UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z 115 851
AND LICENSE NO. 491 561
Issued to: Franklin D. PIERCE

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2173

Franklin D. PIERCE

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 29 July 1979, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Pilot aboard the SS RICE QUEEN, under the authority of the above-captioned license, on or about 19 December 1977, Appellant, while the vessel was underway within Suisun Bay, negligently failed to take precautions necessary to prevent the collision of the SS RICE QUEEN with Suisun Bay Light 31 (LLNR 872.20).

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 into evidence a stipulation of facts.

In defense Appellant offered no further evidence.

At the conclusion of the hearing, the Administrative Law Judge rendered written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 3 July 1978. Appeal was timely filed and perfected on 20 November 1978.

FINDINGS OF FACT

On 17 December 1977, Appellant was serving as Pilot under authority of his above-captioned license, aboard SS RICE QUEEN. While transiting eastbound in Suisun Bay, Appellant issued orders in a timely manner directing the vessel's head into New York Slough. The orders were not promptly followed and RICE QUEEN continued to proceed eastbound in Suisun Bay. Appellant executed a corrective maneuver by backing the vessel on its anchor. During the maneuver the master of the vessel recommended that the vessel go full astern. Appellant ordered full astern. As a result thereof the vessel struck and extinguished Suisun Bay Light 31 (LLNR 872.20). The light, erected 15 feet above water on a pile, displays a flashing green six-second light with a normal range of 3 miles.

BASES OF APPEAL

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

1) The Administrative Law Judge improperly relied on a presumption of negligence;

2) there were no facts which would substantiate a finding of negligence;

3) the Administrative Law Judge should have dismissed the action after reviewing the first stipulation; and

4) the Administrative Law Judge was improperly subjected to command influence.

APPEARANCE: Hall, Henry, Oliver & McReavy, San Francisco, California, by Robert C. Chiles, Esq.

OPINION

The Administrative Law Judge opined that upon proof that SS RICE QUEEN, conned by Appellant, collided with an aid to navigation a *prima facie* case of negligence was presented. I must agree. It is a matter of law no longer in dispute. *The* courts of admiralty and numerous Decisions on Appeal have found that where a moving vessel strikes a stationary object, such as a wharf, an inference of negligence arises and the burden is then on the operator of the vessel to rebut the inference of negligence. The *Oregon*, 158 U.S. 186, 193 (1894), *The Clarita and the Clara*, 23 Wall 1, 13 (1874), *Brown & Root Marine Operators v. Zapata Offshore Co.*, 337 f.2 724 (CA5, 1967); Decisions on Appeal 1200, 1197, 699, 672. The inference of the lack of due care suffices to establish a *prima facie* case of negligence against the moving vessel. *Brown & Root v. Zapata Offshore* (*supra*). The inference of negligence established by the fact of allision is strong and requires the operator of the moving vessel to move forward and produce more than some cursory evidence on the presumptive matter. In order for the respondent to gain a favorable decision after the presumption is appropriately established it must be shown that the moving vessel was without fault or that the allision was occasioned by the fault of the stationary object or it was the result of inevitable accident. *Carr v. Hermosa Amusement Corp.*, 137 F.2d 983 (9th Cir., 1943), Cf. *The Clarita and the Clara*, supra, and *The Oregon*, supra.

The rationale for the inference is elementary. Ships under careful navigation do not run aground or strike fixed objects, in the ordinary course of events. While discussing this doctrine in *Patterson Oil Terminals v. The Port Covington*, 109 F.Supp. 953, 954, Senior Judge Kirpatrick stated:

> "The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses who testify that as soon as the danger became apparent everything possible was done to avoid an accident. The question remains, How then did the collision occur? The answer must be either that, in spite of the testimony of the witnesses, what was done was too little or too late, or if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur."

And, he continued:

> "The only escape from the logic of the rule and the only way in which the respondent can meet the burden is by proof of the intervention of some occurrence which could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence--not necessarily an act of God, but at least an unforeseeable and uncontrollable event."

Based on the preceding analysis it is apparent that the law warrants an inference of negligence in the allision situation where the mariner either knew or should have known of the presence of the unmoving object. the inference is clearly raised where an operator backs his vessel into a charted and operative aid to navigation. This basis of appeal is therefore without merit.

II

The record of this case is established by a stipulation of facts which presents only the barest of details relating to the allision. Nevertheless, the stipulation is sufficient to support a finding of negligence. Appellant is a pilot for San Francisco Bay and tributaries to Stockton and Scaramento. As a pilot Appellant warranted superior knowledge of the waters in question, certainly covering such factors as channel courses, depth, current, navigational aids and significant features peculiar to the area. Decision on Appeal No. 531. The particular aid that RICE QUEEN

struck was charted and noted on the Light List. Although Appellant was not responsible for the vessel having passed the intended turn point, he was in operational control of the vessel as it attempted the backing maneuver and was charged with the responsibility to exercise that degree of caution and expertise as would be reasonably prudent pilot under same or similar circumstances. It is apparent from the allision that the vessel failed to remain within the course of the channel. This happenstance may have been caused by the effect of wind or current or improper maneuvering but each was under the responsibility of Appellant as pilot to be aware of and anticipate. The suggestion of the master does nothing to create a superseding intervening act. Appellant adopted the suggestion and ordered the vessel full astern, resulting in the allision. The finding of negligence was therefore fully supported by the record.

Appellant has made reference to a possible "error of judgement" to defend an inference of negligence. I do recognize that there are occasions where an individual is placed in a position, not of his own making, where he has to chose between apparently reasonable alternative. If the individual responds in a reasonable manner and uses prudent judgement in choosing an alternative he is insulated from any allegation of negligence. Hindshight may show that the choice was poor under the circumstances; but hindsight is not the measure of compliance. Decision on Appeal No. 1755. Appellant chose to correct his position by backing, an acceptable alternative if prudently executed. Appellant is not found negligent for attempting this specific corrective maneuver but for striking Suisun Bay Light 31 during the process. There is no evidence of alternate choices that were reasonable in character but instead a strong inference that Appellant failed, in carrying out the maneuver, to exercise that degree of care, vigilance and forethought which a pilot of ordinary caution and prudence would have exercised under the circumstances.

III

At the hearing the Investigating Officer offered a stipulation of fact entered into by the parties. Upon review the trier of fact found that a reading of the stipulation differed from the interpretation given by the investigating officer. Due to the vagueness inherent in the document, the Administrative Law Judge

refused to accept the proposed stipulation and required the investigating officer to offer his evidence on the case. After a brief recess the Investigating Officer offered an amended stipulation which was accepted.

The Administrative Law Judge is obligated to conduct the hearing in such a manner as to bring out all relevant and material facts necessary so as to allow a knowledgeable finding on the issues presented. 46 CFR 5.20-1(a). As was observed in decision on Appeal No. 2013,

> "It is the function of an examiner, just as it is the recognized function of a trial judge, to see that the facts are clearly and fully developed. He is not required to sit idly by and permit a confused and meaningless record to be made."

The fact that the administrative Law Judge chose to exclude the initial stipulation does not indicate bias or prejudice but instead indicates that he was concerned in establishing a meaningful record sufficient t allow a ruling on the matter in issue.

IV

The amended stipulation offered into evidence included a recommended order in the event the alleged charge was proven. Appellant contends that the Administrative Law Judge was improperly influenced by the Table of Average Orders, causing him to reject the recommended order. The sanction imposed is exclusively within the authority and discretion of the Administrative Law Judge. He is not nor can he be bound by either a stipulation of the parties or the table of averages. As stated within Title 46 CFR at 5.20-165(a): "The Table 5.20-165 is for the information and guidance of Administrative Law Judges. The orders listed for the various offenses are average only and should not in any manner affect the fair and impartial adjudication of each case on its individual facts and merits."

As was stated in Decision on Appeal No.2002:

> The scale provided is merely for guidance and the Administrative Law Judges are not bound thereby. The degree of severity of the order is a matter peculiarly within the discretion of the Administrative Law Judge and will be modified on appeal only upon a clear showing that it is arbitrary or capricious.

See also Decision on Appeal No. 2138.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 29 June 1978 is AFFIRMED.

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

Signed at Washington, D. C., this 28th day of Nov 1979.

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