UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Russell S. SYVERTSEN 554336

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2506

Russell S. SYVERTSEN

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

By an order dated 8 June 1989, an Administrative Law Judge of the United States Coast Guard at New York City, New York, suspended Appellant's First Class Pilot License for a period of two months remitted on four months probation upon finding proved the charge of negligence. The single specification supporting the charge alleged that on 9 May 1988, Appellant, while serving as Pilot on board the M/V OMI HUDSON under the authority of his above-captioned License, did fail to keep a safe distance while overtaking the M/V EASTERN SUN, resulting in a collision between the M/V OMI HUDSON and the M/V EASTERN SUN approximately four miles north of the Tappan Zee Bridge on the Hudson River.

The hearing was held on July 21 and July 22, 1988, at New York, New York. Appellant was represented by professional counsel and entered a response of DENIAL to the charge and the specification.

During the hearing the Administrative Law Judge heard six witnesses an admitted twenty-two exhibits. At the conclusion of the

hearing the Administrative Law Judge reserved decision. The complete Decision and Order was issued on 8 June 1989, and served on Appellant on 12 June 1989. Appellant perfected his appeal by filing his appeal with the Commandant on 17 August 1989.

Appearance: Joseph C. Smith, Esq. Burlingham Underwood & Lord, One Battery Park Plaza, New York, New York 10004.

FINDINGS OF FACT

On 9 May 1988, Appellant Russell S. Syvertsen was the pilot aboard the M/V OMI HUDSON under the authority of his Coast Guard issued License No 554336 which qualified him as a First Class Pilot of steam and motor vessels of any gross tons on the Hudson River.

The M/V OMI HUDSON is a United States flag vessel operating under a Coast Guard Certificate of Inspection. The M/V OMI HUDSON is 616.60 feet in length, 105 feet in breadth, 32,328 gross tons, with a forward and aft draft, at all relevant times, of 27 feet. The M/V EASTERN SUN is a United States flag vessel operating under a Coast Guard Certificate of Inspection. The M/V EASTER SUN is 271.90 feet in length, 50 feet in breadth, 1,576 gross tons, with a draft, at all relevant times, of 14.11 feet forward and 16.08 feet aft. At all times relevant herein, William Frappier was the Pilot aboard the M/V EASTERN SUN, and was qualified to pilot the M/V EASTERN SUN on the Hudson River.

On 9 May 1988, both vessels were proceeding northbound on the Hudson River. The M/V EASTERN SUN, after passing under the centerline of the Tappan Zee Bridge, steered a course to a position about 30 yards inboard of buoy #4. At buoy #4, the M/V EASTERN SUN again altered course for a position about 75 yards inboard of Scarbourough Light Beacon #6.

When the M/V EASTERN SUN reached buoy #2, the M/V OMI HUDSON was about one half mile astern on the M/V EASTERN SUN's port quarter. After the M/V OMI HUDSON passed the west side of the Tappan Zee Bridge, she steered a course for a position about 75 yards inboard of buoy #5 on the west side of the channel.

When the vessels were about one half mile from each other, Appellant, by radio, received permission form the bridge of the M/V

EASTERN SUN to pass on the port side. From the time the M/V EASTERN SUN altered course for beacon #6 at Buoy #4, both vessels were steering approximately parallel courses and were about 200 feet apart laterally. The breadth of the channel were the overtaking occurred, from buoy #5 to Beacon #6, is about 300 yards. In this interval, the water under the keel of the M/V OMI HUDSON was about 10 feet. The M/V EASTERN SUNS's speed was about twelve and one-half knots and the M/V OMI HUDSON's about fourteen and one-half knots.

As the M/V OMI HUDSON overtook the M/V EASTERN SUN, suction created by the M/V OMI HUDSON took hold of the M/V EASTERN SUN's bow causing it to sheer to port and collide with the starboard quarter of the M/V OMI HUDSON.

While Mr. Frappier, the M/V EASTERN SUN's pilot, attempted unsuccessfully to counter his vessel's uncontrollable sheer to port, their was no evidence that Mr. Frappier's seamanship or management of the M/V EASTERN SUN caused the sheer. There was no evidence of a machinery or equipment malfunction aboard the M/V EASTERN SUN. Until the time the M/V EASTERN SUN sheered to port, she maintained her course and speed as the overtaken vessel, as she maintained her course and speed as the overtaken vessel, as she was required to do, and she did not crowd the M/V OMI HUDSON.

At the time of the collision, the weather was clear, it wa daylight, and visibility was good. Also, there was no down river traffic during the overtaking situation. The M/V OMI HUDSON had ample room to pass the M/V EASTERN SUN at a wider and safer distance farther up the river in the vicinity of buoys #7 and #8 where the channel widens to 450 yards.

Appellant failed to keep his overtaking vessel, at a safe distance from, or far enough off, the M/V EASTERN SUN to avoid suction interaction between the vessels. Appellant failed to anticipate or consider suction while overtaking the M/V EASTERN SUN in the narrow channel of the Hudson River.

The Administrative Law Judge found that Appellant's failure to consider suction effect was not an error of prudent pilot judgement, but an act of negligence which a reasonable and prudent pilot under the same circumstances would not commit. the Administrative Law Judge thus concluded that the charge of negligence and its specification were proved.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. On appeal, Appellant asserts that:

(1)the Administrative Law Judge's reliance on legal treatises was improper since those treatises may form the basis of expert opinion by a witness but may not, standing alone, form the basis for a conclusion that the vessels were at an unsafe distance from one another;

(2) the findings of fact require that the charge of negligence be dismissed since none of the fact witnesses thought the M/V OMI HUDSON's overtaking of the M/V EASTERN SUN would be unsafe; and

(3) considering the M/V EASTERN SUN's pilot's recent sanction from the Coast Guard, his testimony that suction was the cause of the sudden sheer was self-serving.

OPINION

I

Appellant's contention that the Administrative Law Judge improperly relied on the treatises, J. Griffin, *The American Law of Collision*, 257 (1949 ed.), and Farwell's, *Rules of the Nautical Road*, 250-253 (6th ed. 1982), as the basis for findings of fact regarding suction phenomena is without merit. Contrary to Appellant's position, authoritative materials are explicitly admissible for consideration by the Administrative Law Judge. Title 46 C.F.R. 5.555(a) provides: "Treatises, periodicals, or pamphlets relating to nautical practices are admissible in evidence without the use of expert witnesses."

Appellant correctly asserts that learned treatises may not be considered conclusive of an issue. 46 C.F.R. 5.555(b). However, Appellant offers no evidence that the Administrative Law Judge reached his conclusions exclusively on the basis of the treatises. To the contrary, the record reveals that there was abundant additional evidence from which the Administrative Law Judge could reasonably infer that the M/V OMI HUDSON passed too close to the M/V EASTERN SUN

causing suction interaction.

Also, Appellant claims that the absence of expert testimony regarding the effects of suction interaction between vessels was a "... fatal gap in the Coast Guard's evidence ... " (Appellant's Brief, p. 6). However, expert testimony is not required to establish a standard of care when "... that standard has been announced in earlier decisions and is readily apparent from the customary principles of good seamanship and common sense." Appeal Decision 2302 (FRAPPIER). See Also, Appeal Decisions 2393 (STEWART) and 2359 (WAINE).

There is a wealth of support for the proposition, as the Administrative Law Judge found, that the suction phenomenon in circumstances similar to this case is an accepted maritime fact. Suction is recognized by authorities and the courts as being a frequent cause of collisions between ships operating in too close proximity. J. Griffin, *The American Law of Collision at 585 (hereinafter Griffin on Collisions)*.

The occurrence of suction, attributed to an overtaking vessel in a confined channel, is well-documented in the admiralty law of this country. *The Tompkinsville*, 50 F. Supp. 308 (E.D.N.Y. 1941), The *Robert Fulton*, 10 F.2d 424 (2d Cir. 1926), *The Henry W. Oliver*, 202 F. 306 (D.C. Oh. 1912). More specifically, it has been stated, "Suction is a well-known and long-recognized hydrodynamic phenomenon that poses a significant potential hazard to vessels engaged in overtaking maneuvers." *Intercontinental Bulktank Corp. v. M/S Shinto Maru*, 422 F. Supp. 982, 985 (D. Or. 1976). See also, *The Sif*, 181 F. 412, 416 (E.D. Pa. 1910), *The Monterey*, 171 F. 442, 449 (S.D.N.Y. 1909); *The Mesaba*, 111 F. 215, 227 (S.D.N.Y. 1901); and *The Ohio*, 91 F. 547 (6th Cir. 1898).

The preceding cases and authority establish the suction influence to be so well recognized that the duty to consider suction effect when maneuvering in the close vicinity of another vessel is a customary principle of good seamanship. Thus, expert testimony is not required to establish the standard of care for negligence where the specification alleges failure to keep a safe distance resulting in the suction effect.

II

Appellant asserts that the Coast Guard failed to prove a reasonable and prudent person in the same circumstances would not have overtaken the M/V EASTERN SUN in the same manner. This position fails to take account of the duties placed upon the operator of an overtaking vessel under The Inland Navigational Rules and the heightened standard of care by which the actions of a pilot are judged.

The Inland Rules of the Road firmly place a duty upon the overtaking vessel to keep clear of the overtaken vessel until she is past and clear and a duty upon the overtaken vessel to maintain her course and speed. 33 U.S.C. 2013(a),(d). See *The Reliance*, 25 F.2d 625 (2d Cir. 1928), and *Williams-McWilliams Industries Inc. v. F&S Boat Corp.*, 286 F. Supp. 638 (E.D. La. 1968).

The significance of the duty to keep clear or maintain a safe distance is that if the overtaking vessel fails to do so and a collision occurs, the burden of proof rests on that vessel to show she was not negligent and that the collision resulted from the fault of the other. *The Henry W. Oliver, supra* at 8. See also, *The J.G. Gilchrist*, 173 F. 666 (D.C.N.Y. 1909), *affirmed* 183 F. 105 (2d Cir. 1910), and *The M.E. Luckenbach*, 163 F. 755 (D.C.N.Y. 1908). The overtaking vessel is subject to a presumption of fault. *Liner v. Crewboat Mr. Lucky*, 275 F. Supp. 230 (E.D. La. 1967). Thus:

It is well settled that an overtaking vessel assumes those risks inherent in the passing maneuver, and, should collision occur, such overtaking vessel shall accordingly bear the responsibility therefor absent proof of fault on the part of the overtaken vessel.

A/S J. Ludwig Mowinckles Rederi v. M/V Sea Level II, 1984 A.M.C. 1110, 1113 (E.D. La. 1983). See also, *Cole v. Sabine Towing & Transp. Co.,Inc.*, 432 F. Supp. 144, 147 (S.D. Ala. 1977), and *Intercontinental Bulktank Corp, supra*, at 986.

Under the above rationale, the presumption of negligence remains on the Appellant since he does not argue on appeal that the operator of the M/V EASTERN SUN was at fault. Instead, Appellant claims the Coast Guard did not satisfy its burden of proof on the charge of negligence. Even were the burden of proof not on the Appellant to

dispel the presumption of fault, a violation of the Inland Rules of the Road is deemed *per se* negligence by the violator. This is the essence of the oft-cited Pennsylvania Rule derived from *The Pennsylvania*, 86 U.S. 125 (1873), cited in Appeal Decision 2386 (LOUVIERE):

"... if a vessel collides with another following a violation of the statutory navigation rules, the causal connection between the violation and the collision is presumed without further proof. ... (Thus) ... in suspension and revocation proceedings, a violation of a navigation rule is, itself, negligence... "

See also, Appeal Decisions 2438 (TURNER), Appeal Decision 2395 (LAMBERT), and Appeal Decision 2358 (BUISSET).

Appellant claims that the Coast Guard put on no evidence as to what was an appropriate distance and that there was no evidence that the distance between the M/V OMI HUDSON and the M/V EASTERN SUN was unsafe. However, since the Administrative Law Judge has made the finding, uncontested on appeal, that the cause of the collision was not attributable to the M/V EASTERN SUN [Decision and Order pp. 13-16], the fact that the collision occurred was evidence in itself of an unsafe distance between the two vessels. The conclusion that the overtaking vessel is at fault flows naturally from the nature of the duty and the absence of fault on the overtaken vessel. This syllogism was explained in Farwell's *Rules of the Nautical Road, supra*, at 251: "A collision due to suction is nearly always chargeable to the overtaking vessel because it is prima facie evidence that she tried to pass too close."

There is no formula for determining a safe distance to pass in any given channel. It has always been recognized that the distance at which the forces of suction begin to act varies with such factors as the dimensions of the channel, and the speed and size of the ships. *Griffin on Collisions*, at 588.1 One of Appellant's main arguments was that neither pilot anticipated any danger of collision. The Administrative Law Judge correctly observed that personal belief does not lessen the standard of due care one must exercise to avoid suction. In determining negligence, the element of foreseeability has always been tested objectively, not as the appellant suggests,

subjectively. As in Appeal Decision 2319 (PAVELEC):

In order to prove the charge, it is only necessary to show that Appellant's conduct in some manner failed to conform to the standard of care required of a reasonably prudent operator under the same circumstances.

1 The Hudson River channel is most susceptible to the suction interaction since it is narrow and shallow. Accordingly, the phenomenon has been alleged to have occurred on the river at distances greater than 200 feet. *The Cedarhurst* 42 F.2d 139 (2d Cir. 1930), 1929 A.M.C. 365, *cert. denied* 282 U.S. 868 (1930).

For a charge of negligence, the Appellant's actions are judged on the standard of the reasonably prudent operator. The standard is more stringent for pilots given the special expertise, proficiency and superior knowledge they are presumed to have. Case law has long recognized this higher order of duty. *Atlee v. Packet Co.* 88 U.S. 389 (1874); *The Framlington Court*, 69 F.2d 300 (5th Cir. 1934), 1933 A.M.C. 522, *cert. denied* 292 U.S. 651; *Homer Ramsdeel Transp. Co. v. Campagnie Generale Transatlantique*, 63 F. 845 (S.D.N.Y. 1894). These standards are appropriate today. *Transorient Navigators Co. S.A. v. M/S Southwind*, 714 F.2d 1358 (5th Cir. 1983); *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151 (2d Cir. 1978). Applying this higher standard, the Administrative Law Judge found the Appellant negligent under 46 C.F.R. 5.29 for

... failing to consider the effects of suction in overtaking the SUN at close quarters in a narrow river channel, and in failing to keep his vessel at a safe distance from the SUN until his vessel was finally past and clear of the SUN. [Decision and Order p. 21].

Appellant argues these conclusions cannot be used as findings to support the charge of negligence, or, essentially that the Administrative Law Judge arrived at the above conclusion without foundation. This claim is without merit. Appellant did not show this conclusion to be inconsistent with the testimony, exhibits or facts as found by the Administrative Law Judge. Moreover, issuance of separate conclusions are required pursuant to 5 U.S.C. 557(c)(3)(a) and 46

C.F.R. 5.563. See also, Appeal Decisions 2282 (LITTLEFIELD) and 2275 (ALOUISE).

The Administrative Law Judge retains significant discretion in finding the ultimate facts. As such, his findings "... need not be consistent with all evidentiary material contain ed in the record so long as sufficient material exists in the record to justify such a finding." Appeal Decisions 2424 (CAVANAUGH) and 2282 (LITTLEFIELD). Since it is the sole duty of the Administrative Law Judge to evaluate and weigh the evidence presented at the hearing, his findings will not be disturbed on review unless it can be shown that the evidence relied upon was inherently incredible. Appeal Decisions 2492 (RATH), 2378 (CALICCHIO), 2333 (AYALA), and 2302 (FRAPPIER). I find that the Administrative Law Judges' findings were supported by a preponderance of the credible evidence, as a whole, in the record.

III

Appellant asserts that the testimony of the M/V EASTERN SUN's pilot as to suction was self-serving in explaining the sudden sheer of the M/V EASTERN SUN. The Administrative Law Judge found that the cause of the sheer was not due to any professional mismanagement on the part of the M/V EASTERN SUN's pilot. Since Appellant does not question this finding on appeal his challenge appears, therefore, to be directed to the credibility of the M/V EASTERN SUN's pilot as a witness. However, the Administrative Law Judge explicitly found the testimony of the M/V EASTERN SUN's pilot credible. Decision and Order, p.13. The Administrative Law Judge's determination on the credibility of the witness will not be disturbed on appeal unless it is inherently incredible. Appeal Decision Nos. 2390 (PURSER), aff'd *sub nom, Commandant v. Purser NTSB order No. EM-130 (1986); Appeal* Decisions 2472 (GARDNER), 2356 (FOSTER), 2344 (KOHAJDA), 2340 (JAFFE), 2333 (AYALA), 2302 (FRAPPIER), and 2275 (ALOUISE).

CONCLUSION

Having reviewed the entire record and considered Appellant's arguments, I find that Appellant has not established sufficient cause to disturb the findings and conclusions of the Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The decision and order of the Administrative Law Judge dated 8 June 1989 at New York is AFFIRMED.

MARTIN H. DANIELL
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 6th day of September 1990.

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5 EVIDENCE
5.67 Official notice
-authoritative materials are explicitly admissible in evidence without the use of expert witnesses

-the ALJ may not rely solely on authoritative materials as the basis for conclusions of law

5.34 Expert

-testimony of, not necessary to establish standard of care where standard has been announced in prior decisions and is readily apparent

5.190 Witnesses

-ALJ determination of credibility will not be disturbed unless inherently incredible

11 NAVIGATION

11.67 Overtaking situation

-suction is well recognized as a frequent cause of collisions between ships in close proximity

-duty to consider suction effect is a customary principle of good seamanship

-duty to keep clear of overtaken vessel

-following a collision, overtaking vessel bears the responsibility absent proof of fault on the overtaken vessel

-violation of the Inland Rules of the Road is per se negligence

-collision due to suction is prima facie evidence of an unsafe distance

7 NEGLIGENCE

7.70 Negligence

-expert testimony not necessary to establish standard of care where standard has been announced in prior decisions and is readily apparent

-violation of navigation rules as

7.71 Operator

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7.72 Pilot

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12 ADMINISTRATIVE LAW JUDGE

12.50 Findings

-need not be consistent with all evidentiary material if the record is sufficient to support such a finding

-upheld unless inherently incredible

CITATIONS

Appeal Decisions: 2302 (FRAPPIER); 2393 (STEWART); 2359 (WAINE); 2386 (LOUVIERE); 2438 (TURNER); 2395 (LAMBERT); 2358 (BUISSET); 2319 (PAVELEC); 2282 (LITTLEFIELD); 2275 (ALOUISE); 2424 (CAVANAUGH); 2492 (RATH); 2333 (AYALA); 2390 (PURSER); 2472 (GARDNER); 2356 (FOSTER); 2344 (KOHAJDA); 2340 (JAFFE);

NTSB Cases Cited: Commandant v. Purser, NTSB Order No. EM-130 (1986)

Federal Cases Cited: The Tompkinsville, 50 F. Supp. 308 (E.D.N.Y. 1941); *The Robert Fulton*, 10 F.2d 424 (2d Cir. 1926); *The Henry W. Oliver*, 202 F. 306 (D.C. Oh. 1912); *Intercontinental Bulktank Corp. v. M/S Shinto Maru*, 422 F. Supp. 982 (D. Or. 1976); *The Sif*, 181 F. 412 (E.D. Pa. 1910), *The Monterey*, 171 F. 442 (S.D.N.Y. 1909); *The Mesaba*, 111 F. 215 (S.D.N.Y. 1901); *The Ohio*, 91 F. 547 (6th Cir. 1898); *The Reliance*, 25 F.2d 625 (2d Cir. 1928); *Williams-McWilliams Industries, Inc. v. F&S Boat Corp.*, 286 F. Supp. 638 (E.D. La. 1968); *The J.G. Gilchrist*, 173 F. 666 (D.C.N.Y. 1909), affirmed 183 F. 105 (2d Cir. 1910); *M.E Luckenbach*, 163 F. Supp. 755 (D.C.N.Y. 1908); *Liner v. Crewboat Mr. Lucky*, 275 F.Supp. 230 (E.D. La 1967); *A/S J. Ludwig Mowinckles Rederi v. M/V Sea Level II*, 1984 A.M.C. 1110 (E.D. La. 1983); *Cole v. Sabine Towing & Transp. Co., Inc.*, 432 F. Supp. 144 (S.D. Ala. 1977); *The Pennsylvania*, 86 U.S. 125 (1873); *The Cedarhurst*, 42 F. 2d 139 (2d Cir. 1930), *cert. denied* 282 U.S. 868; *Atlee v. Packett Co@.* 88 U.S 389 (1874); *The Framlington Court*, 69 F.2d 300 (5th Cir. 1934), *cert. denied* 292 U.S. 651; *Homer Ramsdeel Transp. Co. v. Campagnie Generale Transatlantique*, 63 F. 845 (S.D.N.Y.

1894); *Transorient Navigators Co. S.A. v. M/S Southwind*, 714 F.2d 1358 (5th Cir. 1983); *Tug Ocean Prince, Inc. v. United States*, 584 F. 2d 1151 (2d Cir. 1978)

Statutes and Regulations Cited: 46 C.F.R. 5.555(a),(b); 33 U.S.C. 2013(a),(d); 5 U.S.C. 557(c)(3)(a), 46 C.F.R. 5.563

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