

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
Merchant Mariner's LICENSE No. 479982  
Issued to; Richard M. GONSALVES

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2407

Richard M. GONSALVES

This appeal has been taken in accordance with Title 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 6 April 1984, an Administrative Law Judge of the United States Coast Guard at Honolulu, Hawaii, suspended Appellant's license for six months plus an additional six months remitted on 12 months' probation, upon finding proved the charge of negligence. The specification originally alleged that Appellant while serving as Chief Engineer aboard the F/V OCEAN PEARL under authority of the captioned license did on or about 21 November 1983 while said vessel was at sea negligently allow oxygen and starting fluid (ether) to be used to start the vessel's main engine which resulted in an explosion which fatally burned the Master and seriously burned six other crewmembers.

At sessions of the hearing convened in Honolulu, Hawaii, on 17 and 18 January 1984, Appellant was absent but was represented by professional counsel.

The Investigating Officer introduced in evidence the testimony of six witnesses and forty-one exhibits.

At a session of the hearing on 22 February 1984, in Honolulu, Hawaii, Appellant was present with his counsel.

In defense, Appellant offered in evidence his own testimony, that of two witnesses, and nine exhibits.

After receiving all of the evidence and hearing the final arguments of both parties, the Administrative Law Judge amended the specification to read "In that you while serving as Chief Engineer aboard fishing vessel OCEAN PEARL, Official No. 643983, under authority of the captioned documents, did on or about 0900, 21 November 1983, while said vessel was at sea, in approximate position 10°03'S 179°21'E, negligently fail to warn and advise the master of the danger of using oxygen to start the vessel's main engine and negligently allowed [sic] oxygen and starting fluid (ether) to be used to start the vessel's main engine which practice

resulted in explosion which fatally burned the master and seriously burned six (6) other crewmembers."

After the hearing, on 6 April 1984 the Administrative Law Judge rendered a written Decision and Order in which he concluded the charge and specification, as amended, had been proved.

The Decision and Order was served on counsel for Appellant by certified mail on 10 April 1984. Appeal was timely filed and perfected on 1 May 1984.

#### FINDINGS OF FACT

On 21 November 1983 Appellant was serving under the authority of his license as Chief Engineer aboard the F/V OCEAN PEARL. The main propulsion diesel engine had stalled approximately 2 1/2 days earlier and Appellant, the Master and other members of the crew had been working continuously since that time to restart it. All of their efforts had been unsuccessful.

The Master decided to use oxygen and starting fluid (ether) in an attempt to start the engine. Although Appellant did not realize there was any possibility of danger, he was opposed to putting oxygen into the engine because he did not think it would work. The Master first pressurized the engine compartment by closing all vents which would allow air to escape, turned on the engine room ventilation input blowers, and then reversed the engine room ventilation output blowers. The Master then sprayed ether into the engine turbo charger intake and opened three oxygen bottles positioned so that the valve openings would blow freely into the turbo charger intake.

With the engine room thus pressurized and the oxygen bottles blowing freely in the vicinity of the turbo charger intake, the Master ordered Appellant to attempt to start the engine. After the second or third attempt there was a violent explosion followed by a fire. The Master and six others were seriously burned and taken to the hospital by helicopter. A few days later the Master died of his injuries.

#### BASIS OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant sets forth the various bases for appeal. Because of the deposition of the first, the others are not discussed. Appellant urges that the administrative Law Judge committed prejudicial error when he sua sponte redrafted the specification.

APPEARANCE: David W. Tiffany, Esq, 111 Elm Street, Suite 333, San Diego, California 92101.

#### OPINION

The question that must be answered is whether the Administrative Law Judge exceeded the permissible limits in amending the specification to conform to the evidence. I conclude that he did.

The regulations for suspension and revocation proceedings permit "the amendment of charges and specifications to correct harmless errors by deletion or substitution of words or figures." 46 CFR 5.20-65(B). However, if an error of substance is found then the regulation mandates that the Administrative Law Judge "shall rule that the defective charge or specification is withdrawn." 46 CFR 5.20-65(c). When an amendment, needed to make a specification conform to the proof substantially changes the specification, the Administrative Law Judge must rule that the defective specification is withdrawn rather than amending it. Appeal decisions 2326 (MCDERMOTT) and 1792 (PHILLIPS).

In MCDERMOTT, I considered a case where a specification had been amended by an Administrative Law Judge. A Chief Engineer had been charged with negligence in connection with his duties as person in charge of oil transfer operations aboard a vessel during bunkering. The original specification alleged that the Chief Engineer had failed to insure that an overflow discharge vent had been adequately and securely blanked off, causing a discharge of oil. After Coast Guard had rested its case, the Administrative Law Judge sua sponte amended the specification to allege that the Chief Engineer had negligently allowed oil to be transferred. I determined that the amendment had changed the offense, thereby putting the Appellant at a disadvantage and hampering his ability to present his defense, since he presumably had prepared his defense, including his cross examination of Coast Guard witnesses, to address the issues raised by the original specification.

Here, I also find that the character of the original specification was substantially changed by the amendment. After the amendment, the specification alleged that Appellant had been negligent not only in allowing oxygen and ether to be used in starting the engine, but also in failing to warn of the dangers involved. The Administrative Law Judge specifically found that Appellant was unaware of the danger involved in putting unregulated oxygen into the engine. He further stated that the finding of

negligence was based on Appellant's failure to advise the master of the dangers which his proposed actions presented, and that the Coast Guard had clearly established that every licensed engineer should have this knowledge. It thus appears that the Administrative Law Judge found Appellant negligent not due to his action or inaction at the time of the incident, but due to his lack of knowledge. This is substantially different allegation from that in the original specification, and one against which Appellant, like the Chief Engineer in MCDERMOTT, was not prepared to defend.

In Appeal Decision No. 2396 (MCDOWELL), I stated:

Deficiencies in the pleading in Administrative proceedings can be cured where the record clearly shows that was no prejudice. In Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 841(D.C. Cir. 1950), it was stated: "there may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprise." This doctrine has been accepted in Suspension and Revocation proceedings. See Appeal Decisions 2358 (BUISSET), 2166 (REGISTER), and 1792 (PHILLIPS). This, of course, does not mean that an Administrative Law Judge should allow a hearing to proceed on a specification that is not adequate. To do so bears or involves a risk that the individual charged will not be adequately prepared to respond to the Coast Guard's allegations. If this were to occur, findings based on such a specification could not be affirmed. Thus, it is incumbent upon the presiding Administrative Law Judge to insure, at the outset of the hearing, that those specifications upon which the hearing is to proceed contain a clear and sufficient statement of the facts constituting the offense alleged. See 5 U.S.C. 554(b)(3) and 46 CFR 5.05-17(b).

After he amended the specification, the Administrative Law Judge offered Appellant a continuance to present further evidence. This offer, however, is not a substitute for the requirement as set forth in 46 CFR 5.20-65(c), to withdraw specifications containing errors of substance. MCDERMOTT, Supra. Here, as in MCDERMOTT, the Administrative Law Judge's withdrawal of the specification would have allowed the investigating officer to prepare and serve a new charge and specification.

#### CONCLUSION

The Administrative Law Judge improperly amended the specification to allege an offense different from that originally

charged and on which the hearing proceeded.

ORDER

The decision of the Administrative Law Judge dated at Long Beach, California, on 6 April 1984 is VACATED, the findings are SET ASIDE, and the charge and specification DISMISSED.

B. L. STABILE  
VICE ADMIRAL, U.S. COAST GUARD  
VICE COMMANDANT

Signed at Washington, D.C. this 17th day of September, 1985.