

In the Matter of License No. 34344
Issued to: KARL M. SKJAVELAND

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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KARL M. SKJAVELAND

This case comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations 137.11-1.

On 12 January, 1949, an Examiner of the United States Coast Guard at New York entered an order revoking Appellant's license No. 34344 as Master, and suspended the chief officer's endorsement thereon for a period of six months; of which the first two months were an absolute suspension and the remaining four months were on probation for one year from 11 January, 1949, upon finding him guilty of negligence and incompetence based upon his service as chief officer of the American SS JOHN E. SCHMELTZER on 25 November, 1947.

Three charges were originally lodged against Appellant's license: First; Misconduct - for that while serving as chief mate on said vessel under authority of his duly issued license, on or about 25 November, 1947, while said vessel was at sea, and having been ordered by the master to call him at 0400, he failed to do so without reasonable cause; second; Negligence - for that while serving as aforesaid, he did on 25 November, 1947, while said vessel was at sea, fail to utilize all means at his command to establish the position of said vessel during the 0400 to 0800

watch, thereby contributing to said vessel going aground; and third; Incompetence - for that while serving as aforesaid, on or about 25 November, 1947, while said vessel was at sea and Appellant was in charge of the bridge, he sighted unidentified land close ahead, but failed to stop or reverse the engine of said vessel, thereby contributing to the vessel going aground.

Appearing with counsel, Appellant entered a plea of "not guilty" to each charge and specification. At the close of the testimony offered to support the charges, Appellant's counsel moved to dismiss all three charges. The motion was granted as to the first charge, but denied with respect to the second and third charges. Exceptions were timely taken to the ruling of the Examiner on the second and third charges; and counsel for Appellant then announced that Appellant would not testify nor call any witnesses in his behalf.

At the conclusion of the hearing, the Examiner entered the order from which Appellant now appeals.

On the appeal, it is contended that:

- (a) The evidence was insufficient to support the specification laid under the charge of negligence.
- (b) The specification laid under the charge of incompetence did not set forth facts which constitute incompetence.
- (c) The evidence did not support the specification laid under the charge of incompetence.
- (d) The order of the Examiner is illegal.
- (e) The order of the Examiner is arbitrary and capricious.

Based upon a careful study of the Record of this case, I make the following

FINDING OF FACT

Appellant was serving as chief mate under his duly issued license and had charge of the 0400 to 0800 watch on the bridge of the American SS JOHN E. SCHMELTZER when that vessel was at sea approaching the Cape Verde Islands on 25 November, 1947. Around midnight, Appellant had been told by the Master, who was about to retire, that Point Machado Light should be sighted about 0400, 25

November, 1947, and directed to call the Master when the light was sighted. Appellant was in charge of the vessel's navigation from about 0400 on 25 November, 1947, but did not call the Master from sleep until about 0546 when he reported "land or clouds" ahead, and by the time the Master's vision was adjusted to dark night conditions, it was too late to avoid grounding at about, 0549. The Master did order "hard right" rudder but before it could take effect, the vessel struck. From the dead reckoning position, course and speed of the vessel, it would run ashore sometime between 0530 and 0600 unless the course or speed or both were changed prior to that time, or the course or speed were modified by forces outside the ship. Appellant took no action to change course or speed even when he sighted land or clouds ahead. The vessel had a radar which was operating properly but the Appellant was not accustomed to using it. The compasses, including the gyrocompass, were in good operating condition, as was the fathometer. At the time of the grounding, it was dark and there was no moon; weather conditions were good. There were some ocean currents in the vicinity of the vessel's course-line.

OPINION

The Examiner was justified in dismissing the first charge and specification for lack of proof.

The Examiner erred in finding the third charge and specification proved. In my opinion a charge of "incompetence" should be based on inability on the part of the holder of a license or certificate to perform the duties required by such license or certificate. In this case, the specification does not support a charge of incompetence, nor does the evidence. The mere fact that Appellant did not take avoiding action or that he made a mistake in judgment under the circumstances does not show that he was unable to do so because of professional deficiencies. Appellant's failure to act may have been negligence, but negligence and incompetence are not the same thing. In *Olsen v. North Pacific Lumber Co.* 100 F. 384, 386, 40 CCA (9th) 427 (1900), Mr. Justice McKenna said:

"There is certainly a difference between the ability to perform work, and negligence in performing it."

In 20 *Words and Phrases* 536, negligence and incompetence are distinguished as follows:

"`Negligence' and `incompetence' are not convertible terms, since one may be thoroughly competent and be negligent and while a series of acts of negligence or even a single act may so indicate the character and mental disposition as to prove incompetency, a well qualified and entirely competent person may be negligent on occasion, without being incompetent."

I concur with Appellant as to grounds (b) and (c) of his appeal, and believe that the finding of the Examiner on the third charge, and specification thereunder, must be set aside.

On the other hand, I am not inclined to agree with Appellant as to the second charge, and the specification thereunder. When a licensed ship's officer has charge of the navigation of a vessel equipped with the usual navigation equipment in good operating order and that vessel goes aground without any indication of mechanical failure aboard the ship or any outside force materially affecting the movement of the ship, all of which appears to have been established by the evidence in this case, a legal implication arises that the officer was negligent. A *prima facie* case has been made out against him, and if he does not choose to offer evidence to over come the inference, he cannot prevail. Vessels under careful navigators do not go aground in the ordinary course of events without cause. Presence of the Master on the bridge when the vessel grounded does not exculpate this Appellant whose antecedent negligence had brought her into a position from which it was impossible to escape disaster. The Master at least gave an order designed to avoid grounding; but due to Appellant's delay in calling the Master, it was too late for anyone to have extricated the vessel from peril.

The specification under this charge reads: "Did fail to utilize all means at your command to establish the position. . ." It does not appear to me that Appellant used any means at all other than his eyesight. An officer in charge of the navigation of a ship has a duty to use every means available to him to insure the safety of his ship.

If he unintentionally fails in this duty, he is negligent. If his failure is deliberate, he is guilty of misconduct - a more serious offense. Appellant's failure to use the radar, under the particular circumstances of this case, does not excuse him from using other means at his command, mechanical or otherwise, and if he was in doubt after using such means, he had an additional duty to inform the Master. Seeking advice of the Master was in itself a "means at his command." Appellant may, as far as the evidence goes, have used some of the means at his command, but he did not use all means even if the radar is not considered a "means at his command." He did not seek the advice of the Master, or even inform the Master of the situation. He knew the Master expected Point Machado Light to appear, and he must have been in some doubt as to the vessel's position after 0400. Any means that he might have used, if used carefully and not negligently, could do little under the circumstances than indicate that the vessel was approaching danger. In my opinion, in the absence of evidence rebutting that given by the Master, the Examiner was justified in finding Appellant's negligence contributed to the disaster; both the specification and the evidence were sufficient to support the charge. Finding nothing in the Record to indicate that the Examiner's ruling was clearly erroneous on the question of negligence, I do not believe that this finding should be set aside.

I take official notice of data contained in the files of the Coast Guard that Appellant was serving under license No. A-5503 issued 16 December, 1943 (issue 4,6) at the time of the grounding of the SS JOHN E. SCHMELTZER. This license was as Master of vessels of 500 gross tons or less in coastwise vessels; on the license was an endorsement as chief mate for any gross tons steam and motors, oceans. License No. 34344 was a routine renewal on 18 November, 1948, of the older license. Appellant's contention that his license as Master was earned at a later date is in error. He was serving under the chief mate endorsement on his Master's license when the grounding occurred. The license against which the order was made is essentially the same license that he held at the time of the incident; for this reason, I see nothing erroneous in proceeding against the renewal license which was reissued as a matter of form under routine procedures, and not as a result of further examination of Appellant's abilities. In such case, the issuing authority has power to withdraw the license if it was issued in error, or if not in error but merely as a matter of routine procedure, the renewed license is certainly subject to any

charges pending against the license being renewed.

The devastating results which attended Appellant's negligence in this case afford him little justification for invoking technical defenses.

I do not consider the Examiner's order illegal, arbitrary, or capricious as does the Appellant, but I entertain some doubt respecting the practicability of administratively effectuating the Examiner's order in the manner as stated. However, this detail is a matter of routine administrative adjustment, and the Examiner's error is attributable to Appellant's own misstatement respecting the status of his Master's license.

CONCLUSION AND FINAL ORDER

Dismissal of the first charge and specification is AFFIRMED. The decision of the Examiner on the second charge, and specification thereunder, is AFFIRMED. The decision of the Examiner on the third charge, and specification thereunder, is REVERSED because the specification and evidence do not support the charge.

The order of the Examiner dated 12 January, 1949, revoking Appellant's license as Master is AFFIRMED. Since the endorsement permitting Appellant to sail as chief mate, unlimited tonnage, is inscribed on Appellant's license as Master, it follows that endorsement is also revoked.

Inasmuch as I find no reason to disturb the Examiner's order dated 12 January, 1949, other than to administratively correct the procedure for effectuating that order, a license may be issued to Appellant permitting him to sail as chief mate, unlimited tonnage. That license, when issued, shall be suspended for six months, of which the first two months shall be effective as of the date Appellant surrenders his current temporary license; the remaining suspension of four months shall not be effective provided no charge is proved against Appellant for offenses cognizable under the provisions of 46 United States Code 239 (R.S. 4450) as amended, for twelve months from the date Appellant surrenders his current temporary document.

As herein prescribed there has been no enlargement of the Examiner's order - only the correct procedure in view of the known facts is announced.

With such procedure established and to be followed, the Examiner's order dated 12 January, 1949, is AFFIRMED.

J. F. FARLEY
Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 9th day of June, 1949.

***** END OF DECISION NO. 328 *****

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