

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

UNITED STATES COAST GUARD

Complainant

vs.

JOHN KENNETH PARKER

Respondent.

Docket Number: CG S&R 06-0088
CG Case No. 2462265

DECISION AND ORDER

Issued: September 24, 2007

Issued by: Walter J. Brudzinski, Administrative Law Judge

Appearances:

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PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard) initiated this administrative action seeking revocation of John Kenneth Parker's (Respondent) Merchant Mariner's License Number: 1119007. This action was brought pursuant to the authority contained in 46 U.S.C. 7703 and its underlying regulations codified at 46 CFR Part 5 and 33 CFR Part 20.

The Coast Guard issued its Complaint on March 3, 2006 charging Respondent with five (5) counts of negligence and two (2) counts of misconduct. Specifically, the Coast Guard alleges that on August 13, 2005, Respondent: 1) failed to proceed at a safe speed in order to avoid a collision in accordance with Inland Navigation Rule 6; 2) failed to use all available means appropriate to the prevailing circumstances and conditions to determine if a risk of collision existed in accordance with Inland Navigation Rule 7; 3) failed to slacken vessel speed to allow more time to assess the situation after becoming aware of the existence of a possible radar contact ahead of the P/V NORA VITTORIA in accordance with Inland Navigation Rule 8; 4) failed to maintain a proper lookout by sight and all available means appropriate in the prevailing circumstances and conditions in accordance with Inland Navigation Rule 5; 5) failed to make appropriate sound signals in or near an area of restricted visibility in accordance with Inland Navigation Rule 35; 6) failed to submit in a timely manner a written Notice of Marine Casualty and Voyage Record as required by 46 CFR 4.05-10(a); and 7) provided a written statement knowing the statement contained materially false, fictitious or fraudulent information in violation of 18 U.S.C. § 1001. After two (2) extensions of time to file an answer, Respondent filed his Answer on May 15, 2006.

The hearing commenced in Boston, Massachusetts on July 19, 2006 at 9:47 a.m. after a brief meeting with the undersigned and concluded on July 20, 2006. Lieutenant Commander

Russell E. Bowman, USCG, an attorney, and Lieutenant Edward X. Munoz, the Investigating Officer, represented the Coast Guard. David J. Farrell, Jr., Esquire appeared on behalf of Respondent. Additional attorneys present at the hearing included Kenneth M. Chiarello, Esquire, counsel for Respondent's former employer Boston Harbor Cruises, and Sheila E. McCravy, Esquire, counsel for the owners of the vessels hit by Respondent. The Coast Guard presented the testimony of six (6) witnesses and introduced fifteen (15) exhibits. Respondent, by counsel, presented the testimony of four (4) witnesses and introduced five (5) exhibits. Additionally, there were two (2) ALJ exhibits. The list of witnesses and exhibits is contained in **Attachment A**.

On September 25, 2006, both parties submitted post hearing briefs, including proposed findings of fact and conclusions of law and on October 16, 2006, the parties submitted reply briefs. The undersigned's rulings on the parties' proposed findings of facts and conclusions of law are contained in **Attachment B**.

After careful review of the entire record, including witness testimony, exhibits, applicable statutes, regulations and case law, I find the Coast Guard **PROVED** that Respondent negligently operated the P/V NORA VITTORIA on August 13, 2005 and committed one (1) act of misconduct. Furthermore, I find the Coast Guard has **NOT PROVED** the second count of misconduct, that Respondent provided a written statement knowing the statement contained materially false, fictitious or fraudulent information.

FINDINGS OF FACT

The Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimony of witnesses, and the entire record taken as a whole.

1. At all relevant times mentioned herein and specifically on August 13, 2005, Respondent, John Kenneth Parker, was the holder of Coast Guard Merchant Mariner License Number 1119007. (ALJ Ex. 1).
2. At all relevant times mentioned herein and specifically on August 13, 2005, Boston Harbor Cruises employed Respondent as Master of the M/V NORA VITTORIA, a high-speed catamaran. (Tr. 1 at 21, 23; Tr. 2 at 257-261).
3. The M/V NORA VITTORIA was built by Gladding Hearn Shipbuilding and delivered to Boston Harbor Cruises in the fall of 1998. It is 121 feet long, 33 feet wide, and draws approximately 6.5 feet when carrying a full compliment of passengers. (350). (IO Ex. 10 at 4; Tr. 1 at 24-37).
4. The M/V NORA VITTORIA is powered by four Cummins KTA-38 (M2) diesels rated at 1300 HP each, driving four MJP water-jets, two on the stern of each hull. The vessel is capable of a maximum speed of 36 knots, but averages closer to 32 knots and can safely go full astern from 35 knots stopping the vessel in one and a half boat lengths. (IO Ex. 10 at 4; Tr. 1 at 24-26).
5. The control system of the M/V NORA VITTORIA uses push button technology, which includes primary, backup and the clutch/backflush panel. The primary control system uses a multidirectional joystick, controlling all functions of the jets and a steering lever for controlling nozzle direction only. The primary system performs two functions, harbor mode and pilot mode through a single push-button. Harbor mode is used for dockside and harbor maneuvering, while pilot mode is for vessel transit. (IO Ex. 10 at 12).

6. The M/V NORA VITTORIA is equipped with the following navigational equipment:
Northstar 951 XD GPS; Furuno GP-1750 GPS; Nobeltec Electronic Chart Plotter;
two Furuno FR-8051 Radars with an optional circuit in the starboard unity
autoplotting; Furuno PG-1000 Integrated Heading Sensor; Datamarine DDM-600
Depth Sounder; Raytheon Ray-430 Loudhailer; two Furuno VHF FM-2710 radios.
(IO Ex. 10 at 6).
7. On August 13, 2005, the M/V NORA VITTORIA engaged in transporting
commuters, sightseeing, and whale watching. (Tr. 1 at 21; Tr. 2 at 257).
8. On August 13, 2005, after the M/V NORA VITTORIA had completed two whale
watching trip and one sunset cruise, it began its final return trip of the day from Long
Wharf to Hingham, Massachusetts at approximately 2100. (Tr. 1 at 44, 45; Tr. 2 at
257, 260; Resp. Ex. B, track line).

9. The National Weather Service and the Coast Guard issued numerous severe
thunderstorm warnings for that evening. (IO Ex. 3-7). Specifically, thunderstorms
were expected in the West Gut and surrounding areas at the same time as the M/V
NORA VITTORIA's transit to Hingham. (IO Ex. 3-7).
10. As Respondent navigated the M/V NORA VITTORIA towards Hingham, Mr. Pudlo,
a deckhand, and Ms. Sandy McGrath, the galley attendant, were below deck cleaning.
(Tr. 1 at 44, 354-55). Mr. Walsh, the senior deckhand, completed the routine
departure duties and then joined Respondent on the bridge due to weather coming
through. (Tr. 1 at 54, 2 at 263). The only other people on the M/V NORA
VITTORIA were two non paying passengers, Ms. McGrath's daughter and her friend.
(Tr. 2 at 346).

11. The weather and visibility was good at the beginning of the M/V NORA VITTORIA's trip to Hingham. (Tr. 1 at 48-50).
12. Respondent began to observe the storm as the M/V NORA VITTORIA entered the West Gut. (Tr. 2 at 282).
13. The M/V LIGHTNING departed Quincy en route Boston and encountered the storm cell which restricted visibility to almost zero (0). (Tr. 1 at 261, 267-68).
14. In response to the reduced visibility and severe weather conditions, the captain of the M/V LIGHTNING, Deborah Ridings, posted two (2) lookouts and reduced her speed to below 7 knots. (Tr. 1 at 267-68).
15. As the storm intensified, Captain Ridings reduced the M/V LIGHTNING to a full stop. (Tr. 1 at 271).
16. The heavy rain, severe lightening and high winds reduced the visibility to virtually zero (0). (Tr. 1 at 92, 165, 220, 260).
17. On August 13, 2005, Jeffery and Nicole Crispo, along with Jeffery's brother Stephen Crispo and friend Dana Gagne spent the day on Peddock's Island attending a cookout. (Tr. 1 at 295-98).
18. When all four prepared to leave Peddock's Island, Stephen Crispo asked Jeffery Crispo to tow his boat because Stephen Crispo's boat became disabled on his trip to Peddock's Island. (Tr. 1 at 301).
19. Jeffery Crispo tied Stephen Crispo's thirty six (36) foot lobster boat, the F/V LAINA LOU, to Jeffery and Nicole Crispo's twenty three (23-25) foot Chris Craft pleasure craft, the MSJC69, (Crispos' vessels) alongside each other with both bows pointing in the same direction. (Tr. 1 at 301).

20. The MSJC69, with Jeffery and Nicole Crispo aboard, and the F/V LAINA LOU, with Stephen Crispo and Dana Gagne aboard, departed Peddock's Island around 2000 with Nicole Crispo at the helm of the MSJC69. (Tr. 1 at 302-04).
21. During the transit across the West Gut to Quincy, just east of Nut Island and inside the Quincy Yacht Club mooring area, the MSJC69's propeller became lodged in a mooring line causing the engine to stall. (Tr. 1 at 305-09).
22. The occupants of the two vessels attempted to untangle the line from the propeller and restart the MSJC69's engine. They could not untangle the rope and their attempts to restart the engine were unsuccessful due to the battery running down. Moreover, it was getting dark and raining, with thunder and lightning. (Tr. 1 at 308-10; Tr. 2 at 18).
23. Steven Crispo dropped the 40 pound Danforth-type anchor from the F/V LAINA LOU. (Tr. 1 at 310, 331; Tr. 2 at 15, 16).
24. While at anchor, Steven Crispo, energized the F/V LAINA LOU's running lights because the MSJC69's running lights were not functioning due to its dead battery. (Tr. 2 at 18, 19, 32).
25. As the storm cell enveloped the Crisos' vessels, Nicole and Jeffery Crispo took cover inside the cabin of the MSJC69 while Steven Crispo and Dana Gagne stayed aboard the F/V LAINA LOU. (Tr. 1 at 311).
26. The M/V NORA VITTORIA was traveling approximately twenty five (25) to twenty seven (27) knots as it approached buoy two (2). (Tr. 2 at 270, 336).
27. As the M/V NORA VITTORIA approached buoy two (2), visibility reduced to approximately twenty five (25) to thirty (30) feet. (Tr. 1 at 63-4).

28. Respondent slackened his speed by approximately two (2) knots, then navigated the M/V NORA VITTORIA around buoy two (2) directly into the storm cell and could not see anything on the radar due to the “obliterated blob.” (Tr. 2 at 284-88).
29. After making the turn, Respondent spotted the Crispos’ vessels tied together dead ahead, about 80 feet in front of him. (Tr. 2 at 290).
30. Respondent then put the rudder hard right, trying to avoid colliding with the Crispos’ vessels. (Tr. 2 at 284-90).
31. The defensive maneuver failed and the M/V NORA VITTORIA collided with the Crispos’ vessels. (Tr. 2 at 292).
32. In the brief moments prior to the collision, the occupants of the Crispos’ vessels observed the M/V NORA VITTORIA approaching their position at a high rate of speed. (Tr. 1 at 313-14, 2 at 13, 24).
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33. Stephen Crispo whistled and yelled to get the attention of the M/V NORA VITTORIA prior to the collision. (Tr. 2 at 22).
34. Stephen Crispo heard no sound signals coming from the M/V NORA VITTORIA. (Tr. 2 at 31).
35. Nicole Crispo heard no sound signals coming from the M/V NORA VITTORIA. (Tr. 1 at 344).
36. The Coast Guard rescue vessel CG-25599 responded to the call for assistance placed by Respondent. (Tr. 1 at 168-69, 219, 317, Tr. 2 at 292-94).
37. Nicole Crispo was given a citation for failure to maintain a constant lookout because she had been at the helm of the MSJC69. (Tr. 1 at 337).

38. Nicole Crispo sustained minor chemical burns from fuel spillage after the collision. (IO Ex. 13).
39. Steven Crispo suffered from a broken nose, a chipped bone in his right elbow, and lacerations on his head, hands, and upper body. (IO Ex. 13).
40. Jeffery Crispo suffered lacerations over a large part of his body, incrustation of barnacles in his chest and leg area, and suspected nerve damage. (IO Ex. 13).
41. After the incident, Respondent submitted a CG-2692 form to the Coast Guard on September 20, 2005, thirty eight (38) days after the collision. (Tr. 2 at 122).

DISCUSSION

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. Administrative actions against a license, certification or document are remedial and not penal in nature. These actions are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. If a merchant mariner license holder commits an act of negligence, misconduct, or a violation of law or regulation in performing his duties related to the vessel, his license may be suspended or revoked. 46 U.S.C. § 7703(1)(B). Title 46 CFR 5.19 gives Administrative Law Judges authority to suspend or revoke a document, license, or certificate in a hearing for violations arising under 46 U.S.C. § 7703.

To successfully allege negligence and misconduct, the Coast Guard must prove by a preponderance of the evidence that a respondent was acting under the authority of his license. 46 U.S.C. § 7703. A person employed in the service of a vessel is considered to be acting under the authority of a license, certificate, or document when holding 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). It is uncontested that Respondent was employed by Boston Harbor Cruises and working under the authority of his license. (Tr. 2 at 253-54).

The Coast Guard charged Respondent with five (5) counts of Negligence and two (2) counts of Misconduct stemming from a collision that occurred on August 13, 2005. The Coast Guard seeks revocation of Respondent's license. For the reasons stated below, I find that the Coast Guard has proved that Respondent operated the M/V NORA VITTORIA negligently on five counts and committed one act of misconduct. I do not find that the evidence was sufficient to prove that Respondent committed the second act of misconduct.

Burden of Proof

The U.S. Administrative Procedure Act (APA), 5 U.S.C. 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges. 46 U.S.C. 7702(a). The APA authorizes imposition of sanctions 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). Under Coast Guard procedural rules and regulations, the burden of proof is on the Investigating Officer to prove that the charges are supported by a preponderance of the evidence. 33 CFR 20.701, 20.702(a). "The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court." Appeal Decision 2477 (TOMBARI) (1988). The burden of proving a fact 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)). Therefore, the

Investigating Officer(s) (IO) must prove by credible, reliable, probative and substantial evidence that Respondent more likely than not committed the violation charged.

Negligence

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. The Coast Guard established by a preponderance of reliable and credible evidence that Respondent committed five (5) acts of negligence. Factual Allegations 11-15 of the Complaint specifically address the acts of negligence alleged by the Coast Guard; each negligence offense will be addressed below.

First Offense (Factual Allegation 11) – Respondent failed to proceed at a safe speed as to take proper and effective action to avoid a collision and stop the P/V NORA VITTORIA within a distance appropriate to the prevailing conditions as required by Rule 6 of the Inland Rules of Navigation.

Rule 6 of the Inland Rules of Navigation states,

Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.

In determining a safe speed the following factors shall be among those taken into account:

(a) By all vessels:

- (i) the state of visibility;
- (ii) the traffic density including concentration of fishing vessels or any other vessels;
- (iii) the maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions;
- (iv) at night the presence of background light such as from shores lights or from back scatter of her own lights;
- (v) the state of wind, sea, and current, and the proximity of navigational hazards;

(vi) the draft in relation to the available depth of water.

(b) Additionally, by vessels with operational radar:

(i) the characteristics, efficiency and limitations of the radar equipment;

(ii) any constraints imposed by the radar range scale in use;

(iii) the effect on radar detection of the sea state, weather, and other sources of interference;

(iv) the possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range;

(v) the number, location, and movement of vessels detected by radar; and

(vi) the more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects in the vicinity.

33 U.S.C. § 2006.¹

On August 13, 2005, Respondent was traveling at a speed of approximately twenty seven (27) knots when he began navigating the turn around buoy two (2) in the West Gut and encountered a rain squall. (Tr. 2 at 270, 335). According to weather reports, there were strong thunderstorm warnings for the Boston, Quincy and Scituate waters with forecasts of gusts up to thirty five (35) knots, small hail, heavy rain, and dangerous lightening. (IO Ex. 5, 6, 8, and 9). Respondent tracked the storm cell on his radar and as he navigated the turn into the oncoming storm cell he reduced his speed by approximately two (2) knots. (Tr. 2 at 282, 284-88).

After encountering the rain squall, Respondent slowed the M/V NORA VITTORIA slightly but still continued at a speed of approximately twenty five (25) knots even though the visibility was reduced. (Tr. 2 at 284-88). Respondent states that the visibility was approximately a quarter to a half mile, while Mr. Walsh testified that he could not see past the M/V NORA

¹ Sec. 303 of Pub.L. 108-293 (August 9, 2004) provides that Section 2 of the Inland Navigational Rules Act of 1980 is repealed (33 U.S.C. §§ 2001-38) effective upon the effective date of final rules (published by the Secretary of the Department in which the Coast Guard is operating) prescribing inland rules applicable to all vessels upon the

VITTORIA's twin bows, approximately twenty five (25) to thirty (30) feet. (Tr. 1 at 63, Tr. 2 at 286). Mr. Walsh's testimony is more consistent with evidence that other vessels in the area either ceased movement or slowed down to speeds of approximately seven (7) knots. (Tr. 1 at 267-71). While navigating through the squall and around the turn at buoy two (2), Respondent sighted the Crispos' vessels and immediately placed the M/V NORA VITTORIA in reverse to try and avoid a collision. (Tr. 2 at 290). However, the M/V NORA VITTORIA did collide with the Crispos' vessels while traveling at approximately twenty (20) knots. (*Id.*).

Respondent tracked the squall on his radar until he entered it. (Tr. 2 at 282, 288). He described this storm cell image on his radar as a large green mass and admitted that he could not "see" into the storm cell by radar. *Id.* This alone should have illustrated to Respondent how severe this storm was and put him on notice that there will be visibility problems when he entered the squall. (33 U.S.C. § 2006 (b)). Furthermore, this should have given Respondent a warning that traveling at twenty (20) knots, or at any speed in excess of that which he can take proper and effective action to avoid collision, was placing himself and others in danger.

Traveling at speeds of twenty (20) to twenty five (25) knots in near zero (0) visibility is irresponsible and dangerous. All other vessels in the area took precautions while navigating through the squall by reducing their speed drastically, if not reducing it to zero (0). The High Speed Vessel Operations Manual states at page 27, that "[t]he Master is obligated to maintain a safe speed in any situation especially in fog . . . [i]f any uncertainty exists, or the Master is unsure of the particular area characteristics, the Master should reduce the vessels (sic) speed to a safe and comfortable level . . . with a high density of traffic in narrow channels some vessels may be anchored or in distress." (IO Ex. 10 at 27). Respondent did not proceed at a safe speed

inland waters of the United States. To date, no final rules have been issued. Therefore, until such final rules are issued, Sec. 2 of the Inland Navigation Rules Act of 1980 is still in effect.

under the prevailing circumstances and conditions as to allow him to take proper and effective actions to avoid a collision. Thus, I find Factual Allegation 11 proved.

Second Offense (Factual Allegation 12) – Respondent failed to use all available means appropriate to the prevailing circumstances and conditions to determine if the risk of collision existed as required by Rule 7 of the Inland Rules of Navigation.

Rule 7 of the Inland Rules of Navigation states,

(a) Determination if risk exists

Every vessel shall use all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. If there is any doubt such risk shall be deemed to exist.

(b) Radar

Proper use shall be made of radar equipment if fitted and operational, including long-range scanning to obtain early warning of risk of collision and radar plotting or equivalent systematic observation of detected objects.

(c) Scanty information

Assumptions shall not be made on the basis of scanty information, especially scanty radar information.

(d) Considerations taken into account in determining if risk exists

In determining if risk of collision exists the following considerations shall be among those taken into account:

- (i) such risk shall be deemed to exist if the compass bearing of an approaching vessel does not appreciably change; and
- (ii) such risk may sometimes exist even when an appreciable bearing change is evident, particularly when approaching a very large vessel or a tow or when approaching a vessel at close range.

33 U.S.C. § 2007.

At the time of the collision, the M/V NORA VITTORIA had entered a squall that reduced visibility to practically zero (0). (Tr. 1 at 92, 165, 220, 260). The squall's rain clutter also

“obliterated” the radar screen causing a green circle (the storm cell) to form south to southwest across the screen. (Tr. 2 at 282). This effect occurs when there is so much rain bouncing off the water that it causes the radar screen to turn completely green because of all the contact points. Therefore, the radar was useless at the time of the collision. Since the radar screen was of no practical value at the time of the collision, it was not an available means appropriate to determine risk of collision. Assumptions shall not be made on the basis of scanty information, especially scanty radar information. 33 U.S.C. § 2007 (c).

Respondent did not have a proper lookout at the time of the collision. Both Respondent and Mr. Walsh were inside the wheelhouse of the M/V NORA VITTORIA monitoring the vessel’s two radars, the chart plotter, and looking out the windows. (Tr. 2 at 278). The only other people aboard the M/V NORA VITTORIA were Mr. Pudlo, Ms. McGrath, her daughter, and her daughter’s friend who were below deck at the time of the collision. (Tr. 1 at 44, 355).

Since all of the people aboard the M/V NORA VITTORIA were inside the vessel at the time of the collision, no one could possibly have acted as a proper lookout. Because Respondent did not have a lookout posted outside the wheelhouse, he could not take advantage of the available means of the human ear. (Tr. 2 at 278). Just prior to the collision, Steven Crispo was whistling and yelling in an attempt to attract the attention of the M/V NORA VITTORIA. If a person had been stationed outside they might have been able to either see or hear the Crisos calling for help prior to the collision and thus have avoided the incident.

Finally, Respondent was traveling at a speed between twenty seven (27) and twenty five (25) knots before he saw the Crisos’ vessels ahead of him. (Tr. 2 at 270, 335). Respondent knew that he was traveling into a squall and slowed down only minimally despite the weather reports, the obliteration of the radar screen due to the immense amount of rain clutter, and the

personal observation of reduced visibility. (Tr. 2 at 282, 336-37). Respondent could have stopped the M/V NORA VITTORIA and waited the squall out, thus avoiding the collision.

Therefore, I find that Factual Allegation 12 proved.

Third Offense (Factual Allegation 13) – Respondent did not take appropriate action to avoid a collision in that you failed to slacken vessel speed or take all way off to allow more time to assess the situation after you became aware of the existence of a possible radar contact ahead of the M/V NORA VITTORIA as required by Rule 8 of the Inland Rules of Navigation.

Rule 8 of the Inland Rules of Navigation subsection (e) states that “if necessary to avoid collision or allow more time to assess the situation, a vessel shall slacken her speed or take all way off by stopping or reversing her means of propulsion.” 33 U.S.C. § 2008. Prior to leaving Long Wharf in Boston for the trip back to the Hingham, in the Quincy Bay area, a weather report was issued for the entire Boston, Massachusetts area. (IO Ex. 3, 4, 8). These reports stated there was a severe thunderstorm watch with a possibility of hail up to one (1) inch in diameter, wind gusts up to seventy (70) miles per hour, and dangerous lightning. (*Id.*)

Respondent was aware of the storm cell moving across that area and that he would be navigating the M/V NORA VITTORIA into the path of the oncoming storm. (Tr. 2 at 282, 338). Furthermore, Respondent observed the storm cell on his radar screen for at least several hundred yards prior to making the turn at buoy two (2). (Tr. 2 at 281). In response to this observation, Respondent reduced his speed to twenty five (25) knots and navigated the turn at buoy two (2) placing the M/V NORA VITTORIA directly into the oncoming storm. (Tr. 2 at 284-88). Even after Respondent entered the squall he only slackened his speed to zero (0) thrust and then full reverse when he observed the Crispos’ vessels in the water dead ahead of the M/V NORA VITTORIA. (Tr. 2 at 290).

Respondent's actions were not compliant with Rule 8 of the Inland Rules of Navigation subsection (e). Respondent had ample opportunity to slow the M/V NORA VITTORIA to avoid the collision. Respondent's failure to slacken his speed in a timely fashion directly contributed to the collision. Therefore, I find Respondent was negligent when he failed to comply with Rule 8 and I find Factual Allegation 13 proved.

Fourth Offense (Factual Allegation 14) – Respondent failed to maintain proper lookout by sight and by all available means appropriate in the prevailing circumstances and conditions as to make full appraisal of the situation and of the risk of a collision as required by Rule 5 of the Inland Rules of Navigation.

Rule 5 of the Inland Rules of Navigation states that “every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision.” 33 U.S.C. § 2005. Furthermore, Boston Harbor Cruises’ policy concerning “Inland Reduced Visibility” states that a third crewmember should be posted on the bow or bridge as a lookout. (IO Ex. 10 at 27, lines 7 and 8).

On the evening of August 13, 2005, the M/V NORA VITTORIA did not have a person posted who was solely a look-out at the start of the trip to Hingham. As the weather conditions changed, Respondent believed that it would be too dangerous to put a look-out on the bow due to the numerous lightening strikes. (Tr. 2 at 346). Respondent did not maintain a look-out by “all available means.” First, Respondent and Mr. Walsh were inside of the wheelhouse doing an “ergonomic scan.” (Tr. 1 at 68, 101-03; Tr. 2 at 278, 330). An ergonomic scan is a process of scanning your electronics and looking out the window and back to electronics again. (Tr. 2 at 278). Thus, neither Respondent nor Mr. Walsh solely devoted their attention to looking out for other vessels. At any time Respondent and Mr. Walsh could have simultaneously both been looking at instruments and not looking out for vessels in the water.

Second, “all available means” would include both Ms. McGrath and Mr. Pudlo. Ms. McGrath and Mr. Pudlo were below deck cleaning when the M/V NORA VITTORIA encountered the deteriorating weather conditions. (Tr. 1 at 44, 354-55). Other vessels in the area used all available personnel to act as look-outs due to the lack of visibility. (Tr. 1 at 171, 261). Specifically, the M/V Flying Cloud under the direction of Captain Deborah C. Ridings, posted her entire crew on each side of the pilothouse to help navigate through the storm. (Tr. 1 at 261).

“A look out may not properly have other duties.” Appeal Decision 2214 (CHRISTENSEN) (1980). As stated above, neither Respondent nor Mr. Walsh were solely devoted to looking out for other vessels. They were each engaged in an ergonomic scan and thus two thirds of the time had their attention on things other than acting as a look-out. (Tr. 1 at 68, 101-03; Tr. 2 at 278, 330). Therefore, neither Respondent nor Mr. Walsh would constitute a proper lookout as required by Rule 5. Further, a significant blind spot and the lack of a bow lookout constitutes prima facie evidence of an improper lookout. Appeal Decision 2581 (DRIGGERS) (1996). In light of all the evidence presented at the hearing, I find that Respondent did violate Rule 5 of the Inland Rules of Navigation and committed an act of negligence by failing to maintain a proper look-out and Factual Allegation 14 is proved.

Fifth Offense (Factual Allegation 15) – Respondent failed to make appropriate sound signals when or near an area of restricted visibility as required by Rule 35 of the Inland Rules of Navigation.

Rule 35 of the Inland Rules of Navigation states that “in or near an area of restricted visibility . . . (a) a power drive vessel making way through the water shall sound at intervals of not more than 2 minutes one prolonged blast.” 33 U.S.C. § 2035 (a). Many vessels have a sound signal device that automatically sounds signals at a specific interval. This device was installed in the M/V NORA VITTORIA and available to Respondent on August 13, 2005. (Tr. 2 at 272-77).

Respondent admitted to not taking advantage of the sound signal device that evening. Instead, he stated that he sounded the whistle manually. (*Id.*).

I do not find Respondent's testimony concerning the sounding of the whistle credible for several reasons. Respondent admits that he specifically sounded the whistle manually to shorten the interval because he was afraid the M/V NORA VITTORIA would outrun the signal if it was sounded at two (2) minute intervals. (Tr. 2 at 272-77). However, in addition to having to keep time and sound the vessel's whistle, Respondent was watching the radar, charting, and looking out of the wheel house's window. (Tr. 1 at 68, 101-03; Tr. 2 at 278, 330). The number of acts engaged in by Respondent left room for distraction and loss of track of the time intervals between whistle blasts. Second, the Crispos never heard a sound signal made by the M/V NORA VITTORIA. (Tr. 1 at 317, 344). This was corroborated by the Investigating Officer's information obtained by the Investigating Officer from the other crew members of the M/V NORA VITTORIA. If Respondent had been sounding the whistle at two (2) minute intervals then the Crispos would have heard the P/V NORA VITTORIA prior to seeing it.

After careful consideration of all the evidence presented, I find that Respondent did not sound the P/V NORA VITTORIA's whistle at intervals of no more than two (2) minutes apart. I find that Respondent did commit an act of negligence by violating Rule 35 of the Inland Rules of Navigation and therefore, Factual Allegation 15 is proved.

Misconduct

"Misconduct is human behavior which violates some formal, duly established rule. 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. It is an act which is forbidden or a failure to do that which is required." 46 CFR 5.27. The Coast Guard

established by the preponderance of reliable and credible evidence that Respondent committed Misconduct (First Offense, Factual Allegation 16) but did not prove Misconduct (Second Offense, Factual Allegation 16). Factual Allegations 16-17 of the Complaint specifically address the acts of misconduct alleged by the Coast Guard. Each allegation will be addressed below:

First Offense (Factual Allegation 16) – Respondent did not submit a written Notice of Marine Casualty and Voyage Record in a timely manner as required by 46 CFR 4.05-10(a).

Title 46 Code of Federal Regulations Subpart 4.05 governs the Notice of Marine Casualty and Voyage Records process. Specifically, section 4.05-10(a) states that “[t]he owner, agent, master, operator or person in charge shall, within five days, file a written report of any marine casualty required to be reported under § 4.05-1.” The collision between the M/V NORA VITTORIA and the Crispos’ vessels occurred on August 13, 2005. Form CG-2692, (Report of Maine Accident, Injury or Death), a form mariners must submit reporting a marine casualty incident, was due on August 18, 2005. The Coast Guard did not receive the Form CG-2692 until September 20, 2005. (Tr. 2 at 122, IO Ex. 14).

Respondent presented several mitigating factors on why the form was late. He submitted the CG-2692 Form for the second time to his former attorney on September 5, 2005. Respondent’s CG-2692 Form was finally submitted by his former attorney on September 20, 2005, thirty three (33) days after it should have been filed. (Tr. 2 at 378, IO Ex. 14). Respondent’s former attorney testified that he had been diagnosed with a cognitive impairment during the relevant time period; this impairment affects his ability to retain and keep track of information presented to him. (Tr. 2 at 373-76). I find Respondent’s former attorney’s testimony credible. Thus, I find Respondent’s CG-2692 Form was filed late but due to circumstances beyond Respondent’s control. However, as a matter of law, it is Respondent’s responsibility and duty to file the CG-2692 Form within the time allotted by 46 CFR 4.05-10(a). Therefore, I find

that Respondent committed an act of misconduct by failing to file a written report within the regulatory mandated time period. Thus, I find Factual Allegation 16 proved.

Second Offense (Factual Allegation 17) – Respondent, in the Report of Marine Accident Injury or Death, provided a written statement knowing the statement contained materially false, fictitious or fraudulent information in violation of 18 U.S.C. § 1001.

At the hearing there was considerable discussion over Respondent's objection to the admission of the contents of the CG-2692 (obtained during the course of the Part 4 investigation) because the Respondent's admissions therein will be used for purposes other than impeachment as prescribed by 33 CFR 20.1311. That code section proscribes testimony regarding admissions made by a respondent during an investigation under Part 4, except for impeachment. The Coast Guard replied that the CG-2692's contents were being offered for the limited purpose to support the allegations of misconduct for false official statements because the form shows a materially false statement between what was said to the Coast Guard at one time and what was said at another time. The Coast Guard argued that it did not intend to offer the 2692's admissions to be considered as substantive evidence on the negligence allegations. I overruled Respondent's objection and accepted Form CG-2692 for the limited purpose of determining whether the alleged misconduct is proved. (Tr. 2 at 124–31).

The statements made by Respondent after the collision and reported on Form CG-2692 were subject to interpretation. I do not believe that Respondent "knowingly" made a false, fictitious or fraudulent statement to the Coast Guard casualty investigators on the evening of August 13, 2005 or on the CG-2692 Form.

Respondent informed the Coast Guard casualty investigator that he pulled the throttle back to zero (0) thrust as an emergency maneuver after sighting the two vessels rafted together. (Tr. 2 at 133-35). Respondent's CG -2692 Form stated "the master was still watching the radar

while turning to port to a course of 090. At this time, the master pulled the throttle back to zero thrust due to possible targets(s) on radar, and when looking up, there were two vessels rafted to one another, no running or deck lights, and possible at anchor.” (IO Ex. 14). This statement does not directly contradict with the statements given to the Coast Guard casualty investigator.

Title 18 United States Code Section 1001(a)(2)-(3) states that a person may not make a “materially false, fictitious, or fraudulent statement or representation” or make “any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry.” The distinction between pulling back the throttle to zero (0) thrust just prior to seeing the Crispos or pulling back the throttle to after seeing the Crispos is minimal. The distinction between these two (2) statements is not significant enough to rule out interpretation or paraphrasing error by the Coast Guard casualty investigator. I am unable to find that this minimal distinction between the two statements constitutes a misrepresentation of a material fact.

Therefore, in light of all the surrounding circumstances of that night and the evidence presented at hearing, I find Factual Allegation 17 not proved.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At all relevant times, Respondent was a holder of Coast Guard issued Merchant Mariner License Number 1119007.
2. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. 7703; 46 CFR Part 5; 33 CFR Part 20; and the Administrative Procedure Act, codified at 5 U.S.C. 551-59.
3. On August 13, 2005, Respondent was acting under the authority of his license while operating the P/V NORA VITTORIA as captain.

4. On August 13, 2005, (**Allegation 11, Negligence, First Offense**) during the transit from Boston to Hingham, Respondent was negligent in that he failed to proceed at a safe speed so as to take proper and effective action to avoid a collision and stop the M/V NORA VITTORIA within a distance appropriate to the prevailing conditions as required by Rule 6 of the Inland Rules of Navigation (33 U.S.C. § 2006). Respondent was traveling at speeds of 31 knots between the Long Island Bridge and West Gut and between twenty five (25) quickly down to twenty (20) knots immediately prior to the collision in near zero (0) visibility. This failure placed members of his crew and passengers in danger, and led to injuries suffered by the occupants of the F/V LANA LOU and MSJC69.
5. On August 13, 2005, (**Allegation 12, Negligence, Second Offense**) during the transit from Boston to Hingham, Respondent was negligent in that he failed to use all available means appropriate to the prevailing circumstances and conditions to determine if the risk of collision existed as required by Rule 7 of the Inland Navigation Rules (33 U.S.C. § 2007). This failure placed the members of Respondent's crew in danger and led to the injuries suffered by the occupants of the F/V LANA LOU and MSJC69.
6. On August 13, 2005, (**Allegation 13, Negligence, Third Offense**) during the transit from Boston to Hingham, Respondent did not take appropriate action to avoid a collision in that he failed to slacken vessel speed or take all way off to allow more time to assess the situation after he became aware of the existence of a possible radar contact ahead of the M/V NORA VITTORIA as required by Rule 8 of the Inland Rules of Navigation (33 U.S.C. § 2008).

7. On August 13, 2005, (**Allegation 14, Negligence, Fourth Offense**) during the transit from Boston to Hingham, Respondent failed to maintain a proper lookout by sight and by all available means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and of the risk of collision as required by Rule 5 of the Inland Rules of Navigation (33 U.S.C. § 2005).
8. On August 13, 2005, (**Allegation 15, Negligence, Fifth Offense**) during the transit from Boston to Hingham, Respondent failed to make appropriate sound signals when or near an area of restricted visibility as required by Rule 35 of the Inland Rules of Navigation (33 U.S.C. § 2035).
9. Respondent committed Misconduct (**Allegation 16, Misconduct, First Offense**) when he filed his CG-2692 Form on September 20, 2005, thirty three (33), days² after the due date of August 18, 2005, in violation of 46 CFR 4.05-10(a) which requires that it must be delivered to the Coast Guard within five days.
10. Respondent did not submit a materially false statement concerning when he brought the P/V NORA VITTORIA to zero (0) thrust and thus did not commit an act of Misconduct (**Factual Allegation 17, Misconduct, Second Offense**)³ in violation of 18 U.S.C §1001.

SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. Appeal Decision 2362 (ARNOLD) (1984). Title 46 CFR 5.569 (b) provides “[e]xcept for acts or offenses for which revocation is mandatory, factors which may affect the order [sanction]

² The Complaint reflects that the CG-2692 was submitted 38 days late. It is hereby amended to reflect thirty three (33) days to conform to the evidence.

³ The Complaint reflects the next allegation after allegation 16 also as “16. Misconduct, First Offense.” For clarity of reference, the second Misconduct allegation is amended to reflect “17. Misconduct, Second Offense.”

include: (1) Remedial actions which have been undertaken independently by the respondent; (2) Prior record of the respondent, considering the period of time between prior acts and the act or offense for which presently charged is relevant; and (3) Evidence of mitigation or aggravation.” Title 46 CFR Table 5.569 is the “Suggested Range of an Appropriate Order” for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. Appeal Decision 2628 (VILAS) (2002), *aff’d* by NTSB Docket ME-174. “The orders are expressed by a range, in months of outright suspension, considered appropriate for the particular act or offense prior to considering matters in mitigation or aggravation . . . [which] may make an order greater or less than the given range appropriate.” 46 CFR 5.569 (d). The Table’s recommended sanction range for negligence is outright suspension from 2 to 6 months; for misconduct it is 1 to 6 months.

In this case, Respondent committed five (5) acts of negligence by failing to: (1) post a proper lookout; (2) transit at a safe speed considering the reduced visibility; (3) use all available means to avoid a collision; (4) sound a prolonged whistle blast every two minutes in an area of restricted visibility; and (5) slacken his speed in order to assess the situation presented by the fast moving storm cell in order to avoid a collision. Although I have found that Respondent committed five (5) acts of negligence, these acts are multiplicitous for sanction purposes along with the one count of misconduct. Appeal Decision 2496 (MCGRATH) (April 8, 1990); Appeal Decision (MOULDS) (August 20, 1990). That is, the maximum license suspension for each count of negligence and one count of misconduct may not be aggregated in order to exceed the 6 month limit as prescribed by 46 CFR Table 5.569. The maximum is still 6 months.

Since the one proved misconduct allegation took place subsequent to the August 13, 2005 proved allegations, an argument could be made that a misconduct sanction from one to six

months suspension could be aggregated with the proved allegations of negligence to exceed the maximum of 6 months under Table 5.569. However, I do not think it is appropriate to do so in this case because the circumstances surrounding Form CG-2692's late submission, although the fault and responsibility of Respondent as found above, were due largely to the unintended acts and omissions of his former counsel. Further, while serious in its own right to warrant a finding of "proved," late submission of the CG-2692 cannot, in and of itself, warrant a significant and meaningful sanction when compared to the more egregious threats to life and property at sea imposed by Respondent's five acts of negligence. Therefore, the sanction will be fashioned primarily around the facts and circumstances surrounding the five negligence allegations.

In this case, the Coast Guard proposes Revocation of Respondent's license. However, 46 CFR Table 5.569 limits the sanction to 6 months suspension of Respondent's license "prior to considering matters in mitigation or aggravation." 46 CFR 5.569 (d). Therefore, aggravating factors must be shown and considered for an upward departure from Table 5.569 to be upheld. See Commandant v. Moore, NTSB Order No. ME-177 (2005).

Matters in Aggravation

Speeding tickets. As evidence in aggravation, the Coast Guard introduced Exhibit 14 which is comprised of four (4) tickets that Respondent received in 2003 and 2004: three for speeding and one for failure to obey a stop sign. While there was some argument concerning their admissibility, I admitted these exhibits over the objection of Respondent's counsel. (Tr. 2 at 143). Respondent testified on the factual circumstances surrounding these citations and how it came to be that his driver's license was suspended for two months. (Tr. 2 at 307-12). He also testified that he went to a defensive driving class and learned from that experience. (Tr. 2 at 311). While these tickets are evidence of his past driving habits and subsequent remediation through a

defensive driving course, I cannot accord them great weight because speeding in an automobile does not necessarily indicate that he was predisposed towards excessive speed while piloting the M/V NORA VITTORIA on August 13, 2005.

Damage to the vessels hit by Respondent and injury to their occupants. While causation and damages are not elements of negligence as defined at 46 CFR 5.29, “[t]he consequence, such as a collision or an allision . . . may be an aggravating factor, or the lack thereof be a mitigating factor” Appeal Decision 2129 (RENFRO) (1978). The evidence shows that Nicole Crispo sustained minor chemical burns from fuel spillage; Steven Crispo suffered a broken nose, a chipped bone in his right elbow, and lacerations on his head, hands, and upper body. Jeffery Crispo suffered lacerations over a large part of his body, incrustation of barnacles in his chest and leg area, and suspected nerve damage. Findings of Fact 38 through 40. The evidence also shows extensive damage to the Crisos’ boats. IO Ex. 12.

I am mindful of the fact that Nicole Crispo also received a citation from the Coast Guard for failure to keep a constant lookout. However, considering the heavy rainfall, the severe, restricted visibility, and the Crisos boats’ inability to maneuver, I cannot find that a lack of a lookout on the Crispo boat contributed to this accident.

There is also evidence that one of the occupants of the Crisos’ boats had consumed two beers and that the odor of alcohol beverage was possibly detected on one of the occupants during the rescues process. (Tr. 1 at 202, 339). However, there is no evidence that alcohol played any role in this accident.

NORA VITTORIA’s excessive speed under the circumstances. The M/V NORA VITTORIA is capable of a maximum speed of 36 knots, but averages closer to 32 knots under normal conditions. It can safely go full astern from 35 knots stopping the vessel in one and a half

boat lengths. This does not mean that it is safe to travel twenty five (25) to thirty (30) knots around a radar blind turn into a squall. I have already found Respondent committed an act of negligence for violating Inland Rule of Navigation 6 by failing to proceed at a safe speed to avoid collision. Respondent did not just fail to travel at a safe speed, he recklessly traveled at a speed so excessive from what is considered a safe speed that I consider it an aggravating factor because he navigated the NORA VITTORIA directly into a blind spot created by a rain squall with no dedicated lookout. Most other vessels in the area reduced their speed to a “slow bell” while the squall passed.⁴ Not Respondent. He exceeded the speeds of other vessels in the area by at least eighteen (18) knots, an act markedly inconsistent with prudent navigation under the circumstances.

Respondent’s professed unwillingness to learn from this incident. Respondent testified that he would not do anything differently if the identical circumstances were presented to him again. (Tr. 342-48, 350-54). This causes me great concern because if that were true, and Respondent hits another vessel, its occupants may be less fortunate than those in this case. If Respondent truly believes what he said, then it could reasonably be inferred that he is incapable of remediation, thereby rendering his continued possession of a merchant mariner’s license incompatible with safety at sea.

Title 46 CFR 5.569 (b) (1) provides that one of the factors which may affect an appropriate sanction is “[r]emedial actions which have been undertaken independently by the respondent.” Respondent’s activities since August 13, 2005 have been primarily with the Global Marine Transportation School at the U.S. Merchant Marine Academy in the following capacities: 1) as a ship handling instructor for high-speed craft; 2) as an operator of a simulator; and 3) and as a radar instructor. (Tr. 2 at 253-255). It is inconceivable that he could continue these duties

⁴ A slow bell is a term used by mariners to describe a vessel moving at approximately seven (7) knots. Tr.1 at 267.

successfully and still maintain that he would not do anything differently if he was once again presented with the identical circumstances. Therefore, I cannot find that Respondent is incapable of remediation. This finding is further buttressed by Respondent's testimony that he actually learned something from the defensive driving class that he took to get his driving privileges restored.

It is the nature of this administrative proceeding 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 light of the above, I also find that Respondent's continued possession of a merchant mariner's license is not inconsistent with safety at sea. As an instructor at the Global Marine Transportation School, I find that remediation is taking place and is providing him with a greater appreciation for more thoughtful compliance with the relevant rules of the road.

After careful consideration of all the circumstances in this case, an appropriate sanction is suspension of Respondent's merchant mariner's license outright for a period of eight (8) months.


ORDER

IT IS HEREBY ORDERED that Respondent, John Kenneth Parker's License, issued by the Coast Guard and held by Respondent, is **SUSPENDED** for a period of eight (8) months.

Respondent is to turn over his license to the Investigating Officer at Coast Guard Sector Boston immediately.

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 C**).

Done and dated September 24, 2007
New York, New York



HON. WALTER J. BRUDZINSKI
ADMINISTRATIVE LAW JUDGE
U.S. COAST GUARD
