

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE NO. 575158
Issued to: Robert J. Tombari

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2477

ROBERT J. Tombari

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

By his order dated 14 December 1987, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's License for twelve months plus on additional twelve months remitted on twelve months probation upon finding proved the charge of negligence. The specification thereunder found proved alleged that Appellant, while serving in the capacity of Chief Engineer under the authority of the captioned license, on board the R/V ENDEAVOR, did fail to insure that certain safety precautions were taken regarding the shifting of the electrical load from ship's power to shore power, resulting in the death of an Assistant Engineering Officer on or about 11 August, 1986. The hearing was held at Providence, Rhode Island on 9, 10 and 11 December 1986, and on 30 September 1987. To clarify any confusion regarding this case, it must be noted that the Administrative Law Judge who initially presided over the hearings in December, 1986, died on 14 August 1987. Before his death, he had completed his findings and conclusion of law, but had not rendered a final Decision and Order. The case was reassigned to another Administrative Law Judge on 1 September 1987, who subsequently completed the hearing on 30 September 1987, and issued the final

Decision and Order on 4 November 1987.

Appellant was present at all sessions and was represented by lawyer counsel. The Investigating Officer introduced into evidence five exhibits and the testimony of six witnesses. Appellant offered into evidence twenty-seven exhibits and the testimony of four witnesses, including his own testimony.

The original charge and specification set forth that Appellant was negligent while serving as Chief Engineer, under the authority of his license, on board the R/V ENDEAVOR on or about 11 August 1986 in that he did:

fail to ensure that safety precautions were taken prior to directing the shifting of the electrical load from ship's power to shore power which resulted in the death of Miss Alison Rollins.

The Administrative Law Judge, without prior notice to Appellant, and on the motion of the Investigating Officer amended the charge and specification to read:

fail to insure that safety precautions such as (1) That the connections were, in fact, completed at the connection box aboard the vessel; (2) That shore power was available as indicated at the distribution panel; (3) That the connections at the shore side connection box were properly completed; (4) That communications between the Respondent and his subordinates verified that the ship was ready to receive shore power; (5) That the subordinate engineers aboard the vessel were aware that the evolution was about to take place; the evolution, specifically, being the shifting of ship's power to shore power. That these steps were taken prior to taking the shifting of the electrical load to ship's power to shore power which resulted in the death of Miss Alison Rollins, who was serving as an engineer aboard the vessel the M/V ENDEAVOR.

The Administrative Law Judge's Decision and Order concluded that the charge and specification (with the exception of averments (1) and (2) were found proved by reliable and probative evidence. The Decision and Order was served on Appellant on 23 November 1988. Appellant's appeal was filed on 24 December 1987. The transcript of the hearing was served on Appellant on 7 March 1988. He perfected his appeal in a timely manner by filing his Appellate Brief on 9 May 1988.

FINDINGS OF FACT

On 11 August 1986, Appellant, Robert J. Tombari, was serving as Chief Engineer aboard the R/V ENDEAVOR, under the authority of his duly issued license which authorized service as Chief Engineer of uninspected motor vessels not over 5,000 horsepower; Assistant Engineer restricted to Plum Island motor Ferry Vessel, not over 3,200 horsepower, and Third Assistant Engineer of Motor vessels not over 5,000 horsepower. The R/V ENDEAVOR is a research vessel operated by the University of Rhode Island. As a condition of employment, Appellant was required to hold the aforementioned license with a Chief Engineer endorsement.

On 11 August 1986, the ENDEAVOR was returning to her homeport at Narragansett, Rhode Island. Alison Rolling was serving on board the ENDEAVOR as one of two assistant engineers.

The ENDEAVOR was equipped with a shore power cable designed to permit the ship to utilize shore side electrical power while berthed. The ship end of the cable was designed to be fed through a hawse pipe into an electrical box located in the muffler room. The shore end of the cable is designed to be plugged into a connection on the pier. The ship's end of the cable did not contain a plug, but rather a pigtail array of electrical leads which would normally take several minutes to hook up in the muffler room. Appellant was responsible for the assignment of an engineering officer to make the hookup or, alternatively, he could perform the duty himself. Appellant ordered the connection and energizing of the electrical hookup, while, unknown to Appellant, Alison Rollins was still in contact with the ship end of the cable in the muffler room. Alison Rollins consequently died from electrocution as determined by the Medical Examiner of the Rhode Island Department of Health. Because of the subsequent disposition

of this case, no further findings of fact are appropriate or required.

BASES OF APPEAL

Appellant sets forth ten separate bases of appeal, however, the following disposition of this case makes discussion of all of those bases unnecessary. The determinative issue is as follows:

(1) The Administrative Law Judge misconstrued and misapplied the applicable standard of proof.

Appearance by: James T. Murphy, Esq., Hanson,
Curran, Parks & Whitman, 1210 Turks
Head Bldg. Providence, RI02903-2274

OPINION

I

Appellant asserts that the Administrative Law Judge failed to acknowledge and apply the proper standard of proof at the hearing by following a standard other than preponderance-of-the-evidence. Appellant cites to the following exchanges between Appellant's counsel and the Administrative Law Judge as verification that the Administrative Law Judge erred:

MR. MURPHY: ...I might add that under the regulations, the burden of proof is on the government and they have to prove it to a fair preponderance of the evidence.

ADMINISTRATIVE LAW JUDGE: Don't say that. They have to prove it by substantial evidence.
(Transcript Vol. 2, p. 159)

MR. MURPHY: ...I have one question that relates to that. During the discussion yesterday there was some discussion about the standard of proof which is stated in the regulations as requiring, I believe it is reliable, probative, substantial

evidence, and I had been under the understanding that that was the same and required substantial evidence, required a preponderance of the evidence. (sic)

ADMINISTRATIVE LAW JUDGE: Not necessarily.

MR. MURPHY: Is it something less than a preponderance of the evidence?

ADMINISTRATIVE LAW JUDGE: Yes... (Transcript Vol. Vol 3, pp. 6-7)

The proper standard of proof applicable in Suspension and Revocation Proceedings is set forth in 46 C.F.R. 5.63, which states that "findings must be supported by and in accordance with the reliable, probative, and substantial evidence." Appeal Decision [2417](#) (YOUNG). This standard complies with the requisites of the Administrative Procedure Act, 5 U.S.C. 556(d). Appeal Decision [2346](#) (WILLIAMS). The United States Supreme Court in *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 101 S. Ct. 999 (1981) clarified the concept of "substantial evidence" further. The issue in *Steadman, supra*, was the standard of proof in a proceeding conducted under the provisions of the Administrative Procedure Act. The Supreme Court held that the word "substantial" denotes a certain quantity of evidence and in fact establishes a preponderance-of-the-evidence standard. The Supreme Court made this determination based on the legislative history of the Administrative Procedure Act. The Court stated that "any doubt as to the intent of Congress is removed by the House Report, which expressly adopted a preponderance-of-the-evidence standard." *Steadman, supra*, 450 U.S. at 1007. See, also, *Bender v. Clark*, 744 F. 2d 1424 (10th Cir. 1984; *Sea Island Broadcasting Corp. v. Federal Communications Commission*, 627 F.2d 240 (App. D.C. 1980). Consequently, the term "substantial evidence" is synonymous with "preponderance-of-the-evidence" as defined by the Supreme Court. 46 C.F.R. 5.541 requires the Administrative Law Judges to consider and comply with federal case law. Appeal Decision [2468](#) (LEWIN), Appeal Decision 2472 (GARDNER), Appeal Decision

2474 (CARMENKE). Where as here, the Administrative Law Judge states on the record that the correct standard to be applied at the proceeding is less than a preponderance of the evidence, I must take him at his word, and absent clarification, must give plain meaning to his words. There is no other information in the record that would permit me to conclude that the Administrative Law Judge did not in fact apply the erroneous standard to which he referred in making his determinations.

CONCLUSION

The Administrative Law Judge stated on the record essentially that the substantial evidence standard, which he used in the proceeding, constituted a lesser burden of proof than the preponderance of evidence standard. Consequently, the Administrative Law Judge misinterpreted the proper standard of proof and in fact applied an erroneous standard of proof. This constitutes plain error. The proper disposition is dismissal without prejudice to refile.

ORDER

The decision of the Administrative Law Judge dated at New York, New York, on 4 December 1987 is VACATED, the findings are SET ASIDE, and the charge and specification DISMISSED WITHOUT PREJUDICE to refile.

CLYDE T. TUSK JR.
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this *28th* day of *December* 1988.

***** END OF DECISION NO. 2477 *****

[Top](#)