UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT (Redacted)
and LICENSE NO. 443665
Issued to: William K. GILLIKIN

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2188

William K. GILLIKIN

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 11 May 1978, an Administrative Law Judge of the United States Coast Guard at New York, New York, after a hearing at New York, New York, on 16 March and 31 March 1978, suspended Appellant's license for a period of three (3) months on probation for twelve (12) months upon finding him guilty of inattention to duty. The one specification of inattention to duty found proved alleged that while serving as master aboard TS PRINCESS BAY, Appellant did, on or about 3 November 1977, while said vessel was transferring gasoline at the Phillips Fuel Company, Hackensack, New Jersey, and while acting as the person in charge of the transfer operation, wrongfully fail to provide flame screens or proper supervision for open cargo tank hatches as required by 46 Code of Federal Regulations 35.30-10.

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

The Investigating Officer introduced into evidence the testimony of one witness, three documents, and a series of four color photographs depicting PRINCESS BAY.

In defense, Appellant introduced into evidence his own testimony.

Subsequent to the hearing, the Administrative Law Judge entered a written decision in which he concluded that the charge and specification alleged had been proved. He then entered an order of suspension for a period of three months on probation for twelve months.

The decision was served on 18 May 1978. Appeal was timely filed on 7 June 1978, and perfected 5 December 1978.

FINDINGS OF FACTS

On 3 November 1977, Appellant was Master on board the TS PRINCESS BAY under the authority of his duty issued License and Merchant Mariner's document. On that date, while said vessel was transferring gasoline at the Phillips Fuel Company, Hackensack, New Jersey, Appellant, while acting as the person in charge of the operation, allowed seven cargo tank hatches to remain open without installation of flame screens.

PRINCESS BAY, Official No. 220806, is a steel tank ship of 446 net tons, 195 feet length, with a beam of 28.4 feet. The vessel is fitted with twelve cargo tanks, Nos. 1 to 6, port and starboard. Each tank is fitted with a hatch approximately two feet in diameter which may be secured by five wire nuts. Longitudinally, tank hatches are separated by approximately ten feet, while the distance athwartship is between six and ten feet. Each tank also is fitted with a separate ullage opening adjacent to the hatch.

At about 0900, 3 November 1977, MST 2/c Charles A. Klima, USCG, in company with another Coast Guard Petty Officer assigned for duty with the Captain of the Port of New York, boarded PRINCESS BAY to conduct a pollution prevention inspection. At this time transfer operations were underway and the hatches of the six port tanks and of No. 6 starboard tank were open, without flame screens being in place or visible on deck. Appellant was on deck, looking into the open hatch of No. 6 port cargo tank. An unidentified crewmember was also on deck, operating a valve located between No. 1 port and starboard tanks. All ullage holes were closed. No 6 port tank contained approximately two to three inches of gasoline at the time of the boarding.

MST 2/c Klima advised Appellant that he was in violation of applicable tanker regulations by having seven cargo tank hatches open without flame screens in place. After a discussion between Appellant and MST 2/c Klima, Appellant secured the tank hatches.

No casualty resulted from this incident.

BASES OF APPEAL

This appeal has been taken from the decision and order of the Administrative Law Judge. It is contended that the Administrative Law Judge erred in finding that the open cargo tank hatches were not under the supervision of the Appellant and the crewmember on deck during the cargo transfer operation. It is also contended, although not directly argued, that although Appellant was initially charged with *wrongfully* failing to provide proper supervision , the Administrative Law Judge concluded that Appellant *negligently* failed to provide proper supervision in violation of 46 CFR 35.30-10.It is further contended that the ALJ erred in not finding as fact that Appellant opened the hatches to better observe fluid levels in order to prevent the vessel's pumps from overheating if the level became excessively low.

APPEARANCE: Crowell, Rouse & Varian, New York, New York, by William T. Foley, Jr., Esq.

OPINION

I

Appellant makes much of the fact that a variance exists between the specification alleged and the conclusion of the Administrative Law Judge based on their use of the words "wrongful" and "negligent" respectively. A mere variance, however, is not fatal to the proceedings unless it deprived Appellant of notice of the issues to be litigated and affected the conduct of the defense. *Kuhn v Civil Aeronautics Board*, 183 F.2d 839,841(D.C. Cir 1950), established that:

> It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings.

See Decision on Appeal No. 2020.

The use of the term "wrongfully" in specifications for suspension and revocation proceedings was considered in Decision on Appeal No. 1915, wherein it was concluded that "the word 'wrongfully' is often mechanically inserted into specifications...[but] it is not always a necessary term." The opinion also noted that misconduct, as defined at 46 CFR 5.05-20(a)(1) must be considered as well. It is instructive to note that the regulatory definition of negligence appears at 46 CFR 5.05(20)(a)(2). Decision on Appeal No. 2060 is directly on point with the instant case, upholding a conclusion couched in terms of negligence, while the charge was phrased in terms of "wrongful" activity. See Decision on Appeal No. 2086 (person charged with wrongfully losing control and found guilty of negligence by ALJ; vacated on other grounds); see also, Decision on Appeal No. 1857. With the absence of surprise, and a full opportunity to defend on the basis of the issues raised as evidenced on the record as a whole, I conclude that no prejudicial error was introduced by the variance between the specification and the charge proved.

II

Appellant asserts that the Administrative Law Judge erred in not finding as fact that the cargo hatches had been opened to enable Appellant better to observe the level of cargo in order to prevent overheating of the vessel's transfer pumps if the level became too low. While this is proper concern of the master in his quest for safe transfer operations, it fails to justify the state of the six hatch covers open over tanks not being pumped at the time of boarding. Since the initial decision was not founded on the absence of proper supervision of No. 6 port tank, any error caused by omitting a finding of fact in this regard is non-prejudicial to the Appellant.

III

Appellant argues that all seven open cargo hatches were under the supervision of the master, Gillikin, and the unidentified crewmember at the time of the boarding. While the crewmember was clearly on deck at the time in question, there is no evidence that he was engaged in the supervision of the open tanks or even that his presence was related to the ongoing transfer operations.

Appellant did not avail himself of the opportunity at hearing to identify the crewmember or establish his responsibilities. Thus, the base assertion that the crewmember could have ben engaged in the supervision of some number of the cargo tanks is unpersuasive in the face of the total absence of evidence of record in this regard. Additionally, the record reflects that the crewmember was working with valves set between the forward-most tanks. Thus, the discussion pertaining to the master's "supervision", *infra*, is equally applicable to the crewmen. It therefore remains to examine the evidence and facts vis a vis the master to determine if the conclusion of the ALJ is supported by substantial evidence of record.

As the Administrative Law Judge aptly noted, this case requires an interpretation of the word "supervisor" in 46 CFR 35.30-10. The opinion in Decision on Appeal No. 1839 is instructive on this point. Therein it was determined that the "controlling concepts are `constant attention' and `continuously checking'." The Investigating Officer established by competent evidence a prima facie case of negligence on the part of the master. No justification for the many cargo hatch covers being open was proffered, and no showing was made that "constant attention" was being given to any hatches other than No. 6 port tank. The Appellant therefore failed to bear his burden of rebuttal. The Administrative Law Judge also took appropriate notice of CG-174 (Manual for Safe Handling of Flammable and Combustible Liquids and other Hazardous Products), Sections 2.9.3, 3.3.19 and 3.4.10 which are indicative of the standard of care to be employed when gauging, sampling, or thieving cargo tanks.

Bearing in mind the provisions of CG-174, the safety consideration enumerated by the Investigating Officer on the record, and the Congressional interest in promoting vessel safety reflected in the statute authorizing regulations, it is my conclusion that the ALJ correctly interpreted "supervision" to require more than mere presence on deck under the facts of this case. Decisions on Appeal Nos. 1999 and 2009.

Considering the foregoing, substantial evidence of record supports the conclusion of the Administrative Law Judge that Appellant was negligent in failing to properly supervise his vessel's cargo tanks while the hatches to those tanks were open without flame screens installed.

CONCLUSION

It is concluded that the charge here was proved in that Appellant, while acting as the person in charge of the transfer

operation negligently failed to provide flame screens or proper supervision for open cargo tank hatches as required by 46 CFR 35.30-10.

ORDER

The order of the Administrative Law Judge, dated at New York, New York, on 11 May 1978, is AFFIRMED.

R. H. SCARBOROUGH
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 27th day of February 1980.

INDEX

Negligence
supervision of cargo tanks

Notice
adequacy of
surprise, absence of

***** END OF DECISION NO. 2188 *****

Top