UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. BK 283 467
Issued to: Fay KELLOGG LICENSE NO. 417774

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2101

Fay KELLOGG

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 8 April 1976, an Administrative Law Judge of the United States Coast Guard at New York, New York suspended Appellant's licenses for 3 months outright plus 3 months on 12 months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as Master on board the United States SS EDGAR M. QUEENY under authority of the license above captioned, on or about 31 January 1975, Appellant did not have "a competent person standing by in position to let the anchor go promptly as the vessel was maneuvering in congested waters," and that Appellant did "wrongfully fail to take positive action in sufficient time to prevent a collision with the SS CORINTHOS."

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 the

following: a stipulation as to the testimony of Pilot Sverre SORENSON (Ex. 1), the stipulated testimony of 3rd Mate Robert C. DOWNS before the Coast Guard Marine Board of investigation corrected by an ERRATA sheet (Ex. 2), a photo copy of chart 12312 depicting the Delaware River in the vicinity of General Anchorage No. 7 and a stipulation that this chart was corrected through Notice to Mariners No. 45 (Ex. 3), and the stipulated testimony of Chief Mate Michael J. CASEY before the Coast Guard Marine Board of Investigation corrected by an ERRATA sheet (Ex. 4).

In defense, Appellant offered in evidence his own sworn testimony, the testimony of Robert Paul McKEEVER, K.H, EITZEN, George LARIMER and Edward W. GRAS. In addition, Appellant offered the following defense exhibits:

The sailing record of Capt. KELLOGG (Ex. A), the copy of the Deck Bell Book for Jan. 31, 1975 (Ex.B), an excerpt of CDR SMITH'S statement Board of Investigation (Ex.C), the course recorder record showing time, heading and swing (Ex. D), an affidavit of Pilot Samuel M. SCHELLENGER (Ex. E), calculations of the course recorder record showing time, heading and swing (Ex. F), a chart used by Capt MCKEEVER (Ex. G), a stipulation concerning the testimony of Lee C. WOODARD, Chief Mate of SS QUEENY, (Ex. H), a stipulation of the testimony of first Asst. Engr. George ZAHAR (Ex. 2), a stipulation as to the testimony of Michael C. BRETON, Ch. Engr., SS QUEENY (Ex. J), letters from Charles HUNTZINGER, Capt. EITZEN, John W. MANSFIELD, GIBSON, and Ted WATSON (Ex. K-O), telegrams (Ex. P), and a letter written in German which was not received in evidence due to no translation (Ex. Q).

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and the above-listed specifications had been proved. He then entered an order suspending all licenses issued to Appellant, for a period of 3 months outright plus 3 months on 12 months' probation.

The entire decision and order was served on 10 April 1976. Appeal was timely filed on or about 28 April 1976.

FINDINGS OF FACT

On the evening of 30-31 January 1975, Appellant was serving as a Master on board the United States SS EDGAR M. QUEENY and acting under authority of his license while the ship was at the Monsanto Dock heading down river in the Delaware River, in the vicinity of General Anchorage No. 7. He had been her regular Master since 1970.

The SS EDGAR M. QUEENY is 660 feet long, has a 90 foot beam, and is of 36,900 tons. She is powered by a single screw steam turbine main engine and is equipped with a 1000 horsepower bow thruster.

Pilot Sverre SORENSON, was aboard to assist in conning the QUEENY from the Monsanto Dock upriver to Paulsboro, New Jersey. Appellant had known Pilot SORENSON for approximately 13 years and had confidence in his ability as a Pilot. Pilot SORENSON had acted as pilot on the QUEENY during docking and undocking operations on numerous occasions, and Appellant had been QUEENY'S Master on a substantial number of those occasions.

Appellant had previously maneuvered the QUEENY while headed downstream in a 180 degree turn to go upstream. Neither Appellant nor Pilot SORENSON considered this a complex or extraordinary maneuver. Such a maneuver is almost invariably done by "backing and filling", a method by which a vessel maneuvers in a 180 degree turn in place or nearby so by coordination of rudder orders with a series of astern and ahead orders on her engines. Appellant was aware, however, of the narrowing of the Marcus Hook Range Channel in which a portion of the maneuver would be conducted through the Local Notice to Mariners.

The Tug TANDA 12 was ordered by QUEENY'S owners to assist the QUEENY in the undocking and turning maneuver, and although Appellant did not think at the time that the tug was needed he decided to use it since it had been ordered. The tug was used in the undocking maneuver and to assist the bow thruster in the turning maneuver to go upriver but was released by the Pilot prior to completion of the turn. Appellant did not countermand this action although at the time he expressed a question about the wisdom of releasing the tug prior to completion of the turn.

In order to accomplish the turning maneuver, the QUEENY was

using her bow thruster at full thrust, her helm was hard right and her engine was half ahead. At approximately the time of dismissing the tug, Appellant dismissed the anchor detail, consisting of Chief Mate CASEY and the Boatswain, leaving only a lookout on the bow. At this time the vessel was still engaged in her close-quarters 180 degree turn and was perpendicular to the Pennsylvania shore. At this time, the third mate on watch, Mr. Downs, became apprehensive that QUEENY would not successfully complete her turn.

As the QUEENY continued her turn and accelerated toward the Pennsylvania shore and a discharging oil tanker, SS CORINTHOS, at the BP dock, Appellant began to become apprehensive that she would not make the turn successfully. Appellant walked to the starboard bridge wing, voiced his concern to the Pilot and suggested that it was time to come astern on the engines. The Pilot did not, however, heed this suggestion. Some seconds later, Appellant walked to the port side of the bridge to observe the Range lights, and then ordered "full astern." At the time of the "full astern" order the QUEENY'S bow was approximately 800 feet from the CORINTHOS and her speed was about 5-6 knots over the ground. The tide was flooding at about 1 1/2 kts. The QUEENY'S engines require about 30 seconds to go from half ahead to full astern. The pilot looked into bridge, looked at the CORINTHOS and stated that they were too close and added "Double jingle". Appellant repeated the order of "double jingle", and mentioned getting the tug back. As the QUEENY began to feel the effect of the engine going astern, her rate of swing to starboard increased, and although Appellant thought the two ships would clear each other they did not. While making about 1 knot ahead the QUEENY'S bow struck the CORINTHOS. An explosion occurred followed by a second explosion aboard CORINTHOS, and the resulting fire spread to the QUEENY. Appellant then maneuvered his ship away from the burning CORINTHOS to a safe anchorage and had his crew successfully fight the fire aboard the QUEENY.

BASES OF APPEAL

This appeal has been taken form the order imposed by the Administrative Law Judge. It is contended as follows:

A. IF THE PILOT WAS FOUND NOT GUILTY OF WRONGFULLY FAILING TO POSITIVELY DETERMINE THAT HE WAS DIRECTING THE VESSEL TO BE

MANEUVERED SAFELY SO AS TO ENTER MARCUS HOOK RANGE CHANNEL, THEN AFORTIORI (sic) THE MASTER COULD NOT BE FOUND GUILTY OF WRONGFULLY FAILING TO TAKE POSITIVE ACTION IN SUFFICIENT TIME TO PREVENT A COLLISION WITH THE SS CORINTHOS.

B. THE ADMINISTRATIVE LAW JUDGE ERRED IN FINDING THAT THE MASTER WAS NEGLIGENT FOR MOMENTARILY DELAYING HIS FULL ASTERN ORDER WHILE HE CONFIRMED THE NECESSITY FOR GIVING SUCH AN ORDER.

C. THERE WAS NO REQUIREMENT UNDER THE CIRCUMSTANCES THAT AN ANCHOR WATCH BE MAINTAINED IN TRANSLATING THE RIVER: AND, IN FACT IF AN ANCHOR HAD BEEN DROPPED DURING THE RIVER TRANSIT THE VESSEL WOULD HAVE BEEN IN GREAT PERIL.

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OPINION

I

The grounds for Appellant's first contention are: first, that the decision by the same Administrative Law Judge in the related case of Pilot SORENSON at least affected (and possibly compelled) his decision in the instant case. Related to this is Appellant's statement that "[o]nce the pilot was exonerated, the master could not as a matter of law be found guilty of failing to correct the pilot's course in sufficient time to avoid the collision." It should be noted that no citation appears for this proposition and none has been found. The second underlying basis is Appellant's statement "there was overwhelming evidence in the instant case to conclude that Appellant acted competently, with reasonable promptness" (Brief p. 7).

Appellant's first ground above is not supported by the record, and in fact, is directly contrary to the record. See Ruling on Post Hearing Motion Filed by Counsel for Respondent dated 9 April 1976. Apart from this denial by the Administrative Law Judge, traditional principles of law do not require the result sought by

Appellant. *Neaderland v. C.I.R.*, 424 F. 2d 639 (2) Cir. 1970); *Bryson v. Guarantee Reserve Life Ins. Co.*, 520 F. 2d 563 (8th Cir 1975).

The correct principle is rather that, generally, a judicial finding of a material fact in one adjudicative proceeding is not conclusive in a separate adjudicative proceeding involving different parties, different issues, and a different record even though the factual background is similar. *NLRB v. Donnelly* Garment Co., 330 U.S. 219 (1947). Furthermore, the charge which was found not proved in Pilot SORENSON'S case was that the pilot "negligently failed to utilize information available from aids to navigation and navigational devices, to properly ascertain that the vessel was not standing into danger." Appellant has asked the rhetorical question of how the Appellant can be found negligent if the pilot was found not negligent on the same general facts. The answer to this question is that the decision is based on different charges, different records containing different evidence, different persons and different issues. The Administrative Law Judge's opinion in the case of Pilot SORENSON, after reciting the substance of the evidence on both sides, merely stated that the government had not carried its burden to prove negligence. Whether or not that decision is correct doesn't affect the outcome of this case because even if the pilot was not negligent in failing to utilize available equipment to ascertain the QUEENY was standing into danger, the Appellant was negligent not merely for his failure to act sooner in the time period of a few seconds between the point at which he *actually* acertained that the ship was in danger to the time he took action, but for the complete failure to sooner realize that pilot's maneuvers were likely to place the vessel in danger and to take appropriate corrective action.

In support of this argument, Appellant has cited a statement in an Administrative Law Judge opinion in an unrelated RS 4450 proceeding. Appellant's brief p. 10. Administrative Law Judge opinions in separate cases are not binding precedent, and *should* not be cited as such. At most, they should be considered only for the persuasiveness of the reasoning contained in them until they are affirmed on appeal.

On the separate question of whether or not there was overwhelming evidence in this record that Appellant acted competently, with reasonable promptness, suffice it to say that there is substantial and reliable probative evidence showing that his actions were not competent and taken with reasonable promptness.

With respect to Appellant's second contention, a statement of some general principles is appropriate. First, the Master is ultimately responsible for the safety of his vessel at all times regardless of whether a pilot is aboard and is assisting. In fulfilling this responsibility a Master is required to exercise that degree of care which a reasonably prudent Master would exercise under all the circumstances. When he *observe*s or should observe that his vessel is stand*in*g into danger, he is on notice that he must use all means available to ensure that timely action is taken to avoid placing his vessel in that danger. See e.g. COMMANDANT APPEAL DECISIONS 830, 1755.

Appellant claims that he is at most guilty of an error in judgment by failing to take sufficient steps to avoid the collision. Appellant's failure to appreciate in a timely manner the increasing risk that his vessel would not safety make the turning maneuver and take sufficient action to avoid the collision is a failure to exercise that degree to care required of a reasonably prudent master under the circumstances. At some point after the QUEENY left her pier and before Appellant ordered her engines full astern to avoid the collision, he should have realized that the Pilot's maneuvering would place the QUEENY in perilous circumstances. The deck bell book shows that at 0019 the pilot ordered QUEENY'S engines half ahead (her rudder had been hard right and her bow thruster on full in a close quarters turn). He allowed QUEENY'S engines to remain half ahead while the vessel accelerated to 5-6 knots toward the Pennsylvania shore in a narrow channel hoping that she would complete her turn safely. Appellant sanctioned this maneuver despite the fact that normally such a turn would be accomplished by "backing and filling" (R-65, 70). Thus, Appellant's failure to take timely sufficient action to avoid an allision with the moored CORINTHOS under the facts and circumstances here amounts to more than a mere error in judgment. It rises to the level of negligence.

The in *extremis* doctrine sought to be applied by Appellant is inapposite. That doctrine is a narrow exception to the principle which requires observance of the standards of prudent navigation. It applies to a vessel which, through no fault of her own, is placed in a position where collision is seemingly imminent. It states that she will not be cast in fault for action taken which on afterthought does not comply with due standards of navigation so long as the fault can b e explained by the extremity in which she was placed. Gilmore and Black, The Law of Admiralty (1957) p. 401. The doctrine most certainly does not apply to a situation in which a vessel collides with a stationary object under conditions which are not extraordinary, while engaged in a routine maneuver performed many times previously. Nor does the *Howlett* case [1970 A.M.C.783 (2nd Cir)] furnish much support for Appellant's contention. Although the *Howlett* decision applied a lower standard of care than ord*in*ary maritime negligence to those emergency situations which arguable fall outside the application of the traditional in *extremis* doctrine, it did not extend that lowered standard to the situation presented here -- that of an allision caused by the lack of care in the execution of a routine maneuver under non-emergency conditions.

III

Although no statute or regulation was cited as expressly requiring an anchor detail to be maintained under the circumstances of this case, maritime custom establishes standards of due care and good seamanship as a source of standards of correct action. *The* requirement for maintaining an anchor detail in congested pilot waters exists pursuant to these standards. The *Virginia*, 25 F. 2d 623 (2nd Cir. 1928). Furthermore, the requirement exists irrespective of whether it may be desirable in any particular case to drop an anchor. As pointed out by the Administrative Law Judge below, the Appellant was not charged with failing to use his anchor, but with failing to maintain the anchor detail (D & O p. 19). Accordingly, the second specification and supporting record are adequate to establish a charge of negligence under the circumstances of this case.

CONCLUSION

There is substantial and probative evidence to support the findings of the Administrative Law Judge in this case. None of Appellant's contentions have substantial merit.

ORDER

The order of the Administrative Law Judge dated at New York, New York on 8 April 1976, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 26th day of April, 1977.

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moored vessel

OPINION

By ALJ in another case not precedent

***** END OF DECISION NO. 2101 *****

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