

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
Re: Michael G. Reynolds
AAD NO. 07-026/F&WA
Lobster Trap Allocation
MPURP 000101
2008

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD) pursuant to Applicant's request for hearing on the Initial 2007 RI/Area 2 Lobster Trap Allocation as determined by the Department of Environmental Management, Division of Fish and Wildlife (Division). Applicant Michael G. Reynolds appeared on his own behalf. Gary Powers, Esq. appeared on behalf of the Division. The hearing was conducted on September 11, 2007 immediately following the prehearing conference.

The within proceeding was conducted in accordance with the statutes governing the Administrative Adjudication Division for Environmental Matters (R.I. GEN. LAWS § 42-17.7-1 et seq.); the *Administrative Procedures Act* (R.I. GEN. LAWS § 42-35-1 et seq.); the *Administrative Rules of Practice and Procedure for the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters (AAD Rules)*; and the *Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans, and Horseshoe Crabs (Marine Fisheries Regulations)*.

PREHEARING CONFERENCE

A prehearing conference was conducted on September 11, 2007. The parties did not agree to any stipulations of fact.

Applicant identified the following as the issue to be considered by the Hearing Officer at the hearing:

1. That the regulations were retroactive to 2004 but the Applicant was in a serious accident in 2002, and in 2003, which limited him to light duty and he could not fish.

The Division identified the following as issues to be considered by the Hearing Officer at the hearing:

1. Whether the Applicant's January 17, 2007 Initial 2007 Lobster Management Area 2 Lobster Trap Allocation was calculated consistent with the requirements of Part 15.14.2-Area 2 Lobster Trap Effort Control that was duly promulgated pursuant to R.I. GEN. LAWS § 42-35-1 et seq.
2. If the Applicant seeks to prove that he is entitled to a medical hardship exception, whether the Applicant suffered a medical hardship during the target years of 2001-2003 as required pursuant to Part 15.14.2-5(e)(1).
3. If the finding to the issue set out above in Issue 2 is in the affirmative, whether the Applicant landed any lobsters in 2004 as required by Part 15.14.2-5(e)(3).

A list of the exhibits that were presented by the parties is attached to this Decision as Appendix A.

HEARING SUMMARY

The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued by the Division on January 17, 2007, assigned a zero (0) trap allocation to Michael Reynolds. Div. 1. Mr. Reynolds filed an appeal at the AAD on February 7, 2007, citing medical hardship. Div. 2.

Applicant bears the burden of proving by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation for RI commercial fishing license #MPURP000101 pursuant to Part 15.14.2-5 of the *Marine Fisheries Regulations*.

The Applicant's only witness was himself. The Division called two (2) witnesses: Thomas Angell, a Principal Marine Biologist in the Division of Fish and Wildlife who, by agreement, was qualified as an expert concerning the lobster fishery and in the interpretation and application of the Department's lobster regulations; and Michael Reynolds.

In Applicant's presentation of his case he testified that he was injured in an automobile accident in 2002 and involved in another accident in 2003. He was unable to fish because of back pain. He stated that he was on limited duty in 2004 because of his back, and could not lift large amounts of weight. When he did fish, he served as a deck hand with James Bounakes as captain of the vessel. Applicant presented two (2) letters from doctors as exhibits. The correspondence from Eugene A. Russo, M.D. states that Michael Reynolds was being treated by his office from August 28, 2002 until January 16, 2003 and again from July 19, 2003 to December 4, 2003 due to two motor vehicle accidents. After the first accident Mr. Reynolds was "incapable of any heavy lifting, pushing, or pulling movements." After the second accident he was "unable to do any lifting over ten pounds." Appl 1. The second document, a letter from W. Scott Keigwin, D.O., recites that Mr. Reynolds had been in an automobile accident in August 2002 and sustained injury to his cervical and lumbosacral spine. He was a passenger in a vehicle in another motor vehicle accident on July 19, 2003 and was diagnosed with cervical spondylosis. The doctor wrote that the two accidents limited Mr. Reynolds' ability "to do any sort of fishing for several years and he was on light duty only until January of 2005." Appl 2. The two documents are not notarized.

The Division waived cross examination of the witness. Applicant then rested his case.

In the Division's presentation of its case, Thomas Angell testified that among his responsibilities as a Principal Marine Fisheries Biologist are research and monitoring the lobster fishery. He serves as a member of the Lobster Technical Committee of the Atlantic States Marine Fisheries Commission (ASMFC) and as staff coordinator of the ASMFC Area 2 Lobster Conservation Management Team. Mr. Angell explained that the Lobster Technical Committee is responsible for taking stock assessments and for reviewing management plans. Each of the stock assessment reports from 1996, 2000 and 2006 concluded that the lobster stock in southern New England and particularly in Area 2 were overfished. Over the years several management tools were employed to encourage the re-building of the resource: increasing the minimum size of a legal lobster; increasing escape vent size; placing restrictions on non-trap lobster fishermen; and implementing an Area 2 lobster trap effort control plan that limits the number of traps to the number that had been fished in the years 2001-2003. Lobster Management Area 2 encompasses the waters from the Rhode Island/Connecticut border on the west and runs easterly to southern Cape Cod; the area includes all of Rhode Island state waters.

The lobster trap effort control plan, also referred to as *Addendum VII*, that was approved by the ASMFC required the affected states to implement the management plan in a timely manner. Mr. Angell testified that if a state does not comply with the *Addendum VII* effort control plan, then the ASMFC will make a finding of noncompliance and forward the finding to the United States Secretary of Commerce and the Secretary of the Interior. Those officers could then begin the process of shutting down the lobster fishery in the offending state through the imposition of a moratorium on the fishery.

Mr. Angell stated that he took the *Addendum VII* management plan and prepared the draft regulatory language for Rhode Island. Once the regulations were adopted, he and colleague John Lake began to implement the plan. Notices were sent to applicants; dispute reviews were conducted; and notifications of the Division's determination of trap allocations were issued.

The witness explained that the Lobster Trap Allocation issued to Mr. Reynolds employed data from his Catch and Effort Logbook for the years 2001 through 2003. The Logbook had shown no pounds landed and no reported lobster traps fished for those years, resulting in a zero (0) Lobster Trap Allocation. Div. 1 at 1. A summary of Mr. Reynolds' activity in 1999-2000, and in 2004, indicates that the Applicant had fished 800 effective traps for 1999 and 2000 but had no pounds landed and no reported lobster traps fished for 2004. Div. 3. Mr. Angell concluded that even if Mr. Reynolds' claim of the medical hardship exception was justified, he could not use the effective traps fished for 1999-2000 to calculate the Lobster Trap Allocation because the Applicant did not have any landings of lobster in 2004. He stated that he did not dispute that Mr. Reynolds suffered the medical hardship for 2001-2003 as provided in the regulations. Under cross examination Mr. Angell explained that the regulatory language does not include a medical hardship extending into 2004. He stated that the current regulations do not apply to this matter; that this application must be reviewed according to the regulations that were in effect when the application was submitted to the Department. The older regulations required that the Applicant have lobster landings in 2004 and make no provision for a medical hardship continuing through 2004.

The Division briefly called the Applicant as a witness. Mr. Reynolds agreed that there was no documented government agency decision regarding his medical condition. The Division then rested its case.

In Applicant's closing argument he stated that he had provided medical documents for the years in question and that he could not fish in 2004 due to medical hardship. He requested that the number of effective traps fished in 1999 be used to modify the Lobster Trap Allocation. He argued that the Division "left the door open" by not addressing in the regulations the circumstance of a medical hardship extending into 2004.

In the Division's closing argument Mr. Powers stated that the Hearing Officer cannot "rewrite" the regulations but must apply those duly promulgated and adopted. He contended that although Mr. Reynolds has shown medical hardship, it is not to the degree set forth in Part 15.14.2-5 (e)(1) of the *Marine Fisheries Regulations*: there is no governmental decision regarding Applicant's medical condition, so medical hardship has not been established. Counsel asserted that even if the medical hardship standard has been met, the landings from 1999-2000 cannot be used for a new calculation of the Lobster Trap Allocation because the Applicant has not demonstrated that he had lobster landings in 2004 as required by Part 15.14.2-5 (e)(3) of the *Marine Fisheries Regulations*.

Conclusion

Although the Division applied the provisions of the *Marine Fisheries Regulations* as adopted on November 22, 2006 to the appeal in this matter, the Director in his recent decision in *Re: Charles Borden*, AAD No. 07-028/F&WA, Final Agency Order entered on December 31, 2007, made clear that the later, amended *Marine Fisheries Regulations*¹ "were promulgated with the intent that they be in place prior to making any final decisions on appeals." at 2. I therefore am applying the provisions of the most recent *Marine Fisheries Regulations*, as amended August 1, 2007, to Mr. Reynolds' appeal of his Lobster Trap Allocation.

The Division presented evidence that Applicant had no pounds landed and no reported traps fished for the years 2001 through 2003, resulting in a Lobster Trap Allocation of zero (0). Div. 1 at 1. The Division also presented evidence regarding Applicant's lobster trap fishing history for the years 1999 - 2000, and in 2004. Div. 3. Mr. Reynolds had 800 "Effective Traps Fished" for 1999 and 2000. Claiming medical hardship, Mr. Reynolds seeks to have the 1999 - 2000 lobster trap fishing history substituted for the lack of such history during the target years 2001 - 2003. Although Mr. Angell testified that he did not dispute that Mr. Reynolds' met the medical hardship standard under the November 22, 2006 regulations, he concluded that the Applicant was not

entitled to a modification of the Lobster Trap Allocation because the regulations required that he have lobster landings in 2004 and Applicant had none.

The amendments that were adopted after the November 22, 2006 regulations no longer employ the medical hardship standard. The amendments now require proof of “material incapacitation” and altered the requirement for landings by trap in 2004. The pertinent provisions of the *Marine Fisheries Regulations* are set forth below.

Part 15.14.2-2 of the regulations defines “material incapacitation” to mean:

a verifiable event beyond the control of the license/permit holder, such as a medical condition, that adversely affected his/her fishing performance during the three-year period 2001 - 2003, inclusive. Military service performed during the three-year period 2001 - 2003 also constitutes material incapacitation. Other than a decision to serve in the military, material incapacitation can not involve a choice by the license/permit holder to pursue other interests; or to a short-term illness or injury that would not have incapacitated a person for the three qualifying years.

Part 15.14.2-8 sets forth the procedure to claim “material incapacitation” and to request the alternative calculation of the lobster trap allocation:

(a) An individual who meets the qualifying criteria set forth in sections 15.14.2-6(a) (i) and (iii), but had no documented, or had reduced, fishing performance during the three-year period 2001 - 2003, inclusive, due to material incapacitation, as specified in section 15.14.2-2 herein, and as further described below, may request that his/her initial Area 2 LTA be based on his/her fishing performance in Area 2 during the period 1999 - 2000.

(b) In order to establish material incapacitation on the basis of a medical condition, an applicant must present the following notarized documentation, which may pertain to the applicant or to the applicant's family member, i.e. a parent, spouse, child, mother-in-law, or father-in-law:

(i) Evidence that the applicant or family member had a physical or mental impairment during the period 2001 - 2003, inclusive, involving inpatient care in a hospital, a nursing home, or a hospice, or outpatient care requiring continuing treatment or supervision by a health care provider...

(c) ***

(d) ***

(e) ***

Mr. Reynolds testified and presented documentary evidence regarding his medical treatment for the two (2) automobile accidents, one occurring in August 2002 and the second on July 19, 2003. Although Part 15.14.2-8 (b) of the *Marine Fisheries Regulations* requires an applicant to present notarized documentation of the medical condition to establish material incapacitation, the reports from Dr. Russo and Dr. Keigwin were not notarized. *See* Appl 1, Appl 2.

It is unnecessary to grant Mr. Reynolds the opportunity to cure this defect, however, since his appeal fails on other grounds.

Applicant's testimony and documentary evidence support a finding that he suffered injuries that adversely impacted his lobster fishing performance from August 2002 through January 2003, and again from July 19, 2003 through January 2005. While no doubt the impact to his fishing history for 2002 - 2003 was substantial, Applicant has not met the standard set forth in the August 1, 2007 regulations and as interpreted by the Director in the recent *Borden* decision. The material incapacitation must have adversely affected the fishing performance for the entire three-year period. “Applicant's fishing performance during the three year period 2001 - 2003 must have been impacted for the full three year period.” *Re: Charles Borden*, AAD No. 07-028/F&WA, Final Agency Order entered on December 31, 2007, conclusion of law #5. As a consequence of this interpretation and application of “material incapacitation”, the Applicant has failed to prove that he suffered a material incapacitation for the period 2001 - 2003 whereby his fishing performance from 1999 and/or 2000 could be used for an alternative calculation of his Lobster Trap Allocation.

It is noted that the amended regulations no longer require an applicant to have had landings by trap in 2004 in order to apply the fishing history from 1999 and/or 2000 for an alternative Lobster

Trap Allocation. *Re: Walz, Richard R.*, AADNo. 07-024/F&WA, Final Agency Decision and Order entered on January 18, 2008, conclusion of law #4. As a result the Division cannot deny an applicant the alternative calculation due solely to the lack of landings by trap in 2004.

Based upon the testimony and documentary evidence presented at the hearing, I conclude that Mr. Reynolds has not proven he had no documented fishing performance for the three-year period 2001 - 2003, inclusive, due to material incapacitation as defined by the August 1, 2007 regulations and as interpreted by the Director in *Re: Charles Borden*, AAD No. 07-028/F&WA, Final Agency Order entered on December 31, 2007. Applicant has failed to prove that he is entitled to a re-calculation of the Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # MPURP000101.

Wherefore, after considering the testimonial and documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Applicant for RI commercial fishing license #MPURP000101 allowed zero (0) traps based upon his reported activity in the lobster fishery in the target period of the years 2001 through 2003.
2. Applicant filed a request for hearing at the Administrative Adjudication Division on February 7, 2007.
3. Applicant was injured in an automobile accident in August 2002 and was incapable of any heavy lifting, pushing or pulling movements from August 28, 2002 through January 16, 2003.
4. Applicant was injured in an automobile accident on July 19, 2003 and was unable to do any lifting over ten pounds from July 19, 2003 through December 4, 2003 and was on light duty only until January 2005.
5. Applicant provided correspondence from two (2) doctors regarding his medical treatment from on or about August 28, 2002 through on or about January 16, 2003 and from July 19, 2003 until on or about January 2005.
6. The doctors' reports were not notarized.
7. Applicant had 800 "Effective Traps Fished" for 1999 and 2000.
8. Applicant had no pounds landed and no reported traps fished in 2004.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the above findings of fact, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The *Marine Fisheries Regulations*, as amended August 1, 2007, were promulgated with the intent that they be in place prior to making any final decisions on appeals.
3. The *Marine Fisheries Regulations*, as amended August 1, 2007, apply to the final decision in this matter.
4. Pursuant to the provisions of Part 15.14.2-8 (a) of the August 1, 2007 *Marine Fisheries Regulations*, an applicant who is claiming a material incapacitation is no longer required to have landed lobsters with traps from Area 2 during the year 2004.
5. Applicant failed to present notarized documentation to establish material incapacitation as required by Part 15.14.2-8 (b) of the August 1, 2007 *Marine Fisheries Regulations*.
6. Pursuant to Part 15.14.2-2 of the August 1, 2007 *Marine Fisheries Regulations* "Material Incapacitation" means a verifiable event beyond the control of the license/permit holder, such as a medical condition, that adversely affected his/her fishing performance during the three-year period 2001 - 2003, inclusive.

7. The Director has interpreted "Material Incapacitation" to require that Applicant's fishing performance during the three-year period 2001 - 2003 must have been impacted for the full three-year period.

8. Applicant has failed to prove by a preponderance of the evidence that the injuries caused by the automobile accidents in August 2002 and on July 19, 2003 constitute a material incapacitation.

9. Applicant has failed to prove by a preponderance of the evidence that he is entitled to a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation for RI commercial fishing license #MPURP000101.

Wherefore, based upon the above Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. Applicant's request for a modification of the Initial 2007 RI/Area 2 Lobster Trap Allocation is DENIED.

2. The Initial 2007 RI/Area 2 Lobster Trap Allocation for RI Commercial License # MPURP000101 shall remain at zero (0) traps.

Entered as an Administrative Order this _____ day of January, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

Mary F. McMahon

Hearing Officer

Entered as a Final Agency Decision and Order this _____ day of _____, 2008.

W. Michael Sullivan Ph.D.

Director

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI Gen. Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

APPENDIX A

LIST OF EXHIBITS

APPLICANT'S EXHIBITS

App 1 Correspondence from Eugene A. Russo, M.D., dated March 7, 2007

Full

App 2 Correspondence from W. Scott Keigwin, D.O., dated March 13, 2007

Full

DIVISION OF FISH AND WILDLIFE'S EXHIBITS

Div Copy of Notice of Initial 2007 RI/Area 2 Lobster Trap Allocation issued to Michael

1 Reynolds for RI Commercial License #MPURP000101

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Div
2 Copy of Applicant's hearing request dated February 5, 2007

Full

Div Summary of Division's records regarding Applicant's reported activity in the lobster fishery
3 during the years 1999, 2000 and 2004

Full

Div
4 Curriculum vita of Thomas E. Angell

Full

Footnotes

1

The November 22, 2006 regulations were amended on April 11, 2007 (effective May 1, 2007) and again on August 1, 2007 (effective August 21, 2007).