

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 012349 replacing LICENSE NO. 528873
Issued to: Walter William JAFFEE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2340

Walter William JAFFEE

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

By order dated 31 January 1983, an Administrative Law Judge of the United States Coast Guard at Alameda, California suspended Appellant's license for six months, plus six months on twelve month's probation, upon finding him guilty of negligence. The specifications found proved allege that while serving as Operator on board the United States motor vessel PILLAR POINT 3 under authority of the license above captioned, on 7 November 1982, Appellant knowingly carried passengers for hire on the PILLAR POINT 3 on a sport fishing voyage off the coast of California from Pillar Point Harbor and back to Pillar Point Harbor with the starboard engine inoperative, the starboard engine-driven bilge pump inoperative, and the starboard shaft disconnected from the reduction gear in an unsafe manner.

The hearing was held at Alameda, California on 1 December 1982.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of four witnesses and nine exhibits.

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 all specifications had been proved. He then entered an order suspending all licenses issued to Appellant for a period of six months plus six months on twelve months probation.

The Decision and Order was served on 2 February 1983. Appeal was timely filed on 10 February 1983 and perfected on 13 June 1983.

FINDINGS OF FACT

On 7 November 1982, Appellant was serving as Operator on board the United States motor vessel PILLAR POINT 3 and acting under authority of his license on a sport fishing voyage out of Pillar Point Harbor, California.

The vessel PILLAR POINT 3, official number 269744, was and inspected steel passenger vessel, 60 feet long and of 44 gross tons, powered by twin diesel engines. Each engine was cooled by a keel cooler, which must be connected and functioning in order for the engine to be safely operated. Each engine drove a shaft and propeller through a transmission connected to the shaft by a flexible coupling. Each shaft extended aft from the coupling through a stern tube in the hull to the propeller. Aft of each propeller was a rudder. The starboard engine powered, through a belt drive, the vessel's only fixed bilge pump. The vessel was also equipped with a portable hand bilge pump. The Certificate of Inspection allowed carriage of 49 passengers and required a crew of one licensed ocean operator and one deckhand.

On 7 November 1982, PILLAR POINT 3 was used for half-day charter fishing trip with thirty Cub Scouts and accompanying adults aboard. Appellant served as the Operator and was assisted by a deckhand who had approximately 2200 hours of experience, including approximately 60 trips as deckhand on PILLAR POINT 3. Prior to the trip, the starboard engine keel cooler had been disconnected. Consequently, the starboard engine could not be safely operated, and in fact was not operated throughout the trip. Hence, the starboard engine-driven fixed bilge pump was also inoperative. Further, the starboard shaft flexible coupling was not connected for the trip.

In the course of the trip, the disconnected starboard shaft slid aft. As a result, water began to leak into the engine compartment through the stern tube, necessitating use of the hand bilge pump. It was the only one available since the engine-driven pump could not be operated. The shaft moved far enough aft for the propeller to foul the rudder and prevent proper steering.

Despite these problems, Appellant continued the trip, going from one fishing spot to another. He made no effort to return to the harbor before the scheduled time. When he did eventually return, he was unable to enter the harbor because of the steering impairment. Another vessel had to tow the PILLAR POINT 3 into the harbor and assist in debarking the passengers.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends that:

1. The specifications do not state an offense.
2. The findings of fact, opinions and conclusions set forth in the Administrative Law Judge's Decision and Order are unsupported by the evidence.
3. The ordered sanction is excessive.

APPEARANCE: Appellant pro se

OPINION

I

Appellant contends that the acts alleged in the specifications supporting the charge of negligence are not violations of any law and are, therefore, not negligent acts. I cannot agree.

Negligence is defined for the purpose of suspension and revocation proceedings by 46 CFR 5.05-20(a)(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." Violation of a specific law or regulation is not necessary to establish negligence.

The reasonably prudent operator of an inspected vessel would not carry passengers when half the propulsion machinery (engine or propeller) is inoperative or when the bilge pump, critical for safety, is inoperative.

In addition, 46 CFR 182.25-10(a) required the PILLAR POINT 3 to be provided with a fixed bilge pump and a portable hand bilge pump. Carriage of passengers when her engine-driven bilge pump is inoperative is specifically a violation of that regulation. Where regulations exist, they establish a standard of care to which the reasonably prudent person adheres. Violation of that standard, in the absence of an adequate explanation, is negligence. Appeal Decisions Nos. 2261 (SAVOIE), 1515 (EWING), and 1073 (FARACLAS). Appellant's actions in total indifference to and in violation of that regulation were properly found negligent.

II

Appellant disputes numerous specific findings of fact and the

conclusions drawn by the Administrative Law Judge. I find no merit in his contentions.

The findings of fact were based primarily on the story of the trip given by the deckhand, supported in general by the testimony of a passenger on the trip and by most of the Appellant's story. Certain important technical facts were established by an expert Coast Guard witness and by Coast Guard inspection records pertaining to the vessel. That evidence and the inferences which may be drawn therefrom support three facts central to the findings of negligence on the three specifications: that the starboard engine was never run during the trip, that the starboard shaft was disconnected before the trip began, and that the starboard engine keel cooler was disconnected before the trip began. Appellant disputed these particular facts in his testimony and disputes them now on appeal.

Because Appellant's testimony contradicted the deckhand's, the credibility of both witnesses is critical. Naturally, Appellant urges that he should be believed rather than the deckhand. But the Administrative Law Judge specifically noted that "the testimony of the deckhand...is completely believable whereas there is considerable question and doubt about certain parts of [Appellant's] testimony." I have frequently stated that it is the function of the Judge to evaluate the credibility and veracity of witnesses and resolve inconsistencies in the evidence. Appeal Decisions Nos. 2333 (AYALA), 2290 (DUGGINS), 2212 (LAWSON), and 2116 (BAGGETT). Therefore, unless the Judge's resolution is unreasonable, I will not re-evaluate the evidence on appeal.

Appellant, in his appeal, has offered additional information pertaining to the deckhand's credibility, but I will not consider information from outside the record. See Appeal Decisions Nos. 2151 (GREEN), 2289 (ROGERS), 1977 (HARMER), 1752 (HELLER). See also 5 U.S.C. 556(e).

In addition, Appellant contest the drawing of inferences from circumstantial evidence to support the finding that the starboard shaft was disconnected before the trip began. Appellant argues, "There is no eyewitness testimony to indicate otherwise" than that the facts were as he claimed them to be. However, eyewitness testimony is not required. Circumstantial evidence may form a proper basis for a finding, Appeal Decision No. 1930 (CRUZ).

Appellant specifically objects to the following passage in the Judge's decision:

[Appellant] sent [the deckhand] to specifically look into the starboard engine compartment to see if the shaft had slid.

(This specific instruction...indicates that Respondent already knew or certainly feared that the shaft had slid aft, even before he supposedly first became aware that the shaft was disconnected and thus free to drift aft.)

Appellant calls this "blatant speculation." The fact is that the deckhand testified that he and Appellant heard a noise, whereupon Appellant sent the deckhand to look into the starboard engine compartment "to see if the shaft had slid." From this circumstantial evidence, the Administrative Law Judge could properly draw the inference that, indeed, Appellant already knew that the shaft was disconnected.

The Administrative Law Judge also found, and Appellant disputes, that after water began to leak into the vessel due to displacement aft of the starboard shaft, Appellant navigated the vessel farther from the harbor. The Administrative Law Judge noted in his opinion that this exposed the passengers to the additional hazard of increased distance from possible assistance. However, there is no evidence on the direction of the vessel's various movements after the leak began. There is evidence on how long each of these movements took which tends to show that the vessel's movements did not lead in a direct line back to the harbor. In any event, the evidence clearly supports a finding that Appellant made no effort to return to the harbor promptly despite the leak or other problems. The resulting continued exposure to danger is essentially the same as that noted by the Administrative Law Judge. Appellant's contention, "The only reason it took so long to return to the harbor was that it took that amount of time for appellant's efforts [to correct the hazardous situation] to become effective," is not supported by the evidence.

With the inconsequential exception noted above, concerning increased distance from the harbor, there was substantial evidence to support the findings of the Administrative Law Judge. Therefore, the findings will not be disturbed. See Appeal Decision Nos. 2267 (ERVAST), 2255 (BASIR), 2217 QUINN).

III

Appellant contends that the sanction ordered, a combination of outright suspension for six months and a further six-month suspension on twelve months probation, is excessive. I disagree.

Appellant argues that the sanction imposed on him exceeds that provided by the Scale of Average Orders, 46 CFR Table 5.20-165. However, the table is only a general guide. The actual order imposed in an individual case depends "on its individual facts and merits." 46 CFR 5.20-165(a). Further, Appellant presents a list

of previous cases in each of which the order was more lenient than the one in this case. Comparison with other cases is unpersuasive. As stated in Appeal Decision No. 1760 (POMPEY), " each order is tailored to the severity of the offense as evaluated by the [Administrative Law Judge]."

The regulations establish minimum safety standards. The Coast Guard places on a license holder a heavy responsibility for upholding them and for maintaining safe conditions generally. The licensed operator is expected to ensure continuing compliance with the regulations. See Appeal Decisions Nos. 1515 (EWING), 2308 (GRAY).

Appellant points out that if his actions were unsafe, they threatened him as much as anyone else on the vessel, implying that whatever risk he undertook was acceptable. Yet the risks an individual is willing to take upon himself are not necessarily acceptable for passengers on a vessel. I agree with the Administrative Law Judge that Appellant's "obvious total disregard for the safety of his passengers clearly warrants the sanction ordered here."

CONCLUSION

There was substantial evidence of a reliable and probative character to support the findings and order of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge at Alameda, California dated 31 January 1983 is AFFIRMED.

B. L. STABILE
VICE COMMANDANT

Signed at Washington, D.C., this 20th day of January 1984.

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