UNITED STATES OF AMERICA

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

UNITED STATES COAST GUARD

Complainant

vs.

EDMOND J. ORGERON

Respondent.

Docket Number: CG S&R 04-0382
CG Case No. 2117441

DECISION AND ORDER

Issued: March 31, 2005

Issued by: Thomas E. McElligott, Administrative Law Judge

Appearances:

For Complainant
Lt. Ian Bird and CWO Scott Young
U.S. Coast Guard
2901 Turtle Creek Drive
Port Arthur, Texas 77640-8056

For Respondent
Michael R. Delesdernier, Esq.
3632 N. Labarre Rd.
Metairie, LA 70002

PRELIMINARY STATEMENT

In discharge of its duty to promote the safety of life and property at sea, the United States Coast Guard ("Coast Guard" or "Agency") by its Investigating Officers (IOs), Port Arthur, Texas, initiated this administrative law hearing seeking revocation or suspension of the Coast Guard Merchant Mariner's License ("license") issued to Respondent Edmond John Orgeron. This action was brought pursuant to the legal authority contained in 46 United States Code ("U.S.C.") 7703, and the proceedings were conducted in accordance with the procedural requirements of 5 U.S.C. 551-559, 46 Code of Federal Regulations ("CFR") Part 5, and 33 CFR Part 20.

On July 29, 2004, the Coast Guard filed a Complaint against Respondent's merchant mariner license. The Coast Guard alleged Respondent committed one count of misconduct by knowingly operating a vessel beyond the limitations set by his license. The Coast Guard also alleged Respondent committed three counts of negligence by: (1) negligently performing duties related to vessel navigation by alliding with a facility while attempting to moor; (2) negligently performing duties related to vessel navigation by attempting to moor a vessel at a facility located 5 ½ miles south of intended mooring; and (3) negligently performed duties related to vessel safety by failing to have crewmembers on deck for mooring. On August 20, 2004, Respondent filed an Answer to this Complaint stating he lacked sufficient knowledge to admit or deny the jurisdictional and factual allegations in the Complaint. On November 2, 2004, an Amended Complaint was filed and served on Respondent by the Investigating Officers seeking revocation instead of a twelve (12) month suspension of Respondent's license.

The hearing was conducted by Administrative Law Judge Thomas E. McElligott on November 4, 2004, in Beaumont, Texas. At the hearing, Respondent was represented throughout

by attorney, Michael R. Delesdernier. One witness testified under oath and three of the IO's exhibits were admitted into evidence by the Judge, as part of the Coast Guard's case. Respondent testified on his own behalf, and four exhibits of Respondent were admitted into evidence by the Judge. After conclusion of the hearing, both parties filed post-hearing briefs arguing their respective positions. The Investigating Officer's brief (hereinafter "Gov't Brief") makes the following arguments: (1) Respondent committed an act of misconduct by violating 46 U.S.C. 8904(a), 46 CFR 15.401, and/or 46 CFR 15.910; (2) Appeal Decision 2379 (Drum) (1985) establishes a presumption of negligence when a vessel strikes a fixed object that applies in this case; and (3) in the interests of public safety, revocation is the appropriate sanction.

In response, Respondent asserts the following arguments: (1) the Coast Guard failed to prove Respondent was acting under the authority of his license; (2) the PABTEX crane was an unlawful obstruction to navigation; (3) the Coast Guard failed to introduce any evidence of negligence on the part of Respondent; (4) the presumption of negligence that applies when a vessel collides with a fixed object does not apply to objects that move; (5) the Coast Guard improperly introduced evidence of prior incidents during closing arguments depriving Respondent of an opportunity to rebut the statements with fact testimony; (6) revocation will create an unreasonable financial hardship on Respondent and his family; and (7) in the event Respondent's license is suspended, Respondent's failure to work under his license for a period of 90 days should be considered, because the Coast Guard advised him not to work under his license until after this matter is resolved. (*Resp't Brief).*

FINDINGS OF FACT

1. Respondent holds a Coast Guard issued U.S. Merchant Mariner's license authorizing him to serve as a Master or Captain of steam or motor vessels of not more than 100 gross registered

tons (Domestic) upon inland waters except for waters subject to the International Regulations for preventing collisions at sea, 1972. (IO Ex. 2). Respondent's license does not contain any additional endorsements. (IO Ex. 2). Respondent first received a Coast Guard issued license in the 1960s and has been operating vessels ever since. (Tr. at 48).

2. At the time of the incident, Respondent was employed by River Ventures, Inc. (Tr. at 48). Respondent was hired as a mate for the company's towing vessels, and his employer looked at his license and knew what license Respondent held. (Tr. at 49).

3. On May 25, 2004, a total of four crewmembers were on board the towing vessel FREEDOM, and the towing vessel was supposed to be heading for the HMS coke dock near Port Arthur and Beaumont, Texas pushing four barges one behind the other ahead of the tug. (Tr. at 23, 28, 52-53, 60, 68). The towing vessel FREEDOM is 202 gross registered tons. (IO Ex. 3). The only crewmember with a license, that would have allowed this other crewmember to be a captain of the vessel FREEDOM, was off duty and sleeping at the time of the incident. (Tr. at 35-36). The other captain or Master had been relieved of his duties by Respondent Orgeron, who took over navigational control of the tow.

4. Shortly after Respondent took over the watch at 6:00 p.m., he received a call from the dispatcher informing him to drop off or moor a barge at the coke dock in or near Port Arthur, Texas. (Tr. at 50). At the time, Respondent was only aware of one coke dock in Port Arthur and did not know that there were in fact two coke docks in the Port Arthur, Texas area. (Tr. at 50).

5. Respondent had one deckhand awake and on duty to assist him on stand-by, who was in the towing vessel's galley. (Tr. at 60). Before attempting to dock about midnight, Respondent called the deckhand over the intercom and instructed him to go to the head of the tow, so when they were ready to deliver one of the four barges, he would be there to tie up the vessel. (Tr. at

70-72). However, the deckhand did not report back to Respondent over the walkie-talkie that he was at the head of the lead barge. (Tr. at 71). Respondent claimed he kept calling the deckhand, but the deckhand never responded. (Tr. at 72).

6. When Respondent did not get a response from his deckhand, Respondent could have stopped the towing vessel and four barges and stayed out in the river. (Tr. at 74). If Respondent wanted to stop the tow and communicate with or find his deckhand, it would have taken approximately one to two minutes to stop the tow. (Tr. at 75).

7. Respondent's one deckhand did not go to the head of the lead barge. The height of the second barge would have prevented Respondent from seeing Respondent's deckhand even if the deckhand had gone to the head or bow of the lead barge. (Tr. at 71, 74). The extra height of the second barge blocked Respondent's view of the stationary dock crane that Respondent struck.

8. Respondent assumed that he was docking at the correct coke dock in the area of Port Arthur and Beaumont, Texas. (Tr. at 51). In fact, Respondent was at the Pabtex coke dock located approximately four to five miles away from the HMS coke dock. (Tr. at 29, 42, 44). Respondent did not check the correct location by calling his dispatcher and the docking facility to check properly on the exact location where he was supposed to dock or moor his five vessel tow.

9. As Respondent approached the dock, the dock was lit, and he could see the top of a gantry crane with his spotlight. (Tr. at 54-55, 63). However, Respondent's spotlight was on top of the pilothouse and was not high enough to see the bottom of the crane. (Tr. 78-79).

10. The crane can be extended out over water or the dock, and can be moved up and down, and is used to load and unload petroleum coke from vessel cargo holds. (Tr. at 39). When Respondent approached the dock, the crane was extended over the water, and there were no

lights on the crane. The crane was not being used, was stationary and remained that way. (Tr. at 34-36, 54-58, 78). The crane remained stationary and still until Respondent struck it with his high second barge.

11. Respondent was in control of the tow's navigation, direction and speed, while Respondent was located in the towing vessel's wheelhouse at the controls, approximately 800 feet from the head of the lead barge, and was traveling at approximately a mile an hour. (Tr. 71, 75). Respondent was unable to see the bottom part of the crane, because of the height of one of his four barges. (Tr. at 76). There was no work taking place on the dock and the shore side crane was not moving but stationary. (Tr. at 63).

12. Around 11:00 p.m., as respondent attempted to dock, the first barge cleared under the crane, but the high loaded covers of his second barge hit the stationary crane pulling it towards the dock, snapping the vessel's stern wire and causing the head, or first of the four barges to hit the pilings and damage the dock. (Tr. at 29-31, 36 54-58). Respondent then backed away and made a second successful attempt to place or park the five vessel tow appropriately along side the approximately one thousand foot dock located along and parallel with the shore. (Tr. at 30-31).

13. At the time of the incident, Respondent was the only person in charge in the towing vessel's navigation and in the towing vessel's wheelhouse or bridge. (Tr. at 24). Respondent was the only one in control of the vessel's navigation and moments at the time of the allision with the nonmoving crane.

14. Respondent reported the incident and allision to the U.S. Coast Guard, Marine Safety Office, Watch Stander in the Port Arthur, Texas area, and was forthright and cooperative in answering the Casualty Investigation Duty Officer's questions. (Tr. at 43, 45).

15. Respondent identified himself as the captain of the vessel to the Coast Guard Casualty Investigations Duty Officer and admitted that he was on the wheel controlling the movements of the towing vessel and the four barges when the towing vessel FREEDOM's tow struck or allided with the Pabtex dock. (Tr. at 22-23). Respondent also stated that he had a 100 gross ton limited license and the towing vessel FREEDOM was a 200 gross ton vessel. (Tr. at 33). When the Casualty Investigations Duty Officer asked Respondent why he was serving on the vessel FREEDOM without the proper license Respondent claimed he was getting his license upgraded. (Tr. at 33). However, Respondent did not put into evidence any documents or witnesses supporting this claim.

16. Some time after the allision, the Coast Guard informed Respondent that they were going to have a hearing before a U.S. Administrative Law Judge and they wanted to talk with Respondent. (Tr. at 66). At the meeting, Respondent asked the Coast Guard whether he should work under his license to which the Coast Guard advised him that it may not be a good idea to work under his license until this matter was resolved or decided. (Tr. at 66-67). Respondent did not work under his license after the accident for approximately three months. However, after talking with his attorney, Respondent's attorney advised Respondent he did not see any reason why Respondent could not work on vessels under 100 gross tons.

DISCUSSION

The U.S. Administrative Procedure Act (APA), 5 U.S.C. 551-59, governs Coast Guard suspension and revocation hearings. 46 U.S.C. 7702(a). The APA only authorizes sanctions to be imposed if upon consideration of the entire record as a whole the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. 556(d). "The term substantial evidence is

synonymous with preponderance of the evidence as defined by the Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of showing something by a preponderance of the evidence "simply requires the trier of fact 'to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence.'" Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993) (citing In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (brackets in original)). Under Coast Guard procedural regulations, the IOs bear the burden of proving the charges by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). Therefore, the Investigating Officers must prove with reliable and probative evidence by witnesses and documents or exhibits that Respondent more likely than not committed the violations charged.

In this case, the Coast Guard alleged Respondent committed an act of misconduct and three acts of negligence. Under 46 U.S.C. 7703(1)(B), a U.S. Merchant Mariner's license may be suspended or revoked if the holder, when acting under the authority of that license, commits an act of incompetence, misconduct, or negligence. A person employed in the service of the vessel is considered to be acting under the authority of a license when the holding of such license is: (1) required by law or regulation; or (2) required by a maritime employer as a condition of employment. 46 CFR 5.57(a). If law, regulation, or condition of his employment does not require Respondent to hold his license, then the Coast Guard lacks jurisdiction under 46 CFR 5.57(a). Appeal Decision 2620 (COX) (2001). Jurisdiction is a question of fact that must be proven. Appeal Decision 2620 (COX) (2001). Therefore, the Investigating Officers must prove Respondent was employed in the service of a vessel when he committed the acts of negligence

and misconduct and Respondent's Coast Guard license was either (1) required by law, including statutes and/or regulations or (2) required as a condition of his employment.

Since the Complaint and the Amended Complaint allege Respondent's license was required as a condition of employment, I will discuss condition of employment first. To prove Respondent's license was required as a condition of employment, the Coast Guard must show the maritime employer required Coast Guard issued credentials or the employer would not have hired the respondent without Coast Guard issued credentials. Appeal Decision 2371 (McFATE) (1984) (Evidence that employer knew Respondent possessed a license was insufficient.); See also Appeal Decision 2566 (WILLIAMS) (1995); *aff'd sub nom.* Commandant v. Williams, NTSB Order No. EM-181, 1996 WL 30281 (1996) (Under the condition of employment test, a mariner is acting under the authority of a license where the maritime employer requires possession of a Coast Guard issued license to serve aboard the vessel.). Additionally, "A mere finding that the employer required a license is insufficient. The character of the particular employment at hand, and its relation to the scope of the license must also be examined to determine if jurisdiction lies." Appeal Decision 2620 (COX) (2001). In COX, the employer required respondent to possess a license as a condition of employment, but at the time of the incident giving rise to the Misconduct charge the respondent was not serving as a Master or Captain. The Commandant reasoned that since respondent's job duties at the time of the incident did not fall within the scope of his license he was not acting under the authority of his license. When McFATE and COX are read together the Appeal Decisions establish a two-prong test for condition of employment. First, the Coast Guard must prove Respondent's employer explicitly required Coast Guard issued credentials or would not have hired the Respondent without Coast

Guard credentials. Secondly, the Investigating Officers must prove Respondent's job duties were related to the scope of his Coast Guard issued credentials.

Turning to the first prong of condition of employment, the Appeal Decisions have required testimony or documentary evidence showing that a respondent's maritime employer required respondent to hold a Coast Guard issued license. See Appeal Decision 2566 (WILLIAMS) (1995) (Testimony that the company required Coast Guard licenses of all its masters and mates and evidence that Respondent was employed as a mate met the condition of employment test.); Appeal Decision 2491 (BETHEL) (1989) (Coast Guard did not have jurisdiction over appellant's license when the Coast Guard failed to offer evidence that a Federal pilot's license was required as a condition of employment.); Appeal Decision 2448 (POWER) (1987) (Condition of employment was held established on appeal, because mariner implied possession of sufficient license.); Appeal Decision 2411 (SIMMONS) (1985); *aff'd sub nom.* Commandant v. Simmons, 5 N.T.S.B. 2628, NTSB Order No. EM-134 (1986); *motion for reconsideration denied* 5 N.T.S.B. 2643; NTSB Order No. EM-135 (1986) (A letter from appellant's employer offered into evidence by the IO stating Respondent-Appellant has a valid Coast Guard license as a condition of employment established that Appellant-Respondent was acting under the authority of his license at the time of the incident.); Appeal Decision 2393 (STEWART) (1985) (Text of labor agreement offered into evidence by the IO stating that prior to promotion to permanent master the mariner must have two years experience as a licensed officer and a federal First Class Pilot license, with a radar observer endorsement, supported having a license as condition of employment finding.); Appeal Decision 2161 (BRONZOVICH) (1979) (It was an error in finding a Coast Guard issued license was required as condition of employment when company assigned captains to operate government furnished tugs without

regard as to whether the individuals held any licenses and both NASA and the towing company interpreted the contract as only requiring licensed operators on privately furnished tugs.); Appeal Decision 1281 (McDEVITT) (1962) (IO's evidence that tugboat owner's policy that Appellant-Respondent would not have been hired as the master without a license established jurisdiction.); Appeal Decision 1030 (FLACY) (1958) (Respondent's license was required as a condition of employment, because the IOs showed evidence that the employer required experience with operation of oil barges evidenced by a Coast Guard issued license with a tanker's certificate.).

In this case, the IOs did not offer any evidence that Respondent's employer either explicitly required a Coast Guard issued license or would not have hired Respondent without a Coast Guard issued license. (Tr. at 21-45). Although Respondent testified that his employer hired him as a mate and knew what license Respondent held, this is insufficient to meet the first requirement for condition of employment. (Tr. at 48-49). Under McFATE above evidence by the IO that Respondent's employer knew he had a license is insufficient to satisfy condition of employment, and there is no other evidence indicating that Respondent's employer either explicitly required a Coast Guard license or would not have hired Respondent without a Coast Guard issued license. In this case, there is no evidence offered by the IO of a company policy, labor agreement, document, or testimony from Respondent's employer indicating that Respondent's license was required as a condition of employment. Therefore, jurisdiction cannot be established through condition of employment.

However, as discussed above, jurisdiction can also be established if Respondent was employed in the service of a vessel and statute or regulation required Respondent to hold a Coast Guard issued U.S. Merchant Mariner's Mate's or Captain's or Master's license. To find that a statute or regulation required Respondent to hold a license, the vessel's certificate of inspection

or a description of the vessel must be examined. Appeal Decision 2283 (FUEHR) (1982). In this case, Respondent Orgeron had a Coast Guard issued license allowing him to serve as Master of steam or motor vessels of not more than 100 gross registered tons, but he was operating a 202 gross register ton vessel. (IO Ex. 2; IO Ex. 3; Tr. at 22-23). Under 46 CFR 15.805(a)(5), every towing vessel of at least 8 meters (at least 26 feet) or more in length must be under the command of a licensed master of towing vessels or a mariner licensed by the U.S. Coast Guard as master of inspected self-propelled vessels greater than 200 gross tons holding either: (1) a completed Towing Officers Assessment Record or (2) a license endorsed for towing vessels. Since 46 CFR 15.805(a) required the Master of the towing vessel FREEDOM to hold a Coast Guard issued license, Respondent was acting under the authority of his Coast Guard issued license. Therefore, the Investigating Officer has established jurisdiction over Respondent and Respondent's Coast Guard issued license.

Respondent argues that he was not acting under the authority of his license, because he was hired as a steersmen/pilot. (*Resp't Brief.).* However, I find that Respondent was in fact operating as a captain of the towing vessel, because Respondent was alone on the bridge in the wheelhouse controlling the towing vessel and the four barges and giving instructions and orders to the crew. (Tr. at 22-31, 50-51, 70-75). The only other licensed master aboard was off duty and asleep. Additionally even if Respondent were operating only as a mate or pilot, a Coast Guard issued license would have been required regardless, because 46 CFR 15.910 provides that no person may serve as master or mate (pilot) of any towing vessel without meeting the requirements of 46 CFR 15.805(a)(5).

A. MISCONDUCT

Misconduct is partly defined as human behavior that violates some formal, duly established rule, and such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ship's regulation or order, or shipping articles and similar sources. 46 CFR 5.27. In this case, 46 CFR 15.401 partly provides that a person may not serve in a position in which an individual is required by law or regulations to hold a license unless the individual holds a valid license authorizing service in the capacity in which the individual serves within any restrictions placed on the license. Under 15 CFR 15.910, no person may serve as master or mate (pilot) of any towing vessel without meeting the requirements of 46 CFR 15.805(a) or 15.810(d) respectively. As stated above, 46 CFR 15.805(a) required Respondent to hold a license as master of inspected self-propelled vessels greater than 200 gross tons holding either: (1) a completed Towing Officers Assessment Record or (2) a license endorsed for towing vessels. Since Respondent 's license did not meet the requirements of 46 CFR 15.805(a), he could not legally serve as master or mate (pilot) of the vessel FREEDOM. Therefore, Respondent committed an act of Misconduct by violating 46 CFR 15.401.

B. NEGLIGENCE

Under Coast Guard regulations, negligence is defined as the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform. 46 CFR 5.33. In this case, the Coast Guard argues that under Appeal Decision 2379 (DRUM) Respondent is presumed negligent, because he crashed into or allided with a stationary or fixed object, that is, he crashed his towing vessel's tow into a nonmoving stationary crane. (*Gov't Brief*). However, Respondent

citing Florida East Coast Railway v. Revilo Corporation, 1979 AMC 1888 (M.D. Fl. 1979) and U.S. v. Subine Towing, 289 F.Supp. 250, 252 (E.D. La. 1968) argues that the presumption of negligence that applies when a vessel allides with a fixed object does not apply when a vessel allides with movable objects, such as the PABTEX crane. (*Resp't Brief).* However, since I find negligence has been established without relying on the presumption of negligence that applies when a vessel allides with a fixed object, I do not need to resolve whether the presumption of negligence should apply in this case.

The Coast Guard alleged Respondent was negligent by performing duties relating to vessel navigation and by failing to have crewmembers on deck for help with the docking or mooring resulting in an allision with a stationary facility and dock. In Commandant's Appeal Decision 1191 (JENNETTE) (1960), which contains facts similar to the case at hand, the Commandant's Appeal Decision affirmed a finding of negligence by the ALJ when the master did not attempt to confirm lookouts were at their assigned posts and the master himself did not keep an alert lookout. In the JENNETTE appeal case, two lookouts abandoned their stations prior to a collision with another vessel at night. In finding the respondent negligent, the Commandant reasoned that:

> "As Master, the Appellant had a duty to protect the lives and property entrusted to him by exercising a reasonable degree of skill and judgment, such as might fairly be expected of a man of his calling under circumstances then prevailing…We are not to expect extraordinary skill or extraordinary diligence. On the other hand it is negligence not to take all reasonable steps to avoid danger in navigation, and the nature of those steps must of course depend on the surrounding circumstances, and they may call for the utmost possible precautions." Appeal Decision 1191 (JENNETTE) (1960).

There have been several similar Commandant's Appeal Decisions upholding an ALJ's findings of negligence when a Respondent failed to maintain a proper lookout. See Appeal Decision 2414 (HOLLOWELL) (1985) (Respondent's failure to post a look out on barge's bow was

negligence.); Appeal Decision 460 (DUGAS) (1950) (failing to post a proper lookout on the barge was negligent when visibility to the starboard side of the pilothouse was blocked by the deckhouse.); Appeal Decision 2058 (SEARS) (1976) (Appellant / Respondent did not exercise the required ordinary care when he failed to post a lookout when the view was impeded by the barge riding high in the water.). Respondent Orgeron is guilty of the same failure as the Respondent in the SEARS Commandant's Appeal Decision.

In this case, I find a reasonably prudent towing vessel's captain would have ensured that a crewmember lookout was on the lead barge of his four barges being pushed ahead, one behind the other, when the lead barge was approximately 800 feet ahead of Respondent and Respondent was attempting to dock at night in the dark around midnight. Respondent's failure to ensure the deckhand went to his post as ordered was an act of negligence. Additionally, I find that a reasonably prudent master or tow captain situated in the wheelhouse at the controls approximately 800 feet from the lead barge would not attempt to dock a vessel at night without confirming that the deckhand lookout was at his post when the height of the second barge impeded or blocked Respondent's visibility. Therefore, Respondent committed a second act of negligence when he attempted to dock the five vessel tow alliding with the stationary crane on the dock and alliding into the docking area.

Turning to the third allegation of negligence for failure to perform duties related to vessel navigation by attempting to moor at a facility about four to five miles away from his intended mooring or docking. In this case, I find that a reasonable and prudent captain would do more than simply just assume he was docking at the correct facility, and Respondent's failure to take additional measures to ensure he was docking at the correct facility is an act of negligence.

In defense of these negligence allegations, Respondent's attorney argues that: (1) the PABTEX crane at the docking facility was an unlawful obstruction to navigation, because it did not have a permit from the U.S. Army Corps of Engineers; and (2) the Coast Guard failed to introduce any evidence of negligence on the part of Respondent. (*Resp't Brief).*

Turning to the question of whether the crane's failure to maintain a permit from the U.S. Army Corps of Engineers is a defense to Respondent's negligence, a similar argument was raised in Appeal Decision 2380 (HALL) (1985), in which the Respondent argued that a bridge operator's noncompliance with its permit adequately rebutted the presumption of negligence. In HALL, the Commandant ruled that under the Pennsylvania Rule a Respondent violator of a statutory rule intended to prevent allisions has the burden of proving not only that Respondent's negligence was not a contributing cause of the allision but also that Respondent's negligence could not have been a contributing cause of the allision. The Commandant held that the effect of the Pennsylvania Rule in Coast Guard trial type hearings before U.S. Administrative Law Judges is to raise a presumption of negligence against a bridge operator's noncompliance with its permit, but that presumption does not negate the presumption of negligence against a Respondent navigator causing or contributing to causing an allision with a stationary object. Appeal Decision 2380 (HALL) (1985). The Commandant reasoned that the issue in Coast Guard suspension and revocation trial type hearings is the negligence of the Respondent, and contributory negligence of others is not a defense. Appeal Decision 2380 (HALL) (1985).

Although I am not deciding this case based solely on the presumption of negligence, I find the HALL Appeal Decision is relevant and applicable, because the issue in this case is not the negligence of the PABTEX crane people, but the negligence of Respondent. Additionally, any contributory negligence of the PABTEX crane company and its employees is not a defense

in these proceedings. Therefore, the issue of whether the PABTEX crane was an unlawful obstruction to navigation has little or no bearing on this case. The crane was still and stationary and not being used when Respondent Orgeron crashed his tow into it, as was proved by the evidence I find credible.

I find the Investigating Officers proved by a preponderance of the reliable, probative and substantial evidence that Respondent committed the three acts of negligence.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent was acting under the authority of his Coast Guard issued U.S. Merchant Mariner's license when he committed an act of misconduct by operating a vessel beyond the limitations of his license.

2. While acting under the authority of his Coast Guard issued license, Respondent committed an act of negligence related to vessel safety by failing to ensure his deckhand lookout was on the lead barge before attempting to dock at night.

3. While acting under the authority of his Coast Guard issued license, Respondent committed an act of negligence related to vessel navigation by attempting to dock at night without confirming his one deckhand had complied with Respondent's orders to his deckhand to go to the head of the lead barge and act as Respondent's lookout in mooring and docking his five vessel tow, consisting of four barges being pushed ahead one behind the other by the towing vessel. The entire tow being navigated and controlled by Respondent.

4. While acting under the authority of his Coast Guard license, Respondent committed an act of negligence related to vessel navigation by docking or mooring at a facility approximately four to five miles away from his intended mooring or docking facility. Respondent did not call

or check with his company's dispatcher and the docking facility employees as to the exact location the dispatcher ordered him to.

SANCTION

In this case, the Investigating Officers (IOs) appear to argue that revocation is the appropriate sanction, because Respondent has several previous incidents. (Tr. at 83-84; *Gov't Brief*). However, Respondent objects to consideration of the alleged previous violations, because the IOs improperly introduced evidence of Respondent's previous violations during closing argument but after close of testimony. (Tr. at 83-86; *Resp't Brief*). Under 33 CFR 20.1315(a)(6), evidence of mitigating and aggravating circumstances may be offered for any charge ruled or found proved. This means the parties must wait until the Administrative Law Judge finds the Complaint's allegations proved before offering evidence of a prior record unless the parties offer the evidence in accordance with 33 CFR 20.1309. In this case, the Investigating Officer switched roles during his closing argument from an advocate to a witness by offering testimony during closing arguments before I ruled the allegations proved. (Tr. at 83 at 84). In order for the Investigating Officer's statements regarding Respondent's prior maritime history to be considered, the Investigating Officer should have been placed under oath and testified as a witness in accordance with 33 CFR 20.706(a) and been subject to cross examination by Respondent's attorney. In this case, the Investigating Officer was not placed under oath or subject to cross-examination because he was giving his summation or final arguments based on the evidence and applicable laws.

Additionally, in disputing the Investigating Officer's statements regarding Respondent's prior record, Respondent's post hearing brief also contains unsworn statements of fact. Therefore, in accordance with 33 CFR 20.1315(a)(6), this hearing will reconvene to hear

evidence of Respondent's prior record and any aggravating and/or mitigating circumstances that may be relevant to determine the appropriate sanction. If the Coast Guard Investigating Officers want Respondent's prior records considered, the Coast Guard Investigating Officers may either offer copies of those records as documentary exhibits into evidence; and/or call witnesses to testify under oath, subject to cross examination, regarding Respondent's prior records. Respondent's attorney may do the same regarding Respondent's prior records.

ORDER

IT IS HEREBY ORDERED that this hearing will reconvene to receive any and all evidence by both sides regarding Respondent's prior record and suggested sanctions on **Tuesday, June 21, 2005**, commencing at 9:30 a.m., at the U.S. Attorney's Office, Media Room, located at 350 Magnolia, Beaumont, Texas 77701.

PLEASE TAKE NOTICE that service of this Decision on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 CFR 20.1001 – 20.1004. (Attachment A). However, this Decision will not become final and subject to appeal until I have also rendered my Decision on the appropriate sanctions in this case.

Done and dated March 31, 2005.
Houston, Texas

THOMAS E. P. McELLIGOTT
U.S. ADMINISTRATIVE LAW JUDGE

ATTACHMENT A

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 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 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 each 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.

33 CFR 20.1002 Records on appeal.

(a) The record 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.

33 CFR 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 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 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.

33 CFR 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.

ATTACHMENT B

WITNESS AND EXHIBIT LISTS

WITNESS LIST

COMPLAINANT'S WITNESSES

1. Chief Warrant Officer Stephen Mills, U.S. Coast Guard Marine Safety Office, Port Arthur, Texas

RESPONDENT'S WITNESSES

1. Edmond J. Orgeron, Respondent

EXHIBIT LIST

COMPLAINANT'S EXHIBITS

IO Ex. 1	CG Form-835 Outstanding requirements
IO Ex. 2	Copy of Respondent's Coast Guard issued license
IO Ex. 3	Certificate of Documentation for towing vessel FREEDOM

RESPONDENT'S EXHIBITS

Resp't Ex. A	Photograph of shore side Pabtex crane
Resp't Ex. B	Photograph of shore side Pabtex crane
Resp't Ex. C	Photograph of shore side Pabtex crane
Resp't Ex. D	Affidavit of Michael L. Bouef

ATTACHMENT C

RULINGS ON PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

COMPLAINANT'S PROPOSED FINDINGS

1. On May 25, 2004, Captain Orgeron was acting as master and operating the towing vessel FREEDOM. At approximately 2330, Captain Orgeron allided with the PABTEX dock, causing significant structural and monetary damages.

   ACCEPTED AND INCORPORATED.

2. Captain Orgeron's Coast Guard record showed numerous previous violations. Per the Coast Guard Marine Information for Safety and Law Enforcement (MISLE) system, Captain Orgeron was directly involved in the following acts:

   1. March 4, 2001, (activity numbers 228052 & 738991) Captain Orgeron had an allision with the F/S NELVANA and the towing vessel CATHERINE B. For this incident, his license was suspended for 2 months and he was put on probation for 12 months.

   2. November 18, 2003, (activity number 1950770) While operating the towing vessel CAPT LES BARRIOS, Captain Orgeron allided with a fixed mooring dolphin.

   3. February 19, 2004 (activity number 20200428) Captain Orgeron, while operating the towing vessel FREEDOM, ran aground with barge AX 3202 in the Marianne Channel at 0600.

   4. February 19, 2004 (activity number 2009614) Captain Orgeron ran the towing vessel FREEDOM aground in the Marianne Channel at 1416.

   5. April 2, 2004 (activity numbers 2037554 & 2040180) Captain Orgeron failed to report a loss of propulsion on the towing vessel FREEDOM. Captain Orgeron failed to comply with orders from VTS Morgan City requiring him to wait for assist tugs before transiting the Morgan City zone with an underpowered vessel. Captain Orgeron was issued a Letter of Warning for failure to comply with VTS Morgan City order.

      RULING WITHHELD UNTIL AFTER HEARING IS RECONVENED.