UNITED STATES OF AMERICA

DEPARTMENT OF HOMELAND SECURITY

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	DECISION OF THE
UNITED STATES COAST GUARD	:	COMMANDANT
vs.	:	ON APPEAL
MERCHANT MARINER LICENSE	:	NO. 2695
Issued to: WILLIAM DEA AILSWORTH	:	

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures set forth in 33 C.F.R. Part 20.

By a decision and order (hereinafter "D&O") dated August 31, 2009, Michael J. Devine, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard, at Norfolk, Virginia, revoked the merchant mariner license of Mr. William Dea Ailsworth (hereinafter "Respondent"), upon finding proved one charge of *negligence* and two charges of *violation of law or regulation.* The first specification found proved alleged that on January 11, 2009, Respondent, the master of a towing vessel, grounded a listing barge, the SL-119, and then caused it to sink on January 12, 2009, by negligently removing it from its beached position on the shore before remedying the cause of the list. The second specification found proved alleged that Respondent violated 46 C.F.R. § 4.05-10 by failing to submit a marine casualty report to the Coast Guard within five days of the sinking. The third specification found proved alleged that Respondent violated 46 C.F.R. § 4.05-1 by failing to notify the Coast Guard immediately of an

occurrence materially affecting a vessel's seaworthiness when he failed to immediately notify the Coast Guard of the list that caused him to ground the SL-119. The ALJ dismissed a fourth specification alleging that Respondent wrongfully failed to comply with a subpoena to appear.

APPEARANCES: Michael L. Donner, Sr., Esq., Hubbard, Terry & Britt, P.C. 293 Steamboat Road, Irvington, VA, 22480, for Respondent. The Coast Guard was represented by LT Candice Casavant, LT Aidan Van Cleef, and LT Maria Wiener, U.S. Coast Guard Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk VA, 23518.

PROCEDURE & FACTS

At all relevant times herein, Respondent was the holder of, and acted under the authority of, the Coast Guard issued merchant mariner license at issue in this proceeding.

On January 9, 2009, Respondent arrived at the south side of the Honeywell International (hereinafter "Honeywell") plant's loading pier in Hopewell, Virginia, to load the SL-119 and one other barge with fertilizer. [D&O at 6; Transcript (hereinafter "Tr.") at 217-220; Coast Guard Exhibit (hereinafter "Ex.") 11 at 1] After a Honeywell employee completed loading the barge on the morning of January 10, 2009, the SL-119 developed a noticeable list. [D&O at 6; Tr. at 231-32] Respondent believed the barge was overloaded. [Tr. at 231] Respondent moved the barge to the north side of the pier after Honeywell employees told him that he would need to make space for another vessel to dock on the south side. [D&O at 6; Tr. at 232-33] Respondent used electric pumps in an attempt to remove water leaking into two of the SL-119's compartments. [D&O at 6; Tr. at 237-41] Thereafter, Respondent asked a Honeywell employee about offloading

some of the fertilizer, but was informed that Honeywell did not have the equipment for offloading. [D&O at 6; Tr. at 117-118, 244-47]

At approximately 9:00 a.m. on January 11, 2009, Respondent grounded the barge on the shore next to the pier after determining that the list had become more severe and that pumping could not relieve a leak in one of the compartments. [D&O at 7; Tr. at 246] Respondent did not contact the Coast Guard at any time on January 11, 2009, to inform the agency of the barge's compromised position. [D&O at 8; Tr. at 264-65, 286, 288] However, Respondent did contact Dave Bushy, the president of a diving business, who agreed to send a crew the next morning to inspect the barge for damage and to bring additional pumps. [D&O at 8; Tr. at 170-72, 264] Respondent was also in contact with an excavator who could offload the barge if Respondent moved it alongside the pier. [D&O at 7; Tr. at 254-57, 260]

By about 9:00 a.m. on January 12, 2009, a high tide threatened to submerge the barge while it was aground. [D&O at 7; Tr. at 256] Respondent believed that the excavator was supposed to be at the pier at 9:00 a.m., and, for that reason, a little before 9:00 a.m., Respondent chose to move the boat from the shore back to the pier. [D&O at 7; Tr. at 256, 259, 261] Respondent secured the barge to the pier a little after 9:00 a.m., and the barge sank at 9:35 a.m., before the excavator arrived. [D&O at 7; Tr. at 172, 261]

Respondent reported the barge's sinking to the Coast Guard about 30 minutes after it occurred. [D&O at 8; Tr. at 266, 286, 288] However, Respondent did not submit a written report of the accident until January 23, 2009. [D&O at 8; Coast Guard Ex. 1] Because Respondent left blank certain boxes on that report, he submitted a corrected version three days later. [D&O at 8; Coast Guard Ex. 2] According to an employee of

the Virginia Department of Environmental Quality, the sinking released ammonium sulfate, which can poison aquatic life and cause other environmental harm, into the James River. [Tr. at 178-81] In addition, Honeywell submitted a report stating that the boat's sinking cost nearly one million dollars. [Coast Guard Ex. 20.]

The Coast Guard filed its original Complaint in the matter on March 3, 2009, but amended the complaint several times, until the final amended complaint charged Respondent with the four violations detailed above. [D&O at 3] Respondent admitted to the jurisdictional allegations, but denied that he negligently moved the barge from the beach, denied that he failed to submit a marine casualty report within five days of the sinking, and denied that he failed to immediately notify the Coast Guard of the vessel's compromised seaworthiness. [*Id.*]

The hearing in the matter convened on June 9, 2009, in Norfolk, Virginia. [D&O at 4] The Coast Guard introduced nine witnesses and entered ten exhibits into the record. [D&O at 4; Tr. at 3-4] Respondent testified on his own behalf and entered four exhibits into the record. [*Id.*] The ALJ issued his D&O in the matter on August 31, 2009.

Respondent filed a timely notice of appeal on September 22, 2009, and perfected his appeal by filing an appeal brief in the matter on October 30, 2009. The Coast Guard did not reply to Respondent's brief. Therefore, this appeal is properly before me.

BASES OF APPEAL

This appeal is taken from the ALJ's D&O finding proved one charge of *negligence* and two charges of *violation of law or regulation.* Respondent's appeal arguments are summarized as follows:

I. *The ALJ erred in finding that Respondent was negligent because he A) erroneously found that the barge was stable when Respondent*

removed it from the shore; B) erroneously found that Honeywell, the party responsible for loading the barge, did not cause the list by overloading the barge; and C) erred in concluding that different standards of negligence govern civil actions and suspension and revocation proceedings.

II. *The ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-10 when he filed an untimely written report of the accident;*

III. *The ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-1(a)(4) when he failed to notify the Coast Guard immediately of his grounding of the SL-119;*

IV. *The ALJ committed an error of law by holding that the Pennsylvania Rule required a finding of negligence unless Respondent produced evidence that his violation of 46 C.F.R. § 4.05-1(a)(4) did not contribute to the vessel's sinking; and*

V. *The ALJ erred by imposing a sanction—revocation—that was unreasonable.*

OPINION

Standard of Review

"On appeal, a party may challenge whether each finding of fact rests on substantial evidence, whether each conclusion of law accords with applicable law, precedent, and public policy, and whether the ALJ committed any abuses of discretion." Appeal Decision 2685 (MATT) *citing* 46 C.F.R. § 5.701 and 33 C.F.R § 20.1001. "[G]reat deference is given to the ALJ in evaluating and weighing the evidence." Appeal Decision 2685 (MATT). "The ALJ is the arbiter of facts" and it is "his duty to evaluate the testimony and evidence presented at the hearing." Appeal Decision 2610 (BENNETT). "[T]he findings of fact of the ALJ are upheld unless they are shown to be arbitrary and capricious or there is a showing that they are clearly erroneous." Appeal Decision 2610 (BENNETT) *citing* Appeal Decisions 2557 (FRANCIS), 2452

(MORGRANDE) and 2332 (LORENZ). Moreover, "the ALJ is vested with broad discretion in making determinations regarding the credibility of witnesses and in resolving inconsistencies in the evidence." Appeal Decision 2639 (HAUCK) *citing* Appeal Decisions 2527 (GEORGE), 2522 (JENKINS), 2519 (JEPSON), 2516 (ESTRADA), 2503 (MOULDS), 2492 (RATH) and 2614 (WALLENSTEIN). *See also* 2628 (VILAS) ("If the ALJ's findings are supported by reliable, credible evidence, they will be upheld because he saw and heard the witnesses, even if there was evidence on which he (or I sitting in his stead) might reach a contrary conclusion. Stated another way, I will not substitute my findings of fact for the ALJ's unless the ALJ's [findings] are arbitrary and capricious."). "The findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." *See* Appeal Decision 2685 (MATT) *citing* Appeal Decisions 2395 (LAMBERT) and 2282 (LITTLEFIELD).

I.

The ALJ erred in finding that Respondent was negligent because he A) erroneously found that the barge was stable when Respondent removed it from the shore; B) erroneously found that Honeywell, the party responsible for loading the barge, did not cause the list by overloading the barge; and C) erred in concluding that different standards of negligence govern civil actions and suspension and revocation proceedings.

The ALJ found, "based on the evidence in the record as a whole" that the Coast Guard proved "negligence in that (1) Respondent failed to take adequate measures to obtain assistance after deciding the condition of the barge SL-119 required grounding for stability on January 11, 2009; and (2) actions in moving the SL-119 on January 12, 2009, were negligent under 46 C.F.R. § 5.29." [D&O at 14] The record reveals that, throughout the course of these proceedings, Respondent has argued that he should not be

found negligent because Honeywell personnel overloaded the barge—and in so doing led to the incidents at issue here—and that Respondent's actions to save the barge, including moving it from its grounded position, were prudent. With regard to the negligence charge, itself, the ALJ correctly noted that "[t]he only issue to be determined in this case is whether Respondent's actions were negligent under the standard provided at 46 C.F.R. § 5.29." [D&O at 15] Under 46 C.F.R. § 5.29, negligence "is 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." After reviewing the entire record, the ALJ found as follows:

> After barge SL-119 was loaded, it began to list. Respondent took action to dewater the barge with an electric pump after finding water in a compartment, however, as the problem with the barge SL-119 increased, Respondent intentionally grounded the barge. Respondent's action in partially grounding the barge on January 11, 2009, to maintain its stability, is considered within the range of actions that a person in a similar situation would take in keeping with 46 CFR 5.29. Respondent's failure to take sufficient action to obtain assistance after intentionally grounding the barge SL-119 on January 11, 2009, before moving the barge on January 12, 2009 to the position where it sank, constitutes negligence under 46 CFR 5.29.
>
> Respondent intentionally grounded barge SL 119 at approximately 0900 on January 11, 2009, and moored it in a stable position. The evidence in the record demonstrates that there was time to seek additional assistance before moving the barge back to the Honeywell pier the next day. Respondent clearly knew the barge had a leak and was not stable. After mooring the SL-119, Respondent requested a gasoline powered pump from the Honeywell facility; the Honeywell facility had no gasoline pump. At approximately noontime on January 11, 2009, Respondent contacted Mr. David Bushy of Pro-Dive and requested additional pumps and requested that divers inspect the barge. Mr. Bushy informed Respondent they would be unable to get to the Honeywell facility until the morning of January 12, 2009. However, prior to the arrival of Pro-Dive, Respondent directed the movement of barge SL-119, on the morning of January 12, 2009, from its grounded position to the pier at the Honeywell facility where it sank. This action was taken by Respondent even though he knew the SL-119 had been taking on water, he had not obtained gas powered pumps, and with the knowledge that the equipment to offload the cargo from the barge was not present at the dock.

> I find a reasonable and prudent person with the knowledge and experience of the Respondent would not have moved the barge from its grounded position without first obtaining assistance in some form, including but not limited to contacting the Coast Guard for support and assistance from the Captain of the Port, Coast Guard Sector Hampton Roads or other Coast Guard entity; obtaining gas powered pumps that may have been able to pump out the compartments with water in them; waiting until a diver could arrive and assess the condition of the barge; and/or waiting for the offloading equipment to be present at the dock prior to moving the barge.

[D&O at 15-16] (citations omitted) On appeal, Respondent argues that ALJ erred in finding that Respondent was negligent because the ALJ erred in: finding that the barge was stable while it was aground, finding that Honeywell did not overload the barge, and in finding that different standards of negligence govern civil actions and suspension and revocation proceedings. If Respondent's assertions are not persuasive, the ALJ's finding of negligence, which is supported by evidentiary material, will not be disturbed.

A.

In finding the negligence charge proved, the ALJ erroneously found that the barge was stable when Respondent removed it from the shore.

On appeal, Respondent notes that his "entire defense rested on his position that he had to pull the SL-119 off the beach on January 12, 2009, to prevent it from being sunken by the rising tide." [Respondent's Appeal Brief at 4] Respondent insists that none of the Honeywell employees whose testimony the ALJ cited to support this finding stated clearly that the boat was stable after Respondent pushed it aground, and he further points out that neither described the condition of the boat on the morning of the sinking. [*Id.* at 13-16]

I will overturn the ALJ's factual finding that the SL-119 was not in immediate danger of sinking on the morning of January 12, 2009, only if it was arbitrary and capricious, clearly erroneous, or based on inherently incredible evidence. *See e.g.*,

Appeals Decisions 2685 (MATT) and 2654 (HOWELL). In this respect, "[t]he findings of the ALJ need not be consistent with all evidentiary material in the record as long as there is sufficient material in the record to support their justification." Appeal Decision 2685 (MATT) *citing* Appeal Decisions 2395 (LAMBERT) and 2282 (LITTLEFIELD).

A review of the record shows that there is testimony to support the ALJ's conclusion that the SL-119 was stable while it was beached. Mr. Herman Schlimmer, the leader for marine operations at Honeywell's Hopewell plant, who observed the barge while it was sitting on the beach, testified that the barge "appeared to be stable where it was sitting." [Tr. at 148] Mr. Schlimmer further testified that he would not have recommended that the barge be moved away from the shore, again, because "[i]t appeared to be stable where it was sitting." [Tr. at 151] Given both the great deference afforded to the ALJ's findings and the fact that there is evidence in the record to support the ALJ's conclusion that the barge was in a stable condition while it was beached, Respondent's argument regarding the barge's lack of stability is not persuasive.

B.

The ALJ erroneously found that Honeywell, the party responsible for loading the barge, did not cause the list by overloading the barge.

Respondent takes issue with the ALJ's decision to refrain from finding that Honeywell caused the list by overloading the barge. [Respondent's Appeal Brief at 3, 8-10, 16-17; D&O at 14-15] Respondent seems to argue that the evidence shows that his decision to move the barge back to the pier was reasonable because he deduced that he could correct the list only by unloading the barge. [Respondent's Appeal Brief at 3, 8-10] Ultimately, as Respondent concedes, this argument is rendered irrelevant by my conclusion that the ALJ acted within his discretion by finding that the barge was stable

while it was aground. [Respondent's Appeal Brief at 16, note 4] Since the barge was not in danger of sinking while it was aground, the ALJ reasonably concluded that Respondent negligently moved the barge back to the pier before obtaining a diagnosis as to the cause of the list.

C.

The ALJ erred in concluding that different standards of negligence govern civil actions and suspension and revocation proceedings.

Respondent contends that the ALJ erred in concluding that different standards of negligence govern civil actions and suspension and revocation proceedings. [Respondent's Appeal Brief at 7-8] It is my responsibility to review whether an ALJ's legal conclusions comply with applicable law and precedent. *See e.g.*, Appeal Decisions 2685 (MATT) and 2646 (McDONALD). Contrary to Respondent's assertion, a review of the record shows that the ALJ did not state that different negligence standards govern suspension and revocation proceedings and civil actions. Instead, the ALJ merely made the accurate comment that the *contributory* negligence of another actor, is not a valid defense in a suspension and revocation proceeding. *See* D&O at 14-15; *see also* Appeal Decision 2639 (HAUCK), Appeal Decision 2520 (DAVIS), Appeal Decision 2492 (RATH), Appeal Decision 2474 (CARMIENKE), Appeal Decision 2421 (RADER), Appeal Decision 2402 (POPE), Appeal Decision 2400 (WIDMAN), Appeal Decision 2380 (HALL), and Appeal Decision 2319 (PAVLEC). Accordingly, Respondent's argument is not persuasive.

II.

The ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-10 when he filed an untimely written report of the accident.

Respondent argues that the ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-10 by filing an untimely written report of the accident. [Respondent's Appeal Brief at 23-24] Respondent concedes that he filed an initial written report six days late, and a corrected report three days later, but contends that his filings contained sufficient information to "constructively comply" with the regulation and that there is no evidence that his tardiness caused any further damage. [*Id.*]

46 C.F.R. § 4.05-10 requires the owner of a vessel to file a written report of a marine casualty with the Coast Guard Sector Office or Marine Inspection Office within five days of the occurrence of a marine casualty. Respondent's concession that he filed a tardy written report (six days late) dooms his argument. Given Respondent's own admission, the ALJ did not err in finding that the violation occurred.

III.

The ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-1(a)(4) when he failed to notify the Coast Guard immediately of his grounding of the SL-119.

Respondent argues that the ALJ committed an error of law by concluding that Respondent violated 46 C.F.R. § 4.05-1(a)(4) when he failed to notify the Coast Guard immediately of his grounding of the SL-119. [Respondent's Appeal Brief at 22-23] Respondent insists that he fulfilled his duties by notifying the Coast Guard of the *sinking* shortly after it occurred. [*Id.*] He further contends that, in any event, his failure to notify the Coast Guard of the grounding was harmless because, he insists, the record shows that

the Coast Guard would not have been able to mitigate the damage to the barge before the high tide forced Respondent to move it. [*Id.* at 22]

46 C.F.R. § 4.05-1(a) states, in relevant part, as follows:

> Immediately after the addressing of resultant safety concerns, the...master...shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—
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> * * *
>
> (2) An intended grounding...that creates a hazard to navigation, the environment, or the safety of a vessel, or that meets any criterion of paragraphs (a) (3) through (8);
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> * * *
>
> (4) An occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service or route, including but not limited to fire, flooding, or failure of or damage to fixed fire-extinguishing systems, life saving equipment, auxiliary power generating equipment, or bilge pumping systems.

Pursuant to 46 C.F.R. § 4.03-1(b), "[t]he term marine casualty or accident applies to events caused by or involving a vessel and includes, but is not limited to...any occurrence involving a vessel that results in...Grounding... [or]...Flooding." In this case, the record shows that Respondent intentionally grounded the SL-119 because the vessel was taking on water and listing. [D&O at 6-7] Respondent does not dispute the ALJ's finding that the list that forced him to ground the SL-119 constitutes a marine casualty materially affecting the SL-119's seaworthiness, nor does he dispute that he failed to contact the Coast Guard immediately regarding the SL-119's compromised seaworthiness after grounding the barge. Moreover, while Respondent asserts that he informed the NRC of the sinking of the barge, he does not argue, nor can he show, that he informed the "nearest Marine Safety Office, Marine Inspection Office or Coast Guard

Group Office that the vessel was in extremis. Thus, the ALJ correctly concluded that Respondent violated 46 C.F.R. § 4.05-1(a)(4).

Although the ALJ did not err in finding the violation proved, I feel it necessary to briefly address Respondent's contention that this violation was harmless. Respondent asserts that, had he alerted the Coast Guard of the list immediately after grounding the barge, the Coast Guard still would not have had time to respond during the 24 hours between the grounding at approximately 9 a.m. on January 11, 2009, and 9 a.m. on January 12, 2009, the time Respondent insists that he needed to move the barge to prevent it from sinking on the shore as the tide came in. Respondent points out that Lieutenant Patrick Burkett, an Investigating Officer for the Coast Guard, testified that the Coast Guard "would have had somebody in place to mitigate the situation before it led to the vessel sinking had we known 48 hours in advance as opposed to after it sunk." [Respondent's Appeal Brief at 19; Tr. at 74] He also points out that another Coast Guard witness, Lieutenant Saladin Shelton, a Command Duty Officer, could only speculate on the Coast Guard's response—and the amount of time it would have taken for the Coast Guard to implement that response—had it been notified of the list. [Respondent's Appeal Brief at 20]

Even assuming that the barge was sinking while it was aground on the morning of the 12th (and, as I previously discussed, the ALJ was within his discretion to reject that assumption), the record shows that the Coast Guard may have been able to assist the Respondent by that time had he expedited notice of the grounding. Lieutenant Shelton testified that, had he been notified of the grounding of the morning of January 11th, a response team may have been at the site in as little as four to six hours, and that,

depending on the circumstances, he may not have recommended moving the barge even if it were about to sink while grounded. [Tr. 88-93] Thus, it is quite possible that Respondent's compliance with 46 C.F.R. § 4.05-1(a)(4) may have enabled the Coast Guard to provide assistance or advice that would have prevented the sinking, or at a minimum, mitigated its damages. As such, Respondent's arguments concerning the reporting of the marine casualty are not persuasive.

IV.

The ALJ committed an error of law by holding that the Pennsylvania Rule required a finding of negligence unless Respondent produced evidence that his violation of 46 C.F.R. § 4.05-1(a)(4) did not contribute to the SL-119's sinking

Respondent asserts that the ALJ erred by applying the Pennsylvania Rule to the specification of negligence, which, he claims, improperly shifted the burden of proof to Respondent. Respondent's assertion to this end fails to acknowledge that prior to discussing the application of the Pennsylvania Rule to Respondent's case, the ALJ found Respondent negligent by direct evidence. [D&O at 14, 19] Irrespective of that fact, the ALJ also found that Respondent was negligent under the Pennsylvania Rule.

"Under the Rule of The *Pennsylvania*, a party who fails to observe a safety regulation has the burden of showing 'not merely that [its] fault might not have been one of the causes [of the loss], or that it probably was not, but that it could not have been.'" *U.S. v. Nassau Marine Corp.*, 778 F.2d 1111, 1116 (5th Cir. 1985) *quoting The Pennsylvania*, 86 U.S. 125, 136 (1873). In his D&O, the ALJ offered the following analysis regarding the application of the Pennsylvania Rule:

> The application of the Pennsylvania Rule is an available means to prove negligence in Coast Guard suspension and revocation cases. Appeal Decision 2412 (LOUVIERE). The Pennsylvania Rule is not limited to regulations or rules regarding collisions but may also be applied to

> violations of regulations intended to prevent the injury that actually occurred. *United States v. Nassau Marine Corp.*, 778 F.2d 1111 (5th Cir. 1985). In this case, the regulation that was violated provides that the master of a vessel shall provide immediate notice to the Coast Guard of a marine casualty that results in "[a]n occurrence materially and adversely affecting the vessel's seaworthiness or fitness for service...." 46 CFR 4.05-1(a)(4).
>
> After a tragic incident arising from an allision with a railroad bridge that caused the derailment of the Amtrak Sunset Limited in September 1993...this regulation was updated to clarify which marine casualties require immediate notice so prompt corrective or investigative efforts can be initiated. *See* 59 Fed. Reg. 39469-02 (August 3, 1994). The regulation was specifically updated to ensure immediate notice to the Coast Guard to avoid dangerous situations and provide the opportunity for response....Since the regulation is designed to require immediate notice to allow corrective measures to be taken, application of the Pennsylvania Rule would require Respondent to demonstrate [that] his failure to comply with the regulation was not a cause of the negligent sinking of the barge. ...I find Respondent did not demonstrate a basis to rebut the application of the Pennsylvania Rule since there was no persuasive evidence that providing notice to the Coast Guard on January 11, 2009 would not have resulted in corrective action being initiated by the Coast Guard that could have prevented the sinking. Therefore, Respondent is also found negligent on that alternative basis. Even where not applied to establish negligence, the Pennsylvania Rule applies to demonstrate as a matter of aggravation that Respondent's negligent actions in this case caused the sinking of the barge SL-119 and resulting harm from the sinking.

[D&O at 19-21] (footnotes omitted)

In this case, Respondent was charged with negligence with regard to the sinking of the barge SL-119. Although application of the Pennsylvania Rule was not necessary to establish negligence, the ALJ properly applied the Pennsylvania Rule to establish the causal link between Respondent's negligence and the resulting sinking of the barge—a matter in aggravation. Accordingly, Respondent's assignment of error regarding the application of the Pennsylvania Rule is not persuasive.

V.

The ALJ erred by imposing a sanction—revocation—that was unreasonable.

Respondent argues that the ALJ's revocation of his merchant mariner license was an abuse of discretion. [Respondent's Appeal Brief at 24-25] He contends that 46 C.F.R. Table 5.569 recommends only a one to three month sanction for violating a United States regulation, that his violations of 46 C.F.R. §§ 4.05-1(a)(4), 4.05-10 were "*de minimis,*" and that he took immediate and well-intentioned steps to rectify the list and prevent the SL-119 from sinking. [*Id.*]

The ALJ has wide discretion to choose the appropriate sanction based on the individual facts of each case. *See* Appeal Decision 2654 (HOWELL) *citing* 46 C.F.R. § 5.569(a) and Appeal Decisions 2640 (PASSARO), 2609 (DOMANGUE), 2618 (SINN) and 2543 (SHORT). The ALJ may consider the sanction recommended by the table in 46 C.F.R. § 5.569(d), but Respondent's remedial actions, his prior record, and other aggravating and mitigating factors may justify a tougher or more lenient order. [*Id.*]

In this case, the ALJ considered a wide variety of aggravating factors, including Respondent's conviction in the present case of three separate offenses, his 2007 conviction for reckless driving, the property and environmental damage caused by the barge's sinking, and, most importantly, Respondent's violation of the requirement to notify the Coast Guard of the SL-119's grounding despite testimony that he had previously been informed of his duty to do so. [D&O at 29-34] In mitigation, the ALJ considered Respondent's actions to determine the source of the list, but determined that they did not compensate for Respondent's repeated poor judgment. [Id. at 32] The

ALJ's thorough and thoughtful discussion of these factors demonstrates that his decision to revoke Respondent's license was not an abuse of discretion.

CONCLUSION

The actions of the ALJ accord with applicable law, and were not arbitrary, capricious, or clearly erroneous. Furthermore, the record shows that competent, substantial, reliable, and probative evidence existed to support the findings and order of the ALJ. Therefore, I find Respondent's bases of appeal to be without merit.

ORDER

Accordingly, the Decision and Order of the ALJ, dated August 31, 2009, is hereby AFFIRMED.

VADM Sally Brice-O'Hara USCG

Signed at Washington, D.C. this 14th day of June, 2011.