

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT No. Z-165320
LICENSE No. 419385
Issued to: Albert S. WILHELMY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2144

Albert S. WILHELMY

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 15 November 1977, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's License for a period of one month, on probation for one year, after finding him guilty of a charge of negligence. The specification found proved alleged that while serving as Master aboard the United States M/V SAM LAUD, Appellant did, on 4 July 1976, fail to accurately ascertain the vessel's position with due care while approaching Buffalo South Entrance Channel, Lake Erie, resulting in the grounding of the vessel.

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

The matter came on for hearing on 12 April 1977. The Investigating Officer presented as evidence the testimony of Wilfred J. Short, a mate on watch aboard M/V SAN LAUD at the time of the incident, as well as documentary evidence. After the

Investigating Officer rested his case, Appellant moved for dismissal; following oral argument by counsel for both parties, the motion was denied. The case was then continued until 26 July 1977.

At the hearing of 26 July 1977, Appellant offered in evidence the testimony of Captain Robert J. Laughlin, a consultant with the American Steamship company, who expressed opinions with respect to navigation procedures during approaches to Buffalo Harbor from Lake Erie. Captain Laughlin's experience and qualifications were not challenged by the Investigating Officer. Appellant also presented various items of documentary evidence.

After Appellant rested, both sides made final arguments, and the hearing was then closed. Appellant filed proposed findings and conclusions on 8 September 1977 and the decision and order of the Administrative Law Judge was subsequently served on Appellant on 21 November 1977. This Appeal was timely filed on 8 December 1977.

FINDINGS OF FACT

Appellant served as Master aboard M/V SAN LAUD, O.N. 564002, from 10 April 1976 to 9 July 1976; on 4 July 1976 he was serving as Master aboard that vessel under authority of his license and document.

M/V SAM LAUD is a diesel powered vessel of 615 feet in length. The vessel was built in 1975. On 4 July 1976 it was carrying a cargo of ore.

On 4 July 1976, at about 1200 while Appellant was conning SAM LAUD and approaching the South entrance to Buffalo Harbor on Lake Erie, the vessel touched something, (or "rubbed") at a point approximately 8000 feet due West of Cargill Pier, Buffalo Harbor. The vessel did not "hang-up" or "fetch-up" as a result of this "rubbing." Following the "rubbing" the vessel proceeded to the South entrance of Buffalo Harbor, where it arrived at 1216.

The charted depth of the water, at a point approximately 8000

feet due West of Cargill Pier, was twenty-seven (27) feet.

The indication of water depth appearing on the chart was based upon Low Water Datum.

Lake Erie was 4.03 feet above Low Water Datum on 4 July 1976.

SAM LAUD was drawing 27 feet 6 inches amidships. Its forward draft was 27 feet 4 inches, and its draft aft was 27 feet 8 inches.

The weather at the time of the incident was clear; there were no unusual weather conditions; and there was no mechanical failure aboard the vessel.

BASES OF APPEAL

This appeal has been taken from the order issued by the Administrative Law Judge. Appellant contends:

- (1) The Administrative Law Judge erred in not granting Appellant's Motion to Dismiss at the conclusion of the Investigating Officer's case;
- (2) The findings are in error and are unsupported by the record; and
- (3) Appellant was denied a fair bearing perforce of the Investigating Officer's conduct.

APPEARANCE: Ray, Robinson, Keenen and Hanninen, Cleveland, Ohio; Roman T. Keenen, Esq.

OPINION

The Administrative Law Judge decided that the charge of negligence had been proved, based on the finding that SAM LAUD had grounded at a point approximately 8000 feet due West of the Cargill Pier where the charted water depth was twenty-seven feet. This

finding was in turn based upon the finding that the draft of SAM LAUD exceeded twenty-seven feet. Also presented at the hearing, however, was evidence of a measurement taken by the U.S. Army Corps of Engineers on 4 July 1976 which showed that the level of Lake Erie was 4.03 feet above charted depths on that date. This measurement was not disputed. Assuming that the measurement was accurate, this means that the depth of the water at the point at which the Administrative Law Judge found the vessel had grounded would have been thirty-one feet, not twenty-seven. In his written opinion, the Administrative Law Judge goes to considerable effort in quoting from the United States Great Lakes Pilot, (p.180), 1976 ed., which describes oscillations of the water level of Lake Erie. These oscillations are described as being the product of "storms," "squall conditions," and "strong winds." (Opinion, 18). From this, the Administrative Law Judge concludes that the "4.03 feet above Low Water Datum" measurement was not absolute, but, rather, it was possible for the water level to be lower. Thus, the Judge finally concludes, "the vessel hit something, and, based upon the evidence of record, it could *only* have been the 27-foot high point described in the Findings." (Opinion, 19,20). Yet, finding No. 4 of the Administrative Law Judge states that "[t]he weather at the time of the grounding was clear; there were no unusual weather conditions...." (Opinion, 8).

The undisputed evidence presented at the hearing established that the water depth at the alleged point of grounding, on 4 July 1976, was approximately thirty-one feet. To add later to this evidence a conjectural possibility (storm conditions) which is inconsistent with a prior finding of fact, (clear weather; no unusual conditions,) was clearly erroneous. That SAM LAUD hit something is undisputed; it is also undisputed that the vessel did not "hang-up," and no evidence was presented at the hearing as to the extent of damage sustained by the vessel. It is entirely possible, based on the evidence of record, to conclude that the vessel struck some uncharted, unknown, submerged obstruction. Consequently, the evidence of record does not establish that SAM LAUD could have hit only the "27-foot high point described in the Findings." Insofar as the decision of the Administrative Law Judge (that a grounding was proved) was based solely on the finding that the vessel must have necessarily been only at that "27-foot" point, and hence "grounded," the decision cannot be affirmed.

Owing to the dispositive nature of this issue on appeal,

Appellant's bases of appeal numbered (1) and (3) need not be addressed.

The grounding of M/V SAN LAUD not having been established by the evidence of record, there exists no basis upon which a finding of negligence, as charged in this case, may be supported.

ORDER

The findings of the Administrative Law Judge are SET ASIDE, and the order issued pursuant to those findings is VACATED. The charge of negligence is DISMISSED.

R.H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
ACTING COMMANDANT

Dated at Washington, D.C., this 5th day of JANUARY 1978.

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