

NTSB Order No.
EM-144

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 21st day of July, 1987

PAUL A. YOST, Commandant, United States Coast Guard,

v.

MARK DOUGHERTY and EDWARD C. MURPHY, Appellants.

Dockets ME-121
and ME-122

ORDER DENYING RECONSIDERATION

By Orders EM-140 and EM-139, served March 2, 1987, the Board reversed decisions of the Vice Commandant affirming suspensions of the appellant's merchant mariner's licenses on charges of negligence stemming from their operation of vessels that had struck fixed objects. The Board found in each case that notwithstanding the admiralty law presumption of negligence an allision or collision creates, the appellants had demonstrated the exercise of reasonable care in the navigation of their respective vessels. The Coast Guard has filed requests for reconsideration in each docket, urging that the Board has applied an incorrect standard in concluding in these proceedings that the presumption of negligence had been overcome.¹ As we find no error in the Board's decisions in these cases, the requests for reconsideration will be denied.²

We have carefully considered the Coast Guard's argument that the Board's conclusions that appellants' evidence rebutted the

¹The Coast Guard has also petitioned for oral argument on its consideration requests. We think oral argument unnecessary as the legal issues are adequately developed on the record and in the pleadings. The petition for oral argument is therefore denied.

²The appellants, who are represented by the same counsel, have filed a joint response opposing the requests for reconsideration as they involved a common legal issue. For that same reason we have determined to address both requests for reconsideration in a single order.

presumption of negligence in these cases do not comport with admiralty law decisions in the courts that purport to require a party charged with negligence to disprove fault where the presumption has been established. In our view, this argument essentially represents no more than a disagreement with the Board's judgment that the evidence these appellant's adduced did demonstrate that they had done all the reasonable care required of them in the circumstances.³ For example, apart from the fact that the Coast Guard makes no effort to suggest what additional showing to rebut the presumption should have been required of appellant Dougherty, its insistence that appellant Murphy should have known that an encounter with fog in the harbor would affect his ability safely to navigate his tug and tow thereafter ignores the uncontradicted evidence that the harbor was clear of fog when appellant Murphy entered it and set up his flotilla to take on an additional barge. As a consequence, the presumption of negligence arising from an allision that occurred in navigating after the sudden onset of dense fog cannot relate back to the decision to precede into the harbor.⁴

The Board is fully aware that in maritime tort actions some courts treat the presumption of negligence relied upon by the Coast Guard in these cases as effectively shifting both the burden of persuasion and the burden of proof to the charged party.⁵ However,

³In its reply to appellant Murphy's appeal, the Coast Guard asserted that to rebut the presumption "requires nothing more than [a showing of] reasonable care." Reply at 4.

⁴This does not mean, of course, that the Coast Guard was not free to draw the propriety of that decision into question with evidence that "given the weather conditions observed and forecast for the day in question, appellant knew or should have known that the fog in the area could obscure the river so quickly and completely that he would not be able to navigate safely in the event the fog moved in while a barge transfer operation was underway" (Order EM-139 at 6). Evidence of that nature could support a finding of negligence without regard to any subsequent consequences, such as a collision with a fixed object, that might result from such a faulty judgment.

⁵It is far from clear to us, however, how such courts, in instances where disproving fault arguably involves more than a showing of the exercise of reasonable care, could discern whether a party charged with negligence had disproved fault where the charging party limited its affirmative proof to the facts establishing the presumption, as the Coast Guard has done in these proceedings.

these are not civil actions for damages in which under substantive principles of admiralty law a finding of negligence dictates economic liability. They are, rather administrative proceedings subject to the requirements of the Administrative Procedures Act, a statute that in recognition of, inter alia, the importance of affording the individual certain rights when the government seeks to abridge or curtail a valuable privilege, places the burden of proof on the Coast Guard as the proponent of a suspension order (see 5 USC §556(d)). When the Coast Guard's charge against a seaman is proved, it has the discretion to suspend or revoke his license or document where doing so would be in the interest of promoting safety at sea. See 46 USC §§7701-7703.

These differences at the very least would appear to counsel against exclusively reliance on expedient presumptions developed for proceedings that are not intended to advance maritime safety or to protect the rights of merchant mariners. In any event, we continue to believe that the presumption should be rebuttable on a showing of reasonable care in the circumstances. No alteration in that belief is warranted because some other, more rigorous standard might be applied in other forums adjudicating different interests.

ACCORDINGLY, IT IS ORDERED THAT:

The requests for reconsideration are denied.

GOLDMAN, Vice Chairman, LAUBER and NALL, Members of the Board, concurred in the above order. BURNETT, Chairman and KOLSTAD, Member, filed a dissenting statement.

BURNETT, Chairman, dissenting:

In view of the impact of our decisions in these cases on the Coast Guard's prosecution of charges of negligence against seamen under its suspension - revocation authority, I would grant its request for oral argument on the issues raised in the petition for reconsideration. I dissent from the denial of that request.

Jim Burnett
Chairman

Commandant vs. Dougherty and Murphy
James L. Kolstad, Member of the Board, Dissenting

I do not agree with my colleagues in their decision to deny the Coast Guard the opportunity of reconsideration in these instances.

While there seems to be no dispute with respect to the facts, the majority is persuaded by the Coast Guard's decision to omit the legal evidence to sustain the sanctions.

The poor quality of the Coast Guard's legal arguments is not debatable. However, no reading of rules of the road or principles of piloting can excuse the poor judgement of these tugboat captains, and it is inappropriate that they be returned to the bridge without remedial sanction.

In my opinion, a far more appropriate response is to approve the petition for reconsideration and to correspond with the Commandant relative to the Board's insistence that in the future more adequate legal evidence be included in the Coast Guard's arguments.

Safety in the inland waterways cannot be enhance by the majority's decision in this case. For that reason, I vote to grant the Coast Guard its petition as requested.

James L. Kolstad