

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

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| UNITED STATES OF AMERICA | : | |
| UNITED STATES COAST GUARD | : | DECISION OF THE |
| | : | |
| vs. | : | VICE COMMANDANT |
| | : | |
| LICENSE NO. 604326 as superseded | : | ON APPEAL |
| by LICENSE NO. 666357 | : | |
| | : | |
| <u>Issued to John C. TIMMEL</u> | : | NO. 2597 |
| | : | |

This appeal is taken in accordance with 46 U.S.C. § 7702 and 46 C.F.R. § 5.701.

By an order dated May 27, 1994, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's above-captioned license, upon finding a charge of *negligence* proved. The single specification supporting the charge alleged that Appellant failed to safely navigate the M/V NECHES (hereinafter NECHES), running the vessel aground twice.

Hearings were held in Tampa, Florida, on January 19, 1994, and on February 2, 1994. Appellant entered a response denying the charge and specification.

The Coast Guard Investigating Officer introduced into evidence 19 exhibits and the testimony of six witnesses. Appellant introduced into evidence five exhibits, his own testimony, and the testimony of four witnesses. Both parties submitted proposed findings of fact and conclusions of law.

The Administrative Law Judge issued a written Decision and Order (D&O) on May 27, 1994. It concluded that the charge of *negligence* and the supporting specification were proved. The Administrative Law Judge suspended Appellant's license for a period of one month, remitted after three months probation.

Appellant filed a notice of appeal on June 22, 1994, and perfected it on July 28, 1994.

APPEARANCE: Ms. Margaret D. Mathews of Akerman, Senterfitt and Eidson, P.A., P.O. Box 3273, 100 S. Ashley Drive, Suite 1500, Tampa, Florida 33601-3273.

FINDINGS OF FACT

At all relevant times, Appellant was acting under the authority of the captioned license while serving as the pilot aboard the NECHES. [Transcript of January 19, 1994, (TR 1) at 33]. This license authorized Appellant to serve, in pertinent part, as a first class pilot of steam or motor vessels of any gross tons upon the waters of Tampa Bay and its tributaries. [Investigating Officer (I.O.) Exhibit 6]. The NECHES is a 20,066-gross-ton, 632-foot, steam-powered, tank ship. [I.O. Exhibit 1].

Appellant boarded the NECHES in Tampa, Florida, at 8:30a.m. on March 4, 1993, to pilot the vessel out of Tampa Bay. [TR 1 at 108]. The NECHES had a forward draft of 6 feet and an aft draft of 22.5 feet, resulting in a 16.5-foot trim. [I.O. Exhibit 17]. Soon after boarding, Appellant met with the master and discussed plans for the transit. [TR 1 at 108, Transcript of February 2, 1994 (TR 2) at 33]. The master informed Appellant that part of one of the propeller blades was missing, but that the damaged propeller would not affect the vessel's maneuverability. [I.O. Exhibit 16, TR 1 at 107, TR 2 at 34]. Three tugs assisted the NECHES while getting underway, with two of the three released soon thereafter. One tug remained to assist the vessel in traversing the first few turns in the channel. [TR 1 at 108, TR 2 at 36-37]. After turning into the part of the channel called G Cut, Appellant decided to release the remaining tug. After experiencing difficulty in removing the tug's line from the ship, Appellant slowed the NECHES, and the crew was finally able to release the tug. [TR 1 at 108-109, TR 2 at 37]. Appellant proceeded to the next turn, approximately three-quarters of a mile away, increasing the vessel's speed to approximately eight knots. [TR 1 at 114, TR 2 at 38-39].

As the NECHES approached the next turn, Appellant ordered 10 degrees of right rudder. When the vessel did not respond satisfactorily, Appellant then ordered an increase to 20 degrees of right rudder. [TR 1 at 110, TR 2 at 43, 45]. When it appeared that the vessel would go out of the channel as it turned into the part of the channel called F Cut, Appellant increased the rudder to right full. [TR 2 at 45]. The NECHES went aground between buoys 8F and 6F. [TR 1 at 110-111].

After the grounding, Appellant backed the vessel, and it refloated. Appellant unsuccessfully turned the vessel to continue out to sea and grounded the vessel again between buoys 6F and 4F. [TR 1 at 111, TR 2 at 60-61]. After the second grounding, Appellant had the ballast tanks sounded and determined that the NECHES had not sustained damage. [TR 1 at 118, TR 2 at 63]. Appellant then called the recently released tug, still nearby, for assistance. The tug, pulling on the NECHES, refloated it and assisted the vessel outbound without further incident. [TR 2 at 62-63].

Weather was clear with a 15-knot, northwesterly wind.

BASES OF APPEAL

1. The Administrative Law Judge violated due process in applying the presumption of negligence. Even if the presumption of negligence was applied properly, the presumption was rebutted by evidence regarding the broken propeller's affect on the maneuverability of the vessel.
2. The presumption of negligence which arose from the groundings applies only to the vessel and not to the pilot and merely acts to shift the burden to the vessel to demonstrate that no failure on the part of its crew or equipment caused the grounding.
3. The decision to back the ship after the first grounding was made jointly with the master, and it was unclear as to whether Appellant or the master was navigating the vessel.
4. Because the master did not intercede prior to Appellant refloating the vessel or intercede prior to the second grounding, Appellant should not be held negligent for the second grounding.
5. It is common for a vessel to ground during an attempt to refloat and, therefore, Appellant should not be held negligent for the second grounding.
6. Appellant must be found negligent for both groundings for the single specification to be found proved.
7. The charge should be dismissed because the Investigating Officer acted improperly during the investigation and hearing.

OPINION

I

Appellant contends that the Administrative Law Judge violated due process in applying the presumption of negligence. Appellant also contends that even if the presumption of negligence was applied properly, the presumption was rebutted by evidence regarding the broken propeller's affect on the maneuverability of the vessel.

The Supreme Court has held that "[p]resumptions are permissible [in administrative hearings] unless they are unreasonable, arbitrary, or invidiously discriminatory." Lavine v. Milne, 424 U.S.

577, 582 (1975). If the presumption being applied meets the articulated standard, then due process is satisfied. *See* Chung v. Park, 514 F.2d 382, 387 (3rd Cir.), *cert. denied*, 423 U.S. 948 (1975); Dawson v. Myers, 622 F.2d 1304, 1314 (9th Cir. 1980); Appeal Decision 2560 (CLIFTON). There was no evidence presented by Appellant that the presumption was arbitrary or invidiously discriminatory. However Appellant did argue that the application of the presumption of fault against the pilot and not the master was unreasonable. It is well-settled that a rebuttable presumption of negligence results when a vessel grounds. *See* Appeal Decisions 2272 (PITTS), *rev'd on other grounds sub nom.*, NTSB Order No. EM-98 (1983), 2173 (PIERCE), *aff'd* NTSB Order No. EM-81 (1979), 2177 (Homer), 2113 (HINDS), 1131 (OUGLAND). "[There] is a rebuttable presumption or inference of negligence (similar to when a moving vessel strikes a stationary object) because vessels under careful navigators do not run aground in the ordinary course of things." Appeal Decision 1200 (RICHARDS). Therefore, the application of the presumption to Appellant was reasonable.

Appellant contends that even if the presumption of negligence which arose from the grounding was reasonable, the presumption was rebutted as Appellant presented evidence showing that a broken propeller affected the maneuverability of the vessel. However, the Administrative Law Judge found that the impact on maneuverability of the vessel due to the damaged propeller provided only a partial explanation for the grounding. [D&O at 21]. The Administrative Law Judge noted that the Coast Guard presented evidence showing that the turn was made late and wide and that Appellant failed to properly account for the excessive trim of the vessel. Thus, the Administrative Law Judge determined Appellant had not presented sufficient evidence to successfully rebut the presumption of negligence which arose from the grounding, noting that the damaged propeller "was not the sole cause of the grounding, and did not eliminate as a contributing cause the Coast Guard's direct evidence. . .and in general the inference of negligence arising from the grounding itself." [D&O at 10-11]. The role of the Administrative Law Judge is to weigh all of the evidence presented and she is in the best position to determine the facts. *See* Appeal Decision 2421 (RADER), 2319 (PAVELIC). Thus, conflicting evidence will not be reweighed on appeal when the Administrative Law Judge's determinations can be reasonably supported by the record. *See* Appeal Decision 2504 (GRACE), 2468 (LEWIN), 2356 (FOSTER). The Administrative Law Judge's findings must be supported by reliable, probative, and substantial evidence. *See* 46 C.F.R. § 5.63, Appeal Decision 2420 (LENTZ), 2421 (RADER). Findings of the Administrative Law Judge need not be consistent with all evidentiary material in the record as long as sufficient material exists in the record to justify the finding. Appeal Decision 2424 (CAVANAUGH), 2282 (LITTLEFIELD), 2519 (JEPSON), 2492 (RATH), 2546 (SWEENEY). I will reverse the decision only if the findings are arbitrary, capricious, clearly erroneous, or based on inherently incredible evidence. *See* Appeal Decision 2570 (HARRIS), *aff'd* NTSB Order No. EM-182 (1996); 2390 (PURSER), 2363 (MANN), 2344 (KOHAJDA), 2333 (AYALA), 2581, (DRIGGERS), 2474 (CARMLENKE).

In the instant case, the master testified that, in his opinion, the turn leading up to the first grounding was made too late and that Appellant did not use enough rudder when making the turn. [TR 1 at 120, 125, 126]. The master also testified that the vessel's maneuverability was not affected by the damaged propeller. [TR 1 at 120, 127, 128]. Additionally, other pilots who navigated the vessel after the propeller was damaged testified that they experienced no problems with the maneuverability of the vessel. [TR 1 at 47, 48, 74, 76, 85, 86, 92, 93]. In fact, the vessel's master testified that Appellant himself had previously piloted the vessel with the propeller in damaged condition. [TR 1 at 105-106]. Additionally, the Coast Guard submitted into evidence a letter written by Appellant addressed to the Marine Safety Officer, Tampa, Florida. In this letter, Appellant stated that the grounding was partly caused by the vessel's excessive trim. [I. O. Exhibit 17]. Finally, as noted by the Administrative Law Judge, even if the original grounding was due in part to the damaged propeller, the Appellant after pulling the vessel off ground after the initial grounding, the Appellant failed to ascertain the cause of the initial grounding, failed to utilize the available tug, and proceeded to ground the vessel a second time outside the channel. [D&O 21-22].

I therefore find that Appellant did not successfully rebut the application of the presumption of negligence as there was substantial evidence to support the Administrative Law Judge's findings regarding the first grounding that Appellant made the turn too wide and too late and that Appellant failed to account for excessive trim, and completely failed to rebut the presumption of negligence as to the second grounding.

II

Next, Appellant contends that the presumption of negligence which arose from the groundings applies only to the vessel and not to the pilot. According to Appellant, this presumption shifts the burden to the vessel to demonstrate that no failure on the part of its crew or equipment caused the grounding. Thus, Appellant contends, the presumption should not apply to the pilot as the pilot does not have "management" of the vessel and has the disadvantage of being aboard the vessel for only a short time whereas the crew can cover up any wrongdoing and blame the pilot. I disagree. In a similar case, Commandant v. Pierce, NTSB Order No. EM-81 (1980), the National Transportation Safety Board specifically stated that the presumption of negligence which arose when a moving vessel collided with a fixed object is applicable equally to the vessel and to the "licensed officer directing the vessel's navigation at the time."

The Federal courts have explicitly stated that the pilot who navigates a vessel and causes an allision with a fixed object is negligent over the master because, "when we consider the value of the lives and property committed to [the pilots'] control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and

frequent examinations...this very class of skill, we do not think we fix the standard too high. Atlee v. Packet Co., 88 U.S. 389 (1874); *see also* The Framington Court v. United British S.S. Co., 69 F.2d 300 (5th Cir. 1934); Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, 63 F. 845 (Cir. Ct. S.D. NY 1894). I have held that this high standard is equally applicable to the pilot who grounds a vessel. *See* Appeal Decision 2465 (O'CONNEL).

Appellant cites Mount Washington Tanker Co. v. Wahyuen Shipping, Inc., 833 F.2d 1541 (11th Cir. 1987) to support his argument, stating that the case stands for the proposition that a vessel carrying a compulsory pilot cannot recover its damages from a pilot unless the ship can prove that the pilot was solely responsible for the grounding. Appellant misinterprets the holding of this case. More importantly, Mount Washington is irrelevant. In Mount Washington, the Eleventh Circuit simply held that the moving vessel, in order to escape the presumption of negligence that results from an allision, must show that the pilot was solely responsible. If the pilot is found to be free of fault (as was the case in Mount Washington), the vessel must still rebut the presumption of negligence. I conclude that the Administrative Law Judge correctly applied the presumption of negligence in accordance with applicable precedents.

III

Appellant contends that the decision to back the ship after the first grounding was made jointly with the master and that it was unclear as to whether Appellant or the master was navigating the vessel.

On appeal, I will only review the hearing record. The hearing record consists of the testimony and the exhibits presented, along with all papers, requests and rulings filed in the proceedings. *See* 46 C.F.R. § 5.563(c); *see also* 46 C.F.R. § 5.701(b). My review of the record finds no mention of any confusion as to who was navigating the vessel. I will not entertain this appeal basis because it "was not raised at the hearing where evidence and testimony of witnesses from both sides could have resolved the matter. It, therefore, cannot be raised for the first time on appeal." Appeal Decision 2458 (GERMAN); *see also* Appeal Decisions 2345 (CRAWFORD), 2289 (ROGERS), 2184 (BAYLESS), 1741 (GIL).

IV

Appellant contends that, because the master did not intercede prior to Appellant refloating the vessel or intercede prior to the second grounding, Appellant should not be held negligent for the second grounding. I disagree.

The presumption of negligence that results from a grounding can apply to more than just the person in charge of the navigation of the vessel. "[T]he presumption of negligence in a grounding

applies against all those involved in the management of the vessel at the time of the incident." Appeal Decision 2550 (RODRIQUES). Therefore, regardless of whether the master was negligent in allowing Appellant to refloat the vessel, Appellant was negligent in refloating the vessel. Additionally, the contributory negligence of other parties "is not a viable issue or defense in Suspension and Revocation Proceedings." Appeal Decision 2520 (DAVIS), *see also* Appeal Decisions 2492 (RATH), 2421 (RADER), 2380 (HALL), 2319 (PAVLEC), 2400 (WIDMAN).

V

Appellant contends that it is common for a vessel to ground during an attempt to refloat and, therefore, Appellant should not be held negligent for the second grounding. I disagree.

First, Appellant's brief contains no support for the contention that a second grounding is common when refloating a vessel. More importantly, however, the Administrative Law Judge found Appellant negligent for the second grounding, based primarily on the fact that Appellant refloated the vessel without first investigating the cause of the first grounding. Appellant's witness, a Tampa Bay Pilot, stated that, "[i]f I did not know in my own mind why I overshot the turn, I probably would not back it off and go forward. I'd want to know why." [TR 2 at 171]. Therefore, I find that the Administrative Law Judge was not arbitrary, capricious, clearly erroneous or unsupported by law when he concluded that Appellant was negligent in refloating and subsequently grounding the vessel without determining the cause of the first grounding.

VI

Appellant contends that he must be found negligent for both groundings for the single specification to be found proved.

This issue is only relevant if Appellant was found not to be negligent in regards to one of the two groundings. However, my review of the record finds that the Administrative Law Judge's findings as to both groundings were not arbitrary, capricious, clearly erroneous or unsupported by law and, therefore, the specification was proved as to both groundings.

VII

Finally, Appellant contends that the charge should be dismissed because the Investigating Officer acted improperly during the investigation and hearing.

I will not entertain this appeal basis because, as in III above, it "was not raised at the hearing where evidence and testimony of witnesses from both sides could have resolved the matter. It, therefore, cannot be raised for the first time on appeal." Appeal Decision 2458 (GERMAN); *see*

also Appeal Decisions 2345 (CRAWFORD), 2289 (ROGERS), 2184 (BAYLESS), 1741 (GIL).

The general procedures for suspension and revocation hearings are set forth in 46 C.F.R.. § 5.501 (d). An appeal to the Commandant from the decision of an Administrative Law Judge is clearly not designed as an opportunity for new issues to be raised. The opposing side is not afforded an opportunity to rebut any argument presented to the Commandant through the submission. The rights afforded Appellant during his hearing are described in 46 C.F.R. § 5.519. These rights include the right to have witnesses and relevant evidence subpoenaed, to examine and cross-examine witnesses, and to introduce relevant evidence into the record. Appellant submitted no evidence to support his allegations of misconduct at the hearing. Appellant had every opportunity to assert this issue during the hearing, which would have allowed the Investigating Officer to respond. Appellant never did so. Thus, Appellant has waived his ability to assert this issue on appeal. Despite the waiver, I have reviewed the record and find no evidence of any impropriety on the part of the Investigating Officer.

CONCLUSION

The findings of the Administrative Law Judge are supported by reliable, probative and substantial evidence. The hearing was conducted in accordance with applicable law.

ORDER

The Decision and Order of the Administrative Law Judge dated May 27, 1994, is AFFIRMED.

/S/

R. D. HERR
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 01 day of March, 1998.