

IN THE MATTER OF LICENSE NO. 357855 MERCHANT MARINER'S DOCUMENT
NO. Z-66482-D1 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Boyd McGRAW

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1700

Boyd McGRAW

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 27 February 1967, an Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman's documents for three months, upon finding him guilty of misconduct and inattention to duty. The specifications found proved allege that while serving as Third Mate on board SS THUNDERHEAD under authority of the document and license above described, Appellant:

(Under "Misconduct")

(1) on or about 18 July 1966, at Bangkok, Thailand, wrongfully failed to perform his duties from 0800 to 1200 due to intoxicants;

(2) on the same date, while the vessel was at sea, wrongfully failed to perform duties because of intoxication;

(Under "Inattention to Duty")

(1) On or about 29 August 1966, failed to keep a proper bell book while the vessel was in the Mississippi River.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charges and each specification.

The Investigating Officer introduced in evidence the testimony of the master of the vessel, and certain voyage records.

In defense, Appellant offered in evidence his own testimony.

After the hearing, the Examiner rendered a written decision in which he concluded that the charges and four specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months.

The entire decision was served on 3 March 1967. Appeal was filed on 16 March 1967 by Appellant's attorneys. Appellant did not, however, comply with the terms of the order until 9 October 1967, and no action was taken to consider the instant case until that time.

FINDINGS OF FACT

On all dates in question, Appellant was serving as Third Mate on board SS THUNDERHEAD and acting under authority of his license and document.

On 18 July 1966, at Bangkok, Thailand, Appellant failed to perform his watch duties from 0800 to 1200 because of intoxication.

That night, at sea, it was necessary for Appellant to be relieved of the watch because of his intoxication.

The next night, that of 19 July 1966, Appellant could not stand his watch at all because of intoxication.

On 29 August 1966, when the vessel was proceeding up the Mississippi River to New Orleans, Appellant failed to make proper entries in the deck bell book, which it was his duty to maintain.

BASES OF APPEAL

This appeal has been taken from the findings made by the Examiner. It is contended that there is no evidence that Appellant partook of any alcoholic beverage and that medicinal narcotic drugs found in his room were the cause of his condition.

APPEARANCE: Kierr and Gainsburgh, New Orleans, La.,
by Eldon E. Fallon, Esq.

OPINION

I

Appellant complains first that "The findings of fact made by the Hearing Examiner do not support his opinion finding Boyd McGraw guilty of being under the influence of alcoholic beverages..." Appellant has, it seems, reversed his argument. "Findings" do not support "Opinion;" "Opinion" may justify or explain "Findings."

It is true, as Appellant urges, that there is no direct evidence that Appellant partook of

alcoholic beverages and that there is no evidence that "anyone noticed odors of alcoholic beverages on Mr. McGraw's breath." These mere references to the absence of certain types of evidence admissible before a jury from a lay witness are not persuasive on appeal.

In order to permit lay witnesses to testify as to bases for an opinion that a person was intoxicated at a given time, the rules of evidence have developed that perception of drinking and of odor of alcoholic on the breath may be testified to by the layman in support of his conclusion as to intoxication. Many other such observations are found admissible also -- slurring of speech, staggering of walk, and the like. There is no rule that says that all of these bases for a lay opinion that a person is intoxicated must be present at the same time.

The abnormal actions and conditions of Appellant, in the instances recited in this case, are enough to justify an inference of intoxication even in the absence of one or two of the time-honored pieces of admissible evidence.

II

The ultimate findings of the Examiner in this case, with respect to his findings as to whether Appellant was intoxicated, actually do not use the terms "alcohol" or "alcoholic" at all, so that once again Appellant's specific argument on appeal does not apply. Pleadings in cases of this kind, and findings made after hearing are not to be narrowly construed like criminal indictments. Kuhn v. Civil Aeronautics Board, C.A. D.C. 183 F. 2nd 839. "Intoxication," in a proceeding such as this, I construe to be broad enough to include the condition of a person as observed leading to a conclusion by the lay observer that he is "intoxicated" whatever the cause, alcohol, drugs, or even medicines.

Whether the condition is excusably or wrongfully brought about is the test, in these proceedings, as to whether the intoxication is wrongful so as to lead to a finding of misconduct.

III

The reasoning just set out almost automatically rejects Appellant's second point on appeal. He admits to the fact that he was in a condition, at the material times, that would lead the master to believe that he was intoxicated but that the condition was caused by use of a drug, not by use of alcohol. I cannot find a case before considered in which an Appellant was excused for failing to perform duties because of "intoxication" merely because he asserted that his condition was caused by use of drugs rather than use of alcohol.

The mere fact that Appellant referred to his drugs as "medicinal" does not excuse his failures. The record is devoid of evidence that Appellant apprized the master or chief mate of any physical ailment that would permit the licit use of drugs. Also, it is obvious that had the master known of a need to use such drugs he would have had to inquire into their effect upon Appellant to determine whether he would be fit for duty after their use.

The record also fails to show that Appellant was entitled, under medical advice, to use any drug that he might have use. Even if he was, his use of the drug, without the knowledge of the master, so as to produce the effects observed by the master, rendered his failure to perform duties wrongful.

CONCLUSION

It is concluded that the charges and specifications were proved by the required quantity and quality of evidence.

ORDER

The order of the Examiner dated at New Orleans, La. on 27 February 1967, is AFFIRMED.

W. J. Smith
Admiral, U. S. Coast Guard
Commandant

INDEX

Evidence

intoxication, not all permissible evidence need be available

Intoxication

caused by drugs

caused by medicines

odor of alcohol not needed to prove

Failure to perform duties

intoxication caused by drugs

intoxication caused by medicines