

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE No. 569146  
Issued to : Joseph J. POWER

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2448

Joseph J. POWER

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

By order dated 29 May 1985, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for one month outright, plus and additional two months remitted on nine months' probation upon finding proved the charges of misconduct and negligence. The specification under the misconduct charge alleges that while serving as Docking Pilot aboard the M/V VERGO, under the authority of the captioned documents, on or about 1 September 1984, Appellant piloted the vessel in Newbold Channel, Delaware River, an area beyond the scope of his license. The specification under the negligence charge alleges that, while serving in the same capacity on the same date, Appellant caused the vessel to ground in the Delaware River.

The hearing was held at Philadelphia, Pennsylvania, on 26 March and 16 April 1985.

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

The Investigating Officer introduced in evidence six exhibits and the testimony of one witness.

In defense, Appellant introduced in evidence one exhibit and his own testimony.

After the hearing the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been proved. The Administrative Law Judge entered a written order suspending all licenses issued to Appellant for one month outright, plus an additional two months remitted on nine months' probation.

The complete Decision and Order was served on 5 June 1985. Appeal was timely filed on 17 June 1985 and perfected on 30

December 1985.

FINDINGS OF FACT

Appellant holds a Federal License which is endorsed as follows:

First Class Pilot of steam and motor vessels of any gross tons upon the Delaware River from the mouth of the Schuylkill River to upper end Fisher's Point Range; Operator of uninspected towing vessels upon the inland waters of the United States, excepting waters subject to the International Regulations for preventing collisions at sea 1972; Radar Observer (inland waters) - expires November 1984.

On 1 September 1984, Appellant was serving as "Docking Pilot" aboard the M/V VERGO during an undocking operation from the Fairless Steel Works, Trenton, New Jersey.

The waters of the Delaware River which are involved in this proceeding are not encompassed within the pilotage endorsement on Appellant's license.

BASIS OF APPEAL

Appellant advances a number of grounds for appeal. These may be summarized as follows:

1. The Coast Guard lacks jurisdiction over his license.
2. The Administrative Law Judge erred in admitting and relying upon entries from the VERGO's deck and bell logs.
3. The Administrative Law Judge misinterpreted certain symbols in the log books.
4. The presumption of negligence, which normally arises when a vessel grounds, was rebutted.

Because of the disposition of the case, only the first three of these bases are discussed.

APPEARANCE: James F. Young, Esq., Krusen Evans & Byrne, Philadelphia, Pennsylvania.

OPINION

Appellant argues that he was not serving under the authority of his Coast Guard license at the time of this incident. I do not agree.

Jurisdiction in these proceedings is premised on the requirement that, at the time of the offense complained of, the individual charged was acting under the authority of his license, certificate or document. 46 USC 7703. The Charges here so allege. An individual is considered to be acting under the authority of a license when the holding of the license is required by the law or regulation or is required in fact as a condition of employment. 46 CFR 5.01-35 (Current version at 46 CFR 5.57). The Administrative Law Judge states the "[t]here is no law or regulation cited or pronounced by the Investigating Officer that addresses jurisdiction." Decision and Order at 7. The Investigating Officer argued rather that jurisdiction was premised on the rationale that being the holder of a properly issued license was a condition of Appellant's employment aboard the VERGO.

Appellant argues that there is no evidence in the record that he was hired by reason of his federal pilot's license. The Administrative Law Judge, however, made the following determinations concerning this question: (1) Appellant possessed a federal pilot's license. (2) Appellant did not possess a Pennsylvania State Pilot's license. (3) When Appellant boarded the VERGO at the Fairless Steel Works, he introduced himself as the undocking pilot and handed the "Pilot's Slip" (I.O. Exhibit 1) to the Master. (4) This document contained a "pilotage clause." (5) The significance of this act was that Appellant held himself out as a competent Pilot for this area of the Delaware River and "impliedly warranted the possession and sufficiency of his license." Decision and Order at 8. (6) The Master's act of returning the signed "Pilot's Slip" "was an acceptance of Appellant's offer and implied warranty." Decision and Order at 8. Accordingly, the Administrative Law Judge concluded that the possession of the pilot's license with adequate pilotage was a condition of his employment, citing Appeal Decision 1077 (COLLINS). (Pilot held to be acting under authority of license where holding of license was a condition of employment.)

I find the Administrative Law Judge's conclusion to be well supported by the evidence, and I will not disturb it. As the Administrative Law Judge succinctly pointed out, since the Master had requested the assistance of a docking pilot, there was "no reason to believe that he would turn over the conn of his vessel to anyone but a licensed pilot." Decision and Order at 8.

II

In finding that a grounding occurred, the Administrative Law Judge relied on certain entries made in the VERGO's deck and bell logs. Appellant asserts that the Judge erred in admitting these log entries, since they should have been excluded as hearsay. He argues that there are discrepancies in the deck log, that the most significant entry has been altered, and that substantial evidence does not support a finding that the vessel grounded.

With respect to Appellant's argument that the log entries should have been inadmissible as hearsay, I point out that strict adherence to the Federal Rules of Evidence is not required in suspension and revocation proceedings (46 CFR 5.20-95(a), current version at 46 CFR 5.537.), and hearsay evidence is not inadmissible. Further the log entries are admissible under the provisions of 46 CFR 5.20-107(a), as it existed at the time of the hearing, as business entry exceptions to the hearsay rule. "The evidentiary weight to be given such entries is determined separately in each case; however, they may constitute substantial evidence to support findings. See Appeal Decisions 2117 (AGUILAR) and 2133 (SANDLIN)." Appeal Decision 2289 (ROGERS).

However, the inconsistencies in the record concerning the grounding of the vessel while under control of Appellant cause me to remand this case for further proceedings.

The record shows that Appellant backed the M/V VIRGO out from the Fairless Steel dock, turned the vessel to head downstream, and turned over control of the vessel to a river pilot. The river pilot experienced steering problems with the vessel, and the vessel subsequently grounded about one mile downstream. At that point, the river pilot called Appellant back to the bridge (Record at 19), whereupon Appellant resumed control of the vessel and returned to the dock.

Although Appellant testified that the vessel did not ground during the undocking (Record at 34), the Administrative Law Judge determined that the VIRGO grounded as Appellant backed into the channel from the dock. In making this determination, as noted above, he relied on certain entries made in the VERGO's deck and bell logs.

The deck log (Investigating Officer's Exhibit No. 3) records a grounding at 0915 on 1 September. Appellant contends this was after he relinquished control of the vessel to the river pilot. Appellant argues that the Investigating Officer and the Administrative Law Judge misinterpreted the meanings of various symbols in the bell log, with the result that the Administrative Law Judge in his Decision and Order ascribed to Appellant maneuvers that he did not make. Appellant's point is well made.

The thrust of Appellant's argument is that the Administrative Law Judge reversed the meanings of all the ahead and astern entries in the bell log, and that the meanings assigned to the symbols in the log by the Administrative Law Judge are contrary to the "custom and trade of the shipping industry." Brief at 12. To illustrate this argument, Appellant points out that, as the bell log was interpreted by the Administrative Law Judge, the VIRGO was on a dead slow ahead bell for a period of nine minutes beginning at 0853 - the time Appellant began to maneuver the vessel away from the dock. Appellant argues that since the VERGO was moored bow to the shore, and was required to back from its moored position out to the river channel, if it had been on a dead slow ahead bell for nine minutes "there would have been the . . . prospect of the vessel becoming a permanent fixture in the location immediately forward of her moored position." Appellant argues that the actual order was dead slow astern. Appellant argues further that a series of orders from 0908 to 0915, which the Administrative Law Judge characterized as astern orders, were actually ahead orders, given to head the vessel downstream on her voyage. Critical to the Administrative Law Judge's determination that the VIRGO grounded as Appellant backed into the channel from the dock was his finding that "the vessel's engines were astern from 0908 until . . . 0915." Decision and Order at 10.

While it is generally the function of the judge to determine what version of events under consideration is correct, (Appeal Decision 2097 (TODD)), I am persuaded that the inconsistencies pointed out by Appellant require remand to the Administrative Law Judge for further proceedings concerning the maneuvers of the M/V VERGO. Specifically, the Administrative Law Judge should reexamine the meanings assigned to the various bell log entries in light of the issues raised by Appellant, and should make supplemental findings concerning the orders issued by Appellant from 0853 to 0915.

#### ORDER

The decision and order of the Administrative law Judge dated 29 May 1985, at New York, New York, is modified as follows:

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

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

VICE COMMANDANT

Signed at Washington, D.C. this 8th day of June, 1987.