U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	
	:	DECISION OF THE
vs.	:	
	:	VICE COMMANDANT
MERCHANT MARINER'S LICENSE NO. 667738	:	ON APPEAL
	:	
Issued to: John R. Jones, Appellant.	:	NO. 2574

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

By order dated March 25, 1993, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended appellant's license for two months, remitted upon nine months probation, upon finding a *negligence* charge proved. The

single specification supporting the charge alleged that Appellant, while serving as the master of the charter boat MYRNA BEA VII, did on July 22, 1992, navigate the vessel in such a manner as to cause the vessel to ground on Roland Bar Rapid in the Snake River.

At the hearing held at Lewiston, Idaho, on January 27, 1993, Appellant was represented by counsel. On counsel's advice, Appellant denied the charge and its supporting specification.

During the hearing, the Coast Guard Investigating Officer introduced into evidence one exhibit and the testimony of two witnesses.

In defense, Appellant offered into evidence four exhibits and the testimony of two witnesses.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved. On March 25, 1993, the Administrative Law Judge issued a written order suspending Appellant's license for a period of two months, remitted on nine months probation.

Appellant timely filed an appeal on April 23, 1993, which was perfected on June 30, 1993. Therefore, this appeal is properly before me for review.

Appearance: Howard M. Neill, Esq., Aitken, Schauble, Patrick, Neill & Ruff, 210 Downtown Professional Building, P. O. Box 307, Pullman, WA 99163.

FINDINGS OF FACT

At all relevant times on July 22, 1992, Appellant was serving as master of the charter boat (C/B) MYRNA BEA VII. Appellant's license authorizes him to serve as master of inland steam or motor vessels of not more than 25 gross tons on the Snake and Salmon Rivers. The C/B MYRNA BEA VII, O.N. 965120, is a 7 gross ton inspected passenger vessel, 33.7 feet in length.

The C/B MYRNA BEA VII, while being navigated by the Appellant, grounded on a portion of the Snake River known as Roland Bar Range. The Roland Bar Range is located between Lewiston, Idaho, to the north, and Hells Canyon Dam, to the south. At this point of its course, the river current runs in a northwesterly direction.

From Lewiston to Hells Canyon Dam, the Snake River is generally navigable only by rafts and jet-powered boats. Along this section of the river, the channel varies in depth, depending upon releases of water from the Hells Canyon Dam. On July 22, 1993, the water flow was approximately 6,000 cubic feet

per second. A release rate of 5,000 cubic feet per second is considered marginal conditions for navigating this section of the river; any less appreciably increases the chances of grounding. Transcript (TR) at 143, 188-189.

On July 22, 1993, the C/B MYRNA BEA VII was the second vessel in a two-boat flotilla that departed from Lewiston, Idaho, en route to the head of navigation at Hells Canyon Dam on the Snake River, with return to Lewiston. After making stops for refreshments and to pick up passengers on the return trip, the two vessels, C/B MYRNA BEA VII, operated by the Appellant, and C/B MYRNA BEA III, entered the reach of the Snake River known as Roland Bar Range. Because the C/B MYRNA BEA VII had made an additional stop for passengers, the C/B MYRNA BEA III had already cleared Roland Bar Range by the time the C/B MYRNA BEA VII entered the upstream portion of the rapids.

Prior to entering this stretch of rapids, Appellant observed a down bound vessel, similar in appearance to the C/B MYRNA BEA III, ahead of him but was unable to determine its identity. Subsequent investigation revealed that the vessel was a third jet boat, the C/B MYRNA BEA IV. After safely navigating the upper portion of Roland Bar Rapids, Appellant again observed

the C/B MYRNA BEA IV ahead of him. At that time, however, the down bound C/B MYRNA BEA IV had come about and was now facing upstream.

In reaction to the changed circumstances, Appellant slowed his vessel, which in turn increased the vessel's draft. As a result, the vessel struck an underwater object, presumably a rock, which disabled the port jet drive and displaced the operator from his seat. With the starboard engine and jet drive continuing to propel the vessel ahead, the C/B MYRNA BEA VII sheared hard to port, eventually coming to rest on a rocky islet some 60 feet downstream from the initial point of grounding. The master and four passengers sustained minor injuries.

BASIS OF APPEAL

On appeal, Appellant contends that the application of the presumption of negligence that arises when a moving vessel runs aground is inappropriate in the particular circumstances of this case.

OPINION

I

Appellant asserts that the presumption of negligence arising in the case of a vessel grounding does not apply to the facts of this case because the incident involved a grounding on an uncharted rock. Specifically, Appellant contends that it has not been shown that he knew, or should have known, of the obstruction on which C/B MYRNA BEA VII grounded. I concur with Appellant's contention that the Coast Guard did not meet its burden of establishing the presumption of negligence in this case.

The presumption of negligence may apply to a vessel grounding where it can be shown that the person responsible for the vessel's navigation knew, or should have known, of the obstruction. *See* Pennzoil Prod. Co. v. Offshore Express, Inc., 943 F.2d 1945 (5th Cir. 1991); (Appeal Decision 2409) ((PLACZKIEWICZ)) (presumption was applicable to grounding on shoal for two reasons: the Appellant had actual knowledge of the shoal, and "the shoal was clearly designated on the appropriate navigational chart"); *Cf*. Delta Transload Inc. v. M/V Navios Commander, 818 F.2d 445 (5th Cir. 1987) (presumption of negligence not applicable where object is a hidden defect in an

unforeseeable location). The Administrative Law Judge concluded that the presumption of negligence was applicable to the facts of this particular case after finding that the "uncontradicted testimony and photographic evidence [permitted] the trier of fact to conclude that the area in which" Appellant's vessel grounded consisted of an extensively rocky riverbed. Decision and Order (D&O) at 18.

At best, the evidentiary record is inconclusive as to whether the Appellant should have known of the obstruction struck by his vessel. While the Coast Guard's case-in-chief did establish, through the testimony of a second jet boat operator, the operator of the C/B MYRNA BEA III, Mr. Paul Hanson, the existence of a rock in the general location in which the C/B MYRNA BEA VII grounded, Appellant's knowledge of that rock was never established. TR at 79-81. For the presumption of negligence to apply to collisions with sunken or hidden objects, the party "invoking the presumption has the burden of proving either that the object was visible or that the vessel [operator] possessed [or should have possessed] knowledge of the object's location." Delta Transload, Inc., 818 F.2d at 450. In this case, the record reflects no such compliance by the Coast Guard

with this burden of production. For example, the testimony clearly indicates that the rock struck by the C/B MYRNA BEA VII was uncharted. TR at 211-12, 219. Further, the testimony indicates that Appellant was unaware of the existence of the rock struck by his vessel and the transcript is devoid of evidence that he should have known of its existence. TR at 144-45, 188-189. Without such information, it is difficult to establish whether Appellant's actions were negligent or merely an unfortunate choice among reasonable alternatives. *Cf*. Appeal (Decision 2302 (FRAPPIER)) (presumption of *negligence* established where charted depths of water in general location of grounding less than navigational draft of vessel).

Second, photographs introduced into evidence by the Coast Guard depict only the site in the river where Appellant's vessel came to rest (Coast Guard Exhibit No. 1). While these photographs depict numerous exposed rocks in the vicinity, they serve to illustrate only the conditions in that particular location of the river. As such, the photographs cannot invoke the presumption of *negligence* since they depict an area of the river navigated by the vessel only after it had sustained damage from the earlier grounding upon which the negligence charge is

alleged. Indeed, the Coast Guard witness testified that the rock which Appellant's vessel first struck was submerged. TR at 69. The photographs do not evidence that the submerged rock's location should have been detected by the Appellant. Accordingly, such photographs do not support a finding that the channel transited by the C/B MYRNA BEA VII prior to its final grounding contained submerged objects that constituted a hazard to navigation to the vessel.

The only evidence in support of a conclusion that Appellant should have known about the rock struck by his vessel is the testimony of the operator of the C/B MYRNA BEA III, Mr. Paul L. Hanson, that he, Mr. Hanson, was aware of its existence. TR at 79. However, this testimony is not dispositive. Mr. Hanson testified that the rock was in fact completely submerged. TR at 69. Mr. Hanson also did not testify as to whether the Appellant knew of the submerged rock, nor provide any basis for concluding that the Appellant should have known of the submerged rock. Additionally, the testimony as to the nature of the riverbed along this portion of the Snake River and the size of the submerged hazards, rocks and boulders, known by Mr. Hanson to be in the area of the grounding, is inconclusive since the available water depth, or lack thereof, above the hazards was

never established. TR at 78-81. Submerged objects become hazardous only when they have the potential for interfering with safe transit of a vessel in the vicinity. Thus, if a riverbed is strewn with rocks and boulders but the water depth above those objects exceeds that required by a passing vessel for its safe navigation, the objects are not hazardous. In this case, the Government did not present any evidence concerning the effect the submerged objects had on the ability of a jet boat to safely navigate the Roland Bar Range.

The Administrative Law Judge drew guidance from dictum in (Appeal Decision 2500 (SUBCLEFF)), and stated "[t]he presumption of negligence can apply when a vessel grounds upon a known submerged rock, even if the precise location is unknown". D&O at 18. In Subcleff, an Administrative Law Judge applied a presumption of negligence where a vessel was operated in an area where charted navigation information indicated the presence of substantial, shifting underwater obstructions, i.e., boulders, and contained specific warnings as to their impact on available navigable drafts. While another basis for negligence aside from the presumption of negligence was the only basis reviewed on

appeal, in invoking the presumption of negligence in Subcleff, the Coast Guard met its burden of production by demonstrating that the navigational draft of the vessel exceeded known conditions at the time of the grounding and by showing that the pilot involved knew, or should have known, of the navigational restrictions--neither of these have been shown here.

I find that the Coast Guard presented insufficient evidence to properly raise the presumption of negligence in this case. Absent proof as to the location of the grounding, the nature of the bottom in the area of the grounding, and any associated draft limitations, I cannot conclude that Appellant knew, or should have known, of the obstruction which his vessel struck. Since there is no affirmative showing "that the casualty occurred at a place which should give rise to the presumption", it would be impermissible to invoke that finding given the circumstances of this case. United States v. Soriano, 366 F.2d 699 (9th Cir. 1966).

II

While the Administrative Law Judge's finding of negligence was based on the "presumption of negligence" said to arise when a moving vessel grounds on a known obstruction, my finding that

the Coast Guard failed to established the presumption does not dispose of the appeal. Notwithstanding a failure to establish the presumption of negligence, the Administrative Law Judge also found that Appellant was negligent in several additional respects. First, the Judge concluded that Appellant's decision to reduce speed was improper and inconsistent with the action's of a prudent mariner, under the prevailing circumstances, since the practices of good seamanship required that the Appellant know available depths of water along his transit and the limitations those correspondingly imposed upon the handling characteristics of his vessel. D&O at 9. Second, the Judge concluded that Appellant's decision to slow his vessel constituted explicit violations of duty under the navigation rules of the road. *Id*.

A

The Administrative Law Judge concluded, citing Appeal (Decision 2302 (FRAPPIER)), that Appellant's failure to use information he should have known, e.g., the river conditions and the characteristic draft of his vessel with differing engine speeds, with the result that his vessel grounded, constituted negligence. Frappier is inapposite for two reasons. First,

Frappier relied upon invocation of a presumption of negligence. Second, Frappier was held to have had knowledge of the obstruction upon which his vessel grounded but chose to maneuver his vessel across the obstruction anyway. In Frappier, the vessel appellant was piloting went aground on an uncharted shoal area in an otherwise well-charted waterway; negligence was found because the evidence showed that Frappier "knew, from word of mouth, of an uncharted shallow spot" yet navigated his vessel in such a way as to submit it to possible hazarding by a known navigational limitation. In the instant case, however, it has not been shown that Appellant knew, or should have known, of the submerged obstruction.

The Administrative Law Judge stated that "good seamanship required [Appellant] to know the measured depth of water and available clearances he would encounter along the route." D&O at 17. While it is true that Appellant is charged with knowledge of river conditions in the area to be transited, the duty is not one of omniscience. *See* Davidson Steamship Co. v. United States, 205 U.S. 187, 194 (1907) (pilot was held negligent when his vessel, while entering a harbor, struck the submerged portion of a breakwater that was under construction,

since the record indicated that the pilot knew, or should have known, of the construction and accordingly adjusted his approach to remain clear of the work in progress); *cf*. (Appeal Decision 2367 (SPENCER)) (where the record contained substantial evidence that knowledge of an allision's causative factor, i.e., operating characteristics of the tug, could have been reasonably obtained by the respondent's prior direct observation of the tug, the Commandant rejected a tug operator's contention that the failure of the tug to respond as expected caused the allision).

Thus, while a navigator should know the hazards of a previously travelled route, in order to base negligence on the lack of that knowledge, there should be some showing that the navigator either knew or should have known of the particular hazards of the chosen route. By contrast, the record before me does not reflect the fact that Appellant's lack of knowledge of the submerged obstruction his vessel struck violates a prudent mariner standard of care. *Cf*. Pelican Marine Carriers, Inc. v. City of Tampa, 791 F.Supp. 845, 852 (M.D.Fla. 1992) *aff'd* 4 F.3d 999 (11th Cir. 1993) (in grounding of their vessel on a

sewer line "cap", a pilot and master were not negligent when they did not know the existence of the "cap" located three to five feet above the sewer line although the pilot did know of the sewer line's existence); Patterson Oil Terminals v. The Port Covington, 109 F.Supp. 953, 954 (E.D.Pa. 1952) *aff'd* 205 F.2d 694 (3rd Cir. 1953) (proof of intervention of conditions which "could not have been foreseen or guarded against by the ordinary exertion of human skill and prudence" can rebut the presumption of negligence arising from an allision).

Consequently, absent proof that Appellant had knowledge, actual or constructive, of the submerged obstruction and that he thereby hazarded the C/B MYRNA BEA VII by reducing its speed, I cannot conclude that a finding of negligence can arise on the first of the Administrative Law Judge's additional bases.

B

The second of the additional bases for the Administrative Law Judge's finding of negligence is that the Appellant, by reducing the speed of his vessel, violated his duty under Rule 6(a)(vi), 33 U.S.C. 2006(a)(vi), to proceed at a safe speed. I disagree with the Administrative Law Judge's application of the safe speed rule.

In suspension and revocation proceedings, the navigation

rules provide an applicable standard of care for a mariner, and accordingly, a finding of a violation of a navigation rule may constitute negligence. Appeal Decisions (2358 (BUISSET)), (2386) ((LOUVIERE)). Rule 6 (safe speed) provides, in part, that:

> Every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions.
>
> In determining a safe speed the following factors shall be among those taken into account: (a) By all vessels: . . . (vi) the draft in relation to the available depth of water. 33 U.S.C. 2006(a)(vi).

Here, Appellant introduced testimony that his actions in slowing the vessel arose from uncertainty as to the identity and intentions of a vessel observed downstream of his location. TR at 101-110, 112-119. As a result, his action to reduce the speed of his vessel did not constitute a violation of the rules, but an action taken in furtherance of his obligations thereunder. Further, the general construction of the statute is a precautionary one in the context of vessels whose speed in restricted visibility or narrow or congested waters may contribute to a vessel's collision with another vessel, e.g., because of excessive speed, or otherwise become unmaneuverable, rather than out of a concern that a reduction in speed will give rise to any aggravating consequences. *See* A. Parks and E.

Cattell, The Law of Tug, Tow, and Pilotage, 253-258, 3rd ed. (1994); R. A. Smith, Farwell's Rules of the Nautical Road, 216-220 (1994)); A. Cockcroft and J. Lameijer, Collision Avoidance Rules, 42-47, 4th ed. (1991). For these reasons, I do not concur with the Administrative Law Judge's assessment of the obligation imposed by Rule 6.

CONCLUSION

Because I do not find that the Coast Guard has presented sufficient evidence to invoke the presumption of negligence and because I do not find that the evidence otherwise shows that Appellant's actions rise to the level of negligence, I am dismissing the decision of the Administrative Law Judge. Since the determination of the allegations of negligence against Appellant are dispositive of this issue on appeal, I reach no conclusion as to the merits of Appellant's other contentions mentioned in his appeal brief (that he rebutted the presumption of negligence, that his actions were excusable as an error in judgement, or that the actions taken were permissible under the doctrine of error in extremis).

This determination is limited to the particular facts of

this case. Had the Coast Guard introduced additional evidence in support of its allegations, e.g., such as photographic evidence of the section of Roland Bar Range in which Appellant's vessel first grounded, testimony concerning Appellant's actual or constructive knowledge of the area, such as local knowledge of the submerged rock or other incidents in this reach of the Snake River, or data to support a conclusion that operating a jet boat during the stated river conditions constituted negligence, disposition of this matter on appeal may have very well been different. This opinion in no way condones the Appellant's choice of actions in this situation, it is merely an assessment that the record does not support the finding of negligence.

ORDER

The Decision and Order of the Administrative Law Judge dated March 25, 1993, are DISMISSED.

A. E. HENN

Vice Admiral, U.S. Coast Guard

Vice Commandant

Signed at Washington, D.C., this 22nd day of January, 1996.

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