UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 440208
Issued to: James Albert HINDS BK-45022

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2113

James Albert HINDS

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 28 January 1977, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's seaman's licenses for 1 month outright plus 2 months on 6 months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as Master/First Class Pilot on board the United States SS SPARTAN under authority of the license above captioned, on or about 12 August 1976, Appellant:

(1) wrongfully failed to obtain or properly use information available from radar observations, for the purpose of determining the safe course into Ludington Harbor, Michigan.

(2) wrongfully failed to reduce the speed of his vessel during conditions of fog and restricted visibility.

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 seven exhibits, his own testimony, and that of four witnesses.

In defense, Appellant offered in evidence the testimony of two witnesses.

At the end of the hearing, the Administrative Law Judge reserved the decision. He subsequently entered an order on Appellant suspending all licenses issued to Appellant for a period of 1 month outright plus 2 months on 6 months' probation.

The entire decision was served on 9 February 1977. Appeal was timely filed on 28 February 1977.

FINDINGS OF FACT

On 12 August 1976, Appellant was serving as Master/First Class Pilot on board the United States SS SPARTAN and acting under authority of his license while the vessel was underway on Lake Michigan. The vessel had departed that morning from Kewaunee, Wisconsin, and proceeded at full speed for Ludington, Michigan, on a course of 125 degrees. The weather at eight A.M. was clear with five to six miles of visibility but because increasingly restricted as the vessel approached Ludington. The Third Mate took a radio direction finder fix on the Harbor when the vessel was 10 miles from the Michigan shore and altered the course to 135 degrees. The Third Mate had determined the distance from the Harbor by the use of his radar which was WWII vintage. When the vessel was 20 minutes out of Ludington the Third Mate, in accordance with customary procedure, called Appellant in the chart room and the engine room personnel to inform them of the proximity of the Harbor. Appellant soon thereafter came on the bridge appearing alert and shaven and was notified by the Third Mate that the radar was not functioning properly. The vessel was then two miles out of

the Harbor going full speed on course 135.

The weather became increasingly foggy with winds gusting up to 20 miles per hour. Appellant therefore ordered that the vessel's fog horn be turned on and a man was sent to the bow as lookout. The Third Mate continued to give Appellant bearings for course alterations which were made intermittently and reported that there were small craft in the area, although none was close enough to present any danger to the vessel. One and a half miles from the Harbor the speed was lowered to 12 miles per hour and Appellant changed the course to 100 degrees for the approach to the opening in the breakwater surrounding the Harbor. The breakwater consisted of two arms encircling the outer basin of the Harbor with an entrance 475 feet wide. Large rip rap boulders are placed along the sides and ends of the breakwater up to 75 feet out to protect them from wave action. The rip rap is reported in a Department of Commerce publication entitled the Great Lakes Pilot, was known to Appellant, and is charted on maps of the Harbor.

After the vessel had been set on a course of 100 degrees, and Third Mate took another bearing and determined that the Harbor lay at a bearing of 75 degrees true from the vessel's position. The Appellant ordered the course changed to 075 degrees and the speed up to full. The speed limit for the channel leading to Ludington is 8 miles per hour. Following the course change to 075 degrees, the Third Mate returned to the radar scope and ascertained that the vessel was one quarter mile from the breakwater. However, he could not determine from use of the radar where the entrance to the breakwater lay. A reason for the radar's failure to pick up the breakwater entrance was that it could not pick up objects less than a quarter of a mile and was unreliable up to a full mile from the vessel. Within a few minutes after ordering the vessel to full speed, Appellant ordered her back to half. Minutes after this last order, Appellant spotted the South Breakwater Light dead ahead and commanded the engine room to reverse engines at three quarters power. One minute after reversing the engines the vessel ran aground on the rip rap about 40 to 50 feet from the light.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) The findings that the vessel was traveling at 12 miles per hour when the collision occurred and that the speed limit was 8 miles per hour are not supported by the facts.

(2) The Judge erred in finding that the collision between the moving vessel and a stationary object raised a presumption of negligence.

(3) The Judge erred in concluding that Appellant failed to present evidence to rebut the presumption of negligence as Appellant had testified that he was compelled to keep up half speed in order to maintain steerageway and that, regardless, the Judge failed to show a casual relationship between the vessel's speed and the collision.

(4) The Judge erred by including within his Decision the finding that Appellant had previously been found guilty of negligence as Appellant did not have any opportunity to testify regarding his record.

(5) The Judge erred in not following Appellant's suggested procedures for an investigation.

(6) The Judge erred in not examining the Third Mate's role in the collision.

(7) The Judge erred in taking any action against Appellant's documents as he falls within the exemption clause of 46 CFR 137.20-170.

APPEARANCE: James F. Finn, Esq. of Detroit, Michigan.

OPINION

I

Appellant has complained that there is no foundation for the Administrative Law Judge's findings that the vessel was moving at

twelve miles per hour at the time of collision and that the speed limit for the area had been set at eight miles per hour.

There is evidence that the vessel was traveling at something less than twelve miles per hour at that moment of encounter since the speed had been reduced by reversing the engine one minute before. The speed at the moment of the collision is immaterial since it was the speed at the time that the light was sighted by Appellant that was the determining element in the operation. As to that, there was adequate proof of the speed limit in the testimony of the mate and the fact of the limit is established anyway by reference to the controlling regulation, 33 CFR 207.450 (a). Appellant himself admitted to a speed of 9 or 10 miles per hour in the approach and there is evidence of even a higher rate.

However, the charges in the case dealt with the question of speed as being immoderate with respect to the conditions of visibility. Appellant acted immediately on sighting the light and reversed the engine. He was unable to stop the vessel by its own machinery and it was the rip-rap that brought it to a halt. The vessel was then, at most, 75 feet from the light. On the view most favorable to Appellant the vessel had, during the minute before, from the first sighting of the light, traveled at least 400 feet. The vessel plainly had been proceeding at a greater speed than would allow it to be stopped within half the distance of visibility and hence was traveling at immoderate speed in reduced visibility.

II

Appellant asserts that the Judge erred in concluding that a presumption of negligence arose from the collision of a moving vessel with the stationary rip rap. Support for the Judge's conclusion can be found in the case of *Standard Dredging Corp v S/S Syra,* 290 F. Supp. 260 (D.Md. 1968) in which the court stated:

> When a moving ship collides with either a vessel at anchor or with a stationary or fixed object, there is not only a presumption in favor of the anchored or stationary object, but a presumption of fault on the part of the moving vessel which shifts the burden of proof.

However, further review of the cases does not support the Judge's findings that collision with a stationary, *submerged* object, without more, raises a presumption of negligence. But where the submerged object is clearly identified to the Mariner, the presumption may arise. For instance, the court in *Afran Transport Co.* v *United States*, 435 F.2d 213 (2d Cir. 1970) explained that, in a case involving the grounding of a vessel:

> the stranding of Northern Gulf on a *well-known and well charted* rocky ledge at the principal approach to Portland Harbor raised a presumption of fault. (Emphasis added)

The Third Mate had testified that the rip rap extended 75 feet from the wall and was indicated on the charts by broken lines around the breakwater. Appellant had conceded that the chart showed the rip rap and that its existence was known to him and to all local mariners. I therefore find that sufficient facts had been presented by the Investigating Officer to satisfy the elements necessary to establish a presumption of negligence following the collision of the moving vessel with a well charted, known, stationary, submerged object.

III

Appellant argues that the Judge erred in his conclusion that he failed to present sufficient evidence to rebut the presumption of negligence arising from the vessel's collision with the rip rap. In reference to the specification charging Appellant with wrongfully failing to obtain or use information available from radar observations, I concur. The presumption that a Master's failure to utilize his operational radar is a contributing factor in any collision was declared in the case of *Afran Transport Co.* v *The Bergechief*, 274 F.2d 469 (2d Cir 1960). This presumption, however, may be rebutted by the presentation of sufficient evidence proving that the Master exercised due care in not relying upon his radar. The burden of production and proof then shifts back to the Investigating Officer. Appellant had testified that the radar on board his vessel was of WWII vintage and less effective than the newer models in that it could not be relied upon to pick up objects which were less than a mile away from the vessel. The Third Mate testified that he had informed

Appellant when the latter took over the bridge that the radar was not functioning properly. In addition, the Third Mate stated that he had lost several small vessels on the radar scope and could not locate the entrance to the harbor from one quarter of a mile out. *Pocahontas Steamship Co* v. *The Esso Aruba*, 94 F.Supp. 486 (D.Mass. 1950) involved a case in which prior to a collision between two vessels the Master of one had ceased to rely upon his radar as it was picking up a great deal of interference and false targets. The court said:

> I find that Captain Keating under all the attending facts and circumstances was not negligent in discontinuing the use of the radar...There might well be times when the continued use of radar by a navigator who was uncertain of the results he was observing and unwilling to place reliance thereon might well be foolhardy and hazardous.

Appellant met his burden of production of evidence to overcome the presumption that the nonuse of his radar contributed to the grounding of his vessel upon the rip rap. The only countervailing evidence that the Investigating Officer introduced was that the radar had been inspected on 19 November 1975. I find the presentation of evidence that the radar was inspected in port by the Investigating Officer is insufficient to prove that it was operational on the date of the collision or that it was capable of reliably distinguishing objects less than a 1/4 of a mile and possibly up to a mile from the vessel. The finding that Appellant wrongfully failed properly to utilize his radar to assist his approach into Ludington is therefore vacated.

Appellant contends that he rebutted the presumption that his violation of the statutory speed limit of 8 miles an hour and that imposed by Rule 15 of the Great Lakes Rules of the Road (33 U.S.C. 272) when sailing in conditions of restricted visibility contributed to the collision. Appellant argues that he was compelled to travel at half speed in order to maintain steerageway in view of the gusting wind and current across the mouth of the Harbor. He also asserts that the Judge failed to prove that the speed of the vessel had any causal relationship with the collision.

Appellant's contentions are without merit. Appellant had conceded that the rule for proceeding in fog is "to run it at a

moderate speed and be able to stop your vessel in half the distance you can see" (TR 127). The court in *Holland-America Line* v *M/V Johs. Stove,* 286 F.Supp. 69 (S.D.N.Y. 1968) had in a case involving the collision of two vessels rejected the argument that a violation of Article 16 of the Inland Rules of the Road (33 U.S.C. 192), nearly identical to Rule 15 of the Great Lakes Rules, could be defended on the grounds that it was necessary to maintain steerageway. The court had stated:

> The Stove's master testified that the Stove's bow (about 200 feet away) was visible from the bridge but that he could see nothing beyond it. The Stove should, therefore, have been able to stop in 100 feet, an impossibility giving her three to four knot speed. The Stove urges, however, that her three to four knot speed was necessary to maintain steerageway in the ebb tide. Accepting that fact, it is still no defense. When conditions are such as to "require a vessel to exceed the proper speed in a fog to maintain steerageway, that vessel should not be underway in the first place."

I similarly reject Appellant's argument as its acceptance would introduce chaos in navigation by permitting each Master to use his own judgment as to whether he would obey the most basic rules of the road.

Appellant's attack upon the Judge's finding that his failure to adhere to Rule 15 had a causal relationship with the collision is also without foundation. The record overwhelmingly indicates that a direct cause of the collision was the Appellant's inability to halt the vessel in time. I note that the collision was not immediate but occurred after the Master had seen the breakwater wall ahead and ordered the engineroom personnel to reverse engines. The Marine Engineer testified that it may have been a full minute between the time the order to reverse engines was given and the time the collision occurred. Upon these facts I conclude that the Judge's finding that the speed of the vessel was a direct cause of the collision is correct.

VI

Appellant objects that his prior record was ascertained by the Administrative Law Judge in improper fashion, and that the prior

record that was in fact ascertained was incorrect.

It is clear that Appellant did not consent to the obtaining of his prior record (after findings had been made) in any fashion in other than in open hearing. The matter was specifically discussed as the last item of business just before the last adjournment announced by the Administrative Law Judge. When the methods of "open hearing" or a less formal mode of ascertainment were considered, Appellant's counsel said. "I think, in the best interests of my client, I cannot at this time agree to that [ascertainment "off the record"]." Despite this, and with no pertinent comment, the initial decision contains a recital of a prior record. The record reflects no subsequent arrangement agreeable to the participant for the obtaining of the record. This was error. Decision on Appeal No. 1472.

Appellant now asserts that a specific harm was created by the error:

> "Particularly, in view of the fact that a finding by the examiner as to the prior record is in error in that it refers to the respondent being involved in a collision in Sturgeon Bay, Wisconsin on November 11, 1974. It further finds that the ship involved was the S/S SPARTAN and that it collided with a south breakwater light. As a matter of record, the SPARTAN did not hit the south breakwater light on November 11, 1974. The respondent, had he been allowed to testify, would have been able to clear himself of any claimed charges involving his prior record..."

This issue raised by Appellant can be resolved now by official notice of his record.

It is agreed that the prior record has been inaccurately stated. Appellant was not warned on 11 November 1974.

The initial decision does not, however, say that SPARTAN was involved in a collision on 11 March 1974; it says only that a warning was given on that date. In fact, Appellant was warned on 5 November 1974 at Sturgeon Bay, Wisconsin, for operating SPARTAN without a lookout in fog, contributing to a collision with Kewaunee Shoal Light (LL 2388) on 2 November 1974.

The remedy allegedly lost to Appellant by the improper introduction of prior record, that of being "able to clear himself of any claimed charges involving his prior record," is imagined, not real, since the fault found and the warning issued under 46 CFR 5.05-15 (a) are not subject to litigation in the instant proceeding.

In the case in Decision on Appeal No. 1472 it was found proper to set aside the order and to remand the case for further proceedings on the question of record since there the Appellant specifically sought to provide counteracting evidence of conduct generated between the last matter of record and the case then under consideration. To remedy the error here there is no need to do this, since what Appellant proffers on appeal would not be acceptable anyway. The error not being, at this stage, substantive, can be remedied by a modification of the order entered so as to lessen its effect on Appellant. A portion of the modification of the order to be entered below reflects this consideration.

V

Appellant's contention that the Judge erred in not following his suggestions for an investigation is without merit. The task of gathering evidence that would serve to rebut the charge of negligence is clearly that of Appellant and his counsel.

VI

Appellant argues that the Judge erred in not examining the role of the Third Mate in the collision. Such an examination is unnecessary as the Master of a vessel cannot exculpate himself on the basis of an alleged failure of his officers to perform their duties properly. The court in *Butler* v *Boston and Savannah S.S. Co.*, 130 U.S. 527, 9 S.Ct. 612 (1889) declared in a case involving the limitation of the owner's liability the age old maritime axiom that:

> By virtue of his office and the rules of maritime law, the captain or master has charge of the ship and of the selection

and employment of the crew, and it was his duty, and not that of the owners, to see that a competent and duly qualified officer was in actual charge of the steamer when not on the high seas.

Appellant was himself in active control of the handling of his ship at the time and was sufficiently on notice as to conditions.

VII

When Appellant complains that it was improper for the Administrative Law Judge to suspend his merchant mariner's document in view of the "exemption" in 46 CFR 5.20-170 (c), he is pursuing a false end.

First, the regulation does not create an "exemption." It merely authorizes an administrative law judge to recognize that certain acts of negligence or conditions of incompetence are peculiar to a class or capacity of seaman and that not all service as a seaman should be barred, but only service in that particular capacity.

More important, however, in the instant case is that the Administrative Law Judge did not purport to do what Appellant says he did. While the proceeding was directed against both the license and the merchant mariner's document of Appellant, the initial order of suspension was directed only to the captioned license "and all other valid licenses issued to you..." The suspension of which Appellant complains was never ordered.

However, another difficulty with the Administrative Law Judge's order does come to light. While the ordered suspended outright the captioned license and "all other licenses," he addressed his additional order of suspension on probation only to "your said license," in the singular. To avoid confusion in the event that some future act may depend on the interpretation of the effect of this discrepancy in language, I intend to limit the entire order to the captioned license.

CONCLUSION

It is concluded that the allegations of the first specification as to use of radar were not established but that those of the second specification of the charge of negligence, that of proceeding at immoderate speed in fog, were proved by the required quantum of evidence. This conclusion leads to an adjustment of the ultimate order.

It has been concluded also that the manner of ascertaining prior record was wrong but that, in view of the specific relief suggested by Appellant, an adequate disposition is arrived at by considering this in the adjustment of the order.

The total time period of suspension is being reduced, and the whole will be placed on probation, the ultimate order being directed solely to Appellant's captioned license.

ORDER

The findings of the Administrative Law Judge as to the first specifications of negligence are SET ASIDE. The findings as to the second specification and the charge of negligence are AFFIRMED. The order entered at St. Louis, Missouri, on 28 January 1977 is MODIFIED, to provide for a suspension of your license, No. 440208, for a period of one month, the suspension is not to be effective provided no charges under R.S. 4450 (46 U.S.C. 239) are proved against you for acts committed within six months of the date of service of this decision, subject to the provisions of part 5, title 46, Code of Federal Regulations. As MODIFIED, the order is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 28th day of Feb 1978.

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