SERVED: January 31, 1994

NTSB Order No. EA-4050

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 22nd day of December, 1993

DAVID R. HINSON,
Administrator,
Federal Aviation Administration,

Complainant,

v.

RICHARD WAYNE KREMER,

Respondent.

Docket SE-12814

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Patrick G. Geraghty at the conclusion of a three-day hearing held in this case on March 10, 11, and 12, 1993.[1] In that decision, the law judge affirmed the

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

Administrator's emergency order[2] revoking his commercial pilot certificate based on his alleged operation of a helicopter with a blood alcohol level of, or exceeding, .04 percent by weight, in violation of 14 C.F.R. 91.13(a), 91.17(a)(2), and 91.17(a) (4).[3]

On appeal, respondent argues that the law judge should have granted his motion to suppress the results of a blood test taken at Vermilion County Hospital because, in his view, the test was taken in violation of 14 C.F.R. 91.17(c)(1), Indiana law, and the Fourth Amendment to the Constitution. He also challenges the law judge's denial of his motion to exclude results from a second blood test taken at Methodist Hospital, arguing that the test is inadmissible under section 91.17(c) (2) because it was taken more than four hours after his operation of the helicopter. Finally, respondent argues that the law judge improperly excluded evidence

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[2] Respondent waived the applicability of the Board's rules for emergency proceedings.

[3] Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Section 91.17(a) provides, in pertinent part:

§ 91.17 Alcohol or drugs.

(a) No person may act or attempt to act as a crewmember of a civil aircraft --

* * *

(2) While under the influence of alcohol;

* * *

(4) While having .04 percent by weight or more alcohol in the blood.

proffered by respondent relating to his consumption of alcohol after the crash.

As further discussed below, we reject all of respondent's challenges, and affirm the law judge's initial decision.

Facts of the case.

The record reveals that on Friday, August 21, 1992, respondent piloted his helicopter on a half-hour flight in the vicinity of Marshall, Indiana, which ended at approximately 5:15 p.m. when the helicopter crashed in a hayfield. The helicopter burned, and respondent sustained a broken leg and burns. His passenger was not hurt. An emergency medical technician (EMT) who arrived at the scene approximately a half hour after the crash testified that she smelled a strong odor of alcohol on respondent while she was attempting to administer first aid to him. (Tr. 70-1, 80, 104.) Although respondent indicated his strong desire to be taken to Methodist Hospital in Indianapolis, he was instead taken to the closer Vermilion County Hospital because the EMT determined that respondent was in potential medical danger and needed to be stabilized as quickly as possible. (Tr. 73, 105-6.) (Driving from the accident site to Methodist Hospital would have taken approximately one and a half to two hours, whereas the trip to Vermilion Hospital took only 24 minutes. (Tr. 78, 100.))

Upon arrival at the Vermilion Hospital emergency room, respondent was seen by Dr. Lori Fuqua, who ordered blood to be drawn for a variety of diagnostic tests, including a

determination of respondent's blood alcohol level. (Tr. 223.) Dr. Fuqua acknowledged that respondent did not consent to treatment, but explained that she treated him anyway because in her judgment it was medically necessary. (Tr. 147, 148-9, 168, 172.) Although Dr. Fuqua testified that she routinely orders blood tests for almost all emergency room patients (Tr. 226), she also indicated that her decision to order a blood alcohol test in this case was influenced by her observation of what she considered abnormal behavior: respondent's repetitive and slurred speech, agitation, inability to concentrate, belligerence, and shifting moods (Tr. 170, 241-2) . The test of respondent's blood -- which was drawn at 6:35 p.m. (approximately 1 hour and 20 minutes after the crash) -- showed a blood serum alcohol level of .216 percent.[4] (Exhibit A-4, Exhibit R-5, Tr. 489-90.) Dr. Fuqua diagnosed respondent as suffering from, among other things, acute alcohol intoxication. (Exhibit A-3 p. 5, Tr. 225.)

Indiana State Trooper Lynn Manley arrived at the crash scene at 6:15 p.m. After learning that respondent had been taken to Vermilion Hospital, Trooper Manley went there and interviewed respondent at approximately 7:20 (slightly more than two hours after the crash) . Although Trooper Manley testified that he did

[4] The law judge accepted, as do we, respondent's expert's testimony that a serum blood test (as this was) will result in a 20 to 25 percent higher blood alcohol concentration than a whole blood test. (Tr 541-2.) Accordingly, he recognized that the .216 percent alcohol level in the serum actually represented an alcohol level of .173 to .161 percent in whole blood. (Tr.551-2.) He noted, however, that in either case respondent's blood alcohol level exceeded the legally permissible limit of .04 percent. (Tr. 552.)

not smell alcohol on respondent, he stated that respondent's unusual behavior (e.g. slurred speech, periods of crying) caused him to believe respondent was "under the influence of something." (Tr. 177-8.)[5] After ascertaining that respondent had not been given any medication which would cause such behavior, he decided that he had probable cause to order a blood alcohol test. (Tr. 181-2, 186-7.) He was about to order such a test when he was shown the results of the test that had already been done. (Tr. 181-2.) Trooper Manley then returned to the accident scene and verbally reported the results of the blood alcohol test to the FAA Inspector at the scene. (Tr. 191, 327.)[6]

After spending approximately two hours at Vermilion Hospital, respondent was transferred to Methodist Hospital in Indianapolis. There, respondent's blood was drawn at 12:10 a.m. (approximately seven hours after the crash) and again tested for alcohol. (Tr. 486.) That test, which used whole blood as opposed to serum, revealed a blood alcohol level of .091 percent. (Exhibit A-7, Tr. 487.)

1. Admissibility of Vermilion Hospital test results.

Section 91.17(c) requirements. Respondent argues that the Vermilion test results were obtained in violation of section

[5] Trooper Manley testified that he had met respondent and had spoken with him before this incident, and he knew that this behavior was not characteristic of respondent. (Tr. 178.)

[6] Hard copies of the Vermilion Hospital blood test results, which were obtained on Monday, August 24, were subsequently also provided to the FAA.

91.17(c) (1) in that no law enforcement officer asked respondent to submit to the test, and section 91.17(c) (2) in that the Administrator never requested that respondent release the results.[7] Respondent has misconstrued that regulation. Respondent's obligation under section 91.17(c) (1) to submit to a test upon request of a law enforcement officer when certain conditions are met does not preclude the Administrator from obtaining and relying on test results which were not conducted pursuant to that section. We addressed this point in Administrator v. Boyle, NTSB Order No. EA-3236 at 6 (1990), aff'd. Boyle v. NTSB, No. 91-70282 (9th Cir. February 5, 1992):

> The regulations, however, do not preclude the Administrator from using test results that were not taken pursuant to [the predecessor to section 91.17(c)(1)]. On the contrary, [the predecessor to section 91.17(c) (2)] entitles the

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[7] Section 91.17(c) provides:

> (c) A crewmember shall do the following:
> (1) On request of a law enforcement officer, submit to a test to indicate the percentage by weight of alcohol in the blood, when --
> (i) The law enforcement officer is authorized under State or local law to conduct the test or to have the test conducted; and
> (ii) The law enforcement officer is requesting submission to the test to investigate a suspected violation of State or local law governing the same or substantially similar conduct prohibited by paragraph (a) (l), (a) (2), or (a) (4) of this section.
> (2) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(l), (a)(2), or (a) (4) of this section, that person shall, upon request by the Administrator, furnish the Administrator, or authorize any clinic, hospital, doctor or other person to release to the Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates percentage by weight of alcohol in the blood.

> Administrator to the results of "each test" taken within a prescribed period whenever the Administrator has a reasonable basis to believe that there may have been a violation of paragraphs (a)(l), (a)(2), or (a)(4). Thus, for example, a pilot who Provided a toxicological specimen for alcohol testing at the request of his employer could be obligated to provide the results to the FAA.

Moreover, the requirement in section 91.17(c)(2) that respondent provide to the Administrator, upon his request, results of certain blood tests does not mean that the Administrator is only permitted to use those test results if they are obtained directly from respondent pursuant to such a request. To the contrary, the preamble to the regulatory amendment which added this requirement indicates that the requirement was intended to make it easier, not more difficult, for the Administrator to obtain relevant test results.[8] The fact that the Administrator obtained the test results in this case from the Indiana State Police rather than directly from respondent in no way violates section 91.17(c)(2).

Lack of consent. Respondent maintains that, because he did not consent to having his blood taken at Vermilion Hospital, the test results were obtained in violation of Indiana law, the Fourth Amendment to the U.S. Constitution, and his Constitutional right to privacy, and accordingly should have been excluded as illegally obtained evidence. We disagree. Respondent's lack of

[8] "This amendment should allow the Administrator to obtain more easily the results of hospital or medical tests performed on a crewmember following an accident or incident." 50 Fed. Reg. 15376, 15377 (4/17/85).

consent to the blood test does not require exclusion of the results. As we said in Boyle, where a similar argument was made:

> Assuming arguendo that respondent's (consent was not voluntary, we see no reason why the Administrator, having played no part in initiating the request and having no role in respondent's interpretation of the FARs [which led him to believe, essentially, that his certificate would be revoked if he did not agree to the blood test], should be deprived of the use of the hospital record for whatever evidentiary weight it should be accorded. The Supreme Court has held that evidence obtained by a state criminal law enforcement agent in violation of the Fourth Amendment can be used by the Federal Government in a civil proceeding. [footnote citing United States v. Janis, 428 U.S. 433 (1976) .] Thus , if the State of Hawaii violated respondent's rights, an issue we need not and do not decide, the Administrator should not be foreclosed from using the test results for purposes of enforcing civil laws and regulations, particularly where aviation safety is at stake.

Boyle at 7. See also Administrator v. Rotunno, 5 NTSB 1, 3 (1985) (even if evidence was unconstitutionally seized by a state officer, such evidence is admissible in a civil proceeding instituted by the Federal Government) .

The FAA was not involved in any way in the decision to take respondent’s blood or to run the blood test. Accordingly, even if respondent’s rights were violated by the non-consensual blood test (an issue which we need not address), it would not affect the Administrator's right to use the test results.[9]

Reliability of test results. Respondent alleges that the chain of custody of the blood sample was faulty and asserts that,

[9] Accordingly, we need not resolve the dispute over whether Trooper Manley had probable cause to obtain the test results, thereby removing the limitation apparently imposed by Indiana law upon disclosure of blood test results to persons other than a prosecuting attorney. Ind. Code § 9-30-6-6. We note, however, that it is not our role to enforce state law.

because some witnesses did not notice any signs of his being intoxicated, the test results must be inaccurate. However, we are unable to perceive in this record any basis for questioning the reliability of the test results. There was no evidence of any impropriety in the procedures used in drawing and testing respondent's blood.[10] The testimony of the phlebotomist who drew respondent's blood and the laboratory technologist who ran the test indicated that the testing machinery was working properly and had received all the required tests and calibrations, and that respondent's was the only blood being tested at the time and thus could not have been confused with anyone else's. (Tr. 278, 281-2, 287, 253, 257.) See Gallagher v. NTSB, 953 F.2d 1214 (10th Cir. 1992) (deficiency in shipping and packing of blood sample taken for alcohol testing did not render test results inadmissible -- to be admissible in administrative proceeding evidence need only be shown to be what it purports to be) . Accordingly, we uphold the law judge's findings that the test results were admissible and reliable.

2. Admissibility of Methodist Hospital test results.

Respondent argues that the Methodist Hospital test results (which showed a blood alcohol level of .091 percent seven hours

[10] Respondent points to the fact that the consent form for the blood alcohol test (which he did not sign) containing the time of the blood draw and chain of custody information was not filled out until after his blood was drawn. However (except for his contention that the blood was not drawn for medical reasons as Dr. Fuqua's notation indicates), he does not allege that the information shown on this form is incorrect.

after the crash) should not have been admitted because they were taken outside of the four-hour time period specified in section 91.17(c) (2).[11] However, the Administrator argues that the four-hour period in that section was simply intended to establish a limit to the requirement that airmen release test results to FAA investigators during the course of an enforcement investigation, and not to limit the FAA's use of test results in a subsequent Board proceeding.[12] (The Administrator notes that the Methodist test results were obtained by subpoena after respondent appealed the order of revocation to the Board, thereby placing in issue his blood alcohol level.)

We find the Administrator's interpretation of section 91.17(c) (2) to be consistent with the regulatory language and otherwise reasonable. See Administrator v. Miller, NTSB Order No. EA-3581 (1992). As discussed above regarding section 91.17(C)(1), this section was intended to facilitate, not hinder, the Administrator's efforts to obtain relevant test results. Moreover, this mandatory disclosure requirement was never invoked in this case with regard to the Methodist Hospital test results, since the results were neither sought nor obtained from respondent, but were obtained by subpoena from the hospital. Accordingly, we reject respondent's claim that the rule should be

[11] The text of section 91.17(c) (2) is set forth in footnote 7.

[12] The Administrator cites supporting language from the preamble to the regulatory amendment. 50 Fed. Reg. 15377 (4/17/85).

read so as to preclude our consideration of the Methodist Hospital test results.

Respondent does not challenge the accuracy of this blood test. However, he argues that it is not indicative of his blood alcohol level seven hours earlier when he was piloting the helicopter. While we agree that the greater the amount of time which has elapsed between the operation of an aircraft and a blood test, the less useful the test may be, that is not to say that a test taken more than four hours later can never be relevant. Indeed, we find the Methodist Hospital test results in this case to be useful in corroborating the earlier test results from Vermilion Hospital. In sum, respondent has shown no error in the law judge's admission and consideration of the Methodist Hospital test results.

3. Exclusion of corroborative evidence regarding respondent's alleged post-accident consumption of alcohol.

On the third day of this three-day hearing, respondent stated during the course of his testimony that someone at the crash site had handed him a "pop bottle" which, he realized only after he drank from it, contained some sort of alcohol mixture. (Tr. 387-8.) Subsequently, respondent's wife testified that, when she was alone with him at Vermilion Hospital (after the blood test had been given), she gave him two small sample bottles of whiskey. Counsel for the Administrator made no response to respondent's testimony about post-crash consumption of alcohol at the time it was given. However, shortly after respondent's wife

began to testify, the law judge interrupted the hearing and held an off-record conference with both counsel. (Tr. 408.)

When the hearing reconvened, the law judge explained that he would allow no further testimony regarding respondent's alleged post-crash consumption of alcohol because he viewed it as an unpleaded affirmative defense,[13] which was precluded by section 821.31(c) of our rules of practice.[14] (Tr. 409-10.) The law judge then stated that, although he had allowed respondent's testimony (because, in his view, a respondent "should have every opportunity to say whatever he or she wants to say in any particular case" (Tr. 409)), he would nonetheless have disregarded the testimony regarding post-crash consumption of alcohol (Tr. 413) .

Respondent's counsel made an offer of proof, stating that, if permitted, respondent's wife would have given further testimony regarding additional alcohol she gave respondent while he was in the hospital, and that another witness (Steve Wood)

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[13] There is no indication in the record that the Administrator was aware that respondent was going to present evidence regarding post-accident consumption of alcohol.

[14] Section 821.31(c) provides, in pertinent part:

§ 821.31 Complaint procedure.

(c) Answer to complaint.

* * *

Respondent's answer shall also include any affirmative defense that respondent intends to raise at the hearing. A respondent may amend his answer to include any affirmative defense in accordance with the requirements of § 821.12(a). In the discretion of the law judge, any affirmative defense not so pleaded may be deemed waived.

would have been called to testify as to a bottle he found at the crash scene the next day which contained something smelling like alcohol. (Tr. 414-5.) During the testimony of respondent's expert witness, Dr. Walter Frajola, respondent's counsel further offered that, if permitted, Dr. Frajola would have testified that respondent's ingestion of alcohol at the crash scene and in the hospital would have affected subsequent blood alcohol tests, and could account in part for some of the test results in this case. (Tr. 468.)[15]

Although we agree with respondent that his alleged post-crash consumption of alcohol was not an affirmative defense which he was required to include in his answer,[16] we do not agree that it was reversible error for the law judge to exclude corroborative testimony on that point.

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[15] On appeal, respondent has somewhat expanded this offer of proof by attaching to his appeal brief (in addition to affidavits detailing the proffered testimony of himself, his wife, and Steve Wood), an affidavit signed by Dean Bonebrake stating that he gave respondent a pop bottle containing whiskey or rum at the crash scene, and that he saw respondent take "several swigs from it." Respondent offers no explanation of why he failed to proffer Mr. Bonebrake's testimony at the hearing.

In light of our disposition of this case, the Administrator's motion to strike these affidavits is granted.

[16] An affirmative defense is defined as "new matter which, assuming the complaint to be true, constitutes a defense to it." Blacks Law Dictionary 82 (4th ed. 1951). See, for example, those listed in Rule 8(c) of the Federal Rules Civil Procedure. Respondent's position, however, does not assume the allegations in the complaint to be true, but rather purports to be a denial of the Administrator's allegation that, at the time of his helicopter flight, he had a blood alcohol level of .04 percent or more.

In making his initial decision, the law judge had before him respondent's and his wife's testimony regarding his alleged post-crash consumption of alcohol, and the offers of proof regarding allegedly corroborative evidence from Mr. Wood and expert testimony from Dr. Frajola. His ultimate affirmance of the order of revocation against the respondent could only mean that he found respondent's and his wife's testimony to be incredible, and that he would have similarly disbelieved any corroborative evidence. Such credibility determinations are within the exclusive province of a law judge. Administrator v. Smith, 5 NTSB 1563 (1986).

While it would clearly have been preferable for the law judge to have listened to the proffered testimony and then made an explicit credibility finding, we think a remand of this case for the receipt of that evidence would serve no meaningful purpose. It is clear from the record that the law judge did not credit respondent's eleventh-hour explanation of the blood test

results, [17] and that the admission of corroborative evidence would not have changed that determination.[18]

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The law judge's initial decision and the Administrator's order of revocation are affirmed.

COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order. Chairman VOGT did not concur and submitted the following dissenting statement.

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[17] We note that there was no mention of respondent's alleged post-crash consumption of alcohol in his notice of appeal from the emergency order, his lengthy answer to the Administrator's complaint, or in his opening argument. Nor, apparently, did the extensive pre-hearing discovery process (which focused almost exclusively on the admissibility and reliability of the two hospital blood test results) provide the Administrator with any clue as to the existence of this potentially dispositive defense. (See Tr. 414-5 and Administrator's Motion to Strike, dated June 1, 1993, indicating that neither Mr. Wood nor Mr. Bonebrake were included on respondent's witness list for the hearing.)

[18] We note that Mr. Wood's proffered testimony (that the day after the crash he found a bottle containing what might have been alcohol at what had been a well-attended crash scene) provides scant support for respondent's position, and that respondent's wife's testimony apparently went only to alcohol she allegedly gave respondent after the Vermilion test results had been run.

Dissent by Chairman Vogt in Administrator v. Kremer;
Notation 6120

I dissent from the denial of the respondent's appeal. I would find that the law judge erred in disregarding testimony that respondent consumed alcohol after the crash.

The majority is wrong in speculating that the law judge considered testimony that the respondent had consumed alcohol after the crash. Twice during the hearing he stated that he would not listen to any further testimony on the subject and/or would disregard that which he had already heard (TR 409, 413). He then did exactly what he said he would do. Nowhere in his lengthy and thorough decision did the law judge consider any evidence of post-crash alcohol consumption or respondent's offer of proof on the issue. There is therefore no basis for the majority's conjecture that he considered but did not credit the defense of post-crash alcohol consumption. I agree that the law judge erred in not admitting additional evidence of post-crash alcohol consumption on the ground that it constituted an unassorted affirmative defense. Thus, the record upon which the law judge relied is devoid of evidence relevant to a defense which respondent was entitled to make. The case should be remanded.