UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
Merchant Mariner's License NO. 514802
Issued to : Peter A. MADJIWITA

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2368

Peter A. MADJIWITA

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

By order dated 16 March 1984, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri suspended Appellant's license for two months, plus three months on twelve months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as pilot on board the Panamanian vessel, the M/V PASSAT, under the authority of the license above captioned, on or about 17 August 1983, Appellant negligently failed to insure that there was adequate clearance between the vessel's #4 cargo hatch boom and the Tower Drive Bridge, which spans the Fox River at Green Bay, Wisconsin, prior to transiting beneath the bridge, causing the boom to strike the bridge.

The hearing was held at Sturgeon Bay, Wisconsin on 25 August 1983.

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

The Investigating Officer introduced in evidence the testimony of three witnesses and five documents.

In defense, Appellant offered in evidence his own testimony and two documents.

After the end of the hearing, the Administrative Law Judge rendered a decision in which she concluded that the charge and specification had been proved. She then served a written order on Appellant suspending all documents issued to Appellant for a period of two months plus three months on twelve months' probation.

The Decision and Order was served on 21 March 1984. Appeal was timely filed and perfected on 12 April 1984.

FINDINGS OF FACT

On 17 August 1983, Appellant was serving as pilot on board the Panamanian cargo vessel, the M/V PASSAT, pursuant to 46 U.S.C. 216a (now recodified as 46 U.S.C. 9302), and under the authority of his license while the vessel was transiting the Fox River at Green Bay, Wisconsin. Appellant began his service on the M/V PASSAT on 15 August 1983 at Port Huron, Michigan.

At approximately 0700 on 17 August, the M/V PASSAT's #4 cargo hatch boom struck the Tower Drive Bridge which spans the Fox River. Appellant was directing the vessel's navigation at that time.

When the allision occurred, the vessel's highest point measured 116 feet and 8 or 9 inches above the water line at the #4 boom. The *Coast Pilot* states that the vertical clearance of the Tower Drive Bridge at low water datum is 120 feet. The evidence does not establish the river level at the time and location of the allision. However, the water level in the adjoining Lake Michigan was above low water datum by 38 inches on 5 August and 37 inches on 20 August.

The M/V PASSAT had safely passed beneath the bridges in the Welland Canal located in Canada, near Niagara Falls, before Appellant boarded the vessel. The applicable section of the Coast

Pilot which appeared in the record states "[t]he vertical lift bridges limit the overhead clearance through the [Welland] canal to 120 feet." Coast Pilot, Vol. 6, p. 130 (1983). However, Appellant testified that he believed the minimum clearance in the canal was 117 feet and that higher water levels could have reduced it to 115 feet.

Appellant had not ascertained the actual vessel height from the M/V PASSAT's personnel before the allision. Instead, he assumed the height to be no greater than 117 feet because the vessel had transitted the Welland Canal. He also assumed this height had not increased based on what proved to be a false assumption that the vessel took on water to compensate for the water consumed in transit. Appellant, however, had not verified his assumptions. Furthermore, he failed to consider fuel consumption which, when combined with the water consumption, added three or four inches to the vessel's height.

In addition, Appellant did not ascertain the water level in the Fox River prior to passing under the bridge, even though this information was available from gauges in the river or from the Army Corps of Engineers and the Coast Guard. Instead, he used a "safety factor" of approximately 30 inches which he subtracted from the published 120 foot vertical clearance for the Tower Drive Bridge. Based on this calculation, Appellant assumed the available clearance was at least 117 feet. He also assumed that the Fox River water level would not exceed his "safety factor." However, this assumption was unsubstantiated. In fact, the average water level above low water datum in Lake Michigan during July and August from 1969 through 1978 exceeded three feet with extreme levels of five feet recorded.

BASES OF APPEAL

Appellant takes this appeal from the order imposed by the Administrative Law Judge. Appellant contends that:

(1) The Administrative Law Judge erred by inferring negligence from the occurrence of the allision;

(2) he rebutted the presumption of negligence accompanying the allision by showing he acted reasonably;

(3) he rebutted the presumption of negligence by showing the allision was "mathematically" impossible;

(4) he rebutted the presumption of negligence by showing he should not have been held responsible for knowing the vertical clearance beneath the bridge;

(5) The Administrative Law Judge erred in finding that specific acts of negligence occurred because Appellant acted reasonably; and

(6) The Administrative Law Judge erred by denying the motion to dismiss.

APPEARANCE: Chestnut & Brooks, by Karl L. Cambronne.

OPINION

I

Appellant generally asserts that the Administrative Law Judge erred by inferring negligence from the occurrence of the allision. I do not agree.

It is well settled that a rebuttable presumption of negligence arises when a moving vessel strikes a fixed object such as a bridge. Appeal Decisions No. 2284 (BRAHN) and 2264 (MCKNIGHT). Past decisions and case law fully develop the presumption's rationale, applicability and effect. Appeal Decisions Nos. 2325 (PAYNE) and 2288 (GAYNEAUX), and *Patterson Oil Terminals v. The Port of Covington*, 109 F. Supp. 953 (E.D. PA. 1952), *aff'd*, 208 F.2d 694 (3d Cir. 1953). Only the effect is at issue here. It is two-fold.

First, Appellant had the burden of going forward with rebuttal evidence once the presumption was established. *Brahn*, *supra*. This is a "heavy" burden, *Patterson*, 109 F. Supp. at 954. To overcome it, a mariner must "produce more than cursory evidence" to show that "the moving vessel was without fault or that the allision was occasioned by the fault of the stationary object

or ... was the result of inevitable accident." Appeal Decision No. 2173 (PIERCE). He may rebut the presumption by such evidence as will show his due care under the circumstances. Appeal Decision No. 2211 (DUNCAN).

Second, an "unrebutted presumption suffices to establish a *prima facie* case of negligence." *McKnight*, *supra*. An Administrative Law Judge may conclude that negligence was proved on this basis alone. *McKnight* and *Duncan*, *supra*.

In the instant case, the Government established by substantial evidence that the allision occurred and that Appellant was directing the vessel's navigation. The presumption arose, therefore, and Appellant then had the burden of going forward with evidence sufficient to rebut it. To this end, he produced evidence intended to show his "due care" and "lack of fault."

The Administrative Law Judge found negligence was proved by concluding that (1) Appellant failed to rebut the presumption and (2) the evidence also established independent, substantial proof of specific acts of negligence. These findings fall squarely within the principles set forth above.

II

Appellant contends he rebutted the presumption by showing he acted reasonably in assuming the vessel would clear the Tower Drive Bridge since it had previously passed beneath bridges in the Welland Canal with less clearance. This argument is not supported by the evidence or law.

The minimum overhead clearance above low water datum in the Welland Canal is 120 feet. This is not lower than but equal to the clearance beneath the Tower Drive Bridge which the vessel struck. In addition, the evidence does not establish that the vessel's height remained unchanged after it transitted the canal or that the respective water levels in the canal and the Fox River were identical. Without this information Appellant could not know if his "safety factor" was adequate. The evidence, therefore, does not support Appellant's contention.

Furthermore, Appellant did not act reasonably in making such assumptions. A pilot is responsible for knowing the vessel's height and available clearances he will encounter on a voyage. *Ryan Walsh Stevedoring Co. v. James Marine Service*, 557 F. Supp. 457 (E. D. LA. 1983); *see*, *City of New York v. McAllister Brothers, Inc.*, 299 F. 2d 227 (2d Cir. 1962). The evidence establishes that Appellant did not ascertain the vessel's height and the Fox River water level even though this information was readily available. Thus, he did not exercise due care or act without fault in undertaking a voyage on "the basis of unsubstantial and erroneous assumptions." *Ryan*, 577 F. supp. at 462. Appellant, therefore, failed to rebut the presumption of negligence and also established independent, substantial proof of specific acts of negligence.

III

Appellant argues that he rebutted the presumption by showing the allision was "mathematically" impossible. I disagree.

Appellant's argument is based on speculation because the record does not establish the water level at the time and location of the allision. But even the existence of such evidence would not, standing alone, rebut the presumption of negligence.

To rebut the presumption on this basis, Appellant had to show that he relied to his detriment on apparently reliable information available to him. Appeal Decision No. 2241 (NIED). Appellant, however, did not establish that he obtained or relied on such information concerning the vessel or water height.

IV

Appellant also asserts that he rebutted the presumption by showing he should not have been held responsible for knowing the vertical clearance beneath the Tower Drive Bridge. This argument fails for the same reasons stated in the foregoing paragraph.

The Coast Pilot excerpt entered into evidence states that the vertical clearance is 120 feet. Appellant presented evidence that the State of Wisconsin, which constructed the bridge, had not given

final certification of the 120 foot clearance authorized by the Coast Guard. However, such evidence simply does not establish that the published clearance was incorrect, or most importantly, that Appellant relied on this information to his detriment.

V

Appellant contends he acted reasonably, and thus, the Administrative Law Judge erred in finding that Appellant committed specific acts of negligence. As discussed in section II, this argument is without merit.

VI

Appellant asserts that the Administrative Law Judge erred by denying the motion to dismiss which he made when the government rested. I disagree.

At the end of the Investigating Officer's case, the evidence showed that the M/V PASSAT's number four boom struck the Tower Drive Bridge while transiting the Fox River at Green Bay, Wisconsin. The evidence also showed that Appellant was the pilot of the vessel and was directing its navigation at that time. This is sufficient to raise the presumption of negligence associated with an allision. Therefore, the Administrative Law Judge did not err in denying Appellant's motion to dismiss.

CONCLUSION

The findings of the Administrative Law Judge are supported by substantial evidence of a reliable and probative nature. The hearing was conducted in accordance with the provisions of applicable regulations. The sanction ordered is appropriate under the circumstances.

ORDER

The order of the Administrative Law Judge dated at St. Louis, Missouri, on 16 March 1984, is AFFIRMED.

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

Signed at Washington, D.C., this 14th day of August, 1984.

***** END OF DECISION NO. 2368 *****

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