

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 500856
Issued to: Conrad P. NILSEN

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2382

Conrad P. NILSEN

This appeal had been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 1 July 1982, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's license for one month upon finding him guilty of negligence. The specification found proved alleged that while serving as Master of the S/S SAN JUAN, under the authority of the license above captioned, Appellant did on 11 February 1980, while said vessel was departing San Juan, Puerto Rico, fail to navigate the vessel within the confines of the Bar Channel causing said vessel to ground. Two other specifications were dismissed, one on motion of the Investigating Officer, the other on motion of Appellant.

The hearing was held at San Juan, Puerto Rico, on 3 February, 4 February, and 31 March 1982.

At the hearing, Appellant was represented by professional counsel, and entered a plea of not guilty to the charge and the specification.

The Investigating Officer introduced in evidence eleven exhibits and the testimony of three witnesses.

In defense, Appellant offered in evidence eight exhibits and the testimony of three witnesses.

After the end of the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and the specification had been proved. He served a written order on Appellant, suspending license NO. 500856 and all other valid licenses issued to Appellant issued to Appellant for a period of one month.

The entire decision was served on 2 July 1982. This appeal was timely filed on 16 July 1982 and perfected on 2 November 1982.

FINDINGS OF FACT

On 11 February 1980, Appellant was serving as Master on board S/S SAN JUAN and acting under the authority of his license while the vessel was departing San Juan, Puerto Rico.

The S/S SAN KUAN is a container ship of 18,455 gross tons, 659 feet in length, 78 feet in breadth, and 29 feet in depth. It is steam propelled with 9,000 horsepower.

Appellant has a Master's license for Steam and Motor Vessels any gross tons upon the ocean. His license also has various pilotage endorsements, including one for San Juan, Puerto Rico.

On 11 February 1980 the S/S SAN JUAN was moored at berth G in the Puerto Nuevo Channel in the harbor of San Juan, Puerto Rico. At about 2300 the S/S SAN JUAN got under way to proceed to sea. San Juan Harbor Pilot Fernandez navigated the vessel from the Army Terminal through Puerto Nuevo Channel, Graving Dock Channel, and into the Anegado Channel. He departed the vessel in the vicinity of Buoy No. 11 (La Puntilla). When Pilot Fernandez left the S/S SAN JUAN, the vessel was on the normal course of 315°T in the Anegado Channel.

To proceed to sea from the vicinity of Buoy 11, a vessel must

continue on a course of 315°T until it reaches the Bar Channel. It must then come right to a course of 008°T. This turn to the right should be begun at or before the time the vessel reaches the vicinity of Buoy 5. Pilot Fernandez stated that this turn is usually started when the vessel crosses the extension of an imaginary line drawn between Buoy 2 and Buoy 3. Buoy 2 was missing on 11 February 1980. The Coast Guard broadcast a Notice to Mariners at about 0100 on 11 February 1980 advising mariners that Buoy 2 was missing and the S/S SAN JUAN had a copy of this message onboard.

As the S/S SAN JUAN proceeded outbound down the Anegado Channel, she began a gradual turn to the right. Overall, the S/S SAN JUAN headed in a northwesterly direction, crossed the channel, went outside of the channel and grounded on a rocky outcropping.

The Chief Mate of the S/S San JUAN was stationed on the bow. He testified that he saw some sort of small boat, perhaps a fishing boat, in the vicinity of Buoys 3 and 5 in the Bar Channel. Other witnesses testified that fishing boats commonly fished in this area and that they have caused problems for years.

The Chief Mate reported the existence of the fishing boat to the Third Mate on the bridge. The S/S SAN JUAN was then in the Anegado Channel near Day Mark No. 7. The bow of the S/S SAN JUAN then swung to the left and the Chief Mate observed that the S/S SAN JUAN would clear the fishing boat by staying on the left side of the channel. Shortly thereafter he noted the S/S SAN JUAN was coming to the right and he began to secure the anchors. After securing the port anchor, he looked over the bulwark, and saw breakers. He went to the rail as the S/S SAN JUAN grounded.

The Third Mate was on the bridge with Appellant. He testified that all of the equipment on the S/S SAN JUAN was functioning properly. He also stated that the departure was normal and that Appellant gave no unusual helm or engine commands. After the turn to the left he thought the S/S SAN JUAN was out of the channel. The Third Mate then observed the S/S SAN JUAN come slowly to the right and then ground.

Immediately after the grounding, Appellant made several calls on the radio. He stated several times that he had begun the turn

to the right into the Bar Channel, couldn't pick up Buoy 2, and that the S/S SAN JUAN was aground. He made no mention of the fishing boats in those broadcasts.

Appellant's expert witness, a San Juan Harbor Pilot, analyzed the evidence and plotted the movements of the S/S SAN JUAN on the night in question. He testified that the S/S SAN JUAN began her turn into Bar Channel in the vicinity of Day Mark No. 7 by coming 18° to the right. The S/S SAN JUAN then began a 19° turn to the left, and then began to swing to the right. This swing to the right continued until the vessel grounded. The witness plotted the position of the grounding on a rocky spot with a charted depth of 18 feet to the west of Buoy No. 2.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant asserts that the Administrative Law Judge erred in finding that the presumption of negligence which arises when a vessel grounds was not rebutted. He urges that the presumption should be rebutted because the evidence does not support the Administrative Law Judge's findings that:

1. fishing boats in the channel were not the cause of the grounding.
2. Appellant was aware of "the fisherman in the channel problem."
3. the only reference to 'set' during radio communications after the grounding was by the Dredge McFARLAND.
4. the radio transmissions made by Appellant immediately after the grounding were probative of the facts and outweighed other evidence in the record.

APPEARANCE: Harry A. Ezratty, Esquire, 306 Ponce de Leon Ave., San Juan, Puerto Rico, 00906.

OPINION

Appellant argues that the Administrative Law Judge erred in not finding the presumption of negligence rebutted. I disagree.

The evidence established that the S/S SAN JUAN went aground on a charted shoal outside the navigation channel on the evening of 11 February 1980. When a vessel grounds on a clearly designated shoal, or in a place where it has no business being, a presumption of negligence by the person responsible for the vessel's navigation arises. Appeal Decision No. [2216 \(SORENSEN\)](#) and Appeal Decision No. 2133 (SANDLIN). Because the shoal here is both clearly marked on navigational charts, and is outside the designated channel, where the S/S SAN JUAN should not be, the Administrative Law Judge correctly found that a presumption of negligence on Appellant's part existed. The burden of rebutting the presumption of negligence is placed on the person responsible for navigating the vessel. *Id.*

I

Appellant urges that the Administrative Law Judge erred in not finding that the fishing boats were the cause of the grounding. I do not agree.

Appellant argues that the S/S SAN JUAN was forced to leave the channel to avoid a collision with one or more fishing boats. However, the testimony of the witnesses, and the logbook entry, establish merely that one or more fishing boats were in the vicinity of Buoys 3 and 5.

The Chief Mate testified only that the S/S SAN JUAN came left in the vicinity of Day Mark No. 7 and that they would clear a small boat by keeping to the left of the Anegado Channel. The Chief Mate then noticed the bow swing to the right. He did not testify that the fishing boat blocked the Bar Channel. Rather, he testified that, at most, the S/S SAN JUAN had to keep to the left side of channel.

The Third Mate, who was on the bridge with Appellant, gave no testimony as to whether evasive maneuvers were either necessary or undertaken. He said the voyage was normal and that no special

orders were given. The Third Mate did testify that the S/S SAN JUAN was outside the channel before the final right turn was made. Appellant made no mention of fishing vessels in his radio transmissions after the grounding.

There was no evidence that even suggests leaving the channel was required to avoid a collision.

Therefore, Appellant is arguing that the mere fact that there were fishing boats near Buoys 3 and 5 and that he had to keep to the left side of the channel requires the inference that they caused the grounding. Such speculative possibilities are not sufficient to rebut a presumption of negligence. Appeal Decision No. [2174 \(TINGLEY\)](#) aff'd. *sub nom.*, *Commandant v.*

Tingley, NTSB Order EM-86, aff'd. mem. *sub nom.*, *Tingley v. United States*, 688 F.2d 848 (9th Cir. 1982). See also Appeal Decision No. [2272 \(PITTS\)](#), rev'd. on other grounds *sub nom.*, *Commandant v. Pitts*, NTSB Order EM-98 (1983). Because Appellant brought forward no evidence that a course change to take S/S SAN JUAN outside the channel was in fact necessary because of the fishing vessels, his specifications as to why the S/S SAN JUAN left the channel are without factual support. The Administrative Law Judge's findings that the navigation of the S/S SAN JUAN was not embarrassed by the fishing boats will not be disturbed.

II

Appellant argues that the Administrative Law Judge erred in finding that he was aware of "the fisherman in the channel problem." I disagree.

Appellant has a pilotage endorsement for San Juan Harbor and has many years of experience in transiting the Harbor. The three San Juan Harbor Pilots who testified, the Chief Mate, and the Third Mate were well aware of the frequent existence of fishing vessels in the channel. The Chief Mate reported the existence of small boat lights to the bridge. The Third Mate reported this to Appellant and could see the lights himself. The Administrative Law Judge properly found that Appellant was aware of the fisherman in the channel.

Appellant further argues that the Administrative Law Judge erred in finding that, "the fisherman in the channel problem" is a fixed problem which can be uniformly responded to, but instead requires differing solutions depending upon the exact circumstances. The Administrative Law Judge specifically commented on various maneuvers to avoid the fisherman as reported by several witnesses. There is no indication in the record that the Administrative Law Judge found a particular response to the fisherman appropriate in all circumstances. Therefore, the Administrative Law Judge did not, as Appellant urges, consider the "fisherman in the channel" to be a static problem with a fixed solution.

III

Appellant maintains that the Administrative Law Judge erred in finding that "the only mention of 7° westerly set was by the Dredge McFarland..." I disagree.

Appellant misconstrues the context of the Administrative Law Judge's statement. In the portion of the Decision and Order to which Appellant refers, the Administrative Law Judge is dealing only with radio transmissions after the grounding. In this context the Administrative Law Judge is entirely correct.

The Administrative Law Judge did find, in accordance with Appellant's position, that a 7° westerly set existed on the night in question and that this set was unusual. A westerly set pushes a vessel to the west. To maintain a given course a vessel must steer to the east to counteract the set. In this case a 7° westerly set would require the vessel to steer a course 7° to the east of its intended course.

Appellant also questions the finding that the normal set was between 3 and 5 degrees. San Juan Pilot Fernandez testified that a 3 to 5 degree set was to be expected when leaving the harbor. This is sufficient to support the finding.

Appellant also contends that the evidence of an "unusual" 7°

westerly set rebutted the presumption of negligence. It was uncontested that a 7° set was unusual, but there was no evidence that it was unforeseeable. "While the current was stronger than usual, it was not a phenomenon of such rarity that it should not have been anticipated by those in charge of the [vessel's] navigation." *Universe Tankships v. The Munger T. Ball*, 157 F. Supp 237, 1958 AMC 1714, (S.D. Ala. 1957). In the absence of evidence that a current is unforeseeable a Master is chargeable with a duty to be aware of it and to anticipate its effects. See Appeal Decision No. [2173 \(PIERCE\)](#); Appeal Decision No. [2366 \(MONAGHAN\)](#); and Appeal Decision No. [2284 \(BRAHN\)](#). Because there is no evidence that the current could not be anticipated, Appellant failed to rebut the presumption of negligence. Appeal Decision No. [2272 \(PITTS\)](#), rev'd on other grounds *sub nom., Commandant v. Pitts*, NTSB EM- 98 (1983).

IV

Appellant contends that the Administrative Law Judge gave too much weight to radio transmissions made immediately after the grounding and that they are not reliable and probative evidence. I disagree.

The question as to how much weight to assign to particular pieces of evidence is for the Administrative Law Judge to determine. Appeal Decision No. [2302 \(FRAPPIER\)](#). Unless the evidence relied on is inherently incredible, the factual findings of an Administrative Law Judge will not be overturned on appeal.

The Administrative Law Judge found from the radio transmissions that Appellant was looking for Buoy 2 and failed to make the turn into the Bar Channel. The Administrative Law Judge further found that Appellant did not mention, over the radio, either the fishing boats or the westerly set. These findings are supported by the evidence. If the S/S SAN JUAN had left the channel to avoid a collision, it is reasonable to expect Appellant to have mentioned that fact on the radio. Instead, he stated he couldn't find Buoy 2, a Buoy which he had a duty to know was missing. Permissible inferences from the fact of a grounding outside the channel, and the radio transmissions by Appellant, allow the conclusion that he searched for Buoy 2 to determine his

position during the turn. Since Buoy 2 was missing, the S/S SAN JUAN did not complete the turn in time, left the channel, and then grounded. Thus, the evidence relied upon by the Administrative Law Judge is not inherently incredible, and his assignment of weight to give to that evidence will not be disturbed on appeal.

Appellant also questions the reliability of the radio transmissions. Strict adherence to the *Rules of Evidence* is not required in these proceedings. 46 CFR 5.20 20-95(a). The Federal Rules of Evidence, however, provide guidance in determining what evidence is admissible and may be considered reliable and probative. The radio transmissions made by Appellant are admissions and are not hearsay. Fed. R. Evid 801(d)(2). They would be admissible in a Court of the United States. The Administrative Law Judge did not err in admitting them into evidence and considering them as reliable and probative evidence.

CONCLUSION

There was substantial evidence of a reliable and probative nature and to support to the findings of the Administrative Law Judge. The hearing was fair and conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge, dated at New York, New York on 1 July 1982 is AFFIRMED.

B. L. STABILE
Vice Admiral, U.S. Coast Guard
VICE COMMANDANT

Signed at Washington D. C. this 22nd day of February, 1985.

***** END OF DECISION NO. 2382 *****

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