UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: John B. KITTRELL (redacted)

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2461

John B. KITTRELL

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

By order dated 22 January 1987, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri admonished Appellant upon finding proved the charge of Violation of Regulation. The charge was initially supported by three specifications. However, the Administrative Law Judge found one specification involving 46 CRF SS35.35-1(c) not proved and dismissed this count.

One specification found proved alleged that Appellant, serving as person-in-charge aboard Tank Barge T-7953, under the authority of his merchant mariner's document, on or about 25 April 1986, while transferring oil to Tank Barge T-7953 from Packer River Terminal at Mile 857.0, Upper Mississippi River, wrongfully absented himself from the barge in violation of 33 CFR 156.120(s).

The remaining specification found proved alleged that Appellant, serving as person-in-charge aboard Tank Barge T-7953, under the authority of his merchant mariner's document, on or about 25 April 1986, while transferring oil to Tank Barge T-7953 from Packer River Terminal at Mile 857.0, Upper Mississippi River, wrongfully failed to provide a flame screen or proper supervision for the open No. One ullage hole in violation of 46 CFR 35.30-10.

The hearing was held at St. Paul, Minnesota, on 20 October 1986. At the hearing, Appellant represented himself and denied the charge

and specifications.

The Investigating Officer introduced in evidence five exhibits and the testimony of two witnesses.

In response, Appellant introduced in evidence three exhibits, and the testimony of four witnesses. Appellant did not testify.

On 22 January 1987, at St. Louis, Missouri, the Administrative Law Judge rendered a decision in which she concluded that the charge and two supporting specifications had been proved, and entered a written order admonishing Appellant.

The complete Decision and Order was served on 30 January 1987. Appeal was timely filed on 23 February 1987. Appellant requested and was granted an extension of time to perfect his appeal until 30 May 1987. The appeal was perfected on 16 May 1987.

FINDINGS OF FACT

At all relevant times on 25 April 1986, Appellant was acting under the authority of his Merchant Mariner's Document No. [REDACTED], with a tankerman's endorsement on it, dated 5 October 1977.

On 25 April 1986, the tank barge (T/B) T-7953 was moored at Mile 857.0, Upper Mississippi River, at the Packer River Terminal, Minneapolis, Minnesota, while being loaded with sunflower seed oil, a regulated product under Subchapter D, 46 CFR 30.25-1. The T/B T-7953, an inspected tank barge with a capacity of 11,660 barrels, is authorized to carry Grade A and lower products and specified dangerous cargoes.

Appellant was the person in charge of the transfer operation on 25 April 1986 for the T/B T-7953. According to 33 CFR 156.120(s), the transfer operation involving sunflower seed o il on the T/B T-7953 required the presence of a "person in charge", who may be a certified tankerman.

On 25 April 1986, a Coast Guard boarding team conducted an inspection on the T/B T-7953. The No. One ullage hole was found open, unsupervised, without a flame screen over it during the transfer operation. At the time, Appellant was approximately 200 feet away on the tank barge, near the transfer pumps.

Appellant was notified of the discrepancy involving the flame screen on the No. One ullage hole on board the T/B T-7953 by Coast Guard personnel at the time the discrepancy was discovered. Appellant did not rectify the discrepancy nor terminate transfer operations.

Later, during the transfer operation on 25 April 1986, after the initial discrepancy was noted, and with the No. One ullage hole still open without a flame screen over it, Appellant was observed by the Coast Guard boarding team sitting in his van on shore, approximately ten feet from the barge.

BASIS OF APPEAL

Appellant raises the following issues on appeal:

(1) With regard to the specification involving absence from the T/B T-7953 in violation of 33 CFR 156.120(s), the finding of proved was not supported by substantial evidence on the record and should have been dismissed upon evidence that Appellant was overcome by obnoxious vapor fumes, and feeling nauseous, left the vessel, and sat in his van to overcome this feeling.

(2) The Administrative Law Judge erred in not granting Appellant's Motion to Dismiss based on misconduct of Coast Guard personnel, resulting in denial of due process and equal protection of the law.

(3) The Administrative Law Judge erred in relying on Appeal Decision 2188 (GILLIKIN) since the facts in GILLIKIN differ from the case at hand.

(4) The Administrative Law Judge erred in finding that the violation regarding the flame screen could have been rectified by removing a flame screen from a closed ullage hole. (Decision and Order, Finding of Fact No. 12).

Appearance: Appellant, *pro se*.

OPINION

I

The Administrative Law Judge found proved the charge of violation of regulation involving 33 CFR 156.120(s) which states, in pertinent part:

"No person may conduct an oil transfer operation unless...there is a person in charge on the ...receiving vessel..."

It appears from the record below that on 25 April 1986, Appellant was the person in charge during the transfer of sunflower seed oil from the Packer River Terminal to the T/B 7953. (Transcript at 42, 69, 70). Furthermore, it is uncontested that Appellant left the T/B T-7953 during the transfer operation and sat in his van on the shore near the tank barge. (Transcript at 43, 71). Therefore, it is clear that the facts set forth at the hearing establish a violation of the

regulation.

The issue to be resolved becomes what treatment should be accorded Appellant's assertion that his absence during the transfer operation was prompted by illness.

Upon complete review of the record, it is clear that Appellant produced no evidence whatsoever regarding his reason for leaving the vessel during transfer operations. Appellant called numerous witnesses on his own behalf; none of whom testified concerning the reason for Appellant's absence. Appellant did not testify at the hearing, after being advised concerning his rights in this regard. (Transcript at 9).

The first mention of Appellant's reasons for leaving the vessel during transfer operations occurred during Appellant's closing argument. (Transcript at 152, 153). It is a well established rule of law that closing arguments are not evidence and may not be considered as evidence by the fact-finder. Cf., Appeal Decision 1747 (CHALONEC); Appeal Decision 1059 (MARTINEZ); Appeal Decision 806 (JACKSON) (opening statements are not evidence). See, also, *United States v. Smith*, 778 F.2d 925 (2nd Cir. 1985); *United States v. McCaghren*, 666 F.2d 1227 (C.A. Ark. 1981); *United States v. Flaherty*, 668 F.2d 566 (C.A. Mass. 1981); *Vanskike v. ACF Industries, Inc.*, 665 F.2d 188 (C.A. Mo. 1981); *George v. Morgan Const. Co.*, 389 F. Supp. 253 (E.D.PA. 1975). Closing argument is permitted following the presentation of evidence. See 46 CFR 5.559. At best, Appellant's closing argument may be treated as an unsworn statement for purposes of mitigation. Appeal Decision 2376 (FRANK).

II

At the conclusion of the Coast Guard's case, Appellant submitted a written motion to dismiss. (Transcript at 94). Appellant argues on appeal that his motion to dismiss with respect to allegations of misconduct by Coast Guard personnel was improperly denied. Appellant's allegations of misconduct were raised in his motion with respect to Specifications Two and Three of the charge.

Appellant argues that changes to the Barge Boarding form amounted to misconduct and prejudiced the Appellant. See Respondent's Exhibit C. This form under the heading of Vessel Requirements provides a checklist for inspecting personnel. The Coast Guard did not introduce this document in its case against Appellant. Appellant chose to introduce the document as his exhibit in his case in chief. Appellant failed to establish misconduct, failed to show any prejudice associated with this form, failed to call any witnesses to account for the changes on the form, and failed to cross-examine the Coast Guard witnesses from the boarding team regarding the form. With regard to Specifications Two and Three, Appellant asserts that he was not informed of the discrepancies by the boarding officers. The record

does not support this. Both Coast Guard boarding officers, who testified at the hearing, indicated that Appellant was notified at the time of the boarding that discrepancies involving the fire extinguishers and the flame screen had been noted. (Transcript at 65, 84). There is no requirement in the regulations that a foreman in charge of the operation, located off the vessel, be notified of any discrepancies.

Secondly, Appellant asserts that he was improperly served with notice which resulted in delay in securing evidence. Appellant did not produce any evidence to support this assertion, however the record clearly reflects that a letter of warning1 was sent to Appellant more than five weeks prior to the hearing before the Administrative Law Judge. (Transcript at 123-130). Appellant called CWO Maurice Sharpe at the Marine Safety Detachment in St. Paul, Minnesota on 13 September 1986 to discuss the contents of the letter of warning. (Transcript at 123-130). Furthermore, Appellant had been notified concerning Specifications Two and Three on the day the discrepancies were first noted. (Transcript at 65, 84). There was ample opportunity for Appellant to obtain evidence, locate witnesses and prepare a defense.

1The Investigating Officer may issue a letter of warning in lieu of formal suspension and revocation proceedings per 46 CFR 5.105(e) if he finds there is a basis for a complaint, and the violation is not of a serious nature or where the ends of justice will best be served by a written warning. The letter of warning must be accepted in order to forego formal proceedings.

Thirdly, Appellant asserts that the Coast Guard brought this charge and the specifications as a vendetta against Appellant. However, Appellant produces no evidence by way of exhibits or witnesses to support this assertion. Furthermore, had Appellant accepted the letter of warning discussed by CWO Sharpe these proceedings would not have come about. (Transcript at 125). As indicated, the Barge Boarding form provides merely a checklist for inspection of vessels, minor corrections were made to the form. The form was not offered by the Coast Guard during presentation of the prima facie case. I do not consider the changes made to be prejudicial to the Appellant.

Finally, Appellant asserts in his motion to dismiss that the charge and specifications were petty, vague and not in accordance with policy or practices. As such, Appellant asserts the Coast Guard acted without clean hands in this matter. Again, Appellant failed to support his assertions with any evidence of any kind. The Coast Guard requires the proper number and type of fire extinguishers and flame screens on board tank barges during transfer operations for the safety of the vessel, personnel in the vicinity and the protection of the environment.

A motion to dismiss should not be granted unless no evidence has

been introduced in support of one or more required elements of the government's case. See Appeal Decision 2321 (HARRIS); Appeal Decision 2294 (TITTONIS). Cf. Appeal Decision 2368 (MADJIWITA), aff'd sub nom. *Commandant v. Madjiwita*, NTSB Order No. EM-20 (1985). In reviewing the record, I find that the Administrative Law Judge properly dismissed Appellant's motion for lack of support on the record. In this case, substantial evidence adequate to establish a prima facie case of negligence was introduced. The record of the hearing before the Administrative Law Judge clearly indicates that Appellant was accorded all of his rights. I find no denial of due process or equal protection of the laws in this matter.

III

Appellant asserts that the Administrative Law Judge erred in relying on Appeal Decision 2188 (GILLIKIN). The third specification under the charge of violation of regulation, which was found proved, dealt with Appellant's failure to properly supervise an open ullage hole that did not have a flame screen. Testimony indicated that Appellant was observed approximately 200 feet away from the ullage hole on the barge near the transfer pumps during the transfer operation. (Transcript at 43, 45, 71, 73). Later, Appellant was observed on shore, sitting in his van, while the ullage hole remained open without a flame screen during the transfer operation. (Transcript at 43, 71).

The issue before the Administrative Law Judge was whether Appellant properly supervised the No. One ullage hole during the transfer operation since it did not have a flame screen. The Administrative Law Judge properly looked to previous Commandant's Decisions for guidance on the definition of supervision. In Appeal Decision 2188 (GILLIKIN), the person in charge failed to supervise seven cargo tank hatches that were not provided with flame screens. In GILLIKIN as in the present case, a crewmember was clearly on deck during the transfer operation. In GILLIKIN there was a total absence of evidence of supervision. The present case is similar. Appellant produced no testimony at the hearing to show that his activities during the transfer operation amounted to supervision of any sort. I find that GILLIKIN is sufficiently analogous to be of precedential value in this case. In GILLIKIN, the level of supervision required for open hatches and ullage holes without flame screens is constant attention and continuous checking. At a minimum this requires an attentive, responsible presence at the open ullage hole or cargo tank. See Appeal Decision 1839 (BRENNAN); Appeal Decision 1999 (ALT & JOSSY); Appeal Decision 2009 (NORSWORTHY). This is consistent with the testimony of BM3 Marten, the Coast Guard Boarding Officer, that supervision required physically working with the hole. (Transcript at 66). Appellant can not provide the measure of supervision required when he is physically located about 200 feet away from the ullage hole. Furthermore, sitting in a vehicle ashore during transfer operations certainly does not constitute constant attention

and continuous checking of the open ullage hole. See also, Appeal Decision 2020 (JOYNER), aff'd and mod. sub nom. *Commandant v. Joyner*, NTSB Order EM-8 (1975).

Therefore, the Administrative Law Judge did not err in finding that Appellant failed to properly supervise the No. One ullage hole during transfer operations in violation of 46 CFR 35.30-10.

IV

Finally, Appellant asserts that the Administrative Law Judge erred in finding that the violation regarding the flame screen could have been rectified by removing a flame screen from a closed ullage hole. I agree.

There is no evidence on the record to support such a finding. There is evidence that attempts were made to obtain another flame screen by the Packer River terminal operations manager. (Transcript at 105).

Efforts to obtain a replacement screen are evidence in mitigation. The violation was still proved. Therefore, any error by the Administrative Law Judge in this regard was harmless error.

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 22 January 1987 at St. Louis, Missouri, is AFFIRMED.

J.C. IRWIN
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 7th day of December, 1987.

3. HEARING PROCEDURE

.25 Closing Arguments

Not evidence

.39.5 Dismissal

motion for, properly denied where prima facie case established

.44 Due Process

denial of, not shown

4. PROOF AND DEFENSES

.73.5 Mitigating Circumstances

evidence of, need not be given under oath

5. EVIDENCE

.14 Closing Arguments

Not evidence

.130 Unsworn Statements

admissible as evidence in mitigation

10. MASTERS, OFFICERS, SEAMEN

.35 Person In Charge

duty to supervise open cargo tanks without flame screens

12. ADMINISTRATIVE LAW JUDGES

.50 Findings

not upheld where not supported by substantial evidence

13. APPEAL AND REVIEW

.04 Administrative Law Judge

findings not upheld where not supported by substantial evidence

Appeals Cited: *806 (JACKSON)*, *1059 (MARTINEZ)*, *1747 (CHALONEC)*, *1839 (BRENNAN)*, 1999 (ALT & JOSSY), 2009 (NORSWORTHY), 2020 (JOYNER), *2188 (GILLIKIN)*, *2294*

(TITTONIS), 2321 (HARRIS), 2368 (MADJIWITA), 2376 (FRANK).

NTSB cases cited: *Commandant v. Joyner*, NTSB Order EM-8 (1985)

Cases Cited: *United States v. Smith*, 778 F.2d 925 (2nd Cir. 1985); *United States v. McCaghren*, 666 F.2d 1227 (C.A. Ark. 1981); *United States v. Flaherty*, 668 F.2d 566 (C.A. Mass. 1981); Vanskike v. ACF Industries, Inc., 665 F.2d 188 (C.A. Mo. 1981); *George v. Morgan Const. Co.*, 389 F. Supp. 253 (E.D.PA. 1975).

Statutes Cited: None.

Regulations Cited: 33 CFR 156.120(s); 46 CFR 35.30-10; 46 CFR 5.559; 46 CFR 35.35-1(c); 46 CFR 30.25-1.

***** END OF DECISION NO. 2461 *****

Top