

Emery

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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COMPLAINANT.

License No. 878949

Docket No. 00-0514
PA No. 00001395

Issued to:

MICHAEL V. EMERY

DECISION AND ORDER

Respondent

Before:

Archie R. Boggs

Administrative Law Judge

PRELIMINARY STATEMENT

This proceeding is brought pursuant to the authority contained in 5 USC 551-559; 46 USC Chapter 77: 46 CFR Part 5 and 33 CFR Part 20.

Michael V. Emery was charged with two Complaints -one dated 15 August 2000, and a second dated 20 September 2000 -which were issued by U.S. Coast Guard Investigating Officer LTJG L. M.. Piazza of the Marine Safety Office, Miami, FL.

The factual allegations of the first complaint are as follows:

Negligence

The Coast Guard alleges that:

- I. On February 25, 2000, Respondent was acting as Master of the M/V WALTER R, the first of a three vessel tandem tow transiting westbound on the Saint Lucie River in Stuart, FL.

2. While transiting through the FEC Railroad Draw Bridge, Respondent failed to adequately maintain control of his tow and the tow consequently struck the bridge, resulting in an allision with said bridge's fendering system, causing substantial damage.

Misconduct

The Coast Guard alleges that:

1. On March 29, 1996, Respondent signed a Letter of Warning issued by Marine Safety Office Tampa for failing to safely navigate the M/V SALVATION ROSE which resulted in an allision between his vessel and two moored tishinu vessels.
2. Respondent did wrongfully indicate on his Application for License as Officer, Staff Officer, Operator, and Merchant Mariner's Document, signed and dated on March 9, 2000, that he had never been given a Coast Guard letter of warning.

Violation of Law or Regulation

The Coast Guard alleges that:

1. After alliding with the FEC Railroad Draw Bridge, Respondent continued on with his voyage without having notified the nearest Marine Safety Office, Marine Inspection Office, or Coast Guard Group Office of the striking.
2. Respondent failed to report the marine casualty in accordance with 46 CFR 4.05-1.

The factual allegations of the second complaint are as follows:

Negligence

The Coast Guard alleges that:

1. On September 14, Respondent was acting as Master of the Tug M/V BIRDIE B transiting eastbound on the Saint Lucie River in Stuart. FL.
2. While transiting through the FEC Railroad Draw Bridge and the Highway U.S. 1 High Rise Bridge, Respondent failed to adequately maintain control of his tow and the tow consequently struck the bridges, resulting in an allision with said bridges' fendering systems, causing substantial damage.

Misconduct

The Coast Guard alleges that:

1. On September 14, 2000. respondent was acting as the operator of the Tug BIRDIE B.
2. The Tug Birdie B is an Uninspected Towing Vessel (UTV), and per 46 CFR 15.610. must be under the direction and control of an individual licensed by the Coast Guard.
3. Respondent did wrongfully act under his Coast Guard license by operating an Uninspected Towing Vessel without he proper license and/or equivalent license 45 CFR 15.9 10.

Violation of Law or Regulation

The Coast Guard alleges that:

1. After colliding with the FEC Railroad Draw Bridge and the Highway U.S. 1 High Rise Bridge, Respondent continued on with his voyage without immediately notifying the nearest Marine Safety Office, Marine Inspection Office, or Coast Guard Group Office of the striking.
2. Respondent failed to report the marine casualty in accordance with 46 CFR 4.05-1.

Mr. Emery filed a two page handwritten answer to the first Complaint. He requested a hearing. By letter dated 16 October 2000 addressed to the AU Docketing Center, Baltimore, MD, the Respondent answered as follows: "1) It is understood and agreed that Respondent, Michael V. Emery, will be present for the hearing of Coast Guard Case No. PAOOOO1395, Docket No: 00-0514 at 0930, 09 November, 2000 at the Federal Building, Room 1524, Miami, Florida. 2) I intend to contest all Factual Allegations of Negligence, Misconduct, and any Violations of Laws or Regulations at the time of the hearing. 3) A summary of proposed defenses and list of witnesses and supporting testimony will be sent prior to the 15 days allowed before the hearing starts." He did not submit a list of witnesses.

A hearing was held at Claude Pepper Federal Building, Room 1524, 51 SW First Avenue, Miami, 33130, on 9 November 2000.

Although all of his rights were fully explained to him, including his right to be represented by professional counsel, Mr. Emery elected to represent himself.

In support of the Complaints the Investigating Officer introduced in evidence the testimony of: (1) the Respondent, Mr. Emery; (2) Joseph L. Schonder, office engineer for the Florida East Coast Railway; (3) Steven A. Krivdo, Chief Petty Officer, U.S. Coast Guard, who is stationed at the Marine Safety Detachment, West Palm Beach, FL; (4) LT Michael Lingatis, supervisor of the Marine Safety Detachment, West Palm Beach; and (5) Gladys Hernandez, senior license evaluator for the Regional Exam Center, Miami.

In addition to the testimony of the five (5) aforementioned witnesses the Investigating Officer introduced in evidence seven (7) exhibits.

1.0.Exhibit No. 1 –a copy of license No. 878949 which authorizes Michael Vincent Emery to serve as "Master of steam or motor vessels of not more than 1 00 gross registered tons (domestic tonnage) upon near coastal waters; also, authorized to engage in commercial assistance towing."

1.0.Exhibit No. 2 –a copy of a license renewal application (form CG 719B), which was executed by Michael V. Emery on 9 March 2000.

1.0.Exhibit No. 3 —a copy of a Coast Guard "Letter of Warning" which is dated 29 March 1996, and which Mr. Emery accepted and acknowledged with his signature.

1.0.Exhibit No. 4 –a letter from Mr. J. L. Schonder, which indicates that the estimated cost to repair bridge 260.93 over the St. Lucie River due to the allision of 25 February 2000 is \$86,932.85.

1.0.Exhibit No. 5 –a second letter from Mr. Schonder with an estimate to repair the damage to the same bridge as a result of the allision of 14 September 2000 as \$25,068.10.

1.0.Exhibit No. 6 –a completed marine accident form (CG 2692) reporting the allision of the towing vessel Dorothy Ann with the Roosevelt Bridge on ~5 February 2000 together with (a) a handwritten statement from Captain Michael Zarr, (b) a sketch of the scene of the allision by Captain Zarr, (c) a three page handwritten statement dated 29 February 2000 by Mr. Emery, (d) a one page statement dated 29 February 2000 by James D. Addison II, (e) a handwritten statement from Martin Wells and (f) a report of marine accident (Form CG 2692) for the Tug Walter R concerning the allision of 25 February 2000.

1.0.Exhibit No. 7 –a copy of the radio log of the U.S. Coast Guard Station, Ft. Pierce, FL, for the 0400-0800 watch on 14 September 2000.

At the conclusion of the hearing the Administrative Law Judge took the matter under advisement .

It is now concluded that both Complaints are proved.

FINDINGS OF FACT

On 29 March 1996 the Respondent signed an acknowledgment of a "Letter of Warning" which was issued by the U. S. Coast Guard Marine Safety Office, Tampa, FL. for failing to safely navigate the M/V Salvation Rose (ON D531297) resulting in an allision between his vessel and two moored fishing vessels in the vicinity of Tarpon Springs fuel dock in the Anclote River.

2. On 9 March 2000 the Respondent submitted an application for renewal of his license.
3. On the form which he completed (CG 719B) he was asked the question "Have you ever been given a Coast Guard letter of warning or been assessed a civil penalty for violation of maritime or environmental regulations?" Mr. Emery answered by placing his initials in the "No" block on the form.
4. On 14 September 2000 when Mr. Emery was serving as operator of the Tug Birdie B he held a license which authorized him to serve as "Master of steam or motor vessels of not more than 100 gross registered tons (Domestic tonnage) upon near coastal waters, and also authorized to engage in commercial assistance towing." The Tug Birdie B is an uninspected towing vessel.
5. The regulations require uninspected towing vessels to be under the direction and control of an individual licensed by the Coast Guard in accord with 46 CFR 15.610. A proper license for operating the Birdie B would have been "operator of uninspected towing vessel" or its equivalent, which would be "Master of steam or motor vessels of not more

than 200 gross tons."

6. On 25 February 2000 Mr. Emery was relief operator on the tug Walter R. The vessel was westbound on the St. Lucie River in Stuart, FL. The Walter R was the lead vessel in a three vessel tow when it approached the "Roosevelt Triple Set" of bridges. The Walter R was pulling the barge Santa Lucia while the Dorothy Ann was pushing the barge from astern. The barge was being relocated from Ft. Pierce terminal to Maritime Tug and Barge.
7. When transiting from east to west the bridges are encountered in the following order:
(a) Highway U .S. 1 Highrise (Roosevelt Bridge); (b) the Florida East Coast Railway Drawbridge; and (c) the Old Roosevelt drawbridge.
8. Just prior to approaching the bridges Mr. Emery stopped the tandem tow to shorten the tow line between he Walter R and the barge Santa Lucia. The tow then continued forward. As the Dorothy Ann (the stern tug) approached the railroad bridge approximately halfway into the fendering system the starboard side of the barge Santa Lucia slid to the north side of the trestle and levered itself against the fendering system. The Dorothy Ann then backed down until the barge was freed.
9. Once clear of the FEC Railway bridge the Respondent contacted the bridge tender and the tender informed him that there was damage to the fender systems, and several boards had fallen into the water as a result of the allision.
10. No notification was given by the Respondent to any Coast Guard facility with regard to

the allision.

11. 46 CFR 4.05-1 provides as follows: "(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in –

(1) An unintended grounding, or an unintended strike of (allision with) a bridge."
12. The Coast Guard Marine Safety Detachment in West Palm Beach was notified of the striking by the Florida East Coast Railway.
13. An estimate to repair the damage to the bridge was \$86,932.85
14. On 14 September 2000 when Mr. Emery was operating another vessel, the tug Birdie B, the Roosevelt and FEC Railway drawbridge were struck again.
15. The tug Birdie B, like the passing of the Walter R on 25 February 2000, was westbound on the St. Lucie River. Mr. Emery was the relief operator who was at the helm at the time of the allision. The tow consisted of a barge followed by a dredge, then a crane barge followed by three sets of dredge piping. The entire tow was approximately 1200 feet in length. In addition to the Birdie B there were two other tugs, the Cheyenne and the E. R. Adams, which were assisting in the passage through the bridges.
16. Before passing under the bridges Mr. Emery broke the tow into two sections. The first section consisted of the barge and the dredge. The remaining section was anchored. The

Respondent contacted all of the operators and instructed them on how to position themselves for making the transit - the Cheyenne to the north and the E. R. Adams to the south. The Birdie B took the first half of the tow through the three bridges. The Birdie B passed through the highway U.S. 1 High Rise Bridge without incident, but when the tow began to transit through the FEC Railway draw bridge, the tow shifted from north to south, causing the last part of the tow, which was the dredge, to be set to the south and its port bow hit the south fendering system of the bridge. The same situation repeated itself as the tow passed through the third bridge, the old Roosevelt Bridge.

17. Once through the three bridges the partial tow was anchored and the tugs headed back east through the bridges in order to pick up the second half of the tow.
18. The second half of the tow passed through the bridges without incident. The Respondent reunited both sections of the tow and proceeded on.
19. Again. Mr. Emery gave no notification to the Coast Guard regarding this second collision.
20. Coast Guard Station Ft. Pierce was notified of the casualty at 0500 on 14 September 2000 by the Roosevelt bridgetender, approximately two hours after the casualty.
21. An estimate to repair the FEC Railway Bridge was \$25,068. 1 0

CONCLUSIONS OF LAW

The Respondent and the subject matter of this hearing are within the jurisdiction vested in the U.S. Coast Guard under the provisions of 46 USC Chapter 77.

First Complaint, proved. Second Complaint, proved.

OPINION

The evidence clearly supports the allegations of the Complaints.

As indicated in the findings of fact, on 29 March 1996 the Respondent signed an acknowledgment of a letter of warning which was issued to him by the U.S. Coast Guard Marine Safety Office, Tampa, FL.. However, when he submitted an application for renewal of his license he indicated that he had never been given a letter of warning by the Coast Guard.

18 USC1001, which is cited on form CG 719B, reads as follows:

"Whoever, in any manner within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

Mr. Emery holds a license which does not authorize him to operate either of the uninspected towing vessels –the M/V Walter R or the MN Birdie B. His license authorizes him to serve as "Master of steam or motor vessels of not more than 100 gross registered tons (domestic tonnage) upon near coastal waters; also, authorized to engage in commercial assistance towing." He was in violation of the law when he operated both of those vessels.

A license as Master of 100 gross tons does not authorize a person to serve as operator of uninspected towing vessels.

46 CFR figure 10.403 shows that a license for operator of an uninspected towing vessel is higher than that of a license for Master of a 100 gross ton vessel. The equivalent license for an operator of an uninspected towing vessel is a license as Master of steam or motor vessels of not more than 200 gross tons. Mr. Emery's license authorizes him to serve as Master of steam or motor vessels of not more than 100 gross tons. The endorsement for commercial assistance towing does not apply to an operator of an uninspected towing vessel (46 CFR 10.482)

Captain Emery indicated that he did not know that his license did not qualify him to serve as operator of uninspected towing vessels.

A holder of a license is, of course, required to know the limitations of that license. Furthermore, the application for renewal of his license, which he executed on 9 March 2000, indicates that he was applying for ("Master near coastal 100 gt"). However, there also appears on the application the following wording: "Renewal license issued first but want(s) eligibility for 200 T." This would indicate that Mr. Emery wished to be issued a 200 gross tons license which would authorize him to serve as operator of uninspected towing vessels.

With regard to the allisions themselves the Commandant of the Coast Guard has repeatedly ruled that when a moving vessel allides with a bridge there is a presumption of negligence on the part of the operator of the vessel.

In CDOA 2524 (David A. Taylor) the Commandant ruled as follows:

"Appellant asserts that the Administrative Law Judge erred in finding him negligent in alliding with N&W Railroad Bridge No. 5. I do not agree.

Appellant acknowledges that the allision with the bridge created a presumption of negligence. However, he claims that the presumption was rebutted by the evidence. Specifically, Appellant stresses that, having never before moved a barge as large as the MORIANA 450. Appellant took adequate, overcome it, a mariner must "produce more than cursory evidence" to show that "the moving vessel was without fault or that the allision was occasioned by the fault of the stationary object or. . . was the result of inevitable accident." Appeal Decision No. 2173 PIERCE). He may rebut the presumption by such evidence as will show his due care under the circumstances. Appeal Decision No. 2211 (DUNCAN).

Second, an "unrebutted presumption suffices to establish a prima facie case of negligence. McKnight, supra. An Administrative Law Judge may conclude that negligence was proved on this basis alone. McKnight and Duncan, supra.

In the instant case, the Government established by substantial evidence that the allision occurred and that Appellant was directing the vessel's navigation. The presumption arose, therefore, and Appellant then had the burden of going forward with evidence sufficient to rebut it.

Mr. Emery was clearly negligent in his operations of both vessels. In addition to the negligent operation of the vessels Mr. Emery further violated the law when he did not immediately report the allisions to the Coast Guard.

46 CFR 405-1 provides as follows:

"(a) Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Marine Safety Office, Marine Inspection Office or Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in—
(1) An unintended grounding, or an unintended strike of (allision with) a bridge:"

In both instances the Coast Guard investigators contacted the Respondent concerning the allisions. It was the duty of the operator of the vessels to contact the investigators.

ORDER

License No. 878949 and any other valid license issued to you by the United States Coast Guard, now held by you, be and the same are hereby REVOKED; and upon service of prudent precautions by posting two lookouts on the barge and an extra crewmember in the wheelhouse as a lookout. Appellant urges that he received favorable information from his lookouts in positioning the M/V JENNA B and its tow for transit under the bridge. Appellant claims that he did everything a prudent mariner could have done to safely navigate through the area.

The guiding precedent in such negligence cases is Commandant v. Murphy, NTSB Order No. EM-139 (February 3, 1987) and Order Denying Reconsideration, NTSB Order No. EM- 144 (July 2 1, 1987). See also, Appeal Decisions 2500 (SUBCLEFF); 2501 HAWKER ; 2492 RATH; 1200 (RICHARDS). In Murphy, supra, the following criterion was pronounced in determining whether the presumption of negligence has been rebutted:

Since the ultimate burden of proof on its charge against a seaman remains continuously with the Coast Guard notwithstanding any presumption of negligence, a credible, non-fault explanation for a collision defeats the presumption and obligates the Coast Guard to go forward with evidence to counter the seaman's explanation or to show that he was nevertheless guilty of some specific act of negligence. (emphasis supplied)

In the instant case the Respondent has not offered a no fault explanation in connection with either of the allisions.

Also, in CDOA 2368 (Madji Walker) the Commandant ruled as follows:

Appellant generally asserts that the Administrative Law Judge erred by inferring negligence from the occurrence of the allision. I do not agree.

It is well settled that a rebuttable presumption of negligence arises when a moving vessel strikes a fixed object such as a bridge. Appeal Decisions No. 2284 (BRAHN) and 2264 (MCKNIGHT). Past decisions and case law fully develop the presumption's rationale, applicability and effect. Appeal Decisions Nos. 2325 PAYNE and 2288 (GAYNEAUX), and Patterson Oil Terminals v. The Port of Covington, 109 F. Supp. 953 (E.D. PA. 1952), aff, d208 F.2d 694 (3d Cir. 1953). Only the effect is at issue here. It is two-fold.

First, Appellant had the burden of going forward with rebuttal evidence once the

presumption was established. Brahn, supra. This is a "heavy" burden, Patterson
109 F. Supp. At 954. To

this order upon you, you are directed to forthwith deliver your license to the Coast Guard
Marine Safety Office, 100 McArthur Causeway, Miami Beach, FL 33 139.

The rules governing appeals are attached hereto.

ARCHIE R. BOGGS
ADMJNISTRATIVE LAW JUDGE

Dated 7, March 2001
New Orleans, Louisiana