UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Stanley Walsh Z-242873

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2233

Stanley Walsh

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 20 December 1979, an Administrative Law Judge of the United States Coast Guard at New York, New York, admonished Appellant, upon finding him guilty of negligence. The specification found proved alleged that while serving as Tankerman on board MORANIA 140 under authority of the document above captioned, on or about 14 October 1979, Appellant, as person in charge of cargo loading, negligently allowed a cargo tank to overflow, spilling fuel oil on the deck of the barge and into Arthur Kill, a navigable water of the United States, by not monitoring the level in the tank after it had been secured.

The hearing was held at New York, New York, on 29 November 1979.

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 in evidence two

documents, one of which comprised the stipulated testimony of an eyewitness to the event in question.

In defense, Appellant offered in evidence two documents and his own testimony.

After the hearing the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant admonishing Appellant.

The entire decision was served on 10 January 1980. Appeal was timely filed on 10 January 1980 and perfected after an extension on 20 May 1980.

FINDINGS OF FACT

On 14 October 1979, Appellant was serving as Tankerman on board MORANIA 140 and acting under authority of his document while the vessel was moored in the port of Perth Amboy at Chevron Terminal in Arthur Kill. A second tankerman was also on board at the time in question.

On the morning of 14 October 1979 Appellant signed a Declaration of Inspection as the person in charge of cargo transfer operations for the vessel.

The two tank domes in question are 15-20 feet apart without any intervening obstructions. Shortly after Appellant moved to the #5 starboard tank, #5 port overflowed, discharging oil onto the deck and thence into the water. The supervisor of the facility reacted to the spill by immediately halting the transfer. It was determined that the #5 port low suction valve was open two or three turns. After the valve was secured the transfer was resumed and completed without further incident.

MORANIA 140 was formerly an asphalt barge with tanks arranged in pairs, port and starboard, and numbered fore to aft, one through six. On the day in question No. 2 fuel oil was being loaded in tanks 3,4,5 and 6, port and starboard, by shoreside pumps. The loading process involved two 8" gate valves on each tank: a low

suction valve and a high suction valve. Standard procedure was for the low suction valve to be opened and the tank filled to a depth of 3 to 4 feet. Then the low valve would be secured and the high valve opened. Since all tanks are filled at once for convenience, the high valves are opened in reverse order, six through three.

Topping-off is accomplished by closing all the high valves except on the tank being topped. As that tank reaches its full capacity, the high valve on the next tank is open while the high valve on the topped tank is secured. The process proceeds from tank to tank in that fashion and ordinarily requires five to ten minutes per tank. Topping off induces vibration in the piping system which causes the pipes to sing.

At the time in question, Appellant began topping off at #3 port and worked aft until he arrived at #5 port. The low valve on #5 port had been very stiff in the past but a yard overhaul had rendered it very east to open or close. Those valves required 15 turns from full open to full close. They are mounted vertically with the stem on the top.

Appellant monitored the topped off tanks by looking for air bubbles through the ullage hole. If none was observed he concluded that the valves were closed and the tank secured.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Three grounds are raised to justify reversal, to wit:

a. the finding of negligence is not supported by substantial and reliable evidence;

b. the Investigating Officer's comments were improperly considered by the Administrative Law Judge in arriving at his decision;

c. the expertise of the Administrative Law Judge was improperly included as evidence and part of the basis for the

decision and order.

OPINION

I

Appellant urges that the Administrative Law Judge improperly evaluated the evidence in this case to determine that Appellant acted in a negligent manner on the morning in question. I do not accept this contention.

Negligence for the purpose of these proceedings is defined at 46 CFR 5.05-20(a)(2)2. It is manifest that the mere fact of a spill or discharge does not prove negligence. However, in the instant case substantial evidence appears in the record to satisfy the regulatory definition of negligence. The stipulated evidence or an eye witness established the occurence of the spill, the fact that both "tankermen" were on the deck of the barge at the time of the spill, and that Appellant was engaged in filling an adjacent tank when the just secured tank overflowed. Appellant's own testimony indicated that he did not verify the level in the number 5 port tank after topping it off, other than "a look" taken immediately after securing the high suction valve. His testimony concerning events after the spill established that the number 5 port low suction valve was found to be open about two turns.

The "Manual for the Safe Handling of Flammable and Combustible Liquids and Other Hazardous Products" (CG-174) was placed into evidence in pertinent part, without objection. This manual is an authoritive source of information regarding general handling procedures. Appeal Decision No. 2188. It is evident from Appellant's testimony that he did not check the level in the topped off tanks frequently to ascertain that they were really secured.

The facts established on the record constitute substantial evidence of a reliable and probative nature from which the Administrative Law Judge properly concluded that Appellant failed to conform to the standard of conduct required of a reasonably prudent tankerman in the existing circumstances, by neglecting to verify the level of product in the secured tanks as loading progressed. Appellant's suggestion that vibration opened the offending valve is inapposite, as proper monitoring would have

detected the influx of additional oil into #5 port tank. In any event, the negligent act is the failure to monitor, not the occurence of the spill itself and Appellant would be chargeable even had no spill occurred. Appeal Decisions Nos. 1755 and 1349.

II

A closing statement is not evidence, but rather a summary of evidence which may include the views of the Investigating Officer concerning the proper inferences to be drawn. So long as the proffered interpretations are not inflammatory or designed to influence the trier of facts improperly there in no error. No basis for appeal lies from mere imprecisions in a closing argument. Appeal Decision No. 2014. The latitude in summation is accorded to both parties. Appeal Decisions Nos. 1960. and 1958.

The record here demonstrates that the Investigating Officer did not accept the opinion of Appellant that vibration opened the offending valve, due to the configuration of the gate valve. Although the Administrative Law Judge's Decision noted that this occurred, the opinion does not rely on this interchange. Rather, the absence of "substantial evidence that the vibration cause the low suction gate valve...to open" was controlling, negating any argument that the Investigating Officer's comments and summation were prejudicial to a consideration of the evidence.

III

Appellant contends that no evidence in the record supports the conclusion of the Administrative Law Judge that "watching for air bubbles may be, (but I doubt), one way of determining if the valve is closed, but a better safer way is to gauge the ullage by the lip of the deck or some other reference point in the tank." Appellant asserts that the lack of some comparative analysis of the merits of various monitoring methods leads to the conclusion that some expertise of the Administrative Law Judge must be responsible for such an opinion. However, I.O. Exhibit 2 specifically addresses the issue of monitoring tank levels in paragraph 3.4.7(7):

> (7) The liquid level in topped - off tanks should be checked frequently to make certain that the level is not rising.

> During discharge, the ullage of full tanks should be checked after discharge has started since it is possible for cargo to bypass into a full tank through leaking valves or stripping lines which have not been properly closed.

Since the evidence indicates that fluid level should be checked frequently, it is not improper for the trier of fact to apply the procedure in the Manual in a common sense manner. This conclusion is supported by the admission of Appellant that the Manual was on board the vessel and that he was familiar with it. The suggestion of the Administrative Law Judge that gauging the ullage by the lip of the deck or some other fixed reference would be methods comporting with the evidence of proper practice is therefore not the interjection of his own experience as evidence in the proceeding. It is instead the application of common knowledge and the realities of life to a practical situation: how one can determine if the level of fluid in a tank is rising. Both courts and administrative bodies may apply such knowledge. *Continental Can Co. v. U.S.*, 272 F.2d 312 (2nd Cir. 1959).

CONCLUSION

Substantial evidence of a reliable and probative nature in the record supports the findings of the Administrative Law Judge.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 20 December 1979, is AFFIRMED.

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

Signed at Washington, D.C., this 9th day of February 1981.

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