

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE No. 44116  
Issued to: Bennie W. POPE

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2402

Bennie W. POPE

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5. 30-1.

By order dated 27 February 1985, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's merchant mariner's license for a period of two months plus an additional four months on eighteen month's probation upon finding him guilty of negligence. The specification found proved alleges that, while navigating the M/V CITY OF GREENVILLE under the authority of his license on or about 2 April 1983, Appellant failed to maintain proper control of his vessel and tow resulting in an allision with the Poplar Street Bridge at mile 179.2 of the Upper Mississippi River.

The hearing was held at Memphis, Tennessee from 6 to 9 December 1983.

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

The Investigating Officer introduced in evidence six exhibits and the testimony of two witnesses.

in defense, Appellant introduced one exhibit, his own testimony, and the testimony of one other witness.

After the hearing, the Administrative Law Judge took the matter under advisement and ultimately rendered a written Decision and Order on 27 February 1985. She concluded that the charge and specification had been proved and suspended all licenses issued to Appellant for a period of two months plus four months on eighteen months' probation.

The Decision and Order was served on 28 February 1985. Appeal was timely filed on 25 March 1985 and perfected on 16 April 1985.

FINDING OF FACT

At all relevant times on 2 April 1983, appellant was serving as Operator aboard the M/V CITY OF GREENVILLE under the authority of his license. The M/V CITY OF GREENVILLE and its tow were down bound on the Upper Mississippi River. They were under the actual direction and control of Appellant from the departure from Marathon Pipeline Company docks, mile 1966.5, Upper Mississippi River, at approximately 1645, until they struck the Poplar Street Bridge at St. Louis, Missouri, mile 179.2, Upper Mississippi River, at approximately 2320. The tow was comprised of four loaded petroleum barges arranged single file. Near its stern on the starboard side, the second barge in the tow struck the right hand pier of the alternate span of the bridge. The overall dimensions of the flotilla were approximately 1,050 feet by 50 feet.

On 2 April, the Mississippi River, at St. Louis, was above 27 feet and rising. Flood stage at St. Louis is 30 feet. As a vessel proceeds downstream through St. Louis Harbor, it passes six bridges; the Merchants, McKinley, Veterans, Eads, Poplar Street, and McArthur, in that order. The Eads Bridge is two tenths of a mile down river from the Veterans Bridge. The Poplar Street Bridge is eight tenths of a mile below the Eads Bridge.

The vicinity of the last four bridges is known for having sets, especially in highly water, because of the configuration of that stretch of the river. The severity of the set is usually increased by a strength of the current. The flow of the river at the bend approaching St. Louis Harbor down bound initially goes at an angle from the right descending bank to the left descending bank near the Veterans Bridge and Eads Bridge. When the current hits the left descending bank (Illinois side of the river) above the Poplar Street Bridge, it tends to bounce off that side at an angle and head back for the right descending bank (Missouri side).

Because of the sets in the river, and also because of the close proximity and limited clearances of the bridges, the St. Louis Harbor area is known as a very difficult passage for tows, especially in high water. Night passage is even more difficult because of presence of background lights. The experienced pilots who navigate the area regularly are well aware of the conditions in the St. Louis Harbor and compensate for them.

As the pilot proceeding downstream approaches the Veterans Bridge in high water, he can expect a draft settling him toward the Illinois shore. A similar draft can be found in the down bound approach to the Eads Bridge. However, as a pilot proceeding downstream approaches the main channel span at the Poplar Street Bridge, he can expect a draft setting his tow toward the Missouri shore, and an evermore pronounced draft in the approach to the alternate span. The alternate span is customarily used only by

north bound tows when they are meeting down bound traffic so they do not have to wait to go through the main channel span. In addition, the main channel span has one-hundred feet more clearance than the alternate span, and does not place the tow as deep into the bend. Consequently, the pilot would normally prefer, and be expected to choose, the main channel span of the Poplar Street Bridge, rather than the alternate span unless there was some reason he could not go through the main channel span.

After leaving the Marathon Dock, the M/V CITY OF GREENVILLE passed through lock 27 which is 4 to 5 miles above St. Louis Harbor. Appellant did not inquire about the river stage from lock 27 on the night of the accident. By calling the locks on the marine radio, a mariner can obtain information about the actual stage of the river at any time. However, Appellant did not know he could get such information from the locks. Rather, he judged the stage of the river from a marker he was using on the bank while moored at the Marathon Dock before proceeding downstream. When he left the dock, he believed the river was no longer rising. In fact, the river was continuing to rise.

As Appellant approached the Eads Bridge, he positioned his tow on the sailing line as depicted on the Army corps of Engineers Upper Mississippi Chart No. 140. As the tow approached the bridge it encountered a strong left hand set which moved it toward the Illinois side. As the tow passed under the bridge, Appellant had to swing the stern to the right in order to clear the bridge span and avoid an allision. This maneuver put his tow at an angle heading toward the Illinois shore. As a result, it was not set up to pass through the main channel span of the Poplar Street Bridge. After passing the Eads Bridge, Appellant made no major course changes, but continued downstream toward the Poplar Street Bridge's alternate span. As the flotilla was entering the alternate span, it encountered a set toward the Missouri side. This moved the tow toward the bridge pier separating the two usable spans. Appellant attempted to avoid the bridge pier by swinging his stern to port. However, the tow's starboard side stuck the pier between the second and third barges resulting in the breakup of the tow, fire, and pollution.

Appellant was not familiar with the various sets at the bridges in the St. Louis Harbor. Prior to April 1983 he had not been on watch down bound through the St. Louis Harbor for ten years, except on one occasion in January 1983. Prior to those ten years, he navigated vessels in that area regularly.

The configuration of the navigation lights on the Poplar Street Bridge is as follows: alternate span - one green light in the middle of the span; main channel span - one green light below

three lights in vertical alignment in the middle of the span. On the night of the accident, one of the white lights on the main span was not operating. It is foreseeable on the inland waters that a navigation light may be out.

The visibility on 2 April 1983 was two to three miles. A proper lookout could have seen the piers on the Poplar Street Bridge from the Eads Bridge and the main channel span lights that were operating.

#### BASES OF APPEAL

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

(1) Because the Coast Guard chose to enter evidence of specific acts of negligence, it cannot rely upon the presumption of negligence accompanying the allision;

(2). Because the findings of the Administrative Law Judge are similar to those in Petition of M/V Elaine Jones, 480 F. 2d 11 (5th Cir. 1973) the Administrative Law Judge based her factual findings on that case rather than evidence before her:

(3) It was error to introduce evidence of the effect of the allision:

(4) Because Appellant introduced some evidence that the allision might have been caused by factors other than his negligence, he successfully rebutted the presumption of negligence; and

(5) The cause of the casualty was not the negligence of Appellant, but the fact that one of the navigation lights on the bridge span was extinguished.

APPEARANCE: William C. Bateman, Jr., Esq. of Johnson and Bateman, Memphis, Tennessee.

#### OPINION

I

Appellant asserts that because the Coast Guard introduced evidence of specific acts of negligence, it may not rely on the presumption of negligence accompanying the allision. I do not agree.

Appellant cites no legal authority for the proposition that by introducing proof of specific negligent acts, the Coast Guard was precluded from relying on the presumption of negligence. In addition, Appellant does not assert that the Coast Guard Investigating Officer specifically disavowed the presumption of negligence as a theory upon which the case would be presented. Appellant merely argues that by presenting evidence of the facts surrounding and leading up to the allision, the Coast Guard has abandoned the presumption of negligence.

The fact that the Investigating Officer, in the alternative, seeks to establish negligence by proving specific acts or omissions in addition to relying upon the presumption, does not affect the continued validity of that presumption unless the evidence serves somehow to undermine it. Appeal Decision 2177 (HOMER). See also Appeal Decision 2302 (FRAPPIER). Thus, the fact that the Coast Guard introduced evidence of specific actions leading up to the allision, does not preclude a finding of negligence based on the presumption which accompanies the allision.

Appellant argues that the Administrative Law Judge erroneously relied on the facts as described in Petition of M/V Elaine Jones, 480 F. 2d 11 (5th Cir. 1973) because certain findings of fact in the Decision and Order are similar. I do not agree.

Appellant specifically complains about the findings of the Administrative Law Judge: that Appellant did not properly position himself for passing through the Eads Bridge in a manner that would have compensated for the effect of the draft on his tow; that the draft did in fact affect the position of the M/V CITY OF GREENVILLF'S tow to the extent that strong rudder turns were required to avoid contact with the pier under the Eads Bridge; and that it is general knowledge in the industry that if a vessel does not make the Eads Bridge properly, regardless of whether or not it strikes that bridge, it may not be set up to properly make the main channel span of the Poplar Street Bridge. In support of his position, Appellant argues that he testified that he passed under the Eads Bridge with the rudder straight, that no changes in it were made, and that his expert testified that it was proper to pass under the Eads Bridge on the mid channel line. Appellant does not address the evidence that was presented with respect to the general knowledge of the industry, but only states that this finding goes beyond the record.

There was considerable evidence presented with respect to the proper manner of navigating a flotilla, such as Appellant's, through the bridges in St. Louis Harbor. Some of the witnesses drew diagrams of the flotilla as it passed through the various bridges. A change in the heading of the flotilla, as shown on

these diagrams, strongly suggests a rudder change. In addition, Appellant's own expert witness, after examining the exhibits, stated on cross-examination that it would not have been possible for the flotilla to enter the bridge as shown on the diagrams and also leave it as shown on the diagrams while holding straight rudder. There was testimony that the drafts in the river changed the head of the tow both before and after it passed under the Eads Bridge. There was also expert testimony that if a draft were expected, it would be proper to enter the bridge other than on the channel center line in order to compensate. From this evidence, as well as the totality of the other evidence presented, it was reasonable for the Administrative Law Judge to conclude that Appellant had not properly positioned himself for passing under the Eads Bridge so as to compensate for the effect of the draft on his tow, and that the draft, in fact, affected his flotilla to the extent that rudder turns were required to avoid contact with the pier under the Eads Bridge. Considering the totality of the testimony of the several expert mariners regarding passage through St. Louis Harbor, the Administrative Law Judge's finding that it is general knowledge in the industry that if the vessel does not make the Eads Bridge properly it may not be set up to make the center span of the Poplar Street Bridge is reasonable.

In the Decision and Order, the Administrative Law Judge states that these findings are based on the evidence. In addition, the record shows that the Administrative Law Judge was aware that court cases should be used only for legal precedent, and not as a substitute for evidence in determining the facts. Therefore, I refuse to infer, as Appellant urges, that the Administrative Law Judge based her findings on the description set forth in Petition of M/V Elaine Jones rather than the evidence before her.

### III

Appellant next urges that it was error for the Administrative Law Judge to allow introduction of evidence concerning what transpired after the flotilla allided with the bridge. I do not agree.

Appellant argues that his conduct must be evaluated without reference to the fact that damage occurred. This is, of course, true. Damage is not an element of negligence in these proceedings. See Appeal Decisions 2358 (BUISSFT) and 2319 (PAVELEC). The prima facie case of negligence was complete when the Coast Guard established that the vessel, under Appellant's direction and control, allided with the Poplar Street Bridge. It is permissible, however, to show what the results of the negligence were as an

aggravating circumstances (See PAVELEC and 46 CRF Table 5.20-165) or in the context of the circumstances surrounding the incident.

Appellant relies on Commandant v. Hopkins, NTSB Order EM-93 (1981). However, I do not read this decision as precluding the introduction of any evidence concerning the results of the negligence involved, so long as that negligence is properly proved.

From the record, it is clear, that the Administrative Law Judge based her finding of negligence on the fact of the allision and the events leading up to it. She did not base it on the pollution, fire, and damage which followed. I find no error here.

#### IV

Finally, Appellant argues that if the presumption arose, he rebutted it. I do not agree.

In support of this Appellant urges: first, that his evidence shows that he navigated the flotilla with due care; and second, that in any event, one of the navigation lights on the Poplar Street Bridge was not operating.

Whether or not Appellant operated the vessel with due care was a contested issue at the hearing. Not only did the allision raise a presumption that he had not done so, but the Administrative Law Judge could properly conclude from the totality of the evidence presented that Appellant had not properly set up his tug and tow when it passed through the Eads Bridge to be in proper position to pass through the main channel span of the Poplar Street Bridge. In addition, the Administrative Law Judge could properly infer that Appellant was negligent in failing to promptly locate the main channel span in the Poplar Street Bridge, so as to steer a proper course to pass through it. Appellant was not as familiar with the St. Louis Harbor and the drafts to be encountered in it at the particular stage of the river or of the particular river conditions on the night in question as a pilot should have been. Considering the totality of evidence, whether or not Appellant made a sufficient showing that he had navigated his vessel properly under the circumstances to rebut the presumption of negligence is a question of fact to be resolved by the Administrative Law Judge. I am unable to say that the Administrative Law Judge's determination in this regard was unreasonable.

Appellant further argues that the fact that one of the navigation lights on the Poplar Street Bridge was not operating, establishes that the negligence of the bridge was a cause of the allision and therefore rebuts the presumption of Appellant's

negligence. Even if negligence on the part of the Poplar Street Bridge and those responsible for maintaining it were a contributing cause of the allision, this would not necessarily establish that Appellant was not also negligent. In these proceedings, the contributory negligence of others is not a defense. Appeal Decision 2319 (PAVELEC).

To rebut the presumption of negligence, it would have to be shown that the extinguished navigation light could reasonably have been the cause of the allision, to the exclusion of any negligence on the part of Appellant. In this case, the evidence showed that the navigation lights marking the main channel span of the Poplar Street Bridge consisted of a single green light with three white lights arranged vertically above it. The navigation light for the alternate span of the bridge, through which Appellant ultimately tried to pass, was a single green light. The light that was not operating was one of the three white lights above the green light marking the main channel span. The evidence also showed that navigation lights, from time to time, do fail to operate, and that experienced navigators are aware of this fact. Considering this, I cannot say that Administrative Law Judge's failure to find this circumstance to have rebutted the presumption of Appellant's negligence was unreasonable.

Where as here, the Administrative Law Judge's conclusions are not unreasonable based on the totality of the evidence, even though other conclusions might have been drawn, they will not be disturbed. See Appeal Decision 2333 (AYALA), and 2320 (FRAPPIER).

Appellant argues vigorously that the decision of the National Transportation Safety Board in Commandant v. Jahn, NTSB Order EM-88 (1981), is controlling and the presumption has been rebutted by a showing that the allision could have resulted from factors other than Appellant's negligence. I do not believe that this decision helps Appellant. In JAHN there were factors present which could well have caused the grounding of the vessel which he was piloting entirely independently of any negligence on his part. Where, as here, the other potential causes of the casualty are things for which the Administrative Law Judge could reasonably find that a prudent pilot could compensate, the Administrative Law Judge is not required to find that the presumption is rebutted. See United States v. woods, 681 F.2d (5th Cir. 1982) and Commandant v. Pitts, NTSB Order EM-98 (1983), both decided since JAHN.

#### CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The

hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri on 27 February 1985 is AFFIRMED.

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

Signed in Washington, D.C. this day of Second August 1985.