

IN THE MATTER OF LICENSE NO. 307328
Issued to: Robert Joseph HERRING

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1933

Robert Joseph HERRING
Z-61858

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 26 February 1971, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's licenses for three months outright upon finding him guilty of negligence. The specifications found proved allege that while serving as pilot on board the Japanese M/V SUWA MARU #37 under authority of the license above captioned, on or about 17 July 1969, Appellant:

- (1) negligently failed to navigate "said vessel" in a cautious and prudent manner "notwithstanding the presence of the M/V KOLO which was also being navigated outbound ahead of said vessel," and
- (2) negligently failed to maintain a proper lookout aboard SUWA MARU #37.

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

The Investigating Officer introduced in evidence the testimony of two witnesses who were aboard KOLO.

In defense, Appellant offered in evidence his own testimony.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specifications had been proved. He then entered an order suspending all licenses issued to Appellant for a period of three months.

The entire decision was served on 6 March 1971. Appeal was timely filed.

FINDINGS OF FACT

On 17 July 1969, Appellant was serving as a pilot on board the Japanese vessel, M/V SUWA MARU #37 while the ship was in the port of Honolulu. At about 1700 on that date, with Appellant at the helm, the SUWA MARU departed Pier 28 and headed out to sea. As he was maneuvering the vessel into the ship channel, he observed the M/V KOLO proceeding to sea about 400 feet and about 4 points on his port bow. Thereafter, the relative bearing of the two vessels did not materially change, while the distance between them slowly closed. Appellant proceeded between mid channel and the starboard side heading toward the sea buoy first at five to six knots, then later between seven and eight knots. As he approached Buoy 7, Appellant stepped to the starboard side of the wheel house in order to observe the position of the pilot boat which was following the SUWA MARU to pick him up. As a result of this positioning, Appellant lost sight of the KOLO. Appellant then instructed the Master of the SUWA MARU to reduce speed to slow ahead to allow the pilot vessel to come along side, but before the reduction became effective, Appellant felt the ship shudder and he saw the KOLO emerge under his starboard bow. Prior to the collision, no whistles were blown and no communications were had with people stationed on the bow or on the bridge wings.

On 17 July 1969, the KOLO, operated by Clarence Hauki, departed Pier 21 upon a mission to remove an injured seaman from the SS RUTH LYKES, then anchored in the vicinity of the Sea Buoy. After backing out of the berth and making the turn into the ship channel, the KOLO's operator observed the SUWA MARU proceeding outbound in the vicinity of Pier 28. After rounding Sand Island, the operator went to the starboard side of the channel making between seven and eight knots. The SUWA MARU was not observed again by personnel on board the tug until she came into contact with the starboard quarter of the KOLO in the vicinity of the number 7 Buoy. The impact caused the tug to capsize and sink. Those aboard were rescued by the pilot vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that the Judge erred in finding that Appellant's vessel was an overtaking vessel, in failing to find the KOLO at fault, and in finding that Appellant failed to arrange for and to maintain proper lookouts. It is also alleged that there were numerous errors in the transcript and in the conduct of the hearing which are prejudicial to Appellant.

APPEARANCE: Roy A. Vitousek, Jr., Esq. at hearing; A. Peter Nowell, Honolulu, Hawaii on appeal.

OPINION

I

Concerning the first of Appellant's contentions, I agree that the evidence is insufficient to make out an overtaking situation as found by the Administrative Law Judge; however, it was not alleged that the SUWA MARU #37 was an overtaking vessel. The specification alleged that Appellant failed to navigate in a cautious and prudent manner, notwithstanding the presence of the KOLO which was also being navigated outbound and ahead of SUWA MARU #37, contributing to a collision between the vessels. The testimony adduced at the hearing established by reliable and probative evidence that Appellant failed in his duty to navigate in a reasonable and prudent manner and that such failure contributed to the collision.

Uncontradicted evidence reveals that both vessels were proceeding outbound in the Honolulu Channel with Appellant, serving as the pilot and actually at the helm of the SUWA MARU, behind the slightly to the starboard of the KOLO. Appellant, himself, admits that he was aware of the presence of the KOLO and of its proximity of his own vessel. He was chargeable at that point with the responsibility of navigating in a prudent manner with regard to the other vessel. This duty required him to keep advised of the KOLO's position at all times. By leaving the position where he could observe the progress of both vessels relative to one another and by not taking steps to keep himself so informed, Appellant breached his duty and failed to navigate in a cautious manner. It was negligence not have taken all reasonable steps in avoid danger in this situation. The use of ordinary care, caution, and maritime skill could have avoided the collision since had the tug been kept under constant surveillance, Appellant would have been in a position to take appropriate and timely action to avoid the KOLO.

II

Appellant's argument that the Administrative Law Judge was in error in failing to find the KOLO at fault is clearly without merit. This hearing was concerned only with the allegations of negligence of Appellant; the possible fault of the KOLO was not an independent issue for determination. The major-minor fault doctrine has no application here, and the possible fault or negligence of another person or vessel in no way mitigates against the fault of Appellant.

III

Neither, are Appellant's contentions concerning errors in the hearing transcript considered persuasive. It is conceded that some typographical errors appear in the transcript, but the errors are not substantive in nature and do not constitute a ground for reversal. There is no indication that anyone was at all misled by any of the spelling errors or errors in transcription of technical terms. The failure to follow proper procedures of documenting evidence and of introducing testimony or pictures concerning damage to the vessel is not condoned, but at the same time is not considered sufficient to warrant reversal.

IV

I also find some difficulty in accepting the fact that Appellant's counsel announced himself as appearing for the State of Hawaii when all indications are that he was a private practitioner and not associated with the Attorney General's Office of Hawaii. Without some affirmative authorization presented on the record, I do not see how a private practitioner can be accepted as representing a State in these proceedings.

V

I also agree with Appellant that the Administrative Law Judge erred in finding that Appellant failed to maintain a proper lookout. It is obvious that the testimony of the two witnesses aboard KOLO, which constituted the Investigating Officer's case-in-chief, did not establish lack of a proper lookout aboard SUWA MARU #37. Appellant's own testimony was only that there were men on the bow and this in itself does not prove that none of them was a proper lookout. Appellant testified that he discussed the vessel's readiness to go to sea with the Master and was assured that all was proper and ready. It is reasonable to assume that the vessel had provided the necessary lookouts. In any event the evidence does not tend to affirmatively prove that none of the persons on the bow was a lookout.

VI

The most important question of jurisdiction was treated in a rather cursory manner with an acknowledgement by Appellant's attorney to a statement, "I gather that he was serving under authority of his license." Appellant, while holder of a Federal license for the waters traversed to the point of collision, was serving aboard a foreign vessel subject to State pilotage requirements under 46 U.S.C 211. The finding of the necessary jurisdictional element of service "under authority" of his Federal

license was inadequately treated.

The problem of pilotage "under authority" of a Federal license aboard a vessel subject to the jurisdiction of a State has recently been dealt with in Appeal No. 1842 (SORIANO). There, it was the State's own legislative requirement that a State pilot hold a valid Coast Guard license for the waters involved which was crucial to the question of jurisdiction. In this case, although not developed in the record, it is a Hawaii Civil Service requirement that a State pilot as a condition of employment is required to have a Federal license issued by the Coast Guard. A Department of Personnel Services, State of Hawaii, Examination Announcement for Port Pilot in 1969 listed, among other things, the type of license required as follows:

"License Required: Possession of an unlimited Master's or Chief Mate's license issued by the United States Coast Guard. Prior to the completion of the probationary period, the incumbent must acquire a United State Coast Guard First-Class Pilot's license for all the major ports in the Hawaiian Islands."

CONCLUSION

In light of the foregoing I find that there is sufficient evidence of a reliable and probative nature to support the specification alleging general negligence on the part of Appellant. With regard to the second specification, I conclude that the necessary evidence required to prove that Appellant failed to maintain a proper lookout has not been proved. The second specification is, therefore, dismissed. I further find that the order entered by the Administrative Law Judge is appropriate based on the findings as to the first specification and it is therefore affirmed.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 26 February 1971 is affirmed. The second specification under the charge of negligence is dismissed.

C.R. BENDER
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 15th day of June 1973.

INDEX

Counsel

- Unauthorized representations of
- Charges and Specifications
- Surplusage, failure to prove, effect of

Findings of Fact

- Erroneous, not necessarily prejudicial
- All need not be correct to support
punishment

Lookout

- Failure to maintain proper

Hearings

- Record of adequate, in spite of errors

Jurisdiction

- Acting under authority of license
pilots

Negligence

- Failure navigate prudently
- Defined
- Major-minor fault doctrine, application of
- Overtaking situation
- Misconduct
- Failure to observe privileged vessel

Pilots

- Jurisdiction over
- Responsibilities of

Transcript of hearing

- Clerical defects not prejudicial