SERVED: January 17, 2008

NTSB Order No. EA-5352

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 16th day of January, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. DAVID KEITH MARTZ, Respondent.	Docket SE-17706

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge Patrick G. Geraghty, issued February 28, 2007.[1] The law judge affirmed, in part, the Administrator's complaint, which had ordered a suspension of respondent's commercial pilot certificate, based on alleged

[1] A copy of the initial decision, an excerpt from the hearing transcript, is attached.

violations of 14 C.F.R. §§ 91.7(a),[2] 91.13(a),[3] and 91.405(a).[4] The law judge reduced the Administrator's sanction of 270 days to 230 days, based on a finding that respondent had presented mitigating circumstances that indicated that he made an effort to operate the aircraft in a safe manner. We deny respondent's appeal.

The Administrator's order, dated March 27, 2006, functions as the complaint against respondent, and alleges that respondent operated a Bell 206B helicopter as pilot-in-command (PIC) on two flights that occurred on June 5, 2005, after the aircraft had sustained damage to its vertical stabilizer and tail rotor blades. According to the complaint, the first flight originated in Mexico and terminated at San Diego, California, and the second flight originated and terminated in San Diego. The complaint alleges that respondent operated the aircraft without correcting the deficiencies to either the vertical stabilizer or tail rotor blades, and that such operation was careless and reckless. Based on these alleged facts, the Administrator

[2] Section 91.7(a) prohibits operation of a civil aircraft unless it is in an airworthy condition.

[3] Section 91.13(a) prohibits operation of an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[4] Section 91.405(a) requires each owner or operator of an aircraft to have the aircraft inspected and have discrepancies repaired in accordance with part 43 of the Federal Aviation Regulations.

charged respondent with violations of §§ 91.7(a), 91.13(a), and 91.405(a).

The law judge held an evidentiary hearing on February 28, 2007. The Administrator presented the testimony of Graig Butler, who is a law enforcement officer for Customs and Border Protection (CBP), and who testified that he received a call from another pilot who stated that respondent's aircraft appeared unairworthy. Tr. at 15. Officer Butler observed the aircraft when respondent arrived at Brown Field, which was where Officer Butler was stationed for his CBP duties, and testified that approximately 15 to 20 percent of the aircraft's vertical stabilizer was covered in duct tape. Id. at 15-16, 21. Officer Butler briefly questioned respondent about the aircraft, but did not require respondent to remain at Brown Field. Tr. at 25.

The Administrator also called Aviation Safety Inspector Tyrone Park, who was assigned from his San Diego Flight Standards District Office as the operations inspector for this case. Tr. at 27, 29. As part of his investigation into respondent's operation of the aircraft at issue, Inspector Park received written statements from several witnesses who observed the aircraft and opined that it was either unairworthy or not flyable. Tr. at 31 (Exh. C-2), 33 (Exh. C-3), 34 (Exh. C-4), 35 (Exh. C-5), 36 (Exh. C-6). Inspector Park also obtained a copy

of an invoice indicating that a mechanic had replaced the vertical fin and tail rotor blades on the aircraft after the flights in question. Tr. at 36; Exh. C-6 at Attachment A (stating, "[r]emove damaged vertical fin and install serviceable fin after paint," and "[r]emove damaged TR blades and install new blades"). After receiving the aforementioned documents and photographing the damaged blades from the aircraft, Inspector Park testified that he sent the information to a product support engineer at Bell Helicopter, who opined that a tail rotor sudden stoppage on a Bell helicopter would render the aircraft unairworthy until the aircraft met the inspection requirements "in the BHT-206A/B-SERIES-MM-1." Exh. C-7 at 1.

Finally, the Administrator called Mr. Gary Suozzi to provide expert testimony regarding the damage to the aircraft. Mr. Suozzi testified that his assessment of the aircraft was based on photographs and information he received, not a physical inspection, but opined that the type of damage that respondent's aircraft sustained "would have required a sudden stoppage inspection." Tr. at 55, 57. Mr. Suozzi testified that a pilot who observes the type of damage to the stabilizer and tail rotor blades that respondent observed should not operate the aircraft again, because such operation would be careless and could result in a serious accident. Tr. at 58-59. Mr. Suozzi concluded that the aircraft in question was not airworthy with the damage that

it sustained, as it could not comply with its type certificate requirements because the manufacturer did not release the aircraft from its factory with duct tape. Tr. at 63.

In response, respondent provided the testimony of his brother, Mr. Chris Martz, who was with respondent during the flights at issue. Mr. Martz, however, was not with respondent when respondent hit a wire on the flight that caused the damage at issue. Tr. at 68-69. Mr. Martz testified that he saw the aircraft after it hit the wire, and observed that the stabilizer fin "had a big nick in it." Tr. at 69. After speaking with respondent about the damage, Mr. Martz and respondent put duct tape on the nick and got in the aircraft and flew it to Ensenada, Mexico, alongside two other helicopters. Tr. at 70-72. The following day, Mr. Martz testified, he and respondent spoke with other pilots who observed the aircraft; one mechanic recommended that Mr. Martz and respondent not exceed 80 knots on their way back to San Diego. Tr. at 73-74. Mr. Martz testified that both flights at issue in the complaint were uneventful. Tr. at 76, 78.

Respondent also testified on his own behalf, and stated that, after he hit a wire while operating the aircraft, he immediately landed and inspected the aircraft. Tr. at 82-84. Respondent confirmed that he noticed damage to the aircraft, in the form of one nick on the vertical stabilizer, two nicks on

one of the tail rotor blades, and one nick on the other tail rotor blade. Tr. at 84. Respondent stated that he determined, with the help of a few interested people who observed the aircraft, that if he taped the vertical stabilizer, it "would keep the flow across the vertical stabilizer." Tr. at 85. Respondent then asked his passengers to disembark the aircraft "for safety purposes," and arranged for two helicopters to accompany him on the remainder of his trip. Tr. at 85-87. The next morning, a mechanic who respondent knew recommended that respondent keep his speed below 80 knots. Tr. at 88. Respondent operated the aircraft again, and did not have the aircraft towed for repair until a mechanic at respondent's final destination recommended doing so. Tr. at 98.

The law judge found that the Administrator had proved each of the regulatory violations charged. Specifically, the law judge rejected respondent's argument that he had justifiably relied upon the representations of others with regard to whether the aircraft was airworthy, on the basis that respondent had an independent obligation to ensure that the aircraft was airworthy. Initial Decision at 135. In addition, the law judge rejected respondent's reliance argument on the basis that each witness who expressed an opinion regarding the state of the aircraft only opined as to the flyability of the aircraft, not whether the aircraft was airworthy under § 91.7(a). Id. at 133.

Overall, the law judge held that the Administrator had presented sufficient evidence to show that the aircraft did not fulfill the requirements of its type certificate, and therefore was unairworthy. Id. at 134. The law judge, however, reduced the sanction from 270 days to 230 days, because he determined that respondent had made some attempts to ascertain the status of the aircraft before operating it. Id. at 139-40.

On appeal, respondent asserts that the law judge erred in concluding that the Administrator had proved that respondent violated the regulations, as alleged. In particular, respondent argues that the law judge erred when he concluded that the aircraft did not conform to its type certificate; that qualified maintenance personnel never declared that the aircraft was unairworthy; and that even if the aircraft were unairworthy, respondent legitimately relied on others' opinions regarding the aircraft, and therefore did not have any reason to know that the aircraft could be unairworthy. Respondent also challenges the law judge's evidentiary rulings with regard to the admission of some of the Administrator's evidence at the hearing, and argues that the Administrator did not show that respondent violated § 91.13(a), because he did not operate the aircraft over a populated area, and therefore could not have endangered any lives or property of anyone. Finally, respondent also challenges the law judge's ruling on respondent's motion to

exclude evidence, based on the Fourth Amendment's search and seizure clause, because the Administrator temporarily took and photographed the aircraft's tail rotor blades without respondent's permission, while the aircraft was in a mechanic's facility. The Administrator contests each of respondent's arguments, and urges us to affirm the law judge's decision.[5]

In reviewing the law judge's decision and considering respondent's appeal, we are mindful of the fact that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence.[6] In cases in which the Administrator alleges that an operator has violated 14 C.F.R. § 91.7(a), we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation.[7] We have recognized that, "the term

[5] The Administrator does not contest the reduction in sanction.

[6] Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005); see also Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (it is the Board's role to determine, after reviewing the evidence the Administrator presents, whether the Administrator has met the requisite burden of proof).

[7] Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2 (1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, 7 NTSB 1316, 1317 (1991).

'airworthiness' is not synonymous with flyability."[8] In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation in the aircraft's conformance with its type certificate.[9]

In applying the Doppes two-prong standard, we conclude that the Administrator has provided adequate evidence to establish that the aircraft neither complied with its type certificate requirements, nor was in a condition for safe operation during the two flights at issue. The evidence in the record, which includes photographs, an invoice listing repairs, and witnesses' statements, combined with the expert testimony of Mr. Suozzi, all indicate that the aircraft was not in a condition for safe operation. Moreover, respondent's own testimony and the actions respondent took in operating the aircraft establish that respondent knew of the aircraft's condition of questionable airworthiness. Tr. at 85 (stating that he asked his passengers to leave the aircraft after he inspected it); 87, 107 (describing how other aircraft accompanied respondent to both

[8] Doppes, supra note 7, at 52 n.6.

[9] See, e.g., Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994); see also Administrator v. Easton, NTSB Order No. EA-4732 at 2 (1998) (acknowledging that significant risks exist when a pilot fails to confirm that an aircraft is airworthy following maintenance).

destinations). As such, respondent's argument that he neither knew, nor should have known, that the aircraft may not be airworthy under Yialamas, supra note 9, is unavailing. Respondent does not dispute that he was aware of the nicks in the stabilizer and tail rotor blades, and acknowledges that he applied duct tape to the nicks in the stabilizer before departing. Tr. at 85. Respondent's awareness of the potentially unsafe condition leads us to conclude that his operation of the aircraft resulted in a violation of § 91.7(a). Respondent's implication that he reasonably relied on others' assessments regarding the safety of the aircraft is similarly erroneous.[10]

Based on our conclusion that the Administrator has established the § 91.7(a) violation, we also conclude that respondent's operation of the aircraft subsequent to the

[10] Respondent cites Administrator v. Fay & Takacs, NTSB Order No. EA-3501 (1992), in an attempt to show that he had justifiably relied on others' assessments that his aircraft was suitable for flight. We note that Fay & Takacs is unhelpful to respondent, given its conclusion that the PIC (Fay) could not legitimately rely on the flight engineer's proper performance of his duty, and the flight engineer (Takacs) could not reasonably rely on a presumption that someone had properly tied down an aircraft that the Administrator alleged they had tipped over with their jet exhaust. Id. at 4. In the case at hand, we further note that respondent did not seek a professional opinion on the airworthiness of the aircraft, but instead asked for opinions of people who happened to be in the vicinity of his aircraft. Tr. at 105-106. Respondent has not established that his reliance on others' opinions was reasonable or justified.

collision was careless and reckless, in violation of § 91.13(a). Respondent's implication that the Administrator must prove that respondent operated the aircraft over a populated area in order to establish that respondent violated § 91.13(a) is also baseless. Respondent's argument in this regard ignores our longstanding case law that we consider a pilot's operational violations to constitute a violation of § 91.13(a), where the Administrator has based the § 91.13(a) allegation on an operational violation and can establish such.[11] Moreover, respondent does not dispute that the potential for endangerment as a result of his operation of the aircraft existed, and we have long held that potential endangerment will suffice to establish a violation of § 91.13(a).[12]

Similarly, respondent's arguments regarding the law judge's evidentiary rulings and evaluation of the evidence are also unhelpful, as respondent has not established that the law judge's rulings were an abuse of discretion.[13] We have

[11] See Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003); Administrator v. Nix, NTSB Order No. EA-5000 at 3 (2002); Administrator v. Pierce, NTSB Order No. EA-4965 at 1 n.2 (2002).

[12] See, e.g., Administrator v. Szabo, NTSB Order No. EA-4265 at 4 (1994); Administrator v. Lancaster, NTSB Order No. EA-3911 at 2 (1993); see also Haines v. Department of Transp., 449 F.2d 1073, 1076 (D.C. Cir. 1971).

[13] See, e.g., Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Seyb, supra, at 2-3; Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

previously held that law judges have significant discretion in overseeing hearings and admitting evidence into the record.[14] Respondent cannot show that the law judge erred in evaluating some witnesses' statements as more persuasive than others, and has not provided a basis for the Board to overturn the law judge's assessments as to the credibility of these statements.[15] Similarly, respondent's argument that the Fourth Amendment[16] precludes consideration of photographs and testimony concerning the condition of the tail rotor blades is also unsupported. We have previously held that "searches" for evidence concerning an enforcement action is not unreasonable under the Fourth Amendment, because the Administrator has broad authority to conduct investigations in pursuing an enforcement action, among other reasons.[17] In addition, respondent has not attempted to show that any search the Administrator conducted was without

[14] Administrator v. Bennett, NTSB Order No. EA-5258 (2006) (citing Administrator v. Santana, NTSB Order No. EA-5152 at 3 (2005), and 49 C.F.R. § 821.35(b)).

[15] We note that we defer to the credibility findings of law judges absent a showing that such findings are arbitrary and capricious. Administrator v. Smith, 5 NTSB 1560, 1563 (1986); see also Administrator v. Nickl, NTSB Order No. EA-5287 (2007); Administrator v. Crocker, NTSB Order No. EA-4565 at 6 (1997).

[16] The Fourth Amendment provides people with the right be free of "unreasonable searches and seizures." U.S. Const. Amend. IV.

[17] Administrator v. Brodnax, 3 NTSB 2795, 2796 (1980) (quoting Administrator v. Patterson, NTSB Order No. EA-1265 at 8 (1979)); see also Administrator v. Weichert, NTSB Order No. EA-3650 at 1 n.4 (1992).

respondent's permission or unreasonable, because respondent's mechanic, who had custody of the blades at the time the Administrator took and photographed them, voluntarily provided the blades to Inspector Park upon his request. Overall, respondent has not provided a basis to overturn the law judge's decision; as such, we reject respondent's appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The law judge's initial decision, including the reduction in sanction from 270 to 230 days, is affirmed; and

3. The 230-day suspension of respondent's commercial pilot certificate shall begin 30 days after the service date indicated on this opinion and order.[18]

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

[18] For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MARION C. BLAKEY,	*	
Administrator,	*	
Federal Aviation Administration	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-17706
	*	JUDGE GERAGHTY
DAVID KEITH MARTZ,	*	
	*	
Respondent.	*	

U.S. Bankruptcy Court
Department 5
Wienberger Courthouse
325 F Street
San Diego, CA 92101

Wednesday,
February 28, 2007

The above-entitled matter came on for hearing, pursuant to Notice, at 9:30 a.m.

BEFORE: PATRICK G. GERAGHTY,
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE GERAGHTY: This has been a proceeding before the National Transportation Safety Board on the appeal of David Keith Martz, hereinafter Respondent, from an Order of Suspension which seeks to suspend his Commercial Pilot's Certificate for a period of 270 days.

The Order of Suspension was filed on behalf of the Administrator Federal Aviation Administration, herein the Complainant, through her Regional Counsel of the Western Pacific Region, Federal Aviation Administration.

The matter has been heard before this Administrative Law Judge, and as provided by the Board's Rules of Practice, I am issuing a Bench Decision in the proceeding.

Pursuant to notice, this matter came on for trial on February 28th, 2007 in San Diego, California. The Complainant was represented by one of her Staff Counsel, Ms. Lierre Greene, Esq., of the Regional Counsel's Office, Western Pacific Region. The Respondent was present at all times and was represented by his Counsel, Mr. Brian Lawler, Esq., of San Diego, California.

The Parties have been afforded the full opportunity to offer evidence, to call, examine, and cross-examine witnesses, and to make argument in support of their respective positions.

In discussing the evidence, I will summarize the evidence and limit myself to that which leads to the conclusion

I've reached herein. I have, however, considered all the evidence, both oral and documentary, and the evidence that I don't specifically mention, although having been reviewed by me, is viewed as either being essentially corroborative of that which I do state or as not materially effecting the outcome of the decision.

AGREEMENTS

By pleading, it was agreed there was no dispute as to the following numbered Paragraphs of the Complaint, paragraphs 1, 2, 3, 8, and 9, and that that is contained in those Paragraphs are taken as having been established for purposes of this decision.

DISCUSSION

As stated, the Complainant seeks a suspension of 270 days against the Respondent for an alleged incident in which the Respondent on June 5, 2005 is alleged to have operated a Bell 206B helicopter, N526DL, on two occasions, one from a flight from Mexico to Brown Field in San Diego, California, and from there, to Montgomery Field Airport, also in San Diego, California. It's alleged that on these two operations, that as a consequence of the aircraft having sustained a wire strike or at least damage to the tail section of the helicopter, that the Respondent operated the helicopter in regulatory violation of Sections 91.7(a), 91.13(a), and 91.405(a) of the Federal Aviation Regulations. The specific provisions as stated in

those Regulations will be referred to subsequently as appropriate.

The Complainant's case was made through the testimony of three witnesses and exhibits that were offered during the course of that testimony. The first of the witnesses was Officer Graig Butler, who, at the time in question, that is June 5, 2005, was employed as an Officer with the Customs and Border Protection Agency or Border Security and Customs, however their title is. In any event, he was on duty at Brown Field on the date in question when he received a phone call from Mexico, Ensenada, where the Respondent's aircraft had been located. According to Officer Butler, he was informed by the person on the phone that the Respondent had just departed from the location in Mexico with severe damage to the tail rotor section and that the aircraft in this person's opinion had left in an unairworthy status and possibly was being operated under the provisions of Part 135 of the Federal Aviation Regulations, which would apply if it was a carriage for compensation or hire.

In any event, about an hour later, the Respondent arrived at Brown Field, and at that point, Officer Butler did speak with the Respondent. It was, on the testimony, a very bland conversation. The only observation being made by Officer Butler was that he saw what he considered and testified was extensive duct taping on the tail rotor section of the

helicopter. He gave the opinion that there was red duct tape wrapped around over the top, front, and about the section in what looked to him like a figure eight, and that's why he opined that it was a lot of duct tape.

Officer Butler also stated that as a result of the phone call that he received, that he attempted to contact some official at the Federal Aviation Administration concerning the situation. Officer Butler is not a pilot and has no aviation background or particular knowledge. He stated that on his phone call to the Federal Aviation Administration, he was unable to reach any Aviation Inspector there. Nobody was on duty in that category, and therefore, that after he had checked the paperwork of the Respondent, which was correct, that he allowed the Respondent to proceed on his way. I comment here that Officer Butler would have had no authority to interdict this flight on his own authority. As a border patrol officer or customs officer, his duty is to ensure the aircraft was legally being operated into the United States, not whether or not the aircraft was airworthy or whether Respondent was in a position to operate that aircraft. That's why he tried to contact the FAA. Once the paperwork was deemed to be proper, Officer Butler had fulfilled his duty of his position. He had to let the Respondent proceed on his way.

Inspector Tyrone Park testified he is an Inspector with the Federal Aviation Administration with the San Diego

Flight Standards Officer, the FSDO. He has been with the FAA for about 15 to 16 years. He's been in aviation for about 40 years and has over 10,000 flight hours and holds an Airline Transport Pilot's Certificate and various ratings. He became involved in this because another Inspector, Mr. Nolting, had come in and inquired of Mr. Park questions concerning this operation conducted by the Respondent from an operations point of view. Mr. Nolting apparently is an Airworthiness type Inspector. And at that point, Mr. Park became involved in the investigation.

During his investigation, he obtained several written statements, all of which were received as Exhibits C-2, C-3, C-4, C-5, and C-6, along with the attachments in that package, Attachment A and Attachment B, which are several colored photographs of the tail rotor of this particular aircraft. I comment here as to the taking of the photographs. The photographs were not surreptitiously taken by the FAA. They asked permission from the individual who had custody of the aircraft at the time, a Mr. Krauss, who apparently was doing repairs. He receipted for the parts, took the photographs, and returned the parts to Mr. Krauss. And I'll discuss his testimony and reference that subsequently. In any event, I will also discuss the statements.

STATEMENTS

C-2 is a statement from Mr. McClure. Mr. McClure did

not see the helicopter in Mexico. He was at Montgomery Field. His opinion was inquired after the helicopter had arrived back in the United States at Montgomery Field in San Diego. At this point, according to the statement of Mr. McClure, he describes the damage that he observed. There was damage to the vertical fin assembly and damage to the tail rotor blades. So that's damage to two separate portions of the aircraft. The fin assembly had a flattened lower leading edge, and one tail rotor blade had a gouge approximately two inches long in the cord wise direction, roughly six to seven inches from the tip. Significantly, the honeycomb filler inside the blade in the gouged area had been evacuated by the impact. So that means it was missing. He goes on to state that Mr. Martz, the Respondent, asked about the airworthiness, and at that point, Mr. McClure in his statement says, "I told him, the Respondent, that although the fin needed to be fixed and didn't have a big impact as far as flying, but that the tail rotor blade was no longer airworthy and should not be flown." The impact of this statement is that on the inspection by Mr. McClure at Montgomery Field, the aircraft was no longer in an airworthy condition.

C-3 is a statement by one Ivor Shier. He was in Mexico. He gives a statement as what transpired between himself and Mr. Martz, the Respondent, at Ensenada Airport before the departure by the Respondent from Mexico back to the

United States. Mr. Shier on the testimony here is the owner of a helicopter company, apparently somewhere here in the San Diego area. So it would appear that he has some background at least in the operation of helicopters.

Mr. Shier states that he observed the tail rotor and vertical stabilizer damage on this particular aircraft on the morning of June 5th while at Ensenada. He goes on to state that he spoke with the Respondent, and that at that time, the Respondent asked Mr. Shier for his opinion on the safety of flight. Now this is significant. It wasn't a question, “Is this aircraft airworthy.” It's about the safety of flight. "And I stated," Mr. Shier goes on to write, "I would not fly the helicopter in that condition. The Respondent informed me that his mechanic told him it was flyable and should keep the air speed low and make a precautionary landing if he felt vibrations." And that's the significance in that statement. To me, the question here is what was said. The Respondent obviously had concerns about the condition of his aircraft at that point. But the inquiries were as to flyability.

Mr. Jeremiah Henson was also in Mexico on the date in question and observed the aircraft after the tail strike. He states in his statement, which is C-4, that "After looking at the helicopter, I suggested to Mr. Martz that he not fly it because of the damage to one of the tail rotor blades. I remember telling Mr. Martz, the Respondent, 'I would not fly in

it.' And I recommended that he talk to another A & P who might have more experience before making any decision." So Mr. Henson, who, on the testimony in front of me, was the only A & P in the area was offering the opinion not to fly the aircraft until you get a definite opinion from a more qualified A & P mechanic.

Exhibit C-5 is a statement of Mr. Krauss in which he reiterates that he told the Respondent that if he chose to fly to San Diego, to take care and to be careful. Again, there's no statement in here as a determination having been made as to airworthiness of the aircraft. Subsequently, there was a declaration made by Mr. Krauss, which I attach weight to because it is a declaration made under penalty of perjury, which adds weight to the statement made by Mr. Krauss. The fact that the statement was printed up by the FAA does not detract from it since Mr. Krauss had the opportunity to read it and refuse to sign it or sign it as he did under penalty of perjury. In this statement, going back to June 5, 2005, he states that he observed the damage in Mexico on the date in question. He indicates the damage was to at least the two rotor blades when he observed it in Mexico. Also, he talks about the taking of the photographs indicating that he did give permission to the FAA to photograph the blades, that they were receipted for, that the blades at the time that the photographs were taken were in the same condition they were at the time

that he, Mr. Krauss, observed them in Mexico, and that when the blades were returned by the FAA to Mr. Krauss, they were in the same condition again. That is, nothing had been done to these blades in between June 5 and the time the FAA took the photographs and returned the blades to Mr. Krauss for the repair.

In Item 6 on his declaration, Mr. Krauss states that on June 20 he completed the repair, which was unairworthy because of the damage to the tail rotor blades and the vertical stabilizer. So in that statement, he's saying he completed repairs of damage, which was damage that rendered the aircraft unairworthy prior to the repairs because of the damage sustained to those two units.

I also observed that I have looked at the receipt, and as pointed out on examination by Respondent's Counsel, there's no mention on the invoice, which is Exhibit A of this package, of any statement concerning airworthiness. But that to me is not significant. Attachment A is an invoice about the repairs that were done and the cost of the repairs and a statement of the work that was accomplished. It is not a statement that deals with airworthiness of the aircraft. It's a statement being given to a customer with the expectation the customer is going to pay the balance on the invoice. So the fact that there's nothing in here about airworthiness on the invoice is to me of no significance.

I have also looked at the photographs and would simply observe for the purposes of the record that the damage that is visualized by me with respect to the blades and the vertical portion of the helicopter is consistent with the damages testified to by the witnesses and also described in the various statements. Particularly with respect to the next to the last page of Exhibit B, the upper and lower photographs, in my view, there is significant damage visible to the units depicted in these two photographs and totally consistent with the testimony that I will discuss as given by Mr. Suozzi.

Mr. Park also testified that to solidify their opinion, which on his testimony, the FAA was of the opinion the aircraft had been operated in an unairworthy condition, that they contacted Bell Helicopter, the manufacturer of this particular helicopter. And after several phone calls, they were placed in touch with an individual who is known as Mr. Gino Drouin. His title on his response to the FAA is Product Support Engineer Light Helicopters. It's true that there's nothing here that says where Mr. Drouin got his engineering degree or to what extent his background is, however, I believe that it is a reasonable inference that the manufacturer of these helicopters employing somebody with the title of Project Support Engineer is employing someone that has more than just basic knowledge of helicopters and particularly about the requirements of Bell Helicopters. It would be to me

blatantly ridiculous to say that a manufacturer is hiring people who are totally unqualified to work on their equipment. So I do acknowledge that I don't have specific information, but a reasonable inference is that someone employed by the manufacturer of the particular aircraft as a support engineer has more than, you know, basic qualifications to render an opinion. And his opinion, as expressed in two return e-mails, the first as I read it was looking at the extent of the damage since he looked at the e-mail photographs that were sent to him by the FAA, was that Bell Helicopter would consider the helicopter on which the blades were installed had sustained a tail rotor sudden stoppage. And with the damage shown in those photographs, to me that is a reasonable conclusion.

Mr. Drouin goes on to state, "Consequently, all the maintenance manual recommendations for a tail rotor sudden stoppage inspection described in Chapter 5 should be followed." In a follow-up communiqué, Mr. Drouin expanded on that and stated, "After an incident such as a tail rotor sudden stoppage, all inspections requirements described," and he gives the series and the bulletins, "for tail rotor sudden stoppage should be fulfilled." Crucial, however, is a statement quoting, "Until all mentioned requirements are met, the helicopter should be considered nonairworthy.

Mr. Gary Suozzi is with the Regional Office in the Technical Support Branch which renders technical support to the

other Branches of the Federal Aviation Administration. His curriculum vitae is part of the record as Exhibit C-8. And based upon review of that and his testimony, he is certainly qualified to render an opinion in this case.

Mr. Suozzi indicated that he had reviewed the case file and the photographs. It was his opinion, based upon his background and experience and his review of the photographs, that the aircraft was in an unairworthy condition. Further, that the aircraft no longer met its type design certificate.

As a witness, Inspector Suozzi went on to elaborate as to the damage and what the consequences were, talking about the damage to the vertical fin damage, the disruption of smooth flow, the honeycomb being disrupted, and what the consequences could possibly be with a separation and also that with the stoppage, as verified by the support engineer's statements, without an inspection as to the interior portions of the helicopter, there was no way of knowing whether or not any damage as a result of the exterior damage had been sustained by the interior components of the helicopter. And therefore, no one could rule out that a catastrophic separation could possibly occur. And that is, we don't have to wait until something catastrophic happens. It's whether or not one would reasonably be expected to know that with the extent of damage on the outside, that there is a possibility of damage interiorally, which needs to be checked out before operating

the helicopter. And again, his overall opinion was that the aircraft no longer met its type design certificate because the aircraft, the helicopter, is not designed with damage to the vertical fin or to the rotor blades. And he agreed with the statement made by the Bell support engineer that a sudden stop inspection would be required under Chapter 5 of the applicable Bell Manual. And also, in his opinion, the operation of the aircraft in the condition that it was was a careless operation, specifically talking about the possibility of incidents that could occur over a populated area. The aircraft may have been operated as testified to over the water on the way back up from Brown Field, however, from Mission Bay back into Montgomery Field, you have to go over at least some portion of populated areas. I'm familiar enough with this area, having flown in and out of Miramar enough times. And lastly, he was of the opinion that a reasonable and prudent pilot would not have flown this aircraft in the condition that was visible to anyone looking at it from the outside.

Respondent's case was made through his testimony and testimony of Chris Martz, who is the Respondent's brother. Mr. Chris Martz was with the Respondent in Mexico. Apparently, this was some type of auto race down in Mexico, and the Respondent was down there flying support possibly for people that were actually racing the automobiles.

Mr. Chris Martz was not present when the incident

happened, but became aware of it when the Respondent flew the helicopter back to the position where Chris Martz was located.

As to who inspected this aircraft down in Mexico, according to Chris Martz, there was a car mechanic present. A car mechanic giving an opinion on an aircraft is useless. And as to anyone else that was present that offered an opinion, Mr. Chris Martz indicated he wasn't sure how anyone was rated with respect to offering opinions as to airworthiness of an aircraft.

I'm willing to accept that Mr. Henson obviously was qualified and gave an opinion as to flyable, and apparently, Mr. Shier, Ivor Shier, is involved with helicopters, so at least he has some background. I don't know what certificates he holds. But according to Chris Martz, nobody really was sure who was qualified to offer an opinion, and it certainly wasn't a car mechanic.

Mr. Chris Martz indicated he was the one that duct taped the aircraft and, on cross-examination, indicated that, of course, he only holds a student pilot's certificate and does not hold an airframe and power plant certificate, and significantly, no entries were ever made in any logbooks about any repair to this particular aircraft.

Respondent testified on his own behalf saying that he was aware that there was a possibility he had struck something, possibly a wire strike. However, he landed. The aircraft felt

normal. He disembarked three passengers who were on there, not because he didn't think it was safe according to him, but he thought it would probably be more prudent, I guess, not to have them there.

On his testimony, Mr. Henson was the only Air Frame and Power Plant Mechanic that was there. And I have reviewed Mr. Henson's statement, which to me, the significant part was that Mr. Henson suggested that the Respondent not fly the aircraft because of the rotor blades being damaged and stating specifically, "I would not fly it." There's no indication that Mr. Henson, the only A & P there, ever expressed an opinion as to airworthiness. And Respondent himself on cross-examination acknowledged that he had never used the terminology of a question of airworthiness on any of his inquiries.

Respondent also offered Exhibit R-1. And Exhibit R-1 is again a statement from Mr. Krauss which is simply signed. It's dated February 27th. And to me does not really add anything or detract anything from the prior statement made by Mr. Henson and for the declaration under penalty of perjury. Since this Exhibit, R-1, again simply is an issue of flyability. There's no question Mr. Krauss indicated to keep it at a low air speed. If you feel any vibrations, set it down. I have, however, considered the exhibit. That to me is the significant evidence in the case.

Reviewing the testimony, Officer Butler, as I've

already indicated, was in a position simply as a Border Patrol and Customs Official. He had no authority to interdict the Respondent's flight, you know, detain him at Brown Field, without any authorization from the FAA. Whether or not that would have been sufficient is not an issue in front of me because no one from the FAA with any authority was available for Officer Butler to obtain an opinion from. As a Customs Official, his duty was to ensure that the Respondent was legally coming into the country. Once that documentation was presented and it was proper, Officer Butler was in no position to do anything other than to allow the Respondent to proceed on his way. However, even though Officer Butler had no prior aviation experience that he testified to or any particular aviation knowledge, he testified he was concerned enough because of the phone call from Mexico, and again, someone in Mexico was sufficiently concerned about the damage to this aircraft to make an international phone call to an official in the United States that there might be an unairworthy aircraft being operated into the United States. So someone in Mexico was of the opinion the aircraft was unairworthy. And Officer Butler was at least sufficiently concerned to contact the FAA also, particularly after seeing what he considered a lot of duct tape on the back of the aircraft. That's not usual because most airplanes or helicopters do not fly around with a lot of duct tape on its control surfaces.

With respect to the individuals who looked at this aircraft in Mexico, to me the only issue that was ever brought up to any of these people, who were down there apparently as helicopter pilots, was whether or not I can fly this helicopter back to the United States after duct taping it. All of them expressed opinions as to flyability. The flyability is not equivalent to airworthiness. An aircraft can be flyable, but it can also be unairworthy. To be airworthy, it has to be both flyable and in an airworthy condition. To be in an airworthy condition, it must meet its type design certificate. That has been clearly held in Administrator v. Dow and affirmed by the District Court and Court of Appeals upon review. If an aircraft is certified for retractable gear, that gear has to be able to be retracted. You may be able to safely fly the airplane with the gear extended if you have a lot of money and pay for the fuel, but it's no longer meeting its type design if the gear doesn't operate.

Similarly as in Dow, if there are instruments that are supposed to be in the panel and they're not there, although you can fly the aircraft safely possibly if you don't care about what the gauges might be telling you, it's no longer airworthy because the aircraft is type certificated to have the holes filled up with the gauges.

Here, the evidence in front of me is that this aircraft no longer met its type design certificate. That is

clear to anyone looking at the photographs. The aircraft was not manufactured with the extent of damage that's visible in these photographs, nor was it certified to be flown with duct tape or with honeycomb evacuated from the interior of the blades.

This aircraft no longer met its type design certificate. On top of that, it is also unairworthy because with the damage and the sudden stoppage because of the wire strike, the aircraft could not be returned to service until it has been checked out as required by the Bell Manual for Chapter 5, to check out for interior damage. There was significant damage in my view to the exterior. And any helicopter pilot knowing the crucial nature of the control surfaces to the rear of the helicopter, if you lose that, you're in a uncontrollable spin, and you're going to be a smoking hole. And if you fly in a helicopter, it may not have vibrations, but if suddenly something lets go inside, there's no way you're going to control it, and you don't know unless you look. That aircraft should have been trucked out of Mexico or left there and someone flown into Mexico to inspect the aircraft and at least obtained a ferry permit to fly it someplace where it could be checked out and repaired. That wasn't done.

The aircraft, in my view, was unairworthy as a result of this strike. And to repair it with duct tape was not the action of any reasonable and prudent pilot.

Counsel referred to decision of Administrator v. Fay & Takacs. That dealt with a flight crew of an air carrier. And all that says is yes, you have a right of reliance as long as you have a right to rely upon the individual who is giving you whatever the information is. Your flight engineer, the load master. As pilot in command, you can rely upon that individual who is qualified to give that opinion as long as you have no independent duty to check out the information that is being passed onto you. There's no question. But that's not the situation here. It is completely distinguishable. There's nothing in front of me that indicates that the Respondent did not have an independent duty to determine the airworthiness of this aircraft. In fact, that's not what the Regulation says. Section 91.7(a) states that no person may operate an aircraft unless it is in an airworthy condition. That means that the pilot in command, since he's the person operating, must determine that. He did not make a determination from anyone who, in my view, expressed an opinion as to airworthiness until it really got back to Montgomery Field. Mr. McClure stated that. Everything else was about flyability, which is not the same. In any event, the Respondent had an independent duty. This is completely different from the situation in Fay and Takacs, which is dealing with individuals who had specific duties as load masters, first officers, to independently perform duties and then advise the pilot in command, the

captain, that those duties had been fulfilled and the captain had no independent obligation to double check on his subordinates. That's not the question here. The Respondent had a duty himself to determine the airworthiness of this aircraft, and he didn't do that.

Without belaboring the point further then, I do find that as charged in the Complaint, that it is established by a clear preponderance of the evidence that the aircraft, N526DL, did sustain damage to the vertical stabilizer and tail rotor blades while being operated by the Respondent in Mexico on June 5, 2005.

Further, that at the time of his subsequent flights, which are admitted in Paragraph 2 of the Complaint, that this particular aircraft was in an unairworthy condition due to the damage to both the vertical stabilizer and the tail rotor blades, and that is established by a preponderance of the evidence. I further find that incident to both flights, that is from Ensenada to Brown Field and from Brown Field to Montgomery Field, both in San Diego, that the Respondent flew the aircraft without having corrected the deficiencies to either of those two units or having entered into the aircraft maintenance logs any attempt at repairs that were made, that is, the duct taping. That was to be considered to be a repair, it should have been entered. There's not a charge about that, but it should have been entered anyway. Whether or not it was

an effective repair is another question. It's just simply I do observe there was no entry.

Section 91.7(a), as I've already stated, requires and states that no person may operate a similar aircraft unless it is in an airworthy condition. This aircraft was no longer airworthy after its tail rotor strike with the amount of damage visible to the exterior surfaces. It was also no longer airworthy because there was no way of knowing whether or not the aircraft had sustained internal damage due to the sudden stoppage. And then the aircraft, with the damage that was visible, no longer clearly to any pilot could have been stated to meet its type design certificate. It's not designed to have that kind of damage. If it doesn't meet its type design certificate, it's unairworthy. I find that the violation of Section 91.7(a) is established on the record.

Section 91.405(a) requires that each owner or operator of the aircraft, and the Respondent is both the owner and operator as I understand it, shall have, between required inspections, discrepancies repaired as prescribed in Part 43 of the Chapter. That is Part 43 of the Federal Aviation Regulations. And clearly on the evidence in front of me, the discrepancies were not repaired as prescribed in Part 43 as Part 43 does not provide for repairs to damage by use of duct tape. I therefore find the violation of 91.405(a) is established.

With respect to 91.13(a), which prohibits careless or reckless operation, I find here that it is at least careless operation that could have potentially endangered the life or property of others. From Ensenada to Brown Field, if you were over the desert, you might have killed a lizard if you went down. Your brother was with you as I understand it, so he is the life of another. You may have flown over the water from Brown Field to Montgomery Field, but you had to come inland at some point to get to Montgomery Field. It is a reasonable nexus in my view between the operation and potential endangerment under ample precedent. You don't have to wait until something catastrophic occurs. I find that the violation of 91.13(a) is clearly established.

Turning then to the question of sanctions. I take into account that it is conceded that the Respondent on at least two prior occasions, September 18th, 2003, had a regulatory violation and a period of a 30-day suspension for violation of three charged Regulations therein, including aerobatics flights and a 91.13(a) violation also. Subsequently, then on February 20, 2004, there was a revocation that revoked the Commercial Pilot's Certificate of the Respondent, again for a violation including 91.13(a) of the Regulations. So as the Board has held, I take into account the prior violation history of the Respondent, which includes at least two separate occasions of a violation of Section

91.13(a), the same violation involved herein.

The economic consequences as I've stated during the proceeding itself is not an issue that the Board addresses in its consideration of sanction. I refer to Administrator v. Whitaker, a 1970s case. The crux issue for the Board is the public interest in air safety and air commerce and transportation. Any action, other than maybe a purely pleasure pilot, and even he is going to have some loss, then there's going to be a loss of either enjoyment or loss of income. Again, that is not an issue in front of me. However, in looking at the sanction sought and taking into account the prior violation history and the violations here, I am taking into account the fact that while deference is to be shown to the Administrator's choice of sanction, that the Respondent at least made some attempt to ascertain the status of his aircraft before he departed from Mexico. Those attempts, while not satisfactory in the sense that they satisfy the requirements of the Regulations, at least shows that he was conscious that something should have been, you know, checked. He obtained opinions as to flyability at least. I'm going to give him the benefit of the doubt that at least he made some effort, as futile in my view as it was, but at least it's not totally disregarding.

On the other hand, as I've indicated, to duct tape an aircraft and think that that's satisfactory and does not affect

the airworthiness of the aircraft is beyond what I would expect of a reasonable and prudent helicopter pilot, particularly one who on testimony that he brought on himself, he engages in helicopter operations for his livelihood to a great extent during the course of a year.

Be that as it may, I will at least give him the benefit of the doubt on making some effort and reduce the period of suspension from 270 days to 230 days. And with that modification, I will affirm the Order of Suspension.

ORDER

IT IS THEREFORE AFFIRMED AND ORDERED:

1. That the Order of Suspension, the Complaint herein, being one and the same, hereby is modified to provide for suspension of 230 days instead of 270 days.

2. That the Order of Suspension, the Complaint herein as modified, being one and the same, hereby is affirmed.

3. The Respondent's Commercial Pilot's Certificate hereby is suspended for a period of 230 days.

Entered this 28th day of February 2007 in San Diego, California.

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EDITED & DATED ON
MARCH 23, 2007

PATRICK G. GERAGHTY
Administrative Law Judge