UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: David A. TAYLOR 224 50 5056

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2524

David A. TAYLOR

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 30 November 1990, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia revoked Appellant's Merchant Mariner's Document for negligence, violation of law and misconduct.

Appellant was charged with negligence supported by a single specification alleging that he negligently failed to properly navigate his vessel, causing an allision with a bridge.

Appellant was also charged with violation of law supported by a single specification alleging that he wrongfully discharged oil into a navigable water.

Appellant was also charged with misconduct supported by twelve specifications alleging that Appellant wrongfully served in the capacity of towing vessel operator while his license was under suspension from a previous order of the Administrative Law Judge.

The hearing was held on 5, 7, and 11 September 1990. Appellant, represented by professional counsel, was present at the proceedings. The Investigating Officer offered into evidence twelve exhibits and introduced the testimony of nine witnesses. Appellant offered into evidence two exhibits and introduced the testimony of two witnesses. In addition, Appellant testified on his own behalf.

The Administrative Law Judge's written decision was issued on 30 November 1990 and the written order was issued on 18 December 1990. Appellant was served with the decision and order on 18 December 1990. Appellant filed his notice of appeal on 19 December 1990, pursuant to 46 C.F.R. SS5.703. Following receipt of the transcript, Appellant perfected his appeal by filing a supporting appeal brief on 29 January 1991. Accordingly, this appeal is properly before the Commandant for review.

FINDINGS OF FACT

At all times relevant, Appellant was the holder of the above-captioned license and document issued to him by the Coast Guard. Appellant's license authorizes him to serve as operator of uninspected towing vessels upon inland waters. His document authorizes service as an ordinary seaman.

On 5 February 1990, Appellant's license (the same license involved in the case herein) was suspended outright for two months with three additional months suspension remitted on six months probation. In that case, Appellant was charged with negligence by causing an allision of his vessel while operating under the scope and authority of his license. [TR 30]. That suspension took effect by oral order of the Administrative Law Judge issued at the hearing on 5 February 1990. The written order was subsequently served on Appellant on 8 February 1990.

Two days subsequent to being served the suspension order of the

Administrative Law Judge, Appellant reported on board the M/V JENNA B at Norfolk, Virginia at 0930, 7 February 1990. The M/V JENNA B is a 320 gross ton uninspected towing vessel, 137.4 feet in length, documented as a U.S. vessel (NO. 249167). Its tow, at the time in question, the barge MORIANA 450 (NO. 630040) is 405 feet in length and 64 feet at the beam.

While serving on board the M/V JENNA B, on the twelve dates stated in the specifications to the charge of misconduct, Appellant served in the capacity of operator of the towing vessel notwithstanding the fact that his license had been suspended by the Administrative Law Judge on 5 February 1990.

On 22 April 1990, Appellant was serving in the capacity of operator of the M/V JENNA B while made up to the starboard side of the barge MORIANA 450. A lookout and tankerman were posted on the barge (lookout on the bow) and Appellant and one other crewmember were in the wheelhouse. At approximately 0500, Appellant was attempting to maneuver his vessel and its tow under N&W Railroad Bridge No. 5 located on the Elizabeth River, Eastern Branch, Norfolk, Virginia. The horizontal clearance under the bridge is 140 feet. The weather was clear and dark with four miles visibility. The wind was out of the Northeast at approximately 10 knots and the current was out of the East at approximately 1.3 knots. [I.O. EXHIBIT 7].

While transiting under the bridge, the port quarter of the barge allided with the bridge rupturing a fuel tank. The Coast Guard was notified and inspected the barge later that morning. The boarding team observed oil spilling into the water from the barge.

Appellant formally reported the incident to the Coast Guard by filing a Form CG-2692 describing the incident and reporting the loss of "550 gal #2 Fuel." [I.O. EXHIBIT 7]. Based on his sounding of the tanks subsequent to the allision the tankerman determined that 400-500 gallons of fuel had been lost. [TR 263].

APPEARANCE: R. John Barrett, Esq., Vandeventer, Black, Meredith & Martin, 500 World Trade Center, Norfolk, VA 23510.

BASES OF APPEAL

Appellant asserts the following bases of appeal from the decision of the Administrative Law Judge:

1. The Administrative Law Judge erred by not recusing himself after rejecting a proposed plea agreement;

2. The Administrative Law Judge erred in finding proved the charge of negligence in striking N&W Railroad Bridge No. 5;

3. The Administrative Law Judge erred in finding proved the char ge of violation of law in discharging oil into navigable waters;

4. The Administrative Law Judge erred in finding proved the charge of misconduct in operating in violation of the previous suspension order;

5. The Administrative Law Judge erred in excluding testimony as to the reputation for truthfulness of a government witness;

6. The order of revocation is excessive.

OPINION

I

Appellant asserts that the Administrative Law Judge erred by not recusing himself following his refusal to accept a proposed plea agreement recommendation negotiated by Appellant and the Investigating

Officer. I do not agree.

At the hearing, Appellant never raised a motion for the recusal of the Administrative Law Judge notwithstanding that he was given the opportunity to raise such a motion. [TR 52]. Absent clear error, such an issue cannot be considered on appeal where it was not raised at the hearing. 46 C.F.R. ÷5.701(b)(1). Appeal Decisions 2504 (GRACE); 2458 (GERMAN); 2376 (FRANKS); 2400 (WIDMAN); 2384 (WILLIAMS); 2184 (HAYES); 2463 (GREEN).

Even assuming arguendo that a motion for recusal had been made, the record fails to reflect any bias or prejudice on the part of the Administrative Law Judge. Bias or prejudice must be affirmatively shown. Appeal Decisions 2365 (EASTMAN); 1554 (McMURCHIE). The record, when fully reviewed, clearly reflects that notwithstanding that the Administrative Law Judge was justifiably concerned regarding the gravity of the charges, he stated that the charges had yet to be proved and that he was not predisposed to a finding in the case. [TR 6, 30, 35, 37].

In fact, the Administrative Law Judge, after hearing a proffer of testimony, realized that critical inconsistencies existed on the crucial issue of whether Appellant was acting in the capacity of operator of the vessel. The record reflects that the Administrative Law Judge determined that he must hear the evidence before issuing findings and deciding an appropriate order. [TR 52]. His decision to make his determinations based on the evidence and the merits of the case, in light of the nature of the charges and the proffer of testimony, is not inappropriate. Accordingly, I find Appellant's assertion without merit.

II

Appellant asserts that the Administrative Law Judge erred in finding him negligent in alliding with N&W Railroad Bridge No. 5. I do not agree.

Appellant acknowledges that the allision with the bridge created a presumption of negligence. However, he claims that the presumption was rebutted by the evidence. Specifically, Appellant stresses that, having never before moved a barge as large as the MORIANA 450, Appellant took adequate, prudent precautions by posting two lookouts on the barge and an extra crewmember in the wheelhouse as a lookout. Appellant urges that he received favorable information from his lookouts in positioning the M/V JENNA B and its tow for transit under the bridge. Appellant claims that he did everything a prudent mariner could have done to safely navigate through the area.

The guiding precedent in such negligence cases is Commandant v. Murphy, NTSB Order No. EM-139 (February 3, 1987) and Order Denying Reconsideration, NTSB Order No. EM-144 (July 21, 1987). See also, Appeal Decisions 2500 (SUBCLEFF); 2501 (HAWKER); 2492 (RATH); 1200 (RICHARDS). In Murphy, supra, the following criterion was pronounced in determining whether the presumption of negligence has been rebutted:

> Since the ultimate burden of proof on its charge against a seaman remains continuously with the Coast Guard notwithstanding any presumption of negligence, a credible, non- fault explanation for a collision defeats the presumption and obligates the Coast Guard to go forward with evidence to counter the seaman's explanation or to show that he was nevertheless guilty of some specific act of negligence. (emphasis supplied)

Based on the foregoing, it is incumbent on Appellant to establish a "credible, nonfault explanation" for the allision with the bridge other than Appellant's actions or inactions. Appellant has failed to establish this "explanation."

The record reflects that there were no unusual conditions or

forces extant at the time and place of the allision with N&W Railroad Bridge No. 5. The evidence indicates that the M/V JENNA B with its tow could have passed under the bridge with a horizontal clearance margin of 44-49 feet. [TR 456-457, 536, I.O. EXHIBIT 12]. Additionally, the weather conditions at the time were not abnormal and posed no unusual problem for a prudent, experienced operator. [I.O. EXHIBIT 7]. Furthermore, contrary to Appellant's assertion, the presence of a construction barge that was moored in line with the edge of the bridge fender [TR 540-541], but not restricting the horizontal

clearance under the bridge, does not create circumstances that rebut the presumption of negligence.

In essence, Appellant has failed to detail any circumstances that demonstrate that Appellant could not have maneuvered his vessel and tow under the bridge uneventfully. Vessels are presumed not to allide with fixed objects in the ordinary course when operated by reasonably careful operators. RICHARDS, supra, cited in SUBCLEFF, supra.

Based on the foregoing, I find Appellant's assertion without merit.

III

Appellant urges that the Administrative Law Judge erred in finding proved the charge of violation of law for discharging oil into a navigable water. Appellant asserts that the finding is not proved by a preponderance of the evidence. I do not agree.

The record reflects that the barge tankerman saw fuel oil coming from the puncture in the shell plating of the barge, subsequent to the allision with the bridge. [TR 262] He subsequently sounded the barge's fuel tanks and determined that between 400-500 gallons of fuel oil were missing. [TR 263]. Appellant himself reported the discharge to the Coast Guard. [I.O. EXHIBIT 8, p. 4]. Furthermore, the discharge was noted in the written report filed with the Coast Guard. [I.O. EXHIBIT 7]. Additionally, it is noted that the Coast Guard Investigators observed a sheen on the water in the vicinity of the MORIANA 450. [I.O. EXHIBIT 8, p. 4].

Determining the weight of the evidence is a function within the exclusive purview of the Administrative Law Judge. Only in exceptional cases will such determinations be disturbed. Appeal Decisions 2503 (MOULDS); 2156 (EDWARDS); 2472 (GARDNER); 2116 (BAGGETT). While arguably the aforementioned evidence, considered singularly, might be insufficient to find the charge proved, when considered in toto, the evidence fully supports the findings of the Administrative Law Judge.

IV

Appellant asserts that the Administrative Law Judge erred in finding that Appellant was operating under the authority of his license in violation of the previous suspension. Appellant contends that he never served in the capacity of the operator of the M/V JENNA B. He urges that at all times he was acting in the capacity of a deckhand, steering the vessel only under the orders and control of the "licensed captain." I do not agree.

Title 46 C.F.R. ÷5.57 states in pertinent part that "[a] person employed in the service of a vessel is considered to be acting under the authority of a license . . . when the holding of such license . . . is . . . [r]equired by law or regulation . . ." In the case herein, the record clearly reflects that Appellant conducted himself ostensibly as the operator, notwithstanding that his license had been suspended.

The "licensed captain", S. Lucky, whom Appellant claims was one of the actual operators, testified that Appellant was the bonafide operator of the vessel, assuming full, unfettered, navigational

control of the vessel. [TR 86, 129]. The testimony of Lucky is corroborated by another licensed crewmember, J. Sitka, III. [TR 231, 234, 237, 241]. The evidence also reflects that the company operating the M/V JENNA B advised Lucky that he was onboard the vessel merely to fulfill a pro forma statutory requirement and that Appellant would actually ". . . run the boat and . . . [Lucky] was to work under his direction . . . [Lucky] was on there to fulfill the legal requirement of having a licensed man on board." [TR 146].

Appellant lied to certain crewmembers, telling them that his license had not been suspended but that he was merely on probation. [TR 85]. Appellant also was treated as the vessel operator ("captain") in matters of vessel protocol and privilege. [TR 87, 133].

Appellant's name was also submitted by the M/V JENNA B as the vessel operator ("pilot") to the Chesapeake & Delaware Canal Controller during pertinent times. Appellant's name is listed accordingly in the Canal's vessel traffic logs. [TR 355, I.O. EXHIBIT 4].

Most significantly, the record clearly reflects that Appellant independently directed the navigational control of the M/V JENNA B and its tow at critical times and took no direction from the licensed crewman whom Appellant asserts was the operator. [TR 91, 103, 131, 241].

Appellant challenges the credibility of the witnesses who testified that Appellant was in fact acting as the vessel operator. However, based on a complete review of all testimony and evidence, I will not disturb the findings and credibility determinations of the Administrative Law Judge. Determinations of the Administrative Law Judge will not be disturbed where supported by the record and not inherently incredible. Appeal Decisions 2503 (MOULDS); 2472 (GARDNER); 2390 (PURSER), aff'd sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986).

In the case herein, the evidence supports the finding that Appellant was acting as the operator of the M/V JENNA B while his license was under suspension. Accordingly, Appellant's assertion of error is without merit.

V

Appellant asserts that the Administrative Law Judge erred by not allowing the testimony of the witness J. Gaulding which challenged the credibility of the witness S. Lucky.

The Administrative Law Judge refused to allow unsubstantiated,

non-specific testimony of Gaulding. Gaulding attempted to challenge the credibility of Lucky by relating that Lucky had previously lied about a transcript from a vessel radio transmission. [TR 431-437]. The Administrative Law Judge advised Gaulding and Appellant's counsel that Gaulding's testimony must be detailed and specific in order to be allowed. "[w]e're talking about the reputation of an individual. If he can substantiate the specific time and date with facts, that testimony will be allowed." [TR 435].

Appellant, represented by professional counsel, did not object to the Administrative Law Judge's ruling not to allow Gaulding's testimony regarding Lucky's reputation for truthfulness. It is noted that the Administrative Law Judge succinctly explained his reasons for not accepting Gaulding's unsubstantiated testimony. [TR 431-437]. Accordingly, Appellant was fully apprised of the nature of the ruling and had the opportunity to raise an objection on the record. Where Appellant is fully aware of the issues being litigated and has notice and the opportunity to raise objections and motions, no subsequent challenge on appeal can be made. Appeal Decisions 2504 (GRACE); 1776 (REAGAN); Affirmed sub nom Commandant v. Reagan, NTSB Order

No. EM-9; Kuhn v. Civil Aeronautics Board, 183 F.2d 839 (D.C. Cir. 1950). See also 46 C.F.R. ÷5.701(b)(1) and those cases cited in Opinion I, supra.

VI

Appellant asserts that the revocation of his license and document is an excessive sanction. Appellant bases his assertion on the fact that the Investigating Officer was willing to agree to a recommended suspension of fifteen months and that Appellant did not intentionally flaunt the previous suspension order.

I do not agree that the order of revocation is excessive. The record reflects a course of conduct by Appellant to intentionally circumvent the previous suspension order. It is also noted that Appellant's course of conduct extended over a period of almost two months. Contrary to Appellant's assertions, his conduct evidences a knowledgeable and intentional attempt to evade the clear, succinct suspension order of the Administrative Law Judge. There is no evidence that Appellant was tricked, duped, coerced or otherwise induced into this course of conduct.

Sanctions imposed by the Administrative Law Judge are exclusively within his discretion unless obviously excessive or an abuse of discretion. Appeal Decisions 2445 (MATHISON); 2422 (GIBBONS); 2391 (STUMES); 2362 (ARNOLD); 2313 (STAPLES). In the case herein, the record reflects no abuse of discretion and the order is not obviously excessive.

The case herein presents a case of first impression. In cases involving different issues, the sanction of revocation has been ordered for drug use/possession and those instances where the conduct in issue caused or could have reasonably caused a serious threat to property and life. Appeal Decisions 2346 (WILLIAMS) (fraudulently altering a document that could have enabled the holder to serve in a responsible capacity for which not qualified); 2459 (LORMAND) (Drug possession); 2450 (FREDERICK), affd sub nom Commandant v. Fredericks, NTSB Order No. EM-147 (1988) (Gross negligence consisting of cutting across the bow of another moving vessel so as to seriously threaten lives of crew and vessel); 2427 (JEFFRIES) (Incompetence due to alcoholism).

Here, where the record clearly reflects an intentional, calculated course of conduct to circumvent or disregard a previous suspension order of the Administrative Law Judge, revocation is appropriate. The Administrative Law Judge understandably has a justified concern that his order was flagrantly disregarded and could be disregarded again. Appellant has demonstrated no respect for the previous order issued and there is no reason to believe that he would not similarly disregard subsequent suspension orders. The record reflects that Appellant has been making his living onboard vessels for the past 24 years and supports his family on his salary as a licensed operator. Appellant has no record other than the previous suspension and the charges in the case herein. [I.O. EXHIBIT 1]. However, as noted in Appeal Decisions 2346 (WILLIAMS); 2290 (DUGGINS); 1516 (ALFONSO), "the need for a seaman to support his family must be considered subservient to the remedial purpose of these proceedings to promote safety at sea."

These proceedings serve no useful or remedial purpose if the orders issued by the Administrative Law Judge are not strictly enforced and obeyed. Accordingly, having reviewed all aspects of this case and closely reviewing the record, I will not disturb the findings of the Administrative Law Judge or his order of revocation.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable law

and regulations.

ORDER

The Decision and Order of the Administrative Law Judge dated 30 November and 18 December 1990 at Norfolk, Virginia is AFFIRMED.

/s/
MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 6th day of May, 1991.

***** END OF DECISION NO. 2524 *****