



NEGLIGENT OPERATIONS - ESTABLISHING THE STANDARD OF CARE

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The Hearing Office Newsletter previously featured information pertaining to cases involving negligent operations. (See Newsletter Volume 9 – October 2010, “K N O T” #1.) The article very briefly touched on the key factual elements needed to be shown in order for Hearing Officers to find prima facie evidence of a violation under Title 46 United States Code (U.S.C.), Section 2302(a). A recent appeal decision in which a civil penalty case involving negligent operations was dismissed for lack of evidence of the “standard of care” prompts further discussion of these types of cases. This article will briefly revisit the elements of 46 U.S.C. § 2302(a) and review what constitutes negligence, focusing on the importance of establishing the standard of care applicable to the circumstances of each case.

46 U.S.C. § 2302(a) provides that a person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, or property of a person is liable to the U.S. Government for a civil penalty. In order to show a violation occurred under this cite, there must be evidence to show that the charged party in fact: 1) operated a vessel; 2) in a negligent manner; and, in doing so, 3) endangered the life, limb or property of a person.

In most cases, presenting evidence identifying the vessel operator and showing how persons or property were endangered is fairly straightforward. Occasionally, however, showing how a person’s actions were negligent can be more challenging.

So, what *is* negligence? Regulation 33 CFR § 5.29 defines negligence as, “...the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person, of the same station, under the same circumstances, would not fail to perform.” To sum it up: It is

the failure to use such care as a reasonably prudent and careful person would use under similar circumstances.

Before showing that a person failed to use such care as a reasonably prudent and careful person would use under similar circumstances, the “standard of care” applicable to the circumstances of the case must first be firmly established. In other words, the case file must show evidence of what was expected of the vessel operator under the then-existing circumstances. The standard of care can be established in a number of ways, such as reference to existing laws or regulations such as the Navigation Rules, or navigation safety regulations which require specific actions under specific conditions. For example, the standard of care may require adherence to: posted “No Wake/Speed” zones; a state law prohibiting “bow riding”; or a state law restricting vessel operations in close proximity to “diver-down” flags.

Applicable or persuasive court decisions may recognize a presumption of negligence when certain things occur that generally do not happen in the absence of negligence, such as vessel groundings, or when a moving vessel allides with a fixed object, such as a bridge or a charted stationary navigational aid. In such cases, the presumption of negligence will make it unnecessary to further address the standard of care.

In situations where the applicable standard is not so obvious, a standard of care may be established by submission of expert witness testimony concerning generally accepted marine practices. Coast Guard witnesses may provide evidence of a standard of care, if the witness is shown to have sufficient expertise in the particular subject matter. Such evidence must have a sound basis, however, and be supported by something more than conclusory statements of disapproval for certain conduct.

To sufficiently address the negligence element, the case file should contain: 1) evidence of the applicable standard of care as described above; and 2) evidence showing how the charged party failed to follow the applicable standard. As always, each element is essential to the Hearing Officer’s determination as to whether the alleged violation did, or did not, occur as alleged. Evidence clearly addressing the negligence element also provides the charged party with a good understanding of the basis for the alleged violation(s) against him/her, and allows for a more meaningful opportunity to respond with evidence in his/her defense, or to present extenuating or mitigating factors for consideration.