

IN THE MATTER OF Merchant Mariner's Document No. Z-590024
Issued to: KENNETH M. YOUNG

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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KENNETH M. YOUNG

This appeal comes before me by virtue of Title 46 United States Code 239(g) and Code of Federal Regulations Sec. 137.11-1.

On 8 July, 1949, an Examiner of the United States Coast Guard at New York City suspended Merchant Mariner's Document No. Z-590024 issued to Kenneth M. Young, upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as a fireman-watertender on board the American S. S. AMERICAN MILLER, under authority of the document above described, during the period from 6 June, 1949, to 15 June, 1949, he repeatedly failed, without reasonable cause, to perform his duties while the said vessel was at sea or in foreign parts. Three other specifications pertaining to Appellant's refusal to perform his duties were found "not proved".

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Appellant was represented by counsel of his own selection and he entered a plea of "not guilty" to the charge and each specification.

Thereupon, the Investigating Officer made his opening statement. He then introduced in evidence the testimony of five

witnesses and read into the record the five written medical reports pertaining to examination of the Appellant by various doctors.

In defense, Appellant offered in evidence the testimony of two witnesses. He also testified under oath in his own behalf.

At the conclusion of the hearing, having heard the statements of the Investigating Officer and Appellant, the Examiner found the charge "proved" and the above specification "proved in part." He then entered an order suspending Appellant's Merchant Mariner's Document No. Z-590024 for a period of three months on twelve months' probation.

From that order, this appeal has been taken, and it is urged that the evidence does not support the findings because it shows that Appellant was ill during the specified period of time. It is also claimed that the records of the U. S. Public Health Service Hospital at Stapleton, Staten Island, New York, prove that Appellant was permanently injured.

APPEARANCES: GAY and BEHRENS of New York City

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

During a voyage which included the period from 5 June, 1949, to 15 June, 1949, Appellant was serving in the capacity of a fireman-watertender on board the American S. S. AMERICAN MILLER, acting under authority of Merchant Mariner's Document No. Z-590024, while the said vessel was at sea and in various foreign ports.

On 5 June, 1949, Appellant was standing his regular 4 to 8 (1600 to 2000) watch and Goddard was the Junior Engineer of the watch. During this watch, Appellant made some comic sketches on the engine room bulletin board and these drawings were erased by Goddard with a wet "soogie" rag. Then Appellant drew pictures on the front of the port boiler and Goddard approached the boiler intending to erase the pictures with the wet "soogie" rag which was

in his right hand. Since it was then a few minutes before 1950, Appellant was holding a 12-pound sledge hammer which was used to ring a bell at 1950 to notify the relieving watch of the time. When Goddard attempted to erase the pictures from the port boiler, there was an argument and some scuffling between Goddard and Appellant. During the course of this, the "soogie" rag that Goddard had in his hand came into contact with Appellant's face and Appellant was hit on the right jaw. Goddard is left-handed.

When Appellant was relieved of the watch, he went to the Purser for medical treatment for his jaw. The Purser found no evidence of injury and took the matter up with the First Assistant Engineer, Mr. Werner. Appellant told Werner that Goddard had struck him on the jaw and Goddard stated that Appellant had first hit him with the sledge hammer. The two men then shook hands and the matter seemed to be settled.

At about 2300 on the same date, Appellant again went to the Purser asking for treatment and claiming he had a headache as well as a pain in his jaw. The Purser could not detect any swelling or other indication of injury but he gave Appellant a hot-water bottle and some aspirins. Because of his dissatisfaction with the way he was being treated, Appellant reported the incident to the Master at this time.

At about 0400 on 6 June, 1949, Appellant was called to the Chief Engineer's Office since he said he could not stand his 0400 to 0800 watch because his jaw was swollen and hurting. The Purser examined him for the third time but could detect no swelling or other injury. Appellant received no order to stand his 4 to 8 watch and he did not do so.

The ship docked at Bremerhaven on 7 June, 1949, and Appellant was given a letter to the agent who took him to the dental clinic. The dental report dated 7 June, 1949, stated:

"Kenneth Young has been examined and no evidence of fracture found."

The doctor also gave Appellant some pills to take. Two days later, Appellant was sent to the Port Health Doctor at Bremen. The report stated that Appellant's blood pressure and temperature were normal

and that there was no sign of any disease. An examination on the 13th of June by the Port Doctor at Victoria Dock, London, disclosed no abnormalities. The doctor reported that he considered Appellant "to be *fit* for seagoing employment" and he suggested the use of codeine.

On 16 June, 1949, a doctor at the Seaman's Hospital examined Appellant when he told them he was unable to open his mouth all the way and had been having headaches as a result of having been hit on the jaw. The medical report confirmed that Appellant was not able to open his mouth to its full extent, "due to the very severe bruising of the masseter muscle." It also stated that there was no fracture but "the muscles of the right side of the face were somewhat tense and bruised;" and that it was possible Appellant had sustained a very mild concussion. The report concluded that it was the doctor's opinion that Appellant's failure to perform his duties was due to the effects of the bruising and concussion.

A dental surgeon at this same hospital then examined Appellant's mouth and jaw. The report stated that Appellant was able to open his mouth without difficulty and that a tenderness inside his mouth indicated he had received a severe blow on the right side of his jaw. It was the surgeon's opinion that the blow would have rendered Appellant incapable of work for at least twelve hours after it was received but that he was entirely fit for duty at the time of the examination except for the possible psychological effect of having to return to an engine room in which he might be subject to a further attack. The second doctor who had examined Appellant had also mentioned the latter possibility and suggested that Appellant's watch be changed but nothing was done about this.

Appellant did not stand his watch on the morning of June 6, 1949, or any of his watches on the 10th, 11th or 12th of June. He was not at any time ordered to "turn to" but simply failed to do so on these dates.

There is no record of any previous disciplinary action having been taken against Appellant by the Coast Guard. At the time of the incident, Appellant had been going to sea for approximately four years and he is 24 years of age.

OPINION

The Examiner found that Appellant failed to "turn to" and stand his watches on the morning of 6 June, 1949, and on the 10th, 11th and 12th of June, 1949. Appellant does not deny that he failed to stand these watches but he contends that his conduct was justified because he was ill as a result of a blow on the jaw he received on 5 June, 1949. Appellant states that the evidence in the record supports his position and that the Examiner's findings are not supported by the evidence.

It was Appellant's duty, as a member of the crew, to "turn to" and stand the watches assigned to him unless he was incapacitated from doing so. The evidence adequately establishes that Appellant was struck on the jaw by Goddard and that Appellant failed to stand the above mentioned watches. The evidence is conflicting as to whether the blow was severe enough to cause such pain as to prevent Appellant from performing his duties.

With respect to the finding that Appellant was guilty of "misconduct" for failing to stand his watch on the morning of 6 June, 1949, I feel that the decision of the Examiner should be reversed and the specification found "not proved" as to that particular watch. Appellant complained to the Purser three times during the night of the 5th and 6th that he was suffering. Although the Purser was not able to find any injury when he examined Appellant on these three occasions, it seems unlikely that a man would continue to seek relief unless he were actually in some pain. Also indicative of this is the fact that Appellant was awake at 0200 on the 6th after having gone to see the Purser as late as 2300 on the 5th. There must have been some reason for his lack of sleep during these hours, particularly since he was scheduled for the 4 to 8 watch on the morning of the 6th. And the last doctor to examine Appellant stated it was his opinion that such a blow as was received by Appellant was sufficient to make him incapable of work for at least twelve hours. I believe that this evidence, considered as a whole, presents strong doubt as to whether Appellant was fit for duty on the morning of 6 June, 1949.

Concerning the 10th, 11th and 12th of June, it is my opinion that Appellant has failed to satisfactorily account for his actions. The Purser examined Appellant three times soon after the

blow was struck but yet he testified that he was unable to detect any sign of injury. The Purser, Chief Engineer and the First Assistant Engineer testified that Appellant's jaw was not swollen; but Appellant and two of his witnesses testified that it was swollen. The medical reports also conflict as to the extent of the injury. Expert opinion must be considered but, even if it is wholly contrary to the balance of the evidence, it is not necessarily conclusive. The Examiner, as the trier of the facts, must use his own judgment as to the weight to be given the expert opinion evidence as well as the testimony of the witnesses. The evidence may be substantial even though it does not point entirely in one direction and it permits two or more possible inferences. *Baltimore and Ohio Railroad Co. V. Postem (C.C.A., D.C., 1949)*, 177 F. 2d 53. Consequently, it is my belief that the findings and conclusions of the Examiner with respect to Appellant's conduct on the 10th, 11th and 12th of June were based on substantial evidence. I feel that, although Appellant quite probably did not feel fit to stand his watch on the morning of the 6th, he was no longer suffering from the ill effects of the blow on these later dates.

Appellant claims that the records of the U. S. Public Health Service Hospital at Stapleton, Staten Island, New York, prove that Appellant was permanently injured. It was Appellant's privilege to introduce and such records in evidence but he failed to do this. Hence, it can be given no consideration in this appeal.

I am satisfied the Examiner has carefully weighed and considered the testimony and documentary evidence presented in this case as disclosed by the moderation of his Order.

ORDER

The Order of the Examiner, dated 8 July, 1949, should be, and it is, AFFIRMED.

Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 5th day of July, 1950.

***** END OF DECISION NO. 398 *****

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