UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 17738 Issued to: Larry D. Drum

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2379

Larry D. DRUM

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

By order dated 14 November 1983, Administrative Law Judge of the united States Coast Guard at St. Louis, Missouri, suspended Appellant's license for one month plus an additional two months remitted on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator aboard the M/V DAVID ESPER under the authority of the above captioned license, Appellant did, on or about 9 May 1983, while pushing twelve loaded coal barges downbound on the Ohio River, fail to navigate his vessel so as to avoid alliding with the Big Four Railroad Bridge at approximately mile 603 on the Ohio River.

The hearing was held at St. Louis, Missouri, on 12 July 1983.

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

The Investigation Officer introduced in evidence three

documents.

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

At the end of the hearing, the Administrative Law Judge rendered an oral decision in which she concluded that the charge and specification had been proved and entered an order suspending Appellant's license for month, plus an additional two months remitted on twelve months' probation.

The Decision and Order was served on 22 November 1983. Appeal was timely filed on 12 December 1983 and perfected on 27 April 1984.

FINDINGS OF FACT

On 9 May 1983 Appellant was serving as Operator of the M/V DAVID ESPER, acting under the authority of his license, while the vessel was underway on the Ohio River. The M/V DAVID ESPER is a 140 foot, 6000 horsepower towboat, and is capable of controlling a tow consisting of as many as twenty-five barges. On 9 May 1983, the vessel was downbound on the Ohio River under Appellant's control with a tow of twelve laden barges, in a configuration three wide and four long, with a total length of 800 feet and width of 105 feet.

On 9 May 1983 the Ohio River was at flood stage. River currents were running four to five miles per hour. The lower Louisville gauge reading was 55 feet, approximately 45 feet above normal. The upper Louisville gauge reading was between 24 and 26 feet. Whenever the upper gauge reading exceeds 13 feet, the Louisville Vessel Traffic Service (VTS) goes into effect. VTS regulates traffic on a voluntary basis during high river conditions in the Louisville area. In addition, VTS will inform vessel operators of particular river conditions of which they have knowledge, if requested. Appellant did not, however, request any information regarding river conditions

Appellant contacted the Louisville VTS when he was approximately twelve miles above the Big Four Railroad Bridge, located at Mile 603 of the Ohio River. He again contacted VTS

approximately seven miles above the bridge, and was told to proceed downriver. He was also informed that a "no-wake" rule was in effect approximately five miles above the bridge. The no-wake rule is designed to prevent damage to banks, levees, and other man-made structures during high water.

When the M/V DAVID ESPER was approximately five miles above the bridge, VTS informed Appellant that another vessel was flanking the Louisville - Portland Canal, and that he should hold back. Upon being informed that the river below was clear, the M/V DAVID ESPER proceeded, and Appellant attempted to line the flotilla up to pass the bridge. However, in the vicinity of Towhead Island, a strong draft set the stern of the vessel out into the river.

Once he realized that the stern was being set into the river, Appellant attempted to take corrective action. At the hearing, he testified that he could not use full power to regain control of the tow because of the no-wake rule, and because he was concerned that he would allide with a barge fleet moored along Towhead Island. After coming ahead on his starboard engine, he realized that he would be unable to make the bridge. He then put his engines full astern. Unfortunately, these corrective measures were to no avail, and the tow allided with the bridge.

BASES OF APPEAL

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

1. The Coast Guard has no authority to revoke or suspend a mariner's license for negligence;

2. The Administrative Law Judge improperly applied the presumption of negligence arising from cases of allision;

3. Appellant successfully rebutted the presumption of negligence;

4. Any mistake on Appellant's part was an error of judgment and no t negligence;

5. The sanction imposed was too harsh.

appearance: Frank J. Dantone, Esq., Henderson, Duke, and Dantone, Greenville, Mississippi.

OPINION

I

Appellant argues that the Coast Guard has no authority to revoke or suspend a mariner's license for negligence, relying upon 46 U.S.C. 239(b) [now contained in 46 U.S.C. 77703]. I do not agree.

At the time of this proceeding, the Coast Guard's authority for license revocation and suspension was contained in 46 U.S.C. 239(g), not section 239(b). Section 239(g) explicitly includes negligence as a ground for revocation or suspension. *See* Appeal decision No. 2167 (JONES); *Dietze v. Siler*, 414 F.Supp. 1105, 1109-1110 (E.D. la. 1976). *See also Woods v. United States*, 681 F.2d 988 (5th Cir. 1982). Therefore, the Coast Guard does have the authority to revoke or suspend Appellant's license for negligence.

II

Appellant argues that the Administrative Law Judge improperly applied a presumption of negligence arising from the allision. Specifically, Appellant argues that application of the presumption, which clearly arises in civil cases for damages resulting from an allision, should not be applied in a Coast Guard suspension and revocation proceeding because such proceedings are "quasi-criminal". Appellant also argues that the presumption impermissibly shifts the burden of proof to the respondent and compels him to testify, in violation of his right to due process. I conclude, however, that the presumption of negligence was properly applied by the Administrative Law Judge.

On 9 May 1983 the M/V DAVID ESPER, operated by Appellant, allided with the Big Four Railroad Bridge at mile 603 of the Ohio River. When a vessel strikes a fixed object, a rebuttable

presumption of negligence is created. *See The Oregon*, 158 U.S. 186, 193 (1894); *Brown & Root Marine Operators, Inc, v. Zapata Offshore Co*., 377 F.2d 724, 726 (5th Cir. 1967). The rational for this presumption is simple: prudently navigated vessels do not in the normal course of events strike fixed objects. *See, e.g., Patterson Oil Terminals, Inc. v. The Port Covington*, 109 F.Supp. 953, 954 (E.D.Pa. 1952), *aff'd*, 238 F.2d 694 (3rd Cir. 1953); Appeal Decision Nos. 2367 (SPENCER) and 2284 (BRAHN).

This presumption has been, and will continue to be, applied in Decisions on Appeal. See, e.g., Appeal Decision Nos. 2367 (SPENCER), 2284 (BRAHN), and 2173 (PIERCE). See also *Woods v. United States*, 681 F.2d 988 (5th Cir. 1982). The rationale for the application of the presumption in civil actions for damages is equally applicable in suspension and revocation proceedings. Contrary to Appellant's assertions, these proceedings have never been construed as criminal or "quasi-criminal". See, e.g., Appeal Decision Nos. 2167 (JONES), and 1931 (POLLARD). Rather,

> [t]he suspension and revocation proceedings are remedial and not penal in nature because they are intended to maintain standards of competence and conduct essential to [promoting] the safety of life and property at sea by insuring that the licensed or certificated persons continue to be qualified to carry out their duties and responsibilities.

46 CFR 5.01-20. Application of the presumption of negligence arising out of an allision is fully consistent with the safety-oriented nature of these proceedings.

Neither does the application of the presumption impermissibly shift the burden of proof. The burden of proof in suspension and revocation proceedings always remains on the Coast Guard. 46 CFR 5.20-77; Appeal Decision No. 2294 (TITTONIS). However, the presumption arising from the fact of allision establishes a *prima facie* case of negligence. Once this *prima facie* case is established, the respondent has the burden of going forward with sufficient evidence to rebut the presumption. In the absence of

appropriate rebuttal evidence, the presumption is sufficient to satisfy the Coast Guard's burden of proof. See Appeal Decision Nos. 2266 (BRENNER), and 2264 (McKNIGHT).

The application of this presumption does not, as Appellant contends, compel him to testify in violation of 46 CFR 5.20-455. After the Coast Guard establishes its *prima facie* case, a party charged is still privileged not to personally testify. See Appeal Decision Nos. 2279 (LEWIS) and 2174 (TINGLEY). Although failure to rebut the presumption will inevitably result in the resolution of the case against him, a respondent may offer evidence other than his own testimony to do so.

Thus, the Administrative Law Judge properly applied the presumption of negligence against Appellant.

III

Appellant argues that, even if the presumption of negligence was properly invoked by the Administrative Law Judge, it was adequately rebutted by evidence showing that Appellant acted prudently. I do not agree.

The standard for rebutting the presumption of negligence arising from an allision was set out in *Patterson Oil Terminals, Inc. v. The Port Covington*, 209 F.Supp. 953 (E.D. Pa. 1952), *aff'd*, 208 F.2d 694 (3d Cir. 1953), where the court held that:

> The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be that, in spite of the testimony of the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur.
>
> The only escape from the logic of the rule and the only way in which the respondent can meet the burden is by proof of the

> intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence - not necessarily an act of God, but at least an unforeseeable and uncontrollable event.

Id. at 954. See also Appeal Decision Nos. 2284 (BRAHN), and 2173 (PIERCE). The evidence clearly demonstrates that Appellant did not satisfy this burden; rather, it supports a finding of negligence.

Appellant's testimony shows that none of the conditions he encountered were unforeseeable. Indeed, he was, or should have been, fully aware of those conditions. He knew that the Ohio River was at an extreme flood stage. He know that there was an unusually fast current of 4-5 miles per hour, yet he proceeded downriver with bare steerageway. When he reported in to the Knoxville VTS, he knew that he could request information on river conditions in the vicinity of the Big Four Railroad Bridge, yet he failed to do so.

Appellant testified that he lost control of his vessel because of an unexpectedly severe draft in the vicinity of the bridge, and that his ability to regain control and pass through the bridge was constrained by a moored barge fleet and by the existence of a no-wake rule. He testified, however, that he knew of the existence of the draft, that it began when the river reached a height of 14-15 feet, and that it increased in severity as the river rose. At the time of the incident, the gauge read 26 feet. He knew of the permanently moored barge fleet.

Appellant also knew of the existence of the no-wake rule. He essentially testified that he believed that the rule prohibited him from using enough power to maintain more than bare steerageway. As the Administrative Law Judge held:

> [A no-wake regulation] does not eliminate the operator's responsibility for the safe navigation of his vessel. An operator in a "no-wake" zone should go as slow as possible *while still maintaining the safe operation of the vessel*. This, of course, would not excuse an underpowered towboat for the size tow it was moving for going full throttle through a "no-wake" zone on the theory it was needed to maintain the safe navigation of the vessel.

Even if Appellant's belief regarding the effect of the no-wake rule was correct, however, it would not support his argument that he was not negligent in alliding with the bridge. As stated above, both the severity of the river conditions, and the existence of the rule, were or should have been known to him prior to his transit.

As a licensed operator, Appellant is responsible for ascertaining that his vessel can safely traverse the planned route. This includes knowledge of the handling characteristics of his tow, and of the state of currents and bank suctions, clearance from obstructions, and the availability of navigational aids. See, e.g., Appeal Decision Nos. 2367 (SPENCER), 2284 (BRAHN), and 2264 (McKNIGHT). Appellant's failure to do so resulted in the allision. Therefore, the Administrative Law Judge's finding that the evidence offered by the Appellant was inadequate to rebut the Coast Guard's *prima facie* case of negligence will not be disturbed.

IV

Appellant argues that any mistake on his part that caused the allision was merely an error in judgement, and not negligence. This argument is without merit.

> Although it is true that mere error of judgement is not negligence, error of judgement is distinguishable from negligence. On an occasion when an individual is placed in a position, not of his own making, where he must choose between two apparently reasonable alternatives, and the individual responds in a reasonable fashion using prudent judgement in choosing al alternative that hindsight shows was a poor choice under the circumstances, he is not negligent.

Appeal Decision No. 2325 (PAYNE). As noted above, however, Appellant was in a position of his own making. The conditions his vessel experienced could have been foreseen through the exercise of reasonable care, and his failure to do so cannot be excused as an error in judgment.

V

Appellant argues that the sanction imposed by the administrative Law Judge was too harsh. However, the order in a particular case is peculiarly within the discretion of the Administrative Law Judge, and will not be disturbed on appeal absent special circumstances. See Appeal Decision No. 2344 (KOHAJDA). I do not find any special circumstance that would warrant modification of the sanction.

CONCLUSION

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

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 14 November 1983 is AFFIRMED.

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

Signed at Washington, D.C. this 8th day of February, 1985.

***** END OF DECISION NO. 2379 *****

Top