

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 516721
Issued to: Edward C. MURPHY

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2419

Edward C. MURPHY

This appeal has been taken in accordance with 46 U.S.C. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J).

By order dated 17 May 1985, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for two months outright plus an additional two months on eight months' probation upon finding proved the charge of negligence. The specification found proved alleges that Appellant, while serving as Operator aboard the M/V JOE BOBZIEN, under the authority of the captioned document, on or about 6 January 1985, navigated his tow in such a manner as to cause the tow to collide with the fleeted barges at Mile 808.5, Ohio River, left descending bank.

The hearing was held at Evansville, Indiana, on 20 February 1985.

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 seven exhibits and the testimony of three witnesses.

In defense, Appellant testified on his own behalf and introduced the testimony of one additional witness.

After the hearing the Administrative Law Judge rendered a decision in which she concluded that the charge and specification had been proved. The Administrative Law Judge then issued a written order suspending Appellant's license outright for a period of two months, plus an additional suspension of two months, remitted on eight months' probation.

The complete Decision and Order was served on 17 May 1985. Appeal was timely filed on 6 June 1985 and perfected on 8 August 1985.

FINDINGS OF FACT

At all relevant times on 6 January 1985, Appellant was serving as Operator aboard the M/V JOE BOBZIEN, a 180 foot uninspected towing vessel generating 8400 horsepower, under the authority of his license which authorizes him to serve as First Class Pilot of Steam or Motor Vessels of Any Gross Tons upon certain waters of the Lower Mississippi River, and as Operator of Uninspected Towing Vessels on all of the Inland Waters of the United States excepting waters subject to International Regulations for Preventing Collisions at Sea. At approximately 0400 on 6 January 1985, Appellant assumed the direction and control of the M/V JOE BOBZIEN and its tow at Mile 794, Ohio River. The tow was downbound on the Ohio River, enroute to Cairo, Illinois. The tow consisted of 21 barges, and was configured 5 barges across with 3 strings of 5 barges to port and 2 strings of 3 barges to starboard. The overall length of the flotilla was 1160 feet; the width was 175 feet.

Earlier on the morning of 6 January 1985, the tow had been held up in fog for several hours. Throughout the evening of 5 January and the morning of 6 January, the area had been occasionally blanketed in fog which at times reduced visibility to near zero.

At approximately 0510, the M/V JOE BOBZIEN arrived in the vicinity of a barge fleeting area near Mile 808, where arrangements had been made to pick up three additional barges. A harbor tug, the M/V CAN DO, was to assist in removing the barges from the fleet and adding them to the tow of the M/V JOE BOBZIEN. Upon arrival at the fleeting area, Appellant directed the Chief Mate to prepare to receive the additional barges. The Chief Mate donned his winter gear and went out to the stern of the tow.

The operator of the M/V CAN DO was aware of the fog in the area, and he advised Appellant that if, at any point while he was bringing the barge out, he lost sight of the M/V JOE BOBZIEN, he would return to the bank or the fleet. The M/V CAN DO, with a barge alongside, proceeded toward the M/V JOE BOBZIEN. However, during this period fog set in, and the operator of the M/V CAN DO advised Appellant that he was returning to the fleeting area due to reduced visibility.

With the visibility near zero, Appellant decided it was unsafe to remain where he was, and proceeded downstream seeking a safe mooring. No lookout was posted on the tow. The M/V JOE BOBZIEN was equipped with operational radar, but the high banks along the shoreline resulted in false echoes making it difficult to distinguish the shoreline and barges. As Appellant proceeded downstream, his tow allided with two fleeted barges.

APPEARANCE: John K. Gordinier, Esq., Pedley, Ross, Zielke and Gordinier, 1705 Meidinger Tower, Louisville, Kentucky 40202.

BASES OF APPEAL

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

1. The application of the presumption of negligence that arises when a moving vessel strikes a fixed object is inappropriate in this case.

2. The Administrative Law Judge erred in concluding that Appellant failed to rebut the presumption of negligence.

3. The Administrative Law Judge erred in admitting certain evidence and basing findings thereon.

4. The Coast Guard investigating officer failed to conduct the investigation of this incident in accordance with applicable regulations.

OPINION

I

The gravamen of this appeal is a challenge to the presumption of negligence which arises when a moving vessel allides with a fixed object. Appellant first contends that such a presumption is inapplicable to suspension and revocation proceedings. This argument is without merit.

It is well settled that a presumption of negligence may be invoked in these proceedings. Appeal Decision 2373 (OLDOW), affd sub nom. Commandant v. Oldow, NTSB Order EM-121 (1985); Appeal Decision 2368 (MADJIWITA), affd sub nom. Commandant v. Madjiwita, NTSB Order EM-120 (1985); Appeal Decision 2272 (PITTS), modified sub nom. Commandant v. Pitts, NTSB Order EM-98 (1983); Appeal Decision 2174 (TINGLEY), affd sub nom. Commandant v. Tingley, NTSB Order EM-86 (1981); Appeal Decision 2173 (PIERCE), affd sub nom. Commandant v. Pierce, NTSB Order EM-81 (1980); Woods v. United States, 681 F. 2d 989 (5th Cir. 1982). As Judge Rubin, writing for the Fifth Circuit in Woods, stated:

When a moving vessel collides with a fixed object there is a presumption that the moving vessel is at fault, and this presumption suffices to make out a prima facie case of negligence against the vessel. Brown and Root Marine Operators, Inc. v. Zapata Off-Shore Co., 377 F. 2d 724,

726 (5th Cir. 1967) The burden of disproof of fault by the moving vessel requires demonstration that its operator did all that reasonable care required. Id. The presumption of negligence applies to the operator as well as to the vessel. It works against all parties participating in the management of the vessel at the time of contact. (Citations omitted.) Id. at 990.

II

Appellant next contends that, assuming the presumption of negligence applies, the Administrative Law Judge erred in applying an inappropriate measure of persuasion necessary to rebut the presumption. I disagree.

Appellant argues that the Administrative Law Judge erred in utilizing a "guilty until proven innocent" standard, requiring him to "exonerate himself" in rebutting the presumption. In support of his argument, Appellant cites Appeal Decision 2235 (RABREN). I do not believe that this decision assists Appellant. In RABREN, the Commandant found that the presumption had been rebutted, and stated the rule concerning the effect of a successful rebuttal: "Rebuttal merely returns to the Investigating Officer the burden of going forward with his case."

Here, as discussed supra, the presumption arose when Appellant's tow allided with the fleeted barges. The Administrative Law Judge correctly stated that presumption of negligence, once established, requires Respondent to produce evidence to rebut it, and that rebuttal requires a showing that his vessel was without fault or that the incident was occasioned by the fault of a third party or the result of inevitable accident or act of God, and that he could have taken no reasonable action to have prevented it. Boudin v. J. Ray McDermott & Co., 281 F.2d 81 (5th Cir. 1960); Dibble v. United States, 295 F. Supp. 669 (N.D. ILL. 1968); Appeal Decision 2284 (BRAHN). See also Appeal Decision 2380 (HALL).

Appellant argues that Boudin and Dibble do not stand for the proposition advanced by the Administrative Law Judge. This argument is without merit. See Petition of United States, 425 F. 2d 991 (5th Cir. 1970), Brown & Root Marine Operators, Inc., supra, Elgin, J. & E. Ry. Co. v. American Commercial Line, Inc. 317 F. Supp. 175 (N.D. ILL. 1970).

In an attempt to rebut the presumption, Appellant argues that the fog arose so quickly and was so dense that the accident was inevitable. In addressing this issue, the Commandant has stated:

An accident is said to be "inevitable" not merely when caused by vis major or the Act of God, but also when all precautions reasonably to be required have been taken and the accidents has occurred notwithstanding. (Gilmore and Black, The Law of Admiralty, 2nd Edition, p. 486.) Appeal Decision 2217 (QUINN).

The law is clear that the burden of establishing inevitable accident is a heavy one. Boudin, supra (unexpected severity of forecast hurricane does not establish inevitable accident). Parties claiming the accident was inevitable must exhaust every reasonable possibility under the circumstances and show that under each they did all that reasonable care required. Id. at 88. The burden of persuasion is on the party against whom the presumption operates. James v. River Parishes Co., 686 F. 2d 1129, 1132-1133 (5th Cir. 1982).

Appellant implies that no reasonable action could have been taken to avoid this casualty. However, the record is clear that Appellant did not do all that reasonable care required.

If a master continues to navigate his vessel knowing that dense smoke or fog will "prevent his lookouts from keeping an adequate watch," then he will be held liable for any resulting damage caused by his vessel. Ford Motor Co. v. Bradley Transportation Co. 174 F. 2d 192, 195 (6th Cir. 1949); Bunge Corp. v. M/V Furness Bridge, 558 F. 2d 790, 800 (5th Cir. 1977). See also Carr v. Hermosa Amusement Corporation, Limited, 137 F. 2d 983, 985 (9th Cir. 1943) (Steamship which collided with anchored barge held at fault where there was no showing of "sudden change in visibility such as running into an extraordinary fog density from a much lighter fog area.")

Appellant proceeded in an area where radar was of little or no assistance, under conditions where visibility was near zero, and did so without posting a lookout on the tow.

The issue of a lookout was raised in the investigating officer's cross examination of Appellant. Subsequently, the Administrative Law Judge determined that Appellant had not posted a proper lookout. Appellant complains that the specification at issue did not allege a "failure to use a lookout," and that testimony bearing on the question of a proper lookout should not be considered and could not form the basis for a finding of negligence.

Appellant misses the point. The Administrative Law Judge found that, by showing that the M/V JOE BOBZIEN and its tow struck a moored barge, the investigating officer had established a prima

facie case of negligence, resulting in a presumption of negligence. In a written submission to the Administrative Law Judge after the hearing, Appellant argued that "the allision was a result of an Act of God over which the respondent had no control..." and that the presumption was thus rebutted. The Administrative Law Judge's consideration of whether Appellant was maintaining an adequate lookout was proper in her determination of whether he had done all that reasonable care required - a showing required, as discussed above, to rebut the presumption.

Appellant has not produced sufficient evidence to show that the allision was inevitable. Nor has he shown that his vessel was without fault or that the incident was occasioned by the fault of a third party. He has thus failed to rebut the presumption.

III

Appellant argues that the Administrative Law Judge improperly admitted documentary evidence in the form of weather reports for the general area and logbook entries from other towboats in the area on the date in question. Appellant objected to the admission of these documents at the hearing on the ground that they were irrelevant. The Administrative Law Judge, however, determined they were relevant, noting that Appellant had argued that "the fog condition was an act of God and totally unexpected and could not be anticipated," but that "[t]he evidence clearly shows otherwise." Decision and Order at 9. Relevant and material evidence is admissible in suspension and revocation proceedings. 46 CFR 5.20-95(a). Appeal Decision 2288 (GAYNEAUX). "It is the duty of the Administrative Law Judge to evaluate the evidence and testimony presented at the hearing." Appeal Decision 2378 (CALICCHIO). The Administrative Law Judge's determination as to the relevance of these records is not clearly erroneous or arbitrary and capricious, and will not be disturbed. See CALICCHIO, supra. See also O'Kon v. Roland, 247 F. Supp. 743 (S.D.N.Y. 1965).

Even assuming, arguendo, that it was error to admit these documents, the error would be harmless. There is still substantial evidence, as discussed above, to support the Administrative Law Judge's determination that the charge and specification were proved.

IV

Appellant contends that the Administrative Law Judge erred in refusing to consider evidence of alleged misconduct on the part of the Coast Guard investigating officer who investigated this casualty and who subsequently preferred the charge and presented the Coast Guard's case before the Administrative Law Judge.

Appellant alleges that the investigating officer failed to abide by the rules and regulations pertaining to the investigation of marine casualties. I find no error here.

Suspension and revocation proceedings are procedurally distinct from pre-hearing investigations. Appeal Decision 2216 (SORENSEN). Concerning this issue, the Commandant has held:

[W]hen a party has been accorded all his rights in a Part [5] proceeding, when evidence properly excludable has been excluded, and when the procedural requirements for a hearing under the part have been met, no alleged error in a proceeding under Part [4], nakedly and without more, constitutes a bar to hearing under Part [5]. Appeal Decision 2004 (LORD). See also Appeal Decision 2158 (MCDONALD).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions 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 dated 17 May 1985, at St. Louis, Missouri, is AFFIRMED.

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

Signed at Washington, D.C. this 3rd day of March, 1986.