

UNITED STATES OF AMERICA
UNITES STATES COAST GUARD vs.
LICENSE NO. 179141
ISSUED TO: Lester G. Eastman, Jr.

DECISION OF THE VICE-COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2365

Lester G. Eastman, Jr.

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

By order dated 4 August 1982, an Administrative Law Judge of the United States Coast Guard at Portland, Maine suspended Appellant's license for two months on twelve months' probation, upon finding him guilty of negligence and misconduct. The specification found proved under the charge of negligence alleges that while serving as Operator on board the United States M/V VIKING SUN under authority of the license above captioned, on or about 21 June 1981, Appellant continued the voyage of the M/V VIKING SUN into hazardous waters after the starboard engine stalled. The specifications found proved under the charge of misconduct allege that Appellant wrongfully: (1) failed to provide the passengers with emergency procedures in accordance with 46 CFR 185.25-1 and (2) operated the M/V VIKING SUN while carrying passengers without a valid certificate of inspection.

The hearing was held at Portland, Maine on 15, 16, and 17 June 1982.

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

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

In defense, Appellant offered in evidence five exhibits, the testimony of one witness, and testified in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been proved. He then served a written order on Appellant suspending all licenses issued to Appellant for a period of two months on twelve months' probation.

The entire decision was served on 5 August 1982. Appeal was

timely filed on 7 September 1982 and perfected on 13 June 1983.

FINDINGS OF FACT

On 21 June 1981, Appellant was serving as Operator on board the United States M/V VIKING SUN and acting under the authority of his license. The M/V VIKING SUN is a twin engine, 130-foot, 96 Gross Ton, 3-deck steel passenger vessel built in 1980. Both engines receive fuel from a common supply.

The certificate of inspection was issued on 18 June 1980 at Providence, Rhode Island and expired on 18 June 1981. The certificate allowed the vessel to carry 485 passengers and required a crew of two licensed operators and eight deckhands. It was amended on 5 December 1980 at the port of Miami, Florida. The amendment did not affect the expiration date.

The vessel was operated in Florida during the winter of 1980/1981. During this time emergency check-off lists and placards were posted showing how to don life jackets. They remained aboard until the vessel arrived in Portsmouth, New Hampshire on 15 May 1981.

On 21 June 1981, the vessel was scheduled to depart the regular Viking dock in Portsmouth, New Hampshire at about 1900 for a Father's Day dinner cruise to the Isle of Shoals in the Atlantic Ocean. Appellant and the owner, Arnold Whittaker, agreed that the vessel should go up the Piscataqua River to Great Bay rather than out on the open ocean. At approximately 1900, the vessel departed with 162 passengers aboard. The tide was ebbing in a generally southeasterly direction, which caused a northwesterly eddy to occur in the area where the vessel was berthed. The peculiarities of the Piscataqua River are well know to local navigators. The Atlantic Coast Pilot warns of rapid tidal currents, hazardous cross currents, and changes in direction of the current throughout the entire length of the river. The unusual currents seriously hamper navigation, and the Atlantic Coast Pilot cautions navigators of this.

The M/V VIKING SUN was moored port side to the dock, with a bow line, a stern line, and two spring lines immediately prior to 1900 on 21 June. Its dock is approximately 500 yards east of the Route One Bypass bridge. The Granite State Minerals Dock lies downriver, and a number of lobster traps and a submerged ledge are upriver. There was a bulk carrier discharging cargo at the Minerals dock, moored with her bow extending upriver. Both the bulk carrier and the upriver shoaling restricted the approach of the M/V VIKING SUN to her own dock. In addition, a strong back eddy was setting in from the channel toward her dock. All of these

factors restricted but did not prevent the M/V VIKING SUN's movement in and out of her mooring.

Prior to getting underway, Appellant did not explain emergency procedures, announce the location of personal flotation devices, or state the type carried on the vessel for lifesaving purposes. In addition, he did not insure that instructive placards were provided to afford all passengers the opportunity to become acquainted with the above information.

At 1900 Appellant started the port engine, and the stern line and spring lines were cast off. While the bow line was still made fast and holding, Appellant attempted, unsuccessfully, to start the starboard engine. While Appellant was doing this, the vessel drifted away from the dock approximately 130 feet. The engineer reported that oil was spurting onto the engine, and the vessel's owner suggested that changing the oil filter might stop the leak. The vessel remained in this condition, held by the bow line, for about twenty to thirty minutes. The owner then told Appellant, "take the boat out."

After the bow line was cast off, Appellant backed out into the channel using only the port engine. There were 162 passengers on board and the river was relatively crowded with small craft due to an annual "blessing of the fleet" ceremony. Upon reaching the channel, Appellant put the port engine on full throttle, turned the wheel over to Mr. Danjou, the other operator, and went below to investigate the malfunction of the starboard engine.

With Mr. Danjou at the wheel, the vessel passed through and cleared the Bypass Bridge. About 500 yards above the Bypass bridge and halfway to the I-95 bridge, the port engine began to lose power. It finally stalled fifteen minutes after departure. Appellant then returned to the wheelhouse, dropped anchor near the right bank of the river, and called the Coast Guard for assistance.

BASES OF APPEAL

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

1. The Administrative Law Judge's opinion was biased.
2. The Administrative Law Judge made the wrong decision after hearing conflicting testimony.
3. He was justified in operating the vessel without a valid certificate of inspection.

APPEARANCE: Hoch, Flanagan & Snyder, P.C., by Timothy R. McHugh

OPINION

I

Appellant contends that he was denied due process of law because the Administrative Law Judge was biased. I disagree.

Appellant contends that the Administrative Law Judge demonstrated his bias toward him by continually making reference to his and Mr. Danjou's consideration of the financial impact to the owners if the M/V VIKING SUN did not get underway. There is nothing in the record to indicate that this reference constituted bias toward Appellant. It merely pointed out what might have been a factor in deciding whether to abort the voyage. Making such a decision based on commercial impact neither excused the negligence, nor provided a basis to support negligence. The record does not reveal that this observation of the Administrative Law Judge prejudiced the Appellant. Bias or prejudice must be affirmatively shown. See Appeal Decision No. 1554 (McMURCHIE).

Appellant further contends that the Administrative Law Judge's extended discussion of whether or not Appellant should have made radio calls concerning the vessel's condition demonstrated prejudice.

The Administrative Law Judge has broad discretion to consider all factors of the case in reaching an appropriate sanction. Whether or not Appellant reported the condition of his vessel is one of the circumstances surrounding the incident. There is no indication that the Administrative Law Judge considered this improperly. He reaffirmed, throughout the hearing, that the scope of the first charge was limited to whether Appellant was negligent in backing the M/V VIKING SUN into the Piscataqua River after the starboard engine failed.

II

Appellant urges that the Administrative Law Judge made the wrong decision after evaluating the sharp conflict in the testimony given by the witnesses concerning the facts. I disagree.

Appellant suggests that the testimony, favorable to him, given by Mr. Danjou and Mr. Holt was more credible than the testimony given by Mr. Ross and Mr. Hindle. Although Mr. Danjou and Mr. Holt testified that, in their opinion, Appellant acted properly under the circumstances, the Administrative Law Judge is not bound by the opinion of expert witnesses. Appeal Decisions Nos. 2302 (FRAPPIER)

and 2294 (TITTONIS). The cases are numerous which hold that the trier of fact is the judge of credibility and determines the weight to be given to evidence. Appeal Decisions Nps. 2302 (FRAPPIER); 2290, (DUGGINS); 2156 (EDWARDS); and 2017, (TROCHE).

In Appeal Decision No. 2296 (SABOWSKI), the Commandant stated:

The Administrative Law Judge is not bound by the witnesses' opinions, but must make his own determinations based on the facts and law. It is his function to determine the credibility of witnesses and then to weigh the evidence admitted at the hearing. His decision in this matter is not subject to being reversed on appeal unless it is shown that the evidence upon which he relied is inherently incredible. Appeal Decisions Nos. 2183 (FAIRALL) and 2116 (BAGGETT). On the facts alone, the test for review of an Administrative Law Judge's decision is not whether a reviewer may disagree with the Judge, but whether there is substantial evidence of a reliable and probative character to support the findings.

The evidence established that Appellant chose to navigate the M/V VIKING SUN with one half of the power for which she was designed, on a waterway known for hazardous currents. He did this with 162 passengers aboard at a time when there was current present and the waterway was crowded with other vessels, including small pleasure craft. In addition, Mr. Holt testified that "a fuel problem is right on the top of your list" as a cause for diesel engine failure and that it was reasonable to conclude that the other engine would experience difficulty if the fuel were contaminated. Since no other cause for failure of the starboard engine had been found, Appellant should have anticipated similar problems with the port engine. The Administrative Law Judge was well justified in concluding that Appellant was negligent in spite of the opinions of Mr. Danjou and Mr. Holt.

III

Appellant concedes that there was a "technical violation" of 46 U.S.C. 390c and 46 CFR 176.01-3. Appellant argues that the violation was justified because he was under the impression that a telephone conversation between the vessel's owner and an employee of the Coast Guard resulted in extending the expiration date of the certificate of inspection. I disagree.

The law requires that a valid certificate of inspection be aboard and displayed on vessels requiring it for continued operation. The vessel's operator is expected to know the status of

the certificate of inspection and ensure that it is properly posted with expiration date stickers readily visible. Appeal Decision No. 2308 (GRAY).

The certificate of inspection had indeed expired. Operating a vessel subject to inspection, when carrying more than six passengers, without a valid certificate of inspection is a violation of 46 U.S.C. 390c and misconduct. See Appeal Decision No. 2299 (BLACKWELL)

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the finding that the charges and specifications were proved. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at Portland, Maine on 4 August 1982, is AFFIRMED.

B.L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 10th day of July, 1984.