

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 59554
Issued to: Mark DOUGHERTY

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATES COAST GUARD

2418

Mark DOUGHERTY

This appeal has been taken in accordance with 46 U.S.C. 7702 and former 46 CFR 5.30-1 (currently 46 CFR Part 5, Subpart J).

By order dated 24 April 1985, an Administrative Law Judge of the United States Coast Guard at St. Louis, Missouri, suspended Appellant's license for three months remitted on twelve months' probation upon finding proved the charge of negligence. The specification found proved alleges that Appellant, while serving as Operator board the M/V JAMES E. NIVIN, under the authority of the captioned document, on or about 8 February 1984, failed to operate his vessel so as to avoid alliding with the mooring cell on the Kentucky side of the Portland Canal in Louisville, Kentucky.

The hearing was held at Louisville, Kentucky, on 25 April 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 eight exhibits.

In defense, Appellant testified on his own behalf, introduced the testimony of two additional witnesses, and introduced in evidence four exhibits.

After the hearing the Administrative Law Judge rendered a decision in which she concluded that the charge and specification had been proved. The Administrative Law Judge then issued a written order suspending Appellant's license for a period of three months, remitted on twelve months' probation.

The complete Decision and Order was served on 2 May 1985. Appeal was timely filed on 27 June 1985 and perfected on 8 August 1985.

FINDINGS OF FACT

At all relevant times on 8 February 1984, Appellant was serving as Operator aboard the M/V JAMES E. NIVIN, a 131 foot uninspected towing vessel generating 4200 horsepower, under the authority of his license which authorizes him to serve as Operator of Uninspected Towing Vessels. The NIVIN was upbound on the Ohio River.

At approximately 1315, the NIVIN departed the McAlpine Locks, Miles 606.8, Ohio River, and entered the Louisville and Portland Canal. Upon his departure from the lock, Appellant was advised by the lockmaster to use caution because the U.S. Army Corps of Engineers vessel, the M/V PATOKA, was repairing a mooring cell above the lock on the left descending bank of the canal. The lockmaster further advised Appellant that the towing vessel M/V CITY OF LOUISVILLE with its tow was downbound, entering the canal.

The NIVIN and its tow, consisting of 15 loaded barges, was approximately 1130 feet long and 105 feet wide. The LOUISVILLE flotilla was approximately 1000 feet long and 105 feet wide. The PATOKA was 200 feet long and 44 feet wide.

Appellant contacted the LOUISVILLE and agreed to a starboard to starboard passing. At this point, neither the LOUISVILLE nor the PATOKA were in Appellant's sight due to a bend in the canal

above the McAlpine Lock. Appellant did not post a separate lookout on the tow.

The NIVIN and the LOUISVILLE passed starboard-to-starboard in the vicinity of the PATOKA, with a separation of approximately 75 feet. At this point, the canal is approximately 500 feet wide. After passing the LOUISVILLE, the head of the NIVIN's tow was approximately 2800 feet below the Conrail Bridge, and approximately 3440 feet below the No. 6 mooring cell, which is located above the bridge, near the left descending bank. Appellant continued upbound at a speed of approximately 2 mph and steered the head of the tow to starboard, toward the middle of the canal, for his approach to the Conrail Bridge.

The flotilla responded slowly to Appellant's helm action, and as Appellant approached the Conrail Bridge, the tow was on a direct heading towards the No. 6 mooring cell. As the tow passed under the bridge, Appellant attempted to "twist" his tow into proper position for clearing the cell. The tow did not respond, and Appellant backed down. However, the starboard lead barge of the NIVIN's tow struck the No. 6 cell, resulting in the starboard string of barges being broken away from the tow.

APPEARANCE: John K. Gordinier, Esq., Pedley, Ross, Zielke and Gordinier, 1705 Meidinger Tower, Louisville, Kentucky 40202.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Appellant contends:

1. The application of the presumption of negligence that arises when a moving vessel strikes a fixed object is inappropriate in this case.

2. The Administrative Law Judge erred in applying an inappropriate measure of persuasion necessary to rebut the presumption of negligence.

3. The Administrative Law Judge erred in concluding that Appellant failed to rebut the presumption of negligence.

4. The Administrative Law Judge went outside the record and made conclusions unsupported by proof and testimony, and based upon specification and uninformed opinion.

5. The Administrative Law Judge erred in finding the charge proved by specific acts of negligence not contained in the specification and not presented by the government in its case.

6. The Coast Guard investigating officer failed to conduct the investigation of this incident in accordance with applicable regulations.

OPINION

I

The gravamen of this appeal is a challenge to the presumption of negligence which arises when a moving vessel allides with a fixed object. Appellant first contends that such a presumption is unapplicable to suspension and revocation proceedings. This argument is without merit.

It is well settled that a presumption of negligence may be invoked in these proceedings. Appeal Decision [2373 \(OLDOW\)](#), *affd sub nom. Commandant v. Oldow*, NTSB Order EM-121 (1985); Appeal Decision [2368 \(MADJIWITA\)](#), *affd sub nom. Commandant v. Madjiwita*, NTSB Order EM-120 (1885); Appeal Decision [2272 \(PITTS\)](#), *modified sub nom. Commandant v. Pitts*, NTSB Order EM-98 (1983); Appeal Decision [2174 \(TINGLEY\)](#), *affd sub nom. Commandant v. TINGLEY*, NTSB Order EM-86 (1981); Appeal Decision [2173 \(PIERCE\)](#), *affd sub nom. Commandant v. Pierce*, NTSB Order)7-81 (1980); *Woods v. United States*, 681 F.2d 989 (5th Cir. 1982). At Judge Rubin, writing for the fifth circuit in *Woods*, stated:

When a moving vessel collides with a fixed object there is a presumption that the moving vessel is at fault, and

this presumption suffices to make out a *prima facie* case of negligence against the vessel. *Brown and Root Marine Operators, Inc. v. Zapata Off-Shore Co.*, 377 F. 2d 724, 726 (5th Cir. 1967). The burden of disproof of fault by the moving vessel requires demonstration that its operator did all the reasonable are required. *Id.* The presumption of negligence applies to the operator as well as to the vessel. It works against all parties participating in the management of the vessel at the time of contact. (Citations omitted.) *Id* at 990.

As noted by the Administrative Law Judge, a *prima facie* case of negligence was established when it was shown that Appellant struck the cell with the bow of his tow.

II

Appellant next contends that, assuming the presumption of negligence applies, the Administrative Law Judge erred in applying an inappropriate measure of persuasion necessary to rebut the presumption, and in concluding that Appellant failed to rebut the presumption of negligence. I disagree.

Appellant argues that, as he left the lock chamber, "he was required to position his vessel and tow on the right descending bank of the canal; that this was occasioned by the presence of the . . .M/V PATOKA, on the left descending bank, and the presence of the M/V CITY OF LOUISVILLE and its tow downbound in the canal." (Brief at 11). Appellant contends that these factors, coupled with the shallow water on the right descending bank, rebut the presumption as a matter of law.

As discussed *supra*, a presumption of negligence arose when Appellant's tow allided with the mooring cell. The Administrative Law Judge correctly stated that a *prima facie* case, once established, requires Respondent to produce evidence to rebut it. Rebuttal requires a showing that the moving vessel was without fault or that the incident was occasioned by the fault of a third party or the result of inevitable accident or act of God, and that Appellant could have taken to reasonable action to have prevented

it. *Boudin v. J. Ray McDermott & Co.*, 281 F. 2d 81 (5th Cir. 1960); *Dibble v. United States*, 295 F. Supp. 669 (N.D. Ill. 1968; Appeal Decision [2284](#) (BRAHN). See also Appeal Decision [2380](#) (HALL). Appellant appears to be arguing that if he was not properly aligned to pass under the bridge and avoid the cell it was not his fault but rather an inevitable accident (shallow water) or the fault of others (LOUISVILLE and/or PATOKA).

Although Appellant offered in evidence the results of soundings taken in the canal on 15 June 1983, some eight months before this incident, the Administrative Law Judge made no finding concerning the depth of water in the canal. However, even assuming the water depths were as urged by Appellant, it is irrelevant. After he passed both vessels, Appellant elected to proceed on upriver for a distance of approximately one-half mile (which would have taken approximately fifteen minutes at 2 mph) during which time neither shallow water nor other vessels prevented him from stopping his tow if he was not properly aligned for the bridge. Despite Appellant's characterization of this distance as "extremely tight quarters," (Brief at 16) he testified that he could have held up "right there where we met." (T-97).

Accordingly, Appellant has not demonstrated that he could have taken no reasonable action to have prevented the allision, and the presumption remains unrebutted.

III

Appellant next contends that the Administrative Law Judge went outside the record and made unsupported conclusions based upon speculation and uninformed opinion, and erred in finding the charge proved by specific acts of negligence not contained in the specification and not presented by the government in its case. This argument is without merit.

Administrative Law Judge suggested other actions Appellant could have taken, but did not, including communicating with the LOUISVILLE if he felt that the two vessels could not safely meet in the area of the PATOKA (Decision and Order at 9), holding up on the

right descending bank until the downbound vessel had passed (Decision and Order at 9), and "stopping his vessel and flanking to bring out his stern so he could then move his bow out to position the tow to go through the bridge safely." (Decision and Order at 10).

As noted above, the finding of negligence in this case was based upon an unrebutted presumption of negligence which arose when the NIVIN's tow struck the cell. The comments by the Administrative Law Judge, whether or not supported on the record, are not essential to the finding of negligence, i.e. whether the presumption was rebutted. Appeal Decision [2396](#) (MCDOWELL). See also Appeal Decisions [2402](#) (POPE), [2302](#) (FRAPPIER) and [2177](#) (HOMER).

IV

Appellant contends that the Administrative Law Judge erred in refusing to hear or consider evidence of alleged misconduct on the part of the Coast Guard investigating officer who investigated this casualty and who subsequently preferred the charge and presented the Coast Guard's case before the Administrative Law Judge. Appellant alleges that the investigating officer failed to abide by the rules and regulations pertaining to the investigation of marine casualties. I find no error here.

Evidence, if it exists, of irregularities in the Coast Guard's investigation of this casualty under 46 CFR Part 4 is no bar to a proceeding under Part 5, and is irrelevant to any issue material to the resolution of this appeal. Appellant was certainly accorded his full rights in the proceeding before the Administrative Law Judge. Suspension and revocation proceedings are procedurally distinct from pre-hearing investigations. Appeal Decision [2216](#) (SORENSEN).

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 order of the Administrative Law Judge dated 24 April 1982, at St. Louis, Missouri, is AFFIRMED.

B. L. STABILE
Vice Admiral, U. S. COAST GUARD
VICE COMMANDANT

Signed at Washington, D.C. this *11th* day of *February*, 1986.

***** END OF DECISION NO. 2418 *****

[Top](#)