UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 182135
Issued to: Melvin I. WIDMAN

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2400

Melvin I. WIDMAN

This appeal has been taken in accordance with Title 46 U.S.C. 7702(b) and 46 CFR 5.30-1.

By order dated 26 June 1984, and Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's license for six months and an additional six months on twelve months' probation upon finding proved the charge of negligence. The specifications found proved allege that while serving as Operator aboard the M/V MISS HAVASUPAI, Appellant did on 12 May 1984 negligently fail to operate said vessel with due caution by failing to take prompt and clearly recognizable action to avoid a vessel that was dead in the water in the vicinity of London Bridge, Lake Havasu City and did on 3 June 1984 negligently fail to navigate said vessel with due caution by failing to take prompt and clearly recognizable action to avoid vessels restricted in their ability to maneuver in the vicinity of London Bridge, Lake Havasu City.

The hearing was held at Lake Havasu City, Arizona, on 11 June 1984, and at Long Beach, California, on 26 June 1984.

At the hearing, Appellant elected to represent himself and

entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced in evidence four exhibits and the testimony of six witnesses.

In defense, Appellant offered in evidence his own testimony, the testimony of one additional witness, and seven exhibits.

In addition, the Administrative Law Judge directed that the testimony of three additional witnesses be taken.

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and specifications had been proved. He then served a written order on Appellant suspending his license for six months plus an additional six months on twelve months' probation.

The entire Decision and Order was served on 20 August 1984. This appeal was timely filed on 20 July 1984 and perfected on 15 February 1985.

FINDINGS OF FACT

On both 12 May 1984 and 3 June 1984 Appellant was serving as Operator aboard the M/V MISS HAVASUPAI. The M/V MISS HAVASUPAI is an inspected small passenger vessel. It is a 36- foot tour boat, displacing 18 gross tons, and certificated to carry 48 passengers and a crew of one licensed operator and one deckhand. The vessel is operated from controls located on the starboard side. The M/V MISS HAVASUPAI is owned by Lake Havasu Boat Tours of Lake Havasu City, Arizona. On 12 May 1984, Appellant was returning to his dock from a tour with approximately 23 passengers on board the M/V MISS HAVASUPAI. He was in the operator's seat on the starboard side. There was no lookout posted. The vessel was proceeding at a slow speed estimated between 3 and 10 knots.

Between the M/V MISS HAVASUPAI and her dock was a 21 foot water ski boat. At about 1645, as the M/V MISS HAVASUPAI approached it, it was drifting with the engine idling approximately 25 yards off shore. The five occupants of the ski boat had been engaged in water skiing since about 0800. As a result of horse

play, one of the female occupants of the boat half jumped and was half thrown into the water with her clothes on. She was swimming in the vicinity of the ski boat. Local regulations prohibit swimming in the area.

The occupants of the ski boat saw Appellant's vessel, the M/V MISS HAVASUPAI, bearing down on them. They waved and tried to get Appellant's attention, but to no avail. To avoid a collision, the Operator of the ski boat engaged the engine and backed down. The occupant of the ski boat who was in the water became entangled in the propeller and suffered serious injuries.

The M/V MISS HAVASUPAI crossed the bow of the ski boat at a distance of 6 inches or less.

On 3 June 1984, Appellant was again the Operator of M/V MISS HAVASUPAI and was returning with some passengers to the dock. As he approached the dock there were two paddle boats in his path. Both had to back down suddenly to avoid being struck by the M/V MISS HAVASUPAI. Again, Appellant did not see the boats in his path.

BASES OF APPEAL

This appeal is taken from the order of the Administrative Law Judge. Appellant contends that:

1. The charge and specifications did not give Appellant adequate notice of the detailed factual findings that the Administrative Law Judge would make;

2. The Administrative Law Judge failed to adequately inform Appellant of the consequences of proceeding without counsel because he did not inform him that the resulting decision and order might be entered in evidence at a subsequent civil suit involving the same subject matter;

3. The Administrative Law Judge erred in allowing the admission of hearsay evidence;

4. The Administrative Law Judge erred in continuing the

hearing in order to obtain additional evidence;

5. The evidence is insufficient to support the findings.

APPEARANCE: Norman S. Narwitz, Esq., Manns, Narwitz, Lewis & Klein, Beverly Hills, California.

OPINION

1

Appellant first argues that the charge and specifications did not give him adequate notice of the d*et*ailed factual findings the Administrative Law Judge would make. I do not agree.

Appellant complains that the two specifications merely allege that he was negligent because he failed to take prompt and clearly recognizable action to avoid one vessel that was dead in the water to assist a person in the water and other vessels that were restricted in their ability to maneuver. The Administrative Law Judge then went on to make detailed factual findings regarding each of the incidents in question. Appellant is arguing, in essence, that the specifications should have set forth in detail each of the actions resulting in the violations.

A specification must, of course, set forth the basis for jurisdiction, the date and place of offense, and a statement of facts constituting the offense so that the person charged will be able to identify the offense and be in a position to prepare his defense. 46 CFR 5.05-17(b). A negligence specification must allege particular facts amounting to negligence or sufficient facts to raise a legal presumption which will substitute for particular facts. See Appeal Decisions 2358 (BUISSET) and 2277 (BANASHAK).

The two specifications in the case at hand allege that Appellant failed to take prompt and clearly recognizable action to avoid: first, a vessel engaged in recovering a person from the water; and, second, vessels restricted in their ability to maneuver. These are statutory duties imposed by the Inland Navigation Rules. 33 U.S.C. 2001 et *seq*. Rule 8(a) and

(b) requires that action to avoid a collision be large enough to be readily apparent to another vessel, and be made in ample time. Rule 18 requires a power driven vessel, such as the M/V MISS HAVASUPAI, to keep out of the way of a vessel restricted in its ability to maneuver. Thus, Appellant was clearly charged with failing to fulfill his statutory obligation under the Inland Navigation Rules.

If even this were not sufficient initially, any complaint with respect to the adequacy of this specification should have been made at the hearing rather than on appeal for the first time. From the record, it is apparent that Appellant was aware that he was charged with failing to take action to avoid a collision at the dates and place in question. I find no evidence that he was confused or misled in this respect. In such a situation, the specification need not be set aside on appeal. See *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, (D.C. Cir. 1950).

II

Appellant complains that the Administrative Law Judge did not adequately advise him of the consequences of the hearing because he failed to advise him that the Decision and Order might be used in evidence in a later civil case. I do not believe that such advice is necessary.

The record shows that the Administrative Law Judge advised Appellant that the hearing could result in the loss of his mariner's license. I find no requirement, nor do I believe it appropriate, for the Administrative Law Judge to speculate upon what effect a suspension and revocation proceeding, and the findings made in the course thereof, may have on separate civil proceeding in other jurisdictions. The use which may be made of the Administrative Law Judge's Decision and Order under any of the fifty different state jurisdictions, within the Federal Courts under the Federal Rules of Evidence, or in the course of settlement negotiations between the parties to a civil suit covers too wide a range of possibilities to reasonably expect and Administrative Law Judge to give such advice in the course of the hearing. Evaluation of such matters is best left to the individual and his counsel with respect to the specific situation and the jurisdiction involved. An Administrative Law Judge should not attempt to make such an

evaluation.

III

Appellant asserts that the Administrative Law Judge erred in allowing hearsay evidence to be admitted. I do not agree.

Appellant specifically complains of two items which were allowed in evidence. First, he complains that the report prepared by the Mohavde County, Arizona, Sheriff's Office regarding the incident with the boat recovering a person from the water was admitted into evidence. Second, he complains that two of the Mohave County Deputy Sheriffs testified stating that they had heard that Appellant would come into the dock blasting his horn.

The Administrative Law Judge gave Appellant ample opportunity to object to the admission of the Sheriffhs Office's report. After the report was offered, but before it was admitted, Appellant was allowed to examine it during a recess in the hearing. Only after he had ample time to examine the report and expressly entered "no objection" to it, did the Administrative Law Judge allow it into evidence. I find no error here.

The first occasion on which a Deputy Sheriff testified that Appellant came into the dock blasting his horn, he did so in response to a specific question by Appellant on cross-examination. On the second occasion, the Deputy Sheriff testified during questioning by the Investigating Officer with respect to Appellant's reputation as the tour boat Operator. Appellant made no objection to this testimony. Appellant may not now complain about evidence which he introduced and which the Coast Guard introduced without objection.Even if the Coast Guard's evidence were subject to objection and Appellant had objected, there would be no prejudice since the Coast Guard's evidence was merely cumulative of Appellants own evidence.

IV

Appellant urges that the Administrative Law Judge erred in continuing the hearing on his own motion to obtain additional evidence. I do not agree.

Appellant urges, in essence, that the Administrative Law Judge should have ruled on the evidence as it stood at the end of the Investigating Officer's rebuttal case.

The Administrative Law Judge continued the hearing to obtain the testimony of additional witnesses including the Operator of the ski boat which was the subject of the first specification. It is clear from the record that the Administrative Law Judge would have required the depositions of these witnesses had it not been possible to bring them before him in person. He, of course, has the authority to do this under 46 CFR 5.20-140. By requiring the testimony of these witnesses, the Administrative Law Judge was, in effect, refusing to rely on the reports of what they had said contained in the Sheriff's Office's report and was giving Appellant the opportunity to confront and cross-examine them. I find no error in the Administrative Law Judge's action in continuing the hearing under 46 CFR 50.10-20(a) for this purpose.

V

Appellant urges that the evidence does not support the findings. I do not agree.

In support of this basis, Appellant argues that the evidence does not establish that he should have seen either the ski boat or the paddle boats which were in his path on the two occasions in question.He further argues the improper operation of these vessels.

Appellant's first argument ignores the fact that the Inland Navigation Rules place a duty upon him to see vessels that are in his path. Rule 5 requires that every vessel must at all times maintain a proper lookout and make a full appraisal of the situation and risk of collision. Rule 7 requires every vessel to use all available appropriate means to determine if a risk of collision exists. Rule 16 requires every vessel which is directed to keep out of the way of another to take early and substantial action to keep well clear. Rules 17 and 18 state which vessels are to keep out of the way of which other vessels. These rules, taken together, imply a duty, on the vessel which is to keep out of the way of the other vessel, to see that other vessel. Since the

weather was clear and there appears no reason that the operator of one vessel should not be able to see other vessels, it is unnecessary to prove by further evidence that Appellant should have seen these other vessels.

Appellant's arguments with respect to improper navigation of the other vessels are, also, of no help to him in these proceedings. The fact that the operator of another-vessel may have been negligent,does not excuse Appellant's negligence. Contributory negligence is not a defense in these proceedings. Appeal Decision 2319 (PAVELEC).

CONCLUSION

The findings of the Administrative Law Judge are supported by stantial evidence of a reliable and probative nature. The proceedings were conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge date at Long Beach, California. on 26 June 198 is AFFIRMED.

B. L. STABILE
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 31th day of July, 1985.

***** END OF DECISION NO. 2400 *****

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