UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO: BK-11-238
LICENSE NO. 439526
Issued to: James L. BARROW

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2124

James L. BARROW

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 3 June 1977, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida suspended Appellant's license for 2 months outright plus 6 months on 12 months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as a Master on board the motor tug ESTHER MORAN made fast to the stern of the tank barge NEW YORK under authority of the license above captioned, on or about 9 January 1977, Appellant did negligently abdicate his position and negligently fail to perform his duties as master by placing himself in such a position that he was unable to take the necessary actions to avert the collision between the T/B NEW YORK and the Tampa Electric Company dock.

A second specification alleging that Appellant did negligently cause oil to be spilled in Sparkman Channel, Tampa, Florida as a result of a collision between the T/B NEW YORK and the Tampa Electric Company dock was found not proved.

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

The Investigating Officer introduced in evidence excerpts of the deck log of the ESTHER MORAN and twelve other items of documentary evidence; the sworn testimony of an employee of the the Tampa Electric Company, the Second mate aboard the ESTHER MORAN, a Tampa Bay Pilot, the Masters of the two assisting tugs, and the Chief Mate aboard the ESTHER MORAN.

In defense, Appellant offered in evidence his own sworn testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and first specification had been proved. He then entered an order suspending all licenses issued to Appellant, for a period of 2 months outright plus 6 months on 12 months' probation.

The entire decision and order was served by mail to Appellant's counsel on 9 June 1977. Appeal was timely filed on 17 June 1977.

FINDINGS OF FACT

On the morning of 9 January 1977 Appellant was serving as a Master on board the motor tug ESTHER MORAN and acting under the authority of his license while the tug was in the port of Tampa Bay, Florida. With the assistance of two local harbor tugs, and the services of a local pilot the ESTHER MORAN was in the process of moving the T/B NEW YORK from the Texaco/Marathon Terminal on Ybor Channel to the Amoco Terminal on Sparkman Channel when the NEW YORK collided with a section of dock at the Tampa Electric Company resulting in a rupture of the NEW YORK's hull and the spillage of 80,000 gallons of diesel fuel into the navigable waters of Sparkman Channel. Just prior to colliding with the Tampa Electric Company, as the flotilla proceeded southward, the T/B NEW YORK narrowly avoided colliding with a ship moored at the Southport Terminal dock.

The weather was good. Visibility was unlimited and there was no appreciable wind or current. The visibility forward of the wheelhouse of the ESTHER MORAN was completely blocked and the vision to either side was also impaired because the bow of the tug was "in the notch" of the barge and the deck of the barge was 25 feet above the wheelhouse of the tug. The radar on the tug was in operation during the maneuver. However, there is no evidence in the record with respect to its condition, reliability, or utilization during the operation.

Appellant stationed himself at the helm of the tug and positioned the pilot forward on the barge. The Chief Mate, the Second Mate and four able seamen were aboard the barge. A portable transceiver was used to relay communication between the pilot, Appellant, and the masters of the two assisting tugs. At approximately 0400, when the movement began, the Appellant was at the helm of the tug following the orders of the pilot as to course and engine orders.

At approximately 0430, the port bow of the barge came into contact with a section of the Tampa Electric Company dock. The collision ripped a hole 15 feet long and 2 feet wide in the port bow of the barge 4 feet above the waterline, spilling 80,000 gallons of diesel fuel.

The pilot was a First Class Tampa Bay Pilot and a member of the Tampa Bay Harbor Pilots' Association.

BASES OF APPEAL

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

(1) it was error for the Judge to find that Appellant negligently abdicated his position as Master of the tug by placing himself in such a position that he was unable to avert a collision between the barge and the dock;

(2) it was error to find Appellant guilty of negligence when such negligence did not cause or contribute to the collision or oil spill;

(3) finding specification 1 proved and specification 2 not proved amounted to placing Appellant in double jeopardy;

(4) specification 1 was vague and failed to charge Appellant with any specific act of negligence.

APPEARANCES: Brendan P. O'Sullivan, Esq., of Fowler, White, Gillen, Boggs, Villareal, and Banker, P.A., Tampa, Florida.

OPINION

To accomplish the sailing concerned here, Appellant was required to staff two key positions-a position with good visibility on the T/B NEW YORK and the wheelhouse of the tug ESTHER MORAN. The barge had a notched stern, into which the bow of tug was secured. Propulsion and steering power furnished by the tug ESTHER MORAN with two other tugs available to assist as needed.

The Appellant had over 30 years experience as a Master but had not navigated in Tampa Harbor in nine years. A Tampa Bay Harbor Pilot was employed to assist the Appellant. The pilot was familiar with the local conditions, however, on only one previous occasion had the pilot ever shifted a tug and barge made fast to each other.

Appellant positioned himself at the helm of the tug with limited visibility and placed the pilot on the bow of the barge with unlimited visibility. A portable transceiver provided communications between the pilot, "Appellant," and the assisting tugs.

The pilot was employed because of his greater familiarity with the harbor and local conditions. However, the Appellant's act of placing himself in a position from which he was unable to observe the progress of his tug and barge is not excused by the presence of a pilot. Appeals Decision 360(CARLSEN) correctly stated that

"since the position of the Master of a ship at sea is one of such heavy responsibility, he must take more than ordinary measures to prevent accidents related directly to the errors of others. What a reasonably prudent man in some other station in life would do is seldom sufficient for someone in the position of master of a valuable ship sailing the seas".

Negligence is defined at 46 CFR 5.05-20(2) 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." Thus the issue in this case becomes one of whether the Appellant abdicated his position as the master of the ESTHER MORAN, or acted in a manner different from a reasonably prudent person of the same station, under the same circumstances, when in unfamiliar waters he entrusted the control of his flotilla to a pilot while he remained at the helm of his vessel where he could not view the progress of the flotilla or evaluate the navigational directions of the pilot? Having considered the totality of the record, I find the answer to be in the affirmative.

This situation differs from that in which a master remains in complete control of a flotilla's navigation but merely positions a crewman aboard a barge to serve as lookout. The differences is in the degree of control relinquished. In this case it was the pilot who positioned the assisting tugs, ordered the departure, and gave all engine and rudder orders.

By remaining aboard the tug, where he was blind to all but the stern of the barge, and by submitting himself to the role of merely executing the orders of the pilot, Appellant rendered himself incapable of exercising his position of ultimate command, and incapable of performing his duty to supervise, control, and intervene with regard to the actions of the pilot when the need arose. The standard of care expected of a reasonably prudent master has been stated as follows:

> "...The Master is on duty at all times and is responsible for the proper management and safety of the vessel. He must be constantly vigilant and his guilt or innocence must be judged by that degree of care which must be

> exercised, so far as possible, to avoid any danger to the ship, cargo, passengers, and crew.
>
> The Master of a ship may not rely on others to take the full blame for damage resulting from their negligence especially when the danger would have been avoided if the Master had taken proper steps to prevent the errors of others from jeopardizing the safety of the ship." (CARLSEN)

Appeal Decision 1891(BLANK) correctly states that a Master may not "sit idly by and blindly follow the pilot's actions. He has a duty to question the actions of the pilot and to discuss possible eventualities. The master has the duty of seeing to the safety of the ship and is at all times ultimately responsible."

In this case the Appellant's actions rendered him incapable of fulfilling his responsibilities. By remaining at the helm of the tug, the Master isolated himself from the decision-making control of the flotilla. This responsibility could hardly be delegated to a local pilot who had only shifted a similarly configured tug and barge once before and could not be expected to be as familiar as the master with the vessel's maneuverability and handling characteristics.

Appellant gave several reasons for deciding to remain at the helm of the tug. He pointed out that towing wires could break, that engines could fail, that an eperienced man was needed at the helm, and that there was a possibility of losing communications with the wheelhouse. All of these were possibilities. However, they did not explain why the helm was not turned over to the Chief Mate or the Second Mate, each of whom had served a year on the tug. These possibilities rank far behind the necessity of the Appellant's being in a position from which he could exercise complete control of the flotilla. Appellant's responsibilities could only be exercised and his superior training and experience could only be taken advantage of from a position where the speed of the flotilla, the effects of tide and current, responses to helm orders, unanticipated sheer or drift, the assisting tugs' responses, possible parting of lines, and any possibility of collision and allision could best be observed and corrected. By remaining at the helm of the tug, a position affording virtually no

visibility, and performing merely as a helmsman, Appellant had little or no opportunity to evaluate or assess the propriety of the pilot's commands.

Further, it was found that at no time prior to the pilot's taking over the control of the flotilla did Appellant discuss with him the capabilities of the ESTHER MORAN, the maneuvering components or how the assisting tugs were to be used. As was stated in (BLANK), "I think it was incumbent upon Appellant to have discussed the impending circumstances with the pilot and if not satisfied with the procedures to be followed, he had a duty to take positive action."

II

Appellant further urges that it was error to make a finding of negligence when such negligence did not cause or contribute to the collision or oil spill. This is clearly not correct. It has long been held that the criteria in these administrative hearings is negligence, rather than fault contributing to a casualty. (Appeal Decision 2085(RICHARDS)). It was correctly stated in Appeal Decision 1755(RYAN) that "... an individual should be found negligent in these proceedings if he fails to take the precautions a reasonably prudent person would take in the same circumstances whether or not his conduct or failure to act was the proximate or a contributing cause of a casualty."

III

Appellant contends that the finding of specification 1 proved and specification 2 not proved amounted to placing him in jeopardy twice. However, the double jeopardy provision of the Constitution applies to criminal cases and is not applicable in civil actions. An R.S. 4450 suspension and revocation proceeding is not a criminal action subject to that provision. (Appeal Decision 2029(CHAPMAN)) Administrative proceedings under 46 U.S.C. 239 have been consistently held to be remedial rather than penal since the primary purpose is to provide a deterrent for the protection of seaman and for safety of life at sea. This position has support in 46 U.S.C. 239(h) which provides for the referral of evidence of criminal liability to the Attorney General for prosecution under the Criminal Code Appeal Decision 1931(POLLARD)).

Furthermore, in this case it is clear that even if this were a criminal action, Appellant's argument would be totally without merit. The double jeopardy clause has no application to a situation such as this. Here Appellant was charged in a single proceeding with two separate acts, failing to properly position himself and causing an oil spill. The fact that the Administrative Law Judge found that there was insufficient evidence to prove that Appellant caused the oil spill, in no way triggered a double jeopardy defense to the charge that he negligently failed to place himself in a proper position.

IV

Appellant further contends that specification one is vague and fails to charge him with any specific act of negligence. However, the specification clearly sets forth the facts that are the basis of the charge and is sufficient to have enabled the Appellant to identify the offense and to prepare a defense. (Appeal Decision 1914(ESPERANZA). Therefore, this allegation is not legally persuasive.

CONCLUSION

The Administrative Law Judge's finding of negligence was based primarily on the conclusion that a reasonably prudent master, under the circumstances prevailing, would not have isolated himself from the decision-making control of his vessel so as to render himself incapable of fulfilling his responsibilities. There was substantial evidence of a reliable and probative nature to support the finding of the Administrative Law Judge that Appellant negligently placed himself in a position from which he was incapable of exercising his ultimate command responsibility as master of the ESTHER MORAN.

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida on 3 June 1977 suspending Appellant's license is AFFIRMED.

R. H. SCARBOROUGH
VICE ADMIRAL, U. S. COAST GUARD
Vice Commandant, Acting

Signed at Washington, D. C., this 15TH day of JUNE 1978.

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