

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 395960 AND ALL OTHER SEAMAN DOCUMENTS NO. BK-082926
Issued to: Arne J. LESKINEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2059

Arne J. LESKINEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 5 November 1975, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, after a hearing at Detroit, Michigan, on 25 February 1975, admonished Appellant upon finding him guilty of negligence. The single specification found proved alleges that while serving as Master of M/V H. LEE WHITE under authority of the license above captioned, on or about 11 December 1974, Appellant, while directing the navigation of that vessel upbound in restricted waters, wrongfully failed to navigate the vessel with caution; notwithstanding the fact that information of the proximity and approach of another vessel was available to him (from radar observations) thereby contributing to a collision between his vessel and M/V GEORGIOS A while that vessel was downbound in the St. Clair River.

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

The Investigating Officer introduced in evidence the testimony of a mate aboard M/V H. LEE WHITE, an officer of the St. Clair (Michigan) City Police, and the pilot of M/V GEORGIOS A.

In defense, Appellant offered in evidence the testimony of a police officer of the Provincial Police of Ontario, Canada, and a written statement of a resident of Mooretown, Ontario. Without objection and with no discussion on the record, Appellant was permitted to introduce a written statement previously made and signed by him, although he was present at the open hearing. This was an unsworn statement, although it was described later in the initial decision as "sworn". D-8.

Following this the Investigating Officer was permitted to introduce the testimony of another Coast Guard officer who had interviewed Appellant briefly after the collision, ostensibly for impeachment purposes.

At the hearing, the Administrative Law Judge rendered a written decision in which he concluded that two specifications originally preferred, alleging violations of the Great Lakes Rules of the Road, had not been proved. Dismissing these, he concluded that the third specification, closely paraphrased above, had been proved. He then entered an order of admonition to be placed in Appellant's record.

The entire decision was served on 7 November 1975. Appeal was timely filed, and perfected on 11 February 1976.

FINDINGS OF FACT

On 11 December 1974, Appellant was serving as master of M/V H. LEE WHITE under authority of his license. During the midnight to 0400 watch on that date, the second mate, Donald H. Echols, was the officer of the watch. The vessel was lighted in accordance with Great Lakes rules, a lookout was maintained on the bow, a seaman was at the wheel in the wheelhouse with Echols, and the vessel was proceeding up the St. Clair River at about nine miles per hour. Visibility was good. The vessel's radar was in operation.

At about 0210, Echols heard a faint call on the radio from an unidentified vessel reporting visibility of one half mile. Since this did not fit his own circumstances he notified Appellant who came to the wheelhouse immediately. At about 0230 Appellant assumed the watch duty and directed the mate to obtain weather information. The vessel was then below Buoy R. 48, opposite the St. Clair Inn, just north of the downtown area of St. Clair. When the mate returned to the wheelhouse he reported that weather prospects were good, and looked at the radar. He reported a target up ahead to Appellant. Appellant looked at the radar and saw a target in the vicinity of Stag Island Shoal, about two miles ahead. With neither officer marking or plotting the target, Appellant concluded that it was a fixed object. The mate, with Appellant's permission, departed the wheelhouse area. At Buoy R 50 Appellant adjusted his course to head for Buoy HB-QK F1.R. Buoy B 51 had been removed from its station for the season. Shortly thereafter, at a point about 2,000 yards upriver from R 50, M/V H. LEE WHITE collided with M/V GEORGIOS A.

Over the same time span, M/V GEORGIOS A, a vessel of Greek registry, conned by Michael Siegal, a United States Registered Pilot, was descending the St. Clair River from Lake Huron. Siegal had boarded the vessel at about 0110. Great Lakes running lights were being displayed. The vessel proceeded at nine miles per hour over the bottom. Two up-bound vessels were passed uneventfully. Since visibility was good, Siegal was not using radar. When M/V GEORGIOS A was a little over a quarter mile upriver from Buoy HB-QK F1 R, Siegal saw the lights of M/V H. LEE WHITE about half a mile

below Buoy R 50. This was at about 0241 and was about the time when Echols, aboard M/V H. LEE WHITE, called Appellant's attention to the radar display. About 0245, when M/V GEORGIOS A had the charted position of Buoy B-51 abeam (the buoy had been removed for the season), Siegal sounded a signal for a port-to-port passage. At this time, M/V H. LEE WHITE was in the close proximity of Buoy B 50 and commencing to swing left, as necessitated by the change in channel direction.

As the vessels approached each other, M/V H. LEE WHITE continued to swing left. This condition existed until the vessel were about 1,000 feet apart, when Siegal sounded a danger signal and backed M/V GEORGIOS A full.

The vessels collided at a point just about equidistant, on a north-south running line, between Buoy R 50 and the charted position of Buoy B 51, at about 0250-51.

The radar of M/V H. LEE WHITE was at all times functioning normally. M/V GEORGIOS A had been actually visible from M/V H. LEE WHITE from 0241 at the latest.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the ultimate finding of the (third) specification as proved is inconsistent with facts specifically found by the Administrative Law Judge, that the evidence does not support a finding that the specification was proved, and that by his action in issuing his decision and order the Administrative Law Judge found the matter proved on issues as to which Appellant had no notice; that is, that the charges were changed after hearing so that Appellant was found guilty of something with which he was not charged and on which he had no hearing.

With respect to this last point, Appellant points to the wording of the specification as found proved and to the Order of the Administrative Law Judge which reads in pertinent part:

"ORDERED: that....be formally ADMONISHED for wrongful failure to navigate the M/V H. LEE WHITE with caution, thereby contributing to a collision with the M/V GEORGIOS A on 11 December 1974."

APPEARANCE: Cadwalader, Wickersham & Taft, New York, N.Y., by
William S. Busch, Esq.

OPINION

I

Since the "findings" of the Administrative Law Judge are directly attacked here as inconsistent with his finding the specification proved, and since the "findings of fact" are, to a degree, inadequate and badly assorted, some general observation is necessary here to explain the Findings of Fact I have made here.

There is no necessity, when two findings as to two specifications made by an Administrative Law Judge are inconsistent in that one dismisses a specification as "not proved" and the other finds a specification proved although the same evidence is adequate to prove both, to reverse the finding of "proved" in order to reconcile theories. Decision on Appeal No. 2043. This is not the situation which Appellant presents here, however. It is his contention that specific findings of fact made (what some Administrative Law Judges refer to as "evidentiary findings") contradict fact allegations in the specification found proved. It is clear that the ultimate "legal finding" that a specification is proved cannot stand if its essential allegations have been found untrue through the medium of specific contradictory individual findings of fact.

As to disturbing findings of fact made by the initial trier of facts, it has been consistently my policy to apply the "substantial evidence" test, and when that test is met the findings are not disturbed. Decisions on Appeal Nos. 1596, 1756, 1775. In the order of things, when the test is met the usual action to follow is affirmance of the initial findings. On the other hand, when I have been moved to disagree with specific findings entered in the initial decision I have not, conforming to a recognized modern practice in admiralty appeals, considered the matter de novo, in order to establish my own findings, except in cases in which the record is made exclusively from depositions or other pre-recorded testimony and exhibits. Decisions on Appeal Nos. 652, 653, 840.

The instant case does not fit either of these categories. Instead, on certain points there is an absence of findings in the initial decision, although sufficient evidence is in the record for them to have been made, and in another area, "findings of fact" have been presented which I think are mere legal conclusions, purportedly based on the evidence but, it seems, unwarranted by and in conflict with the evidence in the case. For these reasons findings of fact have been made here which will appear to be different from those found by the Administrative Law Judge but which are, in truth, statements which are merely in clarification of the initial decision as will be seen in the review.

II

To look first to Appellant's specific objections to apparent contradictions in the decision we find that both the first and the third exceptions urged are involved.

Appellant points out that in connection with the dismissal of the two specifications dealing with Rules of the Road violations the decision says:

"...I have no evidence that the respondent had any knowledge or notice of either the position or the course or the presence nearby of any other vessel until the vessels were in the jaws of the collision at a time when it was too late to take evasive action ..." D-8.

Although stated in the "Opinion" as relevant to specifications other than that found proved, this reflects on its face apparent findings of fact that are in contradiction with a substantive allegation of the third specification.

Similarly, Appellant points out that two of his own proposed findings of fact were "allowed" by the Administrative Law Judge and are thus incorporated into his findings. D-11. These proposals were made, and accepted, without designation or limit to any one or another of the specifications but they bear most directly on the third. They are:

"10...[the mate] came back to the bridge and scanned the radar on both the 3 and 6 mile ranges and reported finding no traffic on the radar. He reported a square target not resembling a vessel which, upon checking ...[Appellant] took to be a shore structure or other stationary object in the area of the Stag Island Shoals"; and

"25. In addition, there is no evidence that the M/V GEORGIOS A, which was proceeding downriver behind the land area above Barlum Point, was ever picked up as a target on the M/V H. LEE WHITE's radar or that Captain Leskinen had information of the proximity and approach of the M/V GEORGIOS A or of any other vessel available to him from radar observation prior to the time he actually saw the vessel."

It is clear that these, especially the second, if they are truly findings of fact, negative the allegations in the specification having to do with availability of information from radar.

Appellant urges that the Administrative Law Judge recognized this himself in phrasing his order, thus impeaching his own finding that the specification was proved as alleged. From this, Appellant concludes that he was in fact found not guilty of what he was

charged with, since the fact issues were resolved in his favor and therefore whatever he was found guilty of it was something different and something of which he had no notice for hearing.

On the case as I see it there is no need to undertake an examination of the specification, with the allegations about radar omitted, to determine whether it adequately states a negligent act or omission. The essential point here is that the order made in the case contains superfluous and legally ineffective language.

A statement of the offense found proved does not belong in an order. The order merely follows upon the finding that the offense alleged in the specification was proved and it is the specification to which we look to find the reason for the order.

To avoid misapplication of this, it must be noted that when an investigating officer files a warning under 46 CFR 5.05-15(a) a statement of the fault is properly spelled out so that the reason for the action is apparent, there being no other record of the facts made. So also, when a statement of prior record is provided to an Administrative Law Judge, since it is necessary for him to know the nature of the acts which led to the earlier orders as well as the quantum of an order itself, it is given in a form summary as, "suspended for one month for _____ " or "admonished for _____ ." It is understood that the synopsis condenses both findings and order.

When a hearing is held a statement of what was proved is essential since it must be known precisely what was charged, what was litigated, and what was established. The specification found proved is the record of this for all future reference. Thus, the unusual wording of the initial order in this case does not and cannot serve to impeach the finding that the specification was proved as alleged. There remains the question of whether the findings of actual facts negative the allegations of the specification so as to dictate an inevitable finding that the specification was not proved.

III

The resolution of this question requires further comment on the initial decision.

The "findings of fact" made are dotted with phrases like these: "he [Appellant] stated" (D-5, three times), "according to his testimony" (D-6), "he testified" (D-6, twice). Recitations of testimony are not findings of fact. Decisions on Appeal Nos. 1576, 1689. The Administrative Law Judge recognized that he had not made certain findings of fact, since he said:

"The evidence before me with respect to this casualty consisted principally of the uncorroborated testimony of the Pilot of the M/V GEORGIOS A and the uncorroborated sworn statement by the respondent...Furthermore, the testimony of Captain Siegal of the M/V GEORGIOS A and the statement by Captain Leskinen of the M/V H. LEE WHITE conflicted so sharply with respect to what occurred during the crucial last few moments leading up to the collision that it was impossible to reconcile the two. I have, nevertheless, been able from the evidence presented to find sufficient facts to dispose of all three of the specifications." D-8.

Mere irreconcilability of testimony should not thwart an effort to ascertain facts by weighing the evidence, a function peculiarly proper to the trier of facts, and the attitude is less laudable when it leads to a dismissal of charges (a "disposition") because no findings of fact have been attempted.

Noteworthy here is that apparently equal weight has been given to each of two conflicting versions of the events leading up to the collision. One version comes from a witness under oath who was subjected to cross-examination. The other comes in the form of a self-serving statement, not even sworn to (as I have pointed out before), and not subject to the tests of cross-examination. Two other elements enter also. The testimony of the pilot-witness is free of self-contradiction and is inherently believable. The self-serving statement is, to some extent, in conflict with a previously made statement of the declarant, testified to at the hearing. Further, there is an important bit of corroboration for the testimony of the pilot of M/V GEORGIOS A in the testimony of the mate, Echols, to whom little attention was paid.

The significance of Echols's testimony is in the fact that he gave a point in the river for the collision. All three officers talked of a place called "Barlum Point." Echols circled a place on the chart and referred to it as Barlum Point. The pilot and Appellant appear to associate Barlum Point with the land nearest the charted position of Buoy B-51, a different place. Although "Barlum Point" is not identified as such on the chart, no extra effort was made to fix the place that the witnesses were talking about, despite the difference in the testimony. For that, I am willing to accept that the place, "Barlum Point," was as identified by the pilot and by Appellant, at the position of Buoy B-51, and that Echols was wrong. But Echols was testifying specifically about the place of collision and he also identified it as a "traffic retreat." Again, no effort was made to ascertain what this term meant, but Echols identified it with a small inlet appearing on the chart, possibly a small boat basin of some kind, and circled that as being the point opposite the collision point.

No such inlet, or any other distinguishing mark visible from a ship, appears at "Barlum Point," and the intent of the identification by Echols cannot be doubted. The position which he marked as the place of collision corresponds almost precisely with the place that is arrived at by working out the testimony of Siegal who describes passing the location of Buoy B-51 and accounts for actions and times thereafter up to the collision.

On these considerations I have arrived at findings of fact which in some instances declare to be facts what the Administrative Law Judge recounted as "testimony" and in some other instances state facts in areas where no findings were made at all although the evidence was available for analysis.

IV

In a second area for consideration I have mentioned that some findings made in the initial decision I consider to be not findings of fact at all but conclusions. Some specific conclusions I consider to be unwarranted in face of the known facts. Such elements in the initial decision as "knowledge or notice of either the position or the course or the presence nearby of any other vessel..." I cannot accept. "Knowledge" may be an ascertainable fact arrived at through inference, but "notice" is a legal concept, and whether "notice" existed or not is a conclusion derivable from specific facts. So also, the purported "fact" that Appellant did not have "information ...available to him from radar observation..." is a legal conclusion to be arrived at only after examination of the facts.

The undisputed and definitely ascertainable facts in this case include that:

- (1) M/V GEORGIOS A was openly navigating in purely normal fashion in the St. Clair River, with no unusual conditions of weather or other unusual factor present;
- (2) M/V H. LEE WHITE's radar was operating in good condition with normal reliability; and
- (3) Appellant was in personal charge of the navigation of M/V H. LEE WHITE, suffering from no indisposition or other handicap of sight or hearing.

I am not concerned here with whether the Administrative Law Judge erred in excusing Appellant from the allegation that he violated the Rules of the Road on the grounds that he did not have knowledge or even notice or information as to the presence of the other vessel. Similarly, I am not concerned with the possibility that

Appellant's negligence need not have been started as linked to radar questions alone. We are dealing only with the single specification as alleged and as found proved.

It is conceded, as Appellant contends, that no regulation or law requires the use of radar under the conditions obtaining at the time in the St. Clair River, and it is not asserted that use of other means of becoming aware of traffic and other conditions in the River might not have been preferable to reliance on radar at the time. The hard fact remains that the radar was there, in operation, and operating with normal reliability. There is not a shred of evidence that the radar did not pick up the oncoming M/V GEORGIOS A in the manner to be expected of a normally functioning radar and there is to be presumed the fact that it did. It necessarily follows from this that the information alleged to have been available to Appellant was in fact available to him and his denial of knowledge of the other vessel's presence, even if accepted from the unsworn statement, simply clinches the inevitable conclusion that he failed to utilize the information available.

Unlike a grounding, the mere fact of collision does not usually imply fault on the part of some one specific person. Here, however, there is far more than just the fact of collision. The entire picture from the witnesses, tending to establish fault on the part of Appellant, demanded, at peril of having the charge of negligence proved, that Appellant explain why he looked at the radar only once, leapt to the conclusion that there were no moving targets, and failed to take any other action thereafter than to excuse the regularly assigned watch officer from the bridge. No such effort was undertaken.

CONCLUSION

The charge and the single specification remaining after the Administrative Law Judge's initial action were proved by reliable, probative, and substantial evidence.

ORDER

The findings of the Administrative Law Judge, as MODIFIED and SUPPLEMENTED herein, and his order of ADMONITION are AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 2nd day of June 1976.

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