UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Gregory T. COUSINS 637253

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2515

Gregory T. COUSINS

This appeal has been taken in accordance with 46 U.S.C. SS7702 and 46 CFR SS5.701.

By an order dated 16 October 1989, an Administrative Law Judge of the United States Coast Guard at Seattle, Washington, suspended Appellant's Merchant Mariner's License outright for a period of nine months upon finding proved the charge of negligence. The charge was supported by one specification which was found proved. The specification alleged that Appellant, while serving as third mate under the authority of the captioned license, on board the T/S EXXON VALDEZ, on or about 23 March 1989, at approximately 2355 and on or about 24 March 1989, at approximately 0002 while the vessel was in Prince William Sound, Alaska, failed to maintain an accurate record of the vessel's position, and failed to ensure steering commands to return the vessel to the Prince William Sound Traffic Separation Scheme were executed in a timely manner, thereby placing the vessel in danger of grounding.

The hearing was held at Seattle, Washington on 5 October 1989. Appellant appeared at the hearing and was represented by professional counsel. Appellant entered, in accordance with 46 C.F.R. SS5.527(b), an answer of no contest to the charge and specification. The

Investigating Officer introduced 18 exhibits into evidence to establish a prima facie case. No witnesses were called. No exhibits were introduced nor were any witnesses called by Appellant.

At the conclusion of the hearing the Administrative Law Judge rendered a decision in which he concluded that the charge and specification had been found proved and rendered an "Order in Open Hearing" that Appellant's License, No. 637253, be suspended for a period of nine months, which order was delivered to the Appellant at the hearing, on 5 October 1989. The complete Decision and Order reaffirmed the 5 October "Order in Open Hearing" and was entered on 16 October 1989.

Notice of Appeal was timely filed on 13 November 1989. Following the receipt of the transcript of the proceedings, Appellant's brief was timely received, after approved extensions, on 2 April 1990. Accordingly, this matter is properly before the Vice Commandant for disposition.

*FINDINGS OF FACT*

At all times relevant, Appellant was serving as third mate on board the T/S EXXON VALDEZ, an inspected tank vessel of the United States required to carry a master, officers and crew who are licensed and/or documented by the United States Coast Guard. The T/S EXXON VALDEZ has a gross tonnage of 94,999 and a length of 949.9 feet. Appellant's license authorized him to serve as second mate of Ocean Steam or Motor Vessels of any gross tons.

The Appellant, while serving as third mate on board the T/S EXXON VALDEZ under the authority of his license, did on 24 March 1989, fail to maintain an accurate plot of the vessel's position while navigating said vessel from Valdez, Alaska in Prince William Sound, thereby placing the vessel in danger of grounding.

The Appellant, while serving as third mate on board the T/S EXXON VALDEZ under the authority of his license, did on 24 March 1989, while navigating said vessel from Valdez, Alaska in Prince William Sound fail to ensure that steering commands given to return the vessel to the Prince William Sound Traffic Separation Scheme were executed in a timely manner, thereby placing the vessel in danger of grounding.

The T/S EXXON VALDEZ, while proceeding at a speed of 11 knots, went aground on 24 March 1989, at approximately 0007 hours, on Bligh Reef in Prince William Sound, Alaska.

Appearance by: Robert L. Richmond, Esq., Marc G. Wilheim, Esq., Richmond & Quinn, 135 Christensen Drive, Anchorage, Alaska, 99501.

*BASES OF APPEAL*

The Appellant appeals the severity of the sanction, giving several bases for that position.

Appellant states that on the morning of the hearing he learned of mitigating evidence regarding the charge and specification, i.e., evidence that the helmsman on the T/S EXXON VALDEZ may not have carried out his rudder commands, that, citing testimony from the criminal proceedings against Joseph Hazelwood, Master of the T/S EXXON VALDEZ at the time of the grounding on Bligh Reef, "the rudder was initiated late" and that "there was not enough rudder used." Appellant states that this evidence was not submitted at the hearing because he was anxious to have his sanction period begin to run even though the evidence in question may have resulted in a less severe sanction. Moreover, Appellant is not requesting that the hearing be reopened to consider this evidence.

Appellant further alleges that the Administrative Law Judge "erred in finding that the T/S EXXON VALDEZ began commencing the turn 'at about 0004 hours on 24 March 1989,' and that the vessel struck Bligh Reef 'at 0007 approximately.'" Appellant's Brief at page 11, quoting Decision and Order at page 20. Appellant argues that this is contrary to other evidence of such times, that this other evidence shows a much greater time difference between the order to turn and the grounding and that if the period between the order to turn and the grounding was eight minutes, as other evidence suggests, there was ample time for the T/S EXXON VALDEZ to conclude its turn. He implies that the Administrative Law Judge's conclusion that, "[t]he turn was made way too late," was based on his erroneous findings. Then citing the previously mentioned unintroduced evidence, he argues that if the rudder order had been executed earlier the resulting turn would have avoided the grounding.

Appellant argues that the Administrative Law Judge erred in his finding that the Appellant's negligence was "great" because this finding is based on the Administrative Law Judge's misconceptions regarding the sequence and timing surrounding the grounding and that no evidence before the trier of fact supported a finding of "great" negligence.

Appellant argues that the Administrative Law Judge erred by taking judicial notice of adjudicative facts not in the record, alleging that the Administrative Law Judge relied on media reports concerning the oil spill which resulted from the grounding of the T/S EXXON VALDEZ.

Appellant further argues that the nine month suspension ordered by the Administrative Law Judge was "clearly excessive," because:

1. The Administrative Law Judge went above the suggested range of appropriate orders in 46 C.F.R. 5.569 and used the wrong range of suggested appropriate orders;

2. The sanction exceeded that recommended by the Coast Guard;

3. The sanction imposed substantially exceeds sanctions imposed in similar cases;

4. The Administrative Law Judge failed to consider matters in mitigation in deciding upon a sanction; and

5. The Administrative Law Judge improperly considered the damage caused by the grounding of the T/S EXXON VALDEZ as an aggravating circumstance.

*OPINION*

I

Regarding the issue of new, mitigating evidence, Appellant states that, for the purposes of arguing his appeal he will rely on the record created by the Coast Guard and argue inferences based on that record. He is not requesting that the hearing be reopened; yet, Appellant seeks consideration of this evidence. Such evidence will not be considered on appeal. Only the record will be considered. The

proper forum in which to present evidence is the hearing. Appeal Decision 2340 (JAFFEE), Appeal Decision 1865 (RAZZI). When a person fails to present evidence and later asserts he had evidence which would have helped his cause, he is too late. Appeal Decision 2314 (CREWS). The issue of whether or not the hearing could be reopened if Appellant so requested, given his knowledge of such evidence prior to the hearing, need not be addressed absent Appellant's petition. 46 C.F.R. 5.601.

II

Appellant urges that the Administrative Law Judge's determinations regarding the times of the order to turn and the grounding itself are erroneous. I.O. Exhibit 17 states, at paragraph 49, that "[t]he time of grounding was logged at 0004. The actual time of the grounding is not clearly established but was probably several minutes after the time logged." I.O. Exhibit 17 at paragraph 35 states that the course recorder shows the time the T/S EXXON VALDEZ first started coming to the right to be approximately 0002, 24 March. The Administrative Law Judge stated:

The vessel did not turn to starboard when abeam of Busby Island at 23:55 hours but rather continued at 11K on a course of 180 degrees for an additional seven to nine minutes before commencing the right turn at about 0004 hours on 24 March 1989. The turn was made way too late; the vessel struck Bligh Reef at a high rate of speed (11K) at 0007 hours approximately. Decision and Order, p.20.

Although different exhibits support slightly different times for the commencement of the turn and the grounding, the Administrative Law Judge's determination of the times, which he indicates are "about" or "approximately", are supported by the evidence. Unless the Judge's resolution of the facts is clearly unreasonable, it will not be disturbed on appeal. Appeal Decision 2314 (CREWS); Appeal Decision 2472 (GARDNER); Appeal Decision 2390 (PURSER); Appeal Decision 2356 (FOSTER); Appeal Decision 2344 (KOHAJDA). As a general rule, the findings of the Administrative Law Judge are consistently upheld unless they can be shown to be unreasonable or inherently incredible. Appeal Decision 2487 (THOMAS); Appeal Decision 2450 (FREDERICKS); Appeal Decision 2395 (LAMBERT). The Administrative Law Judge's findings in this case are not inherently incredible, unreasonable, or without support in the record and will not be disturbed. As to the

Administrative Law Judge's statement that the turn was made "way too late," this is supported by the fact that the vessel did indeed ground, and evidence in Exhibit 17 that approximately six to seven minutes passed after the vessel was abeam of Busby Island (where Appellant was instructed to commence a turn) before the course change was commenced.

III

Appellant argues that the Administrative Law Judge's finding that Appellant's negligence was "great" was erroneous because it was not based on evidence in the record. The Administrative Law Judge gave this opinion in consideration of arriving at an appropriate order. Decision and Order, p. 21. Such a determination is not clearly erroneous. I.O. Exhibit 17 at paragraph 47 indicated that after the grounding the Chief Mate noted cargo flowing out of cargo tanks one thru five Center and one, three, and five Starboard and that Starboard ballast tanks two and four, which had been empty, showed rising levels. Paragraph 54 of I.O. Exhibit 17 indicates that approximately 258,000 barrels of Alaskan North Slope crude oil were lost to Prince William Sound and that repairs to the T/S EXXON VALDEZ will cost an estimated.

The precautions required in the navigation of vessels fluctuate according to the characteristics of each vessel and the water in which it is being navigated. In any event, a higher standard of care must be imposed on the operators of vessels which have the potential for causing great environmental harm, if poor navigational judgments are made. Appeal Decision 2057 (SHIPP).

When navigating a crude oil laden super tanker in Prince William Sound, waiting approximately seven minutes beyond the time when a turn should have been made while on a course which would ground the vessel in a matter of minutes is evidence of "great negligence." The Administrative Law Judge's determination in this regard is not clearly erroneous.

IV

Appellant argues that the Administrative Law Judge erred by taking judicial notice of adjudicative facts not in the record, alleging that the Administrative Law Judge relied on media reports on the oil spill in question. The Administrative Law Judge stated he was

taking official notice that the casualty which resulted from Appellant's negligence resulted in "tremendously distressing damage; the consequences were calamitous." Decision and Order, p. 18. Official notice only applies to notice of Federal and State law, Governmental organizations, and Commandant's Decisions on Appeal. 46 C.F.R. 5.541(a). Further, matters officially noticed are to be specified on the record and the respondent and investigating officer are to be afforded an opportunity to rebut such matters. 46 C.F.R. 5.541(b). While this taking of "official notice" by the Administrative Law Judge was error, given all of the evidence available, such error was harmless. That the casualty resulted in tremendously distressing damage is a conclusion clearly supported by evidence presented at the hearing, specifically, I.O. Exhibit 17 and its statement as to the amount of crude oil spilled, the location of the spill, and the monetary damage to the T/S EXXON VALDEZ. When grounds for a reasonable inference are established, the burden to negative the inference passes to the one who seeks a finding otherwise. Appeal Decision 1793 (FARIA). No challenge to the contents of I.O. Exhibit 17 was made at the hearing. The conclusions of the Administrative Law Judge will not be disturbed unless they are without support in the record, and inherently incredible. Appeal Decision 2465 (O'CONNELL); Appeal Decision 2424 (CAVANAUGH). The Administrative Law Judge's conclusions in this matter are not inherently incredible, unreasonable, or without support in the record, and will not be disturbed.

V

Appellant further argues that the nine month suspension ordered by the Administrative Law Judge was "clearly excessive" because the Administrative Law Judge went above the suggested range of appropriate orders in 46 C.F.R. 5.569 and used the wrong range of suggested appropriate orders (Appellant argues that two-six months, for negligently performing duties related to navigation, was the appropriate range; the Administrative Law Judge used three-six months, for neglect of vessel navigation duties, as the suggested range). Since the suggested range of sanctions is meant to be consulted prior to considering aggravating and mitigating circumstances pursuant to 46 C.F.R. 5.569(d), the mere fact that the sanction imposed exceeds the suggested range does not establish that it is clearly excessive. Further, the sanction imposed at the conclusion of a case is exclusively within the authority and discretion of the Administrative Law Judge. He is not bound by the scale of average orders. Appeal Decision 2362 (ARNOLD); Appeal Decision 2173 (PIERCE). In the

absence of a gross departure from the scale of average orders, the order of the Administrative Law Judge will not be altered on review. Appeal Decision 1937 (BISHOP). A nine month suspension in this case is not a gross departure from the scale of average orders.

Appellant argues that the Administrative Law Judge used the wrong range of suggested appropriate orders, namely neglect of vessel navigation duties (three-six months) vice negligently performing navigational duties (two-six months). Assuming arguendo that the Administrative Law Judge used the incorrect range, this is not clear error. The suggested maximum prior to considering matters in aggravation or mitigation is six months in either case and the suggestions are for guidance only.

VI

Appellant further argues that the nine month suspension ordered by the Administrative Law Judge was clearly excessive because the awarded suspension exceeded the Investigating Officer's recommendation by three months. The Administrative Law Judge is not bound by either a stipulation of the parties or the table of averages. Appeal Decision 2173 (PIERCE). Exceeding the Investigating Officers recommended sanction by three months does not of itself render the sanction clearly excessive.

VII

Analogizing his case to the Tingley1 and Wardell2 cases, Appellant argues his sanction was "clearly excessive," in that it substantially exceeds the sanctions imposed in those cases. Both of those cases involved allisions with a dock by freight vessels and both resulted in license suspensions of three months. Those cases are easily distinguishable from Appellant's case. Given the potential consequences, the degree of care necessary when navigating a loaded super tanker outside of a traffic separation scheme on a heading which, if not altered, will almost assuredly run that vessel aground in a matter of minutes, makes this case far different than the cases Appellant believes are apposite.

1 William Tingley, 17-0029-RHW-76 (1977) Appeal Decision 2174 (1980), aff'd sub nom. *Commandant V. Tingley*, NTSB Order EM-86

(1981), aff'd mem. sub nom. *Tingley v. United States*, 688 F.2d 848 (9th Cir 1982).

2 Olney E. Wardell, 17-0038-RHW-87 (1987), Appeal Decision 2455 (WARDELL), aff'd sub nom. Commandant v. Wardell, NTSB Order EM-149 (1988).

VIII

Appellant further argues that the Administrative Law Judge failed to consider matters in mitigation in deciding upon a sanction. The standard to use in review is whether there has been a clear failure to weigh extenuating circumstances or matters in mitigation. Appeal Decision 1937 (BISHOP). A review of the record indicates that no such failure has occurred. In the Decision and Order at page 18, the Administrative Law Judge states he considered the recommendations of the parties and that the Appellant had enjoyed a "negative" prior disciplinary record. The Administrative Law Judge further states that the "totality of the facts and circumstances of this case . . . were noted and considered." There was no clear failure on the part of the Administrative Law Judge to weigh extenuating circumstances or matters in mitigation.

IX

Although not raised by Appellant in his brief, it is noted that the Administrative Law Judge amended the specification to conform to the proof, i.e., that the T/S EXXON VALDEZ grounded on Bligh Reef on 24 March 1989. Decision and Order, p. 15. *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 841 (D.C. Cir. 1950), states there may be no subsequent challenge of issues which are actually litigated, if there was actual notice and adequate opportunity to cure surprises. Evidence was introduced that was consistent with the "no contest" answer and that provided the Administrative Law Judge information to assist in rendering an order. The issue of the grounding of the T/S EXXON VALDEZ was never litigated. Because Appellant was not notified during the hearing that the specification was being amended, it would be mere speculation to conclude that the same plea would have been entered to an amended specification. The specification shall remain as that which was pleaded to by Appellant.

However, this does not preclude consideration by the

Administrative Law Judge of the fact that the T/S EXXON VALDEZ did run aground. Evidence of the grounding shortly after the negligent actions of the Appellant and the consequences of that grounding were properly presented to the Administrative Law Judge. Appellant cites dicta in the case of *Commandant v. Wardell*, NTSB Order No. EM-149 at 9 fn. 10 (1988)3 for the proposition that the extent of damages can not be considered as an aggravating circumstance. However, Decisions on Appeal have consistently held that damages can be considered as a factor in awarding an appropriate sanction. Aggravation is not defined in the regulations, but the amount of damage occurring in an allision is an indication of the possible consequences involved in negligent maneuvering of the vessel, and may properly be considered as a matter in aggravation. This is not to say that the amount of damage is determinative of the proper order; it is merely one factor to consider. Appeal Decision 2455 (WARDELL). It is not unreasonable for the Administrative Law Judge to take into account the degree of danger into which the negligent omission or commission placed the vessel, her cargo, and especially her crew. Appeal Decision 1937 (BISHOP). The consequence, such as an allision or collision, though unnecessary to support a decision finding negligence, may be an aggravating factor, or the lack thereof may be a mitigating factor, and hence it may be proved whether or not it is alleged. Appeal Decision 2415 (WASHBURN). Appeal Decision 2129 (RENFRO). The damages in this case were foreseeable results of failing to maintain an accurate position and failing to give and ensure execution of timely steering commands while navigating a super tanker laden with crude oil in Prince William Sound. Where the danger is great, the greater should be the precaution. The Clarita, supra.

3 Commandant v. Wardell, NTSB Order No. EM-149 at 9 fn. 10 (1988) states, "Although not directly raised on appeal to the Board, the appellant on appeal to the Vice Commandant argued that the law judge should not have considered the extent of monetary damage to the vessel and city dock in determining sanction. Although we do not find that the law judge gave that factor excessive weight, or that the weight he did give it would justify disturbing the sanction imposed, we are not persuaded by the Coast Guard's argument on brief to us that the matter of damages is properly considered a factor in aggravation under 46 C.F.R. 5.569(b)."

It was not erroneous for the Administrative Law Judge to consider the damages in determining the degree of the Appellant's negligence

and in awarding an appropriate sanction.

*CONCLUSION*

The findings of the Administrative Law Judge, with the exception of an amendment to the specification made in the Decision and Order, are supported by the answer of "no contest" and the supporting evidence of a reliable and probative nature. The hearing was conducted in accordance with the requirements of applicable regulations. The sanction awarded is neither unjust nor disproportionate for the charge and specification found proved.

*ORDER*

The Decision and Order of the Administrative Law Judge dated on 16 October 1989 at Seattle, Washington, excepting the words "In this latter regard I amend the single specification to conform to the proof, that is, that the vessel grounded on Bligh Reef on 24 March 1989," is AFFIRMED.

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

Signed at Washington, D.C., this 28 day of October, 1990.

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findings upheld unless unreasonable

13.10 Appeals

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*CITATIONS*

Appeal Decisions cited: *2340 (JAFFEE), 1865 (RAZZI), 2458 (GERMAN), 2314 (CREWS), 2008 (GOODWIN), 2472 (GARDNER), 2390 (PURSER), 2356 (FOSTER), 2344 (KOHAJDA), 2487 (THOMAS), 2450 (FREDERICKS), 2395 (LAMBERT), 2057 (SHIPP), 1793 (FARIA), 2465 (O'CONNELL), 2424 (CAVANAUGH), 2362 (ARNOLD), 2173 (PIERCE), 1937 (BISHOP), 2455 (WARDELL), 2415 (WASHBURN), 2129 (RENFRO), 2174 TINGLEY*

NTSB Cases Cited: *Commandant v. Tingley*, NTSB Order EM-86 (1981) *Commandant v. Wardell*, NTSB Order EM-149 (1988)

Federal Cases Cited: The Clarita 90 U.S. 1 (1874) *Tingley v. United States*, 688 F.2d 848 (9th Cir 1982) *Kuhn v. Civil Aeronautics Board*, 183 F.2d 839, 841 (D.C. Cir. 1950)

Statutes & Regulations Cited: 46 USC 7702, 46 CFR 5.701(b)(1), 46 CFR 5.519(a)(1), 46 CFR 5.527(b), 46 CFR 5.569, 46 CFR 5.541(a), 46 CFR 5.541(b), 46 CFR 5.569(b)

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