

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Ronald Wayne YATES 463-82-3816-D1

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2485

Ronald Wayne YATES

This appeal has been taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.701.

By order dated 29 March 1988, an Administrative Law Judge of the United States Coast Guard at Houston, Texas, suspended outright Appellant's Merchant Mariner's License and document for one month. In addition, Appellant's license and document were further suspended for two months, remitted on twelve months probation, upon finding proved the charge of negligence. The charge was supported by two specifications, both of which were found proved. The first specification found proved alleged that Appellant, while serving as the operator on board the motor vessel ENTERPRISE, under the authority of the captioned documents, at or about 1930 on 5 December 1987, did wrongfully fail to properly assess the effect of the tidal current on his vessel and tow, while attempting to dock port side to the Conoco Clifton Ridge Barge Dock, resulting in an allision with the ship dock fender system at Conoco Clifton Ridge Dock, resulting in an allision with the ship dock fender system at Conoco Clifton Ridge Terminal, at or on the Calcasieu River. The second specification found proved alleged that Appellant, while serving as the operator on board the motor vessel ENTERPRISE, under the authority of the captioned documents, at or about 1930 on 5 December 1987, did fail to properly arrange his tow for docking at the Conoco Clifton Ridge Terminal, resulting in an allision with the ship dock fender system at Conoco Clifton Ridge Terminal, at or on the Calcasieu River.

The hearing was held at Port Arthur, Texas, on 21 January 1988. Appellant appeared at the hearing and was represented by lawyer counsel. Appellant entered, in accordance with 46 CFR 5.527(a), answers of denial to the charge and each specification.

The Investigating Officer introduced twelve exhibits into evidence and

called two witnesses.

Appellant introduced three exhibits into evidence and called four witnesses. Appellant testified at the hearing in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specifications had been found proved, and entered a written order suspending Appellant's Merchant Mariner's License and Document as previously set forth.

The complete Decision and Order was dated 29 March 1988 and was served on Appellant on 1 April 1988. Notice of Appeal was timely filed and considered perfected on 1 September 1988. Appellant's appeal is properly before me for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of Coast Guard Merchant Mariner's License No. 44532 and Document No. 463-82-3816-D1. Appellant's license authorized him to serve as an operator of uninspected towing vessels upon the inland waters of the United States not including those waters governed solely by the International Regulations for the Prevention of Collisions at Sea of 1972 (72 COLREGS). Appellant's document authorized him to serve as a grade B tankerman and all lower grades.

On 29 March 1988, the Administrative Law Judge in Houston, Texas, issued a Decision & Order suspending Appellant's document outright for one month with an additional suspension for two months. This additional two month suspension was not to be effective provided no charge under 46 U.S.C. 7703, 7704, or any other navigation or vessel inspection law was proved against him for acts committed within twelve months from the date of termination of the outright suspension. A copy of this Decision & Order was sent to the Appellant by certified mail on 29 March 1988.

At or about 1930 on 5 December 1987, Appellant was serving as the operator of the towing vessel ENTERPRISE, which was pushing three loaded naphtha barges in tandem. At that time, Appellant was approaching the Conoco Clifton Ridge barge dock on the Calcasieu River, Louisiana. At or about 1935 on 5 December 1987, the lead tank barge, HOLLYWOOD 1204, being pushed by the towing vessel ENTERPRISE, operated by Appellant, allided with the fender system of the Conoco Clifton Ridge ship dock on the Calcasieu River.

The towing vessel ENTERPRISE is a 71 foot United States vessel of 1800

horsepower and 165 gross tons. It is owned by Marine Industries, Inc., 55 Waugh Drive, Houston, Texas 77251.

The tank barge HOLLYWOOD 1204 is 225 feet in length and 727 gross and net tons. It has a maximum cargo weight of 274 short tons and a cargo capacity of 14,500 barrels. This tank barge was the first or lead barge in the tow navigated and maneuvered by the Appellant. It is owned by Marine Industries, Inc., 55 Waugh Drive, Houston, Texas 77251. It is operated by Hollywood Marine, Inc., 55 Waugh Drive, Houston, Texas 77251.

BASES OF APPEAL

Appellant raises the following issues on appeal:

- (1) Whether the Administrative Law Judge clearly erred when he applied a burden of proof which was less than a preponderance of the evidence.
- (2) Whether the Administrative Law Judge clearly erred when he ruled that the Appellant negligently allided with the Conoco Clifton Ridge Terminal.
- (3) Whether the Administrative Law Judge clearly erred when he allowed the proponent of the order to rely on a presumption of fault which placed the burden of proof on the opponent of the order.

Appearance by: J. Mac Morgan, Esq.
Woodley, Barnett, Williams, Fenet, Palmer & Pitre
500 Kirby Street
Lake Charles, Louisiana 70601

OPINION

Appellant makes several contentions on appeal. Only one will be addressed, because it is dispositive. Appellant argues that the Administrative Law Judge clearly erred when he applied a burden of proof which was less than a preponderance of the evidence. I agree. In his Decision & Order of 29 March 1988, the Administrative Law Judge cites Appeal Decision 2284 (BRAHN) for the proposition that the burden of proof in suspension and revocation proceedings is less than a preponderance of the evidence.

With regard to the proper standard of proof to apply in suspension and revocation proceedings, Appeal Decision 2284 (BRAHN) was reversed by

Appeal Decision 2468 (LEWIN). LEWIN, *supra*, conformed Coast Guard suspension and revocation proceedings with the Supreme Court holding in *Steadman v. SEC*, 450 US 91, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981). In *Steadman, supra*, the Supreme Court concluded that the preponderance of evidence standard of proof shall be applied in administrative hearings governed by the Administrative Procedure Act, 5 U.S.C. 556(d).

Accordingly, the Investigating Officer must prove the charges and specifications by a preponderance of the evidence. Congress has specifically made the provisions of the Administrative Procedure Act, including 5 U.S.C. 556(d), applicable to suspension and revocation proceedings. See 46 U.S.C. 7702. In reviewing the language in 5 U.S.C. 556(d) and the legislative history of the Administrative Procedure Act, the Supreme Court, in *Steadman, supra*, found that it was the intent of Congress to establish a preponderance standard in administrative hearings to ensure due process.

The proper standard of proof for a hearing convened pursuant to 46 U.S.C. 7703 is set forth at 46 CFR 5.63:

"In proceedings conducted pursuant to this part, findings must be supported by and in accordance with the reliable, probative, and substantial evidence. By this is meant evidence of such probative value as a reasonable, prudent and responsible person is accustomed to rely upon when making decisions in important matters."

This regulation was revised in 1985 to reflect the holding in *Steadman*, and tracks the language of 5 U.S.C. 556(d). The rationale concerning the standard of proof as set forth in Appeal Decision 2284 (BRAHN) was based on the language of the predecessor of 46 CFR 5.63 (46 CFR 5.20-95(b)). See Appeal Decision 2468 (LEWIN); Appeal Decision 2477 (TOMBARI); Appeal Decision 2472 (GARDNER); Appeal Decision 2474 (CARMENKE); see also, *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. Federal Communications Commission*, 627 F.2d 240 (App. D.C. 1980).

Since the Administrative Law Judge applied a standard of proof that was less than a preponderance of the evidence, the Decision & Order must be reversed. (Decision & Order at pp. 25, 33, 34).

CONCLUSION

The Administrative Law Judge stated in his decision essentially that the substantial evidence standard, which he used in the proceeding, constituted a lesser burden of proof than the preponderance of evidence

standard. Consequently, the Administrative Law Judge misinterpreted the proper standard of proof and in fact applied an erroneous standard of proof. This constitutes plain error. The proper disposition is dismissal without prejudice to refile.

ORDER

The Decision & Order of the Administrative Law Judge dated at Houston, Texas, on 29 March 1988, is VACATED, the findings are SET ASIDE, and the charge and specifications are DISMISSED WITHOUT PREJUDICE to refile.

CLYDE T. LUSK, JR
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 19 day of May, 1989.

3. HEARING PROCEDURE

.96 Standard of Proof

substantial evidence denotes a certain quantity of evidence, equivalent to a preponderance of the evidence standard.

CITATIONS

Appeal Decisions Cited: 2417 (YOUNG), 2346 (WILLIAMS), 2468 (LEWIN), 2474 (CARMENKE), 2477 (TOMBARI).

Federal Cases Cited: *Steadman v. Securities & Exchange Commission*, 450 U.S. 91, 101 S. Ct. 999 (1981); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984); *Sea Island Broadcasting Corp. v. F.C.C.*, 627 F. 2d 240 (App. D.C. 1980),

Regulations Cited: 46 CFR 5.541.

Statute Cited: 5 U.S.C. 556(d)

***** END OF DECISION NO. 2485 *****