

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 146481
Issued to: Joseph R. PAVELEC

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2319

Joseph R. PAVELEC

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

By order dated 21 January 1982, an Administrative Law Judge of the United States Coast Guard at Houston, Texas suspended Appellant's license for one month, plus two months on nine months' probation, upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the M/V CANDY STORE under authority of the license above captioned, on or about 5 November 1981, Appellant failed to maintain a proper lookout which contributed to the collision between the M/V CANDY STORE and the F/V MISS LAVON.

The hearing was held at Port Arthur, Texas on 8 December 1981.

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 one exhibit.

In defense, Appellant offered in evidence seven exhibits and the testimony of two witnesses in addition to testifying in hiw own behalf.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved by reliable and probative evidence. He then served a written order on Appellant suspending License No. 146481 and all other valid documents issued to Appellant for a period of one month plus two months on nine months' probation.

The entire decision was served on 25 January 1982. Appeal was timely filed on 9 February 1982 and perfected on 19 May 1982.

FINDINGS OF FACT

On 4 and 5 November 1981, Appellant was serving as Operator on board the M/V CANDY STORE and acting under the authority of his license while the vessel was underway in the Gulf of Mexico off the Louisiana Coast.

On 4 November 1981 at approximately 2300 the weather was calm and clear with no moonlight.

At the time, the F/V MISS LAVON was anchored approximately 16-20 miles southwest of Calcasieu, Louisiana in the Gulf of Mexico, about one mile north of the fairway anchorage. The MISS LAVON is a 72 foot shrimper with a steel hull. The Operator and deckhand of the MISS LAVON testified that all deck lights were turned off and a 25 watt anchor light was turned on. Both testified it was on and operating at the time of the collision. The anchor light consisted of a bare 25 watt bulb installed on the forward surface of the mast, approximately 25 to 30 feet above the water line. The light was obscured by the mast when viewed from aft.

At approximately 2355 on 4 November 1981 the M/V CANDY STORE departed Calcasieu, Louisiana on a course of 235 enroute to the drilling rig known as the Temple Apache. The crew of the M/V CANDY STORE consisted of: Appellant, Operator; Doyle Weldon, Relief Operator; Theran T. Hash, deckhand; and Robert Sanders, deckhand.

Appellant and Theran Hash were on duty shortly prior to and at the time of the collision. Appellant left the wheelhouse for approximately 15 minutes beginning at approximately 0100 on 5 November 1981 to get a cup of coffee and a sandwich. During Appellant's absence, the steering and navigation of the vessel were temporarily given to Theran Hash, a 20 year old deckhand. Hash controlled the steering, radar, and navigation of the vessel from the helmsman's chair where he had a 180 view forward of the wheelhouse. It is necessary for him to manually maintain the vessel's course and watch the radar in addition to looking for vessels and obstructions. Prior to leaving the wheelhouse, Appellant checked his radar and set it at a range of six miles.

At approximately 0115 the M/V CANDY STORE collided with the anchored F/V MISS LAVON. The M/V CANDY STORE was proceeding at approximately 16 knots on a heading 235. At the time of the collision it was dark, the weather was clear, and the water was calm. Hash testified that he had neither visual contact nor radar contact with the F/V MISS LAVON until he saw the starboard outrigger of the fishing vessel seconds before the collision. The M/V CANDY STORE'S bow collided with the starboard side of the F/V MISS LAVON.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge at Houston, Texas. Appellant asserts the following bases for this appeal:

I. Appellant argues that the suspension and revocation proceeding lacked subject matter jurisdiction. This position he supports by the argument that operators of uninspected towing vessels are excluded from the definition of officer covered by R.S. 4450, 46 U.S.C. 239.

II. Appellant also contends that the evidence of record failed to establish that the anchored vessel's anchor light was on or, if on, was of sufficient intensity to constitute an effective anchor light.

III. Appellant asserts that under the existing conditions at the time of the casualty, the helmsman was on appropriate lookout.

IV. Appellant argues that Theran Hash was a competent person who had control of the CANDY STORE when the casualty occurred. Therefore, Appellant's position is that this fact would preclude him from being negligent for leaving the control of the vessel to such an individual.

V. Appellant urges that the standard of negligence by which he was judged was improper. He argues that the element of foreseeability was necessary but absent in this case.

APPEARANCE: Chaffe, McCall, Phillips, Toler and Sarpy of New Orleans, Louisiana by Thomas D. Forbes.

OPINION

I

The first question to be considered is that of jurisdiction. Suspension and revocation proceedings are authorized by R.S. 4450, 46 U.S.C. 239(g). The suspension and revocation proceedings apply to:

"...Any acts of incompetency or misconduct...committed by any licensed officer or any holder of a Certificate of Service..."

Appellant argues that the definition of licensed officers does not encompass ocean operators; therefore, jurisdiction over the subject matter is lacking in this case. In this regard Appellant cites 46 CFR 187.30 which specifically states that all licenses issued by the Coast Guard are subject to suspension or revocation proceedings under 46 U.S.C. 239. Appellant argues this regulation is invalid since Congress did not give the Coast Guard the power to make all licenses issued by the Coast Guard subject to suspension and revocation proceedings. Appellant recognizes that the Coast Guard has authority to make regulations pertaining to the inspection of vessel and the qualifications of operators, but urges this does not provide the independent power to suspend operator's licenses.

To support his jurisdictional argument, Appellant cites

Dietz v. Siler, 414 F. Supp. 1105 (E.D.La 1976). This case involved a pilot who held both a state license and a Coast Guard license as a master of steam and motor vessels with a first class pilotage endorsement. The court held that 46 U.S.C. 239(g) authorizes suspension and revocation proceedings by the Coast Guard for an officer's act of incompetence or negligence when operating under the authority of his license.

Dietze is distinguishable from the present case. In this case the only license of concern is one issued by the Coast Guard and there is no dispute as to whether or not Appellant was operating under the authority of it. The purpose of Congress in granting licensing authority to the Coast Guard would be frustrated if it did not include suspension and revocation powers. Therefore, the Coast Guard has jurisdiction to proceed against Appellant's license.

II

Appellant next states that the evidence failed to show that the anchor light was on, or if on, that it was of sufficient candlepower to constitute an effective anchor light. Even if correct, this contention would not be a defense to the charge and specification, but only to the matter in aggravation of whether the negligence contributed to the collision. Contributory negligence is not a defense in these proceedings. Decision on Appeal No. [2031](#) (CANNON).

There was ample testimony presented to the trier of fact to conclude that a 25 watt bulb was on forward of the F/V MISS LAVON's mast. Whether or not the candlepower of F/V MISS LAVON's anchor light met the applicable requirements is not dispositive. The issue is whether or not a lookout, if properly posted, could have seen the anchored vessel in sufficient time to avoid the collision. The evidence showed that the anchor light was obscured when viewed from aft; however, the bow of the M/V CANDY STORE collided with the starboard side of the MISS LAVON making this fact immaterial. Even a 25 watt bare bulb should have been visible to a lookout on a calm dark night well before the moment of collision. The Administrative Law Judge's finding that failure to provide an appropriate lookout was a contributing cause of the collision is supported by the evidence.

III

Appellant argues that under the circumstances of this case, the helmsman could properly serve as lookout.

The International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), Rule 5, provides that:

"Every vessel shall at all times maintain a proper lookout by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make full appraisal of the situation and of the risk of collision."

The adequacy of a lookout on board a vessel underway is a question of fact to be resolved under all existing facts and circumstances. The facts and circumstances of this case were presented to the Administrative Law Judge. He was in the best position to determine whether the circumstances of the case permitted the helmsman to serve as a proper lookout.

The issue of a proper lookout was addressed in Decision on Appeal No. [2046](#) (HARDEN). There I stated that:

"...the general rules of navigation call for an adequate lookout and the general standards of prudent navigators determine as negligent the operator or pilot who in the most favorable conditions of wheather and visibility runs into a craft encountered in the usual course of operation without even being aware of its existence."

In this case, the F/V MISS LAVON was observed only seconds prior to the collision. The setting was a dark clear night in an area of known drilling rigs, platforms and vessel traffic. Under these circumstances a lookout should have been posted. A proper lookout, in all probability, would have observed the F/V MISS LAVON and the collision would have been avoided. The Administrative Law Judge's determination that Appellant failed to post a proper lookout is supported by the evidence.

IV

Appellant asserts that he should not be found negligent because the deckhand whom he left in the wheelhouse was competent. In support of this portion Appellant relies on several cases that deal with the competency of the individual in control of a vessel at the time of a collision. However, the competency of the helmsman/deckhand is not an issue here. Appellant did not contend at the hearing and does not contend on appeal that he relinquished his responsibility for the safety and control of the vessel to Theran Hash, an unlicensed person. Had he done so, he would have been in violation of 46 U.S.C. 405. The facts indicate that he intended only a temporary absence from the wheelhouse thereby maintaining his status as the operator on watch. As such, he remained responsible for the safety of the vessel and for insuring a proper lookout. Whether the temporary absence from the wheelhouse was proper and in accordance with the guidelines in Appeal Decision No. [2058](#) (*SEARS*) is not an issue since Appellant was not charged with improperly leaving the wheelhouse. Therefore, the Administrative Law Judge's determination that Appellant maintained actual direction and control over the vessel and thus remained responsible for posting a proper lookout will not be disturbed.

A similar factual situation occurred in Decision on Appeal No. [2292](#) (*COLE*). Without analysis *SEARS* and *COLE* might seem inconsistent. The cases, however, must be distinguished on their facts. Cole was charged with failure to post a proper lookout. A collision occurred while Cole was away from the wheelhouse after relinquishing control of the vessel to an unlicensed person who had been hired as, and illegally served as, one of the operators. Negligence on the part of Cole was not proved since the collision occurred when Cole was not in control of the vessel. Cole was found guilty of misconduct in turning over control of the vessel and responsibility for its navigation to a person known not to possess a license by allowing him to assume the actual position of Operator on the watch following his own.

In *SEARS* the steering and navigation of the vessel were only temporarily given to the unlicensed deckhand. During that short period of time the actual direction and control over the vessel and status as Operator on watch remained with Sears.

Thus SEARS controls where there is a temporary relief of an operator by an unlicensed deckhand and COLE where there is the illegal use of an unlicensed person as an operator watchstander. Under SEARS the temporarily relieved operator retains responsibility for properly manning the watch. Under COLE the operator who has been relieved is not responsible for violations that are the result of actions by the following operator and occur during that operator's watch; however, he can be held responsible for allowing an unlicensed person to assume the regular position of operator.

In Pavelec's situation the only question was whether he was negligent in not providing a lookout for his watch. He was.

V

Appellant argues that the standard of negligence by which he was judged was improper. He contends that the collision had to have been a foreseeable result of his actions before negligence could be found proved and that such a collision was not foreseeable. I do not agree. This is the standard used in awarding damages where someone must bear a given loss. In a suspension and revocation proceeding no damage need be found. Remedial action is taken where negligence alone is proved.

The standard of care required to support a charge of negligence in these proceedings is found in 46 CFR 5.05-20(a)(2). This regulation defines negligence as:

"...the commission of an act which a reasonably prudent person of the same station, under the same circumstances would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances, would not fail to perform."

In order to prove the charge, it is only necessary to show that Appellant's conduct in some manner failed to conform to the standard of care required of a reasonably prudent operator under the same circumstances as those that confronted Appellant.

The evidence showed that Appellant's vessel was maneuvering at night, in an area of drilling rigs and other vessel traffic. The deckhand, Hash, was left alone in the pilot house. He had to steer the vessel manually on a heading of 235, watch the radar, and serve as a lookout while Appellant went below. As previously stated the 72 COLREGS require a proper lookout so as to enable the vessel to make full appraisal of the situation and the risk of collision. Decision on Appeal No. [417](#) (ADAMS) and cases cited therein have determined a proper lookout under similar conditions to be one with no other duties. Thus, the Administrative Law Judge's finding that Appellant failed to maintain a proper lookout under the circumstances is supported by the evidence.

I believe that a prudent navigator would foresee the possibility of a collision where on person must operate the vessel as well as serve as lookout in waters where other vessel traffic and obstructions are known to exist.

CONCLUSION

There was substantial evidence of a reliable and probative nature to support the finding 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 Houston, Texas on 21 January 1982, is AFFIRMED.

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

Signed at Washington, D.C., this 6th day of September 1983.

***** END OF DECISION NO. 2319 *****

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