UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT
Issued to: Lloyd Spruille RATH 013314

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2492

Lloyd Spruille RATH

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

By his order dated 22 January 1988, an Administrative Law Judge of the United States Coast Guard at Alameda, California, suspended Appellant's Merchant Mariner's Document and License for six months, remitted on twelve months probation, upon finding proved the charges of misconduct and negligence. The misconduct charge was supported by three specifications which were found proved. A fourth specification was dismissed by the Administrative Law Judge. The negligence charge was supported by one specification which was found proved.

Specification one to the charge of misconduct alleges that Appellant, as Master aboard the M/V PRESIDENT EISENHOWER, while serving under the authority of the above-captioned license and document, on or about 0600, 25 October 1986, wrongfully violated 33 U.S.C. 20009(e) by failing to take steps to safely pass another vessel (barge #417) in a narrow channel.

Specification two alleges that at the same time and date aforementioned, Appellant wrongfully violated 33 U.S.C. 2006 by failing to proceed at a safe speed causing a collision with barge #417.

Specification three alleges that at the same time and date aforementioned, Appellant violated 33 U.S.C. 2007(a) by failing to use all available means to determine if a risk of collision existed between the M/V PRESIDENT EISENHOWER and the tug ADVENTURER. This Specification was dismissed by the Administrative Law Judge.

Specification four alleges that at the same time and date aforementioned, Appellant violated 33 U.S.C. 2013(a) by failing to keep out of the way of barge #417 while the M/V PRESIDENT EISENHOWER was burdened as the overtaking vessel.

The specification supporting the charge of negligence alleges that Appellant, as Master of the M/V PRESIDENT EISENHOWER, while serving under the authority of the above-captioned license and document, at or about 0600, 25 October 1986, was negligent by failing to safely navigate the M/V PRESIDENT EISENHOWER while attempting to overtake the tug ADVENTURER and its tow, consisting of the barges LANAI and #417 in Oakland Estuary Channel, Oakland, California.
The hearing was held at Alameda, California on 9 and 10 March 1987. Appellant appeared at the hearing and was represented by professional counsel. Appellant entered, in accordance with 46 C.F.R. 5.527(a), an answer of denial to the charges and specifications.

The Investigating Officer introduced nineteen exhibits into evidence and called four witnesses.

Appellant introduced twenty-six exhibits into evidence and called three witnesses. He also testified in his own behalf.

After the hearing, the Administrative Law Judge rendered a decision in which he concluded that the charges and specifications had been found proved, and entered a written order suspending Appellant's license and document for six months, remitted on twelve months probation.

The complete Decision and Order was served on Appellant on 25 January 1988. Notice of Appeal was timely filed on 22 February 1988. Following the receipt of the transcript of the proceedings, Appellant's brief was timely filed with approved extensions on 8 September 1988. Accordingly, this matter is properly before the Vice Commandant for disposition.

FINDINGS OF FACT

At all times relevant, Appellant was serving as Master aboard the M/V PRESIDENT EISENHOWER, a merchant vessel of the United States, under the authority of his above-captioned document and license. Appellant's license authorized him to serv e as Master of U.S. Steam or Motor Vessels of any gross tonnage upon oceans, Radar Observer, and First Class Pilot for Honolulu Harbor via the main ship channel.

The M/V PRESIDENT EISENHOWER is a U.S. flag steel-hulled freight vessel, 814.25 feet in length and 36,859 gross tons. On the morning of 25 October 1986, the M/V PRESIDENT EISENHOWER was moored starboard side to Berth C/D at the Oakland, California Middle Harbor Terminal. The M/V HOEGH MASCOT was moored at Berth A/B of the same terminal with its stern approximately 50 feet ahead (west) of the M/V PRESIDENT EISENHOWER's bow. Both vessels were scheduled to sail for sea at 0500 that morning. At the same time, the towboat M/V ADVENTURER and barges #417 and LANAI were moored at the Howard Container Terminal, approximately three-fourths of a mile astern (east) of the M/V PRESIDENT EISENHOWER.

The M/V ADVENTURER and the two barges were scheduled to sail for sea at 0530 that morning. In preparation for sailing, the two barges were made up in a side-by-side configuration, barge #417 being the starboard barge in the 200 foot-wide tow. At 0530 on 25 October 1986, visibility was approximately 0.3 of a mile with no wind.

At 0522, M/V ADVENTURER called the Vessel Traffic Service (VTS) by radio and advised that she was preparing to get under- way. VTS responded that M/V HOEGH MASCOT was preparing to get underway. M/V ADVENTURER responded that she would wait for the M/V HOEGH MASCOT to depart. At 0523, VTS called M/V ADVENTURER and advised that the M/V PRESIDENT EISENHOWER was also scheduled to depart from Middle Harbor Terminal. At 0526 the pilot of the M/V PRESIDENT EISENHOWER called VTS, advising that she was preparing to depart from Middle Harbor Terminal. At 0527, VTS acknowledged this communication and advised of the pending departure of M/V HOEGH MASCOT and M/V ADVENTURER. At 0528, M/V PRESIDENT EISENHOWER called M/V ADVENTURER and asked how soon she was departing. M/V ADVENTURER responded that she was departing at that moment. The M/V PRESIDENT EISENHOWER acknowledged by stating: "O.K., We'll wait for you to get past."

At 0530, M/V ADVENTURER pulled the barges LANAI and #417 away from

the dock into mid-channel, proceeding west at a speed of two to three knots. At approximately 0540, the M/V PRESIDENT EISENHOWER called M/V ADVENTURER and asked if it would "be O.K. if M/V EISENHOWER went first." M/V ADVENTURER responded, "O.K., I'll run dead slow and let you get underway."

As M/V ADVENTURER approached the stern of M/V PRESIDENT EISENHOWER, the M/V PRESIDENT EISENHOWER was still alongside the dock with one or more lines on the dock and with her stern canted out from the dock at a slight angle. At that time, M/V ADVENTURER advised that she was already up to M/V PRESIDENT EISENHOWER and had to keep going. The M/V PRESIDENT EISENHOWER responded with "Roger." At this time (approximately 0544) the bow line of the M/V PRESIDENT EISENHOWER was still made fast to the dock. At this time also, the Second Mate reported to Appellant that the M/V ADVENTURER and her barges were approaching from the port quarter.

Shortly after the bow line was released from the dock at 0549, the M/V PRESIDENT EISENHOWER's Third Mate reported that M/V ADVENTURER and barges were abreast of the bow, about 190 feet to port. Shortly after, the Third Mate reported that the distance had decreased to 110 feet. The M/V ADVENTURER and its barge flotilla moved ahead of the M/V PRESIDENT EISENHOWER. However, as the latter vessel began making way, she began overtaking the M/V ADVENTURER. As this overtaking situation developed, the pilot of the M/V PRESIDENT EISENHOWER radioed the M/V ADVENTURER and advised that she was getting underway, and asked if it was "O.K. to pass you." The Master of the M/V ADVENTURER responded, "Go ahead if you think you can do it. I'll stay to the south side and give you the north side."

Due to her rapid acceleration, M/V PRESIDENT EISENHOWER quickly began passing the M/V ADVENTURER and her flotilla. The rapid relative speed of the M/V PRESIDENT EISENHOWER to that of the tug and barges created a suction effect. As a direct result of this suction effect, the barges moved laterally towards the port side of the M/V PRESIDENT EISENHOWER. The starboard side of barge #417 made contact with the port side of the M/V PRESIDENT EISENHOWER and was drawn along with the larger vessel for a short duration. This occurred at about 0556 - 0558.

Following this collision, the M/V ADVENTURER increased speed causing the barges to sheer away to port, forcing the M/V ADVENTURER to alter course to starboard to try and regain control. This in turn caused the tug M/V ADVENTURER to back down in order to avoid a collision with the M/V PRESIDENT EISENHOWER. Consequently, as she backed down, the barges collided with her stern. The pilot of the M/V

PRESIDENT EISENHOWER reported the collision to VTS at 0606 and continued on her voyage after contacting the M/V ADVENTURER and determining that neither she nor her tow needed assistance.

As a result of the collision between M/V PRESIDENT EISENHOWER and Barge #417 and the subsequent collision between Barge #417 and LANAI with M/V ADVENTURER, both barges and M/V ADVENTURER sustained structural damage. M/V PRESIDENT EISENHOWER also sustained hull damage.

Appearance: Denise S. Blocker, Esq., Three Embarcadero Center, San Francisco, CA 94111.

BASES OF APPEAL

The Appellant asserts the following bases of appeal:

a. The Administrative Law Judge relied on a witness that was not credible;

b. The Administrative Law Judge made erroneous determinations regarding the time and speed of the vessels;

c. The determination that Appellant was negligent is not sup ported by substantial evidence;

d. The determination that Appellant committed violations of law is not supported by substantial evidence;

e. An independent determination by a pilot commission that the pilot of Appellant's vessel was not responsible for the collision is conclusive proof that Appellant should be "exonerated;"

f. The M/V ADVENTURER's violations of the Inland Navigation Rules, Federal Law, and practices of good seamanship required a finding that the M/V ADVENTURER was solely responsible for the collision.

OPINION

I

An issue to consider at the outset is the failure of the Administrative Law Judge to render credibility findings regarding the conflicts between Appellant's witnesses and the Master of the M/V ADVENTURER.

When an Administrative Law Judge must determine what events occurred from the conflicting testimony of several witnesses, that determination will not be disturbed unless it is inherently incredible. Appeal Decision 2390 (PURSER), affirmed sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986); Appeal Decision 2356 (FOSTER), Appeal Decision 2344 (KOHAJDA), Appeal Decision 2340 (JAFFE), Appeal Decision 2333 (AYALA), Appeal Decision 2302 (FRAPPIER), Appeal Decision 2275 (ALOUISE), Appeal Decision 2472 (GARDNER).

Appellant is correct in stating that there was substantial conflict between the testimony of the Master of the M/V ADVENTURER and that of the Master, Pilot, and Chief Mate of the M/V PRESIDENT EISENHOWER. Moreover, Appellant correctly asserts that the Administrative Law Judge failed to address the inconsistencies between the testimony as required. Appeal Decision 1285 (DONOVAN), Appeal Decision 2156 (EDWARDS), Appeal Decision 2116 (BAGGETT), Appeal Decision 2472 (GARDNER), Appeal Decision 2489 (JUSTICE). The Administrative Law Judge's failure to issue credibility findings renders his determination(s) based on conflicting testimony inherently incredible.

In this case, the testimony in issue involved communications between the M/V ADVENTURER and Appellant's vessel, M/V PRESIDENT EISENHOWER, regarding the existence of an overtaking situation. In particular, the Administrative Law Judge did not adequately discuss M/V PRESIDENT EISENHOWER's Pilot's testimony concerning the absence of an agreement to the effect that the M/V ADVENTURER would continue outbound or testimony that the Pilot subsequently requested and received permission to overtake the flotilla. See, Decision and Order, Findings of Fact 13 and 16.

In light of the unaddressed and unresolved conflict, there is inadequate credible evidence to support the findings of proved to the charge and specifications of misconduct based on violations o f the navigation laws. In particular, the unresolved conflict in testimony undermines the determinations that Appellant violated 33 U.S.C.

2009(e), 2006, and 2013. Consequently, those issues raised by Appellant relating to the charge of misconduct based on the violation of law need not be addressed further.

While the failure of the Administrative Law Judge to address the aforementioned inconsistencies will defeat charge one and the specifications thereunder, it will not affect the determinations made regarding the charge and specification of negligence.

II

Appellant asserts that the Administrative Law Judge's determinations as to time and speed were erroneous and prejudicial.

As stated in Opinion I, conflicts exist regarding testimony that were not addressed by the Administrative Law Judge. These conflicts included differing opinions as to times and speeds of vessels. However, these were predominantly related to the charge of misconduct based on the violations of law. As stated in Opinion I, those issues need not be discussed further since it has been determined that there is insufficient evidence in the record to find proved the charge and specifications of misconduct. However, any discrepancies regarding times and speeds of vessels are not significantly relevant in the Administrative Law Judge's determination that Appellant was negligent in failing to safely navigate his vessel. There is sufficient credible evidence in the record (apart from data concerning vessel times and speeds) for the Administrative Law Judge to determine the issue of negligence. This evidence is set forth in detail in Opinion III.

III

Appellant asserts that there was not sufficient evidence to find that Appellant was negligent. I disagree.

The charge and specification of negligence allege that Appellant failed to safely navigate his vessel in undocking and maneuvering into the channel while the M/V ADVENTURER and her tow were approximately abeam and then attempting to pass in the narrow channel. There was sufficient evidence in the record for the Administrative Law Judge to find the charge and specification proved.

It is solely the duty of the Administrative Law Judge to evaluate and weigh the evidence presented at the hearing. Unless it can be shown that the evidence upon which he relied is inherently incredible, the findings will not be set aside. Appeal Decision 2390 (PURSER), *affirmed sub nom Commandant v. Purser, NTSB Order No. EM-130 (1986);* Appeal Decision 2356 (FOSTER), Appeal Decision 2344 (KOHAJDA), Appeal Decision 2340 (JAFFE), Appeal Decision 2333 (AYALA), Appeal Decision 2302 (FRAPPIER), Appeal Decision 2275 (ALOUISE), Appeal Decision 2472 (GARDNER).

In this case, the evidence is not inherently incredible and accordingly will not be disturbed. The evidence illustrates that Appellant ordered his vessel away from the dock, in reduced visibility, with full knowledge that the M/V ADVENTURER was only approximately 75-150 feet away. Tr. pp. 134, 324-329; Exhibit 19. Appellant himself admitted that he could have remained at the dock until the M/V ADVENTURER passed at a safe distance. Tr. p. 244. Instead, Appellant undocked the M/V PRESIDENT EISENHOWER when the tug and tow were approximately abeam or only slightly ahead of the M/V PRESIDENT EISENHOWER. Appellant himself admitted that the ship channel is a narrow channel in which he would not want to overtake another vessel. Tr. p. 328. Yet, Exhibit 19, a Telex sent from Appellant as Master to American President Lines, states that Appellant attempted to "overhaul" the tug and barge assembly when visibility was .3 to .4 miles and when the tug and tow flotilla was only 75 feet off the port side of the M/V PRESIDENT EISENHOWER. Exhibit 19, p. 1. Appellant also admitted that he made no check to ascertain the exact position of the tug and tow before giving the order to leave the dock and get underway. Tr. p. 335. Appellant compounded the danger by rapidly accelerating in attempting to pass the M/V ADVENTURER and her tow in the narrow ship channel. The resultant attempt to "overhaul" or overtake the M/V ADVENTURER and her tow resulted in the creation of a severe suction effect and caused the subsequent collision.

It is also significant that Appellant himself admitted that he made the ultimate decision to leave the dock and in fact instructed the pilot to depart. Tr. p. 334.

In addition to the testimony of Appellant and the Master of the M/V ADVENTURER, the testimony of the operators of nearby vessels M/V SEA DUKE and M/V JOAQUIN support the foregoing evidence of negligence. The operator of the M/V SEA DUKE, a mariner with over 40 years of commercial experience, (Tr. p. 113) testified that it was imprudent for

a vessel operator to attempt to pass or overtake another underway vessel in the narrow channel and that the M/V PRESIDENT EISENHOWER should not have left the dock until the tug and tow passed at a safe distance. Tr. pp. 111-117. These witnesses were experienced, knowledgeable vessel operators. Their testimony as to the facts of the incident comports essentially with the testimony of the Master of the M/V ADVENTURER. Tr. pp. 104-139.

The evidence clearly illustrates that Appellant acted in an imprudent manner in undocking his vessel and accelerating alongside the M/V ADVENTURER and her tow. The testimony of the vessel operators, including the admissions of Appellant support the finding of proved to the charge and specification of negligence. The finding is soundly based in fact, is not incredible, and will not be disturbed.

In challenging the credibility of the testimony of the Master of the M/V ADVENTURER, Appellant asserts that the use of telephonic testimony by the Administrative Law Judge was improper. Title 46 C.F.R. 5.535(f) provides specific authority for the Administrative Law Judge to take the testimony of a witness by telephone. This form of testimony promotes flexibility and avoids inconveniences for merchant mariners. It furthers judicial/administrative savings and efficiency. The Coast Guard regulation permitting telephonic testimony provides for an orderly, dignified, and credible procedure, ensuring proper identification of all parties and reliable cross-examination. Appeal Decision 2476 (BLAKE).

A review of the transcript in this case illustrates that sufficient order and decorum were maintained by the Administrative Law Judge during the telephonic testimony. Tr. pp. 43-46. Additionally, Appellant was given full opportunity to question the witness and exercised a thorough cross-examination through his counsel. Consequently, the telephonic testimony was proper, was in accordance with applicable regulations, and did not adversely affect the ability to determine witness credibility.

Appellant also contends that the testimony of the Master of the M/V ADVENTURER is not credible because the notes to which he referred to refresh his memory during his testimony were not made part of the record. I disagree.

The notes in question, by admission of the witness consisted of: "[a] piece of scrap paper ... with a bunch of doodling on it." Tr. p.

48. It is true that the witness did not submit his notes for insertion into the record as directed by the Administrative Law Judge. Tr. pp. 48-49. Appellant now claims prejudicial error.

Omissions from a hearing record of a substantial nature, which relate to significant matters in the proceeding may effectively preclude a meaningful review. Appeal Decision 2276 (LUDLUM). In that case, there were substantial gaps in the transcript at critical stages, relating to substantive issues. Similarly, in Appeal Decision 2168 (COOPER), and Appeal Decision 2157 (KING), omissions constituted error where they were of a nature and magnitude to adversely affect the record. In the former, there were extensive and numerous material errors in the transcript so as to make portions meaningless. In the latter, there was a complete absence of a transcript.

In the instant case, the testimony of the witness in issue is reflected legibly and accurately in the record. Appellant exercised his right to cross-examination, which is also accurately reflected in the record. While technically the scratch paper used by the witness is part of the record, its absence does not constitute an omission of a substantial nature. The Administrative Law Judge was able to make rational determinations and findings based on the testimony of the witness and the other evidence in the record without the scratch paper. Consequently, the absence of this evidence in the record does not constitute prejudicial error and does not adversely affect the ability of the Administrative Law Judge to issue findings or make determinations.

IV

Appellant asserts that he should be "exonerated" since the pilot on board the M/V PRESIDENT EISENHOWER was found not to be negligent by the Board of Pilot Commissioners, based on the same evidence that related to Appellant.

Suspension and Revocation proceedings are remedial in nature, intended to maintain standards of competence and conduct essential to promoting the safety of life and property at sea. These proceedings are governed by the Administrative Procedure Act, 5 U.S.C. 551-559, 46 U.S.C. Chapter 77, and the regulations set forth in 46 C.F.R. Part 5. Findings by other forums or tribunals are not binding on these proceedings. In particular, different procedures, standards of proof, and evidence make it incumbent on the Administrative Law Judge to make

his findings and determinations only on the evidence presented to him at the hearing. To do otherwise would be prejudicial to the respondent.

Most importantly, the Pilot Commission's findings and decisions related only to the pilot (emphasis supplied) of the M/V PRESIDENT EISENHOWER and did not in any manner address or decide the issue of negligence as it relates to Appellant who was the master of the vessel. The findings or determinations of another forum or agency are not determinative on the Administrative Law Judge in this Suspension and Revocation Hearing. See, Appeal Decision 2430 (BARNHART); Appeal Decision 2254 (YOUNG); Appeal Decision 1931 (POLLARD).

Consequently, the finding that Appellant was negligent in his actions as Master is not affected by the Pilot Commission's findings regarding the pilot.

V

Finally, Appellant asserts that the tug ADVENTURER's violations of the Inland Navigation Rules, Federal Law and practices of good seamanship required a finding that the ADVENTURER was solely responsible for the collision, which would preclude the determination by the Administrative Law Judge that Appellant was responsible for this collision. In Coast Guard Suspension and Revocation proceedings, the negligence of the individual charged is the only issue. Contributory negligence is not a defense. Appeal Decision 2175 (RIVERA); Appeal Decision 2096 (TAYLOR); Appeal Decision 2380 (HALL). To prevail, Appellant must show that the sole fault of the collision rests with the Master of the tug and tow. However, on this record, Appellant failed to establish that the Master of the M/V ADVENTURER was solely responsible for the collision.

The findings of the Administrative Law Judge need not be completely consistent with all evidence in the record as long as sufficient evidence exists to reasonably justify the finding reached. Appeal Decision 2282 (LITTLEFIELD).

In this case, although the charge of misconduct failed because of the Administrative Law Judge's failure to reconcile conflicts in testimony in the record, the remaining Charge of Negligence was clearly supported by a preponderance of the evidence. There is no showing that the Administrative Law Judge was arbitrary or capricious

in reaching his findings. See, Appeal Decision 2395 (LAMBERT). Consequently, the finding of proved to the charge and specification of negligence will stand.

The sanction issued by the Administrative Law Judge is reasonable and not excessive even though the findings of proved to the charge and specifications of misconduct are set aside.

CONCLUSION

The hearing was conducted in accordance with the requirements of applicable regulations. The findings of proved as to the charge and specification of negligence were supported by substantial evidence of a reliable and probative nature. The Administrative Law Judge erred by failing to issue credibility findings regarding conflicting testimony upon which the charge and specifications of misconduct were based. Notwithstanding the aforementioned error, the sanction ordered by the Administrative Law Judge is appropriate and not unjust for the remaining proved charge and specification of negligence

ORDER

The findings of proved as to the charge and specifications of misconduct based on violations of law are SET ASIDE. The findings of proved as to the charge and specification of negligence are AFFIRMED, and the decision and order of the Administrative Law Judge as modified, dated at Alameda, California on 22 January 1988 is AFFIRMED.

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

Signed at Washington, D.C., this 28th day of December, 1989.

3. HEARING PROCEDURE

3.44 Due Process

Telephonic testimony does not violate due process

5. EVIDENCE

5.160 Weight

Weight of testimony determined by ALJ

Will not be disturbed unless inherently incredible

5.115 Testimony

conflicting, to be weighed by ALJ

telephonic testimony permissible-does not violate due process

6. MISCONDUCT

.360 Violation of rule/regulation

as misconduct

supported by substantial evidence

7. NEGLIGENCE

7.70 Negligence

Overtaking by rapid acceleration

Overtaking tug & tow creating "suction effect"

Overtaking in narrow channel

Overtaking at too close a distance

12. ADMINISTRATIVE LAW JUDGES

12.50 Findings

Credibility Findings are required to address inconsistencies in testimony

Will be upheld unless evidence inherently incredible

CITATIONS

Appeal Decisions cited: 2390 (PURSER), 2356 (FOSTER), 2344 (KOHAJADA), 2340 (JAFFEE), 2333 (AYALA), 2302 (FRAPPIER), 2275 (ALOUISE), 1751 (GARDNER), 1285 (DONOVAN), 2156 (EDWARDS), 2116 (BAGGETT), 2472 (GARDNER), 2489 (JUSTICE), 2476 (BLAKE), 2276 (LUDLUM), 2168 (COOPER), 2157 (KING), 2430 (BARNHART), 2254 (YOUNG), 1931 (POLLARD), 2175 (RIVERA), 2096 (TAYLOR), 2380 (HALL), 2282 (LITTLEFIELD), 2395 (LAMBERT).

NTSB Cases Cited: Commandant v Purser, NTSB Order No. EM-130 (1986).None.

Federal Cases Cited: None.

Statutes & Regulations Cited: 46 USC 7702, 33 USC 2006, 2007(a), 2009, 2013(a), 5 USC 551-559, 46 USC Chapter 77, 46 CFR 5.701, 46 CFR 5.535(f), 46 CFR 5.701, 46 CFR 5.527(a), 46 CFR Part 5

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