

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

RE: JAMES H. LOW
LOBSTER TRAP ALLOCATION
MPURP 000623

AAD NO. 07-059/F&WA

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on the appeal of James H. Low ("Mr. Low" or "Applicant") of his Initial 2007 Area 2 Lobster Trap Allocation ("Allocation") as determined by the Department of Environmental Management, Division of Fish and Wildlife ("Division"). By letter dated January 16, 2007, the Applicant was notified that his Allocation for 2007 is twenty (20) traps. On February 28, 2007, Applicant requested a hearing with the AAD contesting the Allocation. The governing regulations are the Rhode Island Marine Fisheries Regulations, Part XV, Lobsters, Other Crustaceans and Horseshoe Crabs, dated April 11, 2007 ("Regulations"). See, In Re: Charles Borden, AAD No. 07-028/F&WA, Final Decision and Order, December 31, 2007.

A status conference was held on April 10, 2007. A control date was set to allow the parties to discuss settlement. On June 5, 2007, Applicant notified the AAD that he wished to proceed to hearing and the prehearing conference and hearing were scheduled for July 9, 2007. The prehearing conference was held on July 9, 2007 followed immediately thereafter by the administrative hearing. The Applicant appeared *pro se* and the Division was represented by Gary Powers, Esq. At the prehearing conference, the following documents were submitted and marked as indicated:

For Applicant:

- App. 1 (ID) Receipt for Services from Dr. Bliss dated 7/06/07 (Copy, 1p.)
- App. 2 (Full)¹ Affidavit of James H. Low (Copy, 3pp.)
- App. 3 (Full)² Correspondence from Thomas F. Bliss, MD. dated 7/09/07 (1 p.)

¹ This document was not agreed to by the Division at the prehearing conference and was accordingly marked for identification. In reviewing the exhibits post-hearing, I have considered it as a full exhibit. The affidavit was under oath and the affiant was available at hearing for examination by the Division.

² The record was held open to allow Mr. Low to file this exhibit post-hearing.

For the Division of Fish and Wildlife:

- Div. 1 (Withdrawn)
- Div. 2 (Full) Hearing Request of James H. Low, dated February 19, 2007 (Copy)
- Div. 3 (Full) Landing and Trap Deployment Data for Applicant 1999, 2000 and 2004 (Copy)
- Div. 4 (Full) Curriculum Vita of Thomas E. Angell, 2pp. (Copy)

The following stipulations of fact were agreed upon by the parties:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Applicant.
2. The Applicant reported participation in the lobster fishery to the Department during the years 2001 through 2003 relative to MPURP 000623 and Federal Lobster Permit #121301 that would yield an initial Lobster Trap Allocation for Management Area 2 in the amount of twenty (20) traps.
3. The Applicant reported no landings of lobsters harvested by trap to the Department during the year 2004 relative to MPURP 000623 and Federal Lobster Permit #121301.

The Applicant bears the burden of proof in this proceeding. Applicant identified the following issue:

If Applicant meets the medical hardship exception set forth in the Regulations should the medical hardship exception be extended to cover the full period of disability?

The Division identified the issues as follows:

1. Whether the Applicant's initial 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. Whether the Applicant suffered a medical hardship during the target years of 2001 -2003 as that term is set out in Part 15.14.2-5(d).
3. If the finding to the issue set out above in Issue II is in the affirmative, whether the Applicant landed any lobsters harvested by trap attributable to the license or permit under consideration as required by Part 15.14.2-5(e)(3) during 2004.
4. If the findings to the issues set out above in Issues II and III are both answered in the affirmative, Part 15.14.2-5(e)(3) the higher of Applicant's participation in the lobster fishery in 1999 or 2000 which is attributable to the license or permit under consideration will dictate that the degree to which the Applicant's Initial Lobster Trap Allocation may be modified.

Thomas E. Angell was offered as an expert in the lobster fishery and as an expert in the interpretation and application of the Department's lobster regulations.

Testimony

Mr. Low testified on his own behalf. He explained his participation in the fishing industry during the years 2001 – 2003 and indicated that his reduced fishing performance in those years was directly attributable to his arthritic knees. He testified that he was unable to handle the demands of lobstering as a result of the condition of both knees. Mr. Low sought and received medical treatment from Dr. Bliss who performed a total knee replacement on Mr. Low's right knee on December 2, 2002. Mr. Low described his ordeal as painful with recurrent problems that forced a long recovery period spanning five years of treatment. Only after the right knee was sufficiently healed and healthy did Dr. Bliss perform a total knee replacement for Mr. Low's left knee. That surgery took place on November 8, 2006. Mr. Low testified that he considered himself to be disabled throughout the period 2001 – 2003 and up to and including July 6, 2007 when his doctor released him. The Applicant stated that he did not lobster in the year 2004 because he remained disabled and was unable to meet the physical demands of lobster trapping. Mr. Low concluded his testimony by asking that the medical hardship exception contained in the Regulations be extended to include the year 2004 (when he remained affected by his disabling medical condition) and his Allocation be recalculated based upon his considerably higher, and uncontradicted, 1999 and 2000 performance. There was no cross examination of this witness.

The Division called Thomas E. Angell as its only witness. Mr. Angell is employed by the Department in the Division of Fish and Wildlife. Mr. Angell's duties include serving as the project leader for Rhode Island's Lobster Research and Management Project. Mr. Angell testified that the Regulations were promulgated by DEM to comply with the lobster management plan adopted by the Atlantic States Marine Fisheries Council ("ASMFC"), of which Rhode Island is a member state. Rhode Island is required to comply with the management plan or adopt an alternative that meets the goals of the ASMFC plan, described by Mr. Angell as "conservation equivalency". The goal was to reduce and cap trapping levels to what had existed in 2003. Mr. Angell was responsible for extracting the necessary elements of the ASMFC management plan and drafting state regulations that comply with the ASMFC management plan. Mr. Angell testified that he drafted the initial regulations which were then forwarded to the Rhode Island Marine Fisheries Council (RIMFC) Lobster Panel for review. Thereafter, the proposed regulations were

reviewed by the entire RIMFC and were ultimately forwarded to the Director of DEM for review, approval and adoption.

Mr. Angell next explained his involvement in the implementation of the Regulations. He reviewed applications for Initial 2007 Area 2 Lobster Trap Allocations, reviewed and computed the data provided by Applicants and participated in providing the notices to Applicants regarding their 2007 allocation. Mr. Angell testified that he is familiar with 15.14.2-5(e)(3) of the Regulations and has frequently applied that provision in determining Allocations. He was present for all of Applicant's testimony and based upon the testimony of Applicant and the stipulation that Mr. Low did not land lobsters in 2004, it was his opinion that the Regulations do not allow a recalculation of his Allocation using the years 1999 and 2000. He testified that the basis for this opinion is that Mr. Low landed no lobsters in the year 2004. There was no cross examination of Mr. Angell.

The parties were afforded the option of making closing arguments or filing a brief or written statement after the conclusion of the hearing. Mr. Low and Mr. Powers elected to make a closing statement.

Analysis

Only the portions of the Regulations applicable to the instant proceeding are addressed in this analysis. The Department of Environmental Management has the authority under Title 20 of the General Laws to enact regulations governing the commercial fishing industry in our state. As part of that broad authority, the Department is responsible for regulation of the lobster industry and associated licensing. The Regulations provide that DEM's Division of Fish and Wildlife shall be the lobster trap allocation authority for both state licensed and federally permitted Rhode Island residents. The Division is required to process Area 2 lobster trap allocation applications submitted by Rhode Island residents. Valid license or permit holders³ seeking a 2007 Area 2 Lobster Trap Allocation were required by November 2006 Regulation 15.14.2-2(b) to make written application to the Division from November 12 – December 31, 2006. To be eligible for any Area 2 lobster trap allocation, November 2006 Regulation 15.14.2-2(c) requires an

³ Recreational (non-commercial) lobster trap license holders are exempt from this process.

applicant present documentation that he/she lawfully harvested lobsters employing lobster traps in Area 2 during the years 2001-2003.

The Applicant in this matter submitted the required forms to the Division. The Division accepted the information provided by Applicant and applied the standard regression formula adopted in the Regulations to determine the Applicant's Initial 2007 Area 2 Lobster Trap Allocation. The result of that standard calculation was that Applicant's allotment was twenty (20) traps.

Material Incapacitation

The Regulations establish that the qualifying period for determining the 2007 Area 2 Lobster Trap Allocation is 2001 through 2003. Only two exceptions are enumerated in the Regulations which, if applicable, allow a departure from the 2001 -2003 qualifying period. Those exceptions involve military service and material incapacitation. Applicant alleges material incapacitation on the basis of a medical condition. Part 15.14.2-8 governs the issue of material incapacitation and reads as follows:

15.14.2-8 – Material Incapacitation

- (a) An individual who meets the qualifying criteria set forth in sections 15.14.2-6(a) (i) and (iii)⁴, 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; and/or
 - (ii) Evidence that the applicant or family member received, during the period 2001-2003, inclusive, social security disability benefits (SSDI), and/or supplemental

⁴ Sections 15.14.2-6(a) (i) and (iii) of the Amended Regulations state as follows:

15.14.2-6 – Qualifications for Initial Area 2 LTAs

- (a) To be eligible for an initial Area 2 LTA, an applicant:
 - (i) Must have held a Department-issued commercial fishing license, authorizing the individual to fish commercially for lobster, or a federal lobster permit endorsed for Area 2, at some point during the period 2001-2003; and/or
 - (ii) ...
 - (ii) Must have renewed his/her license/permit annually since 2003.

security income benefits (SSI), and/or 100 percent disabled benefits from the U.S. Department of Veteran Affairs; and

- (iii) If the material incapacitation involves a family member, evidence that the applicant had a direct role in the care of the family member.

Material Incapacitation is defined in section 15.14.2-2 of the Amended Regulations as follows:

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. 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.

Mr. Low endured a disabling physical illness, specifically osteoarthritis in his knees during the entire qualifying period of 2001- 2003. I found Mr. Low to be a thoroughly credible witness. His testimony establishes that although he did not visit Dr. Bliss, an orthopedist, until July of 2002, his severely arthritic knees prevented him from placing pots in the water during 2001 and 2002 because he could not physically handle the pots due to the condition of his knees. Applicant testified that he was significantly disabled prior to the first knee replacement performed by Dr. Bliss in December, 2002. In his letter, Dr. Bliss also states that Applicant had been significantly disabled prior to the surgeries and Mr. Low remained under treatment by Dr. Bliss until July of 2007 when he was released from his care and deemed recovered. During this five year period of outpatient treatment, Mr. Low underwent two total knee replacements and ongoing post-operative care. Mr. Low testified that this medical condition adversely affected his ability to lobster during the period 2001 through and including July, 2007. The evidence introduced by the Applicant included his direct testimony under oath, his affidavit and documentation (unnotarized) from his treating physician confirming Mr. Low's testimony of one total knee replacement during the qualifying years, one total knee replacement in 2006 and rehabilitation that extended into 2007. Although I am persuaded that Mr. Low suffered a disabling physical impairment that adversely affected his fishing performance for the entire qualifying period, the Regulations mandate a more exacting regulatory standard which states as follows:

- (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;

Although Mr. Low presented reliable and persuasive evidence to establish a disabling physical impairment during the qualifying years (and beyond), such evidence did not meet the regulatory standard. Because that rigidly crafted standard is controlling, I am constrained to conclude that Applicant has not introduced sufficient evidence to meet the material incapacitation standard of the Regulations.

Failure to Land Lobsters by Trap in 2004

The Division also strongly argued that Applicant's Allocation could not properly be recalculated as Part 15.14.2-5(e)(3) of the November 2006 Regulations require that an Applicant have landed lobsters by trap in 2004. Part 15.14.2-5(e)(3) proceeds to delineate even further what shall be considered if medical hardship is proven. It states as follows:

3. If an applicant is found to have presented persuasive evidence to qualify pursuant to part 15.14.2-5 (d), the applicant may use landings from any year or years (highest or the average) during the years 1999 and 2000 as the basis for their allocation, *provided that the individual must also have landed lobsters with traps during 2004*, and must have possessed a state or federal commercial fishing vessel registration and/or a state commercial fishing license or federal lobster permit to land lobster continuously during the period 1999 - 2004. (emphasis added)

Based on In Re: Charles Borden, AAD No. 07-028/F&WA, Final Decision and Order, December 31, 2007, the 2006 Regulations do not govern this appeal. The applicable Regulations require that an Applicant meet the qualifying criteria set forth in sections 15.14.2-6(a) (i) and (iii)⁵, and thereafter meet the definition of material incapacitation as mandated by the subsequent regulatory language. The requirement that the Applicant land lobsters in 2004 is contained in Section 15.14.2-6(a) (ii) which is not part of what Applicant is required to demonstrate under Part 15.14.2-8(a) of the Regulations. The fact that Applicant did not land lobsters in 2004 is irrelevant under Part 15.14.2-8(a) of the Regulations to a recalculation of an Applicant's Allocation based on material incapacitation.

⁵ To paraphrase the Regulations, an Applicant must have held a Department-issued commercial fishing license, authorizing the individual to fish commercially for lobster, or a federal lobster permit endorsed for Area 2, at some point during the period 2001-2003; and must have renewed his/her license/permit annually since 2003.

Findings of Fact

After consideration of the documentary and testimonial evidence presented I make the following findings of fact:

1. The Applicant is the holder of a commercial fishing license (MPURP 000623) and a Federal Lobster Permit #121301.
2. Applicant filed an application with RIDEM for a 2007 Initial Area 2 Lobster Trap Allotment determination.
3. The Applicant reported participation in the lobster fishery to the Department during the years 2001 – 2003 relative to MPURP 000623 and Federal Lobster Permit #121301 that would yield an initial lobster trap Allocation for Management Area 2 in the amount of Twenty (20) traps.
4. Applicant filed a request for hearing with the Administrative Adjudication Division on February 28, 2007.
5. The Applicant reported no participation in the lobster fishery to the Department during the year 2004.
6. The Applicant reported landings of lobster to the Department during the years 1999 and 2000 of 2,500 pounds or more each year.
7. Applicant's effective traps for the year 1999 was two hundred (200) traps.
8. Applicant's effective traps for the year 2000 was two hundred (200) traps.
9. The Applicant's physical impairment and nature and length of treatment was documented by Dr. Thomas F. Bliss, M.D., Clinical Assistant Professor of Adult Reconstructive Surgery at the Brown Medical School. The documentation was not notarized.
10. Applicant suffered from severely arthritic knees during the qualifying years 2001 to 2003 inclusive.
11. Applicant's fishing performance during the period 2001 to 2003 inclusive was adversely impacted by his arthritic knees.
12. Applicant was unable to place pots in the water and otherwise handle the lobster pots during the period 2001 to 2003 inclusive due to the condition of his knees.
13. Applicant had a total right knee replacement in December of 2002 performed by Dr. Bliss.
14. A total replacement of Applicant's left knee was performed by Dr. Bliss on November 8, 2006.
15. Applicant remained under the care and treatment of Dr. Bliss from July, 2002 through July 6, 2007 when he was deemed fully recovered and allowed to resume full activities.

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. Applicant failed to prove by a preponderance of the evidence, consistent with the notarization requirements of the Regulations, that he had reduced fishing performance during the three year period 2001 – 2003 inclusive, due to material incapacitation as defined in Section 15.14.2-2 of the Regulations.
3. Due to the lack of notarization, Applicant 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 pursuant to section 15.14.2-8(b) of the April, 2007 Regulations.

Based on the foregoing, it is hereby

ORDERED

1. Applicant's appeal of his 2007 Initial Area 2 Lobster Trap Allocation is **DENIED**.
2. Should Applicant refile the statement of Dr. Bliss dated July 9, 2007 in *notarized* form on or before **February 28, 2008**, this appeal will be reopened for reconsideration of the notarized statement. The statement shall be filed with AAD and a copy contemporaneously provided to Division counsel.
3. The Division shall have ten (10) days from the date of filing to respond to any filing made by Applicant.
4. Should Applicant fail to timely file the notarized statement of Dr. Bliss, this Final Agency Order denying Applicant's appeal shall take effect on **February 29, 2008**.

Entered as a Recommended Decision and Order this 23rd day of January, 2008 and herewith

forwarded to the Director for issuance as a Final Agency Order.



Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Order this 25 day of January, 2008

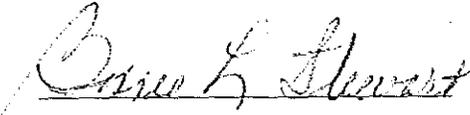

W. Michael Sullivan, PhD.

Director

Rhode Island Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908
(401) 222-2771

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded, via regular mail, postage prepaid to: James H. Low, 50 Sweetmeadow Drive, North Kingstown RI 02852; and via interoffice mail to Gary Powers, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 25th day of January, 2008.



NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI General 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.