

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

UNITED STATES COAST GUARD

Complainant

VS.

KIRK C. PLENDER,

Respondent

Docket Number 2011-0545
Enforcement Activity No. 4193177

DECISION AND ORDER

Issued: September 17, 2012

By Administrative Law Judge: Honorable Walter J. Brudzinski

Appearances:

For Complainant

Mr. Gary F. Ball
USCG Suspension & Revocation National Center of Expertise
100 Forbes Drive
Martinsburg, WV 25404

For Respondent

WILLIAM HEWIG, III
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SUMMARY

Respondent Kirk C. Plender had a severe heart attack requiring placement of an Implantable Cardioverter Defibrillator (ICD) in his chest. As a result, the Coast Guard's National Maritime Center (NMC) determined that Mr. Plender's underlying condition with associated risk rendered him not medically qualified for his Merchant Mariner duties. The NMC denied Mr. Plender's request for waiver and reconsideration. The Commandant denied his appeal. Meanwhile, Mr. Plender returned to work as a Chief Mate for APL Maritime.

The Coast Guard subsequently initiated this administrative action to revoke Mr. Plender's Merchant Mariner's Credentials for incompetence due to physical disability.¹ After an in-person hearing and review of the parties' post-hearing briefs, the undersigned finds the allegation of incompetence due to physical disability **PROVED**. Mr. Plender's medical conditions, including ischemic cardiomyopathy, reduced ejection fraction, and placement of an ICD, put him at a greater risk for sudden incapacitation or sudden death than the general population; therefore, all validly issued credentials Respondent holds are **REVOKED**.

STATEMENT OF THE CASE

This case presents the intersection of two, separate administrative processes – the medical waiver and review process to determine if a mariner is medically qualified for Merchant Mariner duties; and, actions against a mariner's credentials for Incompetence due to physical disability. The former is a medical determination which, in this case, the Commandant has previously made. The latter is a legal determination which is the subject of this decision and order.

¹ Respondent holds Coast Guard issued licenses, an endorsement, and a document which are all now referred to as Merchant Mariner's Credential(s) (MMC) and will be referenced in this decision and order as credential(s) or MMC. See 46 C.F.R. § 10.107(b).

Medical Condition

While on a ski trip in March 2009, Mr. Plender suffered a severe myocardial infarction (heart attack). Surgeons implanted a stent to restore blood flow but blood in the stent clotted causing it to occlude. This condition resulted in acute stent thrombosis requiring a second stent as well as an intra-aortic balloon pump so Mr. Plender could “continue to have blood circulation through the body.” See Tr. at 30-1, 157-8; CG Ex. 01 at 11.

Mr. Plender’s severe myocardial infarction caused substantial damage to his heart. He has “abnormal wall motion on the front wall of his heart” and an ejection fraction from 20 to 25 percent. See Tr. at 29-30; CG Ex. 01 at 11. “Ejection fraction” is the ability of a heart to pump blood to the body. See Tr. at 20-30. A normal ejection fraction is “greater than 55 percent.” See Tr. at 30. Physicians also diagnosed Mr. Plender with mitral valve regurgitation “which means that his mitral valve is slightly abnormal and it’s allowing a leak to occur.” See Tr. at 32; CG Ex. 01 at 22. Moreover, physicians diagnosed Mr. Plender with “coronary artery disease to his native vessels or anatomy.” Id. Two months after his heart attack, an echocardiogram showed Mr. Plender’s left ventricle “severely impaired” because the “systolic function [is] severely reduced.” See Tr. at 33-4; CG Ex. 01 at 28. (Brackets added). The left ventricle is the last chamber of the heart that oxygenated blood goes through before it gets pumped to the body. See Tr. at 33. With an ejection fraction of only 25 percent, Mr. Plender’s heart was left with a severely reduced ability to pump oxygenated blood to his body. See Tr. at 33-4; CG Ex. 01 at 28 and 31.

In May 2009, Respondent’s cardiologist recommended surgically placing an Implantable Cardioverter Defibrillator (ICD) in Mr. Plender’s chest. See Tr. at 36, 160; CG Ex. 01 at 31. An ICD administers an electric shock to the heart in the event the heart develops an arrhythmia (irregular rhythm causing the heart to malfunction). See Tr. at 23-4. The ICD also has a “rare risk of inappropriate shock” meaning there have been instances in which an ICD has

administered a shock without an underlying arrhythmia. See Tr. at 36-7; CG Ex. 01 at 31.

Surgeons successfully implanted an ICD in Mr. Plender's upper left chest in June 2009. See Tr. at 161; CG Ex. 01 at 34.

Medical Waiver and Review Process

In October 2009, Mr. Plender returned to work as a Chief Mate for APL Maritime. See Tr. at 168-9; Resp. Ex. F. As a yearly requirement for his license, Mr. Plender submitted a completed Merchant Mariner Credential Medical Evaluation Report (CG-719K) dated January 1, 2010 to the National Maritime Center (NMC) for review. See 46 C.F.R. § 10.215; CG Ex. 01. On the CG-719K form, Mr. Plender checked the following medical conditions: asthma, heart attack/myocardial infarction, heart surgery/stent/angioplasty, pacemaker/defibrillator, and "any other heart condition." Id. at 5. Based on that information, the NMC determined Mr. Plender's conditions required a medical waiver. See Tr. at 43-50.

On March 22, 2010, the NMC determined Mr. Plender was not eligible for a medical waiver due to his heart conditions and ICD. See CG Ex. 02. The NMC found his conditions presented "unacceptable risks to maritime and public safety" due to potential incapacitation and death. Id. In May 2010, the NMC denied Mr. Plender's request for reconsideration noting that his underlying condition renders him not qualified even without the ICD. See Tr. at 51; CG Ex. 03. On March 17, 2011, the Commandant of the Coast Guard denied Mr. Plender's appeal. See CG Ex. 04 at 2.

Appeal procedures from National Maritime Center (NMC) decisions under 46 C.F.R. § 10.215 and final agency action by the Commandant are provided for at 46 C.F.R. § 1.03-40. The validity and sufficiency of the medical waiver and review process are outside the Administrative Law Judge's scope of review and authority. See 5 U.S.C. §§ 554 and 556; 46 U.S.C. §§ 7701-7704; 46 C.F.R. § 5.19. The ALJ may, however, consider the underlying medical evidence used

in the waiver and review process, along with other evidence, to determine whether an incompetence allegation under 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31 is proved.

Action Against Respondent's Credentials

On November 22, 2011, the Coast Guard served its Complaint on Mr. Plender alleging Incompetence citing 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31 as authority. After the Respondent's timely Answer, the undersigned conducted a pre-hearing teleconference during which all agreed to a hearing date of April 24, 2012 in Boston, Massachusetts.

In accordance with the Scheduling Order, the parties filed their witness and exhibit lists and the undersigned granted the Coast Guard's request for telephonic testimony. On April 12, 2012, the Coast Guard requested a continuance pending the release of Appeal Decision 2698 (HOCKING) (2012).² The undersigned Administrative Law Judge (ALJ) denied the request because it was unknown when the Vice Commandant would issue that decision and whether it would be dispositive of the instant case.

The hearing took place as scheduled and conducted in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559, 46 C.F.R. pt. 5, and 33 C.F.R. pt. 20. Mr. Plender produced his credentials at the hearing's opening in accordance with 46 C.F.R. § 5.521. The Coast Guard introduced six (6) exhibits and the telephonic testimony of one witness, Dr. Laura Gillis, MD, MPH, Federal Maritime Surgeon, Chief, Medical Evaluations Division, U.S. Coast Guard National Maritime Center. Respondent testified on his own behalf and introduced six (6) exhibits.³ The parties filed post-hearing briefs containing proposed findings and conclusions in accordance with 33 C.F.R. § 20.710.⁴ This matter is now ripe for decision.

² The Vice Commandant signed Appeal Decision 2698 (HOCKING) (2012) on April 25, 2012.

³ A detailed list of all exhibits is included with this Decision and Order as **Attachment A**.

⁴ All proposed findings of fact and conclusions of law are ruled upon and listed in **Attachment B**.

BURDEN OF PROOF

The Administrative Procedure Act, at 5 U.S.C. §§ 551-559, applies to Coast Guard Suspension and Revocation trial-type hearings before United States Administrative Law Judges (ALJs). See 46 U.S.C. § 7702(a). The APA authorizes sanctions if, upon consideration of the entire record as a whole, reliable, probative, and substantial evidence support the allegations. See 5 U.S.C. 556(d). “The term substantial evidence is synonymous with preponderance of the evidence as defined by the U.S. Supreme Court.” Appeal Decision 2477 (TOMBARI) (1988); see also, Steadman v. SEC, 450 U.S. 91, 107 (1981). Under Coast Guard procedural rules and regulations, the burden is on the Coast Guard to prove the allegations by a preponderance of the evidence. See 33 C.F.R. §§ 20.701, 20.702(a).

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, 371-2 (1970) (Harlan J., concurring) (brackets in original)). In sum, the Coast Guard must prove by the preponderance of reliable, probative, and credible evidence that Respondent more likely than not committed the act as alleged.

PRINCIPLES OF LAW

“The purpose of suspension and revocation proceedings is to promote safety at sea.” 46 U.S.C. § 7701(a). “Licenses, certificates of registry, and merchant mariners' documents may be suspended or revoked for acts described in section 7703 of this title.” 46 U.S.C. § 7701(b). “The administrative actions against a license, certificate, merchant mariner credential, endorsement 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 C.F.R. § 5.5. Under 46 C.F.R. § 5.19(b), “[t]he Commandant has delegated to Administrative Law Judges the authority to admonish, suspend with or without probation or revoke a credential or endorsement issued to a person by the Coast Guard under any navigation or shipping law.”

Prior to August 9, 2004, 46 U.S.C. § 7703(1)(B) stated “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder – (1) when acting under the authority of that license, certificate, or document – (B) has committed an act of incompetence, misconduct, or negligence.”⁵ On August 9, 2004, Congress amended 46 U.S.C. § 7703 by removing the term “incompetence” from section (1)(B) and placing it in a separate subsection - § 7703(4). In pertinent part, 46 U.S.C. § 7703 now reads “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder - - (4) has committed an act of incompetence relating to the operation of a vessel.” *See Coast Guard and Maritime Transportation Act of 2004*, Pub. L. No. 108-293, 118 Stat. 1028 (Aug. 9, 2004). By enacting this change, Congress removed the requirement that the act of incompetence must occur when the mariner is acting under the authority of his credentials; therefore, a mariner need only to be a credential holder and commit an act of incompetence relating to the operation of a vessel.

The term “act” and the phrase “relating to the operation of a vessel” are not defined in any relevant statute, regulation, or Commandant Decision on Appeal (CDOA). The term “incompetence,” however, is defined at 46 C.F.R. § 5.31 as “the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” As noted in Appeal Decision 2698 (HOCKING)

⁵ Merchant Mariner’s License, Merchant Mariner’s Document, or Certificate of Registry is now referred to as Merchant Mariner’s Credential (MMC). The terms License and Credential as well as Document and Credential are occasionally used interchangeably in this decision and order depending on the context. *See* 46 C.F.R. § 10.107(b).

(2012), the regulation does not use the terms “professional incompetence,” “physical incompetence,” and “mental incompetence.” The regulation “refers only to ‘Incompetence’, describing it in terms of ‘professional deficiencies, physical disability, mental incapacity, or any combination thereof.’” HOCKING at 19.

Reading the statute and regulation together reasonably leads the reader to conclude that when referring to “physical incompetence,” one is referring to an act demonstrating the inability to perform required duties due to a physical disability.⁶ *A priori*, “mental incompetence” is an act demonstrating an inability to perform required duties due to mental incapacity. By using the above reasoning, a reasonable definition of “professional incompetence” is an act demonstrating an inability to perform required duties due to professional deficiency.⁷

SANCTION

While 46 U.S.C. § 7703 provides “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked,” the TABLE at 46 C.F.R. § 5.569 entitled “Suggested Range of an Appropriate Order” provides “[t]he only proper order for a charge of incompetence found proved is revocation.”

FINDINGS OF FACT

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

Respondent’s Credentials

1. At all relevant times, Respondent has been the holder of a Coast Guard issued license as master of steam or motor vessels of any gross tons upon oceans and master’s unlimited towing

⁶ As used in this decision and order, the terms “physical incompetence” and “incompetence due to physical disability” are synonymous.

⁷ In Appeal Decision 2698 (HOCKING), the Vice Commandant stated “professional incompetence . . . is novel and undefined . . .” but provided no further guidance.

vessels. See Tr. at 7-8, 149.

2. At all relevant times, Respondent has also been the holder of a Merchant Mariner's Document and an endorsement for "radar observer unlimited." See Tr. at 7-8, 148-9.

3. Respondent's credentials expire on October 2, 2012. See Tr. at 7-8.

Coast Guard's Medical Witness

4. Dr. Laura Gillis is Chief, Medical Evaluations Division, U.S. Coast Guard National Maritime Center and a federal maritime surgeon. See Tr. at 18.

5. Dr. Gillis is responsible for performing and overseeing all medical evaluations for fitness of duty for Merchant Mariners throughout the United States. Id.

6. Dr. Gillis is board certified in occupational medicine. See Tr. at 20.

7. "Occupational medicine is the specialty of medicine that deals with how the work environment affects and influences a person's health condition and how a person's health condition can affect how they perform in the work environment." See Tr. at 19-20.

Respondent's Medical Condition

8. While on a ski trip in March 2009, Respondent suffered a severe myocardial infarction (heart attack) and he "... no warning, just passed out." See Tr. at 22, 157; CG Ex. 01 at 16.

9. Respondent received medical treatment at Maine Medical which included placement of a stent to restore blood flow through his heart. See Tr. at 31, 158; CG Ex. 01.

10. Blood in the stent clotted causing it to occlude resulting in acute stent thrombosis requiring a second stent as well as an intra-aortic balloon pump to restore and continue blood circulation through the body. See Tr. at 30-1, 157-8; CG Ex. 01 at 11.

11. As a result of his heart attack, Respondent's heart has the following additional conditions: 1) abnormal wall motion on the front wall of his heart; 2) a severely reduced ejection fraction of 20 to 25 percent; 3) coronary artery disease in his native vessels; and, 4) mitral valve

regurgitation. See Tr. at 23, 29-30, 32-5, 41; CG Ex. 01 at 11, 22 and 28.

12. Ejection fraction is the ability of a heart to pump oxygenated blood out to the rest of the body; a normal ejection fraction is 55 percent or greater. See Tr. at 22-4.

13. A significantly reduced ejection fraction places a person at risk for arrhythmia to develop. See Tr. at 23-4.

14. Arrhythmia is an irregular rhythm in the heart causing the heart's pumping mechanism to malfunction, preventing oxygenated blood from flowing to the rest of the body's organs and can be lethal. See Tr. at 24.

15. Two months after Mr. Plender's heart attack, he had an echocardiogram which revealed a severely impaired left ventricle; a severely reduced systolic function; and, an ejection fraction of only 25%. See Tr. at 33-4; CG Ex. 01 at 28 and 31.

16. The left ventricle is the heart's last chamber through which oxygenated blood passes before it gets pumped to the body. Id.

17. Mr. Plender's impaired left ventricle severely reduces his heart's ability to pump blood to the rest of his body. Id.

18. Due to his coronary artery disease with ischemic cardiomyopathy and his risk for possible lethal arrhythmia, Mr. Plender underwent surgical placement of an Implanted Cardioverter Defibrillator (ICD) in his left upper chest. See Tr. at 22-3, 36, 160-1; CG Ex. 01 at 31, 34 and 38.

19. An ICD is a medical device implanted in a patient's chest to correct potentially lethal heart arrhythmias by delivering a shock to the heart which can also cause incapacitation. See Tr. at 23-4, 36-7, 132-3; CG Ex. 01 at 31.

20. There have been rare instances when an ICD administered a shock in the absence of an underlying arrhythmia. See Tr. at 36-7; CG Ex. 01 at 31.

Review by the National Maritime Center and Commandant's Final Action

21. In the fall of 2009, Respondent resumed working under the authority of his MMC as a Chief Mate with APL Maritime and has continued to work in that capacity to the present.

See Tr. at 168-9.

22. Merchant Mariner deck officers such as Mr. Plender are required to submit annual medical exams "to ensure that there are no conditions that pose an inordinate risk of sudden incapacitation or debilitating complication" among other things. See 46 C.F.R. §§ 10.215(d) and (f).

23. The annual medical exams are documented in a Merchant Mariner Credential Medical Evaluation Report, or CG-719K. See Tr. at 24-5; CG Ex. 01.

24. Respondent submitted his CG-719K to the National Maritime Center on January 1, 2010 checking the following medical conditions listed on the form: asthma, heart attack/myocardial infarction, heart surgery/stent/angioplasty, pacemaker or defibrillator, and "any other heart condition." See CG Ex. 01 at 5.

25. In March 2010, Chief, Medical Evaluations Division, U.S. Coast Guard National Maritime Center denied Mr. Plender's request for a medical waiver finding he was not medically qualified for his Merchant Mariner duties due to severe cardiomyopathy requiring the placement of an ICD. See Tr. at 48-50; CG Ex. 02.

26. Dr. Laura Gillis did not conduct the initial review of Respondent's request for a medical waiver but agrees with the result. See Tr. at 50.

27. In May 2010, Commanding Officer, National Maritime Center Coast Guard denied Mr. Plender's request for reconsideration concluding "the underlying cardiomyopathy with the associated risk for ventricular dysrhythmias is disqualifying even without the ICD. As such, we cannot approve a medical waiver for such a condition." See CG Ex. 03.

28. The Commandant of the Coast Guard denied Mr. Plender's appeal following an

independent medical review concluding that due to his “dilated, ischemic cardiomyopathy with impaired left ventricular function and a severely reduced ejection fraction of 25%, Mr. Plender has an inordinate risk of sudden death and incapacitation due to a ventricular arrhythmia.” See CG Ex. 04.

29. The Commandant also decided “[a]ssessing Mr. Plender’s physical capabilities to perform his duties as chief mate would not be applicable towards determining the risk factor associated with the condition of his heart.” Id.

Respondent’s Higher Risk than that of the General Population

30. Respondent’s medical conditions, including ischemic cardiomyopathy, reduced ejection fraction, and placement of an ICD put Respondent at a higher risk for sudden incapacitation or sudden death than that of the general population. See Tr. at 36-9, 43-54, 56-7, 110-11, 123-4, 130-3, and 138-9.

31. As the result of Respondent’s medical conditions and risk, Dr. Gillis opined he would not be medically qualified for any Coast Guard credential. See Tr. at 57-8.

ANALYSIS

Title 46 U.S.C. § 7703(4) requires the mariner to have committed an act of incompetence for his credential(s) to be revoked. See 46 C.F.R. § 5.569 TABLE. Applying 46 U.S.C. § 7703(4) to 46 C.F.R. § 5.31, the act of incompetence can be any act demonstrating a mariner’s inability to perform required duties “due to professional deficiencies, physical disability, mental incapacity, or any combination thereof.” Title 46 U.S.C. § 7703(4) further provides that the act of incompetence must be “relating to the operation of a vessel.” This analysis will discuss the act of incompetence; the inability to perform required duties; and, how the act and inability to perform required duties are “relating to the operation of a vessel.” This Analysis will also distinguish Appeal Decision 2698 (HOCKING) (2012), finding the act and inability to perform required duties “relating to the operation of a vessel” are due to physical disability.

Act of Incompetence

The Coast Guard alleges “[b]y serving onboard APL vessels in safety sensitive positions, as required by the COI, [Certificate of Inspection] while not medically fit for merchant mariner duties, the Respondent committed an act of incompetence described in Title 46 United States Code, Section 7703(4).” See Complaint at 2. As discussed below, the undersigned finds the act of incompetence occurred when Respondent suffered a severe heart attack. In this case, the difference between the pleading and the proof are not fatal. “[T]he purpose of a Complaint in these proceedings is to provide ‘legal and factual bases under which the Coast Guard is proceeding.’” Appeal Decision 2676 (PARKER) (2008) (quoting Appeal Decision 2655 (KILGORE) (2006)). “The thrust of modern pleading, especially in administrative proceedings, is toward fulfillment of a notice requirement.” Appeal Decision 2326 (MCDERMOTT) (1983).

There is no dispute Respondent suffered a heart attack; that he has been diagnosed with cardiac conditions and had an ICD surgically implanted; and, that the Coast Guard found him “not medically qualified.” See CG Ex. 02. Further, the factual allegations were sufficient to place Respondent on notice that the Coast Guard was bringing a charge of incompetence against him pursuant to 46 U.S.C. § 7703(4) and 46 C.F.R. § 5.31. Moreover, he was on notice that the facts surrounding the charge pertained to the heart attack he suffered in 2009 and all subsequent events, up to and including the Coast Guard’s 2011 decision he was not medically qualified for his Merchant Mariner duties. The act and subsequent events placed Respondent on notice of the “act of incompetence relating to the operation of a vessel.”

The term “act” is undefined in 46 U.S.C. § 7703(4) or 46 C.F.R. § 5.31. Black’s Law Dictionary defines “act” as “1. [s]omething done or performed, esp. voluntarily; a deed. 2. [t]he process of doing or performing; an occurrence that results from a person’s will being exerted on the external world . . .” *Black’s Law Dictionary Third Pocket Edition*, at 11-12. Applying this definition to an incompetence case is difficult because no one voluntarily does or performs a

heart attack, schizophrenia, or bi-polar; they simply happen.

Prior to August 9, 2004, 46 U.S.C. § 7703(1) (B) read “. . . (1) when acting under the authority of that license, certificate, or document – (B) has committed an act of incompetence, misconduct, or negligence.” (Emphasis added). On August 9, 2004, Congress amended 46 U.S.C. § 7703 by removing the term “incompetence” from section (1)(B) and placing it in new subsection 7703(4). In pertinent part, 46 U.S.C. § 7703 now reads “[a] license, certificate of registry, or merchant mariner’s document issued by the Secretary may be suspended or revoked if the holder - - (4) has committed an act of incompetence relating to the operation of a vessel.” (Emphasis added). Congress kept the language “committed an act” when it removed “incompetence” from subsection (1)(B) and placed it in subsection (4). The problem with the verb “committed” is that it connotes volition. Narrowly construing the phrase “committed an act” to mean only a mariner’s volitional, intentional, or overt action is inconsistent with the basic facts and circumstances in an incompetence case. For the purpose of Coast Guard suspension and revocation proceedings involving incompetence, the “act” of incompetence encompasses an event or occurrence that happens to a mariner, similar to an unintentional act. As stated in *Black’s Law Dictionary*, an “unintentional act” is “[a]n act not resulting from the actor’s will toward what actually takes place.” *Black’s Law Dictionary Third Pocket Edition*, at 12.

In Appeal Decision 2664 (SHEA) (2007), the mariner committed an act of incompetence when he experienced a manic episode of bipolar disorder causing him to act erratically. In Appeal Decision 2547 (PICCILOLO) (1992), the mariner’s act of incompetence occurred when he suffered episodes of uncontrolled diabetes. In Appeal Decision 2181 (BURKE) (1980), the mariner’s act of incompetence occurred when he suffered “psychotic breaks” due to “paranoid schizophrenia, in remission.” The act of incompetence in the instant case occurred when Mr. Plender suffered a severe heart attack in March 2009.

Mr. Plender's case is slightly different from the above cited decisions because they were adjudicated under the pre-August 9, 2004 statute. Prior to that date, the act of incompetence had to occur while the mariner was acting under the authority of his license. Now, the statute allows the Coast Guard to revoke an MMC any time the holder commits an act of incompetence. See H.R. Rep. No. 108-617, at 81 (2004) (Conf. Rep.). Even if a mariner commits an act of incompetence ashore or otherwise not while acting under the authority of his credential, his MMC may still be revoked as long as the act demonstrates his inability to perform his duties due to physical disability, mental incapacity, or professional deficiency and is "relating to the operation of a vessel." The impetus behind this change seems clear – the Coast Guard should not have to wait for a credentialed mariner to have a debilitating physical or mental event while performing his duties, especially when it is aware the condition could give rise to such an event.

Under 46 U.S.C. § 7703(4), identifying the act is an essential element for incompetence cases. See also 46 U.S.C. § 7701(b). The act will determine whether the "incompetence" is due to "professional deficiencies, physical disability, mental incapacity, or any combination thereof." See 46 C.F.R. § 5.31. For example, if the act is a schizophrenic episode then it is likely the case will involve incompetence due to mental incapacity. Similarly, if the act is that a mariner cannot meet the requirements to hold a MMC, then it is likely the case will involve incompetence due to professional deficiency. In the instant case, the act is a heart attack, a physical condition; therefore, this case involves incompetence due to physical disability.

Inability to Perform Required Duties

The incompetence definition requires the act to show the mariner's inability to perform required duties "due to physical disability, professional deficiency, mental incapacity, or any combination thereof." See 46 C.F.R. § 5.31. Respondent argues "[i]t is undisputed that the Coast Guard offered no evidence whatsoever that Capt. Plender was unable to perform any required physical functions of the license under which he was sailing." See Respondent Captain

Kirk C. Plender's Post-Hearing Brief at 4. Respondent further argues "Captain Plender is currently able to perform every required function or task of a licensed officer." Tr. at 117. Respondent is essentially claiming that because his condition is managed and he is currently able to perform his duties, he is not incompetent.

Similarly in SHEA, the respondent claimed his bi-polar mental condition was medically manageable and he had not suffered any relapses; therefore, he should not have been found incompetent. Mr. Shea, like Mr. Plender, relied on Appeal Decision 2547 (PICCIOLO) for the proposition that medical management of a condition could prevent a finding of incompetence. In SHEA, however, the ALJ found "one [with respondent's condition] who is in remission still has a greater risk of breakthrough episodes than someone who does not have bipolar disorder. Moreover, it is not certain that Respondent will remain symptom free even if he is compliant and takes the medication because the course of the illness is highly variable." See Appeal Decision 2664 (SHEA) (2007) at 4. (Brackets added). The Vice Commandant upheld the ALJ's incompetence finding in SHEA even though Mr. Shea was able to perform his duties at the time of the hearing. As the Vice Commandant stated in HOCKING, "*Picciolo* supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present." HOCKING at 14.

In Appeal Decision 2664 (SHEA) (2007), the mariner demonstrated an inability to perform his duties by experiencing a manic episode of bipolar disorder causing him to act erratically. In Appeal Decision 2547 (PICCIOLO) (1992), the mariner demonstrated an inability to perform his duties by experiencing episodes of uncontrolled diabetes. In Appeal Decision 2181 (BURKE) (1980), the mariner demonstrated an inability to perform his duties by experiencing "psychotic breaks" due to "paranoid schizophrenia, in remission." Similarly, Mr. Plender demonstrated an inability to perform his duties by experiencing a severe heart attack.

Had Mr. Plender been acting under the authority of his credentials onboard a vessel at the time of his heart attack, there would be little doubt he demonstrated an inability to perform his duties due to physical disability, but that is not what the law requires. At the time of his heart attack he was completely incapacitated, taken to the hospital, and received life-saving medical treatment. See Tr. at 31, 158; CG Ex. 01. Mr. Plender's heart attack occurred in early March, 2009 yet he was unable to return to work until late October 2009. Suffering a heart attack requiring stenting and an ICD demonstrated he had the inability to perform his required duties due to a physical disability during that time.

Mr. Plender's arguments he has not had another heart attack or cardiac event and has not suffered any arrhythmia does not disprove he demonstrated an inability to perform his duties. In SHEA, the respondent had received treatment for his bi-polar disorder and his doctor prescribed medication. He followed his doctor's orders and had no further mental decompensations since the act of incompetence aboard his vessel. Similarly, Mr. Plender states he has not suffered another heart attack or arrhythmia and the surgically implanted ICD has never shocked his heart. He monitors what he eats, rigorously exercises, and otherwise takes good care of himself. Respondent's counsel correctly points out there is no evidence Mr. Plender is currently unable to perform any of his required duties. See Tr. at 108-13. However, Mr. Plender's present ability to perform his duties does not eliminate the fact that at the time of his act of incompetence he demonstrated an inability to perform his duties due to a physical disability.

Relating to the Operation of a Vessel

Respondent's arguments imply the term "relating to the operation of a vessel" means something very similar to "acting under the authority of a license" by stating as follows:

Capt. Plender's operational record of service as a licensed chief mate was devoid of any medical accident or incident, affecting his physical ability to perform required duties, "relating to his operation of a vessel." The phrase "relating to the operation of a vessel" means, on its own plain-language terms, that the committed

act of “physical disability” with relation to “required duties” must have had some relationship to the performance by Capt. Plender of his duties as a chief mate aboard his ship.

See Respondent Captain Kirk C. Plender’s Post-Hearing Brief at 5.

There is no Commandant Decision on Appeal defining or discussing “relating to the operation of a vessel.” Narrowly construing “relating to the operation of a vessel” as Respondent suggests would result in a mariner essentially having to be operating under the authority of his MMC during the act of incompetence, a requirement Congress eliminated. The 2004 change in the law simply requires the Coast Guard to make a reasonable connection between the act of incompetence that occurred in the past and the operation of a vessel. In Mr. Plender’s case, the Coast Guard makes that connection by finding his “underlying cardiomyopathy with the associated risk for ventricular dysrhythmias is disqualifying, [for his Merchant Mariner duties] even without the ICD.” See CG Ex. 03. (Brackets added). See also CG Exs. 02 and 04.

The Coast Guard’s medical witness, Dr. Laura Gillis, opined there are several “concerns” regarding Mr. Plender’s situation. First, Respondent has a history of myocardial infarction. According to Dr. Gillis, “depending on how damaged the heart muscle is and how much function the mariner regains after the heart attack, he may or may not be able to do his or her routine and emergency duties.” See Tr. at 44. Second, Mr. Plender had two stents placed. Dr. Gillis explains that this is of concern “because there has been damage to the heart. There’s now a stent in there that’s keeping the blood flow. There’s a risk for reocclusion or occlusion of the stent, and therefore, the risk for sudden incapacitation.” See Tr. at 44-5. Third, Respondent has been diagnosed with cardiomyopathy or cardiac decompensation. See Tr. at 45. This is a concern “[d]ue to the risk of sudden incapacitation or impairment of abilities to perform routine or emergency duties.” Id. Fourth, Mr. Plender has also been diagnosed with congestive heart failure (CHF) or dilation of the heart. See Tr. at 46. Dr. Gillis is similarly concerned with this condition “due to the possibility of impairment of functioning of the heart muscle preventing the

mariner from performing routine and emergency duties.” Id. Fifth, Respondent has an Implanted Cardioverter Defibrillator (ICD). The ICD is designed to shock the heart if the heart slips into an arrhythmia. The ICD is a concern for Dr. Gillis because the shock supplied by the ICD could incapacitate Respondent. See Tr. at 57. Further, there is a possibility that the ICD could malfunction and shock the heart even if the heart does not go into arrhythmia similarly causing incapacitation. See Tr. at 36-7.

Respondent did not present his own expert witness testimony. Rather, he presented medical journal articles and a letter from his cardiologist, Dr. Henry Sesselberg, to stand for the proposition that his risk to safety at sea is acceptable. See Resp. Exs. A, B, C, and D. Respondent attempts to show that because he does not exhibit several risk factors identified in these medical articles and by Dr. Sesselberg, then his risk to maritime safety is reduced.

Respondent concedes he suffered a heart attack; that he has a low ejection fraction; and, that he had an ICD surgically implanted. The Coast Guard’s witness concedes there is no evidence showing Mr. Plender does not have the present inability to perform his required duties and there is no evidence showing Mr. Plender has risk factors such as smoking, diabetes, renal failure, and old age. However, Respondent’s evidence does not rebut Dr. Gillis’ opinion that he is a significant risk for sudden incapacitation or sudden death. See Finding of Fact 30. The undersigned gives great weight to Dr. Gillis’ testimony regarding Mr. Plender’s elevated risk. Mr. Plender does not provide medical testimony that he is at no greater risk for incapacitation than the general population. His evidence merely shows that of all people having the same conditions, he is less of a risk. That is far different than Dr. Gillis’ opinion that his condition places him at a higher risk for sudden incapacitation or sudden death than that of the general population.

After reviewing all the evidence and testimony, the undersigned finds Respondent’s risk of sudden incapacitation or sudden death to be greater than that of the general population, and, as

such, creates an unacceptable risk to safety at sea. Accordingly, the Coast Guard's evidence shows a reasonable connection between the act of incompetence and Mr. Plender's operation of a vessel.

Appeal Decision 2698 (HOCKING) (2012) Distinguished

On the surface, Appeal Decision 2698 (HOCKING) (2012) and Mr. Plender's case appear similar because both involve the same underlying conditions (ischemic cardiomyopathy and placement of an ICD). But, there are several crucial facts that distinguish Mr. Plender's case from HOCKING.

First, in HOCKING, no act of physical incompetence occurred within the time limitations for service of a complaint. Pursuant to 46 C.F.R. § 5.55, "[t]he time limitations for service of a complaint upon the holder of a credential are as follows...for one or more of the misconduct offenses specified in...§5.61(a), service shall be within five years after commission of the offense alleged therein." See 46 C.F.R. § 5.55(a) (2). Section 5.61(a) specifically enumerates "Incompetence" as one of the listed offenses. See 46 C.F.R. § 5.61(a) (9).

Mr. Hocking suffered from episodes of ventricular tachycardia. Physicians diagnosed him with ischemic cardiomyopathy resulting in surgical placement of an ICD in 1995. See Appeal Decision 2698 (HOCKING) (2012) at 2-3. He also suffered additional episodes of ventricular tachycardia in 2000. Id. at n.1. The Coast Guard did not initiate its incompetence action against Mr. Hocking until 2010; therefore, none of the acts occurring in 1995 or 2000 were within the time limitations for service of a complaint under 46 C.F.R. § 5.55(a) (2).

In Mr. Plender's case, his heart attack occurred in 2009. The Coast Guard served its Complaint in 2011, clearly within the five year time limitation. As a result, Mr. Plender's heart attack serves as the starting point for the instant case, whereas in HOCKING, the Vice Commandant stated "[t]he Coast Guard's finding that Respondent was not fit for duty set in motion the events culminating in the charge and proceeding herein" HOCKING at 7. The

Plender case clearly has an act demonstrating the mariner's inability to perform his required duties due to physical disability relating to the operation of a vessel.

Second, in HOCKING, the Vice Commandant stated "[i]n light of the evidence in this case, where there is a lack of evidence that safety would be impaired by Respondent's retention of his MMD, it is consistent with the intent of 46 C.F.R. § 5.567(b) to place Respondent's condition in the category of professional incompetence." HOCKING at 19, (brackets added). Title 46 C.F.R. § 5.567(b) states in pertinent part "[t]he order is directed against all credentials or endorsements, except that in cases of negligence or professional incompetence, the order is made applicable to specific credentials or endorsements." In HOCKING the Vice Commandant held that the mariner's case was one of professional incompetence and because there was no evidence showing the mariner should not retain his document [MMD], he was allowed to do so.

Mr. Plender's case is not one of professional incompetence. The Coast Guard adamantly states it is alleging physical incompetence or incompetence due to physical disability, not professional incompetence.⁸ See Tr. at 11-2, 107-8. (Emphasis added). Contrary to HOCKING which "... had a lack of evidence that safety at sea would be impaired by Respondent's retention of his MMD," Dr. Gillis testified she did not consider Respondent medically qualified for any Coast Guard credential. See Tr. at 57-8. Her opinion is supported by substantial evidence in the record and is therefore accorded great weight.

As stated in HOCKING, the types of incompetence (physical disability, mental incapacity, and professional deficiency) can overlap. Indeed, there is overlap here. Respondent's act of incompetence could have occurred when he was unable to obtain a medical waiver for his underlying heart condition and ICD. Absent a waiver, he could not meet the professional requirements to hold his license thereby demonstrating an inability to perform his

⁸ For the purposes of this Decision and Order, "physical incompetence" is the same as "incompetence due to physical disability."

duties due to professional deficiency. The act would relate to the operation of a vessel because he presents a significant risk for incapacitation or death. While Mr. Plender could have been found to be professionally incompetent, the evidence suggests incompetence due to physical disability presents a clearer analysis.

DECISION

In view of the foregoing, the undersigned finds Respondent committed an act of incompetence demonstrating an inability to perform his required duties due to physical disability when he suffered a severe myocardial infarction in March 2009. That act of incompetence relates to the operation of a vessel because Respondent presents a risk for sudden incapacitation or sudden death greater than that of the general population. The Coast Guard's allegation of incompetence is therefore **PROVED** by a preponderance of reliable, probative, and credible evidence.

ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Kirk C. Plender and the subject matter of this hearing are properly within the jurisdiction of the U.S. Coast Guard and the Administrative Law Judge in accordance with 46 U.S.C. §7703; 46 C.F.R. Part 5; and, 33 C.F.R. Part 20.
2. At all relevant times, Respondent was the holder of validly issued credentials.
3. Respondent committed an act of incompetence when he suffered a severe heart attack in March, 2009.
4. Respondent's incapacitation as a result of his heart attack demonstrated an inability to perform his required duties due to physical disability.
5. Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population.

6. Because Respondent's medical conditions place him at greater risk for sudden incapacitation or sudden death than that of the general population, his heart attack is relating to the operation of a vessel.

7. Respondent has committed an act of incompetence demonstrating his inability to perform required duties due to physical disability that is relating to the operation of a vessel.


8. Respondent is incompetent due to physical disability to hold any Coast Guard issued credential .

ORDER

IT IS HEREBY ORDERED that the allegation of Incompetence against Respondent Kirk C. Plender is found **PROVED**.

IT IS FURTHER ORDERED that all validly issued credentials and endorsements issued to Respondent are hereby **REVOKED** and he must surrender same to the Coast Guard immediately.

PLEASE TAKE NOTICE that service of this Decision and Order on the parties and/or parties' representative(s) serves as notice of appeal rights set forth in 33 C.F.R. §§ 20.1001 – 20.1004, attached hereto as **Attachment C**.


Walter J. Brudzinski
Administrative Law Judge
United States Coast Guard

Date: September 17, 2012

ATTACHMENT A

WITNESSES AND EXHIBITS:

Witnesses:

For the Coast Guard: Dr. Laura G. Gillis, MD, MPH – Federal Maritime Surgeon, Chief, Medical Evaluations Division, National Maritime Center.

For Respondent: Mr. Kirk C. Plender testified on his own behalf.

Coast Guard Exhibits:

CG 01 – Respondent’s Merchant Mariner Credential Medical Evaluation Report (719K) dated January 1, 2010 and accompanying medical documentation (48 pages).

CG 02 – National Maritime Center (NMC) determination letter to Respondent dated March 22, 2010 (2 pages).

CG 03 – NMC reconsideration letter to Respondent from May 2010 (undated) (2 pages).

CG 04 – Commandant appeal letter to Respondent dated March 17, 2011 (3 pages).

CG 05 – Federal Register notice of availability entitled, “Medical and Physical Evaluation Guidelines for Merchant Mariner Credentials,” (73 FR 56600 (September 29, 2008)) (5 pages).

CG 06 – U.S. Coast Guard Navigation and Vessel Inspection Circular (NVIC) 04-08 with enclosures (75 pages). Mutually accessible and available at:
http://www.uscg.mil/nmc/medical/NVIC/NVIC_4_08_with_enclosures.pdf

Respondent Exhibits:

Resp. A – Federal Motor Carrier Safety Administration Expert Panel Recommendations dated April 10, 2007 (35 pages).

Resp. B – *Risk Stratification for Primary Implantation of a Cardioverter-Defibrillator in Patients with Ischemic Left Ventricular Dysfunction*, 51 Journal of the American College of Cardiology, No. 3, January 22, 2008 (9 pages).

Resp. C – *Limitations of Ejection Fraction for Prediction of Sudden Death Risk in Patients with Coronary Artery Disease*, 50 Journal of the American College of Cardiology, No. 12, September 17, 2007 (17 pages).

Resp. D – Letter from Dr. Henry W. Sesselberg, MD to Mr. Luke B. Harden, Chief Marine Credentialing Program Policy Division, U.S. Coast Guard, dated November 7, 2010 (3 pages).

Resp. E – Merchant Mariner Credential Medical Evaluation Report (719K) dated April 9, 2012 (9 pages).

Resp. F – Letter from Captain Joseph M. Surmann, MV APL Phillippines, dated January 16, 2010 (1 page).

ATTACHMENT B

COAST GUARD'S PROPOSED FINDINGS OF FACT

1. Respondent is the holder of a Coast Guard license as master of steam or motor vessels of any gross tons upon oceans. Respondent also holds a Coast Guard document. Respondent's current credentials expire on October 2, 2012. Hearing Transcript ("Tr.") at 7-8.

ACCEPTED AND INCORPORATED.

2. While operating under the authority of his credentials, Respondent is required to perform duties related to the operation of a vessel. Tr. at 149, 154-157, 180.

ACCEPTED AND INCORPORATED.

3. In 2009, Respondent experienced a very significant myocardial infarction or heart attack. Tr. at 22; CG Ex. 1 at 16.

ACCEPTED AND INCORPORATED.

4. As a result of his heart attack, Respondent was diagnosed with coronary artery disease and ischemic cardiomyopathy. Tr. at 22-23; CG Ex. 1.

5. As a result of his ischemic cardiomyopathy and coronary artery disease, Respondent had an implantable cardioverter defibrillator ("ICD") placed. Tr. at 22-23; CG Ex. 1 at 38.

ACCEPTED AND INCORPORATED.

6. An ICD is a medical device implanted in a patient susceptible to potentially-lethal heart arrhythmias. The ICD delivers a shock to the heart in an attempt to correct the arrhythmia. A shock from an ICD can, in itself, cause sudden incapacitation. Tr. at 23-24, 36-37, 132-133; CG Ex. 1 at 31.

ACCEPTED AND INCORPORATED.

7. Respondent's cardiac ejection fraction is between 20 and 30 percent. Tr. at 30, 34, 41; CG Ex. 1.

ACCEPTED AND INCORPORATED.

8. Ejection fraction is a percentage measurement that indicates the performance of the heart. A depressed ejection fraction is an indication that the heart's ability to pump has become compromised. Normal ejection fraction is greater than 55 percent. Tr. at 29-30.

ACCEPTED AND INCORPORATED.

9. Respondent's medical conditions, including ischemic cardiomyopathy, reduced ejection fraction, and placement of an ICD give Respondent a higher risk for sudden incapacitation than that of the general population. See Tr. at 36-37, 45-46, 57, 110-111, 124, 131-133, 138.

ACCEPTED AND INCORPORATED.

10. On March 17, 2011, the Coast Guard Acting Director of Prevention Policy issued a "final agency action" letter to Respondent finding that Respondent's medical condition presented "an unacceptable risk to maritime and public safety," and denying Respondent's application for an endorsement as a vessel security officer. CG Ex. 4.

NOT ACCEPTED. Respondent did not apply for a waiver of endorsement as vessel security officer. Nonetheless, the Commandant's finding that Respondent's medical condition presented an unacceptable risk for the purposes of being qualified to perform Merchant Marine duties under his Credentials supports Dr. Gillis' opinion that Respondent is not medically qualified and his risk of sudden incapacitation or sudden death is greater than that of the general population.

COAST GUARD'S PROPOSED CONCLUSIONS OF LAW:

1. Based on his ischemic cardiomyopathy, severely reduced cardiac ejection fraction, and the placement of an ICD, Respondent presents an unacceptable risk of sudden incapacitation. See Tr. at 57, Appeal Decision 2698 (HOCKING).

ACCEPTED AND INCORPORATED.

2. Due to his medical condition and the placement of an ICD, Respondent is disqualified from performing the duties under his Coast Guard credentials and is unfit for maritime service. See Tr. 58-59; CG Ex. 4; Appeal Decision 2698 (HOCKING).

NOT ACCEPTED as a conclusion of law. It is a fact that the NMC and then the Commandant of the Coast Guard found that Respondent was medically disqualified in a separate administrative process. See CG Exs. 02, 03, and 04. Determining disqualification and fitness for duty are not powers of the Administrative Law Judge in these 46 U.S.C. §§ 7701-7704 administrative proceedings for incompetence.

3. Given his medical condition, Respondent is not medically qualified for any Coast Guard credential. Tr. at 57-58.

NOT ACCEPTED. It is a fact that the NMC and then the Commandant of the Coast Guard found that Respondent was medically disqualified in a separate administrative process. See CG Exs. 02, 03, and 04. Medical qualification or disqualification is not a decision to be made by the Administrative Law Judge. It is a medical determination that is separate and apart from the legal determination of incompetence, which is the subject of these suspension and revocation proceedings.

4. Respondent's medical condition and his ICD render him physically incompetent to hold a Coast Guard-issued credential. See Appeal Decision 2698 (HOCKING).

ACCEPTED AND INCORPORATED to the extent Respondent is incompetent due to physical disability.

RESPONDENT'S PROPOSED FINDINGS OF FACT

1. Capt. Plender is the current holder of a Master's unlimited license and master's unlimited towing vessel license, issued by the United States Coast Guard (T.149);

ACCEPTED AND INCORPORATED. Respondent is also the holder of a Merchant Mariner's Document and an endorsement for "radar observer unlimited."

2. Capt. Plender is currently employed by APL Maritime as a Chief Mate, a position he has held for two years (T. 149).

ACCEPTED AND INCORPORATED to the extent he was employed by APL at all relevant times.

3. As Chief Mate for APL Maritime Okinawa, Capt. Plender's trade route is typically San Francisco to the Far East, including Yokohama, Okinawa, Shanghai, and Pusan, Korea (T. 149);

ACCEPTED BUT NOT INCORPORATED beyond a mere description of his position. The sailing route is not relevant to a finding of incompetence due to physical disability.

4. Capt. Plender's last vessel was the APL KOREA, a 959-foot container vessel (T. 172);

ACCEPTED BUT NOT INCORPORATED. Respondent is incompetent due to physical disability to serve on any vessel in any capacity.

5. Capt. Plender graduated from Maine Maritime Academy in 1982 with a Bachelor of Nautical Science degree (T. 150);

ACCEPTED BUT NOT INCORPORATED. When Respondent graduated from Maine Maritime Academy is not relevant on the issue of incompetence due to physical disability as the result of his heart attack in March 2009.

6. Upon his graduation, Capt. Plender sat for and was issued a Third Mate's license in April 1982 (T. 150);

ACCEPTED BUT NOT INCORPORATED. When Respondent graduated and sat for his Third Mate's examination is not relevant on the issue of incompetence due to physical disability as the result of his heart attack in March 2009.

7. Capt. Plender sailed as a licensed Third Mate on tugboats for Crowley Maritime for five years, then sailed for Keystone Tanker Corporation for seventeen and a half years (T. 150);

ACCEPTED BUT NOT INCORPORATED. Respondent is found physically incompetent due to physical disability to serve on any vessel in any capacity.

8. In 1989, Capt. Plender sat for his Second Mate's license, and then sailed as Second Mate for six to eight years on oil tankers (T. 151);

ACCEPTED BUT NOT INCORPORATED. Respondent is found incompetent due to physical disability to serve on any vessel in any capacity.

9. The duties of a Second Mate aboard oil tankers include bridge watch underway, cargo watch in port, and chart corrections (T. 152);

ACCEPTED BUT NOT INCORPORATED. Respondent is found incompetent due to physical disability for service on any vessel in any capacity.

10. Service as Second Mate on a tanker also involved physical activity, including turning valves, raising and lowering butterworth hoses, and climbing up and down into cargo tanks. Butterworth hoses were used to clean the tank. The tank cleaning often involved raising and lowering 50-foot lengths of hoses and a sprinkler device weighing over a hundred pounds (T. 153);

ACCEPTED BUT NOT INCORPORATED. Respondent is found incompetent due to physical disability to serve on any vessel in any capacity because his medical conditions, including ischemic cardiomyopathy, reduced ejection fraction, and placement of an ICD put him at a higher risk for sudden incapacitation or sudden death than that of the general population, notwithstanding the physical ability as described.

11. Capt. Plender sat for his Chief Mate's license around 1994-5. He then began to sail for Keystone Shipping Company as a Chief Mate under government and military sea lift command supply ships (T. 154);

ACCEPTED BUT NOT INCORPORATED. Respondent's prior experience does not mitigate his risk for sudden incapacitation or sudden death to less than or equal to that of the general population.

12. The job of Chief Mate aboard an oil tanker also involved a great deal of physical activity and stressful work. That included climbing up and down into tanks, carrying heavy hoses, opening and closing valves, etc. (T. 154-5);

ACCEPTED BUT NOT INCORPORATED. Respondent's past physical capacity does not reduce his risk of sudden incapacitation or sudden death to less than or equal to that of the general population.

13. Capt. Plender subsequently went to work as Chief Mate for APL Maritime sailing on container ships (T. 155);

ACCEPTED BUT NOT INCORPORATED. Respondent's past work history does not lower his

risk of sudden incapacitation or sudden death to less than or equal to that of the general population.

14. As a Chief Mate aboard container ships, Capt. Plender was also called upon to do a lot of climbing to inspect ballast tanks, crawl spaces, void spaces, bilge alarms, etc. (T. 155);

ACCEPTED BUT NOT INCORPORATED. Respondent's physical capacity does not lower his risk of sudden incapacitation or sudden death to less than or equal to that of the general population.

15. Around 1996-7 Capt. Plender sat for and passed his Master's License. He has, however, never sailed as Master (T. 156);

ACCEPTED BUT NOT INCORPORATED. Respondent's incompetence due to physical disability applies to all validly issued Credentials he holds.

16. In March of 2009, while he was on vacation and skiing at Loon Mountain, Capt. Plender suffered an anterior myocardial infarction (T. 157);

ACCEPTED AND INCORPORATED to the extent Respondent was on a ski trip in March 2009 at the time of his heart attack. There is an error on page 157 of the transcript which states the myocardial infarction occurred in March 2005 instead of 2009.

17. Medical assistance arrived and took Capt. Plender to Maine Medical by ambulance. At the hospital, two stents were implanted. One stent clotted and occluded, and it was replaced. Capt. Plender's heart never stopped and never went into arrhythmia. It merely slowed down, but then resumed its normal rate (T. 158);

ACCEPTED AND INCORPORATED to the extent that Mr. Plender received emergency medical treatment including the implantation of a second stent after the first stent occluded. The proposed facts that Respondent's heart never stopped and never went into arrhythmia are not factors in determining whether the allegation of incompetence due to physical disability is proved.

18. While in the hospital, Capt. Plender also got a viral infection. He stayed in the hospital an additional three days and was given an antibiotic (T. 159);

ACCEPTED BUT NOT INCORPORATED. The viral infection was not a causative factor in determining whether the allegation of incompetence due to physical disability is proved.

19. At some point during Capt. Plender's stay at the hospital he became acquainted with Dr. Henry Sesselberg and chose him to be his cardiologist. Dr. Sesselberg continues to be Capt. Plender's cardiologist through to the present (T. 159);

ACCEPTED BUT NOT INCORPORATED. Dr. Sesselberg's treatment notes speak for themselves.

20. At some point after his discharge, but during follow-up consultations, Dr. Sesselberg recommended that Capt. Plender consider an implantable cardioverter defibrillator ("ICD") (T. 160);

ACCEPTED AND INCORPORATED to the extent Respondent had an ICD inserted in his chest.

21. At no time, either before or after the implantation of the ICD, did Capt. Plender's heart ever undergo defibrillation (T. 160);

ACCEPTED BUT NOT INCORPORATED. The absence of defibrillation was not a factor in determining whether he is incompetent due to physical disability.

22. Following Dr. Sesselberg's recommendation, Capt. Plender elected to have the ICD surgically implanted on June 16, 2009 (T. 160). Dr. Sesselberg was the surgeon who conducted the surgery. (T. 161);

ACCEPTED AND INCORPORATED to the extent the ICD was inserted in Respondent's chest successfully.

23. In a follow-up visit on July 20, 2009, stitches and staples were removed and Dr. Sesselberg believed that Capt. Plender had successfully tolerated the procedure with no complications (T. 161);

ACCEPTED AND INCORPORATED to the extent that the operation was a success.

24. At the same follow-up visit on July 20, 2009, Capt. Plender had discussions with Dr. Sesselberg about medication. At the time there was no self-testing regimen for Coumadin, and Dr. Sesselberg accordingly assented to Capt. Plender's desire to take aspirin instead (T. 162-3);

ACCEPTED BUT NOT INCORPORATED. Coumadin was not a factor in determining whether the allegation of incompetence due to physical disability was proved.

25. Following that, Capt. Plender went through a rehabilitation period. He started on treadmills, with his EKG wired up, and progressed to work outs three times a week. Medication, dieting, and adjustment of food habits were also part of the regimen (T. 163-4);

ACCEPTED BUT NOT INCORPORATED. His physical conditioning might place him at a lower risk but only among those with similar conditions. His risk of sudden incapacitation or sudden death still remains greater than that of the general population thus rendering him incompetent due to physical disability.

26. Also following his discharge in July, Capt. Plender had an episode of fluid retention. Because he was then eating too much salt, the salt retained excess fluid in his body making it harder for his heart to pump. He experienced a bloated feeling, some discomfort, and some loss of breath. Dr. Sesselberg resolved the problem by prescribing Lasix, and having Capt. Plender monitor his fluid intake and avoid processed foods. Capt. Plender did not suffer any heart arrhythmia (T. 164-5);

NOT ACCEPTED. Respondent mischaracterizes what was actually "mild heart failure" for

“fluid retention.” In his letter of October 22, 2009 (CG Ex. 01 at 48) Dr. Sesselberg’s states “he [Mr. Plender] was treated briefly earlier this last summer for mild heart failure . . .” Dr. Gillis explained that this means “. . . his [Mr. Plender’s] heart failed as a pumping mechanism. When you get congestive heart failure, the heart’s pumping mechanism is failing and it’s not adequately pumping oxygenated blood to the tissues, and as a result there’s back up of fluid throughout the body.” Tr. at 38-9.

27. Capt. Plender never suffered any subsequent or further myocardial infarction (T. 165);

ACCEPTED BUT NOT INCORPORATED. That he has not suffered further myocardial infarctions is not a factor in the determination he is incompetent due to physical disability.

28. Capt. Plender’s ICD has never triggered or signaled since it was installed (T. 165);

ACCEPTED BUT NOT INCORPORATED. The fact that the ICD has never signaled is not a factor in the determination he is incompetent due to physical disability.

29. Capt. Plender recovered thoroughly from the bloating condition with the aid of Lasix (T. 165);

NOT ACCEPTED for the reasons set forth in the ruling on proposed finding of fact 26.

30. Capt. Plender has never had any further cardiac problems of any kind since that date (T. 167);

ACCEPTED BUT NOT INCORPORATED. Whether Respondent has had any further cardiac problems since his heart attack is was not a factor in determining whether he is incompetent due to physical disability.

31. Capt. Plender is now extremely careful about what he eats and drinks aboard ship or on shore. He is also conscientious about his physical fitness. He exercises six days a week, takes frequent stress tests, and monitors his heart rate. His exercises consist of 45 minutes on a rowing machine and 45 minutes on a LifeCycle bicycle (T.166);

ACCEPTED BUT NOT INCORPORATED. Respondent is less at risk than others with his condition but still at greater risk for sudden incapacitation or sudden death than that of the general population.

32. Capt. Plender has never had diabetes (T. 168);

ACCEPTED BUT NOT INCORPORATED. Despite not having diabetes, Respondent’s risk for sudden incapacitation or sudden death is greater than that of the general population.

33. Capt. Plender has never had any kidney problems or renal failure (T. 168);

ACCEPTED BUT NOT INCORPORATED. Despite lack of kidney problems or renal failure, Respondent’s risk of sudden incapacitation or sudden death is still greater than that of the general population.

34. Capt. Plender returned to work as a Chief Mate with APL in the Fall of 2009, having consulted with Dr. Sesselberg and received his full approval as being fit to return to work (T. 168);

ACCEPTED AND INCORPORATED only to the extent Respondent returned to work in the fall of 2009; Dr. Sesselberg is not the decision maker on whether Respondent is qualified for his Merchant Marine duties and not the decision maker on the legal conclusion of whether Respondent is incompetent due to physical disability.

35. Since that time, Capt. Plender has worked continually as a permanent Chief Mate for APL Maritime (T. 169);

ACCEPTED AND INCORPORATED to the extent that since October 2009, Respondent has been a full time Chief Mate for APL Maritime. It does not imply that his risk for sudden incapacitation or sudden death is less than or equal to that of the general population.

36. Capt. Plender typically works 70-90 days on and about the same time off. Two trips to the East Asian run typically take between 70 and 90 days (T.169);

ACCEPTED BUT NOT INCORPORATED. Respondent's trip lengths and time off between trips are not dispositive on whether risk for sudden incapacitation or sudden death is greater than the general population.

37. It was after his first tour as Chief Mate in the Fall of 2009 that Capt. Plender's performance with the company was sufficient to earn him a promotion to Permanent Chief Mate (T. 170), and the praise of his captain (Plender Ex. F.);

ACCEPTED BUT NOT INCORPORATED. Respondent's past performance, while commendable, is not probative on whether his risk of sudden incapacitation or sudden death is greater than that of the general population.

38. Capt. Plender continues to work on a cycle of approximately 84 days on, 84 days off. Before each time when he ships out, he undergoes a pre-employment physical, in which the doctor is required to determine him fit to return to work (T. 171);

ACCEPTED BUT NOT INCORPORATED. Fitness to return to work does not change Respondent's underlying conditions which place him at greater risk for sudden incapacitation or sudden death than that of the general population.

39. Since Capt. Plender returned to work in the fall of 2009, no doctor in a pre-employment physical has ever told him that he is not fit to go to sea. Capt. Plender has disclosed to all the doctors who have examined him his cardiac history (T. 171). Capt. Plender has, in fact, given Dr. Sesselberg's telephone number to all doctors who have performed pre-employment physicals on him so that they could confer with him if they chose to do so (T. 171-2);

NOT ACCEPTED. The opinions of physicians conducting Respondent's pre-employment physicals are accorded less weight in determining his risk of sudden incapacitation or sudden death than the opinions of agency physicians with relevant expertise.

40. On his most recent trip aboard his current permanent vessel APL KOREA, Capt. Plender's duties included bi-annual tank inspections requiring him to climb down into and crawl around seven or eight tanks to inspect for fractures or damage; the standing of eight hours of bridge watch per day; the standing of eight hours of cargo watch in port; calculating the stability of the vessel; ballasting the vessel; patrolling and inspecting on deck to make sure the containers are properly placed; inspecting the containers for damage; insuring the proper lashing of the containers; preparing the vessel's loading plans; inspecting the cargo holds and the bilge alarms, which requires climbing up and down 60-80 feet ladders into cargo holds; preparing the ship for Coast Guard and ABS (American Bureau of Shipping) inspections; preparing the ship for shipyard or dry dock; inspecting safety equipment for Coast Guard inspections; and supervising fire drills (T. 173-176);

ACCEPTED BUT NOT INCORPORATED. That Respondent has demonstrated the present ability to perform such tasks does not lower his risk of sudden incapacitation or sudden death equal to or below that of the general population.

41. Referring to the March 17, 2011 letter received by Capt. Plender, he did not apply for a waiver of his vessel's security endorsement as stated erroneously by the letter (T. 180);

ACCEPTED AND INCORPORATED as shown in the above ruling on Coast Guard proposed finding of fact number 10.

42. Capt. Plender is, in all respects, able to perform all of the required tasks of a licensed Chief Mate or Master aboard an American flag merchant vessel (T. 180);

NOT ACCEPTED. Whether Respondent has the present ability to perform all required tasks does not exclude a determination that his risk of sudden incapacitation or sudden death is greater than that of the general population.

43. Dr. Laura G. Gillis, the Coast Guard's medical expert and only witness, was not at the time of the hearing a board certified cardiologist (T. 60);

ACCEPTED BUT NOT INCORPORATED. Dr. Gillis is board certified in occupational medicine. Her opinion is given great weight because she is able to link Respondent's medical condition and his greater than the average population risk of sudden incapacitation or sudden death to the requirements of safety at sea.

44. Dr. Gillis did not have any cardiologist on the staff at NMC to examine Capt. Plender's record (T. 60);

ACCEPTED BUT NOT INCORPORATED for the reasons set forth in Respondent's proposed finding of fact 43.

45. Dr. Gillis did not refer Capt. Plender's chart out for review by a cardiologist (T. 60);

ACCEPTED BUT NOT INCORPORATED for the reasons set forth in Respondent's proposed finding of fact 43.

46. Dr. Gillis never spoke with or interviewed Capt. Plender during the course of her review of

his chart (T. 60);

ACCEPTED BUT NOT INCORPORATED. Speaking with or interviewing Respondent is not probative on the issue of whether his underlying medical condition, as documented in his medical records, places him at greater risk for sudden incapacitation or sudden death than that of the general population. Respondent's current physical capacity does not lower his risk of sudden incapacitation or sudden death equal to or less than that of the general population.

47. All that Dr. Gillis ever did was to review Capt. Plender's medical chart, a process which took her approximately 20-30 minutes (T. 61);

ACCEPTED BUT NOT INCORPORATED for the reasons set forth in Respondent's proposed finding of fact number 46. Further, there is no dispute about the accuracy of Respondent's medical records. The information contained in Mr. Plender's medical records speaks for itself.

48. Although Dr. Gillis testified that she had concerns about Capt. Plender's ability to "interact with his surroundings" in the event of a sudden incapacitation, she admitted under cross examination that she did not know anything about his surroundings aboard the ship. For example, she did not know the meaning of "watch condition 1", "watch condition 2", "watch condition 3" or "watch condition 4" aboard a vessel with respect both to the circumstances necessitating the conditions or the manning requirements (T. 61-3);

NOT ACCEPTED. Respondent's risk of sudden incapacitation or sudden death is not reduced by changing watch conditions.

49. Not only was Dr. Gillis not acquainted with how many people were on bridge standing watch with Capt. Plender, she also did not know how many people were on deck to assist him for cargo watches either (T. 64);

NO ACCEPTED. Respondent's risk of sudden incapacitation or sudden death remains higher than that of the general population despite the presence of other people to assist him.

50. Dr. Gillis admitted that the reading or the interpreting of ejection fractions ("EF") is subjective, for example, one person might read an EF as 20 and another might read it as 25, depending upon the test, and who is doing the reading (T. 69);

NOT ACCEPTED. In either event, Respondent's ejection fraction remains substantially below the normal of 55%.

51. Dr. Gillis admitted that the FAA's concerns for ICDs, heart arrhythmia, and EF below 40 are more acute for a pilot flying a jumbo jet, a truck driver or school bus driver going 60 miles an hour on an interstate highway, than they would be for a licensed merchant marine officer standing on the bridge of a ship (T. 74-5);

NOT ACCEPTED. Whether Respondent's conditions are less acute than in other transportation modes is irrelevant when his risk of sudden incapacitation or sudden death is greater than that of general population. The risk to safety at sea is not diminished simply because sudden incapacitation or sudden death might be potentially less acute than in other transportation modalities.

52. Specifically, Dr. Gillis admitted that with airline pilots and truck drivers, the margin of error for avoiding an accident may be a matter of split seconds; and that is not the case for a watch officer on the bridge of a ship (T. 75);

NOT ACCEPTED for the reasons stated in the ruling on finding of fact number 51.

53. The document titled "Expert Panel Recommendations", presented to Federal Motor Carrier Safety Administration ("FMCSA") and dated April 10, 2007 (Respondent Exhibit A), states, in response to Key Question 4 (What is the risk of sudden incapacitation or sudden death following implantation of an ICD?), that no attempt was made to determine a quantitative estimate of the risk of sudden death or incapacitation in individuals with low left ventricle ejection fraction ("LVEF"). (T. 79);

NOT ACCEPTED. The journal article speaks for itself. Dr. Gillis testified on page 138-9 of the transcript that she is unable to quantify the risk but that Respondent is at a higher risk than the general population. This decision and order is based on a finding that Respondent's risk of sudden incapacitation or sudden death is greater than that of the general population, not a specific percentage greater than that of the general population. The Commandant found that standard sufficient to determine Mr. Plender is not qualified for his Merchant Marine duties without the necessity for further quantification. The undersigned also finds that standard sufficient to determine Respondent is incompetent due to physical disability without the necessity of further quantification.

54. Referring to a journal article titled "Risk Stratification for Primary Implantation of a Cardioverter-Defibrillator in Patients with Ischemic Left Ventricular Dysfunction, Journal of the American College of Cardiology, v. 51, no. 3 (Respondent Exhibit B), Dr. Gillis admitted that in determining risk factors for a person for a person [sic] with low EF, post-myocardial infarction (heart attack), one must look beyond the presence of an ICD and a low ejection fraction to a number of risks. The Journal article (Exhibit B) identified five risk factors. (T. 85-86);

ACCEPTED BUT NOT INCORPORATED. In finding Respondent not medically qualified for his Merchant Marine duties, the record does not reflect that the Coast Guard failed to take into consideration Respondent's entire medical history. See CG Exs. 01, 02, 03, and 04. As stated in the NMC's denial of Respondent's request for reconsideration (CG Ex. 03), Respondent was found not qualified for his Merchant Mariner duties despite the ICD. Similarly, this decision and order takes into consideration Respondent's entire medical history to arrive at the legal conclusion that Respondent's medical conditions place him at a higher risk for sudden incapacitation or sudden death than that of the general population.

55. Reviewing an article titled "Limitations of Ejection Fraction for Prediction of Sudden Death Risk Patients with Coronary Artery Disease", authored by, among others, Dr. Alfred E. Buxton (Journal of the American College of Cardiology) (Respondent Exhibit C), Dr. Gillis admitted that low ejection fraction is a risk factor only when it exists in combination with other risk factors (T. 88);

NOT ACCEPTED. This proposed finding mischaracterizes the question and Dr. Gillis' response. On page 88 of the transcript, Respondent's counsel asks Dr. Gillis, "Am I correct that the paragraph that I just read and the gist of this article really is what Dr. Buxton is saying, yes,

EF is a factor but sometimes EF is a risk factor only when it exists in combination with other risk factors as well. Have I got that right?" Dr. Gillis responds, "sometimes." Finding Respondent not qualified for his Merchant Mariner duties and finding him incompetent due to physical disability are based on other factors in addition to his low ejection fraction as indicated in the ruling on Respondent's proposed finding of fact 54.

56. Dr. Gillis recognized Dr. Alfred E. Buxton is one of the nation's leading cardiologists (T. 88);

NOT ACCEPTED. Notwithstanding her opinion of Dr. Buxton, Dr. Gillis did not change her opinion that Respondent's medical condition puts him at greater risk for sudden incapacitation or sudden death than that of the general population.

57. The letter of Dr. Henry W. Sesselberg dated November 7, 2010 (Respondent Exhibit D) states that patients with a reduced EF have reduced risk factors for sudden incapacitation if they have excellent exercise tolerances, at 10 mets or greater, and if predictive risk factors such as diabetes, family history of sudden or unexplained death, or active ischemic disease (low blood pressure) are absent. The letter goes onto [sic] state later that other cardiac risk factors include hypertension or old age which Capt. Plender also does [sic] display. Dr. Gillis admitted that those factors all contribute to lowering the risk of sudden death for a patient with low EF and an ICD. (T. 95-98);

NOT ACCEPTED. The absence of those risk factors does not reduce Respondent's risk for sudden incapacitation or sudden death to that equal to or less than that of the general population.

58. In the same letter, Respondent Exhibit D, Dr. Gillis also conceded that Capt. Plender does not exhibit renal dysfunction, or age greater than 70, which are also predictive risk factors for sudden death. (T. 99);

NOT ACCEPTED for the reasons set forth in the ruling on proposed finding of fact number 57.

59. At the hearing, Dr. Gillis denied that the Coast Guard based its medical waiver denial for Capt. Plender upon his ICD and EF lower than 40% (T. 75);

NOT ACCEPTED. In CG Ex. 04, the Coast Guard states Respondent is not qualified for his Merchant Marine duties even without the ICD. On page 75 of the transcript, Respondent's counsel asks Dr. Gillis: "... it really comes down to two things, doesn't it, Captain Plender has and ICD, and he has an ejection fraction of lower than 40 per cent. That's really it, isn't it? Dr. Gillis replied, "no there's more to it than that."

60. The March 22, 2010 letter from Capt. M.D. Hall, U.S.C.G. before Dr. Gillis's [sic] involvement, contradicts Dr. Gillis' statement and clearly states: "the NMC does not issue waivers for heart conditions requiring the use of ICD devices." (CG Exhibit 2);

NOT ACCEPTED. Dr. Gillis opined independently that Respondent's condition places him at greater risk for sudden incapacitation or sudden death than that of the general population. Her opinion is given great weight in the undersigned's determination that the allegation of incompetence due to physical disability is proved.

61. The same statement also appears in an undated but later letter sent by Capt. G.C. Stalfort to Respondent's attorney: "the NMC does not issue waivers for heart conditions requiring the use of ICD devices." (CG Exhibit 3);

NOT ACCEPTED for the reasons set forth in the ruling on proposed finding of fact number 60. The purpose of this suspension and revocation proceeding is to determine independently whether the allegation of incompetence due to physical disability is proved. It is not a forum to collaterally attack the findings and conclusions of a separate administrative process to determine whether to waive Mr. Plender's medical conditions in order for him to remain qualified to continue his Merchant Marine duties.

62. The letter of Coast Guard Captain Lincoln B. Stroh dated March 17, 2011, (CG Exhibit 4) in appearing to comment upon the letter of Dr. Henry W. Sesselberg, dated 11/7/2010, but believed to have been sent on December 27, 2010 (Respondent Exhibit D), does not accurately recite all of the cardiac risk factors which Dr. Sesselberg sets forth. Nonetheless, Captain Stroh acknowledges that risk of sudden death is lowered for Capt. Plender because he was younger and had no ischemic cardiomyopathy. (CG Exhibit 4, P2, Para. 1). Specifically, Captain Stroh did not acknowledge the following additional risk factors set forth by Dr. Sesselberg: treadmill stress test results of nine or ten metabolic equivalents with no evidence of ischemic changes; absence of diabetes; family history of sudden or unexplained death; absence of hypertension and older age. See, 11/7/2010 letter of Dr. Henry W. Sesselberg (Respondent Exhibit D, p.1, Para. 1-2).

NOT ACCEPTED. The paragraph cited by Respondent states:

Mr. Plender's cardiologist provided the requested information on December 27, 2010. The cardiologist generally agreed that patients with Mr. Plender's condition had an increased risk of sudden death but also noted that Mr. Plender was younger and had fewer cardiac risk factors than some patients with ischemic cardiomyopathy. Dr. Sesselberg believed that he was a lower risk of a sudden cardiac event than the current data would suggest. He noted that Mr. Plender's ICD had not yet fired and that it had been installed for prophylactic reasons. CG Ex. 04 at 2.

This paragraph clearly summarizes Dr. Sesselberg's opinions and is not attributable or "acknowledged" by Capt. Stroh. On the contrary, this paragraph does suggest that Dr. Sesselberg agreed with the Coast Guard's assessment that Mr. Plender "had an increased risk of sudden death." Mitigating factors contained in the record lower Respondent's risk for sudden incapacitation or sudden death compared to others with the same condition but not equal to or lower than that of the general population.

63. At the hearing, Dr. Gillis acknowledged also that the word "inordinate" did not come from Dr. Sesselberg's letter (T.103). She also acknowledged that Captain Stroh did not mention absence of family history or absence of diabetes (T. 104). Finally, it is evident that Captain Stroh misrepresents the letter of Dr. Sesselberg by stating that "the reviewing physician noted" a "...a severely reduced ejection fracture of 25%". The "severely reduced" language does not appear anywhere in Dr. Sesselberg's letter. Compare, CG Exhibit 4 with Respondent's Exhibit D.

NOT ACCEPTED. An ejection fraction of 25% speaks for itself. How one characterizes it is

not probative on the issue of incompetence due to physical disability.

64. Dr. Gillis admitted that the Coast Guard's National Maritime Center ("NMC") is not contending that Capt. Plender is unfit to perform the duties of his license based on mental incapacity (T. 107);

NOT ACCEPTED as immaterial. The Coast Guard is alleging incompetence due to physical disability, not incompetence due to mental incapacity.

65. Similarly, Dr. Gillis admitted that NMC is not contending that Capt. Plender is unfit for the duties of his license due to professional capabilities (T. 108);

NOT ACCEPTED for the reasons set for in the ruling on proposed finding of fact 64.

66. Dr. Gillis admitted that what NMC is concerned with relates to a claim of physical disability, or what Dr. Gillis termed "compensation." (T. 108);

ACCEPTED AND INCOPORATED. The issue in this suspension and revocation proceeding is whether Respondent is incompetent due to physical disability.

67. Referring to Capt. Plender's Merchant Marine Medical Evaluation Report, CG 719K (CG Exhibit 1), (P.8), Dr. Gillis reviewed each of the related physical abilities for the thirteen separate shipboard tasks or functions, and admitted that the Coast Guard has no evidence whatsoever that Capt. Plender is unable to perform any of the thirteen "related physical ability" tasks identified with required shipboard functions. (T. 107-113);

NOT ACCEPTED. Respondent's current physical abilities do not reduce his risk of sudden incapacitation or sudden death to a level equal to or below that of the general population.

68. Dr. Gillis acknowledged that Dr. Eric Mukai found Capt. Plender to have been "recommended competent" in his medical examination dated 12/31/09 (T. 113-4);

NOT ACCEPTED. Dr. Mukai checked the box entitled "recommended competent." He does not opine that Respondent's risk of sudden incapacitation or sudden death is equal to or less than that of the general population.

69. Dr. Gillis also acknowledged that the CG 719K Medical Evaluation Report was a report prepared by the Coast Guard and given out to individual mariner medical review officers; that the Coast Guard believed that the competency opinion of a medical review officer is important (T. 113-4);

NOT ACCEPTED. Competency opinions of medical review officers are important but not controlling on the issue of whether Respondent is qualified for his Merchant Marine duties. Likewise, competency opinions of medical review officers are important but not controlling on the issue of whether an allegation of incompetence is proved.

70. Dr. Eric Mukai again examined Capt. Plender on April 9, 2012 and found him "recommended competent", CG 719K dated 4/9/12, Respondent Exhibit E;

ACCEPTED BUT NOT INCORPORATED. Dr. Mukai checked the box entitled "recommended competent." Further, he does not opine that Respondent's risk of sudden incapacitation or sudden death is equal to or less than that of the general population therefore, Dr. Mukai's opinion is accorded less weight than that of Dr. Gillis.

71. Dr. Gillis admitted that nowhere in NVIC04-08 does it say that ejection fraction of lower than 40% are a [sic] disqualifying factor for a medical waiver (T. 120-1);

ACCEPTED BUT NOT INCORPORATED. Determining whether Respondent is qualified for his Merchant Mariner duties and determining whether the allegation of incompetence due to physical disability is proved depends on many factors and combinations of factors, not just a low ejection fraction.

72. Dr. Gillis admitted that a successful stress test is an important consideration in evaluating risk for a person with low EF (T. 122);

ACCEPTED BUT NOT INCORPORATED. It is not the only consideration.

73. Dr. Gillis also admitted that it is true that persons with an ICD stand a better chance of survival with those who do not (T. 123);

ACCEPTED BUT NOT INCORPORATED. In its medical determination, the Coast Guard considered Respondent's ICD. The undersigned also considered Respondent's ICD in finding the allegation of incompetence due to physical disability proved. While an ICD might save Respondent's life, it may also cause incapacitation leaving him unable to perform his duties; thus, survivability alone is not dispositive on whether Respondent is incompetent due to physical disability.

74. Dr. Gillis admitted that the Coast Guard does not conduct personal physical examinations of mariners because they "don't have the man power for that" (T. 124-5);

NOT ACCEPTED. There is no indication Respondent's medical records are incomplete. Assuming Respondent's claims of physical capabilities are correct and assuming the diagnosis of his treating cardiologist is correct, the medical records are sufficient for Dr. Gillis to render a medical opinion that Respondent's risk of sudden incapacitation or sudden death is greater than that of the general population. The undersigned does not accord Dr. Gillis's opinion less weight simply because the Coast Guard did not conduct a physical examination of Respondent. Further, the Commandant also concluded "[a]ssessing Mr. Plender's physical capabilities to perform his duties as chief mate would not be applicable towards determining the risk factor associated with the condition of his heart." CG Ex. 04.

75. Dr. Gillis admitted that an ICD is considered disqualifying generally for federal motor carriers (T. 128);

NOT ACCEPTED. The Coast Guard's reasons for finding Respondent not medically qualified are set forth in CG Exhibits 2, 3, and 4. Whether another agency considers an ICD disqualifying is not controlling on the Coast Guard's medical qualification determinations, nor is it controlling in determining whether Respondent is incompetent due to physical disability.

76. Dr. Gillis also admitted, in reviewing the article labeled as Respondent's Exhibit A, that federal motor carriers have an EF cut-off equal to or less than 40% (T. 128);

NOT ACCEPTED. Assuming the information contained in Exhibit A is correct, medical standards set by other agencies are not dispositive of Coast Guard medical qualification determinations and likewise not dispositive on ALJ determinations of incompetence due to physical disability.

77. Dr. Gillis stated on re-direct examination on examining Dr. Sesselberg's letter that "even with none of the five risk factors, folks who have an ICD with this low ejection fraction are at a significantly higher risk than the general population for sudden death." (T. 132). This represents ongoing evidence that the Coast Guard considers the presence of an ICD and low EF sufficient to deny a medical waiver request;

NOT ACCEPTED. As explained earlier in this decision and order, the ALJ's duties do not include ruling on the Coast Guard's separate administrative determination that Respondent is not medically qualified for his Merchant Mariner duties. The Coast Guard explained in CG Exhibits 2, 3, and 4 the reasons for denying Respondent's medical waiver request. Those exhibits speak for themselves. These suspension and revocation proceedings are an independent evaluation of the medical evidence to determine whether Respondent is incompetent due to physical disability.

78. Dr. Gillis admitted that the Coast Guard is unable to quantify how much additional risk Capt. Plender's service would represent above that of the general public. Specifically, it is unable to say whether the percentage of greater risk is 1%, 3%, 4% or higher. That higher risk could even be as small as .0001%. Dr. Gillis simply could not say.

NOT ACCEPTED. This suspension and revocation decision is based on a finding that Respondent's medical conditions, including ischemic cardiomyopathy, reduced ejection fraction, and placement of an ICD, put Respondent at a higher risk for sudden incapacitation or sudden death than that of the general population. As discussed above, it is unnecessary to quantify further Respondent's risk of sudden incapacitation or sudden death for the purpose of promoting safety at sea. The regulations at 46 C.F.R. § 5.569 direct that the sanction of revocation be imposed for any finding of Incompetence.

RESPONDENT'S PROPOSED CONCLUSIONS OF LAW:

1. The Coast Guard's complaint dated November 22, 2011 alleges "incompetence" against Capt. Plender's, [sic] based on the statutory authority of 46 U.S.C. § 7703(4) and the regulatory authority of 46 CSF [sic] § 5.31 (Complaint);

NOT ACCEPTED as a conclusion of law. It is a statement of fact. A conclusion of law obtains by applying the law to the facts found. It is not a statement of the law.

2. The statute cited by the Coast Guard as authority for charging Capt. Plender with "Incompetence" states, in relevant part, as follows:

"a license, certificate of registry, or merchant mariner's document issued by the Secretary may be suspended or revoked if the holder – (4) has committed an act

of incompetence relating to the operation of a vessel” (46 CFR [sic] §7703(4)(sic);

NOT ACCEPTED as a conclusion of law. It is a statement of the law.

3. The regulation cited by the Coast Guard as authority for charging Capt. Plender with “Incompetence” states as follows:

“Incompetence is the inability on the part of a person to perform required duties, whether due to professional deficiencies, physical disabilities, mental incapacities, or any combination thereof.” 46 CFR §5.31;

NOT ACCEPTED as a conclusion of law. It is a statement of a regulation, except under 46 C.F.R. § 5.31 “physical disability and mental incapacity” are singular.

4. Except for affirmative defenses, or as otherwise provided by statute or rule, the Coast Guard bears the burden of proof in this action. 33 CFR §20.702;

NOT ACCEPTED as a conclusion of law. It is a statement of regulation absent application of the facts in this case.

5. The party that bears the burden of proof shall prove his or her case or affirmative defense by a preponderance of the evidence. 33 CFR §20.701;

NOT ACCEPTED as a conclusion of law. It is a statement of regulation absent application of the facts in this case.

6. In order to meet the “preponderance of the evidence” standard, the ALJ must be convinced that the existence of a fact is more probable than not. Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 US 602, 622 (1993) (citing In Re: Winship, 397 US 358, 371-2 (1970) (Harlan, J., concurring) App. Dec. 2670 (WAIN) (2007) at 10;

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in case law absent application of the facts in this case.

7. It is the function of the Administrative Law Judge (“ALJ”) to resolve conflicts in testimony and issues of credibility. The question of what weight to accord the evidence is committed to the discretion of the ALJ. App. Dec. 2675 (MILLS) (2008);

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in a Commandant’s Decision on Appeal absent application of the facts in this case.

8. The findings of the ALJ need not be completely consistent with all the evidence in the record as long as sufficient evidence exists to reasonably justify the findings. App. Dec. 2652 (MOORE) (2005);

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in a Commandant’s Decision on Appeal absent application of the facts in this case.

9. The ALJ is not necessarily bound by medical findings or opinions. App. Dec. 2547 (PICCIOLO) (1992) at 4;

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in a Commandant's Decision on Appeal absent application of the facts in this case.

10. The ALJ has broad discretion in making determinations regarding the credibility of evidence and resolving inconsistencies of evidence, but that discretion cannot extend beyond the substantive evidence on the record. App. Dec. 2664 (SHEA) (2007) at 9-10; App. Dec. 2547 (PICCIOLO) (1992) at 4;

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in a Commandant's Decision on Appeal, absent application of the facts in this case.

11. All conclusions of law reached by the ALJ must accord with law, precedent and public policy. 33 CFR §20.101(b)(2);

NOT ACCEPTED as a conclusion of law. It is a statement of regulation absent application of the facts in this case.

12. Simply identifying a medical condition and its potential debilitating medical effects upon a mariner does not prove physical incompetence. App. Dec. 2547 (PICCIOLO) (1992) at 3;

NOT ACCEPTED as a conclusion of law. It is a statement of law taken from a Commandant Decision on Appeal absent application of the facts in this case. In HOCKING, the Vice Commandant states as follows:

In the Picciolo case, Mr. Picciolo suffered from diabetes and was found by a Coast Guard ALJ to be physically incompetent to hold a Merchant Mariner Credential due to episodes of high blood sugar, irrespective of the fact that the most recent fitness for duty assessment by a physician had found him fit for duty. Following Mr. Picciolo's appeal, the Commandant remanded the case to the ALJ because the record lacked evidence of whether Mr. Picciolo's blood sugar level could be controlled only through a periodic monitoring program, whether such a program was compatible with available medical services at sea or ashore, whether such a program would unduly interfere with Mr. Picciolo's ability to perform his duties, and the level of risk that Mr. Picciolo would pose to fellow crewmembers and a ship at sea if he failed to follow a prescribed medical program.

The *Picciolo* decision stated that although the ALJ had correctly found the respondent's diabetic condition had been poorly controlled in the past, the medical testimony from his more recent medical care indicated that his condition was then satisfactorily controlled and "it could not be reasonably inferred that he would return to a poorly controlled level should he return to sea."

Contrary to Respondent's argument, the definition of incompetence set forth in 46 C.F.R. 5.31 does not "speak[] entirely in the present tense," and the *Picciolo* case does not suggest that it does. [Internal citation omitted]. Rather, *Picciolo*

supports the proposition that a mariner's medical competence must be determined not based solely on a past incident but by reference to competent medical testimony concerning the individual's condition and necessary treatment, and the risks they present. [Emphasis added].

Appeal Decision 2698 (HOCKING) (2012) at 13, 14.

The instant decision and order applies competent medical testimony concerning Mr. Plender's condition, necessary treatment, and risks his condition presents. See also Appeal Decision 2664 (SHEA) (2007).

13. There must be evidence on the record that tends to prove that the appellant is unable to perform the required duties expected of a merchant mariner's License. App. Dec. 2547 (PICCIOLO) (1992) at 3;

NO ACCEPTED as a conclusion of law for the reasons set forth in the ruling on proposed conclusion of law 12.

14. It is not sufficient to sustain a finding of incompetence for an Investigating Officer to speculate that a mariner would not under certain circumstances be fit for duty. The ultimate issue is whether the appellant can perform the functions expected of him as a holder of his License. App. Dec. 2547 (PICCIOLO) (1992) at 3-4;

NOT ACCEPTED as a conclusion of law for the reasons set forth in the ruling on proposed conclusion of law 12.

15. The "incompetence" for which the deposit of a seaman's certificate is made includes any inability at the particular time of the deposit on the part of the Seaman to perform his particular duties on a ship while at sea, whether due to physical disability, mental incapacity or some combination of both. Juan v. Grace Line, Inc., 299 F.Supp. 1259 (S.D.N.Y. 1969);

NOT ACCEPTED as a conclusion of law. It is a statement of the law as expressed in a U.S. District Court decision without application of the facts in this case. See also, the ruling on proposed conclusion of law number 12.

16. The Coast Guard has not succeeded in proving "incompetence" under 46 U.S.C. §7703(4) unless it can prove that at the time of his deposit of the license (of the April 24, 2012 hearing), Capt. Plender was unable at that particular time to perform his particular duties aboard a ship at sea. Juan v. Grace Line, Inc., 299 F.Supp. 1259 (S.D.N.Y. 1969);

NOT ACCEPTED. The Coast Guard's allegation of incompetence due to physical disability is proved.

17. Because the Coast Guard was unable to prove that, at the time of his April 24, 2012 hearing, Capt. Plender was unable to perform any of the specific physical tasks required of his license grade, the Coast Guard failed to meet its burden of proof, and accordingly, the Coast Guard's Complaint must be dismissed. Juan v. Grace Line Inc., 299 F.Supp. 1259 (S.D.N.Y. 1969); 33 CFR §20.701-702.

NOT ACCEPTED. The Coast Guard's allegation of incompetence due to physical disability is proved. See also, the rulings on proposed conclusion of law numbers 12 and 15.

18. No otherwise qualified individual with a disability in the United States as defined by Section 705(20) of 29 USC shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by an executive agency. 29 USC §794(a); 42 USC §11211 et seq.;

NOT ACCEPTED as a conclusion of law. The Administrative Law Judge in Coast Guard suspension and revocation proceedings has no authority to rule on matters outside the scope of 46 U.S.C. Chapter 77 in these proceedings. See 46 C.F.R. § 5.19; 33 C.F.R. § 20.101; see also 5 U.S.C. § 556(c) and The Attorney General's Manual on the APA § 7(b) (1947).

19. A mariner is a "person with a disability" within the meaning of 29 USC §794(a), and 49 USC §12102, by sole virtue of the fact that his medical waiver has been denied, he is currently "regarded as having an impairment" by the Coast Guard. 29 USC §794; 49 USC §12102;

NOT ACCEPTED for the same reasons set forth in the ruling on proposed conclusion of law 18.

20. Capt. Plender is an otherwise qualified individual with a disability within the meaning of the Rehabilitation Act of 1974;

NOT ACCEPTED for the same reasons set forth in the ruling on proposed conclusion of law 18.

21. A qualifying person with a disability within the meaning of 29 USC §794 is entitled to an individualized review. School Board of Nassau County Florida v. Arline, 480 US 273, 287 (1987) (case by case analysis must gather and analyze all relevant information regarding an individual's work history and medical history and thoroughly assess ability to perform duties of the job involved); Cleveland Board of Education v. LaFleur, 414 US 632 (1974); Stillwell v. Kansas City Board of Police Commissioners, 872 F. Supp. 682 (W.D. Mo. 1995); Bombrys v. City of Toledo, 849 F. Supp. 1210, 1219 (N.D. Ohio, 1993) (blanket exclusions violate Rehabilitation Act);

NOT ACCEPTED for the same reasons set forth in the ruling on proposed conclusion of law 18.

22. NVIC 04-08, Condition 81 authorizes blanket exclusions or across the board cut-offs for medical waivers requested by persons with an ICD. NVIC 04-08, Condition 81 (anti-tachycardia devices or implantable defibrillators "generally not waivable");

NOT ACCEPTED as a conclusion of law because it is argumentative. The NVIC 04-08 speaks for itself. The medical evidence presented in the instant case supports the allegation of incompetence due to physical disability. See also the ruling on proposed conclusion of law 18.

23. By applying blanket exclusions or across-the board cut-offs against Capt. Plender, the Coast Guard violated the Rehabilitation Act of 1974, and Capt. Plender's due process rights under the Fifth Amendment of the United States Constitution.

NOT ACCEPTED for the reasons set forth in the ruling on proposed conclusion of law 18.

24. Failure on the part of the Coast Guard to follow the legally mandated procedural requirements of a federal statute, such as the Rehabilitation Act of 1974, also comprises a violation of the due process provision of the Fifth Amendment of the United States Constitution. International Union, United Government Security Officers of America v. Clark, 704 F. Supp. 2d 54 (D.D.C., 2010) (Rehabilitation Act does not preempt Fifth Amendment claim);

NOT ACCEPTED for the reasons set forth in the ruling on proposed conclusion of law 18.

25. The Coast Guard failed to meet its burden of proving that Capt. Plender is not medically competent because it failed to produce any evidence that he is presently incapable of performing the functions of a licensed ship's master. Juan v. Grace Line, Inc., 299 F.Supp. 1259 (S.D.N.Y. 1969); App. Dec. 2547 (PICCIOLO) (1992);

NOT ACCEPTED. The Coast Guard's allegation of incompetence due to physical disability is proved. See also, the ruling on proposed conclusion of law number 12.

26. Because the Coast Guard cited as its authority for charging Capt. Plender with Incompetence 46 U.S.C. §7703(4) and 46 CFR §5.31, the two must be read together to determine the elements required to be proven by the Coast Guard. When reading the statute and the regulation together, they show that the Coast Guard was required to meet the following elements to sustain its burden of proving Capt. Plender "Incompetent":

(1) that Capt. Plender was unable to perform; (2) required duties; (3) due to a physical disability; and that all of these elements were (4) committed (past tense), relating to the operation of a vessel. (46 U.S.C. §7703(4); 46 CFR §5.31[sic];

NOT ACCEPTED. Reading the statute and regulation together provides for the following elements for physical incompetence: (1) the mariner committed an act; (2) that demonstrated the inability to perform required duties due to physical disability; (3) relating to the operation of a vessel. Mr. Plender committed an act when he suffered a severe heart attack in March, 2009. That act demonstrated an inability to perform required duties because the heart attack completely incapacitated Respondent, required life-saving medical treatment, and kept him from returning to work until October 2009. The act is relating to the operation of a vessel because a preponderance of the reliable, probative, and credible evidence shows that because of his underlying cardiac conditions, damage to his heart and the placement of an ICD, Respondent is a greater risk for sudden incapacitation or sudden death than the general population. See also Analysis, pp. 12-20, *supra*.

27. Because the Coast Guard was unable to prove Capt. Plender incapable of any of the physical tasks required of the holder of a chief mate's license on the date of the hearing (April 24, 2012), the Coast Guard was unable to prove that Capt. Plender was (1) unable to perform; (2) required duties; (3) due to physical disability; and that all these elements were (4) committed relating to the operation of a vessel. 46 U.S.C. §7703(4); 46 CFR §5.31.

NOT ACCEPTED for the reasons contained in proposed conclusion of law number 26.

29[sic]. The Coast Guard has no evidence at the hearing whatsoever that Capt. Plender had ever committed an act of incompetence while serving aboard a vessel, within the meaning of 46 U.S.C. §7703(4) and 46 CFR §5.31. Juan v. Grace Line, Inc., 299 F.Supp. 1259 (F.D.M.Y. [sic] 1969) (requiring proof of inability to perform duties at the time of the document deposit).

NOT ACCEPTED. Since August 9, 2004 the law does not require the mariner to be serving under the authority of his license at the time of the act of incompetence. The preponderance of reliable, probative, and credible evidence shows that when Mr. Plender suffered a severe heart attack in March 2009 he committed an act that demonstrated an inability to perform required duties due to physical disability even though he was not aboard a vessel or acting under the authority of his license at the time.

ATTACHMENT C

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

§ 20.1001 General.

- (a) Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.
- (b) No party may appeal except on the following issues:
 - (1) Whether each finding of fact is supported by substantial evidence.
 - (2) Whether each conclusion of law accords with applicable law, precedent, and public policy.
 - (3) Whether the ALJ abused his or her discretion.
 - (4) The ALJ's denial of a motion for disqualification.
- (c) No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.
- (d) The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

- (a) The record of the proceeding constitutes the record for decision on appeal.
- (b) If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --
 - (1) If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
 - (2) If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

- (a) Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.
 - (1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --
 - (i) Basis for the appeal;

- (ii) Reasons supporting the appeal; and
 - (iii) Relief requested in the appeal.
- (2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.
- (3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.
- (b) Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.
- (c) No party may file more than one appellate brief or reply brief, unless --
 - (1) The party has petitioned the Commandant in writing; and
 - (2) The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.
- (d) The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

- (a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.
- (b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.