



16731

Nov 16, 2006

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]
Attn: [REDACTED]

RE: Case No. [REDACTED]
[REDACTED]
[REDACTED]
\$15,000.00

Dear [REDACTED]:

The Commanding Officer, Coast Guard Hearing Office, Arlington, Virginia, has forwarded the file in Civil Penalty Case No. [REDACTED], which includes your appeal on behalf of Captain [REDACTED], who served as the pilot of the [REDACTED]. The appeal is from the action of the Hearing Officer in assessing a \$15,000.00 penalty for the following violation:

<u>LAW/REGULATION</u>	<u>NATURE OF VIOLATION</u>	<u>ASSESSED PENALTY</u>
46 USC §2302(a)	Operating a commercial vessel in a negligent manner that endangers life, limb or property of a person.	\$15,000.00

The violation is alleged to have occurred on July 9, 2003, when the [REDACTED] grounded on a chartered shoal south of Pt. Latouche on Yakutat Bay, near Valdez, Alaska. At the time of the grounding, the vessel was under the control of [REDACTED], a Southeast Alaska pilot and the holder of a Coast Guard issued merchant mariner credential.

On appeal, you deny the violation and contend that the Hearing Officer erred in refusing to consider the "relative fault of the ship and pilot" in finding the violation proved. To that end, you contend that "[i]t is clear in this case that the helmsman's error [making the wrong course] was the proximate cause of the casualty" and add that "[REDACTED] had the right to rely on the ship's officers to see that his orders were properly obeyed." You further add that [REDACTED] was properly "focused primarily on the ice" present in the bay at the time of the transit and add that "[t]o say in hindsight that the pilot should have monitored the helmsman more closely...at most supports the contention that there was an error in judgment" that is "distinguished from negligence." You further argue that the "Hearing Officer was also in error in not taking into account the considerable fault of the vessel in assessing the penalty" and insist that "[t]here is no basis in the record to ascertain how the amount [of the penalty] was calculated." In that vein, you contend that "[t]he Coast Guard conceded the vessel's fault, the

Coast Guard failed to prove several of the allegations charged, it is accepted that the pilot is entitled to rely on the vessel obeying his orders and it is clear that the vessel's failure to do so was the proximate cause of the casualty." You conclude by stating that "there is nothing to demonstrate that the amount of this penalty was anything other than an arbitrary assessment." Your appeal is denied for the reasons described below.

First, I believe a brief recitation of the facts surrounding this incident is in order. The record shows that on July 9, 2003, the [REDACTED] was carrying 1664 passengers on a sightseeing voyage through Yakutat Bay. The morning portions of the transit were uneventful. The passengers, along with [REDACTED] and a naturalist employed for the transit were taken through Yakutat Bay, into Disenchantment Bay to view the Hubbard Glacier. After viewing the glacier, the vessel returned, through significant ice and fog, to Yakutat Bay, enroute Valdez, Alaska. At approximately 12:01 p.m., [REDACTED] took command of the [REDACTED] and began the trip to Valdez. [REDACTED] was very concerned with the amount of ice present in the Bay during the transit and was, as a result, focused primarily on avoiding ice hazards. Sometime, thereafter, the Master of the [REDACTED], [REDACTED], fearing that the vessel would not clear the 5 fathom shoal, ordered the helmsman to alter course to 220, [REDACTED] agreed with the course change and, in response, the helmsman repeated the stated course. Unfortunately, the helmsman transposed the numbers encompassing the course and, instead, set a course of 202. Although [REDACTED] did not realize the error, [REDACTED] did and immediately called to the helmsman "not 202, 220 starboard, starboard." At 1:47 p.m., a strong vibration was felt as the vessel passed over, and ultimately grounded on the shoal.

Immediately after the incident, the [REDACTED]'s master took steps to ensure that the vessel had not sustained a casualty; he ordered that the vessel's watertight integrity be checked and conducted a thorough inspection of the vessel. [REDACTED] assumed that the vessel had made contact with the ice and viewed the incident as a "near miss." Subsequent inspections of the vessel revealed that it sustained significant damage during the grounding. Significant portions of the vessel's hull sustained damage as did the vessel's propeller. Repair costs to the vessel were estimated to be in excess of \$500,000.00.

Before I address the violation at issue, I will address the standard of proof applicable to Coast Guard civil penalty procedures. As indicated in the correspondence contained within the case file, the procedures applicable to the instant case are set forth in 33 CFR Subpart 1.07. 33 CFR 1.07-65 states that any decision to assess a civil penalty must be based upon substantial evidence in the record. Conversely, if the Hearing Officer does not find substantial evidence to support the alleged violation, the case must be dismissed and returned to the appropriate District Commander. While the Administrative Procedures Act, 5 U.S.C. 551 *et seq.*, does not specifically address the appropriate standard of proof in administrative adjudicative proceedings, both case law and administrative practice clearly show that the standard of proof in such proceedings is a preponderance of the evidence standard. Under this test, Coast Guard Hearing Officers must be convinced that the weight or majority of the evidence supports their conclusion. See Steadman v. SEC, 450 U.S. 91 (1981).

I will now address the violation. [REDACTED] is charged with negligently operating the [REDACTED] on July 9, 2003, under 46 USC 2302(a). As used in 46 USC 2302, negligence is the failure to use that care which a reasonable and prudent person would exercise under similar circumstances. It is the operator's breach of that standard or reasonable care that results in the endangerment of life, limb, or property of a person and which constitutes a violation of 46 USC 2302. In her Final Letter of Decision, the Hearing Officer found, in relevant part, as follows:

I do agree that [REDACTED] had a duty to monitor the execution of his orders. He was not entitled to silently leave his duty entirely to the master, even if he needed to give much attention to ice. If he need not give specific rudder orders, he did need to monitor whether the results of his orders were what he expected. When operating close to the shoal, he had a commensurately greater duty to monitor the vessel's course and position. It is surely true that he didn't know exactly where he was—his initial response to the master's suggestion to steer 220 implicitly acknowledges this. What is important is that his knowledge of the vessel's position was inadequate when operating as near as he was to the shoal.

* * *

I conclude that [REDACTED] was negligent in failing to monitor the vessel's response to his 210 order. Put another way, I find that he was negligent in failing to monitor the vessel's position more precisely and more frequently. His continued failure to monitor the response to his 220 order was, of course, continued negligence.

After a careful review of the record, I find sufficient evidence to support the Hearing Officer's conclusion that [REDACTED] was negligent in performing his duties aboard the [REDACTED].

Though not expressly stated in your appeal, a review of the record shows that the key issue presented here is whether [REDACTED]'s failure to monitor whether the course he ordered was followed constitutes negligence under 46 USC 2302(a). On appeal, to support your contention to the contrary, you argue that [REDACTED] was entitled to assume that his orders would be followed and insist that the grounding was actually caused by the ship's (helmsman's) error. To that end, citing federal case law, you argue that "[t]he master never relinquishes 'command of his ship by employment of a pilot.'" I do not find your arguments, in this regard, persuasive. Contrary to your contentions, a pilot is more than a mere "advisor" or "servant" to the vessel master. The popular misconception that a pilot is a mere advisor to the master is without substantial foundation either historically, or legally. This is perhaps best summarized as follows:

Since the pilot is clothed with an aura of competency, he must bear the burden of fulfilling that obligation with proficiency. He is required to possess qualities of expertness and dexterity in the domain of his pilotage area and he must use careful navigation skill in the performance of his duties. Upon his failure to possess the requisite skills, or if possessing them he neglects to use them, he is held liable for any injury or damage caused thereby...Stated

simply, since he is considered an “expert” or a “specialist”, he is held to a higher degree of care by reason of his proficiency. Parks, The Law of Tug, Tow, and Pilotage, p. 1025 (1982).

There is no question that the master of a vessel is in command of that vessel and is at all times ultimately responsible for its safety. However, there also is no question that the pilot, while acting in that capacity, is in direct control of the ship’s navigation and supersedes the master in that respect until such time as the master, asserting his overall command authority, relieves the pilot of his duties and authority, or, by his action countermands his orders. Although he may be relieved by the master, the pilot is the master *pro hoc vice* charged with the safety of the vessel and cargo and the lives of those onboard. There is a substantial volume of case law supporting this position. See, e.g., Cooley v. Board of Wardens, 12 HOW (US) 299 (1891); Ralli v. Troop, 157 U.S. 386, (1894); Union Shipping v. U.S., 127 F.2d 771, 775 (2d Cir. 1942); Barbey Packing v. The Stavros, 169 F. Supp 987, 901 (D. Ore. 1959); U.S. v. SS President Van Buren, 490 F.2d 504, 506 (9th Cir. 1973).

[REDACTED] was employed by the [REDACTED] because of his particular knowledge and expertise. He was not employed to serve as a mere “lookout.” Instead, he was employed to ensure that the [REDACTED] safely transited Yakutat Bay. Contrary to your assertions, as pilot of the [REDACTED], [REDACTED] was required to do more than simply set the vessel’s course; he was required to ensure that the course he established was followed. The record shows that [REDACTED] did not do so. Indeed, [REDACTED], himself, did not even realize that the helmsman had improperly set a course for the shoal; it was the vessel’s master who did. I agree with the Hearing Officer that a prudent mariner, especially a pilot, is required to monitor the execution of his orders. As such, I find sufficient evidence in the record to support the Hearing Officer’s conclusion that the violation occurred. Therefore, the sole issue remaining before me is whether the penalty assessed by the Hearing Officer is appropriate under the circumstance of the case.

In the findings of fact portion of her decision, the Hearing Officer accepted several of the aggravating factors raised within the Coast Guard’s case file, most notably that the [REDACTED] was carrying 1664 passengers at the time of the incident, that [REDACTED] did not, himself become aware of the improper course set by the helmsman and that the vessel incurred significant damage as a result of the incident. As the Coast Guard noted in case materials, during the incident there was potential for both personal injury and pollution and, perhaps more importantly “[h]ad the master not corrected the pilot, the damage and severity of the incident may have been far worse.” Given these circumstances and the fact that the penalty assessed by the Hearing Officer was significantly less than the maximum penalty authorized by statute, I do not find that mitigation of the penalty assessed by the Hearing Officer is appropriate in this case.

Accordingly, I find that there is substantial evidence in the record to support the Hearing Officer’s determination that the violation occurred and that Mr. Thatcher is the responsible party. The Hearing Officer’s decision was neither arbitrary nor capricious and is hereby affirmed. I find the penalty of \$15,000.00 rather than the \$25,000.00 maximum permitted by statute appropriate in light of the circumstances of the violation.

In accordance with the regulations governing civil penalty proceedings, 33 CFR 1.07, this decision constitutes final agency action. Payment of **\$15,000.00** by check or money order payable to the U.S. Coast Guard is due and should be remitted promptly, accompanied by a copy of this letter. Send your payment to:

U.S. Coast Guard - Civil Penalties
P.O. Box 70945
Charlotte, NC 28272

Payments received within 30 days will not accrue interest. However, interest at the annual rate of 4% accrues from the date of this letter if payment is not received within 30 days. Payments received after 30 days will be assessed an administrative charge of \$12.00 per month for the cost of collecting the debt. If the debt remains unpaid for over 90 days, a 6% per annum late payment penalty will be assessed on the balance of the debt, the accrued interest, and administrative costs.

Sincerely,

//s//

DAVID J. KANTOR
Deputy Chief,
Office of Maritime and International Law
By direction of the Commandant

Copy: Commanding Officer, Coast Guard Hearing Office
Commanding Officer, Coast Guard Finance Center