

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

UNITED STATES COAST GUARD

Complainant,

vs.

ROLLIE BANG, JR.

Respondent.

Docket Number: CG S&R 06-0016
CG Case No. 265505/268736

DECISION AND ORDER

Issued: March 22, 2007

Issued by: Thomas E.P. McEligott, U.S. Administrative Law Judge

Appearances:

For Complainant

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U.S. Coast Guard
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For Respondent Bell, Ryniker & Letourneau

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TABLE OF CONTENTS

TABLE OF CONTENTS	2
PRELIMINARY STATEMENT	3
FINDINGS OF FACT.....	6
DISCUSSION	15
1. NEGLIGENCE (ALLISION).	18
2. MISCONDUCT	21
3. VIOLATION OF LAW	22
4. NEGLIGENCE (COLLISION).	25
5. VIOLATION OF LAW	29
6. VIOLATION OF LAW	30
7. NEGLIGENCE (GROUNDING)	32
8. MISCONDUCT.....	34
ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	35
SANCTION	37
ATTACHMENT B (NOTICE OF ADMINISTRATIVE APPEAL RIGHTS).....	46
ATTACHMENT A (WITNESS AND EXHIBIT LISTS)	40

PRELIMINARY STATEMENT

The United States Coast Guard Investigating Officers (Coast Guard or Agency) initiated this administrative action and trial-type hearing seeking suspension of License Number 1049105 issued to Captain Rollie Bang, Jr. (Respondent). This administrative action was brought pursuant to the legal authority contained in 46 U.S.Code (USC) 7703 and its underlying regulations codified at 46 Code of Federal Regulations (CFR) 5. The Coast Guard issued a Complaint on January 9, 2006, and served it on Respondent personally. The Coast Guard amended the Complaint three times. The final amended Complaint, issued on May 10, 2006, charged Respondent with two (2) counts of Misconduct, three (3) counts of Negligence, and three (3) counts of Violation of Law. These eight (8) charges fall within three (3) general timeframes and coincide with an alleged allision, collision, and grounding involving the towing vessel KAD I.¹

The alleged allision and corresponding charges are supported by three (3) factual allegations that read as follows:

1. Negligence (Allision) – On November 7, 2005 the Respondent negligently navigated the Towing Vessel KAD I, thus alliding with the vessel LIBBY G that was moored at Ethyl Corporation on the Houston Ship Channel, Texas.
2. Misconduct – On November 7, 2005 the Respondent wrongfully failed to immediately notify the Coast Guard of a marine casualty after the vessel he was

¹ The initial Complaint (filed January 9, 2006) charged Respondent with negligence and supported the charges with two factual allegations. The first Amended Complaint (filed January 30, 2006) amended the cited regulatory authority and proposed hearing dates. The second Amended Complaint (filed March 8, 2006) added a third factual allegation and increased the proposed suspension from six months to one year. The third Amended Complaint (filed and served May 10, 2006) was the final Complaint.

operating, the KAD I, allided with the LIBBY G (O.N. 7930046). This is an alleged violation of 46 CFR 4.05-1(b).

3. Violation of Law – On November 7, 2005 the Respondent worked more than twelve hours in a consecutive twenty-four hour period while operating the KAD I. This is a violation of 46 CFR 15.705 (d).

The alleged collision and corresponding charges are supported by two (2) factual allegations that read as follows:

4. Negligence (Collision) – On November 15, 2005 the Respondent negligently navigated the Towing Vessel KAD I, resulting in a collision with the vessel BONNIE SUE on the Houston Ship Channel.
5. Violation of Law – On November 17, 2005 the Respondent worked more than 12 hours in a consecutive 24 hour period while operating the KAD I. This is a violation of 46 CFR 15.705 (d).

The alleged grounding and corresponding charges are supported by three (3) factual allegations that read as follows:

6. Violation of Law – Between 1700 hours on February 4, 2006 and 1700 hours on February 5, 2006 Respondent worked more than 12 hours in a consecutive 24 hour period while operating the KAD I. This is a violation of 46 CFR 15.705 (d).
7. Negligence (Grounding) – On February 5, 2006 the Respondent negligently navigated the Towing Vessel KAD I, resulting in a grounding on the Houston Ship Channel, Texas.
8. Misconduct – On February 5, 2006 the Respondent wrongfully failed to immediately notify the Coast Guard of a marine casualty after the vessel he was operating, the

KAD I, grounded in the Houston Ship Channel. This is a violation of 46 CFR 4.05-1(b).

On January 26, 2006, this case was assigned to the undersigned judge for adjudication. On May 12, 2006, Respondent or Respondent's Attorney filed an Answer to the third amended Complaint. In the Answer, Respondent asserts that the Coast Guard failed to make adequate jurisdictional allegations and denies all factual allegations. Respondent requested a hearing.

The trial-type hearing convened on July 18, 2006 in Houston, Texas before Thomas E.P. McElligott, Administrative Law Judge deciding cases for the Coast Guard and other Federal Agencies. The trial-type hearing proceeded for three days with twelve witnesses sworn under oath, and seventy-five (75) exhibits were admitted into evidence by the undersigned judge. The hearing was conducted in accordance with the U.S. Administrative Procedure Act as amended and codified at 5 U.S.C. 551-559 and the Coast Guard procedural regulations located at 33 CFR Part. 20. Investigating Officers then stationed at Houston, Texas, Lieutenant Cliff Harder, Lieutenant Stephen Dupuy and Chief Brian Sines represented the United States Coast Guard at the hearing. Respondent appeared at the hearing and was represented by attorney, Keith B. Letourneau, of the law firm of Bell, Ryniker, & Letourneau, of Houston, Texas. The twelve (12) witnesses and seventy-five (75) exhibits are listed in Attachment A.

Following the hearing on July 28, 2006, Respondent filed a Summation and the Coast Guard filed Closing Argument. Neither party availed itself of the opportunity to submit proposed findings of fact and conclusions of law. Instead, the parties submitted briefs arguing

their respective positions. All facts and issues raised in closing briefs are addressed throughout the body of this Initial Decision.²

After careful review of the facts and applicable law in this case, the undersigned finds the Coast Guard Investigating Officers have established or proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed two acts of negligence (factual allegations 1 and 4) and two acts of violation of law (factual allegations 3 and 6). The Agency has not established by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed two acts of misconduct (factual allegations 2 and 8), one act of negligence (factual allegation 7), and one act of violation of law (factual allegation 5).

FINDINGS OF FACT

1. Respondent is the holder of Coast Guard License Number 1049105. He is licensed to operate towing vessels upon near coastal waters and western rivers. (Resp't Ex. 16; Tr. Vol. 1 at 42-43, 303).³
2. Respondent began working as a boat captain in 1954. (Tr. Vol. 2 at 206).
3. Respondent has not had any prior charges brought against him or his license. (Tr. Vol. 2 at 206).
4. Respondent owns a company called R & B Leasing. Through this company, Respondent leases his services as a "trip pilot". Respondent leased his services to Overseas Carriers

² On August 9, 2006, Respondent, by and through his attorney of record, filed Objections to Certain Portions of Government's Summation. Subsequently, on August 24, 2006, the Coast Guard filed a Response to "Objections to Certain Portions of Government's Summations" and Motion for Reprimand. An order, issued on September 12, 2006, overruled the Objections set forth by Respondent and denied the Motion for Reprimand requested by the IO's.

³ Two court reporters attended the three day long hearing. The first court reporter produced one transcript for hearing dates July 18-19, 2006. This transcript is cited as "Tr. Vol. 1." The second court reporter produced one transcript for hearing date July 20, 2006. This transcript is cited as "Tr. Vol. 2."

- Company (Tr. Vol. 2 at 207, 367-68). Overseas Carrier Company is the owner and employer for the towing vessel or tug involved throughout these incidents, the KAD I.
5. Overseas Carriers owns the towing vessel KAD I. (Tr. Vol. 1 at 312; Tr. Vol. 2 at 365-72). It is the employer of all Masters, Captains and crew for KAD I.
 6. The KAD I has three engines, but only two steering rudders. It is missing a center rudder which results in decreased maneuverability. The KAD I is in a general state of disrepair. Respondent was aware of the poor condition of the KAD I. (Tr. Vol. 2 at 305, 365-67).

Factual Allegation 1 (Negligence)

7. Respondent captained the KAD I on November 7, 2005. (Tr. Vol. 2 at 205).
8. On November 7, 2005, the KAD I "faced up" (tied and secured with flexible wires from the tug to the barge) to or with an empty seagoing barge in the navigable waterway, Green's Bayou. This barge was approximately 300 feet long, eighty (80) feet wide, and had ten (10) feet of freeboard. (Tr. Vol. 2 at 238-39).
9. The KAD I intended to push the barge out of Green's Bayou, make a port turn onto the Houston Ship Channel (Channel) which is approximately fifty-five miles long between the ports of Houston and Galveston, Texas and proceed outbound. (Tr. Vol. 2 at 242-45).
10. Container barges lined Green's Bayou, resulting in a narrow path for outbound barges to maneuver. Respondent placed two deckhands on the front of the barge to act as lookouts. The lookouts were in radio contact with Respondent. (Tr. Vol. 2 at 241-42).
11. The wind speed in Green's Bayou was low. A high riverbank, trees on the riverbank, and docked ships and barges contributed to a reduction of wind speed in Green's Bayou. (Tr. Vol. 1 at 360; Tr. Vol. 2 at 242-43).

12. Before entering the Channel Respondent did not request and obtain updated wind, weather and traffic conditions for the Channel from the U.S. Coast Guard Vessel Traffic Service (VTS) which watches and monitors conditions on the Channel. (Tr. Vol. 1 at 52-54; Tr. Vol. 2 at 243).
13. As the KAD I approached the Channel, the vessel JO ACER was traveling inbound on the Channel towards Green's Bayou and was approximately one-half mile from Green's Bayou. Respondent contacted the JO ACER's captain. The JO ACER's captain informed Respondent that Respondent had time to push the KAD I out of Green's Bayou. Respondent also asked his lookouts if sufficient time was available to push onto the Channel. The lookouts, at the front of the 300 foot long barge, had a better view of Green's Bayou and the Channel than the Respondent. Lookout Jeff White informed Respondent that sufficient time existed to push out of Green's Bayou and avoid the incoming vessel JO ACER. (Tr. Vol. 1 at 366-67; Tr. Vol. 2 at 243-44, 307-08).
14. As the KAD I pushed out of Green's Bayou and onto the Channel, a strong wind hit the port side of the KAD I's barge. The KAD I gained forward momentum and was unable to reverse back into Green's Bayou. (Tr. Vol. 1 at 360-61, 367; Tr. Vol. 2 at 246).
15. The high winds, combined with excessive power applied by the KAD I, caused the KAD I to slide to the starboard/outbound side of the Channel. (Tr. Vol. 1 at 367; Tr 2: 246-47; Resp't Ex. 11).
16. Respondent did not turn the KAD I hard to port because he feared the wind would then cause the vessel to slide to port. The JO ACER was approaching the KAD I on the KAD I's port side, a slide to port would have created a collision. (Tr. Vol. 2 at 246-47).

17. The stopped moored vessel LIBBY G was on the outbound side of the Channel. (Tr. Vol. 1 at 365; Resp't Ex. 24).
18. Being unable to turn hard to port, the KAD I continued to slide to the starboard, resulting in the starboard bow of the KAD I's barge hitting the non-moving vessel LIBBY G. (Tr. Vol. 1 at 50-51, 89-92, 167, 367-68; Tr 2: 247-48).
19. The contact between the KAD I and LIBBY G caused a load bang. The contact created a small dent on and chipped paint off the LIBBY G. (Tr. Vol. 1 at 50-51, 59, 167-71, 368; Tr 2: 251-52).
20. The contact between the vessels caused no structural damage. The LIBBY G was in the process of being scrapped and the owners were not concerned with the small dent and scrapped paint. (Tr. Vol. 1 at 171-72).
21. The terminal, where the LIBBY G was moored, was not expecting the arrival of the KAD I. (Tr. Vol. 1 at 173-74).

Factual Allegation 2 (Misconduct)

22. The KAD I struck the LIBBY G at approximately 1530 hours, local or Central Time on November 7, 2005. (IO Ex. 1, 2, 4; Tr. Vol. 1 at 50, 72).
23. Through the use of the Automatic Information System (AIS), U.S. Coast Guard's VTS observed the KAD I approach the LIBBY G. By use of a camera, VTS confirmed the KAD I struck the LIBBY G. (Tr. Vol. 1 at 50).
24. At approximately 1540 hours on November 7, 2005, VTS contacted the KAD I by radio and inquired why the towing vessel KAD I was alongside the docked or moored vessel LIBBY G. (IO Ex. 1, 2; Tr. Vol. 1 at 51, 72-73).

25. VTS requested Respondent to remain and hold the KAD I's position. Respondent held the KAD I just outside of Green's Bayou. (Tr. Vol. 1 at 77-78).

26. Respondent filed a "Report of Marine Accident, Injury or Death" (form CG 2692) on November 10, 2005. This report detailed the November 7, 2005 allision by Respondent and KAD I with the non-moving or moored vessel the LIBBY G. (IO Ex. 1; Resp't Ex. 11).

Factual Allegation 3 (Violation of Law)

27. Respondent was the only master or captain aboard the KAD I on November 7, 2005 and the only individual aboard the KAD I with a license to operate a towing vessel on that date. (IO Ex. 7; Tr. Vol. 1 at 297-99, 306-07; Tr. Vol. 2 at 205).

28. The KAD I was underway or shifting barges for approximately thirteen (13) hours and thirty-five (35) minutes on November 7, 2005.⁴ (IO Ex. 7; Tr. Vol. 1 at 274, 330-35).

Factual Allegation 4 (Negligence)

29. Respondent also captained the towing vessel KAD I on November 15, 2005. (Tr. Vol. 2 at 205).

30. Cecil McGuffee was the captain of the towing vessel BONNIE SUE on November 15, 2005. (Tr. Vol. 2 at 105).

31. On November 15, 2005, at approximately 2103 hours, the BONNIE SUE and KAD I were traveling on the Channel at or near the Lower Peggy's Lake range area. The BONNIE SUE was moving inbound and was pushing two barges in a side by side

configuration. The KAD I was moving outbound and was pushing three loaded barges – a head barge, following by a stern barge, and a barge on the starboard hip of the stern barge. (Resp't Ex. 5; IO Ex. 9(a-j); Tr. Vol. 2 at 106, 254-55).⁵

32. On the evening of the collision, gale force winds were blowing from the north and gusting between twenty (20) and forty (40) knots. Winds of this strength do not usually have a significant effect on loaded barges which ride lower in the water. (Tr. Vol. 1 at 423-24; Tr. Vol. 2 at 13, 111, 255).
33. The BONNIE SUE and KAD I hailed each other and agreed upon a one-whistle pass. A one-whistle pass signifies a port-to-port passing agreement, where the BONNIE SUE would stay in or near the northern/red side of the channel and the KAD I would stay in or near the southern/green side of the channel. (Tr. Vol. 2 at 106-07, 112-13, 260-62).
34. The BONNIE SUE was lined up on the Lower Peggy's Lake inbound range when the vessels first hailed one another. The KAD I had just come around a bend (turning to port) and was high on the northern/red side of channel. The KAD I was not yet aligned on the outbound range. (Tr. Vol. 2 at 107, 255; IO Ex. 9(b)).
35. The inbound and outbound ranges are arranged in such a manner as to allow two tows or vessels to pass by one another with a safe separation while proceeding in opposite directions in the Houston, Texas Ship Channel. (Tr. Vol. 2 at 138, 257).
36. As the vessels approached one another, the BONNIE SUE held its course and did not steer to the starboard side of the inbound range. The BONNIE SUE had room to steer to

⁴ Timeframe: November 7, 2005 from 0830-1240 underway (4 hours, 10 minutes), 1245-1345 (1 hour), 1400-1800 underway (4 hours), 1815-1930 underway (1 hour, 15 minutes), 1935-2015 underway (40 minutes), 2030-2200 underway (1 hour, 30 minutes), and 2300-2400 underway (1 hour). (IO Ex. 7; Tr. Vol. 1: 274, 330-35).

⁵ For a ship moving inbound, the red channel markers will be on the ship's starboard side and the green channel markers will be on the ship's port side. For a ship moving outbound, the green channel markers will be on the ship's starboard side and the red channel markers will be on the ship's port side. (Tr. Vol. 2 at 106-08).

starboard. The KAD I was on the northern/red side of channel and started to turn to starboard. (Tr. Vol. 2 at 121-26, 153-55, 261-62; IO Ex. 9(a)-9(g)).

37. When the KAD I turned to starboard, the barge end turned towards the southern/green side of the channel, however the tow end swung further towards the northern/red side of channel.⁶ (Tr. Vol. 2 at 157-59, 263-64).

38. As the vessels approached one another, each vessel throttled down to slow down.

Forward momentum continued to propel the vessels forward. Each vessel was moving at approximately two (2) knots when the collision occurred. (Tr. Vol. 2 at 18-19, 122-28; IO Ex. 9(a)-9(g)).

39. While throttling down, Captain McGuffee turned the BONNIE SUE to starboard. (Tr. Vol. 2 at 153-55).

40. The BONNIE SUE's lead barge's port edge collided with the port side of the KAD I's lead barge. (Tr. Vol. 1 at 379-80; Tr. Vol. 2 at 22, 142-43).

41. The collision broke a port wire on the KAD I's lead barge, swinging the lead barge away from the rear barges. However, the lead barge stayed connected to the rear barges by a remaining intact wire. (Tr. Vol. 1 at 317-18, 377-78; Tr. Vol. 2 at 268).

42. KAD I crew worked to reattach the barges. Approximately ten minutes following the collision, while the crew worked to reconnect the barges, a KAD I barge collided with and knocked over a green navigational marker. (Tr. Vol. 1 at 381-82).

⁶ When a tow and its barges turn, a pivot point is created. This pivot point is about a third of the distance back from the bow. As such, the front of the barge will move in the direction of the turn, but the tow will actually move in the opposite direction of the turn (Tr. Vol. 2 at 157-59, 263-64), until later in the turn when the barges follow the direction of the towing vessel.

Factual Allegation 5 (Violation of Law)

43. Respondent also captained the KAD I on November 17, 2005. (IO Ex. 26; Tr. Vol. 2 at 219-26).
44. The KAD I was navigating underway, making tow, or shifting barges for approximately fourteen (14) hours and nineteen (19) minutes on November 17, 2005.⁷ (IO Ex. 26; Tr. Vol. 1 at 274, 335).
45. Between 1330 and 1400 hours on November 17, 2005, KAD I's deckhand Jeff White sustained an injury to his head. Mr. White was removed from the KAD I. Captain Josh (no last name provided) replaced the injured deckhand. Captain Josh had a U.S. license to operate a towing vessel. (Tr. Vol. 1 at 338-39; Tr. Vol. 2 at 220-21).
46. Captain Josh operated the KAD I for approximately three (3) hours and thirty (30) minutes between 1400 and 2300 hours. During this time period Respondent did not operate the KAD I.⁸ (Tr. Vol. 1 at 220-26)

Factual Allegation 6 (Violation of Law)

47. Respondent captained the KAD I from 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006. During this time period, Respondent was the only individual aboard the KAD I with a license to operate a towing vessel. (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-59; Tr. Vol. 2 at 205, 226-30).

⁷ Timeframe: November 17, 2006 from 0001-0400 underway (3 hours, 59 minutes), 0400-0520 shifting barges (1 hour, 20 minutes), 1200-1330 underway (1 hour, 30 minutes), 1400-1500 underway (1 hour), 1500-1800 shifting barges (3 hours), 1800-1900 underway (1 hour), and 2130-2400 underway (2 hours, 30 minutes). (IO Ex. 26; Tr. Vol. 1 at 274, 335).

⁸ Timeframe that Captain Josh operated the KAD I: November 17, 2006 from 1400-1500 underway (1 hour), 1800-1900 underway (1 hour), and 2130-2300 underway (1 hours, 30 minutes). (IO Ex. 26; Tr. Vol. 1 at 220-226).

48. The KAD I was underway, making tow, or shifting barges for approximately twelve (12) hours and twenty-nine (29) minutes between 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006.⁹ (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-59; Tr. Vol. 2 at 205, 226-30).

Factual Allegation 7 (Grounding)

49. Respondent captained the KAD I on February 5, 2005. (Tr. Vol. 1 at 383; Tr. Vol. 2 at 205).
50. On February 5, 2005, at approximately 1831 hours, the KAD I was traveling outbound on the Channel and approaching the San Jacinto River. The KAD I was pushing three loaded barges – a head barge, following by a stern barge, and a barge on the starboard hip of the stern barge. (IO Ex. 16-21; Tr. Vol. 2 at 282-83).
51. Green temporary buoy #127, located just outside the mouth of the San Jacinto River, marked the outbound side of the Channel. This buoy was off station and was closer to the center of the Channel than the outbound side of the Channel. (IO Ex. 16-21; Tr. Vol. 1 at 386-88; Tr. Vol. 2 at 289-90; Gov't Closing Argument at 13)
52. The tow boat APOLLO, piloted by Captain Soileau, was traveling behind the KAD I. The APOLLO was approximately three to four minutes behind the KAD I. (IO Ex. 16-21; Tr. Vol. 1 at 473).

⁹ Timeframe: February 4, 2006 from 1700-1850 making tow (1 hour, 50 minutes), 1850-2400 underway (5 hours, 10 minutes); February 5, 2006 from 0001-0030 shifting barges (29 minutes), 0030-0130 underway (1 hour), 0900-1000 underway (1 hour), 1100-1200 underway (1 hour), 1500-1600 underway (1 hour), and 1600-1700 shifting barges (1 hour). (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-59; Tr. Vol. 2 at 205, 226-30).

53. As the KAD I approached buoy #127, a long tow was proceeding out of the San Jacinto River.¹⁰ This tow was conducting a starboard turn in order to proceed inbound on the Channel. (IO Ex. 27 track 3; Tr. Vol. 1 at 386-88; Tr. Vol. 2 at 291-95, 391-96).
54. In order to avoid the long tow coming out of the San Jacinto River and to avoid hitting the out of place buoy, the KAD I turned to its starboard. Buoy #127 passed on the port side of the KAD I. (Tr. Vol. 1 at 389-90; Tr. Vol. 2 at 292-96).
55. As the KAD I rounded the corner of the Channel, outside of buoy #127, the starboard edge of the lead barge hit mud on the bank of the channel and was stopped. Respondent waited for all traffic around him to clear up and then pulled the barge off the bank. This took approximately one hour. (Tr. Vol. 1 at 389-93; Tr. Vol. 2 at 296-300).

Factual Allegation 8 (Misconduct)

56. The KAD I ran aground on February 5, 2006, at approximately 1834 hours. (IO Ex. 20).
57. Through the use of the AIS, the U.S. Coast Guard's VTS observed the KAD I had stopped. (IO Ex. 23).
58. At 1850 hours on February, 5, 2006, VTS contacted and spoke with someone aboard the KAD I and confirmed the KAD I was grounded. (IO Ex. 23; Gov't Closing Arguments at 16).

DISCUSSION

One of the major purposes of Coast Guard suspension and revocation trial-type hearings is to promote safety of lives, vessels and properties at sea, ports and channels, etc. These

¹⁰ A long tow represents a tow pushing three barges in a row. (Tr. Vol. 1 at 386).

hearings are presented before a U.S. Administrative Law Judge for a Decision and Order. See 46 U.S.C. 7701. If a merchant mariner license holder commits an act of negligence, misconduct, or a violation of law or regulations in performing his duties related to the vessel, his license may be suspended or revoked. See 46 U.S.C. 7703(1)(B).

Respondent asserts, in his Answer, that the Coast Guard lacks jurisdiction to take action against his license. Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. Appeal Decision 2620 (COX) (2001). The U.S. Administrative Law Judge may suspend or revoke a mariner's license if the license holder is acting under the authority of that license and has committed an act of misconduct. 46 USC 7703(1)(B). "A person employed in the service of a vessel is considered to be acting under authority of a license, certificate or document when the holding of such a license, certificate or document is: 1) Required by law or regulation; or 2) Required by an employer as a condition of employment." Appeal Decision 2620 (COX) (2001).

In each of the factual allegations, the Coast Guard Investigating Officers have proved and established that Respondent was employed by its owner company to master or captain the fifty-five (55) foot long towing vessel KAD I. (Tr. Vol. 1 at 297-99, 306-07, 312, 340-59, 383; Tr. Vol. 2 at 205-07, 219-30, 365-72; IO Ex. 7, 23-25, 26). Being a towing vessel or tug over twenty-six (26) feet in length, a licensed master is required by law to operate the KAD I. (Tr. Vol. 1 at 312; See 46 U.S.C. 8904). Respondent possessed the required U.S. license to operate the KAD I. (Resp't Ex. 16; Tr. Vol. 1 at 42-43, 303). Having established that Respondent was hired to master or captain a towing vessel over twenty-six (26) feet in length and that the law requires such towing vessels be operated by a licensed master, the Coast Guard has successfully

shown that Respondent was acting under authority of his license while operating the towing vessel. Proper jurisdiction was proved or established by the Investigating Officers.

In suspension and revocation proceedings, the burden of proof is on the Coast Guard Investigating Officers to establish a prima facie case of negligence, misconduct, or a violation of law or regulation by a preponderance of the evidence. See 33 CFR 20.701-702; see also Appeal Decision 2485 (YATES) (1989). Negligence is defined in 46 CFR 5.29 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." This definition includes the failure of an individual to exercise the degree of care, vigilance and forethought that a person of ordinary caution and prudence ought to exercise. See Appeal Decision 2550 (RODRIQUES) (1993). In order to establish negligence, the Coast Guard must show that Respondent's conduct, in some manner, failed to conform to the standard of care required of a reasonably prudent mariner under the same circumstances. See Appeal Decision 2321 (HARRIS) (1983); see also Appeal Decision 2282 (LITTLEFIELD) (1982).

Similarly, misconduct is defined in 46 CFR 5.27 as "human behavior which violates some formal, duly established rule," such as those found in the common law, the general maritime law, a ship's regulation or order, or shipping articles. It is an act that is forbidden or a failure to do what is required. 46 CFR 5.27. In the absence of such a rule, misconduct is the human behavior that a reasonable person would consider to constitute a failure to conform to the standard of conduct that is required in the light of all the existing facts and circumstances. See Appeal Decision 2152 (MAGIE) (1979). Specific intent is not an essential element of the charge of misconduct in these administrative proceedings. See Appeal Decision 2607 (ARIES) (1999);

see also Appeal Decision 2286 (SPRAGUE) (1982).

Furthermore, a violation of law or regulation includes a failure to comply with any law or regulation intended to promote marine safety and to protect navigable waterways and related properties.¹¹ See 46 CFR 5.33; see also Appeal Decision 2568 (SANCHEZ) (1995). Where the allegation is violation of law, the complaint must state the specific statute or regulation by title and section number, and the particular manner in which it was allegedly violated. 46 CFR 5.33; Appeal Decision 2581 (DRIGGERS) (1996).

Here, the Coast Guard Investigating Officers have established or proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed two acts of negligence (factual allegations 1 and 4) and two acts of violation of law (factual allegations 3 and 6). The Agency has not also established or proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent committed two acts of misconduct (factual allegations 2 and 8), one act of negligence (factual allegation 7), and one act of violation of law (factual allegation 5).

The eight factual allegations are addressed below:

- 1. Negligence (Allision) – The Investigating Officers did prove that on November 7, 2005, Respondent negligently navigated the Towing Vessel KAD I, thus alliding with the non-moving vessel the LIBBY G.**

The Coast Guard alleges that Respondent's negligence caused an allision between the KAD I and non-moving vessel LIBBY G on November 7, 2005. (Complaints and Gov't Closing Argument at 6). Respondent argues that no allision occurred. (Resp't Sum. at 3-

¹¹ Inland Navigational Rule 2, titled "Responsibility," and more commonly referred to as the rule of good seamanship, as well as Inland Navigational Rule 9, which governs the navigation of vessels through narrow channels, falls within the scope of 46 CFR 5.33.

5). Respondent testifies that as he was pushing an ocean-going barge into the Houston, Texas Ship Channel (Channel), an unexpected wind pushed his barge across the Channel. (Id. at 4). Instead of turning his barge into the wind and risking a possible slide towards the direction of an incoming ship, Respondent asserts that he made a judgment call and deliberately landed the KAD I against the moored or stopped vessel LIBBY G. (Id. at 4-5). Respondent maintains that this action was prudent under the circumstances, it was not "accidental," and it was not a marine casualty. (Id. at 5).

The term marine casualty includes any accidental occurrence involving a vessel which results in damage to another vessel or other property. 46 CFR 4.03-1(b). An accidental occurrence involving a moving object striking a stationary object is an allision. Facts establish that Respondent's actions caused the KAD I to accidentally hit or strike and damage the stopped vessel the LIBBY G, creating a marine casualty. First, the LIBBY G received no advance notice the KAD I was going to land alongside the LIBBY G. (Tr. Vol. 1 at 173-174). This indicates the KAD I had no predetermined intention to land alongside the LIBBY G. Second, the LIBBY G's chief officer describes the KAD I as ramming the stopped LIBBY G. (Tr. Vol. 1 at 167). The chief officer did not describe the KAD I as merely landing alongside the LIBBY G. (Id.). Third, while the damage from the allision was not extensive, the KAD I did dent and scrape the stopped LIBBY G. (Tr. Vol. 1 at 50-51, 59, 167-71, 368; Tr. Vol. 2: 251-52). Finally, Respondent describes the KAD I as sliding to starboard because of the combination of excess power and high wind. (Resp't Ex. 11). Respondent did not purposely cause the slide to starboard. As the KAD I was sliding, Respondent made a conscious decision not to turn the KAD I hard to port. (Tr. Vol. 2 at 246-47). Such a turn would risk sliding the vessel to port and into an oncoming vessel. (Id.). However, this does not mean the uncontrollable slide to

starboard and eventually contact with the LIBBY G was purposeful. If Respondent had control of the vessel, he would have proceeded outbound on the Channel without either colliding with the oncoming vessel or alliding with the stopped LIBBY G. Instead, the KAD I allided with the LIBBY G, caused damage to the LIBBY G, and created a marine casualty.

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 5.29. When a moving vessel strikes a stationary object, such as a moored or stopped vessel, a presumption of negligence arises and the burden is on the operator of the moving vessel to refute this presumption. Appeal Decision 2241 (NIED) (1981); Appeal Decision 579 (NELSON) (1952). "In order for Respondent to gain a favorable decision after the presumption is appropriately established, it must be shown that the moving vessel was without fault, the allision was occasioned by the fault of the stationary object, or it was the result of inevitable accident." Appeal Decision 2294 (BRAHN) (1982). Respondent in this case has not successfully refuted this presumption of negligence.

Respondent's actions clearly contributed to the allision. Respondent was aware the KAD I was missing a center rudder which decreased the vessel's maneuverability. (Tr. Vol. 2 at 305, 365-67). Respondent was also aware the barge he was pushing was empty, was riding high in the water, and had approximately ten (10) feet of freeboard. (Id. at 239). Wind has more of an effect on an empty barge with high freeboard than on a loaded barge deeper and down lower in the waterway. (Tr. Vol. 1 at 422-23). Despite this knowledge, Respondent failed to request and obtain from VTS updated wind speed, conditions and traffic on the Channel prior to entering the

Channel. (Tr. Vol. 1 at 52-54; Tr. Vol. 2 at 243). Respondent was also aware that an incoming vessel, the JO ACER, was approaching Green's Bayou as Respondent was preparing to push out of Green's Bayou on to the Channel. (Tr. Vol. 1 at 366-67; Tr. Vol. 2 at 243-44, 307-08). While Respondent's lookouts informed Respondent he had time to push out in front of the JO ACER, Respondent was also aware the incoming vessel would limit the KAD I's range of motion once he entered the Channel. (*Id.*, Resp't Ex. 11). After the KAD I entered the Channel and wind caused the KAD I to slide to starboard, Respondent was unable to turn to port since he feared a collision with the JO ACER. In the Report of Marine Accident, Respondent stated that one of the corrective measures he could have taken was to "hold up [not exiting Green's Bayou] until traffic clears." (Resp't Ex. 11). In the same report, Respondent also admitted that "too much power [was] applied before [the] barge headed into the wind, causing [a] slide." (*Id.*)

Respondent's knowledge of his vessel's limited maneuverability, his failure to check wind speed and direction prior to entering the channel, his decision to push into the Channel while an incoming vessel was approaching, and his excessive use of power all contributed to the KAD I's slide to starboard. This slide resulted in the eventual allision with the stationary vessel LIBBY G. Respondent has failed to refute the presumption of negligence associated with the allision.

2. Misconduct – The evidence did not establish that on November 7, 2005, Respondent wrongfully failed to immediately notify the Coast Guard of a marine casualty.

The Agency alleges that Respondent failed to immediately notify the Coast Guard of the November 7, 2005 allision with the LIBBY G. Approximately ten (10) minutes following the allision, the U.S. Coast Guard's Vessel Traffic Service (VTS), seeing the KAD I had come to a halt next to the stationary LIBBY G, contacted and communicated with Respondent and the KAD I to determine if an allision occurred. (IO Ex. 1, 2, 4; Tr. Vol. 1 at 51, 72-73). The Coast

Guard argues that since VTS initiated radio contact with Respondent, Respondent did not actually notify the Coast Guard of the marine casualty, violating 46 CFR 4.05-1(a). (Gov't Closing Argument at 8). The Agency's argument is not convincing.

This argument did not consider 46 CFR 4.05-10(a)(b). Section 4.05-10(a) requires a vessel's master to "file a written report [form CG 2692] of any marine casualty required to be reported under §4.05-1" within five days. If this report is filed within five days, the report will suffice as the 46 CFR 4.05-1(a) notice requirement. 46 CFR 4.05-10(b). A filing of form CG 2692 "within the five day time period amounts to per se satisfaction of the notification requirements of . . . 46 CFR § 4.05-1." Appeal Decision 2523 (BRACKEN) (1991). In this case, Respondent filed a Report of Marine Accident, Injury or Death (form CG 2692) on November 10, 2005. (IO Ex. 1, Resp't Ex. 11). This filing, three days after the allision, clearly falls within the notification requirements set forth in the regulations. Respondent properly notified the Coast Guard of the November 7, 2005, allision.

3. Violation of Law – The Investigating Officers proved that on November 7, 2005, Respondent worked more than twelve hours in a consecutive twenty-four hour period while operating the KAD I.

The Investigating Officers charged Respondent with operating a towing vessel for more than twelve (12) hours in a twenty-four (24) hour period on November 7, 2005, a violation of 46 CFR 15.705(d). Respondent argues the vessel he mastered, the KAD I, was a "light boat" not pushing or pulling barges vice a "towing vessel" when under tow. (Resp't Sum. at 8-9). Respondent argues no license is required to operate a light boat, and as such, crew member Jeff White operated the vessel under light boat status. (Id. at 9-10). Thus, the portions of the day that Jeff White operated the "light boat" are not attributable to Respondent's operation of

a “towing vessel.” (*Id.*). Respondent’s argument is without merit. The applicable law and evidence clearly establish the KAD I was a “towing vessel” at all times during November 7, 2005, and that Respondent worked for more than twelve hours on that day.

The KAD I is a fifty-five (55) foot long commercial towing vessel and on November 7, 2005, was engaged in the act of towing barges. (IO Ex. 7; Tr. Vol. 1 at 297-99, 306-07, 312; Tr. Vol. 2 at 205). Respondent was the only master or captain of the KAD I on November 7, 2005, and the only individual aboard with a license to operate and navigate a towing vessel. (*Id.*). Case law establishes that a commercial towing vessel is still a towing vessel even when not actually engaged in the act of towing. See Appeal Decision 2566 (WILLIAMS) (1995).¹² As such, Respondent was the only individual aboard licensed to operate the KAD I at anytime on November 7, 2005. Respondent was limited by law to operating the KAD I for no more than twelve (12) hours in a twenty-four (24) hour period. See 46 CFR 15.705(d).

On November 7, 2005, the KAD I was underway or shifting barges for approximately thirteen (13) hours and thirty-five (35) minutes. (IO Ex. 7; Tr. Vol. 1 at 274, 330-35). The most compelling evidence confirming this time frame is the boat log. (IO Ex. 7). The boat log establishes the KAD I was underway for more than twelve hours on November 7, 2005, with Respondent as the only captain aboard. (*Id.*). Deckhand Jeff White, did not have a master or captain license for towing vessels and was usually only at the helm of the KAD I when it was not under tow. (Tr. Vol. 1 at 306, 333). During such times, Respondent would generally stand next

¹² A towing vessel is defined as a commercial vessel “engaged in or intending to engage in the service of pulling, pushing, or hauling alongside, or any combination of pulling, pushing, or hauling alongside.” 46 U.S.C. 2101(40). “Congress intended commercial vessels in the business of towing to be considered towing vessels within the meaning of the statutes, whether or not actually engaged in pulling, pushing or towing alongside.” Appeal Decision 2566 (WILLIAMS) (1995). For example, if a vessel is returning to port after completing a towing job, that vessel is still in the service of towing and is a “towing vessel.” *Id.* Any “towing vessel that is at least 26 feet in length . . . shall be operated by an individual licensed by the Secretary to operate that type of vessel in the particular geographical area, under prescribed regulations.” 46 U.S.C. 8904(a). Therefore, even if a towing vessel is not

to Mr. White. (*Id.*). The Commandant has held that an unlicensed mate can operate a towing vessel under certain circumstances, however the licensed operator can still give orders to their mate and “still maintain[s] actual control of the vessel.” See Appeal Decision 2566 (WILLIAMS) (1995). Therefore, when Jeff White was at the helm of the KAD I, Respondent still maintained control of vessel as the licensed operator. The time periods that Mr. White operated the KAD I are thus included towards Respondent’s twelve hour maximum.

Respondent asserts that he would never work more than twelve hours in a twenty-four hour period. (Tr. Vol. 2 at 218-19). However, evidence establishes that Respondent is willing to work in excess of twelve hours in a twenty four hour period. On November 7, 2005, Respondent leased his services as a trip pilot to Overseas Carriers.¹³ (*Id.* at 207, 367-68). Ralph Osborn, who also testified, was another trip pilot who worked for Overseas Carriers. Mr. Ralph Osborn described Overseas Carriers as being a company that requires trip pilots to work in excess of twelve hours a day in a twenty-four hour period. (Tr. Vol. 1 at 185-87). Mr. Osborn did not work with Respondent and did not personally observe Respondent working more than twelve hours. However, Mr. Osborn’s observations are credible and help establish the demands Respondent received from Overseas Carriers. Furthermore, Mr. White, a crewmate that worked with Respondent, testified that Respondent has worked for more than twelve hours in a twenty-four hour period. (*Id.* at 307-08). Mr. White also testified that Respondent argued with Overseas Carriers company management about their insistence on working employees over twelve hours a day. (*Id.* at 311-12). Mr. White’s testimony is credible.¹⁴ Considering the demanding culture of

engaged in act of towing, that vessel is still in the service of towing and a licensed master is required to operate such vessel.

¹³ Overseas Carriers company owns the towing vessel KAD I and hires and pays its captains and crews. (Tr. Vol. 1 at 312; Tr. Vol. 2 at 365-72).

¹⁴ Mr. White trained under Respondent and holds Respondent in high regard. Mr. White describes Respondent as knowing his job well and always taking safety into account. (Tr. Vol. 1 at 395). While describing the allision with the LIBBY G, Mr. White stated that “I believe it was the best that Captain Bang could do under the circumstances.”

Overseas Carriers company, the credible testimony stating that Respondent was willing to work in excess of twelve hours a day, and after reviewing the boat logs of the day in question – Respondent is found to have worked in excess of twelve (12) hours in a twenty-four hour period on November 7, 2005, violating 46 CFR 15.705(d).

4. Negligence (Collision) – The Investigating Officers proved or established that on November 15, 2005, Respondent negligently navigated the Towing Vessel KAD I, resulting in a collision with the vessel BONNIE SUE.

The Coast Guard alleges that Respondent's negligence caused a collision between the vessels KAD I and the BONNIE SUE on November 15, 2005. (Complaints and Gov't Closing Argument at 8-12). Respondent argues the negligent actions of the BONNIE SUE's master, Cecil McGuffie, were the actual and only cause of the collision. (Resp't Sum. at 12-14). After careful review of the evidence, the undersigned finds the Coast Guard's Investigating Officers proved or established by a preponderance of the evidence that Respondent's negligent actions contributed to the collision in question on November 15, 2005.

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 5.29. Contributory negligence is not a complete defense in a Suspension and Revocation Proceeding. Appeal Decision 2639 (HAUCK) (2003). To prove a negligence case, it is "incumbent on the

(Tr. Vol. 1 at 368). While describing the grounding incident, Mr. White states that "[u]nder the circumstances I think [Respondent's action] was the best option." (Tr. Vol. 1 at 393). Respondent argues the Coast Guard intimidated Mr. White and as a result, Mr. White lacks credibility when testifying about Respondent's twelve hour rule violation. (Resp't Sum., at 10-11). However, considering that Mr. White's testimony is generally highly favorable towards Respondent, the undersigned does not find the Coast Guard has intimidated Mr. White to the point that Mr. White lied under oath. Mr. White's testimony is deemed credible.

Investigating Officer to establish the standard of care which is relevant to the circumstances involved and to show how that standard has been breached by respondent.” Appeal Decision 2599 (GUEST) (1998). In this case, the Coast Guard argues that Respondent violated Inland Navigation Rule 2 when he “failed to exercise the precaution required by the ordinary practice of seamen by putting his vessel on the wrong side of the channel and into the path of the BONNIE SUE.” (Gov’t Closing Argument at 9-10). The Inland Navigation Rules provide a standard of care that mariners are required to observe.¹⁵ Appeal Decision 2359 (WAINE) (1984) (finding that the navigation rules established a standard of care and a “clear violation of laws intended to promote safety is unquestionably negligence by any standards”) (citations omitted). Causing a collision by failing to navigate on the proper side of the channel violates the ordinary standard of care and is a prima facie case of negligence. Appeal Decision 2152 (MAGIE) (1979). The facts establish that Respondent violated this standard of care.

On November 15, 2005, at approximately 2103 hours, the towing vessels BONNIE SUE and KAD I were traveling on the Houston Ship Channel (Channel) at or near the Lower Peggy’s Lake range area. (Resp’t Ex. 5; IO Ex. 9(a-j)). Respondent captained the KAD I and Cecil McGuffee captained the BONNIE SUE. (Tr. Vol. 2 at 105, 205). The BONNIE SUE was moving inbound and was pushing two barges in a side by side configuration. (Tr. Vol. 2 at 106). The KAD I was moving outbound and was pushing three loaded barges – a head barge,

¹⁵ During the hearing, the Coast Guard did not assert that Respondent violated an Inland Navigation Rule. However, it is permissible for ALJs to take official notice of treatises, regulations, and decisions not presented at hearing. See Appeal Decision 2575 (WILLIAMS) (1996); see also Appeal Decision 2450 (FREDERICKS) (1987). Therefore, it is permissible for the undersigned judge to consider Inland Navigation Rule 2 when determining if Respondent violated a standard of care. This issue is addressed in the September 12, 2006 Order Overruling Objection to Certain Portions of Government’s Summation and Denying Motion for Reprimand. It was signed by the undersigned Judge and served on all parties involved in this case.

following by a stern barge, and a barge on the starboard hip of the stern barge.¹⁶ (Tr. Vol. 2 at 254-55). As the vessels approached, the BONNIE SUE and KAD I hailed and communicated with each other and agreed upon a "one-whistle pass".¹⁷ (Tr. Vol. 2 at 106-07, 112-13, 260-62). At this time, the BONNIE SUE was lined up on the Lower Peggy's Lake inbound range. (Tr. Vol. 2 at 107, 255; IO Ex. 9(b)). The KAD I had just come around a bend (turning to port), was high on the BONNIE SUE's side of the channel (the northern/red side), and had not yet aligned on the outbound range.¹⁸ (Id.).

As the vessels approached one another, the BONNIE SUE held its course on the inbound range. (Tr. Vol. 2 at 121-26, 153-55, 261-62; IO Ex. 9(a)-9(g)). The KAD I, still high on the northern/red side of the channel, started to turn to starboard. (Id.). As the KAD I turned to starboard, the barge end turned towards the southern/green side of the channel, however the tow end swung further towards the northern/red side of the channel.¹⁹ (Tr. Vol. 2 at 129, 157-59, 263-64). Anticipating that a collision was imminent, each vessel throttled down to try and slow down. (Tr. Vol. 2 at 18-19, 122-28; IO Ex. 9(a)-9(g)). Forward momentum continued to propel the vessels forward. (Id.).

At the time of the collision, each vessel was moving approximately two (2) knots. (Tr. Vol. 2 at 18-19, 122-28; IO Ex. 9(a)-9(g)). The BONNIE SUE's lead barge's port edge collided with the port side of the KAD I's lead barge. (Tr. Vol. 1 at 379-80; Tr. Vol. 2 at 22, 142-43).

¹⁶ For a ship moving inbound, the red channel markers will be on the ship's starboard side and the green channel markers will be on the ship's port side. For a ship moving outbound, the green channel markers will be on the ship's starboard side and the red channel markers will be on the ship's port side. (Tr. Vol. 2 at 106-08).

¹⁷ A one-whistle pass signifies a port-to-port passing arrangement, where the BONNIE SUE would stay in or towards the northern/red side of the channel and the KAD I would stay in or near the southern/green side of the channel and the tows could pass each other safely. (Tr. Vol. 2 at 106-107, 112-13, 260-62).

¹⁸ The inbound and outbound ranges are arranged in such a manner as to allow two tows or vessels to pass one another with a safe distance of separation while proceeding in opposite directions. (Tr. Vol. 2 at 138, 257).

¹⁹ When a tow and its barges turn, a pivot point is created. This pivot point is about a third of the distance back from the bow. As such, the front of the barge will move in the direction of the turn, but the tow will actually move in the opposite direction of the turn, until later in the turn. (Tr. Vol. 2 at 157-59, 263-64).

The collision broke a port wire on the KAD I's lead barge, swinging the lead barge away from the rear barges. (Tr. Vol. 1 at 317-18, 377-78; Tr. Vol. 2 at 268). The lead barge stayed connected to the rear barges by a remaining intact wire. (Id.). Approximately ten minutes following the collision, while the crew worked to reconnect the barges, a KAD I barge collided with and knocked over a green navigational marker. (Tr. Vol. 1 at 317, 381-82).

The above facts establish Respondent navigated the KAD I on the inbound side of the channel while proceeding outbound. Respondent contests this finding; however, credible evidence establishes these facts. The most compelling evidence is the AIS reports. (IO Ex. 9(a-j)). These reports display the relative positions of the Respondent and KAD I and BONNIE SUE in the Channel leading up to the collision and establish the KAD I was proceeding on the inbound side of the channel while traveling outbound. (Id.). Respondent provides no evidence discrediting these reports. Furthermore, Coast Guard witness Cecil McGuffie witnessed the KAD I traveling on the wrong side of the channel. Respondent attempts to discredit Mr. McGuffie's testimony via the testimony of Darwin Punkka, friend of Respondent, a visitor aboard the KAD I. (Resp't Sum. at 12-13). Mr. Punkka's testimony is found not credible. First, Mr. Punkka is a long time friend of Respondent. (Tr. Vol. 2 at 11-12, 35). Second, Mr. Punkka testified that a KAD I barge immediately knocked down a green navigational marker following the collision, indicating the collision occurred on the outbound side of the channel. (Tr. Vol. 2 at 21). However, this is in direct conflict with the testimony of Jeff White, a KAD I crewman placed in charge of reattaching the barges after the collision. Mr. White testified the barge knocked down the green navigational marker approximately ten (10) minutes after the collision. (Tr. Vol. 1 at 381-382; 424). This suggests the collision occurred on the inbound, red side of the channel, and that it took ten (10) minutes for the barge to drift to the green side of the channel

before knocking over the marker. Respondent's own testimony and his wife testimony, Ms. Bonnie Bang, also contradict Cecil McGuffie's testimony. However, considering the potential self-serving aspects of those testimonies and after reviewing the previously stated evidence, Mr. McGuffie's testimony is determined more credible. Credible evidence establishes Respondent navigated the KAD I on the inbound side of the channel, while moving outbound.

The undersigned judge finds a reasonably prudent towing vessel's captain would navigate his vessel on the correct side of the channel. Respondent's failure to navigate his vessel on the correct side of the channel resulted in the KAD I colliding with the BONNIE SUE. Respondent committed an act of negligence by failing to navigate his vessel on the correct side of the channel.

5. Violation of Law – It was not established or proved that on November 17, 2005, Respondent worked more than twelve hours in a consecutive twenty-four hour period while operating the towing vessel KAD I.

The Agency charges Respondent with operating a towing vessel for more than twelve (12) hours in a twenty-four (24) hour period on November 17, 2005, a violation of 46 CFR 15.705(d). This is the same violation alleged in factual allegation number three. Therefore, the issues of law addressed in factual allegation number three also apply to this charge. However, unlike factual allegation number three, on November 17, 2005, two licensed operators were aboard the KAD I. The evidence shows the two operators took separate shifts operating the KAD I, with neither operator working more than twelve hours.

Respondent captained the KAD I on November 17, 2005. (IO Ex. 26; Tr. Vol. 2 at 219-26). Between 1330 and 1400, KAD I's deckhand Jeff White sustained an injury to his head and was removed from the KAD I. (Tr. Vol. 1 at 338-39; Tr. Vol. 2 at 220-21). Captain Josh, a

licensed mariner, replaced the injured deckhand. (*Id.*). Captain Josh and Respondent took separate shifts operating the KAD I for the remainder of the day.²⁰ (*Id.*). The KAD I was underway, making tow, or shifting barges for approximately fourteen (14) hours and nineteen (19) minutes on November 17, 2005.²¹ (IO Ex. 26; Tr. Vol. 1 at 274, 335). Of these fourteen (14) hours and nineteen (19) minutes, Captain Josh operated the KAD I for three (3) hours and thirty (30) minutes.²² (IO Ex. 26; Tr. Vol. 1 at 220-26). Respondent operated the KAD I during the remaining ten (10) hours and 49 (minutes). (*Id.*). The evidence shows Respondent worked less than twelve hours. The evidence did not establish, by a preponderance of the evidence, that Respondent operated the KAD I for more than twelve hours on November 17, 2005.

6. Violation of Law – From February 4, 2006 to February 5, 2006, Respondent worked more than twelve hours in a consecutive twenty-four hour period while operating the KAD I as was proved or established by the Investigating Officers.

The Coast Guard charges Respondent with operating a towing vessel for more than twelve (12) hours in a twenty-four (24) hour period between February 4 and February 5, 2006, a violation of 46 CFR 15.705(d). Respondent asserts the same defense he raised in factual allegation three. Specifically, Respondent argues a license was not required to operate the KAD

²⁰ The Coast Guard asserts that Respondent was the only licensed operator aboard the KAD I. (Gov't Closing Argument at 18). Evidence indicates otherwise. Respondent testified that Captain Josh, a licensed operator, replaced the injured deckhand. (Tr. Vol. 1 at 338-39; Tr. Vol. 2 at 220-21). The Coast Guard disputes this by showing the boat logs do not list Captain Josh as being on the KAD I. (IO Ex. 26). However, since Captain Josh was a replacement crew member, it is likely no one updated the boat log to reflect this change. The boat logs did not reflect the fact that Jeff White only worked half a day or that he was injured. (IO Ex. 26). Another seemingly inconsistent aspect of Respondent's testimony is that he was unable to provide Captain Josh's last name. However, Captain Ralph Osborn, a Coast Guard witness, also testified that he worked with Josh and that Josh piloted the KAD I. (Tr. Vol. 1 at 211-12). Captain Osborn was also unable to provide the last name of Captain Josh. (*Id.*). This provides credibility to Respondent's testimony that an individual named Josh, last name unknown, assisted in piloting the KAD I.

²¹ Timeframe: November 17, 2006 from 0001-0400 underway (3 hours, 59 minutes), 0400-0520 shifting barges (1 hour, 20 minutes), 1200-1330 underway (1 hour, 30 minutes), 1400-1500 underway (1 hour), 1500-1800 shifting barges (3 hours), 1800-1900 underway (1 hour), and 2130-2400 underway (2 hours, 30 minutes). (IO Ex. 26; Tr. Vol. 1 at 274, 335).

I when it was not under tow and at such time, crewmember Jeff White operated the vessel. As addressed in discussion section number three above, Respondent's argument is without merit. Specifically, a commercial towing vessel is a "towing vessel" even when not engaged in the act of towing. A towing vessel license is required to operate a towing vessel. Therefore, while an unlicensed crewmember is permitted to physically operate the vessel, it is still under the "control" of the captain. Since the captain maintains control, the time periods that an unlicensed operator is at the helm are included towards the licensed captain's twelve hour maximum. Evidence establishes Respondent violated this twelve hour maximum from 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006.

Respondent captained the KAD I from 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006. During this timeframe, Respondent was the only person aboard the KAD I with a license to operate a towing vessel. (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-59; Tr. Vol. 2 at 205, 226-230). Deckhand Jeff White possessed a 100-ton license, but did not possess a master or captain's license to operate a tow boat or towing vessel. (Tr. Vol. 1 at 343-344). At times, Mr. White operated the KAD I while Respondent remained with Mr. White in the wheelhouse. (Tr. Vol. 1 at 340-341). Since Respondent was the only licensed captain, the time periods that Mr. White operated the KAD I are included towards Respondent's twelve hour maximum.²³ Evidence shows that the KAD I was underway, making tow, or shifting barges for approximately twelve (12) hours and twenty-nine (29) minutes between 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006.²⁴ (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-

²² Timeframe that Captain Josh operated the KAD I: November 17, 2006 from 1400-1500 underway (1 hour), 1800-1900 underway (1 hour), and 2130-2300 underway (1 hours, 30 minutes). (IO Ex. 26; Tr. Vol. 1 at 220-226).

²³ The discussion section of factual allegation number three discusses this issue in depth.

²⁴ Timeframe: February 4, 2006 from 1700-1850 making tow (1 hour, 50 minutes), 1850-2400 underway (5 hours, 10 minutes); February 5, 2006 from 0001-0030 shifting barges (29 minutes), 0030-0130 underway (1 hour), 0900-1000 underway (1 hour), 1100-1200 underway (1 hour), 1500-1600 underway (1 hour), and 1600-1700 shifting barges (1 hour). (IO Ex. 24-25; Resp't Ex. 23; Tr. Vol. 1 at 340-359; Tr. Vol. 2 at 205, 226-230).

359; Tr. Vol. 2 at 205, 226-230). Aside from mastering the vessel while it is under way, the captain of the vessel is responsible for other duties not noted on a vessels log entry (such as making rounds). (Tr. Vol. 1 at 321-322; Tr. Vol. 2 at 380). Therefore, the log entries do not necessarily include all the hours the captain has worked. Respondent is found to have worked in excess of twelve (12) hours from 1700 hours on February 4, 2006 to 1700 hours on February 5, 2006, violating 46 CFR 15.705(d).

7. Negligence (Grounding) – The evidence did not establish that on February 5, 2006, Respondent negligently navigated the Towing Vessel KAD I, resulting in a grounding.

On February 5, 2006, the towing vessel KAD I, piloted and navigated by Respondent, ran aground. (Tr. Vol. 1 at 383, 389-93; Tr. Vol. 2 at 205). A presumption of negligence arises against the master of a vessel which runs aground. Appeal Decision 2382 (NILSEN) (1985). The Coast Guard alleges Respondent has failed to dispute this presumption of negligence and that it is his negligence which caused the KAD I to run aground. (Complaint and Gov't Closing Argument at 12-13). However, Respondent does provide sufficient evidence that the actions he took were prudent under the circumstance. Specifically, his actions were reasonable considering the presence of an off station buoy and the need to avoid an incoming ship. After careful review of the evidence, the undersigned finds the grounding of the KAD I was not a result of Respondent's negligent actions.

On February 5, 2005, at approximately 1831 hours, the KAD I was pushing barges outbound on the Houston Ship Channel (Channel) and approaching the San Jacinto River. (IO Ex. 16-21; Tr. Vol. 2 at 282-283). Green temporary buoy #127, located just outside the mouth of

the San Jacinto River, was supposed to mark the outbound side of the Channel. (IO Ex. 16-21; Tr. Vol. 1 at 386-388; Tr. Vol. 2 at 289-290; Gov't Closing Argument at 13). This buoy was off station and was closer to the center of the Channel than the outbound side of the Channel. (*Id.*). As the KAD I approached buoy #127, a long tow²⁵ was proceeding out of the San Jacinto River.²⁶ (IO Ex. 27 track 3; Tr. Vol. 1 at 386-88; Tr. Vol. 2 at 291-95, 391-96). In order to avoid the long tow coming out of the San Jacinto River and avoid hitting the out of place buoy, the KAD I turned to the starboard, allowing buoy number 127 to pass on the port side of the KAD I. (Tr. Vol. 1 at 389-90; Tr. Vol. 2 at 292-96). As the KAD I rounded the corner of the Channel, the starboard edge of the lead barge hit mud on the bank of the channel. (Tr. Vol. 1 at 389-93; Tr. Vol. 2 at 296-300). Respondent waited for traffic to clear up and then pulled the barge off the mud of the bank. (*Id.*).

The circumstances described above presented Respondent with difficult choices. Respondent could have proceeded past buoy #127 on his starboard side (the "correct" side), but since the off station buoy was near the center of the channel, this would have placed the KAD I in the way of an oncoming ship. In order to avoid the oncoming ship, Respondent could have run over buoy #127, but this would have damaged the buoy and risk fowling or damaging the propellers of the KAD I. Instead, Respondent took or passed the buoy on his port side and grounded the starboard barge. The grounding caused no damage, injuries, or pollution. Jeff White was aboard the KAD I at the time of the grounding and testified that Respondent's actions

²⁵ A long tow represents a tow pushing three barges in a row. (Tr. Vol. 1 at 386).

²⁶ Respondent presents credible evidence establishing a long tow was proceeding out of the San Jacinto. First, via a radio transmission recorded at the time of the grounding, a long tow is heard announcing its exit of the San Jacinto River. (IO Ex. 27; Tr. Vol. 2 at 394-96). Second, KAD I deckhand Jeff White testifies that a long tow was coming out of the San Jacinto. (Tr. Vol. 1 at 429). Jeff White's testimony is deemed particularly credible since his testimony does not always mirror Respondent's testimony (see factual allegation number three). Third, Coast Guard witness Captain Soileau does not unequivocally say a long tow was not proceeding out of the San Jacinto. (IO Ex. 16-21; Tr. Vol. 1 at 469-75). Captain Soileau does not remember a vessel coming out of the San Jacinto. (*Id.*).

were reasonable and prudent.²⁷ (Tr. Vol. 1 at 393). The undersigned agrees and finds the grounding of the KAD I was not a result of Respondent's negligent actions.

8. Misconduct – The credible evidence did not establish that on February 5, 2006, Respondent wrongfully failed to immediately notify the Coast Guard of a marine casualty.

The KAD I ran aground on February 5, 2006, at approximately 1834 hours. (IO Ex. 20). Through the use of the AIS, the U.S. Coast Guard's VTS observed the KAD I had stopped. (IO Ex. 23). At 1850 hours on February 5, 2006, VTS contacted and spoke with the KAD I and confirmed the KAD I was grounded. (IO Ex. 23; Gov't Closing Arguments at 16). The Coast Guard argues that since VTS initiated radio contact and communicated with Respondent sixteen (16) minutes after the grounding, Respondent failed to notify the Coast Guard "immediately" after the incident.²⁸ (Gov't Closing Arguments at 16-17). Unlike the misconduct alleged in factual allegation number two, Respondent has not provided proof that he filed a Report of Marine Accident, Injury or Death (form CG 2692) within five days of the marine casualty.²⁹ Such a filing would amount to per se satisfaction of the notification requirement. Appeal Decision 2523 (BRACKEN) (1991). However, other evidence shows the Coast Guard received sufficient notification of the marine casualty.

The dispositive issue is whether Respondent notified the Coast Guard "immediately" of a marine casualty within the meaning of 46 CFR 4.05-1(a). The "immediate" requirement should be viewed in connection with the less expeditious form of notification allowed by 46 CFR

Captain Soileau's vessel was three to four minutes behind the KAD I, therefore decreasing his view and need to monitor vessels exiting the San Jacinto at the time the KAD I approached the river. (*Id.*).

²⁷ Jeff White was the holder of a Coast Guard 100-ton inland license at the time of his testimony. (Tr. Vol. 1 at 307).

²⁸ As required by 26 CFR 4.05-1(b).

²⁹ Respondent Exhibit 10 is a copy of form CG 2692 detailing the February 5, 2006 grounding. However, no date is provided indicating when this form was filed with the Coast Guard.

4.05-1(a). 46 CFR 4.05-1(1) allows the immediate notification requirements to be satisfied if the master files a "Report of Marine Accident, Injury or Death" (form CG 2692) within five days of the marine casualty. See Appeal Decision 2261 (SAVOIE) (1981). Considering such factors, the Commandant has previously held that a grounded ship, which was experiencing no safety concerns, did not violate 46 CFR 4.05-a(1) when it took fifty (50) minutes to notify the Coast Guard of its grounding.³⁰ (Id.). In this case, no safety concerns resulted from the grounding and Respondent notified the Coast Guard within sixteen minutes of the grounding. (IO Ex. 20 & 23, Gov't Closing Arguments at 16). The question of what party initiated radio contact is not an issue. No part of 46 CFR 4.05-1 mandates what party needs to initiate communication for notification to occur. Following VTS's initiation of radio contact, Respondent discussed the situation with VTS and "notified" VTS of the grounding. Respondent did not violate the immediate notification requirement of 46 CFR 4.05-1(a).

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the United States Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. §§ 6301 and 7703(1)(B); 46 CFR. Part 5; and 33 CFR. Part. 20.
2. At all relevant times, Respondent was the holder of and acted under the authority of his U.S. Coast Guard issued License Number 1049105 while serving as the captain or master

³⁰ In 1994, 46 CFR 4.05-1(a) was updated. Prior to 1994, notice of a marine casualty was required "as soon as possible" and the 1994 changes required specific marine casualties to be reported "immediately" after the resulting safety concerns were addressed. 59 FR 39469-02. The intent of this change was to "help prevent another disaster such as the derailment of a passenger train near Mobil, Alabama, in September, 1993." *Id.* However, the new rule made little change to non-hazardous marine casualties. "The timely submission of the written notice of marine casualty not involving hazardous conditions will fulfill the requirement of paragraph (a) of § 4.05-1. The substitution of written for spoken notice will lighten the burden both of mariners of giving, and on the Coast Guard of getting, spoken notice of marine casualties not involving hazardous conditions." *Id.* Therefore, while Appeal

aboard the towing vessel KAD I on November 7, 15, & 17 2005 and February 4 & 5, 2006.

3. The factual allegation, number 1, of "**NEGLIGENCE**" against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence including testimony as taken from the record considered as a whole.
4. The factual allegation, number 2, of "**MISCONDUCT**" against Respondent is found **NOT PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
5. The factual allegation, number 3, of "**VIOLATION OF LAW**" against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
6. The factual allegation, number 4, of "**NEGLIGENCE**" against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
7. The factual allegation, number 5, of "**VIOLATION OF LAW**" against Respondent is found **NOT PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
8. The factual allegation, number 6, of "**VIOLATION OF LAW**" against Respondent is found **PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.

Decision 2261 (SAVOIE) (1981) was decided using the old version of 46 CFR 4.05-1(a), its ruling on non-hazardous marine casualty reporting is still relevant.

9. The factual allegation, number 7, of “**NEGLIGENCE**” against Respondent is found **NOT PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.
10. The factual allegation, number 8, of “**MISCONDUCT**” against Respondent is found **NOT PROVED** by a preponderance of the reliable and credible evidence and testimony as taken from the record considered as a whole.

SANCTION

The preponderance of evidence in the entire record considered as a whole supports findings that Respondent acted carelessly with respect to the navigation and operation of the towing vessel KAD I, resulting in two acts of negligence (factual allegations one (1) and four (4)). The record also supports a finding that Respondent committed two acts of misconduct (factual allegations three (3) and six (6)).

It is within the duties and authority of the undersigned judge to order any of a variety of sanctions. See 46 CFR 5.569; see also Appeal Decision 2569 (TAYLOR) (1995). However, the undersigned judge is not bound by 46 CFR 5.569 or the average order table. (Id.). Consideration of mitigating or aggravating factors and evidence does justify a lower or higher sanction than the range suggested in the average order table. 46 CFR 5.569(d).

It is the nature of this administrative proceeding and trial-type hearing to “promote, foster, and maintain the safety of life and property at sea.” Appeal Decision 1106 (LABELLE) (1959). These proceedings are remedial, not penal in nature, and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 CFR 5.5. In this case, Respondent is an experienced Master and Captain with over fifty (50) years of

experience as a boat captain or master with no prior blemishes on his maritime record. Of particular note, Respondent's actions caused no injury, pollution, or damage (except minor scraping/denting). After thoughtful and careful consideration of all the circumstances and facts surrounding this case as discussed above, a license suspension of six (6) months, three (3) months outright, with the remaining three (3) months remitted on twelve (12) months probation of Respondent's license is found to be the appropriate order in this case.

This means that during the twelve (12) months of probation Respondent may work by using his license. However, if a Coast Guard Investigating Officer later serves him with a different Complaint and proves that during the said 12-month probation period Respondent committed any additional negligence or misconduct, Respondent's license will be suspended for an additional three months for violation of probationary period; plus any suspension warranted by any proved new or additional negligence or misconduct and proved in the second or later case and trial type -hearing.

ORDER

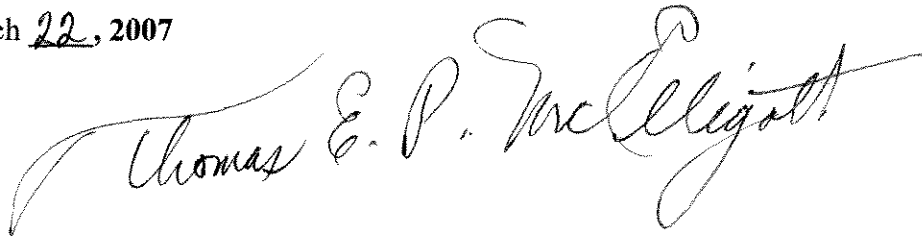
IT IS HEREBY ORDERED that Merchant Mariner's Document Number 1049105 issued to Rollie Bang, Jr., the Respondent, is hereby suspended for six (6) months, three (3) months outright effective when Respondent deposits his said license with the U.S. Coast Guard Sector, Marine Safety Office, 9600 Clinton Drive, Houston, TX 77029 with the remaining three (3) months remitted on twelve (12) months probation. Captain Bang is ORDERED to deliver his license to this Coast Guard Marine Safety Office, to its Commanding Officer or Deputy Commanding Officer or its Senior Investigating Officer.

IT IS FURTHER ORDERED that allegations two (2) (misconduct), five (5) (violation of law), seven (7) (negligence), and eight (8) (misconduct) are found not proved. All other allegations are found proved by the Investigating Officers.

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 B).

Done and dated March 22, 2007

Houston, Texas

A handwritten signature in cursive script, reading "Thomas E. P. McElligott". The signature is written in dark ink and is positioned above a horizontal line.

THOMAS E.P. McELLIGOTT

ADMINISTRATIVE LAW JUDGE

ATTACHMENT A
WITNESS AND EXHIBIT LISTS

Docket Number 06-0016

Investigating Officers' WITNESSES 8:

1. Barry Alexander
2. Christopher Buehl
3. Alberto Hernandez
4. Cecil McGuffee
5. Ralph Osborn
6. Patrick Soileau
7. Michael Stevenson
8. Jeff White

RESPONDENT'S WITNESSES 4:

1. Rollie Bang, Jr.
2. Bonnie Bang
3. Joe Blount
4. Darwin Punkka

Docket Number 06-0016

EXHIBIT LIST

UNITED STATES COAST GUARD'S EXHIBITS by Investigating Officers (37):

- IO Ex. 1 USCG's Vessel Traffic Service (VTS) Houston-Galveston Incident Report
- IO Ex. 2 Automated Information System (AIS) Display – showing position of vessels.
- IO Ex. 3 Statement of Alberto Hernandez (VTS)
- IO Ex. 4 Statement of Barry Alexander (Ethyl Terminal Manager)
- IO Ex. 5 Statement of Invar Bennmo (Chief Officer onboard the LIBBY G)
- IO Ex. 6 Statement of Jeff White (KAD1 – concerning allision on Nov 7, 2005)
- IO Ex. 7 Rough Log from KAD I from Nov 7, 2005
- IO Ex. 8 Shift schedule from KAD I from Nov 1-14, 2005
- IO Ex. 9(a) AIS Display – printout showing vessels positions @ 2103.59 on Nov 15, 2005
- IO Ex. 9(b) AIS Display – printout showing vessels positions @ 2105.24 on Nov 15, 2005
- IO Ex. 9(c) AIS Display – printout showing vessels positions @ 2106.23 on Nov 15, 2005
- IO Ex. 9(d) AIS Display – printout showing vessels positions @ 2107.14 on Nov 15, 2005
- IO Ex. 9(e) AIS Display – printout showing vessels positions @ 2108.07 on Nov 15, 2005
- IO Ex. 9(f) AIS Display – printout showing vessels positions @ 2108.40 on Nov 15, 2005
- IO Ex. 9(g) AIS Display – printout showing vessels positions @ 2109.21 on Nov 15, 2005
- IO Ex. 9(h) AIS Display – printout showing vessels positions @ 2109.49 on Nov 15, 2005
- IO Ex. 9(i) AIS Display – printout showing vessels positions @ 2110.38 on Nov 15, 2005
- IO Ex. 9(j) AIS Display – printout showing vessels positions @ 2111.07 on Nov 15, 2005
- IO Ex. 10 CG-2692 from Bonnie Sue
- IO Ex. 11 Statement of Jeff White (KAD I – concerning collision on Nov 15, 2005)

- IO Ex. 12 Statement of Darwin Punkka (passenger onboard KAD I)
- IO Ex. 13 Rough Log from KAD I from Nov 15, 2005
- IO Ex. 14 VHF Channel 13 recording (CD)
- IO Ex. 15 AIS Display – printout showing vessels positions @ 1830.00 on Feb 05, 2006
- IO Ex. 16 AIS Display – printout showing vessels positions @ 1831.00 on Feb 05, 2006
- IO Ex. 17 AIS Display – printout showing vessels positions @ 1832.32 on Feb 05, 2006
- IO Ex. 18 AIS Display – printout showing vessels positions @ 1833.04 on Feb 05, 2006
- IO Ex. 19 AIS Display – printout showing vessels positions @ 1833.48 on Feb 05, 2006
- IO Ex. 20 AIS Display – printout showing vessels positions @ 1834.27 on Feb 05, 2006
- IO Ex. 21 AIS Display – printout showing vessels positions @ 1958.22 on Feb 05, 2006
- IO Ex. 22 Statement of Captain Pat Soileau (Apollo)
- IO Ex. 23 VTS Houston-Galveston Incident Report (Grounding on Feb 5, 2006)
- IO Ex. 24 Rough Log from KAD I from Feb 4, 2006
- IO Ex. 25 Electronic Log from KAD I from Feb 5, 2006
- IO Ex. 26 Rough Log from KAD I from Nov 17, 2005
- IO Ex. 27 VHF Channel 13 recording (CD) of Feb 5, 2006 grounding
- IO Ex. 28 MISLE records indicating Rollie Bang, Jr. possesses license #1049105
- IO Ex. 29 Statement of Jeff White (July 13, 2006)
- IO Ex. 30 State of Chris Buehl (July 17, 2006)
- IO Ex. 31 Easel pad drawing – totaling hours of log (IO Ex. 7)
- IO Ex. 32 Easel pad drawing – totaling hours of log (IO Ex. 26)
- IO Ex. 33 Statement of Albert Naquin (July 17, 2006)
- IO Ex. 34 Easel pad drawing – how wind affects barges

- IO Ex. 35 Easel pad drawing – made by Capt. McGuffie
- IO Ex. 36 Easel pad drawing – made by Capt. McGuffie
- IO Ex. 37 Calculation of knots vs. miles

Docket Number 06-0016

RESPONDENT'S EXHIBITS (38):

- Resp't Ex. 1 VTS audio recording transcript prepared by court reporter Mark Miller
- Resp't Ex. 2 NOAA weather record for Nov 7, 2005 for Houston Ship Channel
- Resp't Ex. 3 NOAA weather record for Nov 15, 2005 for Houston Ship Channel
- Resp't Ex. 4 NOAA weather record for Feb 5, 2005 for Houston Ship Channel
- Resp't Ex. 5 NOAA chart for Peggy's Lake and Baytown area of Houston Ship Channel
- Resp't Ex. 6 NOAA Chart for Green's Bayou area of Houston Ship Channel
- Resp't Ex. 7 NOAA Chart for Lynchburg Landing area of Houston Ship Channel
- Resp't Ex. 8 Statement of Darwin Punkka
- Resp't Ex. 9 Statement of Jeff White
- Resp't Ex. 10 CG-2692 for KAD I for Feb 5, 2006
- Resp't Ex. 11 CG-2692 for KAD I for Nov 7, 2005
- Resp't Ex. 12 CG-2692 for KAD I for Nov 15, 2005
- Resp't Ex. 13 Letter from U.S.C.G dated 30 January 2006; FOIA Request for VTS audio and
AIS recording of Nov 15, 2006 incident
- Resp't Ex. 14 Letter from U.S.C.G dated 30 January 2006; FOIA Request for VTS audio and
AIS recording of Nov 7, 2006 incident

Resp't Ex. 15 Certified NOAA water levels; observed wind speeds, gusts and direction; and air and water temperature data for November 7, 2005, November 15, 2005, and February 5, 2006.

Resp't Ex. 16 Copy of Rollie Bang's license

Resp't Ex. 17 Easel pad drawing – diagram of boats

Resp't Ex. 18 Statement from OCI deckhands (February 7, 2006)

Resp't Ex. 19 Easel pad drawing – showing hours Rollie Bang was at the helm

Resp't Ex. 20 Easel pad drawing – make from times given in IO Ex. 7

Resp't Ex. 21 Easel pad drawing – made from times given in IO Ex. 26

Resp't Ex. 22 Easel pad drawing – made from times given in IO Ex. 24 and 25

Resp't Ex. 23 Log from Feb 5, 2006

Resp't Ex. 24 Chart

Resp't Ex. 25 Easel pad drawing – picture made of KAD I

Resp't Ex. 26 Blowup of Resp't Ex. 5

Resp't Ex. 27 Easel pad drawing – barge configuration

Resp't Ex. 28 Blowup of Resp't Ex. 7

Resp't Ex. 29 Blowup of IO Ex. 21

Resp't Ex. 30 Easel pad drawing – drawing of grounding

Resp't Ex. 31 Easel pad drawing – drawing made my Darwin Punkka

Resp't Ex. 32 Easel pad drawing – drawing made my Darwin Punkka

Resp't Ex. 33 Easel pad drawing – drawing made my Cecil McGuffie

Resp't Ex. 34 Easel pad drawing – drawing made my Cecil McGuffie

Resp't Ex. 35 Easel pad drawing – drawing made my Cecil McGuffie

Resp't Ex. 36 Hand drawn diagram

Resp't Ex. 37 Overhead sheets

Resp't Ex. 38 Easel pad drawing – barrage configuration

ATTACHMENT B

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

Docket Number 06-0016

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 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.


Certificate of Service

I hereby certify that the attached Initial Decision and Order has been served on the following party or its designated representative by First Class Mail as follows:

Lt. Cliff Harder
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Houston, TX 77029

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ALJ Docketing Center
United States Coast Guard
U.S. Customs House
40 S. Gay Street, Rm 412
Baltimore, MD 21202-4022


Livia Torres,
Paralegal Specialist

Done and dated March 22, 2007
Houston, Texas