

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 458363
Issued to: Howard M. LITTLEFIELD

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2282

Howard M. LITTLEFIELD

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

By order dated 23 November 1979, an Administrative Law Judge of the United States Coast Guard at Portland, Maine, suspended Appellant's license for 1 month on 12 months probation. The specification of the negligence charge found proved alleged that Appellant, while serving as operator of M/V CAPTAIN LARRY, under authority of the captioned license, did at about 1315 on 6 August 1979, fail to adequately take into account the fall of the tide, causing said vessel to ground in the vicinity of Brewer's Boatyard Docks, Great Chebeague Island, Maine.

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

The Investigating Officer introduced into evidence the testimony of four witnesses, and thirteen documents.

In defense Appellant introduced his own testimony and three documents.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification had been proved. He then entered an order of suspension of one month on 12 months' probation.

The decision was served on 26 November 1979. Appeal was timely filed on 5 December 1979 and perfected on 12 August 1980.

FINDING OF FACT

On 6 August 1979, Appellant was serving under the authority of his license as operator of the M/V CAPTAIN LARRY. The Appellant is the holder of a second mate's license, any gross tonnage, which is a higher license than that required to be an operator of the CAPTAIN LARRY. CAPTAIN LARRY departed Portland, Maine, loaded to

half capacity with diesel fuel and gasoline. There were no draft marks on the vessel so that the draft at any particular time had to be estimated. On departure the draft was estimated to be about 4 ft. fore and aft.

The weather at all times was clear, the air temperature was about 82° F, and the wind was calm.

CAPTAIN LARRY arrived at Brewer's Boatyard Docks at about 1230 and tied up to the dock. N.O.S. Chart No. 13290, "Casco Bay," 24th Ed., June 9, 1979, disclosed the water depth in the vicinity of Brewer's docks to be between one-half foot and two feet, depending on the location, at mean low water. From his testimony, Appellant knew that a spring high tide of 8.9 ft. had occurred and that a spring low tide (0.10 ft. below low water) was predicted at 1554. Though he knew that the tide was ebbing, Appellant at no time took soundings to determine the depth of the water.

CAPTAIN LARRY began unloading gasoline at about 1240. After unloading about 500 gallons, Appellant became concerned that the vessel might be left aground with the ebbing tide. At 1255 he ceased unloading and attempted to get underway. However, the vessel was hard aground.

Appellant again tied up to the dock and pumped off 400 gallons more to lighten the vessel but to no avail. The vessel remained hard aground. Finally, Appellant sought to further lighten the vessel by unloading to a tank truck, but none was available.

The vessel remained aground until the flood tide. There was no apparent damage to the vessel, nor any pollution by petroleum products.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge (ALJ). Appellant argues that the charge and specification should be dismissed because:

- 1) The charge and specification are defective as worded;
- 2) There was not substantial evidence in the record to support the government's charge and specification;
- 3) The denials of Appellant's proposed findings are inconsistent with the record;
- 4) Lieutenant BEGLEY's testimony during rebuttal should have been disqualified because of

communications between the Investigating Officer and Lieutenant BEGLEY during a recess;

- 5) Appellant was improperly denied opportunity to present surrebuttal testimony in response to rebuttal testimony of Lieutenant BEGLEY; and
- 6) Fair play and justice require reversal.

APPEARANCES: Preti, Flaherty & Beliveau, by Martin R. Johnson, Esquire.

OPINION

I

Appellant contends that the specification is defective as worded because it apprised Appellant that he failed to adequately take account of the fall of the tide at about 1315 of the date in question, instead of approximately 1230. A specification is not defective if it clearly sets forth the facts which are the basis of the specification and is sufficient to enable the person charged to identify the offense and to prepare a defense. Appeal Decision No. 1914 (ESPERANZA). In the instant case, the time of the negligent act was alleged in the specification to have been 1315; but in fact, it may have been shortly after 1230. This is not enough variance to find the charge defective; Appellant was sufficiently notified of the charge against him.

II

Appellant also contends that there is not substantial evidence in the record to support the negligence theory as charged. Although the ALJ discussed in his opinion the existence of substantial evidence to find Appellant guilty of negligence, this discussion was merely used to bolster his finding based upon the doctrine of the un rebutted presumption.

The grounding of the M/V CAPTAIN LARRY in the vicinity of Brewer's Boatyard Dock on a charted shoal creates a rebuttable presumption of negligence. Unrebutted it suffices to make a prima facie case of negligence against the Appellant. Appeal Decision No. 2177 (Homer). While not shifting the burden of proof from the Investigating Officer, this presumption requires Appellant to come forward with evidence sufficient to rebut it. This Appellant attempted through his own testimony. His explanation of the grounding cause, a sandy ridge about six inches high and two to three feet in length under the vessel, was rejected by the ALJ because insufficient evidence of such a ridge existed. Lieutenant

BEGLEY, who investigated the incident testified that he saw no ridge, even though the hull was exposed at the time he departed at about 1515. (Tr. 151: 1-5; tr. 155: 15-18). The photographs in evidence revealed no ridges (I. O. Exhibit No. 3-8) and nothing in Appellant's Report of the Casualty to the Coast Guard (I.O. Exhibit No. 12) indicated that a ridge existed which might have caused the grounding. Consequently, Appellant was unable to rebut the presumption. On this record, I am unable to conclude that the ALJ erred in rejecting Appellant's explanation and in finding the presumption of negligence unrebutted. This alone would support a finding of negligence; here negligence was also proved by evidence without benefit of the presumption.

Negligence is defined in 46 CFR 5.05-20(2) as "the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform." In order to prove the charge, it is necessary for the Coast Guard to prove that Appellant's conduct in some manner failed to conform to the standard of care required of the reasonably prudent operator of an inland tanker under the same circumstances confronted by Appellant. Obviously, Appellant was bound to operate the vessel without grounding. Appellant entered the Brewer's Boatyard Dock to unload fuel knowing that within 20-24 minutes the ebbing of the tide could cause the vessel to ground. A prudent operator would know the exact draft of his vessel before taking such a risk. In the instant case, Appellant did not know his exact draft nor did he take measures to determine it. A prudent person would know the exact depth of the water before taking such a risk. Appellant did not know, nor did he take any soundings to determine, the water's depth. The ebbing of the tide caused the vessel to ground before the vessel tried to depart. I find that there is sufficient evidence to find Appellant negligent in this grounding incident.

III

Appellant argues that the denial of Appellant's proposed findings of fact is inconsistent with the record. In 46 CFR 5.20-155(a), the ALJ is required to render a decision consisting of a "Finding of Fact," including necessary evidentiary and ultimate facts pertaining to each specification. Sitting as the trier of fact, the ALJ has discretion to find the ultimate facts pertaining to each specification. He sifts the material in the evidentiary record in order to render a "Finding of Fact." It need not be consistent with all evidentiary material contained in the record so long as sufficient material exists in the record to justify such a finding. Appeal Decision No. 1964 (COLON).

After a review of the record I find that the ALJ's rejection of Appellant's proposed findings was neither arbitrary, nor capricious, and there is no reversible error here. Appeal Decision No. 2183 (FAIRALL).

IV

Next, Appellant contends that Lieutenant BEGLEY's testimony during rebuttal should have been disqualified because of communications between the Investigating Officer and Lieutenant BEGLEY during a recess. There is no rule of evidence which forbids a person representing a party from speaking with his witness. Therefore, Appellant's contention on its face is without merit.

V

Appellant contends that surrebuttal testimony in response to the rebuttal testimony of Lieutenant BEGLEY should have been allowed because Lieutenant BEGLEY changed his testimony. Lieutenant BEGLEY initially stated that Coast Guard personnel had not moved their vessel until about 1515 when they were about to depart. He subsequently changed his testimony by saying that they had moved the boat earlier because they were afraid that they would not be able to get underway. Whether the boat was moved or not is not a material fact in this case. I see no error by the ALJ in denying Appellant's request to bring in surrebuttal testimony where there can be no probative consequence. the fact that the witness may have impeached himself goes to the weight of his testimony. (See Appeal Decision No. 2016 (AGOSTINI).) the judge was aware of this and other evidence when he ultimately found that a ridge did not exist. Consequently, I find no reversible error when the ALJ denied Appellant's request for surrebuttal testimony.

VI

Finally, Appellant contends that the ALJ acted in an arbitrary and capricious manner throughout the hearing such that fair play and justice require reversal. No specific acts were mentioned by Appellant in support of this contention. From the record of trial, I find no such behavior. Therefore, there is no choice but to take this argument to be frivolous in nature. Such a contention will not be dealt with here. Appeal Decision No. 1518 (WIGREN).

CONCLUSION

The specification alleging negligence in grounding the M/V CAPTAIN LARRY has been proved by substantial evidence. There was no reversible error in the proceedings and the order should be affirmed.

ORDER

The order of the Administrative Law Judge, dated at Portland, Maine on 23 November 1979, is affirmed.

B. L. STABILE
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 24th day of August 1982.