IN THE MATTER OF LICENSE NO. 70805
MERCHANT MARINER'S DOCUMENT Z-1198004
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Henry Adam BROUSSARD

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1758

Henry Adam BROUSSARD

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 12 February 1968, an Examiner of the United States Coast Guard at New Orleans, La., suspended Appellant's seaman's documents for three months upon finding him guilty of negligence. The specification found proved alleges that while serving as operator on board M/V CAT ISLAND under authority of the document and license above captioned, on or about 27 June 1967, Appellant failed to maintain a proper lookout, thereby contributing to a collision between CAT ISLAND and M/V JANE G.

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

By stipulation, there was introduced into evidence the testimony of two persons aboard JANE G, and the deckhand of CAT

ISLAND, taken and recorded in earlier proceedings. Appellant personally testified before the Examiner.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months.

The entire decision was served on 4 March 1968. Appeal was timely filed on 5 March 1968 and perfected on 3 June 1968.

FINDINGS OF FACT

On 27 June 1967, Appellant was serving as operator on board M/V CAT ISLAND and acting under authority of his license while the vessel was operating in the Gulf of Mexico.

At about 2230 on the date in question, CAT ISLAND left a site in the Gulf of Mexico and headed on a base course somewhat east of north for Empire, La., Appellant had the wheel. Speed was about 23 knots.

At about 2250, Appellant turned the wheel over to his deckhand who had brought him a cup of coffee. Appellant sat down in the wheelhouse at a point aft of the wheel on the port side. At the time the vessel was navigating through a field in which there were numerous structures, the positions of which required maneuvering from base course by CAT ISLAND.

At about 2300, Appellant stood up, about to take the wheel from his deckhand. Almost simultaneously, he and the deckhand saw, through the starboard door, the red and green sidelight and the white masthead light of JANE G, about fifteen or twenty feet away. In a matter of one or two seconds, the stem of JANE G struck the starboard side of CAT ISLAND aft of the wheelhouse.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the Examiner erred in:

(1) rejecting certain proposed findings of fact;

(2) rejecting certain proposed conclusions of law; and

(3) giving the opinion that there was a "lack of unbroken vigilance" on the part of Appellant.

The asserted errors will be examined in detail in the Opinion below.

APPEARANCE: Phelps, Dunbar, Marks, Calverie & Sims, New Orleans, La., by James B. Kemp, Jr., Esq.

OPINION

I

Appellant has urged as error the Examiner's rejection of certain proposed findings of fact. The proposed findings are here summarized and comment made on the Examiner's disposition.

Appellant requested a finding that there was neither personal injury nor loss of life. While the Examiner rejected this proposed finding, he made no finding to the contrary. His silence on the matter is not error, because such results of the collision were not alleged nor was effort made to prove them in aggravation.

While the Examiner rejected a proposed finding as to the good weather, he did make such a finding although not in the words proposed. This is not error.

A proposed finding as to the drinking of coffee by Appellant was ruled "not found." Again, the Examiner substantially found what was proposed, except that he did not find, as proposed, that deckhand Hill "was experienced." The omission is irrelevant.

A proposed finding as to the lighting and speed of CAT ISLAND was found substantially although in other words.

II

A key proposal of Appellant was this:

> "Although the M/V MARY JANE was showing all of her running lights, these lights were dim and were barely visible."

The Examiner rejected this proposal after considering conflicting evidence, and since the evidence upon which he relied to find JANE G's lights "functional" is substantial, his finding will not be disturbed.

It may be mentioned here that the only evidence to support Appellant's proposed finding was the testimony of Appellant, who admittedly was not in a good position to look at all, and of Hill, whose primary concern was to direct the movement of CAT ISLAND at the wheel.

It must be repeated here that a mere failure of JANE G to have lights which measured up to the statutory test would not exonerate Appellant in this proceeding. When a collision is involved in a negligence charge, thee is no requirement that it be found that a statutory fault of the other vessel not only did not contribute but could not have contributed to the collision. When, under the doctrine of "statutory fault," a vessel is found contributory to a collision, this does not automatically exonerate the other vessel; it merely inextricably implicates the statutory offender. Here, we deal with people, not vessels as such, and it is not necessary for a master, pilot, or operator to be found negligent in a collision that the "other vessel" be found free from fault. See Decision on Appeal No. 1670.

Further, "barely visible," as proposed by appellant is almost meaningless. Visibility of unconcealed and unobstructed lights, even if dim, cannot be so restricted on a clear night at see as to require an examiner to find that the failure to see the lights at all was caused by the dimness and not by the failure of anyone to look.

III

Appellant also argues that the Examiner improperly refused to find that JANE G had a floodlight over a cargo space which "obscured" the running lights of the vessel. No quarrel can be had with the examiner's refusal to find this as a fact since in his own proposed finding appellant declares that neither he nor his deckhand saw this light.

IV

The Examiner refused to find as a fact that there was a platform, brightly lighted on a clear night with unlimited visibility, to the right of CAT ISLAND and to the left of JANE G, which, because each vessel was proceeding at about 100 feet off the platform, was near the vertex of the angle of the collision courses of the vessels. If a finding to this effect had been found Appellant might have been worse off than otherwise. (Note: 100 feet is the distance given by the appellant in his proposed finding. One hundred yards is the distance testified to by his deckhand.)

The thrust of Appellant's argument is that since there was a lighted structure which could obscure lights of a vessel behind it, with respect to him, he cannot be found not to have maintained a proper lookout. Recalling that the vessel came from Appellant's right hand side, from behind the structure, it could be that if the Examiner had found the fact as proposed he might also have been forced to find that at twenty-three knots Appellant was traveling too fast under the circumstances. An allegation to this effect was made but the Examiner dismissed the matter.

If finding should have been made that such a structure existed on Appellant's right, his lookout should have been intensified, not omitted.

V

The Examiner made a finding that after Appellant had finished his coffee he stood up to re-take the wheel when he and his deck hand, at the wheel, first saw the lights of JANE G. Substantially the Examiner found the fact established except for the proposed characterization of JANE G's lights as "dim". This matter has already been discussed.

Another proposed finding rejected by the Examiner was to the effect that, at about the same time as Appellant and his crew first saw JANE G, people aboard JANE G for the first time saw CAT ISLAND as "a white flash." Here again, the failure of the Examiner to make the proposed finding is irrelevant because we are not concerned in this case with possible fault of persons on JANE G. Here again, also, the proposal by Appellant that his vessel was a "white flash," if found by the Examiner, might have redounded to Appellant's disadvantage in connection with the allegation that Appellant was moving too fast under the circumstances.

There was no error in denial of this proposal.

VII

The last proposal to the Examiner for a finding of fact, the denial of which is expected to, is this:

"Because of the speed and the closeness of the two vessels, evasive actions were impossible and collision occurred between the bow of M/V JANE G and the starboard side, just aft of the wheelhouse, of the M/V CAT ISLAND."

The Examiner's findings, amply supported by substantial evidence, are that the speed of CAT ISLAND was almost two and one half times that of JANE G. Insofar as comparative speeds are concerned, the proposal was inacceptable since it would seem to imply that speed on the part of both vessels caused the collision and that the speed of each was not negligent. The Examiner found that the speed of CAT ISLAND was not a negligent act on the part of Appellant. Consistently with this, he found, by silence, that the combined speeds of the vessels were irrelevant to the question of failure to maintain a proper lookout.

This is not error. Both responsible persons may have been at fault, but speed of the vessels involved in the collision is not a consideration in determining whether a vessel has a proper lookout.

VIII

Each one of Appellant's first two "exceptions" as to the Examiner's rejection of "Conclusions of Law" proposals has to do with the "reasonableness" of Appellant's actions.

Appellant specifically urged that it was reasonable for him to sit down to have a cup of coffee and allow his deck-hand to take the wheel. The question is not, however, whether it was reasonable for Appellant to have had a cup of coffee, or whether the deckhand was a competent helmsman. The question is whether there was a proper lookout.

The man at the wheel, maneuvering among oil field platforms, was obviously in no position to give his undivided attention to watch for other craft in the vicinity, and Appellant, by sitting down in the wheelhouse effectively took himself out of the lookout category. Since there was no one else present, there was no proper lookout.

The Examiner properly rejected the conclusion offered.

The second rejected conclusion is that it was reasonable to proceed at a speed of slightly less than 25 miles an hour even though there were platforms in the vicinity. Since the Examiner dismissed the specifications dealing with speed, the argument is irrelevant to this appeal.

The third proposed conclusion of law, the rejection of which is urged as error, was a general conclusion that Appellant was in no respect negligent. Since there was substantial evidence that Appellant failed to maintain a proper lookout, the rejection was not error.

IX

Exception is taken to the Examiner's opinion that there was a lack of "unbroken vigilance" on the part of Appellant. Actually the opinion was expressed that "there should be unbroken vigilance on the part of the lookout," and that neither of the persons in the wheelhouse exercised such vigilance. Appellant's complaint is based upon a narrow construction of the opinion with the inference that the Examiner meant that Appellant himself had a personal duty to exercise "unbroken vigilance."

It was not alleged that Appellant had not personally exercised unbroken vigilance, but that as master/operator of the vessel he failed to maintain a proper lookout. He obviously need not be the lookout himself, but he has the duty to see that some one person or series of persons is at all times acting as proper lookout. The Examiner's opinion can be construed to embrace this duty, and thus is unobjectionable.

Whatever the meaning of the opinion stated, the facts found establish that the allegation made, that Appellant, as operator of the vessel, failed to maintain a proper lookout, was proved. In this connection, it is in order to point out that in his original notice of appeal, Appellant asserted that he had been found to have failed "to stand a proper lookout." This was a misconception. There is a difference between a failure of a person designated as lookout to perform his duty, and a failure of a "master/operator" to maintain a lookout, *i. e.* to see to it that a proper lookout is on duty.

X

It is noted that the proceedings were brought "in the matter of" both Appellant's license and merchant mariner's document. There is no affirmative evidence in the record that CAT ISLAND is a vessel of such size as to require that seamen employed on board hold merchant mariner's documents. The question was not raised at hearing, nor on appeal, but I could take official notice of *Merchant Vessels of the United States* to see that CAT ISLAND was of less than 100 gross tons and that therefore Appellant was not required to hold a document, and, in the absence of proof that his possession of the document was a "condition of employment," was not shown to have been serving under authority of the document.

It could also be officially noticed that since M/V CAT ISLAND was inspected and was permitted to be operated with an "operator" as master it was a motor propelled vessel of less than 100 tons, and that Appellant was serving under his license and not under a merchant mariner's document not otherwise required.

However, it is noted that Appellant's negligence was such that it was attributable to him precisely as the licensed "operator" of the vessel. As pointed out above, the fault was not that he

personally failed in performing a duty as lookout, in which case a merchant mariner's document authorizing him to serve in a deck rating from which lookouts may be selected would be involved.

Although the language of 46 CFR 137.20-170(c) is permissive with respect to action in negligence cases, it seems that this is a case in which the order should properly go to the license only.

CONCLUSION

It is concluded that the findings of the Examiner as to the single specification found proved should be affirmed, but that the order should be modified to apply only to his license.

ORDER

The findings of the Examiner, made at New Orleans, La., on 12 February 1968 are AFFIRMED. The order of the Examiner is MODIFIED to apply only to Appellant's license and not to his merchant mariner's document, but, as MODIFIED, is AFFIRMED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 9th day of APRIL 1969.

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