

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

UNITED STATES COAST GUARD

Complainant

vs.

REBECCA JO BRYSON

Respondent

Docket Number 2012-0523
Enforcement Activity No. 4476330

DECISION AND ORDER

Issued: October 21, 2013

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

**CWO JOHN P. COLON
JAMES T. STATON
LT ELIZABETH OLIVEIRA
Sector Hampton Roads**

For the Coast Guard

CRAIG STEVEN JENNI, Esq.

For the Respondent

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I. PRELIMINARY STATEMENT

The United States Coast Guard (Coast Guard or CG) initiated this administrative action seeking suspension of Rebecca Jo Bryson's (Respondent) Merchant Mariner Credentials (MMC). The Complaint identified Respondent as the holder of Coast Guard issued Merchant Mariner Credentials number 000122795 under the name Rebecca Jo Spalding. After marriage, Respondent allowed her previous credentials to expire and changed her name. During the hearing, Respondent noted in obtaining her new merchant mariner credentials there was some name confusion and the credentials were issued to her as Rebecca Jo Bryson.¹ (TR. at 8-9; 25-26; 877-78). Because Respondent's credentials are the subject matter of this proceeding, Rebecca Jo Bryson is the name used for this Decision and Order.² This action is brought pursuant to the legal authority contained in 46 U.S.C. § 7703 and the underlying regulations codified at 46 C.F.R. Part 5.

The Coast Guard issued a Complaint on November 29, 2012, and amended the Complaint on March 22, 2013. The Amended Complaint alleges Respondent, while serving as the Master of the small passenger vessel (SPV) MISS LINDSEY: 1) failed to properly train the crew to respond to a distressed diver emergency, in violation of 46 C.F.R. § 185.420; 2) Respondent's actions or failure to take action on June 9, 2012, directing the crew to assist a diver using appropriate safety equipment in violation of 46 C.F.R. § 185.530 constitutes misconduct; 3) Respondent's direction of the crew to respond to the distressed diver incident without using available floatation devices and safety equipment was negligent; and 4) operated the MISS LINDSEY, a small

¹ Some pleadings in this matter refer to Respondent by the name of Rebecca Jo Spalding.

² The correct credential number is listed on the amended complaint and Respondent did not object to the Respondent name on the amended complaint.

passenger vessel, engaged in diving operations without having specific training procedures for distressed diver emergencies in violation of 46 C.F.R. § 185.510.

Respondent filed timely Answers to both the Initial and Amended Complaint, admitting to the jurisdictional allegations and to the first factual allegation of each charge that on June 9, 2012, Respondent was serving as the Master of the MISS LINDSEY with passengers on board. Respondent denied all other factual allegations.

On January 15, 2013, the Docketing Center assigned this case to the undersigned Administrative Law Judge (ALJ) for adjudication. On January 23, 2013, the parties participated in a pre-hearing telephone conference to discuss preliminary matters and set a hearing date. A second pre-hearing conference was held on February 26, 2013. During that pre-hearing conference, and upon agreement by all parties, the Court granted the Coast Guard's request to reschedule to May 20, 2013. The dates set for completing discovery and filing prehearing motions set in the January 25, 2013, Scheduling Order remained in effect.

The hearing commenced in Norfolk, Virginia on May 20, 2013, and concluded on May 22, 2013. The proceeding was conducted in accordance with the Administrative Procedure Act, as amended and codified at 5 U.S.C. § 551-59, and Coast Guard procedural regulations contained in 33 C.F.R. Part 20. CWO John P. Colon, James T. Staton and LT Elizabeth Oliveira represented the Coast Guard at the hearing. Respondent appeared at the hearing represented by Craig Jenni, Esq. Nine (9) witnesses testified on behalf of the Coast Guard and Respondent testified on her own behalf.

During discovery the Coast Guard provided notice of fifty-three (53) Exhibits (Ex.). Thirty-five (35) of the fifty-three (53) Coast Guard Exhibits were admitted into evidence at the hearing including two (2) demonstrative exhibits not previously marked.

Coast Guard Exhibits 1-5, 7, 9-20, 26, 31-36, 38, 42-44, 47, 50, 51, 53, 38A and 53A were admitted into evidence at the hearing. Coast Guard Exhibits 6, 8, 21-25, 27-30, 37, 39-41, 45-46, 48-49 and 52 were withdrawn and not offered as evidence at the hearing. Coast Guard Exhibits 54 and 55 were offered but not admitted into evidence for reasons stated on the record. (TR. at 781-802). Although Respondent provided a list of seventy-three (73) potential exhibits, Respondent did not offer any exhibits into evidence at the hearing. A list of all witnesses and exhibits can be found in Attachment A.

The Coast Guard also requested the undersigned ALJ take official notice of Exhibits 54 and 55. These materials were not listed or provided to Respondent as prospective exhibits during discovery. The Court determined these materials were not properly within the scope of documents typically considered for official notice and the Coast Guard's request to have the documents admitted to the record by official notice was denied. See 33 C.F.R. § 20.806.

On July 3, 2013, the Coast Guard submitted a Post Hearing Brief containing enumerated Proposed Findings of Fact and Proposed Conclusions of Law. Rulings on these proposed findings and conclusions are found in Attachment B. On July 3, 2013, Respondent also filed a Post Hearing Brief. Respondent's Brief contained some Proposed Findings of Fact and Proposed Conclusions of Law generally addressed within the discussion section of the Post Hearing Brief. Since the Proposed Findings of Fact and Conclusions of Law were not individually enumerated, individual rulings on Respondent's Conclusions of Law are not made. However, all the facts and issues raised in Respondent's Post Hearing Brief have been addressed throughout the body of this Decision.

After careful review of the facts and applicable law in this case, the ALJ finds the Coast Guard **PROVED**, by a preponderance of reliable and credible evidence, the allegations contained in Charges 1 through 4.

Pursuant to the interests of maritime safety as provided in 46 C.F.R. § 5.5, the ALJ orders Respondent's mariner license shall be **SUSPENDED OUTRIGHT** for a period of twelve (12) months, followed by **SUSPENSION ON PROBATION** for an additional six (6) months.

II. FINDINGS OF FACT

The Findings of Fact are based on documentary evidence, witness testimony, and the entire record as a whole.

1. At all relevant times mentioned herein, including June 9, 2012, Respondent was a holder of United States Coast Guard issued Merchant Mariner's Credential (MMC) Number 000122795. (TR. at 6-11).
2. Lynnhaven Dive Center is the operating company of the MISS LINDSEY and employer of the crew in this matter. (CG Ex. 04).
3. Dive Lindsey, Inc. is the corporate owner of the MISS LINDSEY. (CG Ex. 51).
4. The MISS LINDSEY is a small passenger vessel (O.N. 571562). (TR. at 11).
5. Respondent served as Master and boat manager of the small passenger vessel MISS LINDSEY (O.N. 571562) on June 9, 2012, and at all times relevant to this matter. (TR. at 11; 876-78).
6. Rhoderick "Sonny" Alejo was employed as a crewmember (Dive Master) aboard the MISS LINDSEY for a recreational diving voyage on June 9, 2012. (TR. at 430-33; CG Ex. 05).
7. Lucas Gray was employed as a crewmember aboard the MISS LINDSEY on June 9, 2012. (TR. at 186-87; CG Ex. 05).

8. Respondent assigned Lucas Gray to follow Sonny Alejo and assist as directed. (TR. at 186, 195-96).
9. The MISS LINDSEY departed port with three (3) crewmembers and fourteen (14) passengers on board for a recreational diving voyage. (CG Ex. 04, 31).
10. The MISS LINDSEY had floatation and safety equipment in compliance with its Certificate of Inspection including a swim line, two life rings, and a rescue buoy or rescue can with line. (TR. at 439-441; CG Ex. 38 pgs 4-9; CG Ex. 51).
11. The MISS LINDSEY was manned and equipped in compliance with its Certificate of Inspection. (TR. at 808-812).
12. Kevin Kraemer participated in recreational diving as a passenger for hire aboard the MISS LINDSEY on June 9, 2012. (CG Ex. 31).
13. After diving operations were underway, Respondent left the upper deck and went to the galley of the MISS LINDSEY to gather materials to prepare lunch. (CG Ex. 38 pg 15; TR. at 975-76).
14. Mr. Kraemer began his recreational dive at approximately 10:10 AM on June 9, 2012. (CG Ex. 33; TR. at 46-48; 929).
15. Mr. Kraemer surfaced shortly after initially diving and appeared near the anchor line of the MISS LINDSEY. (CG Ex. 33; TR. at 46-48; 929).
16. Respondent heard a call that a diver was up and returned above deck. (TR. at 929).
17. Once on deck, Respondent saw Mr. Kraemer on the surface of the water demonstrating signs of distress including having his mask on his forehead and his regulator out of his mouth. (TR. at 929-30).
18. Sonny Alejo remained at the stern of the vessel at that time. (TR. at 936).

19. Respondent instructed Mr. Kraemer to reinsert his regulator and inflate his buoyancy compensator (BC) but he was not responsive. (TR. at 931).
20. Respondent tossed a line to Mr. Kraemer, which he initially grabbed. (TR. at 930).
21. Respondent attempted to tow Mr. Kraemer aft using the line. (TR. at 930-33).
22. Mr. Kraemer continued to be unresponsive to requests to reinsert his regulator and inflate his BC. (TR. at 931).
23. Respondent directed crewmember Lucas Gray to assist in the effort to tow Mr. Kraemer aft. (TR. at 932-33).
24. Because Mr. Kraemer continued to show signs of distress while Respondent held the assist line, she directed crewmember Lucas Gray to enter the water to assist. (TR. at 935-36).
25. Respondent did not direct anyone to use a life ring or any other floatation equipment to assist Mr. Kraemer. (TR. at 944-45).
26. Respondent also did not direct crewmember Lucas Gray to put on or use any floatation or safety equipment before entering the water to attempt to assist the Mr. Kraemer. (TR. at 940).
27. Crewmember Lucas Gray swam to Mr. Kraemer and attempted to reinsert Mr. Kraemer's regulator into Mr. Kraemer's mouth and attempted to inflate Mr. Kraemer's BC. (TR. at 936-37).
28. Lucas Gray was unsuccessful in his attempts. (TR. at 936-37).
29. Sonny Alejo also entered the water to assist Mr. Kraemer. (TR. at 937).
30. The only floatation equipment crewmember Sonny Alejo was wearing when he entered the water to assist Mr. Kraemer was wetsuit pants. He had no other floatation equipment on at that time. (TR. at 256, 457, 484).

31. Mr. Kraemer lost his hold on the assist line and submerged. (TR. at 937).
32. After Mr. Kraemer submerged, Sonny Alejo, returned to the MISS LINDSEY; put on his diving equipment and dove to search for Mr. Kraemer. (TR. at 945-47).
33. Sonny Alejo recovered Mr. Kraemer and returned with him to the MISS LINDSEY. (TR. at 489-91, 946-47).
34. Personnel aboard the MISS LINDSEY performed CPR, Respondent contacted the Coast Guard, and the MISS LINDSEY returned to port at Rudee Inlet in Virginia Beach, VA to meet emergency response. (TR. at 947-49).
35. Medical efforts to revive Mr. Kraemer were unsuccessful. (TR. 861-62, 947).
36. Mr. Kraemer's cause of death was determined to be death by drowning. (CG Ex. 31, 42).
37. Respondent had seven (7) diver qualifications certificates including Open Water Instructor. Respondent also had CPR, First Aid Training and Oxygen First Aid for Scuba Diving Injuries course completion certificates. (CG Ex. 03).
38. MISS LINDSEY'S training records indicate Respondent completed training procedures for Man Overboard, Fire, Hazardous Seas and Abandon Ship. Periodic training or drills were conducted for the MISS LINDSEY crewmembers in 2011 and in 2012 for Man Overboard, Fire, Hazardous Seas and Abandon Ship. (CG Ex. 02; TR. at 302-03; 907-15).
39. Lucas Gray served as a crewmember aboard the MISS LINDSEY three (3) times, once in 2010, 2011, and 2012. (CG Ex. 07; TR. at 187).
40. On June 9, 2012, Crewmember Lucas Gray had completed training and obtained certifications indicated in CG Ex. 43. (CG Ex. 43).

41. On June 9, 2012, Sonny Alejo had completed training and obtained certifications indicated in CG Ex. 34. (CG Ex. 34).
42. The MISS LINDSEY did not have specific emergency procedures for diving emergencies. (CG Ex. 01; TR. at 918-19).

III. DISCUSSION

On June 9, 2012, the MISS LINDSEY (O.N. 571562) a small passenger vessel operated by the Lynnhaven Dive Center of Virginia Beach, Virginia, under command of Master Rebecca Jo Bryson, Respondent departed port with 14 passengers for hire to conduct recreational diving operations. (CG Ex. 04, 31). The site selected for the dive was in the vicinity of a known wreck. The crew of the MISS LINDSEY consisted of three (3) individuals: Master Rebecca Jo Bryson, Rhoderick “Sonny” Alejo, Master Diver; and Lucas Gray, who was a less experienced crewmember, qualified as a diver but assigned to “shadow” and learn from Sonny Alejo, the Master Diver and experienced crewmember. (TR. at 186-87, 430-33; CG Ex. 05).

A. Jurisdiction

Jurisdiction is a question of fact and must be determined before the substantive issues of the case are decided. See Appeal Decision 2620 (COX) (2001). When a mariner is engaged in the service of a vessel the mariner is considered to be acting under the authority of their mariner credentials when the holding of such credentials is required by law and/or for condition of employment. See 46 C.F.R. § 5.57(a). The Coast Guard has jurisdictional authority to suspend or revoke a mariner’s credentials if the mariner violated a law or regulation, committed an act of negligence, and/or committed an act of misconduct while acting under the authority of that credential. See 46 U.S.C. § 7703(1)(A).

The record contains sufficient evidence to prove jurisdiction as discussed above. Respondent's Answer admitted to paragraphs one (1) and two (2) of the jurisdictional allegations in the Complaint. Respondent did not contest she was acting under the authority of her Coast Guard credentials at all relevant times for the Charges in this matter. (Answer; TR. at 11).

In view of the undisputed facts, including Respondent's testimony at the hearing regarding her actions as Master of the small passenger vessel MISS LINDSEY, jurisdiction was established. The Court finds Respondent was acting under the authority of her Coast Guard credentials as the Master of the small passenger vessel MISS LINDSEY during the dates in question and jurisdiction is **PROVEN**. See 46 C.F.R. § 5.57(a).

B. Burden of Proof

The purpose of Coast Guard suspension and revocation proceedings is to promote safety at sea. See 46 U.S.C. § 7701. To assist in this goal, Coast Guard Administrative Law Judges have the authority to suspend or revoke mariner credentials if a mariner commits certain violations. See 46 U.S.C. § 7703. Under Coast Guard procedural rules and regulations, the Coast Guard bears the burden of proof and shall prove any violation by a preponderance of the evidence. See 33 C.F.R. §§ 20.701-702; see also Appeal Decision 2485 (YATES) (1989).

C. Allegations

In this case, the Coast Guard seeks to prove, by a preponderance of the evidence, Respondent: 1) committed an act of Misconduct by failing to ensure the emergency duties of the crew were explained through instruction and training, and that training was insufficient to comply with 46 C.F.R. § 185.420; 2) committed an act of Misconduct by ordering crewmembers to enter the water to assist a distressed diver

without requiring the use of available rescue and safety equipment, in violation of 46 C.F.R. § 185.530; 3) committed an act of Negligence by failing to have the crew follow vessel procedures and directing crew to enter the water without using available rescue and safety equipment to respond to a distressed diver; and 4) committed an act of Misconduct by failing to ensure the emergency instructions for the MISS LINDSEY were designed to address the particular equipment, arrangement and operation of the vessel in accordance with 46 C.F.R § 185.510.

1. Misconduct

Misconduct is defined in 46 C.F.R. 5.27 as, “human behavior which violates some formal, duly established rule. Such rules are found in, among other places, statutes, regulations, the common law, the general maritime law, a ships regulation, or order, or shipping articles and similar sources. It is act which is forbidden or a failure to do that which is required.” Id. In order to prove Misconduct the Coast Guard must prove, by a preponderance of the evidence, that Respondent is a holder of a merchant mariner credential, document or license; Respondent was acting under the authority of her credentials when the charged violation occurred (on or about June 9, 2012); and Respondent, as Master of the vessel MISS LINDSEY, committed the specific acts of misconduct listed in Charges 1, 2, and 4.

a. Charge 1

The Coast Guard alleges Respondent committed an act of Misconduct by failing to ensure the emergency duties of the crew, related to all vessel operations, were explained through instruction and training and failed as Master to prepare the crew for emergency duties as required by 46 C.F.R. § 185.420.

The Coast Guard presented evidence of the training records of the MISS LINDSEY. (CG Ex. 02). The testimony and records indicate Respondent, employed as

master and boat manager of the MISS LINDSEY, conducted quarterly training in some fashion but the documentation concerning the nature and extent of the training is minimal. (TR. at 876-78; 906-07). Respondent discussed how training was conducted in general. (TR. at 961-70). With regard to diving emergencies, Respondent testified there was not specific training for responding to a distressed diver on the surface or other diving emergencies. (TR. at 906-08; 954-59). The Man Overboard procedures for the MISS LINDSEY appear to be the closest emergency procedures for responding to a diver in distress. The MISS LINDSEY Man Overboard procedures indicate the first action should be to throw a ring buoy as close to the person as possible, and if necessary, have a crewmember don a life vest with a safety line attached and be prepared to jump in the water to assist the person overboard as necessary. (CG Ex. 01). Respondent testified specific Diver in Distress emergency training was not required because the crewmembers were qualified divers. (TR. at 918-23, 929, 969-70). The Diver Stress and Rescue publication from Scuba Schools International (SSI) provides for a rescue on the surface an individual should use maximum positive buoyancy to protect themselves and use a surface floatation device if available. (CG Ex. 50). Although flotation equipment, including life rings and a rescue buoy were available on the MISS LINDSEY, neither Lucas Gray nor Sonny Alejo used floatation devices in their attempt to rescue Mr. Kraemer, nor were they directed by Respondent to use the floatation equipment. (TR. at 984-94). Lucas Gray attempted to inflate Mr. Kraemer's buoyancy compensator but was unsuccessful. If a life ring or other floatation device were in use there may have been an opportunity to keep Mr. Kraemer afloat at least until Master Diver Sonny Alejo was able to reach him.

The MISS LINDSEY'S Man Overboard procedures and SSI Diver Stress & Rescue procedures provide for the use of a floatation device if available. See (CG Ex.

01; CG Ex. 50). Respondent did not direct the crew to use the floatation devices available on the vessel. The evidence shows the crew was not vigilant and appeared to be unprepared to provide sufficient assistance to a distressed diver on June 9, 2012. The training documentation records for crewmembers of the MISS LINDSEY, does not constitute proof Respondent fully complied with the regulations. Training should be tailored to the specific operations of a vessel, such as diving operations. See 46 C.F.R. § 185.420(a) and 46 C.F.R. § 185.510(b).

Respondent failed to direct and the crew failed to use a critical part of the emergency procedures, use of floatation and safety equipment aboard the vessel. The testimony of expert witness Mark Fowler, who served as Master of the MISS LINDSEY, and other vessels engaged in diving operations, supports the importance of training the crew in procedures for divers in distress for the benefit of any person overboard and in distress and for any crewmember or person that enters the water to assist in an attempt to rescue a person in distress. (TR. at 625-642). Training and drills are supposed to be conducted so crewmembers are prepared to respond appropriately in an emergency. See 46 C.F.R. § 185.520. It is not limited to the specific matters listed on the emergency placard as described in 46 C.F.R. § 185.510. See 46 C.F.R. § 185.420. Lucas Gray was a less experienced crewmember and despite his good intentions in attempting to help Mr. Kraemer, he was not sufficiently trained in responding to diving emergencies to be able to inflate Mr. Kraemer's buoyancy compensator and had no other floatation device available to help keep himself and Mr. Kraemer afloat. The evidence shows the training directed by Respondent for the crew was insufficient. Based on the evidence in the record as a whole, the Court finds Charge 1 Misconduct **PROVEN**.

b. Charge 2

The Coast Guard alleges in Charge 2 Respondent committed an act of Misconduct when, in responding to a distressed diver as Master of the small passenger vessel MISS LINDSEY (O.N. 571562) on June 9, 2012, she failed to have the crew follow vessel procedures and use rescue and safety equipment to assist the distressed diver. The Coast Guard alleges Respondent ordered crewmembers to enter the water to assist the distressed diver, without requiring use of available rescue and safety equipment. This failure to use available rescue and safety equipment was not in accordance with vessel procedures and therefore Respondent, as Master of the vessel, failed to appropriately direct the actions of the crew during an emergency situation in violation of 46 C.F.R. § 185.530.

Emergency drills are intended to be conducted, "as far as practicable, as if there were an actual emergency." See e.g. 46 C.F.R. §§ 185.520(c), 185.520(d) and 185.524(c). There were no specific "distressed diver" emergency procedures for the MISS LINDSEY but there is a written Man Overboard procedure. (CG Ex. 01). Those procedures include "1. Throw overboard a ring buoy as close to the person as possible" and "4. Have a crewmember don a life vest, attach a safety line to him or her and have him or her stand by to jump in the water to assist the person overboard if necessary." See (CG Ex. 01).

Additionally, the MISS LINDSEY Welcome Aboard Manual is provided to crewmembers and contains guidelines for Captains, Mates and Dive Masters. (CG Ex. 36; TR. at 907). The guidelines for Captains include, "5. Watch for free ascents, approaching vessels, etc." The guidelines for Mates include, "3. Having your mask, fins and snorkels ready and dressed appropriately to deal with problems/emergencies in the water", and "6. Be on the lookout for free ascents or drifting divers and any

approaching vessels, etc.” The guidelines for Dive Masters include, “4. On board assist the captain and crew in watching for free ascents, drifting divers or approaching vessels” and ”5. Have your mask, fins and snorkel ready to assist in emergencies.”

From the beginning of the emergency when Mr. Kraemer surfaced, at least one member of the crew should have been keeping an eye out for free ascents or drifting divers and both Lucas Gray as the mate and Sonny Alejo as the Dive Master should have had their mask, fins and snorkel ready to assist in an emergency. The evidence shows Respondent was below decks in the galley when Mr. Kraemer surfaced and she only came up on deck when she heard the call “diver up.” (TR. at 929). Lucas Gray was near the stern of the vessel and became aware of the distressed diver when Respondent called for assistance. (TR. at 228-29). As an inexperienced crewmember, Lucas Gray had been assigned to “shadow” the Master Diver. (TR. at 195-96). At the time Mr. Kraemer surfaced in distress, Sonny Alejo was also at the stern of the MISS LINDSEY. (TR. at 446). Respondent had time to direct Lucas Gray to assist her in leading the line around gear on the bow of the vessel. (TR. at 241, 932-34). Respondent also directed Sonny Alejo to help but at no time did she direct the use of a life ring or the rescue bouy or other floatation equipment aboard MISS LINDSEY for the attempted rescue.

Respondent’s indication that there wasn’t time to follow those procedures ignores the fact that the procedures were designed for emergencies and emergencies, by their nature, are unexpected and happen as an unplanned event. Following previously practiced procedures for emergencies is important to improve the chances of success in responding to an actual emergency and to try and enhance the safety of the rescuers. (CG Ex. 01, 50); See also (Testimony of Mark Fowler, TR. at 625-642). Respondent’s failure to direct the use of the available floatation and safety equipment aboard the

MISS LINDSEY constitutes a failure to use good judgment in an emergency situation. See 46 C.F.R. §§ 185.520 and 185.530. The Court finds Charge 2 Misconduct **PROVEN**.

c. Charge 4

In the final Misconduct allegation, Charge 4, the Coast Guard asserts Respondent committed an act of misconduct as the master by failing to ensure the emergency procedures and instructions for the duties of the crew related to the particular equipment, arrangement and operations of the MISS LINDSEY for diving operations complied with the requirements of 46 C.F.R. § 185.510.

There is no dispute the MISS LINDSEY did not have specific emergency procedures for responding to a diver emergency for a distressed diver on the surface. (CG Ex. 01). As previously discussed, the Man Overboard procedures for the MISS LINDSEY appear to be the vessel's only emergency procedures that could be applied to a diver in distress on the surface. (CG Ex. 01). The MISS LINDSEY Man Overboard procedures indicate the first action should be to throw a ring buoy as close to the person as possible and, if necessary, have a crewmember don a life vest with a safety line attached and be prepared to jump in the water to assist the person overboard as necessary. (CG Ex. 01).

Respondent testified specific diver in distress emergency training was not required because the crewmembers were qualified divers. (TR. at 918-23, 929, 969-70). The Diver Stress and Rescue publication from Scuba Schools International (SSI) provides that for a rescue on the surface an individual should use maximum positive buoyancy to protect themselves and use a surface floatation device if available. (CG Ex. 50). Respondent also contends the Coast Guard inspected the MISS LINDSEY and there were no violations noted.

Whether a Coast Guard inspector fails to notice a lack of compliance with regulations does not relieve an operator or an owner of the duty to comply with the regulations and to ensure the safety of the passengers of their vessel. See 46 C.F.R. § 185.420; 46 C.F.R. § 185.510; see e.g. Cassens v. St. Louis River Cruise Lines, Inc., 44 F.3d 508 (7th Cir. 1995); Cf. Appeal Decision 2415 (MARSHBURN) (1985)(contributory negligence on the part of a third party is not a defense to negligence for suspension and revocation proceedings).

Kenneth Edmundson testified for the Coast Guard as an expert in small passenger vessel inspections and requirements for those vessels. (TR. at 760-69). Mr. Edmundson specifically addressed the fact that the regulations provide for some specific training requirements applicable to all vessels but leaves to the operator and owner of the vessel the responsibility for any additional training based on the employment of the vessel. See (TR. at 793). Mark Fowler, who previously served as Master of the MISS LINDSEY, testified as an expert in diving operations and operating a small passenger vessel as master. (TR. at 610-15). From Mr. Fowler's testimony and CG Ex. 50, it is clear that available floatation devices should be used for a surface rescue and the crew should be trained in such procedures. (TR. at 636-40). A vessel engaged in specific operations such as recreational diving operations should have training tailored to that operation. 46 C.F.R. § 185.510(b). Likewise, a vessel engaged in taking passengers out for parasailing should have emergency and safety procedures tailored to parasailing. Even if the general industry standard did not include separate emergency instructions and training for the operations of the vessel such as diving, the industry standard may be insufficient. Cf. The T.J. Hooper, 60 F.2d 737 (2nd Cir. 1932). The regulations also provide training should be realistic in preparing for emergencies.

In this matter, the evidence shows no separate emergency procedures or training was provided for distressed divers and Respondent testified that she relied on the diver training and certifications held by the crew. (TR. at 918-19). Respondent testified she kept diving manuals for emergency response in the wheelhouse including the SSI Stress and Rescue manuals. (CG Ex. 50; TR. at 918-19). Merely keeping manuals on board does not satisfy the requirement for emergency instructions tailored to the operation of the vessel and the need for realistic training to practice responding to an emergency using those instructions.

As is fully discussed above, neither Lucas Gray nor Sonny Alejo used floatation devices even though they were available on the MISS LINDSEY. (TR. at 984-94). Lucas Gray attempted to inflate Mr. Kraemer's buoyancy compensator but was unsuccessful. If a life ring or other floatation device were in use there may have been an opportunity to keep Mr. Kraemer afloat at least until Sonny Alejo reached him. The MISS LINDSEY'S Man Overboard procedures and the SSI Diver Stress & Rescue procedures provide for the use of a floatation device if available. See CG Ex. 01 and CG Ex. 50. The testimony of expert witness Mark Fowler also identifies the need for using floatation devices if available. (TR. at 625-642) Respondent did not direct the crew to use the available floatation devices on the vessel. The logical conclusion from this evidence is that the failure to prepare the crew with separate procedures and realistic training for diving emergencies resulted in the failure to use available equipment during an actual emergency.

The Court finds training directed by Respondent for the crew was insufficient. A critical part of the emergency procedures, use of floatation and safety equipment aboard the vessel, was not used by any of the crew nor directed by Respondent. The testimony of several witnesses, including master and expert witness Mark Fowler and

Kenneth Edmundson, highlights the importance of those procedures for the benefit of both any person overboard and in distress and for any crewmember or person that enters the water in an attempt to rescue a person in distress. Training and drills are supposed to be conducted so crewmembers are prepared to respond appropriately in an emergency. See 46 C.F.R. § 185.520. The Court finds that based on the evidence in the record as a whole, the failure to have separate emergency procedures and training for diving operations is a failure to comply with 46 C.F.R. §§ 185.510 and 185.520, therefore, Charge 4 Misconduct **PROVEN**.

2. Negligence - Charge 3

Negligence is defined 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.” 46 C.F.R. 5.29. The minimum elements necessary to prove negligence under 46 C.F.R. § 5.29 requires the Coast Guard prove by a preponderance of the evidence:

- (1) that Respondent is a holder of a merchant marine credential (document or license);
- (2) that Respondent was acting under the authority of that license when the charged violation occurred (June 9, 2012); and
- (3) that Respondent either 1) committed an act which a reasonable and prudent person/mariner would not commit under the same circumstances; or 2) failed to perform an act which a reasonable and prudent person/mariner would have taken under the same circumstances.

Charge 3 alleges Respondent was Negligent in responding to a distressed diver emergency situation by failing to have the crew use rescue and safety equipment to assist the distressed diver. The Coast Guard alleges Respondent ordered crewmembers to enter the water to assist the distressed diver without requiring use of available rescue

and safety equipment, and this failure to direct the use of rescue and safety equipment was inherently unsafe and exposed the crewmembers to excessive risk. The Coast Guard asserts Respondent's failure to use and failure to direct the crew to use available floatation and emergency rescue equipment was a failure to perform actions and duties in the manner required of a reasonable and prudent mariner of the same station in the same circumstances.

As discussed in the Jurisdiction section above, there is no dispute Respondent is the holder of a merchant mariner credential and that she was acting under the authority of that license on June 9, 2012. (TR. at 11). Therefore, the first two (2) elements listed above are found proven. The dispute to be determined for this charged violation concerns the third element. The following analysis discusses whether Respondent's actions or omissions, leading up to and during the distressed diver emergency and response, were that which a reasonable and prudent person of the same station would have taken under the same circumstances. See 46 C.F.R. § 5.29.

On June 9, 2012, Respondent departed Virginia Beach, Virginia, serving as Master of the small passenger vessel MISS LINDSEY. (TR. at 873). The MISS LINDSEY reached the site of the wreck without incident, and diving operations had commenced. During the diving operation, Respondent left the upper deck and went to the galley and remained there until beginning of the incident. (TR. at 975-76). Upon hearing the "diver up" call, Respondent returned to the forward deck of the vessel. (TR. at 977). Respondent contends, in her Post Hearing Brief, her actions in responding to the emergency were not negligent and the actions taken were necessary because of the small timeframe available to respond to the emergency. Furthermore, Respondent contends if Mr. Kraemer was unable to hold an assist line there is no evidence he would be able to hold a life ring buoy or other flotation device. Respondent asserts Mr.

Kraemer, as a diver, was already wearing floatation devices as a part of his diving gear and alleges the Coast Guard did not show having crewmembers enter the water was unreasonably dangerous.

There were no separate emergency procedures for a distressed diver incident and the MISS LINDSEY's closest emergency procedures are the procedures for Man Overboard.³ (CG Ex. 01). The Man Overboard procedures include, "1. Throw overboard a ring buoy as close to the person as possible" and "4. Have a crewmember don a life vest, attach a safety line to him or her and have him or her stand by to jump in the water to assist the person overboard if necessary." The SSI Diver Stress & Rescue guidance for performing a rescue on the surface includes, "1. Use maximum positive buoyancy to protect yourself. Use a surface floatation device if available." (CG Ex. 50).

The evidence shows the MISS LINDSEY had life rings and a rescue can floatation device available. Respondent knew where all the safety equipment was located on the MISS LINDSEY. Respondent failed to throw or direct someone to throw a life ring to Mr. Kraemer. Respondent also failed to require her crewmembers to use floatation devices when entering the water to assist the distressed diver. Statements that there was insufficient time are not persuasive and not credible. It also highlights the fact that Respondent had gone below decks while diving operations were ongoing and she should have been above decks looking for "free ascents" by divers. (CG Ex. 36). The additional time incurred by having to return top side and then assess the situation to determine how to respond to the situation is critical time lost. Leaving the deck to

³ Because a person that falls overboard may not be wearing a lifejacket and may be injured and unable to keep afloat on their own, the situation is reasonably analogous to a distressed diver on the surface.

begin preparations for lunch instead of maintaining a careful watch of diving operations is not consistent with the prudent mariner standard.

The testimony of expert witness Mark Fowler, who has served as Master of the MISS LINDSEY and other vessels engaged in diving operations, provided evidence of the actions a Master in such circumstances should be taking. (TR. at 625-642)

Respondent's actions in failing to ensure the crew maintained a sufficient watch on deck throughout diving operations and in failing to use and direct the use of floatation equipment during the response to the distressed diver did not meet the standard of taking actions that a prudent mariner of the same station and circumstances would take. See Appeal Decision 2572 (MORSE) (1995).

Additionally, Respondent's suggestion that the distressed diver emergency somehow should permit consideration of being in *extremis* is not supported by the record. *Extremis* is a doctrine applied in excusing orders or actions in a collision emergency where the situation was not caused by the actor's own negligence. See Appeal Decision 2359 (WAINE) (1984); Appeal Decision (2101) (KELLOG) (1977); See also John Wheeler Griffin, *The American Law of Collision* 534-36 (1949) (when *extremis* rule is not applicable). There was no collision emergency in this matter and Respondent's claim she didn't have time to direct the use of floatation equipment on the MISS LINDSEY on June 9, 2012, is not supported by the evidence. Respondent's argument regarding *extremis* is not applicable to excuse the failure to use floatation devices and direct a rescue in keeping with CG Ex. 1 and 50. Instead, the evidence shows Respondent went below deck while diving operations were ongoing, and only returned to the deck in response to a "diver up" call and then failed to direct the use of readily available floatation equipment. I find a prudent mariner in a similar situation would have directed the use of available floatation equipment, as provided in the MISS

LINDSEY Man Overboard procedures and in the SSI Diver Stress and Rescue publication. (CG Ex. 01, 50; TR. at 639). Therefore, I find Respondent's assertion of extremis is **not** a valid basis to excuse failure to follow proper safety procedures in responding to a distressed diver.

Based on the evidence in the record as a whole, I find the Coast Guard has proven the charged violation of Negligence. The evidence shows: 1) Respondent failed to direct the use of life rings or other floatation devices in the attempted rescue of Mr. Kraemer; 2) Respondent's actions in failing to direct the responding crewmembers, Lucas Gray and Sonny Alejo, to use available floatation and safety equipment when entering the water to assist Mr. Kraemer negligently placed the crewmembers at risk; and 3) went below decks while diving operations were ongoing and other crewmembers were assisting divers returning to the vessel at the stern. These actions evidence a failure to act as a reasonably prudent mariner of the same station under the same circumstances and constitutes negligence under 46 C.F.R. § 5.29.

Respondent and her crew are expected to ensure safety at sea of their vessel and passengers in keeping with the regulations and the vessel's emergency procedures. Emergency procedures were created to be followed during an emergency. The regulations emphasize training should be as realistic as possible. The implication that in an emergency the crew is not expected to use available emergency equipment is contrary to both the regulations and logical expectations of a well trained crew. The actions of Respondent in this matter were not sufficient to meet the standard of a prudent mariner. (CG Ex. 01, 50; TR. at 633, 638-44, 673-76). The Court finds Charge 3 Negligence **PROVEN**.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent and the subject matter of this hearing are properly within the jurisdiction of the Coast Guard and the ALJ in accordance with 46 U.S.C. §§ 7703-7704, 46 C.F.R. Part 5, and 33 C.F.R. Part 20.
2. Respondent did not provide sufficient training to the crew as required by 46 C.F.R. § 185.420. Small passenger vessels engaged in specific types of operations are required to provide emergency training to the crew tailored to the specific operations of the vessel such as recreational diving. Therefore, the allegations in Charge 1 “Misconduct” are found **PROVEN** by a preponderance of the reliable and credible evidence including CG Ex. 01, 50, and the testimony in the record considered as a whole.
3. Respondent directed her crewmembers to assist a distressed diver in the water but failed to direct her crewmembers to use the available emergency and safety equipment aboard the MISS LINDSEY on June 9, 2012. Therefore, the allegations in Charge 2, “Misconduct” are found **PROVEN** by a preponderance of the reliable and credible evidence including CG Ex. 01, 36, 50, and the testimony in the record considered as a whole.
4. Respondent did not remain above decks during diving operations to be prepared to respond to a diving emergency, and when an emergency occurred she directed her crewmembers to assist a distressed diver in the water but failed to direct her crewmembers to use the available emergency and safety equipment aboard the MISS LINDSEY on June 9, 2012. Therefore, the allegations in Charge 3, “Negligence” are found **PROVEN** by a preponderance of the reliable and credible evidence including CG Exhibits 01, 36, 50, 38A, 53A and testimony in the record considered as a whole.

5. Respondent did not provide training to her crew tailored to the specific operation and employment of the vessel MISS LINDSEY as a small passenger vessel engaged in taking passengers for hire to conduct recreational diving.

Respondent, as Master, did not develop or provide sufficient emergency procedures and training for responding to distressed diver emergencies for the MISS LINDSEY on June 9, 2012. Therefore, the allegations in Charge 4, “Misconduct” are found **PROVEN** by a preponderance of the reliable and credible evidence including CG Ex. 01, 36, 50 and testimony in the record considered as a whole.

V. SANCTION

These proceedings are remedial, not penal in nature, and “are intended to help maintain standards for competence and conduct essential to the promotion of safety at sea.” 46 C.F.R. § 5.5; Appeal Decision 2294 (TITTONIS) (1983). If a charge is proven, sanctions are to be determined based on the concerns of safety at sea and pursuant to the regulations.

In this case, the Coast Guard seeks eighteen (18) months outright suspension based on the combination of the charged offenses. The Coast Guard’s Post Hearing Brief contained “Facts in Aggravation” in support of their argument. See CG Post Hearing Brief Proposed Findings of Fact 24 through 27. The Court has considered all relevant evidence in determining an appropriate sanction pursuant to 46 C.F.R. § 5.569. Title 33 C.F.R. Part 20, Subpart M (Supplementary Evidentiary Rules) provides guidance on what may properly be presented as evidence in aggravation. No charge or violation has been demonstrated for the allegations contained in Proposed Findings of Fact 24 or 25 regarding alcohol and chemical testing of the crew so those Proposed Findings of Fact fail to meet the requirements of 33 C.F.R. § 20.1315. Therefore, as

noted in Attachment B, CG Proposed Findings of Fact 24 and 25 are rejected as a valid basis for aggravation.

Title 33 C.F.R. Part 20, Subpart H (Evidence) provides guidance on what may properly be presented as evidence in Suspension and Revocation proceedings generally. Evidence presented in the case-in-chief to prove a violation may also be considered by the ALJ in determining an appropriate sanction. See 46 C.F.R. § 5.569. Therefore, the underlying facts in the record that are within CG Proposed Findings of Fact 26 could be considered in aggravation or mitigation but since there is no evidence that connects that evidence to this matter it has been given no weight in determining a sanction in this matter.

As discussed in the Court's Order of April 25, 2013, denying Respondent's prehearing motion seeking to consolidate some of the Coast Guard charges, the Coast Guard was permitted to proceed on all charges to meet the exigencies of proof, but multiplicity may be considered as a mitigating factor with regard to sanction. Whether the case arises from a single incident or course of conduct is not dispositive for consideration of alternative charges. "The exigencies of proof may require multiplicitous or alternative charging in a particular case." Appeal Decision 2496 (MCGRATH) (1990); Appeal Decision 2503 (MOULDS) (1990). If any of the charged violations are proven, any matters that are considered multiplicitous may be merged for purposes of determining a potential sanction. See Appeal Decision 2496 (MCGRATH) (1990).

After consideration of the charges and the evidence in the record the Court finds that Charge 1 and Charge 4 are closely aligned and should be merged as multiplicitous for sanction determination purposes. Likewise, Charges 2 and 3 are also closely aligned and should be merged as multiplicitous for the purpose of determining a sanction.

Based on a review of the evidence in the record as a whole, the Court determined the Charges were proven by a preponderance of the evidence. All of the evidence presented regarding the charges is also relevant and considered with regard to determining a sanction. The parties may also present matters that support either aggravation or mitigation. The Coast Guard presented matters in aggravation in support of the proposed sanction of outright suspension for eighteen (18) months. I ruled during the hearing that some of the matters presented may be limited for consideration by the Court and some matters were considered not relevant. In keeping with administrative practice, those determinations are not final until the Decision and Order is issued. The Coast Guard argued in its Post Hearing Brief that various matters are relevant and should be considering with respect to determining a sanction. Those matters are addressed as follows.

The Coast Guard presented testimony in support of the argument that Respondent failed to have appropriate alcohol testing equipment on board to conduct timely post casualty testing. Because there was no charge in regard to this matter and no finding of a violation resulting in final agency action, this matter is not within any of the permissible aggravation matters listed in 33 C.F.R. § 20.1315. Therefore, I find the evidence and argument on this matter is not proper evidence of aggravation under 33 C.F.R. § 20.1315 and will not be considered for any purpose.

The Coast Guard also presented evidence of previous incidents regarding serious marine casualties involving diving operations. (CG Ex. 32; TR. at 800, 880-85, 970-71). This evidence was considered only for the limited purpose of showing Respondent's knowledge of the risk of diving emergencies for vessels engaged in such operations. The record shows Respondent has no previous record of any suspension

and revocation violations. Respondent's previous good record is considered as a matter in mitigation.

Coast Guard also contends Respondent demonstrated a lack of recognition and understanding of her acts of misconduct and negligence, and that she has not displayed contrition or a willingness to make changes regarding the alleged deficiencies.

Although the Coast Guard has presented sufficient evidence to prove the charged violations, Respondent is entitled to contest the allegations and exercise of her rights, is not a valid basis for asserting her disagreement with the charges is somehow a matter of aggravation. See 46 U.S.C. § 7702; 46 C.F.R. § 5.501. For the foregoing reasons, Coast Guard Proposed Finding of Fact 27 is rejected.

Respondent did not submit any exhibits during the hearing and relied instead on the exhibits presented by the Coast Guard combined with cross examination of witnesses and her own testimony. Respondent is an experienced mariner and there is no dispute that she has no prior violations in her record. Respondent and her crew attempted to rescue Mr. Kraemer but the loss of a passenger diver is a serious marine casualty.

Following the close of the administrative hearing on May 22, 2013, Respondent was allowed to retain her MMC. There are four (4) violations proven in this matter but pursuant to the ruling on multiplicities, the court concedes there to be two (2) violations for purposes of determining an appropriate sanction. There is no specific guidance for the exact violations in this matter but the Court has considered the suggested range of orders contained in 46 C.F.R. Part 5 (Table 5.569). The Table includes a potential sanction of 2-4 months suspension for negligence related to non-navigational safety related duties and 3-6 months for failure to perform duties related to vessel safety. It provides 12-24 months for violations of Regulations and the Table includes a potential

sanction of 2-5 months suspension for misconduct related to improper performance of non-navigational safety related duties.

It is within the duties of the ALJ to order any of a variety of sanctions. See 46 C.F.R. § 5.569; see also Appeal Decision 2569 (TAYLOR) (1995); Appeal Decision 2680 (MCCARTY) (2006). However, the undersigned is not bound by 46 C.F.R. § 5.569 or the average order table. See Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Consideration of mitigating or aggravating factors and evidence may justify a lower or higher sanction than the range suggested in the average order table. See 46 C.F.R. § 5.569(d). Although the violations arise from the same marine casualty, they are separate offenses and required proof of separate elements. There is evidence that in addition to being bound to know the law and regulations as a licensed mariner, Respondent knew of past incidents with distressed divers and was aware of her obligation to be prepared for such emergencies in recreational diving. (TR. at 880-86).

In this case, the crewmembers were not injured during the rescue attempt, but the loss of life highlights the impact of Respondent's failure to direct the use of floatation and safety equipment and the risk involved when such safety measures are not followed. These are valid matters to consider as a basis to exceed the general guidance in the Table. In view of the record as a whole, including all of the testimony and exhibits admitted at the hearing, the evidence establishes that in keeping with the interests of maritime safety as provided in 46 C.F.R. § 5.5, the appropriate sanction in this matter is that Respondent's mariner credentials shall be **SUSPENDED OUTRIGHT** for a period of twelve (12) months, followed by **SUSPENSION ON PROBATION** for an additional six (6) months.

VI. ORDER

IT IS HEREBY ORDERED that the Merchant Mariner's Credential and all other credentials issued by the U.S. Coast Guard to Rebecca Jo Bryson are **SUSPENDED OUTRIGHT FOR A PERIOD OF TWELVE (12) MONTHS, FOLLOWED BY SUSPENSION ON PROBATION FOR AN ADDITIONAL SIX (6) MONTHS.** Conditions of probation are: Respondent shall not be found guilty or proven to have violated any law or regulation that is listed in Table 46 CFR 5.569, or listed in table 46 CFR 10.211(g), or of a violation that would preclude the issuance of a Merchant Mariner Credential during the probationary period.

IT IS HEREBY FURTHER ORDERED that Respondent must immediately surrender her Merchant Mariner Credential and any other Coast Guard issued credentials to the Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, VA 23510. If you knowingly continue to use your documents during a period of outright suspension, you may be subject to criminal prosecution.

PLEASE TAKE NOTICE that service of this Decision 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. (Attachment C).

Michael J Devine
US Coast Guard Administrative Law Judge

Date: October 21, 2013

ATTACHMENT A

WITNESS AND EXHIBIT LISTS

WITNESS LISTS

COAST GUARD WITNESS

CG Witness 1	LT Hannah Kawamoto
CG Witness 2	Lucas Gray
CG Witness 3	Rhoderick "Sonny" Alejo
CG Witness 4	Emily Merritt
CG Witness 5	Mark Fowler
CG Witness 6	David Bourbeau
CG Witness 7	CDR Carolyn Oyster
CG Witness 8	Kenneth R. Edmondson
CG Witness 9	Dr. Wendy M. Gunther

RESPONDENT WITNESS

Resp's Witness 1	Rebecca Bryson
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EXHIBIT LIST

COAST GUARD EXHIBITS

- CG Ex. 01 A copy of Emergency procedures for the vessel for MISS LINDSEY
- CG Ex. 02 Record of Drills for Calender Year 2012
- CG Ex. 03 Documents required from Rebecca Bryson Subpoena dated September 13, 2012
- CG Ex. 04 Report of Marine Accident Injury or death CG 2692
- CG Ex. 05 Drug testing results for crew of the MISS LINDSEY and CG form CG 2692B
- CG Ex. 06 Statement by Joshua Cross (June 9, 2012) (not offered)
- CG Ex. 07 Statement by Lucas Gray (June 9, 2012)
- CG Ex. 08 Statement by Sonny Alejo (June 9, 2012) (not offered)
- CG Ex. 09 Statement by Dennis Daly, Jr. (June 9, 2012)
- CG Ex. 10 Statement by Emily Merritt (June 9, 2012)
- CG Ex. 11 Statement by Rob Saxby (June 9, 2012)
- CG Ex. 12 Statement by Chris Marois (June 9, 2012)
- CG Ex. 13 Statement by Ginny Marois (June 9, 2012)
- CG Ex. 14 Statement by Devon Parsons (June 9, 2012)
- CG Ex. 15 Statement by Jonathan Bevis (June 9, 2012)
- CG Ex. 16 Statement by Brian M. Danatazlo (June 9, 2012)
- CG Ex. 17 Statement by Earl Hemminger (June 9, 2012)
- CG Ex. 18 Statement by William Lamm (June 9, 2012)
- CG Ex. 19 Statement by Randy Glaze (June 9, 2012)
- CG Ex. 20 Statement by Katrina Goodsey (June 9, 2012)
- CG Ex. 21 Recorder Interview of Rebecca Bryson (not offered)

- CG Ex. 22 Recorder Interview of Rhoderick (Sonny) Alejo (not offered)
- CG Ex. 23 Recorded Interview of Lucas E. Gray (not offered)
- CG Ex. 24 Recorded Interview of Josh Cross (not offered)
- CG Ex. 25 Recorded Interview of Randy Glaze (not offered)
- CG Ex. 26 Identification regarding Kevin Jerome Kraemer
- CG Ex. 27 Dive Quarters Nitrox Log (not offered)
- CG Ex. 28 Trace Analytics, LLC Analysis Certificate (not offered)
- CG Ex. 29 USCG Staition Little Creek Logs (not offered)
- CG Ex. 30 Boat Ticket (not offered)
- CG Ex. 31 MISS LINDSEY Manifest and dive times
- CG Ex. 32 Historic Data for the SPV MISS LINDSEY (O.N. 571562) Regarding Reported Marine Casualties.
- CG Ex. 33 Dive computer data for vistims dive June 9, 2012
- CG Ex. 34 Qualifications Certificatess for Crew
- CG Ex. 35 Record of Drills for the calendar year 2011
- CG Ex. 36 Welcome Aboard manual
- CG Ex. 37 Air Quality test for SCUBA tanks (not offered)
- CG Ex. 38 Photographic evidence taken of the vessel MISS LINDSEY
- CG Ex. 38A CG Exhibit 38A was offered and accepted at the hearing.
- CG Ex. 39 2nd Recorded Iterview with Lucas Gray (not offered)
- CG Ex. 40 2nd Recorded Iterview with Rhoderick (Sonny) Alejo (not offered)
- CG Ex. 41 2nd Recorded Iterview with Master Rebecca Bryson (not offered)
- CG Ex. 42 Medical Examiners Report
- CG Ex. 43 Documents from Lucas Grey required by September 13, 2012 Subpoena

- CG Ex. 44 Documents recieved by Rhoderick Alejo in response to subpoena dated September 13, 2012
- CG Ex. 45 Sketch of MISS LINDSEY (not offered)
- CG Ex. 46 Interview summary from Lieutenant Junior Grade, David Bourbeau (not offered)
- CG Ex. 47 CG investigation history of Rebecca Bryson
- CG Ex. 48 Interview summary with LCDR Carolyn Oyster (not offered)
- CG Ex. 49 Witness statement of Joesph Jay Moore, III (not offered)
- CG Ex. 50 Scuba Schools International Manual
- CG Ex. 51 USCG Certificate of Inspection
- CG Ex. 52 Medical Waiver of Rebecca J. Bryson (not offered)
- CG Ex. 53 Demonstrative sketch of MISS LINDSEY
- CG Ex. 53A 2nd Demonstrative Sketch of Miss Lindsey offered at the hearing
- CG Ex. 54 Small Passenger Manual (Rejected)
- CG Ex. 55 Marine Advisory 01-12 (Rejected)

ATTACHMENT B

**RULINGS ON PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

a. COAST GUARD'S PROPOSED FINDINGS OF FACT:

Jurisdictional Facts

1. Rebecca Jo Bryson ("Respondent"), by and through counsel of Craig S Jenni, Esq., admitted in her Answer to the Amended Complaint in *USCG v. Rebecca Jo Bryson*, Docket Number 2012-0523, dated March 22, 2013, Jurisdictional Allegations 1 and 2.
2. The admitted allegations include: (1) that the Respondent holds Merchant Mariner's Credential (MMC) 000122795; and (2) that the Respondent was acting under the authority of MMC 000122795, on June 9, 2012, while serving as Master aboard the vessel MISS LINDSEY as required by law or regulation. The applicable law and regulation, 46 C.F.R. 15.515 and 46 U.S.C. 8902, requires that a small passenger vessel be operated by an appropriately licensed Master. Amended Complaint dated March 22, 2013 for docket # 2012-0523.

ACCEPTED. As provided in the Decision and Order.

Substantive Facts

2. The Respondent, denied in her Answer to the Amended Complaint in *USCG v. Rebecca Jo Bryson*, Docket Number 2012-0523, dated March 22, 2013, paragraphs 1-4 of the Factual Allegations – Misconduct paragraphs 1, 2 and 4, and Negligence paragraph 3.
3. On June 09, 2012, the Respondent was the Master of the Small Passenger Vessel (SPV) MISS LINDSEY. The Respondent admitted that, as the Master, she was responsible for the training of her crew, including training regarding emergency procedures. (CG Ex. 04), (TR. p627-628 ln12-22 ln1-6, Fowler; TR. p873 ln15, TR. p970 ln5-9, Bryson)
4. Respondent did not develop specific emergency procedures to address all operations of the vessel to include aid to distressed divers, and diver rescue and recovery procedures. (CG Ex. 01), (TR. p292-293 ln19-22 ln1-13, Gray; TR. p907-908

ln21-21 ln1, TR. p918-919 ln19-22 ln1-17, TR. p959 ln8-14, Bryson; TR. p793-794 ln8-22 ln1-4, TR. p794 ln11-15, Edmundson)

ACCEPTED. As provided in the Decision and Order.

5. On June 9, 2012, the Respondent as the Master of the SPV MISS LINDSEY was responsible for a standard of care that ensured emergency duties were understood and that the positions of her crew were clearly identified. (TR. p957 ln10-11, Bryson; TR. p643 ln9-17, Fowler), Appeals Decision 2098 (CORDISH)(1977)

ACCEPTED. As provided in the Decision and Order.

6. On June 9, 2012, at the onset of the emergency situation, the Respondent was engaged in activities in the galley which negated her ability to maintain situational awareness and control of her crew. (CG Ex. 38 p15) (TR. p975-976 ln10-22 ln1-16, Bryson)

ACCEPTED IN PART. As provided in the Decision and Order.

7. On June 9, 2012, Mr. Kevin Kraemer was found at the surface clinging to the anchor line in distress, but in a stable position in need of assistance. (TR. p179 ln8-21, Kawamoto; TR. p448-449 ln15-22 ln1-10, TR. p470 ln18-21, Alejo; TR. p934-935 ln21-22 ln1-2, TR. p929-930 ln19-22 ln1, TR. p977 ln15-20, Bryson)

ACCEPTED IN PART. As provided in the Decision and Order.

8. When shifted from his stable position on the anchor line to an assist line, Mr. Kraemer's face became awash and he displayed increasing signs of distress. (TR. p314 ln6-13, Gray; TR. p934 ln3-14, TR. p936 ln9-13 Bryson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

9. On June 9, 2012, the Respondent failed to have her crew follow available emergency procedures, such as Man Overboard procedures, during the emergency situation. (CG Ex. 01) (TR. p907-908 ln21-22 ln1, Bryson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

10. On June 9, 2012, Lucas Gray was designated as a crew trainee assigned to shadow Mr. Rhoderick Alejo. (TR. p339 ln3-11, Gray; TR. p971 ln15-18, Bryson; TR. p433-434 ln22 ln1-3, Alejo)
ACCEPTED. As provided in the Decision and Order.
11. On June 9, 2012, Mr. Lucas Gray was a minimally qualified crewmember aboard the SPV MISS LINDSEY. (TR. p343 ln16-21, TR. p339 ln3-6, Gray; TR. p686 ln6-22, Bourbeau; TR. p969-970 ln20-3, Bryson)
ACCEPTED. As provided in the Decision and Order.
12. On June 9, 2012, the Respondent, allowed a minimally qualified crewmember, Mr. Lucas Gray, to enter the water to attempt the rescue of a distressed passenger without any safety equipment. (CG Ex. 04), (TR. p971 ln15-18, TR. p990 ln2-4, TR. p990-991 ln16-22 ln1-2, Bryson; TR. p247 ln9-17, TR. p346 ln3-10, TR. p339 ln3-6, Gray; TR. p686 ln6-22, Bourbeau)
ACCEPTED. As provided in the Decision and Order.
13. On June 9, 2012, the Respondent, allowed Dive Master, Mr. Rhoderick Alejo, to enter the water to attempt the rescue of Mr. Kevin Kraemer without appropriate safety equipment, deviating from the industry standard. (CG Ex. 36, CG Ex. 50), (TR. p638 ln17-21, TR. p639 ln14-22, TR. p675-676 ln13-22 ln1-4, Fowler)
NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
14. Allowing a crewmember to attempt a rescue of a distressed person without safety equipment poses a significant risk to both the crewmember and the distressed person. (CG Ex. 50), (TR. p991 ln7-21, Bryson; TR. p460-461 ln17-22 ln1-8, TR. p462 ln6-9, Alejo; TR. p671-672 ln15-22 ln1-17, Fowler)
NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
15. On June 9, 2012, the Respondent failed to recognize the significant safety risk associated with her crew attempting the rescue of Mr. Kevin Kraemer without basic safety equipment. (TR. p941 ln21-22, TR. p945 ln18-20, TR. p991 ln7-21, Bryson;

TR. p262-263 ln20-22 ln1-8, TR. p345 ln1-7, Gray; TR. p460-461 ln17-22 ln1-8, p462 ln6-9, Alejo)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

16. On June 9, 2012, the Respondent failed to provide any safety equipment to assist her crew during the attempted rescue of Mr. Kevin Kraemer. (TR. p263 ln15-19, TR. p345 ln1-7, Gray)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

17. On June 9, 2012, the Respondent failed to ensure buoyancy or provide any floatation to a distressed passenger at the surface. (TR. p978 ln2-8, TR. p979 ln17-21, TR. p987 ln18-20, TR. p992 ln17-22, Bryson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

18. The Respondent is the holder of a certification from Scuba Schools International (SSI) in Diver Stress and Rescue. (CG Ex. 03)(TR. p886 ln12-17, Bryson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

19. The Respondent, as the holder of the Diver Stress and Rescue certification from SSI, was aware of the safety standard for responding to a diver in distress. (CG Ex. 03)(TR. p886 ln12-17, TR. p989-990 ln14-22 ln1, Bryson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

20. The Respondent, as the holder of the Diver Stress and Rescue certification from SSI, was aware of the hazards expected when assisting a distressed individual in the water. (CG Ex. 03)(TR. p886 ln12-17, TR. p989-990 ln14-22 ln1, Bryson).
NEITHER ACCEPTED NOR REJECTED. Findings regarding charges are addressed in the Decision and Order.
21. When Mr. Kraemer could no longer maintain his grip on the assist line, he proved to lack sufficient buoyancy to remain at the surface, and as a consequence rapidly sank 60 feet to the ocean floor. (TR. p48 ln3-5, Kawamoto; TR. p450 ln2-3, Alejo; TR. p937 ln17-18, Bryson)
NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
22. The autopsy performed on Mr. Kraemer found no excluding cause of death, no significant heart disease, no trauma, no blood clot, no aneurysm, any infection, and any other disease or injury, which would explain the death aside from drowning. (TR. at 861).
NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.
23. The SPV MISS LINDSEY is a small passenger vessel, which operates as a dive vessel, whose primary operations are dive related. (CG Ex. 51; TR. at 891, 897).
ACCEPTED. As provided in the Decision and Order.

Facts in Aggravation

24. Respondent failed to have appropriate alcohol testing equipment available to conduct post casualty testing within the required time frame. The testing equipment onboard the vessel was expired. The Coast Guard provided testing equipment for the crew; however, it was the responsibility of the Master to ensure the equipment was up to date and the tests were completed. (TR. p41 ln19-22, TR. p42 ln1-16, Kawamoto)
REJECTED. As provided in the Decision and Order.

The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

25. The Respondent was directed on June 9, 2012, by the Investigating Officer, to immediately have the crew of the MISS LINDSEY chemically tested. The Respondent failed to comply with this order until over twenty-four hours after the emergency. 46 CFR 4.06-3(b)(1) articulates that chemical testing should be conducted as soon as possible after safety concerns are addressed. Established case law indicates that chemical testing should be done immediately after safety concerns have been addressed. The 32 hour rule, as the outside limit, does not confer the right to wait beyond the point that safety concerns have been addressed. Appeal Decision 2690 (THOMAS) (2010)

REJECTED. As provided in the Decision and Order. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

26. The Respondent had previously been exposed to serious marine casualties that involved diving operations. However, she still failed to educate the crew or to incorporate drills to reinforce procedures and mitigate risks associated with diving emergencies as required by 46 C.F.R. 185.420 and 46 C.F.R. 185.510. She failed to do so after receipt of a Marine Safety Advisory with specific emergency procedure recommendations. (CG Ex. 32)(TR. from p880 ln8-22 to p885 ln1-18, TR. p970-971 ln21-22 ln1-3 Bryson; TR. p800 ln10-20, Edmundson)

NEITHER ACCEPTED NOR REJECTED. The weight of any evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

27. The Respondent has demonstrated a complete lack of recognition and understanding of her multiple acts of misconduct and negligence. Additionally, she has not displayed any contrition or willingness to make changes to address deficiencies when engaged with the Coast Guard. Instead, she has insisted that the investigation had no value. (TR. p914 ln6-9, TR. p945 ln18-20, TR. p1003-1004 ln21-22 ln1-5, Bryson) **REJECTED.** As provided in the Decision and Order. The weight of any

evidence including testimony during the hearing is to be determined by the court. Some of the evidence may be accepted, some may be rejected and some may be considered immaterial.

b. COAST GUARD'S PROPOSED CONCLUSIONS OF LAW:

1. At all times relevant, Respondent was acting under the authority of issued U.S. Merchant Marine Credential No. 000122795.

ACCEPTED. As discussed in the Decision and Order.

2. The Coast Guard retains jurisdiction over Respondent's credentials for these 46 C.F.R. Part 5 proceedings.

ACCEPTED. The findings regarding jurisdiction are addressed in the Decision and Order.

3. Respondent wrongfully failed as Master to prepare the crew for the duties associated with emergencies related to all vessel operations as required by 46 C.F.R. § 185.420.

ACCEPTED IN PART. As discussed in the Decision and Order.

4. Respondent failed as Master to maintain command, control and situational awareness and to appropriately direct the actions of the crew during an emergency situation, in violation of 46 C.F.R. § 185.530.

ACCEPTED. As discussed in the Decision and Order.

5. The Respondent failed to ensure that the emergency instructions for the MISS LINDSEY were designed to address the particular equipment, arrangement and operation of the vessel in accordance with 46 C.F.R. § 185.510.

ACCEPTED. As discussed in the Decision and Order.

6. Respondent negligently exposed her crew to excessive risk by directing them to engage in a rescue operation without appropriate safety equipment. These actions were not reasonable and do not reflect the actions which are expected of a prudent mariner of the same station and circumstance and constitute negligence in accordance with 46 C.F.R. § 5.29.

ACCEPTED IN PART. As discussed in the Decision and Order.

ATTACHMENT C

NOTICE OF ADMINISTRATIVE APPEAL RIGHTS

33 CFR 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.

33 CFR 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.

33 CFR 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.

33 CFR 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.