

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S LICENSE No. 534223
Issued to: Anthony J. McALLISTER III

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2404

Anthony J. McALLISTER III

This appeal has ben taken in accordance with 46 U.S.C. 7702 and 46 CFR 5.30-1.

By order dated 17 August 1984, an Administrative Law Judge of the United States Coast Guard at New York, New York admonished Appellant upon finding proved the charge of negligence. The specification found proved alleges that Appellant, while serving as operator on board the Tug MARJORIE B. McALLISTER under the authority of the license above captioned, on or about 9 January 1983 while the tug was pushing the loaded T/B McALLISTER 80, negligently failed to navigate with due caution resulting in the grounding of the T/B McALLISTER 80 at Diamond Reef, Hudson River, New York, resulting in a gasoline spill into the Hudson River.

The hearing was held at New York, New York, on various dates between May 18, 1983 and August 15, 1984.

At the hearing Appellant was represented by professional counsel, and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence nine exhibits and the testimony of three witnesses.

In defense, Appellant introduced twenty-five exhibits and the testimony of one witness.

After the completion of the Investigating Officer's case, Appellant moved to dismiss on the grounds of failure to make out a *prima facie* case. The Administrative Law Judge denied this motion on 18 April 1984.

After the end of the hearing, the Administrative Law Judge rendered a written Decision and Order on 17 August 1984. He concluded that the charge and specification had been proved and asmonished Appellant.

The Decision and Order was served 22 August 1984. Appeal was timely filed on 17 September 1984 and perfected on 29 March 1985.

FINDINGS OF FACT

On 9 January 1983, Appellant was serving as Operator on board the M/V MARJORIE B. McALLISTER and acting under the authority of his license while the vessel was underway on the Hudson River near New Hamburg, New York.

The M/V MARJORIE B. McALLISTER is a steel hull towing vessel of 189 gross tons. At the time in question, the M/V MARJORIE B. McALLISTER was pushing the loaded T/B McALLISTER 80, a tank barge of 1654 gross tons. The cargo was gasoline. Appellant is the holder of Coast Guard license No. 534223, which authorizes him to serve as Third Mate of oceans and steam moter vessels of any gross tons.

On 9 January 1983, the M/V MARJORIE B. McALLISTER was underway heading north on the Hudson River, enrout from Gulfport, Staten Island to Rensselaer, New York. At about 2200, the T/B McALLISTER 80 went aground on Diamond Reef, resulting in seven cargo tanks being holed, and a consequent minor oil spill. Damage to the barge was estimated to be \$1,000,000.

Diamond Reef is located near New Hamburg, New York, and is

charted on NOAA Chart 12347, Hudson River, Wappinger Creek to Hudson. It is also marked by the Diamond Reef Buoy. Diamond Reef Buoy was on station on 9 January 1983.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

1. The Administrative Law Judge erred in failing to grant Appellant's Motion to Dismiss at the hearing.

2. The Administrative Law Judge's finding that a grounding occurred at Diamond Reef is not supported by substantial evidence of a reliable and probative character as required by 46 CFR 5.20-95(b).

3. Assuming evidence of a grounding existed, no presumption of negligence arose.

4. Assuming a presumption of negligence arose, Appellant rebutted the presumption.

APPEARANCE: Tabak, Steinman and Mellusi, New York, New York, by Ralph J. Mellusi, Esq.

OPINION

I

Appellant contends that the Administrative Law Judge's denial of the motion to dismiss and the finding that a grounding at Diamond Reef had occurred was predicated on evidence that was hearsay, unsubstantial, unreliable and not probative. This argument is without merit.

The evidence that a grounding occurred at Diamond Reef consisted of a Report of Marine Accident, Injury or Death (Form CG-2692) introduced into evidence by the Coast Guard Investigating Officer, and the testimony of a deckhand who was on the towing vessel at the time of the occurrence. The Form CG-2692 was

submitted to the Coast Guard after the casualty and was signed by an attorney. The form was not signed by Appellant. The deckhand testified that the barge struck a submerged object. Although he did not know the name of the object at the time, he later learned that it was Diamond Reef.

The Administrative Law Judge found that the T/B McALLISTER 80 went aground on Diamond Reef, basing his finding on the Form CG-2692, as supported by the testimony of the deckhand. Appellant argues that there is no proof that the attorney who signed the Form CG-2692 is a proper party authorized to make the report, and that the document was improperly admitted. He also argues that the Form CG-2692 and the testimony of the deckhand are hearsay.

The form is not, as Appellant argues, inadmissible as hearsay. Hearsay evidence is not inadmissible in suspension and revocation proceedings. Strict adherence to the rules of evidence observed in courts is not required. See 46 CFR 5.20-95.

(T)he evidence competent to support findings need not fulfil the prerequisites of admissibility necessary in jury trials. Hearsay evidence may be admitted and used to support an ultimate conclusion, the only *caveat* being that the findings must not be based upon hearsay alone. Appeal Decision 2183 (FAIRALL).

It is undisputed that, if the Form CG-2692 had been signed by Appellant, it would have been excluded from evidence in this hearing as an admission during a Coast Guard investigation by the person charged. 46 CFR 5.20-120 and Appeal Decision [1913](#) (GOLDING). However, the form was not signed by Appellant. In Appeal Decision [903](#) (MAHOOD), I held that a master's report of personal injury, required by regulation, was admissible in a suspension and revocation proceeding in which another crewmember was charged, citing *Sternberg Dredging Co. v. Moran Towing & Transp. Co., Inc.*, 196 F.2d 1002, 1004 (2d Cir. 1952), where the Court held that a report filed pursuant to a federal regulation was an official government record and as such admissible in evidence. Appellant does not argue, nor has he introduced evidence to show, that the information contained on the Form CG-2692 is not trustworthy. I find that the form was properly admitted by the

Administrative Law Judge.

Corroborating evidence of the grounding is provided by the testimony of the deckhand, who testified, based upon personal observation, that the barge struck a submerged object "just north of the Poughkeepsie Bridge" (TR-23, 24). He also testified that, at the time of the grounding, he observed a buoy "further than a barge length...over three hundred foot" (TR-31) off his starboard quarter which he later learned was the Diamond Reef Buoy. Appellant urges strenuously that the deckhand's testimony was hearsay, based on his assertion that the deckhand "did not know where they were on the river at that time." The deckhand did not know the name of the submerged object at the time of the grounding. However, the testimony set out above demonstrates the error of Appellant's contention. The deckhand knew the general location of the vessel. I find that the record contains substantial evidence of a reliable and probative character to support the finding of the Administrative Law Judge that the T/B McALLISTER 80 went aground on Diamond Reef.

Appellant also argues that the Form CG-2692 is inadmissible because there is no evidence that the attorney who signed the form was a proper party to make the report. I disagree.

Appellant does not contend that the report is inaccurate, or that the attorney who signed the form was not authorized to make the report, but rather that the Coast Guard failed to prove that the attorney was so authorized. However, Coast Guard regulations (46 CFR 4.05-1) permit agents to report marine casualties. The Administrative Law Judge determined that the Form CG-2692 was filed pursuant to Coast Guard regulations. I find that the record contains sufficient evidence to support this determination.

II

Appellant next argues that no presumption of negligence arose since Diamond Reef is not well charted. I disagree.

A presumption of negligence arises when a vessel grounds on a well known and well charted object. Appeal Decisions [2113](#) (HINDS) AND [2382](#) (NILSEN). At the hearing, Appellant introduced various Coast Guard and Corps of Engineers documents, vigorously cross-examined two Coast Guard witnesses and introduced

the testimony of an expert witness, then argued that Diamond Reef is not well charted. The Administrative Law Judge, after considering the testimony, concluded that Diamond Reef is well known and its position is well charted.

It is the function of the Administrative Law Judge to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. Appeal Decision [2386](#) (LOUVIERE). Under the circumstances, the Administrative Law Judge's evaluation of the circumstances of the case is not inherently unreasonable, and his findings will not be set aside on appeal. See Appeal Decisions [2367](#) (SPENCER), [2333](#) (AYALA) and [2302](#) (FRAPPIER).

III

Appellant next argues that, assuming a presumption of negligence arose, sufficient evidence was offered to rebut the presumption, and that the Administrative Law Judge erred in applying the improper standard to assess the rebuttal evidence. I disagree.

Appellant urges that the decision of the National Transportation Safety Board in *Commandant v. Jahn*, NTSB Order EM-88 (1981), is the standard, and that the presumption has been rebutted by a showing that the grounding could have resulted from factors other than Appellant's negligence. I do not believe that this decision helps Appellant. In *Jahn*, there were factors present which could well have caused the grounding of the vessel entirely independently of any negligence on the pilot's part. In contrast are cases where, as here, the other potential causes of the casualty are factors for which the Administrative Law Judge could reasonably find that a prudent pilot could compensate. In such cases, the Administrative Law Judge is not required to find that the presumption is rebutted. See *United States v. Woods*, 681 F.2d 988 (5th Cir. 1982) and *Commandant v. Pitts*, NTSB Order EM-98 (1983), both decided since *Jahn*.

Appellant argues that, through exhibits and expert testimony, he demonstrated that the average prudent mariner could, without being negligent, be misled or deceived at Diamond Reef, and that the Administrative Law Judge erred by requiring Appellant to show

that he himself was personally deceived and misled. I disagree.

Once the presumption of negligence arises, rebuttal requires demonstration that the vessel operator did all that reasonable care required. *Woods, supra*. The Administrative Law Judge properly found that a rebuttable presumption of negligence arose. In stating that there was no evidence that Appellant had been deceived or misled, the Administrative Law Judge was simply pointing out that the presumption had not been rebutted.

Finally, Appellant argues that the grounding was caused by the fault of the stationary object or factors which could not have been foreseen or guarded against by the ordinary exertion of human skill or prudence. This argument is without merit.

I have consistently refused to reweigh conflicting evidence if the findings of the Administrative Law Judge can reasonably be supported. 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 Decisions [2356](#) (FOSTER), [2344](#) (KOHAJDA), [2340](#) (JAFFE), [2333](#) (AYALA) and [2302](#) (FRAPPIER).

It is well established that the opportunity of the Administrative Law Judge to observe the demeanor of the witnesses affords him a significant advantage when it becomes necessary to choose between conflicting versions of an event. Appeal Decision [2353](#) (EDGEELL). See also Appeal Decision [2159](#) (MILICI).

After hearing and weighing the evidence, the Administrative Law Judge found that the egrounding was the result of the failure of Appellant to navigate with due caution. I find this determination to be reasonable, well supported by the evidence, and I will not disturb it on appeal.

CONCLUSION

There is substantial evidence the reliable and probative character to support the findings of hte Administrative Law Judge. The hearing was conducted in accordance with the requirements of applicable regulations.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 17 August 1984 is AFFIRMED.

B. L. STABILE

VICE ADMIRAL, U. S. COAST GUARD

VICE COMMANDANT

Signed at Washington, D. C. this 9th day of September, 1985.

***** END OF DECISION NO. 2404 *****

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