UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 02481
Issued to: ALVIN WHITE BRAHN

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2284

ALVIN WHITE BRAHN

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

By order dated 19 September 1980, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia admonished Appellant upon finding him guilty of negligence. The two specifications found proved allege that while serving as operator on board M/V KELLEY, O.N. 299658, under authority of the license above captioned, on or about 18 August 1980, Appellant while transiting the intracoastal waterway, North Landing River, failed to maintain control of his tow, the Barge LOVELAND 6, resulting in two allisions, one at 0150 with the Pungo Ferry Bridge and the other at 0545 with the Great Bridge Bridge in the Albermarle-Chesapeake Canal.

The hearing was held at Norfolk, Virginia on 3 September 1980.

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

The Investigating Officer introduced in evidence two charts

and the testimony of the deckhand of TIM KELLEY on duty at the time of the allisions as well as the testimony of the respective bridgetenders.

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

After the hearing, the Administrative Law Judge rendered an oral decision in which he concluded that the charge and both specifications had been proved and entered an order admonishing Appellant. He later served a written order on him.

The entire decision was served on 23 September 1980. Appeal was timely filed on 20 October 1980 and perfected on 26 March 1981.

FINDINGS OF FACT

On 18 August 1980, Appellant was serving as operator on board TIM KELLEY and acting under authority of his license while the vessel was transiting the Intracoastal Waterway at North Landing River and also at the Albemarle-Chesapeake Canal on a trip between Alligator River Terminal and Norfolk, Virginia. TIM KELLEY had an empty grain barge, the LOVELAND 6, in tow. The barge was made up on a short hawser and wire bridled and was being towed stern first at a distance of about 25 feet. As the tow passed through the Pungo Ferry Bridge the bow of the barge scraped the fender system and struck a draw guide of the bridge. At the time of the incident the bridgetender was aware of the striking, but neither Appellant nor his deckhand were. Later, after the tug had proceeded into the Albemarle-Chesapeake Canal, the tow entered the draw of the Great Bridge Bridge. As the vessel and barge passed through the span, the bow of the barge swung over the fender, struck a marine light and damaged a latch bar guide.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is argued that the Administrative Law Judge erred by finding respondent guilty based solely on the presumption of negligence, that respondent was denied a fair and impartial hearing because the Administrative Law Judge presented

evidence against Appellant and refused to permit argument by him from a chart, (Investigating Officer's Exhibits 1(A) & 1(B)) and that the Commandant should dismiss the charge and specifications as *de minimis*.

Appellant also reargues his first point in two supplemental submissions, one of 30 March 1981 and one of 29 April 1981.

APPEARANCE: Seawell, McCoy, Dalton, Hughes, Gore and Timms, by Phillip N. Davey, Esq., Norfolk, Va.

OPINION

I

The Administrative Law Judge opined that upon proof of an allision between TIM KELLEY and the bridges in question a *prima facie* case of negligence was presented. I must agree. It is a matter of law no longer in dispute. The courts of admiralty and numerous Decisions on Appeal have found that where a moving vessel strikes a stationary object such as a wharf an inference of negligence arises and the burden is then on the operator of the vessel to rebut the inference of negligence. *The Oregon*, 158 U.S. 186, 193 (1894), *The Clarita and the Clara*, 23 Wall 1, 12 (1874), *Brown & Root Marine Operators v. Zapata Offshore Co.*, 337 F.2d 724 (5th Cir. 1967); Decisions on appeal 1200, 1197, 669, and 672. The inference of the lack of due care suffices to establish a *prima facie* case of negligence against the moving vessel. *Brown & Root v. Zapata Offshore (supra)*. The inference of negligence established by the fact of allision is strong and requires the operator of the moving vessel to go forward and produce more than just cursory evidence on the presumptive matter. In order for the respondent to gain a favorable decision after the presumption is properly established, it must be shown that the moving vessel was without fault, the allision was occasioned by the fault of the stationary object, or the result of inevitable accident. *Carr v. Hermosa Amusement Corp.*, 137 F. 2d 983 (9th Cir. 1943), Cf. *The Clarita and the Clara*, supra, and *The Oregon*, supra.

The rationale for the inference is elementary. Ships under careful navigation do not run aground or strike fixed objects in the ordinary course of events. While discussing this doctrine in *Patterson Oil Terminals v. The Port Covington*, 109 F. Supp. 953, 954 (E.D. Pa. 1952) aff'd 208 F. 2d 694 (3d Cir. 1953), Senior Judge Kirkpatrick stated:

> "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 either 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."

And, he continued:

> "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."

Based on the preceding analysis, it is apparent that the law warrants a presumption of negligence in the allision where the mariner either knew or should have known of the presence of the unmoving object. The presumption is clearly raised where an operator allows a barge under his tow to strike a drawbridge fixed in the open station.

When the party charged with negligence responds with evidence that the presumptively blameworthy occurrence resulted from factors other than the alleged negligent operation, the presumption at issue does not survive and is not available to the trier of fact *as a presumption*. The striking of a fixed object by a vessel also is strong circumstantial evidence of negligence. This effect of the evidence, along with all reasonable inferences, would not be

negated by opposing evidence. Only the presumption is negated. The opposing facts and circumstantial evidence remain for resolution by the trier of fact in accordance with with law, 5 U.S.C. 556(d) and regulations, 46 CFR 5.20-95(b).

Here the presumption of negligence was properly raised by the evidence of allision. It is not necessary that every conceivable explanation for an event be rebutted by the Investigating Officer in order to prove his case. The regulatory standard of proof is adequately addressed in 46 CFR 5.20-95(b). (I note that the term "substantial evidence of a reliable and probative character" as used in 46 CFR 5.20-95(b) may be of a lesser quantum than a preponderance of the evidence. "Substantial evidence" means the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *John W. McGrath Corp. v. Hughes*, 264 F. 2d 314, (2nd Cir. 1959), *cert. denied* 79 S. Ct. 1451, 360 U.S. 931, 3 L.Ed.2d 1545.) In an attempt to negate the presumption, Appellant testified that the Pungo Ferry Bridge was a difficult matter (T-99) and that he did not know he had struck the bridge bur thought that maybe he had hit the *fender*. (T-110). He testified further that during the Pungo Ferry Bridge transit he checked [the barge] constantly and there was no yawing (T-112, 113), and that there was nothing unusual about it. (T-113, 114) He testified (T-116) that while there might have been a little bit of wind or maybe a slight current; he did not know how the barge got slightly to starboard, but that there was no bank suction that far out in the river.

Appellant also testified about the Great Bridge Bridge transit and stated that there was no yawing before the allision (T-120), that the barge sheered to the left but he did not know why, (T-120) and that he attempted corrective action by increasing the throttle (T-121). He testified later that there may have been bank suction and that there may have been a little wind, but that there was not much wind, only about 10 miles per hour. (T-128) Appellant had earlier testified to making four to five trips per month for about four years over the route in question here. (T-82)

Although Appellant did not testify to all the weather conditions, the record reveals that the Great Bridge bridgetender testified that there was no current that he knew of and that the weather was clear (T-59) and the Pungo Ferry Bridge bridgetender

testified that the weather was clear and calm and the moon was nice and bright. (T-34, 35)

Appellant's testimony did not refute the evidence of the Investigating Officer in his case-in-chief. In an appropriate case, the evidence offered in defense of an allision case may be sufficient to explain away and effectively negate the case established by an Investigating Officer. Decision on Appeal 2235 and the unreported decision (GEBO) offered by Appellant are examples of this. However, I am not persuaded that the Investigating Officer's case has been negated. The previously cited portions of Appellant's testimony are simply not sufficient to accomplish rebuttal. Other evidence supports a finding of negligence. The Pungo Ferry Bridge bridgetender stated that it is not uncommon for vessels to contact the fender *system* (T-14), that fender touching occurs about once a month (T-45), and that the draw is used approximately 300 to 400 times per month (T-46). The Great Bridge Bridge bridgetender testified that while occasionally vessels warp up and bear against the fender system, the vast majority of vessels do not strike it. (T-62) The portions of his testimony that indicate that Appellant wasn't sure what had happened and that he wasn't sure about some currents and bank suctions also supports the government's case and the finding of negligence. I have evaluated Appellant's testimony and find no allegation or proof of fault attributable to either the drawbridges or the bridgetenders. There is no evidence to indicate an unforeseeable or uncontrollable event or a malfunction of tug or barge. The suggestion here that there *may* have been bank suction is not sufficient to explain the allision with the Great Bridge Bridge. No explanation was even offered by Appellant as to why the allision with the Pungo Ferry Bridge occurred. A tow boat operator with Appellant's professed experience over a particular waterway (four to five trips per month for four years) should be familiar with bank suctions, currents, vessels handling characteristics and the location and characteristics of non-moving structures (such as drawbridges) on the route. Appellant did not even allege that an occurrence intervened which could not have been guarded against. Appellant's negligence is supported by substantial evidence of a reliable and probative character and was not rebutted by his testimony in defense.

II

Appellant argues that he was denied a fair and impartial hearing because the Administrative Law Judge presented evidence against him. The basis for the argument appears to be the question of several witnesses by the Administrative Law Judge. There is no allegation that the Administrative Law Judge testified or presented evidence on his own motion. The record does not reveal even the appearance of impropriety. An Administrative Law Judge is obligated to conduct the hearing in such a manner as to bring out all relevant and material facts necessary to allow knowledgeable findings on the issues presented. 46 CFR 5.20-1(a). In Decision on Appeal No. 2013, it was noted,

> It is the function of an examiner, just as it is the recognized function of a trial judge, to see the facts are clearly and fully developed. He is not required to sit idly by and permit a confused and meaningless record to be made.

The fact that the Administrative Law Judge questioned several of the government's witnesses did not deny Appellant a fair and impartial hearing. It does not show that he was concerned that his decision be based on a fair evaluation of all evidence.

III

Appellant argues further that the Administrative Law Judge denied him a fair and impartial hearing because of the refusal to permit counsel to argue from the chart received in evidence as Investigating Officer's Exhibit 1(A) and 1(B). I note that this exhibit is an uncorrected chart. Appellant urges that it was error to admit an uncorrected chart into evidence. Both parties agreed that the intended use of the exhibit (display of the general location of the bridges) was not affected by the missing corrections. (T-16) The fact that this chart was not corrected does not affect its admissibility. Since Appellant previously agreed that the relevant portion of the exhibit was no affected by the correction, his contention now that it is, is without merit. The exhibit was admitted in evidence during the testimony of the deckhand, Willoughby. It was not used again until Appellant started arguing from it and presenting evidence from it (T 142). The evidence that was being presented and argued in the same breath was never introduced before that time. The chart itself was admitted

for the limited purpose of displaying the relative positions of the bridges. Counsel's attempted to enlarge through argument the effect of a document admitted in evidence for a limited purpose was properly denied by the Administered Law Judge. Appellant was not denied a fair and impartial hearing by either the admission of the uncorrected chart or by being restricted in his argument to evidence of record.

IV

Appellant contends that the Administrative Law Judge foreclosed presentation of evidence. To the contrary, Appellant was allowed to present his case fully. The government is not required to prove the "lawfulness" of the stationary object in this allision case. The presentations concerning that aspect of Appellant's case simply did not tend to prove or disprove a matter at issue in this case.

Appellant argues that the presumption of negligence should not operate in cases contact with fender systems. Appellant was not charged with striking the fender systems of either bridge. The argument is irrelevant and wholly without merit.

V

In untimely submissions of 30 March and 29 April 1981, Appellant argues Decision on Appeal 2235 (RABREN), and a dismissal of charges in a somewhat similar case in further support of his portion on the presumption of negligence question. 46 CFR 5.30-3 sets the time period for appellate submissions in these proceedings. Both supplemental submission were not filed in a timely fashion and cannot be considered. Even if I could consider them the reasoning advanced is neither persuasive nor any different than that already discussed in part I above. Both submissions suggest that the presumption of negligence principle was incorrectly applied because the burden was placed on the respondent to exonerate himself. They argue further that Appellant's testimony demonstrated a lack of fault and that this demonstration somehow required rebuttal by the Investigating Officer to salvage the case.

The evidence of record revealed two allisions. The allisions

established a presumption of negligence. If Appellant's testimony removed or rebutted the presumption, it did not erase the facts already established and the reasonable inferences which may be drawn from them. Appellant's supplemental submissions are not persuasive.

VI

Finally, Appellant argues that the doctrine of *de minimis non curat lex* mandates the dismissal of the charge and expungement of the record.

The literal meaning of this civil law doctrine is that "the law does not care for or take notice of, very small or arbitrary matters" (fractional parts of a penny, notice of a fraction of a day). Striking and damaging two bridges is not a small matter. It appears that the Administrative Law Judge considered the amount of damage in determining an order appropriate to this Appellant and these facts. But, Appellant's contention that dismissal is required is without merit and shows his misunderstanding of both the doctrine and its application.

CONCLUSION

The Administrative Law Judge did not err by finding Appellant negligent based on the presumption arising from the allisions. Appellant received a fair and impartial hearing.

ORDER

The order of the Administrative Law Judge dated 26 September 1980 at Norfolk, Virginia is AFFIRMED.

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

Signed at Washington, D.C. this 08th day of October, 1982.

***** END OF DECISION NO. 2284 *****

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