

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

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UNITED STATES COAST GUARD,

Complainant,

vs.

JOE MICHAEL JOHNSON,

Respondent.

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Docket No: 09-0254  
CG Enforcement Activity No: 3505635

DECISION & ORDER

**Date Issued: March 19, 2010**

**Issued by: HON. BRUCE TUCKER SMITH  
ADMINISTRATIVE LAW JUDGE**

**Appearances:**

***For Complainant:***

Gary F. Ball, Esq.  
SUSPENSION & REVOCATION NATIONAL CENTER OF EXPERTISE

MSSE3 Tim S. Smith  
SECTOR OHIO VALLEY

***For Respondent:***

Mark Freeman, Esq.  
David E. James, Esq.  
STEVENS BALDO FREEMAN & LIGHTY LLP

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## II. PRELIMINARY STATEMENT

The instant matter arises out of a collision which occurred near mile marker 262.5 on the Wilson Lake portion of the Tennessee River. On March 27, 2008, at approximately 7:54 p.m., the lead barge (MMI 2808) being pushed by the M/V POTOMAC collided with the pleasure craft EMANON V. Sadly, four people died in that incident.

On June 26, 2009, the United States Coast Guard (Coast Guard) filed a Complaint against Respondent Joe Michael Johnson (Respondent) alleging that he was negligent and that he violated a law, 46 U.S.C. §7703(1)(A) and (B); 46 C.F.R. §§5.29; 5.33. More specifically, the Coast Guard alleged Respondent violated 33 U.S.C. §2034(d) by failing to sound his vessel's danger signal, as required by Rule 34(d) of the Inland Navigation Rules, prior to the collision with the EMANON V. The Coast Guard further asserted that Respondent was negligent in that he failed to maintain a proper lookout, as required by Rule 5 of the Inland Navigation Rules. The Coast Guard proposed a 6 month suspension of Respondent's Merchant Mariner's License (MML) and Merchant Mariner's Document (MMD).

The Administrative Law Judge (ALJ) Docketing Center received Respondent's Answer on August 10, 2009, wherein Respondent admitted the Complaint's jurisdictional allegations and denied the factual allegations, in part. Respondent specifically denied paragraphs 9 and 10 for both charges. Respondent requested a hearing before an ALJ.

The Coast Guard brought this action pursuant to 46 U.S.C. §7703, which provides bases for the suspension or revocation of a mariner's license. The proceedings were conducted in accordance with the requirements of the Administrative Procedure Act

(APA), 5 U.S.C. §§551-59, and marine safety regulations contained at 46 C.F.R. Part 5 and 33 C.F.R. Part 20.

For the reasons set forth herein, the court finds that the that the allegations in the Complaint filed against Joe Michael Johnson on June 26, 2009, as modified by the Coast Guard's oral Motion to Amend, are found **PROVED**. Further, Respondent's Coast Guard-issued Merchant Mariner's License is hereby suspended for two months for the reasons discussed, infra.

In the Complaint, the Coast Guard stated "The Coast Guard has initiated an administrative proceeding against your license, certificate, and/or merchant marine's document (MMD)." In paragraph two of the Complaint, the Coast Guard noted that Respondent is the holder of both a MML and a MMD. However, in paragraph three of the Complaint, the Coast Guard alleged that Respondent was acting under the authority of his MML only, without reference to his MMD. In the "Proposed Order" section of the Complaint, the Coast Guard proposed "6 months outright suspension" without reference to either Respondent's MML or his MMD. Yet, in its post-hearing brief, the Coast Guard specifically requested Respondent's MML be suspended outright for a period of 6 months, again without reference to Respondent's MMD. Accordingly, the court presumes that the instant action is limited to findings and a sanction against Respondent's MML and not his MMD. Hence, Respondent's MMD is unaffected by this Decision and Order.

On December 1, 2009, this matter came on for hearing in Beaumont, Texas, at the Federal District Court for the Eastern District of Texas. The Coast Guard was represented by Gary F. Ball, Esq. and MSSE3 Tim S. Smith. Respondent appeared in person and

through counsel, Mark Freeman, Esq. and David James, Esq. At the outset of the hearing, the Coast Guard moved to dismiss the allegation of violation of law or regulation. The court granted that oral motion with prejudice. (Tr. Vol. I at 12).<sup>1</sup>

Both parties appeared and presented their respective cases and rested. The Coast Guard called five witnesses in its case-in-chief and the Coast Guard offered eighteen exhibits into evidence, seventeen of which were admitted. Coast Guard Exhibit for identification twenty-two was offered but not admitted, nor was it given any consideration in these deliberations.

Respondent called one witness. Respondent did not testify on his own behalf. Respondent offered seven exhibits into evidence, all of which were admitted. The court admitted three of its own exhibits. No probative or evidentiary consideration was given to ALJ Ex. I.

The court also took official notice of Rule 5 of the Inland Navigation Rules.

At the conclusion of the hearing, the court informed the parties that each would be entitled to make closing arguments in writing via post-hearing briefs. The parties timely submitted written post-hearing briefs and arguments; thereafter the court closed the administrative record.

### **III. FINDINGS OF FACT**

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

1. At all relevant times herein, Joe Michael Johnson (Respondent) was the holder of and acting under the authority of his Merchant Mariner License and Merchant Mariner Document.

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<sup>1</sup> Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at \_\_\_). Citations to Coast Guard Exhibits are marked CG Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

Respondent's license identifies him as a Master of Towing Vessels upon the Inland Waters and Western Rivers, et al. Respondent's license bears a Radar Observer endorsement. Respondent's license and endorsement thereon, expires February 2011. (CG Ex. 1).

2. That on March 27, 2008, and particularly at or about 1950 hours, CDT, Respondent was the pilot and master of the M/V POTOMAC. (CG Ex. 7).
3. That on March 27, 2008 Respondent was employed by, and the M/V POTOMAC was owned by, Maryland Marine Inc., of Houston, Texas. (CG Ex. 7).
4. That the M/V POTOMAC, hull number IMO 127, is and was at all relevant times herein a twin-diesel, approximately two-thousand horsepower, propeller-driven, steel-hulled, commercial tow vessel, measuring seventy-two feet in length. (CG Ex. 7).
5. That the M/V POTOMAC is a triple-decked vessel and the pilot-house of the M/V POTOMAC sits approximately forty-two feet above the water-line. (Tr. Vol. I at 78).
6. That on March 27, 2008, and particularly at or about 1950 hours, CDT, the M/V POTOMAC was pushing two barges: MMI 2807/119444, the face barge and MMI 2808/1194448, the lead barge, were laid bow to stern. (CG Ex. 10).
7. That on March 27, 2008, and particularly at or about 1950 hours, CDT, barges MMI 2807/119444 and MMI 2808/1194448 were laden with flammable Xylene. (Tr. Vol. I at 185).
8. That on March 27, 2008, and particularly at or about 1950 hours, CDT, the M/V POTOMAC carried a ship's complement of a master/pilot (Respondent), a relief pilot (Charlie Waters) and two tankermen/deckhands (Cliff Breaux and Allyn Charpentier). (Tr. Vol. I at 74-75).
9. That on March 27, 2008, and particularly at or about 1950 hours, CDT, barges MMI 2808 and MMI 2807 each measured approximately 297 feet in length and fifty-four feet in width. Added to the seventy-two feet length of the M/V POTOMAC, the approximate length of the entire tow configuration was between 666 and 672 feet. (Tr. Vol. I at 77, 85; CG Ex. 10).

10. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River, a motorized pleasure craft (EMANON V) with four persons aboard was motoring southbound. EMANON V was a thirty-two foot, aluminum hulled, gasoline-powered, inboard, twin-engine vessel. (CG Ex. 7).
11. That on March 27, 2008, and particularly at or about 1950 hours, CDT, the prevailing weather conditions at Wilson Lake, near Mile 262.5 of the Tennessee River were these: partly cloudy to clear sky, 10 nautical mile visibility, winds between 7 and 14 miles per hour resulting in light choppy waves (six inches to twenty-four inches), air and water temperature both sixty-five degrees Fahrenheit. (CG Ex. 7; ALJ Ex. III).
12. That official sunset for March 27, 2008 at Wilson Lake, near Mile 262.5 of the Tennessee River, was 7:08 pm, CDT, otherwise stated as 1908 hours, CDT. At that time and date, 70% of the Moon's visible disk was illuminated, when not obscured by clouds. (ALJ Ex. III).
13. That near Mile 262.5 of the Tennessee River is a known recreational boating and commercial shipping area. (CG Ex. 4, 5, 6).
14. That it was common, during the course of a day in late March, to observe forty-five to fifty small fishing boats on Wilson Lake, near Mile 262.5 of the Tennessee River. (Tr. Vol. I at 120-121).
15. That several public and private marinas and commercial maritime facilities are located in the near vicinity of Mile 262.5 of the Tennessee River on/near Wilson Lake. These facilities include the City of Florence, Alabama landing; Fleet Harbor Base; Occidental Chemical Company Docks; Wilson Lake Harbor Dock; Steenson Marina; City of Florence Excursion Boat; and Turtle Point Yacht and Country Club. (CG Ex. 4, 5, 6).
16. That the river towns of Florence, Sheffield and Muscle Shoals, Alabama are adjacent to or near Mile 262.5 of the Tennessee River (CG Ex. 4, 5, 6).
17. That Mile 262.5 of the Tennessee River is situated in the near vicinity of Wilson Lock, Dam and Hydro Power Plant, which is

located at Mile 259.4 of the Tennessee River on/near Wilson Lake. (CG Ex. 4, 5, 6).

18. That on March 27, 2008, at or about 1950 hours, CDT, and at the time of the collision, the M/V POTOMAC was proceeding eastbound, upriver, at approximately 10 miles per hour and the EMANON V was proceeding southbound at an undetermined speed, while executing a turn to starboard. It is likely that the starboard hull stern quarter and aft of the EMANON V beam collided with the port bow of the lead barge MMI 2808 (Tr. Vol. II at 118; CG Ex. 7, 10; Resp. Ex. AG).
19. That on March 27, 2008, and particularly at or about 1950 hours, CDT, and immediately before the collision with M/V POTOMAC, the EMANON V's lights were configured thusly: navigation light, off; port navigation light, off; starboard navigation light, off; forward mast light, off; stern navigation light, off; anchor light, off; searchlight, off; interior lights, off; all cabin lights, off. That at the time of the collision, none of EMANON V's lights were energized or activated and that she was underway completely "black." (Tr. Vol. II at 124-125; Resp. Ex. AG).
20. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River, the EMANON V struck the lead barge being pushed by the M/V POTOMAC; sinking the EMANON V and drowning all four persons aboard the EMANON V. (CG Ex. 7, 10).
21. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and immediately before the collision with EMANON V, Respondent stood in the wheelhouse of the M/V POTOMAC; the relief pilot was below decks off-watch; and the two tankermen, Breaux and Charpentier were working on the two barges under tow. (Tr. Vol. I at 75-76).
22. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and immediately before the collision with EMANON V, Respondent had energized or caused to be illuminated both the spot light and the search light atop the wheelhouse of the M/V POTOMAC and directed those lights toward the top sides of the two barges where tankermen Breaux and Charpentier were working. (Tr. Vol. I at 81-82).



23. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and immediately before the collision with EMANON V, tankermen Breaux and Charpentier were engaged in the non-emergency tasks of organizing and coiling lines and collecting trash. (Tr. Vol. I at 80-81).
24. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and immediately before the collision with EMANON V, tankermen Breaux and Charpentier could have been positioned forward on the lead barge as lookouts. Both men had handheld radios with which either could have communicated with the Respondent in the pilot house. (Tr. Vol. I at 30.)
25. That Respondent had energized or caused to be illuminated both the spot light and the search light atop the wheelhouse of the M/V POTOMAC and directed those lights toward the top sides of the two barges where tankermen Breaux and Charpentier were working in an effort to provide a safer working condition for the two tankermen. (Tr. Vol. I at 66-67, 82).
26. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and immediately before the collision with EMANON V, Respondent was the only crew member with lookout duties aboard the M/V POTOMAC. (Tr. Vol. I at 74-77).

#### **IV. DISCUSSION**

##### **A. General**

The purpose of Coast Guard Suspension and Revocation proceedings is to promote safety at sea and to maintain standards of competence and conduct. See 46 U.S.C. §7701; 46 C.F.R. §5.5. Title 46 Code of Federal Regulations §5.19 gives an Administrative Law Judge (ALJ) the authority to conduct hearings and to suspend or revoke a license or certificate for violations arising under 46 U.S.C. §§7703 and/or 7704.

Determining the weight of the evidence and making credibility determinations as to the evidence is within the sole purview of the ALJ. See Appeal Decision 2640

(PASSARO) (2003).<sup>2</sup> Additionally, the ALJ is vested with broad discretion in resolving inconsistencies in the evidence, and findings do not need to be consistent with all of the evidence in the record as long as there is sufficient evidence to reasonably justify the findings reached. Id.; Appeal Decision 2639 (HAUCK) (2003).

## **B. Burden and Standard of Proof**

In this case, like all Suspension and Revocation cases, the Coast Guard bears the burden of proof to establish the requisite facts mandated by the organic statute, 46 U.S.C. §7703(2), and the implementing regulations, 46 C.F.R. Part 5; Part 10, Subpart B; 33 C.F.R. Part 20. The Administrative Procedure Act (APA), 5 U.S.C. §§551-559, applies to Coast Guard Suspension and Revocation hearings before United States Administrative Law Judges. 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. See 5 U.S.C. §556(d). The Coast Guard bears the burden of proof to establish the charges are supported by a preponderance of the evidence. 33 C.F.R. §§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 & Products of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., 508 U.S. 602, 622 (1993) (quoting In re Winship, 397 U.S. 358, 371-72 (1970). (Harlan, J., concurring) (brackets in original)).

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<sup>2</sup> Pursuant to 46 C.F.R. § 5.65, “[t]he decisions of the Commandant in cases of appeal... are officially noticed and the principals and policies enunciated therein are binding upon all Administrative Law Judges.”

Therefore, at trial, the Coast Guard was obligated to prove by credible, reliable, probative and substantial evidence that Respondent more-likely-than-not committed the violation charged.

### **C. Jurisdiction**

“The jurisdiction of administrative bodies is dependent upon the validity and the terms of the statutes reposing power in them.” Appeal Decision 2620 (COX) (2001) quoting Appeal Decision 2025 (ARMSTRONG) (1975). Where an Administrative forum acts without jurisdiction its orders are void. Id. Therefore, establishing jurisdiction is critical to the validity of a proceeding. Appeal Decision 2677 (WALKER) (2008) citing Appeal Decisions 2104 (BENSON) (1977); 2094 (MILLER) (1977); 2090 (LONGINO) (1977); 2069 (STEELE) (1976); and 2025 (ARMSTRONG) (1975). See, Appeal Decision 2656 (JORDAN) (2006). Jurisdiction is a question of fact that must be proven. Appeal Decision 2425 (BUTTNER) (1986). See also, Appeal Decision 2025 (ARMSTRONG) (1975) (stating “jurisdiction must be affirmatively shown and will not be presumed”).

Here, the Coast Guard charged Respondent with Negligence, 46 U.S.C. §77013(1)(B) and 46 C.F.R. §5.29. The Complaint, as modified by the Coast Guard’s spoken motion, alleges that on or about March 27, 2008, Respondent, while as serving Master aboard the M/V POTOMAC, failed to maintain a proper lookout as required by Rule 5 of the Inland Navigation Rules. The Complaint alleges that Respondent’s alleged failure to maintain a proper lookout constitutes negligence, per 46 C.F.R. §5.29.

To establish jurisdiction in a negligence case, the action (or inaction) constituting the alleged negligent act must be proven to have occurred while the mariner was “acting

under the authority” of his merchant mariner’s license or credential. Appeal Decision 2516 (DALE) (2000).

The term “acting under the authority” is defined at 46 C.F.R. §5.57 and states, inter alia, “[a] person employed in the service of a vessel is considered to be acting under the authority of a license, certificate or document when the holding of such license, certificate or document is (1) [r]equired by law or regulation; or (2) [r]equired by an employer as a condition for employment.” If neither one of these two criteria is met, then the Coast Guard has no jurisdiction to pursue a Suspension and Revocation proceeding. Appeal Decision 2620 COX (2001).

Whether Respondent was acting under the authority of his license at all relevant times was not a point of contention at any time during the case. In his Answer, Respondent admitted he was indeed acting under the authority of his MML on March 27, 2008, by serving as Master aboard the M/V POTOMAC as required by law or regulation. Moreover, the weight of the evidence clearly proves that Respondent was serving aboard the M/V POTOMAC as a Master on or about March 27, 2008, during the occurrence of a collision and immediately thereafter--the time of the alleged negligence. Therefore, Respondent is found to have been acting under the authority of his Coast Guard-issued license and document at all relevant times.

#### **D. Negligence**

To prove negligence under 46 C.F.R. §5.29, the Coast Guard must prove by a preponderance of the evidence:

- (1) That Respondent is a holder of a merchant marine document or license;

(2) That Respondent was acting under the authority of his license when the charged violation occurred (March 27, 2008); and

(3) That Respondent either (1) committed an act which a reasonable and prudent person/mariner would not commit under the same circumstances; or (2) failed to perform an act which a reasonable and prudent person/mariner would have taken under the same circumstances.

As discussed supra, there is no dispute Respondent is the holder of a merchant mariner license and that he was acting under the authority of that license on March 27, 2008. Therefore, the first two (2) elements listed above are found proved. The dispute to be resolved in this case concerns the third element. Hence, the task before this court is to determine whether Respondent's actions or omissions were that which a reasonable and prudent mariner of the same station would have taken under the same circumstances. See 46 C.F.R. §5.29.

In the instant case, the Coast Guard alleges, and Respondent concurs, that Rule 5 of the Inland Navigation Rules<sup>3</sup> defines the standard by which a reasonable and prudent mariner would conduct himself vis-à-vis maintaining a proper lookout. Rule 5 states:

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.

The U.S. Senate committee report<sup>4</sup> submitted at the time the Inland Navigation Rules were enacted amplifies the intent of the Rule 5:

...Keeping a proper lookout is often termed the first rule of seamanship....Whoever is keeping a lookout must be able to give proper attention to that task and should not be assigned or undertake duties that would interfere with that task.

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<sup>3</sup> See 33 U.S.C. §§2001-2038.

<sup>4</sup> S. Rep. No. 979, 96th Cong., 2d Sess. 7-8 (1980), U.S. CODE CONG. & ADMIN. NEWS 7068, 7075.

On vessels where there is an unobstructed all-round view provided at the steering station, as on certain...towing vessels, or where there is no impairment of night vision or other impediment to keeping a proper lookout, the watch officer or helmsman may safely serve as the lookout. However, it is expected that this practice will only be followed after the situation has been carefully assessed on each occasion, and it has been clearly established that it is prudent to do so. Full account shall be taken of all relevant factors, including but not limited to the state of the weather, conditions of visibility, traffic density, and proximity of navigational hazards. It is not the intent of these rules to require additional personnel forward, if none is required to enhance safety. (Emphasis added).

The duty to maintain a proper lookout aboard a vessel underway has been a constant throughout the history of American maritime jurisprudence. “The duty of the lookout is of the highest importance...In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises according to the power and speed of the vessel in question.” The Ariadne, 80 U.S. 475, 478 (1872). (Emphasis added). Moreover, “[I]t is the risk of collision, not the collision itself, that masters must avoid.” Ocean S.S. Co. v. United States, 38 F. 2d. 782, 784 (2d Cir. 1930). “Performance of lookout duty,” the court declared in Anthony v. International Paper Co., 289 F.2d 574, 580 (4th Cir. 1961), “is an inexorable requirement of prudent navigation.”

The adequacy of a lookout on board a vessel underway is a question of fact to be determined in light of the existing facts and circumstances. Numerous Commandant’s Decisions on Appeal have held that the Administrative Law Judge is in the best position to determine whether the facts and circumstances of the case permitted a given respondent to serve as a proper lookout. Appeal Decisions 2581 (DRIGGERS) (1996); 2576 (AILSWORTH) (1996); 2503 (MOULDS) (1990); 2474 (CARMIENKE) (1988); 2421(RADER) (1986); 2390 (PURSER) (1985); 2319 (PAVELEC) (1983); 2302

(FRAPPIER) (1983); 2294 (TITTONIS) (1983). “In order to determine the adequacy of the lookout, the presiding Administrative Law Judge must carefully consider all of the surrounding circumstances faced by the lookout and determine whether those circumstances permitted the lookout to adequately perform lookout duties.” Appeal Decision 2576 (AILSWORTH) (1996). Expert testimony on the issue is not binding upon the court. Appeal Decisions 2581 (DRIGGERS) (1996); 2319 (PRAVELEC) (1983), 2390 (PURSER) (1985), 2474 (CARMENKE) (1988).

In Appeal Decision 2581 (DRIGGERS) (1996), the Commandant noted with approval the ALJ’s finding of the proximity of a lock, a recreational boat harbor, the presence of recreational boats on the waterway and the proximity of a riverside town as factors which favored the stationing of an additional look-out aboard a Mississippi River tug. The Commandant particularly noted that “Appellant was piloting a flotilla that resulted in a 1,000 foot blind spot ahead” and that Appellant “was allegedly acting as his own lookout from the wheelhouse while he was also piloting, keeping logs, and talking on the radio.” Id.

In DRIGGERS, the Commandant observed that although Rule 5 does not specify a location for a lookout, the “overwhelming weight of authority...suggests that lookouts should ordinarily be on the bow and that a pilot steering the vessel is not a proper lookout unless a bow lookout would add no additional information.” (internal citations omitted). At least one court has held that a blind spot created by the makeup of a tow mandates posting a lookout at the head of the flotilla. Taylor v. Tiburon, 1975 A.M.C. 1229 (E.D. La. 1974.)

Just as was the case in DRIGGERS, supra, the purpose of the instant hearing was not to establish the cause of the collision or fault for the collision, but solely to determine whether a respondent failed to maintain a proper lookout. Respondent's post-hearing brief devotes considerable energy to the argument that liability for a collision cannot be imposed when the positioning of a lookout would not have prevented the collision. That argument misses the mark. To reiterate: the cause of the collision, here, is not at issue in these proceedings. The Coast Guard did not allege, nor did it attempt to prove causation.

#### **E. Analysis**

An examination of the facts and circumstances of the evening of March 27, 2008 reveals several criteria, when viewed objectively; support a finding that the stationing of an additional designated lookout aboard the M/V POTOMAC would have been done by a reasonable and prudent mariner under the circumstances. In this analysis, the court takes particular guidance from the DRIGGERS and Ariadne decisions and the Senate Committee Report, supra. Read together, those sources suggest five key factors which dictate the need for an additional lookout aboard a river tug underway pushing tows:

1. ***The proximity of a lock.*** Here, Coast Guard Exhibits 4 and 5 (taken from navigational charts of the relevant portions of the Tennessee River), plainly reveal the collision occurred not more than four statute miles from the Wilson Lock and Dam. Such facilities signal the potential for the presence and congregation of commercial and recreational vessels transiting up and down river.
2. ***The proximity of commercial and recreational boat harbors or marinas.*** Here, Coast Guard Exhibits 4 and 5 reveal the collision occurred not more than four statute miles from the City of Florence, Alabama, landing; the Fleet Harbor Base; Occidental Chemical Company Docks; the Steenson Marina; the City of Florence Excursion Boat; and the Turtle Point Yacht and Country Club. Such facilities signal the potential for



the presence and congregation of commercial and recreational vessels transiting up, down and cross river.

3. ***The presence of recreational boats on the waterway.*** Here, Alabama Marine police officer Chad Dyer testified that it was common, during the course of a day in late March, to observe forty-five to fifty small fishing boats on Wilson Lake, near Mile 262.5 of the Tennessee River. (Tr. Vol. I at 120-121). This fact would have been or ought to have been foreseeable to a reasonably prudent and experienced Tennessee River pilot such as Respondent. The inquiry is not whether, on the evening of March 27, 2008 there was an actual abundance of recreational vessels on the water. Rather, the inquiry is whether, as he departed the Wilson Lock and Dam, Respondent should have anticipated the possibility of such vessels. (See, Ocean S.S. Co., supra.)
4. ***The proximity of a riverside town.*** Here, Coast Guard Exhibits 4 and 5 reveal that the collision took place not more than 6 statute miles from Florence, Alabama. The court takes official notice that the population of Florence, Alabama in 2008 was approximately thirty-seven thousand people. Likewise, the cities of Muscle Shoals, Sheffield, and Tuscumbia all border or lay near the Tennessee River near Mile 262.5. A prudent mariner would or should have known that these population centers increase the likelihood of traffic in and near his route of transit.
5. ***The power and speed of the vessel.*** Page 1 of Coast Guard Exhibit 7 reveals that the M/V POTOMAC was making 10 miles per hour at the time of the collision. Given her mass, length and speed, a prudent mariner would have foreseen the difficulty inherent to stopping or slowing such a vessel and would have realized the need for advanced warning of other vessels, buoys or navigational hazards.

The court finds three additional factors that dictate the need for a dedicated lookout to assist Respondent.

6. ***Relative darkness.*** ALJ Exhibit III plainly reveals that the sun had set and the three-quarter Moon may have been partially obscured by partly-cloudy sky thus reducing the ambient light and, hence, visibility.

7. **Task saturation.** A river pilot's attention would necessarily be diverted, even momentarily, by the actions of his crew working on the barges, his obligation to scan the radar, his attendance to the throttle and steering apparatus and his need to respond to any radio call. Coast Guard Exhibits 14 and 15 aptly illustrate the instruments and apparatuses that would have occupied the Respondent's attention, even if only slightly, in the course of his duties as pilot.
8. **Cargo.** The barges under Respondent's tow, MMI 2807/119444 and MMI 2808/1194448, were laden with flammable Xylene. (Tr. Vol. I at 185). A potentially dangerous cargo increases a mariner's duty of diligence.

Taken together, these eight factors strongly suggest that a reasonable and prudent mariner would have foreseen the need for an additional "pair of eyes" to maintain lookout on the M/V POTOMAC on March 27, 2008.

Even though Respondent's tow extended more than 600 feet, the court is unable to say a "blind spot" (referenced in other, similar cases) existed or occurred. Absent proof in the form of testimony or evidence, there is simply insufficient evidence to support the suggestion that a "blind spot" occurred in the configuration of the M/V POTOMAC on March 27, 2008.

Likewise, much was made at trial of the potential impact upon Respondent's eyesight and/or night vision because of the illumination of the barge decks from the spot and search lights atop the pilot house. Absent direct evidence or scientific proof from an appropriate expert (i.e., a physicist or an ophthalmologist), the court is unable and unwilling to speculate what impact those lights may have had on this Respondent's ability to see. As a consideration whether Respondent should or should not have posted an additional lookout, the hypothetical "blind spot" and "night blindness" are neutral, non-probative issues.

Page 3 of CG Exhibit 7<sup>5</sup> reveals that Respondent saw the EMANON V immediately before the collision and that he attempted to warn the crew of the pleasure craft with his spotlight. Query: the significance of Respondent having seen the EMANON V immediately before impact?

It is not a question of whether anyone aboard the M/V POTOMAC saw the EMANON V immediately prior to impact. Rather, the inquiry properly remains whether the Respondent had posted an appropriate lookout(s) given the circumstances of the voyage, without reference to the collision. The fact that Respondent saw EMANON V immediately before the collision neither proves nor disproves negligence. In essence, Respondent's sighting is irrelevant to the instant allegation of negligence.

In further support of its allegation of negligence, the Coast Guard called Captain Mark A. Tilford and offered him as an expert on the subject of navigational rules. (Tr. Vol. I at 225; CG Ex. 21). Over Respondent's objection, the court permitted Captain Tilford to testify for the limited purpose as an expert on inland navigational rules and to offer insights whether and when a prudent mariner might post an additional lookout in the same or similar circumstances. (Tr. Vol. I at 243).<sup>6</sup> Captain Tilford's admissible testimony regarding the necessity of a lookout on March 27, 2008, suggested that given his speed, nighttime operations and the presence of other vessels, Respondent should have posted an additional lookout. (Tr. Vol. I at 250, 264.)

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<sup>5</sup> The Coast Guard offered Exhibit 7, page three of which contains hearsay statements made by the Respondent to Alabama Marine Police officer Chad Dyer during the course of the State investigation into the March 27, 2008 collision. (Tr. at 116). After an in-camera review, the undersigned admitted Exhibit 7, particularly page 3, over Respondent's objection. (Tr. Vol. I at 162-164). The undersigned found particularly that Respondent's statements to the Alabama police officer did not fall within the ambit of 33 C.F.R. §20.1311. Hence, the statement was deemed admissible. Hearsay evidence is admissible in these proceedings. 33 C.F.R. §20.80.

Interestingly, Captain Tilford's book, "Mariner's Guide to the Inland and International Rules," (ALJ Ex. II) highlights the dilemma Rule 5 poses for a tugboat pilot: "If a look-out can have no other duties or responsibilities, how can a towboat operator serve as his own look-out in a one-man wheelhouse? Technically," Captain Tilford wrote, "a one-man watch is a violation of the look-out rule." That is, a tugboat pilot must not only maintain a vigil on his course, he must also attend the steering and navigational duties of pilot, radar observer,<sup>7</sup> and general overseer of his crew's activities. Yet Captain Tilford agrees that "It is acceptable for a mariner to be his own look-out as long as there is an unobstructed view from the steering station and there are no conditions that would require a posted look-out." (Emphasis added).

Here, the eight conditions, discussed supra, required Respondent to post an additional lookout. This conclusion is supported by Captain Tilford's limited testimony. Respondent's post-hearing brief argues that Respondent acted reasonably when he illuminated the barges to ensure safer working conditions for his tankermen. However, the tasks performed by tankermen Breaux and Charpentier were not necessary to either safety or navigation: they were engaged in "trash collection" and non-emergency handling of lines, etc. after the tow had been reconfigured following its passage through the Wilson Lock. The tasks they had been assigned were simply routine and could have been performed after the vessel had transited into a more sparsely populated area. Either Breaux or Charpentier or both could and should have been positioned forward on the lead

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<sup>6</sup> To the extent Captain Tilford testified regarding the impact of search or spot lights on Respondent's night vision, i.e., Tr. Vol. I at 251-262, I ruled that such testimony is beyond Captain Tilford's competence as an expert. As such, any such reference was disregarded.

<sup>7</sup> The phrase "by all available means" in Rule 5 establishes a strong mandate not only for the traditional lookout, but also any other appropriate means of gathering information, such as radar. Parks, The Law of Tug, Tow and Pilotage, 2d Ed. Cornell Maritime Press, 1982 at 158, fn. 3.

barge as lookouts. Both men had handheld radios with which either could have communicated with the Respondent in the pilot house. (Tr. Vol. I at 30.)

The court concludes that, based upon the totality of the circumstances and conditions then present on March 27, 2008, Respondent was negligent by his failure to post an additional lookout.

## **V. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent and the subject matter of this hearing are properly within the jurisdiction vested in the Coast Guard under 46 U.S.C. §7703 (2); 46 C.F.R. Parts 5 and 10; 33 C.F.R. Part 20; and the APA as codified at 5 U.S.C. §§551-59. Respondent is found to have been acting under the authority of his Coast Guard-issued License and Document at all relevant times.
2. At all relevant times mentioned herein, and specifically on March 27, 2008, Respondent Joe Michael Johnson, was the holder of Coast Guard issued License and Document.
3. At all relevant times mentioned herein, and specifically on March 27, 2008, Respondent Joe Michael Johnson, was Master of the M/V POTOMAC and its two barges.
4. Respondent Joe Michael Johnson was involved in a collision on March 27, 2008, while serving as Master aboard the M/V POTOMAC.
5. That the tasks performed by tankermen Breaux and Charpentier were not necessary to either safety or navigation.
6. Respondent's attention was diverted by his observation of the activities of his tankermen/deckhands.
7. Respondent knew or should have known that near Mile 262.5 of the Tennessee River on Wilson Lake was a recreational and commercial boating area.
8. Respondent knew or should have known that near Mile 262.5 of the Tennessee River on Wilson Lake was an area was adjacent to known population centers, cities and towns.
9. That on March 27, 2008, and particularly at or about 1950 hours, CDT, at Wilson Lake, near Mile 262.5 of the Tennessee River and

immediately before the collision with EMANON V the following factors known to Respondent were extant: the potentially dangerous nature of Respondent's cargo; Respondent's location in a known recreational/commercial maritime area; Respondent's location near various population centers adjacent to and near-by the Tennessee River; Respondent's crew was engaged in non-essential duties; the onset of darkness and prevailing weather conditions; Respondent's attention was divided between watching his deckhands on the barges, his navigational and steering devices and the waterway; the speed and size of Respondent's tug and tow. All of these factors necessitated a greater degree of care, which Respondent breached by negligently failing to post or maintain a proper lookout.

## VI. CONCLUSION

For the foregoing reasons, I find the Coast Guard has **PROVED** its allegations that Respondent was negligent by his failure to maintain a proper lookout as that term is defined by Rule 5 of the Inland Navigation Rules.

## VII. SANCTION

The authority to impose sanctions at the conclusion of a case is exclusive to the ALJ. 46 C.F.R. § 5.567; 5.569(a); Appeal Decision 2362 (ARNOLD) (1984). The nature of this non-penal administrative proceeding is to "promote, foster, and maintain the safety of life and property at sea." Appeal Decision 1106 (LABELLE) (1959). See also, 46 U.S.C. §7701; 46 C.F.R. §5.5. As discussed supra, Respondent committed an act of negligence while acting under the authority of his license by failing to post an appropriate lookout while serving as pilot and master of the M/V POTOMAC.

To reiterate: causation of the collision with EMANON V is NOT an issue in this case. Thus, causation is not a factor to be considered in selecting an appropriate sanction for Respondent's negligence.

The Complaint seeks a six-month suspension of Respondent's Coast Guard-issued credentials pursuant to 46 U.S.C. §7703.

Title 46 C.F.R. §5.569 provides the Table of Suggested Range of Appropriate Orders (Table) for various offenses. The purpose of this Table is to provide guidance to the ALJ and promote uniformity in orders rendered. 46 C.F.R. §5.569(d); Appeal Decision 2628 (VILAS) (2002), *aff'd* by NTSB Docket ME-174.

The original Coast Guard Complaint alleged one count of violation of law and another count of negligence and also sought a six month suspension of the Respondent's Mariner's License and Document. Logic seems to dictate that the Coast Guard sought a three month suspension for each of the two counts.

At trial, the Coast Guard orally moved to dismiss the count regarding a violation of law, leaving only the allegation of negligence. Yet, in its post-hearing submission, the Coast Guard still seeks a six month suspension for only the one count. The Coast Guard's post-hearing brief does not account for the apparent discrepancy.

In its post-hearing submission, Respondent attributes the proximate cause of the collision to the crew of the EMANON V. Inasmuch as the Coast Guard neither pled nor proved causation of the collision nor the resulting deaths, Respondent's argument misses the mark. Respondent's brief does correctly point out, however, that the Coast Guard offered no evidence of any prior marine incident involving Respondent.

In Coast Guard v. Moore, NTSB Order No. EM-201 (2005), an action brought against a mariner for misconduct (refusal to submit to a drug test), the NTSB disapproved of a license revocation order because the Coast Guard neither proved, nor did the ALJ find, specific factors in aggravation sufficient to depart from the guidance provided in 46 C.F.R. Table 5.569. The NTSB clearly explained that the guidance contained in the

Table is “for the information and guidance of Administrative Law Judges and is intended to promote uniformity in orders rendered.”

While it is true that 46 C.F.R. §5.569(d) also says: ***This table should not affect the fair and impartial adjudication of each case on its individual facts and merits***, it is not for the undersigned to speculate what those individual aggravating facts and merits are relative to ***this*** Respondent, absent some proof.

In determining an appropriate sanction for offenses for which revocation is not mandatory, an ALJ should consider: any remedial actions undertaken by a respondent; respondent’s prior records; and evidence of mitigation or aggravation. See 46 C.F.R. §5.569(b)(1)-(3).

***Remedial Action:*** Respondent did not provide any evidence of any independent, remedial action undertaken by him which might mitigate the sanction here imposed. See 33 C.F.R. §5.569(b)(1).

***Respondent’s Prior Records:*** The undersigned does note that the Respondent did lawfully have a Master of Towing Vessels license, Issue No. 3, which had never been the subject of previous disciplinary action. See 33 C.F.R. §5.569(b)(2). Because the Respondent is acting under the third issuance of his license and, apparently, no adverse action had been previously imposed against his license or credentials, it is reasonable to infer that he has been a safe mariner.

***Mitigation or Aggravation:*** Respondent offered no affirmative proof in mitigation of any potential sanction, except for testimony from marine surveyor Ian D. Cairns, which helped circumstantially prove that the operator of the EMANON V was wantonly, if not criminally negligent in the operation of that vessel. (Tr. Vol. II at 110, et seq.)



(Resp. Ex. AG). Although enlightening, Cairns' testimony and evidence is irrelevant vis-à-vis mitigation, here. The Coast Guard never argued, nor did this court find, that Respondent's failure to maintain a proper lookout was the cause of EMANON V's demise.

Respondent might have produced independent evidence or testimony from the maritime community to establish his actions were reasonable under the circumstances or that similar future conduct would not pose a threat to safety on the waterways.<sup>8</sup> However, no such evidence was forthcoming.

Likewise, the Coast Guard did not present any matters that would support any particular period of suspension. 46 C.F.R. Table 5.569 provides a range of months wherein a mariner's license might be suspended. It is incumbent upon the Coast Guard, via testimony or evidence, to substantiate the basis for its proposed sanction. The Coast Guard might have alleged and proved that Respondent's failure to maintain a proper lookout was a cause of the collision at issue here, but it did not. Likewise, the Coast Guard might have presented expert testimony from an experienced master or a safety investigator to explain how Respondent's conduct posed a threat to life or safety on the waterways, but it did not. Beyond a speculative reference to the fact that Respondent's tow was volatile Xylene, the Coast Guard provided no direct evidence regarding the threat Respondent's actions actually posed to the safety of life or property on the waterways. See 33 C.F.R. §5.569(b)(3).

Absent evidence in either aggravation or mitigation, the court finds that departure from 46 C.F.R. §5.569 and its attendant table is not warranted. There the suggested range

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<sup>8</sup> Even assuming an industry standard exists, it may be inadequate, cf. The T. J. Hooper, 60 F.2d 737, 1932 A.M.C. 1169 (2d Cir. 1932) and compliance with the law is still required.

of appropriate orders suggests a suspension for 2-6 months for negligently performing duties related to vessel navigation.

The Coast Guard has proved that the Respondent did operate a vessel in violation of 46 C.F.R. §5.29, in that he negligently failed to maintain a proper lookout. Yet Respondent's record reflects that prior to March 27, 2008, he had been a safe and prudent mariner. Based upon the record as a whole, the appropriate sanction is two months outright suspension of Respondent's Merchant Mariner's License.

**WHEREFORE,**

### **VIII. ORDER**

**IT IS HEREBY ORDERED**, that all allegations of the Complaint filed against Respondent Joe Michael Johnson on June 26, 2008, as modified by the Coast Guard's oral Motion to Amend, are found **PROVED**.

**IT IS FURTHER ORDERED**, that Respondent Joe Michael Johnson is suspended outright for two months from acting under the authority of his Merchant Mariner's License as a Master. This Order does NOT affect Respondent's Merchant Mariner's Document or the rights and privileges that pertain thereto.

**PLEASE TAKE NOTE**, that issuance of this Decision and Order serves as notice of the parties' right to appeal under 33 C.F.R. Part 20, Subpart J. A copy of Subpart J is provided as Attachment B.

Done and dated this the 19th day of March, 2010,  
at New Orleans, Louisiana.



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**HONORABLE BRUCE TUCKER SMITH**  
**ADMINISTRATIVE LAW JUDGE**  
**UNITED STATES COAST GUARD**

**ATTACHMENT A – EXHIBIT & WITNESS LIST**

**COAST GUARD’S EXHIBITS –**

**AS OFFERED/ADMITTED CHRONOLOGICALLY**

- 01: Respondent’s Merchant Mariner’s License
- 02: M/V POTOMAC
- 03: M/V POTOMAC and tow
- 14: Wheelhouse of M/V POTOMAC
- 15: Wheelhouse of M/V POTOMAC
- 16: Wheelhouse of M/V POTOMAC
- 17: Wheelhouse of M/V POTOMAC
- 18: Wheelhouse of M/V POTOMAC
- 13: Starboard bow of Barge M 27 08 pushed by M/V POTOMAC
- 04: Map
- 05: Map
- 06: Map
- 07: Dyer’s Accident Report (4 pages)
- 12: View of M/V POTOMAC from starboard bow at 1500 on March 28, 2008
- 11: Bow of barge March 28, 2008
- 21: Curriculum Vitae of Captain Mark Tilford
- 20: M/V POTOMAC March 28, 2008
- 10: Higman/Maryland Marine Report of accident

**OFFER OF PROOF:** Exhibit 22: Farwell’s Rules of the Road

**COAST GUARD’S WITNESSES**

- 1. Clifton Breaux
- 2. Chad Dyer
- 3. Harold Flippo
- 4. John Hoesli
- 5. Mark Tilford

## **RESPONDENT'S EXHIBITS**

- AC: Dyer's report 3 pages
- AM: Senate Report
- AG: Cairn's Survey Report
- Y: Photo of EMANON V console
- R: Photo of EMANON V console
- S: Photo of EMANON V selector switch
- V: Photo of EMANON V VHF radio

## **RESPONDENT'S WITNESSES**

1. Ian Cairn

## **ALJ EXHIBITS**

- I: Respondent's statements made during Part 4 investigation
- II: Mariner's Guide to the Inland and International Rules by Captain Mark Tilford
- III. U.S. Naval Observatory - Weather Conditions:  
[http://aa.usno.navy.mil/cgi-bin/aa\\_pap.pl](http://aa.usno.navy.mil/cgi-bin/aa_pap.pl)