billeter on the CASEY H cut his line loose so he could go upstream of the barge and gain control of it. Captain Billeter noted that the JOHN BRIX was not maneuvering or making way and informed Respondent the barge was free. After a long pause Respondent came on the radio, saying he did not have a radio and had to get one from the wheelhouse. (Id. at 19–20).

From the PACIFIC EAGLE, Mr. Murphy saw Respondent leave the aft control station and go toward the wheelhouse, but when Respondent returned he said over the radio that there were no radios in the wheelhouse. He then asked if the barge was loose and Captain Billeter told him it was, and to please start towing on it. After several minutes, Respondent came back on the radio and said he would begin towing. (Tr. Vol. 1 at 20). Around this time, Dale Mullins, a deckhand on the JOHN BRIX, noticed they were very close to the bank of the slough on the starboard side. He asked what was going on, and Respondent told him not to worry. (Tr. Vol. 1 at 67).

Mr. Mullins noticed that Respondent was out of sorts. He seemed “slightly a little lax” and was talking to the other deckhand while maneuvering the boat. (Tr. Vol. 1 at 66). As Mr. Mullins went about his duties, he saw a lot of line floating in the water. (Tr. Vol. 1 at 67). He and

other crew members spent about an hour pulling the line out of the water until it was a little slack but posed no danger of getting caught in the prop. (Id. at 70–71, 72).

The JOHN BRIX finally engaged its engines but was too close to shore and could not make it far enough to come tight into its tow line. (Id.). Captain Billeter, on the assist boat, could not see the JOHN BRIX and asked over the radio what was going on, and Mr. Murphy informed him that the JOHN BRIX was aground. (Tr. Vol. 1 at 20). While Respondent worked the engines on the JOHN BRIX, Captain Billeter unsuccessfully attempted to use the barge's force on the tow line to free the JOHN BRIX. (Id. at 21). Captain Billeter ordered the barge to be retied to the floats, so the crew cut loose the tow line from the JOHN BRIX and the PACIFIC EAGLE assisted the CASEY H in returning the barge to the floats. (Id.; Tr. Vol. 2 at 13). At Captain Billeter's instruction, the PACIFIC EAGLE shuttled him and Mr. Murphy to the JOHN BRIX to assess the situation. (Tr. Vol. 1 at 22; Tr. Vol. 2 at 13).

After tying up the vessels, Captain Hill, Captain Billeter, and Mr. Murphy boarded the JOHN BRIX. Captains Hill and Billeter went to the wheelhouse. Mr. Murphy went first to the lazarette to check the steering gear for water intrusions and to check the engine room and fuel coolant levels, and then proceeded to the wheelhouse. (Tr. Vol. 1 at 26). Captain Billeter asked if Respondent was under the influence of alcohol, which Respondent eventually confirmed. (Tr. Vol. 1 at 27; Tr. Vol. 2 at 13, 67).

Captain Billeter ordered Respondent to take an alcohol test and said he would be escorted off the vessel. (Tr. Vol. 1 at 28). Captain Billeter relieved Respondent of duty and left Mr. Murphy in charge of the JOHN BRIX. (Tr. Vol. 2 at 15, 17). He and Captain Hill then took the PACIFIC EAGLE to retrieve a smaller vessel on which they would shuttle Respondent back to shore. Mr. Murphy testified that when he entered the wheelhouse, he did not smell any alcohol but noticed Respondent drooping and bobbing his head and speaking oddly, unable to form complete sentences. (Tr. Vol. 1 at 28). While they were alone in the wheelhouse, Respondent

repeatedly raised his head, stared at Mr. Murphy, then put his head back down and sighed. After about ten minutes, Mr. Murphy convinced Respondent to go to his stateroom to pack, and when Respondent stood up, he walked slowly with unsure footing. (Id. at 29). Respondent went into his stateroom alone and shut the door. (Id.).

The small vessel returned with Captain Hill, Captain Billeter, and Cindy Garcia, the company's Safety Director. They boarded the JOHN BRIX and Mr. Murphy informed Respondent it was time to take the alcohol test. (Tr. Vol. 1 at 29–30). When Respondent opened the door, he had his toothbrush and a full, unopened bottle of Listerine. (Id. at 30, 31; Tr. Vol. 2 at 31).

Ms. Garcia decided to administer the alcohol test in the wheelhouse, and Respondent required Mr. Murphy's assistance to get back up the stairs. Mr. Murphy and Ms. Garcia verified that the test kit was unopened and unexpired. (Tr. Vol. 2 at 32). They opened the alcohol test kit, read the instructions, and administered the test to Respondent. (Tr. Vol. 1 at 30; Tr. Vol. 2 at 32). Both Mr. Murphy and Ms. Garcia recorded the designated time periods for swabbing the mouth and holding the swab to the test strip. (Tr. Vol. 1 at 33). Ms. Garcia took a video of the test being administered. (Tr. Vol. 2 at 32; Ex. CG-09). The test showed Respondent's blood alcohol content to be between .11 and .12. (Tr. Vol. 1 at 33; Tr. Vol. 2 at 32; Ex. CG-10). Captain Billeter told Ms. Garcia he wanted Respondent to go to the hospital for further testing and documentation. (Tr. Vol. 2 at 32).

Mr. Murphy tried to get Respondent to pack his bag to leave the vessel. (Tr. Vol. 1 at 33–34). Respondent did not leave the wheelhouse for another five to ten minutes, but then went unsteadily back to his stateroom. After several minutes, Mr. Murphy tried to enter but the door was locked. He tried again and the door was unlocked, and she saw Respondent sitting on the deck, leaning against the base of his bunk with his head down. Respondent tried to stand up but fell over into a table, and sat back down bobbing his head. (Id. at 34).

When the small boat was ready to go, Mr. Murphy offered to pack Respondent's bags for him. (Tr. Vol. 1 at 35). As Respondent made his way out of the stateroom, he fell through the doorway and landed on the bulkhead in the companionway. Since Respondent was unable to keep his balance and hold himself up, Mr. Murphy took him by the arm and led him to the Texas deck. Along the way, Respondent continued to trip and stumble. (Tr. Vol. 1 at 35; Tr. Vol. 2 at 34). Respondent started swatting at Mr. Murphy, and a deckhand came to assist. Respondent hugged the deckhand and apologized. (Tr. Vol. 1 at 36; Tr. Vol. 2 at 34).

When Respondent finally made his way to the main deck, he tripped over a chain and fell, then fell again while trying to step up on the bulwark. (Tr. Vol. 1 at 36). Ms. Garcia was concerned that Respondent was becoming aggressive toward Mr. Murphy and Captain Hill, so she yelled at Respondent to get on the small boat and he complied. (Tr. Vol. 2 at 36). Captain Billeter also recalled that the crew was distraught about the situation and was trying not to get involved. (Tr. Vol. 2 at 18). The small boat then shuttled Respondent to shore while Captain Billeter remained on the JOHN BRIX until the vessel could be refloated. (Tr. Vol. 1 at 37, Tr. Vol. 2 at 18).

After Respondent departed the vessel, Captain Billeter was able to free and safely anchor the vessel. Mr. Murphy returned to Respondent's stateroom and found four empty fifths of vodka at the foot of the bed. (Tr. Vol. 1 at 38; Ex. CG-11). He packed Respondent's belongings and put the bottles in a separate trash bag. Once on shore, Mr. Murphy took the bag containing the four empty bottles to Captain Billeter's office. (Id. at 42). Ms. Garcia and Captain Hill initially took Respondent to the hospital for further testing, but after confirming it was unnecessary, they took him to a hotel and notified his wife about the situation. (Tr. Vol. 2 at 40–44, 73–75).

E. Reasonable Cause Existed to Administer an Alcohol Test

Respondent does not dispute that there was reasonable cause for Pacific Tug to direct him to take a chemical test for alcohol. However, under Appeal Decision 2704 (FRANKS) (2014), the Coast Guard must prove that the test was properly ordered.

Coast Guard regulations prohibit merchant mariners from operating a vessel (other than a recreational vessel) or from acting as a crewmember when their blood alcohol concentration is 0.04 percent or higher or if “the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.” 33 C.F.R. §§ 95.020(b) & (c). The regulations allow marine employers to “direct an individual operating a vessel to undergo a chemical test when reasonable cause exists,” meaning when “[t]he individual is suspected of being in violation of the standards in §§95.020 or 95.025.” 33 C.F.R. § 95.035. A determination of reasonable cause should, if practicable, be based on observation by two persons. Id. The applicable standard is whether “[t]he individual is operating any vessel and the effect of the intoxicant(s) consumed by the individual on the person's manner, disposition, speech, muscular movement, general appearance or behavior is apparent by observation.” 33 CFR § 95.020(c).

Here, Respondent had direction and control of the JOHN BRIX at the time it grounded. His decision not to maneuver the vessel while it was in the channel so he could come tight into the tow line and tow wire was unusual and not reasonable or prudent. (See Tr. Vol. 1 at 22). Respondent’s lack of communication while attempting to get underway was also unusual and created a dangerous environment for the crew and vessels. (Id. at 23). Three other employees observed him acting abnormally, including showing confusion, slurring words, and having delayed reactions. . (CG Ex. 3; Tr. Vol. 1 at 59; Tr. Vol. 2 at 13–14, 16, 28–30, 67). Moreover, all three men heard Respondent admit he had been drinking. (Tr. Vol. 1 at 27; Tr. Vol. 2 at 13,

67). I find the evidence establishes Pacific Tug personnel properly ordered a reasonable cause test for alcohol.

F. Respondent Operated a Vessel While Under the Influence of Alcohol

Respondent did not challenge the validity of the test results. Nevertheless, it is the “ALJ's responsibility to determine whether the evidence presented, including evidence involving the administration of the chemical test and the qualification of the technician, was sufficient to show that Respondent was ‘under the influence of alcohol.’” Appeal Decision 2659 (DUNCAN) (2006); see also Appeal Decision 2692 (CHRISTIAN) (2011).

Acceptable evidence of being under the influence of alcohol or a dangerous drug includes but is not limited to either (a) personal observation of the mariner’s manner, disposition, speech, muscular movement, general appearance, or behavior; or (b) a chemical test. 33 C.F.R. § 95.030. A “chemical test” is defined as “a test which analyzes an individual’s breath, blood, urine, saliva and/or other bodily fluids or tissues for evidence of drug or alcohol use.” 33 C.F.R. § 95.010.

The record contains a video of the alcohol test being administered. Ms. Garcia also testified that she received training on administering these type of tests. (Tr. Vol. 2 at 56). Based on the evidence in the record, I conclude the alcohol test was properly administered and gave valid results. Respondent’s BAC was approximately 0.12 on January 27, 2019, while he had direction and control of the JOHN BRIX. This is significantly higher than the level the regulations establish as intoxication, which is .04 percent. See 33 C.F.R. § 95.020(b). I therefore find the charge PROVED.

IV. SANCTION

Having found the allegation proved, I must now issue an appropriate order in this matter. 33 C.F.R. § 20.902(a)(2). While this case was heard simultaneously with Docket 2018-0411, the two cases were not consolidated. Thus, I have considered the appropriate sanction based solely on the facts and circumstances of this case. Moreover, I may not consider the incident giving rise

to Docket 2018-0411 as an aggravating factor, as the Decision and Order in that case is not yet final agency action.

What constitutes an appropriate sanction depends on the type and circumstances of the offense. 46 C.F.R. § 5.569. For some offenses, such as those involving possession, use, sale, or association with dangerous drugs of a conviction of a drug-related offense, revocation is the only appropriate sanction. 46 C.F.R. 5.59. However, revocation may be sought for other offenses if the Investigating Officer believes “the circumstances of an act or offense found proved or consideration of the respondent’s prior record indicates that permitting such person to serve under the credential or endorsements would be clearly a threat to the safety of life or property, or detrimental to good discipline.” 46 C.F.R. 5.61.

Although the Coast Guard decided to seek revocation of Respondent’s MMC, “[t]he selection of an appropriate order is the responsibility of the Administrative Law Judge, subject to appeal and review. The investigating officer and the respondent may suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence.” 46 C.F.R. § 5.569(a). The Commandant also recognized the ALJ’s “wide discretion to formulate an order adequate to deter the [a mariner’s] repetition of the violations he was found to have committed.” Appeal Decision 2475 (BOURDO) (1988). Accordingly, I am not bound by the Coast Guard’s recommendations.

Except where a particular sanction is mandated, an ALJ may consider the following factors in determining an appropriate order: (1) remedial actions which have been undertaken independently by Respondent; (2) the prior record of Respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) evidence of mitigation or aggravation. See 46 C.F.R. § 5.569(b). These rules include a Table entitled “Suggested Range of an Appropriate Order,” stating Table 5.569 “is for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders

rendered. This table should not affect the fair and impartial adjudication of each case on its individual facts and merits.” 46 C.F.R. § 5.569(d).

In Coast Guard suspension and revocation cases, “[t]he sanction imposed in a particular case is exclusively within the authority and the discretion of the ALJ,” who is not bound by the scale of average orders. Appeal Decision 2628 (VILAS) (citing Appeal Decisions 2362 (ARNOLD) and 2173 (PIERCE)). “In the absence of a gross departure from the Table of Recommended Awards, the order of the ALJ will not be disturbed on review.” Appeal Decision 2628 (VILAS) (citing Appeal Decision 1937 (BISHOP)).

The only recommended sanction ranges for violations of law involve refusal to take a chemical test for drugs or alcohol. 46 C.F.R. § 5.569 (Table). Here, Respondent did not refuse to test but rather violated 33 C.F.R. § 95.045(b) by operating the towing vessel JOHN BRIX while intoxicated. Thus, the sanction appears to be entirely within my discretion.

Respondent attempted to maneuver a vessel taking a barge under tow while he was under the influence of alcohol. In the process, he grounded the JOHN BRIX, and the support vessels were forced to return the barge to its berth. This is clearly an aggravating factor.

A further aggravating factor involves the status of Respondent’s medical certificate, a necessary part of the MMC. When a mariner has a medical condition that could possibly pose a risk of sudden impairment or incapacitation, but obtains evidence from their treating physician that the condition is stable and they are not a high safety risk to themselves or others, they may obtain a medical waiver from the Medical Evaluation Division (MED) at the National Maritime Center. (2018-0411 Tr. at 18; see also 46 C.F.R. 10.303). A waiver request is submitted along with the medical certificate application, Coast Guard Form 719-K. (Id.) If the MED grants a waiver, it issues a letter detailing the waiver conditions and instructing the mariner to let the MED know if their condition changes so the staff can review the waiver and determine whether it is still valid. (Id.)

The MED issued Respondent a waiver for alcohol abuse on June 30, 2017, which was valid for five years. (Ex. CG-10; 2018-0411 Tr. at 20). As there is a high risk of recidivism with alcohol abuse, the MED required him to update any changes to his condition and stated the waiver would be invalidated with any future instance involving any type of substance abuse. (2018-0411 Tr. at 23). However, Respondent did not inform the MED that he had any further issues with alcohol abuse. (Id. at 24). The MED only became aware of the alcohol abuse incidents giving rise to both this proceeding and Docket 2018-0411 because of the investigations and complaints in these cases. (Id. at 25).

The Division Director of the MED testified that, due to the incidents giving rise to Docket 2018-0411, followed by those in this case, Respondent's medical waiver is no longer valid. (Tr. at 24). Thus, as I have found the alcohol test was properly ordered and reliable, and Respondent no longer holds a medical waiver, he cannot operate under the authority of his MMC.

The Commandant has upheld a sanction of revocation for operating a vessel while under the influence of alcohol. See Appeal Decision 2406 (ZOFCHAK) (1985) (“[The respondent’s] actions resulted from the abuse of alcohol. It is common knowledge that alcohol abuse often takes the form of a disease and results in repeated episodes of intoxication. This being the case, it was entirely proper for the Administrative Law Judge to find that it would be unsafe to allow Appellant to operate under authority of a Coast Guard issued operator’s license until such time as it could be established that his drinking would pose no future danger to himself or his potential passengers.”).

Here, Respondent endangered his vessel and others, as well as himself and the crewmembers. He grounded the JOHN BRIX, which is a vessel of 136.1 feet in length and 194 gross tons; the vessel was also in the process of picking up a barge at the time. (Ex. CG-02, CG-03). The risk to these large vessels, the crewmembers aboard them, and the support vessels and

crew operating in the vicinity is a significant aggravating factor. Further, Respondent was relieved of command and had to be removed from the vessel. (Ex. CG-03).

Respondent did not present any that evidence he sought or received any treatment for alcohol abuse since the incident aboard the JOHN BRIX. While he submitted letters from both his treating physician and a licensed clinical psychologist, both dating from April 2019, neither addressed Respondent's issues with alcohol. Rather, Dr. Sean Sapunar stated he has never documented any alcohol issues during the four years he has treated Respondent and attributed Respondent's symptoms in January 2019 to abrupt withdrawal from testosterone and the psychologist did not mention alcohol at all. (Ex. R-E, R-F). The only Substance Abuse Professional evaluation in the record dates from June 2017, just prior to issuance of the medical waiver. (Ex. R-D). These letters are not sufficient to establish that Respondent may safely return to work as a mariner and is unlikely to suffer a relapse of his alcohol abuse issues. Moreover, Respondent is currently unable to operate a vessel under the authority of his MMC because he does not possess a valid medical waiver. I therefore find the sanction of **REVOCATION** appropriate.



George J. Jordan
US Coast Guard Administrative Law Judge

Date: