

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 192191
Issued to: Jephtha E. TURNER, Jr.

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2438

Jephtha E. TURNER, Jr.

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 19 July 1985, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended Appellant's license for six months upon finding proved the charges of negligence and misconduct. The negligence specifications found proved alleges that Appellant, while serving as operator aboard the M/V GULF QUEEN, under authority of the captioned document, did on or about 9 March 1985 fail to sound proper whistle signals, while said vessel was at anchor in an area of restricted visibility, at or near 28°55'N and 92°52'W in the Gulf of Mexico. The misconduct specification found proved alleges that Appellant did, on or about 8 March 1985, proceed on a voyage of greater than 12 hours, without the required number of licensed operators on board, at or near 28°55'N and 92°52'W in the Gulf of Mexico.

The hearing was held at Port Arthur, Texas, on 15 April 1985. At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charges and supporting specifications.

The Investigating Officer introduced in evidence eight exhibits and the testimony of one witness. In defense, Appellant introduced in evidence six additional exhibits and testified in his own behalf.

The Administrative Law Judge rendered a written Decision and Order on 19 July 1985. He concluded the charge and specification of negligence and the charge of specification of misconduct had been proved and suspended Appellant's license for six months.

The complete Decision and Order was served on 22 July 1985. Appeal was timely filed on 26 July 1985 and perfected on 17 October 1985.

FINDINGS OF FACT

At all relevant times on 8 and 9 March 1985, Appellant was serving as Operator under the authority of his license aboard the M/V GULF QUEEN, a 50-foot vessel owned by Appellant. The U.S. Coast Guard Certificate of Inspection for the vessel required that it "must be manned with the following licensed and unlicensed personnel ... 2 ocean operators, 2 deckhands." However, the Certificate additionally stated that "[w]hen operating not more than 12 hours in any 24-hours period, the vessel may be operated with: one(1) ocean operator and two (2) deckhands."

The M/V GULF QUEEN departed Cameron, Louisiana at 1900 on 8 March 1985 for a scheduled charter fishing voyage of approximately 21 to 24 hours. Appellant was aboard with 15 passengers and 4 deckhands. Only the Appellant possessed a proper license to serve as an ocean operator of a passenger-carrying vessel.

During the voyage, Appellant anchored or moored the vessel on several occasions. At approximately 1100 on 9 March, Appellant anchored at a fishing location of 28°55'N and 92°52'W in the Gulf of Mexico, a location where the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS) apply. While the vessel was at anchor, visibility was restricted by fog to approximately one quarter of a mile. The M/V GULF QUEEN was equipped with a four-inch diameter hand held bell and an air-powered horn as sound signaling devices.

While the passengers were fishing, Appellant was in the wheelhouse periodically watching the radar which was set on the three-mile range. After about 30 minutes at anchor, Appellant observed on the radar the approach of another vessel. Appellant was not sounding any signals prior to this time. Using the radar, Appellant determined the approaching vessel to be traveling at a speed of approximately 20 knots on a collision course with the M/V GULF QUEEN. Appellant first attempted without success to contact the approaching vessel on Channels 16 and 13 of his VHF-FM transceiver. In a further attempt to alert the other vessel of his presence, Appellant next sounded his bell. Shortly afterwards he began to sound repeatedly one prolonged and two short blasts using the vessel's whistle, eventually followed by a number of short blasts. However, there was no response from the approaching vessel, the M/V ALAN McCALL, an offshore crewboat. The crewboat collided with and sank the anchored M/V GULF QUEEN resulting in the loss of one passenger.

The proximate cause of the collision was the failure of the operator of the M/V ALAN McCALL to maintain a proper lookout and to operate his vessel at a safe speed in restricted visibility.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant asserts the following grounds for appeal:

1. Appellant excepts to the finding of negligence, arguing that his actions in no way caused or contributed to the resulting collision; and

2. The term "operating" as used on the Certificate of Inspection for Appellant's vessel was not defined by the Coast Guard as it applied to licensing and manning regulations.

APPEARANCE: V. Farley Sonnier, Esq., of Davidson, Meaux, Sonnier and McElligott, 810 South Buchanan St., P.O. Box 2908, LaFayette, LA 70502.

OPINION

I

In an extensive discussion of the cause of the collision between the M/V GULF QUEEN and the M/V ALAN McCALL, Appellant alleges he was not negligent since his actions in no way caused or contributed to that collision.

In suspension and revocation proceedings, a violation of a navigation rule itself is negligence. Appeal Decisions 2386 (LOUVIERE) and 2358 (BUISSSET). Whether or not Appellant's actions actually caused the collision is not an element of negligence. It is not the function of suspension and revocation actions to determine liability. "[O]ur inquiry is limited to whether the [Appellant] acted negligent." Appeal Decision 2277 (BANASHAK); see Also Appeal Decisions 2395 (LAMBERT); 2358 (BUISSSET); 2261 (SAVOIE); and 2174 (TINGLEY), affd sub nom. Commandant v. Tingley, NTSB Order EM-86 (1981). Proximate cause, although needed to establish civil liability for damages, is not an element of negligence for the purposes of 46 CFR §5.0520-(a)(2).

An issue not raised by Appellant on appeal concerns the sufficiency of the negligence specification. The specification alleged that Appellant failed "to sound proper whistle signals" while at anchor in an area of restricted visibility. The Administrative Law Judge determined that, under rule 35(c) of the 72 COLREGS, Appellant's vessel was required to "sound at intervals of not more than 2 minutes three blasts in succession, namely one prolonged followed by two short blasts." The Administrative Law Judge applied this rule to Appellant's vessel as a "vessel restricted in her ability to maneuver, ...a vessel engaged in fishing ..." (Decision and Order at 16). He also cited Rule 35(d)

which provides that "a vessel engaged in fishing, when at anchor, and a vessel restricted in her ability to maneuver, shall ... sound the signal prescribed in paragraph (c) of this rule." However, the facts here clearly show that Appellant's vessel was neither "restricted in her ability to maneuver" nor "engaged in fishing" as these terms are defined by Rule 3.¹ Thus, Rules 35(c) and (d), requiring whistle sound signals, do not apply.

The defect in the specification however does not require dismissal of the specification at this stage of the proceedings. Findings leading to an order of suspension or revocation can be made without regard to the framing of the original specification as long as Appellant has actual notice and the questions are litigated. Kuhn v. Civil Aeronautics Board, 183 F. 2d 839 (D.C.Cir. 1950); Appeal Decision 1792 (PHILLIPS).

I

I note that during the hearing, the Investigating Officer relied upon Rule 35(g)² to prove the negligence charge and specification. TR-136, 137. However, as noted above, the Administrative Law Judge found Appellant was required to sound whistle signals, erroneously relying on Rules 35(c) and (d). Accordingly, the Administrative Law Judge could have made additional findings to determine whether Appellant had actual notice of the alleged violation of Rule 35(g), whether the issues concerning Rule 35(g) were fully litigated, and, if so, whether a violation of Rule 35(g) was proved.

II

Appellant asserts the term "operating" as used on the Certificate of Inspection for his vessel was not defined by the Coast Guard as it applied to licensing and manning regulations.

¹Rule 3 defines "vessel restricted in her ability to maneuver" as "a vessel which from the nature of her work is restricted in her ability to maneuver as required by these rules and is therefore unable to keep out of the way of another vessel." A "vessel engaged in fishing" is defined as "any vessel fishing with nets, lines, trawls or other fishing apparatus which restricted maneuverability, but does not include a vessel fishing with trolling lines or other fishing apparatus which do not restrict maneuverability."

²Rule 35(g) provides, in pertinent part, that "[a] vessel at anchor shall at intervals of not more than one minute ring the bell rapidly for about 5 seconds."

Appellant claims that in the absence of a clear definition of the term by the Coast Guard, a fair interpretation of that requirement could be that "operating" does not include that period of time when a vessel is at anchor or is moored to an offshore structure.

The Certificate of Inspection for Appellant's vessel required two licensed ocean operators. However, the Certificate required only one such operator when "operating not more than 12 hours in any 24-hour period." The record is clear that the Coast Guard did not prove the meaning of the term "operating." In fact, the Investigating Officer specifically stated during the course of the hearing that he could not then produce a definition of the term. TR-40. This was a necessary element of the misconduct specification.

Consequently, the evidence does not establish that Appellant "operated" his vessel alone for more than 12 hours within a 24-hour period. Since the Coast Guard failed to prove an adequate definition of the operative term in the Certificate of Inspection for Appellant's vessel, the charge of misconduct should be dismissed.

CONCLUSION

The findings of the Administrative Law Judge as to the charges of negligence and misconduct are not supported by substantial evidence of a reliable and probative character.

ORDER

The order of the Administrative Law Judge dated 19 July 1985 at Houston, Texas is modified as follows:

The finding of the Administrative Law Judge as to the charge of negligence is SET ASIDE. The finding of the Administrative Law Judge as to the charge of misconduct is DISMISSED. The order suspending Appellant's license is VACATED. The case is REMANDED to the Administrative Law Judge for further proceedings in accordance with this decision.

J.C. IRWIN
Vice Admiral, U. S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C. this 24 day of November, 1986.