

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

UNITED STATES COAST GUARD
Complainant

VS

THEODORE DALE HOWELL
Respondent

Docket Number CG S&R 03-0178
CG Case No. PA 1750401

DECISION AND ORDER

Issued: July 23, 2003

Issued by: Edwin M. Bladen, Administrative Law Judge

Appearances:

For the Coast Guard

LT Anthony Sellers,
LT Marianne Gelakoska,
LTJG Belana Audirsch,
Marine Safety Office,
6767 N. Basin Ave
Portland, OR 97217

For the Respondent

Craig W. Weston, Esq.
Reitsch & Weston, P.L.L.C
1408 16th Ave.
P.O. Box 250
Longview, WA 98632

PRELIMINARY STATEMENT

The Coast Guard filed a complaint on March 11, 2003 in which it was alleged that Respondent while serving as an operator of an Uninspected Passenger Vessel (UPV) violated the laws and regulations (1) 46 CFR 26.03-1 by not conducting a safety orientation prior to getting underway with 2 passengers for hire, and (2) 46 CFR 26.03-2 by not ensuring that an emergency check off list was posted in a conspicuous place for passengers on board the uninspected passenger vessel TED'S. The Coast Guard has requested that Respondent's operator's license be revoked.

Respondent through his attorney answered the complaint in which he demanded a hearing on the sanction to be imposed, admitted the jurisdiction of the Coast Guard, and all the factual allegations. See, Answer, March 21, 2003.

A hearing was set for May 28, 2003 at the Marine Safety Office, Portland, OR. The parties appeared at the hearing and agreed that in light of the Respondent's admission of the factual allegations and the violations as alleged in the complaint the hearing should be limited to testimony and exhibits related to the sanction to be imposed, including any mitigating and aggravating factors.

The hearing was convened and as required by 46 CFR 5.521(a) Respondent was requested to present his license for verification. He informed this Judge he only had a photo copy and must have lost it. Thus, he was unable to produce the original license for verification. A form CG-4363 [lost document affidavit] was executed by the Respondent.

At the conclusion of the testimony and admission of the documentary materials the parties waived any filing of proposed findings of facts and conclusions of law as

provided in the Administrative Procedures Act, and instead agreed to make oral closing arguments and thus rely upon the developed record. At the conclusion of oral arguments the record was closed, and a transcript of the proceedings was ordered to assist this Judge in rendering a decision and order on the sanction to be imposed.

One *ex-parte* communication was attempted by the Respondent with the judge during the course of this proceeding¹. On June 16, 2003, Respondent sent to this judge a typewritten statement from a third person apparently in an effort to supplement the record with what was assumed to be mitigating evidence. The communication was viewed as an *ex-parte* communication and was returned to Respondent's counsel by letter of June 16, 2003 with a copy to the Coast Guard representative. Respondent's counsel was informed this judge had not reviewed, or considered that document as any further mitigating evidence in this matter since the record was closed on May 28, 2003.

A transcript was prepared and received on July 14, 2003. Thus, from a consideration of the transcript, the oral testimony, and a reading of the documentary material the record is now complete and ripe for a decision and order regarding the sanction to be imposed.

FINDINGS OF FACT²

1. Respondent's license as an Operator of uninspected passenger vessels as defined in 46 USC 2102(42B) upon or near coastal waters not to exceed 100 miles offshore was renewed on February 13, 2001. The license carries an endorsement

¹ See, 5 USC § 557(d)(1)(C).

² Respondent has admitted all of the well pled factual allegations in the complaint.

that Respondent wear corrective lenses with spare glasses carried on board.³ He has been so licensed since 1991.⁴

2. Respondent is the owner of an uninspected 25 foot passenger and fishing vessel named TED'S with registration number WN2966ML.⁵ It was custom built in 1989 with an open aluminum hull and a deep vee design, but recently had ballast weight installed in the forward part of the vessel to improve its trim. The ballast was comprised of two 45 pound weights one on the port and one on the starboard sides.⁶ It has a 25 HP outboard motor and a 15 HP trolling motor, two fish finders and an automatic pilot.⁷ It operates as a commercial charter sports fishing vessel.
3. Respondent has been a commercial fisherman, and guiding fishing for approximately 35 years and for the preceding 15 years has fished for salmon in and about the Tillamook Bay area off the Coast of the State of Oregon.⁸
4. On May 18, 2002 at about 5:15 AM PDT the vessel TED'S left the Garibaldi Old Mill Marina with Respondent and two passengers for the purposes of a two day fishing trip.⁹
5. Both passengers appeared to Respondent to be experienced fishermen in the Tillamook Bay area and each owned power boats.¹⁰
6. One passenger, a Mr. Davies appeared to Respondent to be concerned about life preservers and each passenger expressed to Respondent they had the same life preservers on board their own power boats that he had on the TED'S.¹¹

³ Coast Guard Exhibit 2

⁴ Coast Guard Exhibit 1

⁵ Coast Guard Exhibit 4

⁶ Coast Guard Exhibit 5

⁷ Coast Guard Exhibit 4; Transcript 5/28/03 p. 169

⁸ Coast Guard Exhibit 5; Transcript 5/28/03, p. 165.

⁹ Coast Guard Exhibit 7 [Respondent's handwritten statement]

7. Respondent has not, prior to getting underway on a fishing trip, regularly given a safety orientation, as required by 46 CFR 26.03-1, nor has he posted on board the TED'S any emergency instructions, as specified in 46 CFR 26.03-2, but on this fishing trip he did discuss with the two passengers the locations of the life preservers, fire extinguishers, electronic gear.¹²
8. The vessel had on board, seven (7) Coast Guard approved life jackets stored in a tower above the center console.¹³
9. The National Weather Service Coastal Weather Forecast for May 18, 2002 was for a West swell of 8 to 9 feet, subsiding to 7 to 8 feet with periods of 11 to 13 seconds. These forecasts cover the coastal waters from Cape Shoalwater, Washington to Florence, Oregon.¹⁴
10. Respondent was aware of the weather forecasts and tide predictions for May 18, 2002.¹⁵
11. On the morning of May 18, 2002 at 4:33 AM PDT a motor lifeboat from Coast Guard Station Tillamook Bay conducted a "first light" bar report, and later broadcast it over channels 16 and 22. The report recommended to leave the bar unrestricted and open to all vessels.¹⁶
12. The "bar" is an area between the north and south jetties at Kincheloe PT and in Tillamook Bay, Pacific Ocean along the Coast of Oregon.¹⁷

¹⁰ Transcript 5/28/03 p. 174

¹¹ Transcript 5/28/03 p. 175

¹² Coast Guard Exhibit 5 [Incident Investigation Report]; Transcript 5/28/03 at p.175

¹³ Coast Guard Exhibit 5

¹⁴ Coast Guard Exhibit 5

¹⁵ Coast Guard Exhibit 5.

¹⁶ Coast Guard Exhibit 5.

¹⁷ Coast Guard Exhibit 12 [Portion of NOAA Chart 18558]

13. Another bar report was made at 6:18 AM PDT with waves of 4-6 feet between jetty tips, 4-6 feet in the area just beyond the jetty tips, 6-8 feet on the series with a long ocean swell, and 4-6 feet at the south hole. The bar remained unrestricted.¹⁸
14. Respondent together with his passengers crossed the bar at approximately 6:00 AM PDT which then had no restrictions.¹⁹
15. Continuing bar reports were conducted and at 7:15 AM a deteriorating bar report was broadcast on VHF channels 16 and 22, together with a Coast Guard 47 foot motor lifeboat being sent out to patrol the bar. The rough bar warning light was activated.²⁰
16. Respondent was monitoring VHF channel 16 and heard these bar reports.²¹
17. Respondent started fishing off the tip of the South Jetty working the area to the South, back and forth.²²
18. From the time of entering the Pacific Ocean, Respondent navigated the vessel trolling for Salmon in the area South of the South Jetty and in 30-45 foot water with 10-15 foot swells.²³
19. At about 11:50 AM PDT on May 18, 2002 the vessel encountered a 10 foot wave about 100 yards away showing indications of 5-6 feet of "white" water. Respondent navigated the vessel over the top of the wave. A second fast moving wave, about 12-14 feet high followed, and when attempting to maneuver over

¹⁸ Coast Guard Exhibit 5.

¹⁹ Coast Guard Exhibit 5; Transcript 5/28/03 at p. 175.

²⁰ Coast Guard Exhibit 5.

²¹ Coast Guard Exhibit 5;

²² Transcript 5/28/03 at p. 176

²³ Coast Guard Exhibit 7, p 5 of 8.; Coast Guard Exhibit 5, and 6 [Statement of BM1 Speer]; Transcript 5/28/03 at p. 176-177.

this wave the vessel was capsized throwing all passengers and Respondent into the water. The capsizing occurred approximately at 12:00 Noon PDT.²⁴

20. The tide and wave conditions encountered by the UPV on May 18, 2002 were not abnormal, and a series of large waves are observed and recorded regularly in this area of Tillamook Bay. This area is known for breaking surf on an ebb tide.²⁵

21. The Coast Guard lifeboat was nearby and observed the UPV taking large waves and was in the process of coming to it in order to orally instruct them to leave the area, which enabled the Coast Guard crew to promptly respond and recover all three persons, however, only Respondent survived.²⁶

22. Neither of the two passengers, nor was Respondent wearing life preservers when thrown into the water. One passenger, Mr. Campbell was clutching a cooler. However, Respondent was able to grab a life preserver and when recovered by the Coast Guard he was clutching that preserver.²⁷

23. Respondent claims that a “life preserver is not the only solution on big high sea breaks”, and are of little value and does not believe in wearing them or instructing his passengers to do so.²⁸

24. Since this incident Respondent has posted an Emergency Check-Off List, conducted safety orientations, including location of life preservers, the method of putting them on and taking them off, and type and location of other life saving devices on the fishing vessel.²⁹

²⁴ Coast Guard Exhibit 3 [CG-2692], 5, and 7; Transcript 5/28/03 at pp 179-180.

²⁵ Coast Guard Exhibit 5.

²⁶ Coast Guard Exhibit 5.

²⁷ Coast Guard Exhibit 8 [The Daily News story of February 25, 2003]; Transcript 5/28/03 at p.182.

²⁸ Transcript 5/28/03 at p. 181

²⁹ Transcript 5/28/03 pp 183-184.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Coast Guard has jurisdiction of this matter. Respondent was acting under and pursuant to the authority of his license when he guided and took two passengers out into Tillamook Bay for fishing. Respondent has also admitted the Coast Guard's jurisdiction in this matter.
2. Respondent has violated 46 CFR 26.03-1 and 46 CFR 26.03-2 by failing to conduct a safety orientation prior to embarking on the fishing trip on May 18, 2002 and failing to post safety instructions on the UPV TED'S.
3. The allegations of violation law and regulation are thus found proved.
4. At the closing of the record, as provided by 46 CFR 5.521(b) a *prima facie* case was established by reason of the admissions of Respondent together with the testimony and exhibits presented at the hearing which showed Respondent had and appears to continue to have a cavalier approach to safety orientations together with an unusually idiosyncratic view about the use of life preservers which demonstrated to me that Respondent's service on an uninspected passenger vessel would constitute a definite danger to public health, interest or safety at sea. Thus, his license was not returned to him during the pendency of the written Decision and Order.

DISCUSSION

Respondent has admitted that he has violated the cited regulations. There is no dispute on that score. The question before me has thus come down to what sanction should be imposed? The Coast Guard says that his license should be revoked because of his cavalier attitude toward safety orientations, and his unusually idiosyncratic and abiding belief that

lifejackets are without value. Of significance, this incident resulted in the unfortunate death of two passengers, neither wearing life preservers.

The Respondent, however, says that he was not found negligent and indeed has not been so charged. His failures to conduct the safety orientation and post emergency instructions are minor violations which should only carry a one or two month suspension.

Two people died, in my view, likely because they were not wearing lifejackets. This capsizing was in an area known generally, and particularly to Respondent, for its surging surf and wave conditions. Respondent's knowledge of the area and the usual difficult surf conditions is obvious from his many years of guiding others in the area.

The utility and life saving properties of lifejackets is so well known that I feel very comfortable in recognizing that as a given fact. Yet, people, choose for whatever reason to ignore that and Respondent in particular allow them to board small vessels like TED'S and go to sea in an area which is known for breaking surf and high waves without safety orientation.

Consultation with the Table of Suggested Range of Appropriate Orders, 46 CFR § 5.569 is not helpful since it does not provide any suggestion for a violation of rules and regulations. The rule does allow me to take into consideration mitigating and aggravating circumstances.

Are the deaths of the two passengers taken together with the Respondent's long standing cavalier approach to safety orientations, and idiosyncratic view of the utility of lifejackets such aggravating circumstances to justify a revocation as the IO requests?

Is Respondent's claim of posting an emergency check list, giving safety orientations, showing location of lifejackets, fire extinguishers and other safety equipment remedial actions undertaken by him since the incident which justify a lessening of any sanction?

I have considered both the aggravating and mitigating circumstances presented. The aggravating circumstances of Respondent's cavalier attitude toward safety orientations, and his long standing idiosyncratic belief that life preservers serve no useful function in the kinds of surf and waves encountered in the Tillamook Bay area outweigh the mitigation presented by Respondent.

In my view the Respondent's attitudes and beliefs orient his conduct and thus have serious adverse implications for the safety of life at sea.

Respondent, of course, contends the request for revocation of his license is too severe a sanction. The regulations governing this proceeding provide that the Administrative Law Judge may consider "evidence of mitigation or aggravation." 46 CFR 5.569(b)(3).

Aggravation is not defined in the regulations, but the amount of injury, damage or potential deaths occurring may properly be considered as a matter in aggravation. This is not to say these factors are determinative of the proper order; they are merely factors to consider. See, *Appeal Decision 2455 (Wardell)*; *Appeal Decision 2486 (Van Goetz)*; *Appeal Decision 2226 (Davis)*; *Appeal Decision 2539 (Harrison)*; *Appeal Decision (Mark E. Davis)*. I have considered the deaths along with the attitude of Respondent toward the safety orientation and his apparent clean disciplinary record of over 35 years together with his cooperation with the Coast Guard where he cancelled fishing trips after being told in an informal inspection of a cracked life ring and the need to replace outdated lifejackets.³⁰

³⁰ Transcript 5/28/03 at pp. 167-168.

Respondent's view of the utility of lifejackets suggests to me that he has lifejackets on board his charter fishing vessel as a tolerated nuisance. I also see his idiosyncratic view contributing to his historical avoidance of the safety orientation requirements. The irony in all of this is shown by the fact that when Respondent was plucked from the surging waves and surf he was clinging to a life preserver.

For all these reasons a sanction other than a mere one to two month suspension is appropriate.

SANCTION

This administrative proceeding has as its dominant purpose to maintain standards of competence and conduct essential to the promotion of safety at sea. 5 CFR §5.5. Those policies are not fostered and respected by Respondent's cavalier approach to safety orientations and an unusually idiosyncratic view of life preservers. Revocation is an appropriate sanction in such circumstances.

ORDER

IT IS THEREFORE ORDERED Respondent's license is REVOKED.

NOTICE OF APPEAL RIGHTS

You have a right to appeal this Decision and Order by filing a notice of appeal with the U.S. Coast Guard Administrative Law Judge Docketing Center, Attention: Hearing Docket Clerk, Room 412, 40 S. Gay Street, Baltimore, MD 21201-4022, within 30 days of the issuance date of this decision. See, 33 CFR § 20.1001 *et seq.*; 46 CFR § 5.701 *et seq.*

Dated: July 23, 2003



Edwin M Bladen
Administrative Law Judge

ATTACHMENTS

Witnesses

1. BM-1 Kevin Speer
2. Lt. John Ditmar
3. Respondent Theodore Dale Howell

Coast Guard Exhibits

1. Application for Respondent's Operator Coast Guard License dated February 4, 1991,
2. Coast Guard Operators License Number 905960
3. Coast Guard Form CG-2692
4. Coast Guard Situation Report
5. Investigating Officer's Statement
6. Copies of Four Coast Guard Rescue Crews' written statements
7. Respondent's written statement
8. Longview Daily New Article February 25, 2003
9. Coast Guard Boarding Report May 25, 2001
10. Coast Guard Operator Licensing Test for un-Inspected towing Vessels
11. Oregon Marine Board Website Description of Tillamook Bay, Oregon
12. National Oceanic and Atmospheric Administration Chart #18558 with hand written notations
13. Sworn Affidavit from Eric Apalategui, Reporter for the Longview Daily News
14. Coast Guard form CG 4380-A Log Remark Sheet for Saturday May 18, 2002 for Station Tillamook Bay

Respondent's Exhibits

A. Photograph of Respondent's fishing boat view from stern with outlay of electronics when new.

B. Photograph of Respondent's fishing boat showing location of electronics, life ring, location of life preservers and placement of seating


Certificate of Service

I hereby certify that I have this day delivered foregoing Order upon the following parties and limited participants (or designated representatives) in this proceeding, at the address indicated as follows:

Marine Safety Office, Portland
Attn: LT Sellers, LT Gelakoska and LTJG Audirsch
6767 North Basin Avenue
Portland, OR 97217
(Gov't Federal Express)

Mr. Craig Weston
Attorney for Respondent
1408 16th Avenue
Longview, WA 98632
(Gov't Federal Express)

Dated at Seattle, WA this 21st of July, 2003.


MARY PURFEERST
Paralegal Specialist to
Administrative Law Judge

33 CFR PART 20- APPEALS

SUBPART J

§ 20.1001 - General

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

§ 20.1002 - Records on Appeal

- (a) The record of appeal of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but, (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 - Procedures for Appeal

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center, Attention: Hearing Docket Clerk, Room 412, 40 S. Gay Street, Baltimore, MD 21201-4022 and shall serve a copy of the brief on every other party. (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the - (i) Basis for the appeal; (ii) Reasons supporting the appeal; and (iii) Relief requested in the appeal. (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record. (3) The appellate brief must reach the Docketing Center sixty (60) days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center thirty-five (35) days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless - (1) The party has petitioned the Commandant in writing; and (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

ATTACHMENT A