

U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	DECISION OF THE
	:	COMMANDANT
	:	
vs.	:	
	:	
	:	
	:	NO. 2576
MERCHANT MARINER'S LICENSE	:	
NO. 670146	:	
<u>Issued to: Alfred E. AILSWORTH</u>	:	

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

By order dated December 3, 1992, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked Appellant's merchant mariner's license. The revocation was based upon finding proved charges of violation of law, negligence, and misconduct. The two specifications supporting the negligence charge alleged that on September 13, 1991, Appellant, while acting as master of the towing vessel, M/V JACQUELINE A, under the authority of the above captioned license, negligently navigated the vessel resulting in an allision with a privately owned dock and vessel in the Wicomico River; and, on that same date, failed to maintain a proper lookout. The specifications supporting the charge of misconduct alleged that on September 13, 1991, Appellant wrongfully worked on his vessel for more than 12 hours in a 24 hour period and wrongfully failed to give his name,

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address, and identification of his vessel to the owner of the property damaged. The violation of law charge was supported by a single specification alleging that on October 18, 1991, Appellant, while acting as master of the towing vessel, M/V JACQUELINE A, under the authority of the above captioned license, wrongfully worked for more than 12 hours in a 24 hour period.

The hearing was held at Norfolk, Virginia, on February 11, 12, and 13, 1991. Appellant appeared personally with legal counsel at the hearing. Appellant denied all charges and specifications.

After the hearing, the Administrative Law Judge rendered a Decision and Order (D&O) in which she concluded that the charges and specifications had been found proved. The Administrative Law Judge's written Decision and Order was served on Appellant on December 14, 1993, twenty-two months after the hearing. This D&O revoked Appellant's merchant mariner's license no. 670146 and all other valid licenses and certificates issued to Appellant by the Coast Guard.

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

FINDINGS OF FACT

Appellant served as master of the M/V JACQUELINE A, on September 12 and 13, 1991, and on October 18, 1991, under the authority of temporary Merchant Mariner's License No. 670146. Appellant's temporary license authorized service as: "Master

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Inland Steam or Motor Vessels of not more than 2000 gross tons; first class pilot steam or motor vessels of not more than 2000 gross tons upon Chesapeake Bay and tributaries." The M/V JACQUELINE A is a 119 gross ton, uninspected towing vessel with a length of 59.8 feet.

The M/V JACQUELINE A departed Southern States Cooperative, Inc., at Kilmarnock, Maryland, for Salisbury, Maryland, at approximately 1736 hours on September 12, 1991, pushing a 195 foot hopper barge, the SL-185. The M/V JACQUELINE A terminated this voyage at Perdue's Terminal in Salisbury, Maryland, at approximately 0800 hours on September 13, 1991. Thus, the voyage was in excess of 12 hours within a 24 hour period. Appellant and his deck hands--William Ailsworth (his son) and Robert Apperson--were the only personnel aboard the M/V JACQUELINE A during this voyage from Kilmarnock to Salisbury. Appellant was the only licensed individual on board the M/V JACQUELINE A.

During the morning of September 13, 1991, while the Appellant navigated the M/V JACQUELINE A upriver on the Wicomico River near Whitehaven, Maryland, the visibility was limited by fog with visibility ranging from 1/8 to 1/4 of a mile. There was an incoming tide on the river; fog is not an uncommon occurrence on the Wicomico River in the Whitehaven area during mornings with an incoming tide.

At approximately 0420 on the morning of September 13, 1991, the M/V JACQUELINE A and her barge, SL-185, were in the area of a dock owned by Mr. Thomas Lilly. A loud crash was heard by Thomas

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Lilly's neighbor, Calvin Peacock, at approximately 0420 on September 13, 1991. Mr. Peacock lives upriver approximately 1/4 to 1/2 mile from Thomas Lilly's dock. After manuevering for approximately 20 to 25 minutes in the area of the Lilly dock, the M/V JACQUELINE A continued its journey upriver towards Salisbury and passed a quarter of a mile above the Whitehaven ferry at approximately 0505. During the time Appellant operated in the area of the Lilly dock, he sent a crewmember to the bow of the SL-185 to act as a lookout. The crewmember remained on the bow for approximately four seconds. Appellant then sent the other crewmember to the bow. He remained on the bow for one to two minutes. After leaving the area of the Lilly dock, Appellant had a crewman maintain a radar watch. The rest of the time, Appellant acted as his own lookout from the pilot house of the M/V JACQUELINE A using the radar.

A 20 foot recreational fiberglass vessel, P/V HIGH HOPES, which is owned by Thomas Lilly, was moored between his dock and pilings on the west (downriver) side of the dock. The P/V HIGH HOPES had its bow facing the river when last seen at dusk on September 12, 1991. The P/V HIGH HOPES was struck on its port side and twenty-seven to twenty-eight feet of the Lilly dock was sheered off by a force moving upriver. According to a Maryland Natural Resources Police Officer, the only other vessel besides the M/V JACQUELINE A that had passed through the Route 50 bridge from dusk on September 12, 1991, to 0750 on September 13, 1991, was the M/V NIKKI JO C, which passed outbound at 1945 on

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September 12, 1991.

A Maryland Natural Resources Department Police Officer took white fiberglass fragments from the barge SL-185 and the damaged P/V HIGH HOPES on September 13, 1991. These particles were microscopically examined at the Maryland State Police Crime Laboratory by a forensic chemist. The chemist concluded, after examination, that the white fragments taken from the barge SL-185 were consistent with the fragments taken from the fiberglass hull of the P/V HIGH HOPES.

Appellant did not notify Mr. Lilly of the collision between the M/V JACQUELINE A's barge, SL-185, and Lilly's dock and vessel.

Appellant also served as master of the M/V JACQUELINE A on October 17, 1991, under the authority of the above-captioned temporary license. On that date, the M/V JACQUELINE A, together with the barge SL-185, got underway at approximately 1730 for a scheduled voyage from Cargill Incorporated, Chesapeake, Virginia, to Cargill, Incorporated, Seaford, Delaware, on the Nanticoke River.

Another licensed person, William Oliver, was supposed to accompany Appellant on this voyage; however, he did not make the trip for personal reasons. Appellant departed on the voyage at 1730 without an additional licensed operator. The scheduled trip of the M/V JACQUELINE A from Cargill in Chesapeake, Virginia, to Cargill in Seaford, Delaware, was a voyage of approximately 120 nautical miles. Appellant expected the trip to take at least

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fourteen hours.

During the voyage to Seaford, the M/V JACQUELINE A did not moor, anchor, or otherwise cease its underway operations until approximately 1600 on October 18, 1991. The only other person on board the M/V JACQUELINE A on this voyage was Robert Apperson, an unlicensed crew member. The underway time of the M/V JACQUELINE A on the voyage from Chesapeake to Seaford was approximately 22 1/2 hours.

BASES OF APPEAL

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

I. That he was faced with an emergency situation in both instances when he operated his vessel in excess of 12 hours in 24 hour periods and, thus, no violations of 46 U.S.C. 8014(h) occurred.

II. The chain of custody for physical evidence was improperly maintained and, therefore, the evidence should not have been admitted.

III. The Administrative Law Judge improperly dismissed the testimony of Appellant's expert and relied on mere suspicion or speculation in finding the allision occurred.

IV. The presumption of negligence does not apply to Appellant, therefore, the burden is on the Coast Guard to establish an independent basis for negligence, which it failed to do.

V. The Appellant maintains that he properly served as his own lookout.

OPINION

I

A

Appellant contends the conditions present when he operated his vessel in excess of 12 hours in a 24 hour period amounted to emergency situations. Title 46 U.S.C. 8104 provides: "On a vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency." 46 U.S.C. 8104(h). Therefore, Appellant claims he was not in violation of 46 U.S.C. 8104(h). Without addressing whether 46 U.S.C. 8104(h) permits an operator to work a continuous twelve hour watch, I disagree that the situations faced by the Appellant were "emergencies".

Appellant has improperly interpreted the meaning of "emergency" in 46 U.S.C. 8104(h).

Title 46 U.S.C. 8104 represents a recodification and compilation of several different statutes that were codified together as part of a comprehensive effort aimed at making Title 46, U.S.C. less redundant and easier to understand and apply. See H.R. Rep. No. 338, 98th Cong., 1st Sess., at 113-117. Accordingly, those statutes dealing with watches and work hour limitations were generally grouped within 46 U.S.C. 8104. *Id.* at 113-117, 180. Because the term "emergency" is not defined within 46 U.S.C. 8104 nor further clarified within 46 U.S.C. 8104(h), the various sections of the recodification of 46 U.S.C.

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8104 should be read in consonance with each other. *Id.* at 180 ("The Committee intends that these sections [of Section 8104] to be [sic] interpreted in a manner consistent with one another."); see also, Brotherhood of Locomotive Firemen and Enginemen v. Northern Pacific Railway Company, 274 F.2d 641, 647, (8th Cir. 1960), quoting, 73 Am.Jur.2d Statutes, 191 at 389 ("[t]he general intention is the key to the whole act, and the intention of the whole controls the interpretation of its parts"); Sutherland Stat. Const. 51.02 (5th Ed) (1995) (discussing construction of statutes on the same subject matter but with differing or omitted language).

Prior to the recodification, provisions in 46 U.S.C. 8104(h) were found in 46 U.S.C. 405(b), and provisions in 46 U.S.C. 8104(b) and (c), which also limit work hours, "except in an emergency," were found in 46 U.S.C. 235 and 673. Unlike the 46 U.S.C. 8104(h) provision imposing work hour limitations "except in an emergency," those in 46 U.S.C.

8104(b) and (c) impose the limitations "except in an emergency when life or property are endangered." I do not consider the absence of the phrase "when life or property are endangered" from 46 U.S.C. 8104(h) to expand the application of the work hour limitation exception to additional emergency situations not imposed by 46 U.S.C. 8104(b) and (c). In order to apply the recodified sections of 46 U.S.C. 8104 in consonance with each other, I conclude that the work hour limitation in 46 U.S.C.

8104(h) also applies except in emergencies when life or property

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are endangered. The Appellant was not faced with situations where life or property were endangered on either September 13, or October 18, 1991, when he operated his vessel in excess of 12 hours within 24 hour periods; therefore, he was not faced with emergencies under 46 U.S.C. 8104(h).

B

Appellant argues that because "emergency" is not specifically defined in 46 U.S.C. 8104(h), a Webster's dictionary definition should be used. The Appellant wishes to define emergency as, "[a] sudden, generally unexpected occurrence or set of circumstances demanding immediate action." Appellant's Brief at 2. However, even if the conduct of the Appellant is reviewed under the standard of the Webster's Dictionary definition, it falls short.

For the misconduct occurring on September 13, 1991, Appellant contends that the fog encountered forced him to slow the M/V JACQUELINE A so that he was unable to complete his voyage within twelve hours and comply with 46 U.S.C. 8104(h). Appellant's son/deckhand testified that the weather conditions were, "hazy and starting to get foggy around the edges of the bank and stuff, like it usually does in there." Transcript (TR) at 355 (emphasis added). He went on to say, "We didn't know whether to stop, you know, because it usually gets worse upriver." TR at 356 (emphasis added). Additionally, Appellant's testimony reveals that, at the time of the voyage and with the existing tide conditions, fog was not an unusual occurrence. TR

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at 542. The record is clear that the Appellant knew fog was an expected occurrence in the area to be transited. Thus, Appellant can not claim that the expected fog created a "generally unexpected occurrence or set of circumstances" forcing him to violate the statute.

Appellant seeks to categorize the voyage of October 17 and 18, 1991, in excess of 22 hours from Chesapeake, Virginia, to Seaford, Delaware, as an emergency situation because the licensed crew member he had scheduled cancelled. Appellant claims his actions fall under the emergency exception because the person who cancelled did so to take his wife to the hospital and because the voyage had already been delayed by bad weather and could not be delayed any longer. While the cancellation may be considered a generally unexpected circumstance, it certainly did not demand immediate action. In this scenario, Appellant stretches the meaning of emergency to extend to the economic loss he might incur while searching for a licensed replacement. Following Appellant's logic, a mariner would be permitted to avoid the work hour limitations of 46 U.S.C. 8104(h) for situations which are created by the mariner's own design. Plainly, these types of situations are not emergencies and I decline to accept them as such.

II

Appellant asserts that the custody chains for the samples of physical evidence collected and analyzed by the Maryland State Police were not properly maintained and, therefore, that evidence

should not have been admitted. I disagree.

Appellant argues that the chain of custody is suspect because the police officer who took two samples from the barge SL-185 placed them in two separate plastic bags and the evidence log only indicates one sample. Appellant's argument is specious. After a thorough review of the record, it is clear that the Investigating Officer established an adequate chain of custody for the admission of the lab results into evidence. The testimony of the police officer taking the samples indicates that two distinct samples were taken from the barge SL-185. TR at 322. One sample was scrapings of metal fragments and the other sample was of white particles. TR at 323. Each sample was put in a separate plastic evidence bag and labeled. TR at 322, 323. The two samples were then placed in one package and sent to the Maryland State Police Crime Laboratory for analysis. TR at 321 - 323. The custody log of the Maryland State Police did indicate that only one envelope was received; however, it contained two evidence bags, one with the metal fragments and one with fiberglass scrapings, both from the SL-185. TR at 323, IO exhibit No. 10. It is also clear that samples from the P/V HIGH HOPES and samples from the barge SL-185 were never mixed, as evidenced by the receipt from the Maryland State Police Crime Laboratory. IO exhibit No. 10. The laboratory examiner concluded that the white fragments from the barge SL-185 were consistent in color and microscopic appearance to the white fragment from the P/V HIGH HOPES. IO exhibit No. 10.

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In addition, Appellant claims the samples were not properly secured because they were left in an unlocked storage compartment on the police vessel for 19 days and civilians were allowed to ride on the police vessel. These assertions by the Appellant are not supported by credible evidence in the record.

The samples of physical evidence collected by the Maryland State Police were kept on board the police vessel in a storage container from September 13, 1991 through October 2, 1991; however, the vessel was locked when the police officers were not present. TR at 155. The vessel may have been unlocked on occasion, but usually only when the officers were in the area. TR at 169 - 171. The Maryland State Police did not permit civilians to ride on the vessel as Appellant claims. TR at 156 - 157. Furthermore, discrepancies in the chain of custody go to the weight of the evidence, not to its admissibility. United States v. Shackelford, 738 F.2d 776, 784 (11th Cir. 1984), United States v. Jefferson, 714 F.2d 689, 696 (7th Cir. 1983), United States v. Lampson, 627 F.2d 62, 65 (7th Cir. 1980); see also Appeal Decision, 2202 (VAIL).

Arguing that the samples taken were not credible, the Appellant also asserts that the presence of the white particles on the SL-185 is not determinative that the SL-185 allided with the Lilly dock and vessel. However, the Administrative Law Judge simply considered the similarity of the particles found on the barge SL-185 to the P/V HIGH HOPES as "some evidence to weigh" and not as determinative of the allision. D&O at 10. I do not

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find any significant breaches in the chains of custody for the samples collected from the vessels involved and, therefore, find that the samples were properly admitted into evidence and given credible weight by the Administrative Law Judge.

III

The Appellant contends that the Administrative Law Judge ignored

the testimony of his expert witness and relied on mere suspicion or speculation in reaching her findings that he negligently navigated his tug and barge so as to collide with the Lilly dock and pleasure vessel. I disagree.

Appellant contends that the evidence presented by his expert was entitled to be given more weight than evidence presented by the Maryland State Police Officer because of his greater experience. The Administrative Law Judge, as the trier of fact, is the judge of credibility and determines the weight to be given to the evidence. Appeal Decisions 2302 (FRAPPIER), 2290 (DUGGINS), 2156 (EDWARDS), 2017 (TROCHE), 2365 (EASTMAN), 2551 (LEVENE). Seeing no reliance by the Administrative Law Judge on inherently incredible evidence, that judgment will not be disturbed on appeal. Appeal Decisions, 2541 (RAYMOND), 2522 (JENKINS), 2492 (RATH), 2333 (ALAYA). My review of the record does not indicate the testimony of the Maryland State Police Officer was inherently incredible. It also indicates that the Appellant's expert's testimony was discredited.

Appellant maintains that the testimony of his expert witness regarding the physical evidence proves the barge SL-185 could not have been involved in the allision. The Appellant's expert witness, Mr. David Barto, testified that, in his opinion, the damage to the P/V HIGH HOPES was inconsistent with being hit by the barge SL-185. TR at 468 - 469. However, on cross examination, Mr. Barto conceded that, in order to reach the conclusion that the barge SL-185 did not cause the damage to the P/V HIGH HOPES, he would have to make assumptions on the speed of the barge SL-185 and the strength of the P/V HIGH HOPES and the pier. He further admitted that none of these factors were known to him or tested by him. TR at 483. This cross examination discredited the Appellant's expert witness testimony. In finding that the barge SL-185 struck the P/V HIGH HOPES and Lilly dock, the Administrative Law Judge relied on evidence that proved the physical possibility of the accident including: the depths of the water around the Lilly dock, the sandy quality of the bottom, the draft and contour of the barge SL-185, and testimony and evidence presented by the State Police. D&O at 11. Additionally, I note that the SL-185 was in close proximity to the Lilly dock and vessel at the time of the crash, and that the only other vessel in the Wicomico River, the M/V NIKKI JO C, was eliminated as a possible cause of the allision because it was traveling in the opposite direction and not in the area at the time of the allision.

It is well established that the Administrative Law Judge is not bound by the testimony of expert witnesses. Appeal Decisions 2294 (TITTONIS), 2365 (EASTMAN). The decision of the Administrative Law Judge to dismiss an expert's testimony will not be overturned unless arbitrary, capricious or an abuse of discretion. Appeal Decision 2365 (EASTMAN). Furthermore, the findings made by the Administrative Law Judge need not be consistent with all the evidentiary material contained in the record so long as sufficient material exists in the record to justify such a finding. Appeal Decisions 2282 (LITTLEFIELD), 2395 (LAMBERT), 2450 (FREDERICK). I find the Administrative Law Judge's decision to discredit the Appellant's expert witness's testimony and find that the barge SL-185 struck the P/V HIGH HOPES and dock are well reasoned and based on credible evidence in the record. Therefore, I will not overturn them on appeal.

IV

Appellant argues that the presumption of negligence that may arise when a vessel strikes a stationary object is not applicable in this case because the offending vessel is not clearly known. Appellant also argues that, because the Coast Guard failed to establish that an allision occurred, the specification for failure to give his name and address to the owner of the property damaged, Mr. Lilly, must also fail. TR at 265 & 551. Because I have already found that the Administrative Law Judge's finding that the barge SL-185 struck the P/V HIGH HOPES and dock is

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supported by credible evidence in the record, this basis for the Appellant's appeal is eliminated and I decline to address it further.

V

The Appellant maintains that he properly served as his own lookout by using the M/V JACQUELINE A's radar. Appellant contends, citing Capt'n Mark v. Sea Fever Corp., 692 F.2d 163, (1st Cir. 1982), that the rule requiring a lookout to be on the bow at all times and to have no other duties is an unrealistic requirement to impose on small vessels with limited crews, especially those equipped with radar. The Appellant misreads the ruling in Capt'n Mark. The question is not whether a dedicated lookout should have been posted on the bow of the barge SL-185 at all times, only whether Appellant could properly serve as the lookout in light of all the attendant circumstances. See Capt'n Mark, supra, at 166.

Rule 5 of the Inland Rules of Navigation provides: Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision. 33 U.S.C. 2205. The adequacy of the lookout is a question of fact to be determined in light of all existing facts and circumstances. Capt'n Mark, supra, at 166-165; Anthony v. International Paper Co., 289 F.2d 574, 580 (4th Cir. 1961) ("the

question of the sufficiency of the lookout in any instance is one of fact to be realistically resolved under the attendant circumstances, bearing in mind that the performance of lookout duty is an inexorable requirement of prudent navigation"). In Coast Guard suspension and revocation proceedings, in order to determine the adequacy of the lookout, the Administrative Law Judge must carefully consider all of the surrounding circumstances faced by the lookout and determine whether those circumstances permitted the lookout to adequately perform lookout duties. See Appeal Decisions 2319 (PRAVELEC), 2390 (PURSER), 2421 (RADER), 2474 (CARMLENKE), 2482 (WATSON), 2046 (HARDEN).

The facts on the record indicate that the Appellant, while the M/V JACQUELINE A and the SL-185 were transiting the fog laden Wicomico River, on two separate occasions sent a crewman to the head of the bow of the barge SL-185. Additionally, at other times, he performed lookout functions using the radar and had a crewman maintain a radar watch after leaving the area of the Lilly dock. TR at 545. Robert Apperson was sent to the bow while the M/V JACQUELINE A was in the area of the Lilly dock to act as a lookout and he stayed there for approximately "four seconds". TR at 46. That was the only time he acted as a lookout. TR at 47. The other crewman, William Ailsworth, went to the bow to act as a lookout after Robert Apperson returned from the bow. TR at 544. He remained on the bow for "a minute, two minutes." TR at 360. According to William Ailsworth, at this time, the fog was so thick at points that you could not see

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the bow of the barge from the wheelhouse of the M/V JACQUELINE A. TR at 357. The conditions all the way up the Wicomico River, approximately 12 to 15 miles, continued to be thick blankets of fog with occasional clearings, with visibility limited to 1/8 to 1/4 mile. TR at 201, 363-365. The M/V JACQUELINE A would slow in the fog and speed up in clear spots, however, no lookouts were posted on the bow for the remainder of the journey to Salisbury. TR at 363.

The Administrative Law Judge held that, under the prevailing circumstances, and considering the length of tow and the fact the transit occurred during the darkness of night, a lookout should have been stationed at the head of the barge SL-185. D&O at 12. I find that the Administrative Law Judge properly reviewed all of the attending circumstances faced by the crew of the M/V JACQUELINE A and appropriately determined those circumstances did not permit the Appellant to serve as both the vessel operator and lookout on the Wicomico River during the morning of September 13, 1991.

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 applicable law regulations. I find no error in the Administrative Law Judge's application of the law.

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ORDER

The decision of the Administrative Law Judge dated December 3, 1992, is AFFIRMED. The order of the Administrative Law Judge is AFFIRMED.

ROBERT E. KRAMEK
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 7th day of July, 1996.