SERVED: January 19, 2005

NTSB Order No. EA-5132

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 18th day of January, 2005

MARION C. BLAKEY, Administrator, Federal Aviation Administration, Complainant, v. RONNIE RAY TAYLOR, Respondent.	)	Docket SE-17253

OPINION AND ORDER

The respondent has appealed from the December 16, 2004, oral initial decision and order of Administrative Law Judge William A. Pope, II,[1] which affirmed the Administrator's emergency revocation of respondent's airline transport pilot and medical certificates. The Administrator's emergency order alleged violations of 14 *Code of Federal Regulations* §§ 91.17(a)(3),

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

135.249(b), and 135.249(c),[2] and his failure to meet the medical standards set forth in 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2).[3] As further discussed below, we deny respondent's

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[2] **§ 91.17 Alcohol or drugs.**

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

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(3) While using any drug that affects the person's faculties in any way contrary to safety.

§ 135.249 Use of prohibited drugs.

* * * * *

(b) No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or an operator, either directly or by contract, any function listed in appendix I to part 121 of this chapter [including flight crewmember] while that person has a prohibited drug, as defined in that appendix, in his or her system.

(c) No certificate holder or operator shall knowingly use any person to perform, nor shall any person perform for a certificate holder or operator, either directly or by contract, any safety-sensitive function if the person has a verified positive drug test result on or has refused to submit to a drug test required by appendix I to part 121 of this chapter and the person had not met the requirements of appendix I to part 121 of this chapter for returning to the performance of safety-sensitive duties.

[3] **§ 67.107 Mental.**

Mental standards for a first-class airman medical certificate are:

* * * * *

(b) No substance abuse within the preceding 2 years defined as:

* * * * *

(2) A verified positive drug test result acquired under an anti-drug program or internal program of the U.S. Department of Transportation or any other Administration within the U.S. Department of Transportation.

§ 67.207 and § 67.307 contain similar language for second- and third-class medical certificates.

appeal and affirm the law judge's decision.

The November 23, 2004, emergency order of revocation alleged, in part, the following facts and circumstances:

2. At all times material herein, you were [] employed as the Director of Operations of Virgin Air d/b/a Air St. Thomas, which operates aircraft pursuant to Air Carrier Certificate No. VAIA663A, under Part 135 of the Federal Aviation Regulations.

3. On or about November 25, 2003, you were the pilot in command of a Piper Aztec PA-23 aircraft, civil registration number N56234, operating under Part 135, carrying passengers to St. Thomas, in revenue flight for Virgin Air Inc. d/b/a Air St. Thomas.

4. Conditions in flight forced you to execute a "wheels up" landing, resulting in an accident,[4] at or near the Cyril King Airport, St. Thomas.

5. Following the above-described accident, you submitted a urine specimen sample on or about November 25, 2003, in accord with the Federal Aviation Regulations governing post-accident drug testing, to a drug test collection facility.

6. The required specimen sample was collected at the Cranston/Dottin Laboratory, St. Thomas.

7. The sample was transferred from St. Thomas to certified testing laboratory, One Source Toxicology, Pasadena, Texas, in accord with federal custody and control requirements and without interruption in the chain of custody, for analysis.

8. The sample submitted to and received by One Source Toxicology Laboratory, Inc., tested positive for cocaine, a prohibited substance, as reported on December 2, 2003.

9. On December 5, 2003, you received actual notice that you had tested positive for cocaine.

10. On December 9, 2003, Medical Review Officer Wayne Keller, M.D., verified the above-described positive test result.

11. At your request and pursuant to the above-described

[4] The event was apparently later determined to have been an incident, rather than an accident. (See Tr. 20, 207.)

positive test result, a split sample specimen test was conducted.

12. LabCorp, San Diego, California, conducted the split sample specimen test you requested.

13. On December 12, 2003, LabCorp reported a positive test result of cocaine in the above-described split sample.

14. From the time you were notified on December 5, 2003, up to and including the date of this notice, you did not provide any letter of medical explanation to the Administrator from a doctor or dentist that could or did explain the above-described positive result.

15. From the time you were notified on December 5, 2003, up to and including the date of this notice, you did not provide any letter of medical explanation to the Administrator from a doctor or dentist that could or did reverse the above-described positive result to "negative."

16. Up to and including December 16, 2003, notwithstanding the above-described positive drug tests, you continued to accept and complete assignments to operate aircraft on behalf of Virgin Air d/b/a Air St. Thomas, carrying passengers pursuant to Part 135 of the Federal Aviation Regulations.

Respondent did not challenge the accuracy of either the first or second drug test results. However, in answer to the complaint he asserted as an affirmative defense that two subsequent hair analysis tests (taken approximately two weeks and 10 weeks after the urine test) showed negative results for cocaine, thereby demonstrating that he had no drugs in his system at the time of the urine test.

At the hearing, the Administrator showed, through testimony from the lab employee who collected respondent's sample, and from Dr. Keller, the medical review officer who reviewed respondent's positive test results, that federal testing protocols were followed. Dr. Keller testified that he offered respondent the

opportunity to provide a medical explanation for the positive results, and that respondent mentioned several things (including his use of vitamins, PABA, ephedra, poppy seed food products, flu and pneumonia vaccinations, and exposure to hydraulic fluid during the gear up landing incident), but that respondent never provided any documentation or medical evidence to show that any of these things could have resulted in a positive urine test result for cocaine.

The Administrator also presented expert testimony from Dr. Yale Caplan that hair sample analysis was not yet approved for use in federal drug testing programs. However, he testified that the Department of Health and Human Services (HHS) had issued a notice of proposed rulemaking (NPRM) proposing to allow testing of hair, sweat, and oral fluids in addition to urine, which is already authorized for federal workplace drug testing programs, and proposing federal standards for such testing (as none currently exist). The NPRM states that, if adopted, the new rules would permit agencies to use hair testing for "pre-employment, random, return-to-duty, or follow-up testing."[5] He stated that hair testing was most useful for detecting chronic drug use but, because a 90-day hair growth was the standard sample size, a limited or single instance of drug use during that period would be so diluted that it would be undetected by such a

[5] Significantly, the NPRM does not mention hair testing as an appropriate method for reasonable suspicion/cause testing or post-accident testing (such as respondent's), circumstances under which urine tests have traditionally been used.

test. Accordingly, Dr. Caplan indicated that a positive urine test, followed by a negative hair analysis test, were not necessarily inconsistent, unless the person was a chronic user.

At the conclusion of the hearing, the law judge upheld the order of revocation, concluding that respondent's urine test results were reliable and accurate. He noted that respondent had offered no plausible explanation for the positive test results. Specifically, he found respondent had not presented any, "evidence to show how his sample might have been contaminated or mixed up … [or] any scientifically-reliable evidence to support his theory that exposure to hydraulic fluid or PABA could possibly have caused false positive urine test for cocaine metabolite." (Tr. 266.) The law judge summarized the evidence on hair analysis, including the pending NPRM, and concluded that the negative hair test results offered by respondent were "not sufficient to offset" the urine test results. (Tr. 268.) Finally, regarding respondent's claim that he did not know how the cocaine got into his urine, the law judge found respondent to be "entirely unconvincing" and "not … a credible witness." (Tr. 269.)

On appeal, respondent argues that: (1) the law judge erred by "refusing to afford any weight" to respondent's hair analysis evidence; and (2) the evidence shows the urine test results were in error.[6] As explained below, we disagree on both points.

First, contrary to respondent's assertions, the law judge

[6] The Administrator has filed a reply brief.

did not "ignore all of the evidence related to hair testing." (Appeal brief at 9). Rather, he considered the testimony and documentary evidence on the reliability and usefulness of both urine and hair tests, noting in particular the evidence that respondent's urine sample was collected and tested by certified laboratories in accordance with federally-established standards, that no federal standards or laboratory certifications have yet been established for hair analysis, and that hair analysis is most useful for detecting chronic drug use and would not detect a single incident of cocaine use. After weighing all of the evidence, the law judge gave "more weight" to respondent's urine test results than to his hair test results. (Tr. 268.)

Thus, there is no basis for respondent's assertions that the law judge, "was apparently operating under the misunderstanding that hair testing evidence cannot be used by a respondent in his own defense simply because the Federal government does not yet mandate[7] the use of hair testing in the workplace," and that he "focused only on the fact that the document published by HHS is a proposal as opposed to a final rule." (Appeal brief at 6 and 9.) The law judge obviously did permit respondent to use the test

[7] We note that respondent's repeated characterization of the HHS NPRM as one that would "mandate" the use of hair testing is somewhat misleading. As the Administrator's expert witness pointed out at the hearing (Tr. 137), the NPRM would "permit" agencies to use hair testing as a supplement to the existing urine testing program. The NPRM (Exhibit R-1) makes clear that if it were to become a final rule, there would be, "no requirement that [agencies use] hair … as part of their drug testing program." 69 *Federal Register* 19673, 19679 (April 13, 2004).

results in his own defense, despite the fact that this methodology has not yet been approved for use in federal workplace programs. The law judge simply concluded (correctly, in our judgment) that the negative hair analysis results did not disprove the positive results of the urine test. Assuming the test results are valid and accurate,[8] the record is abundantly clear that the differing results of the urine and hair tests are not inconsistent.

Second, we disagree with respondent that the preponderance of the evidence shows the urine test result to be erroneous. To the contrary, we see little or no evidence in the record to support respondent's contention. Respondent did not challenge the urine sample's chain of custody, and he stipulated that the test results were admissible and authentic. (Tr. 9, 11.) However, respondent argues that: (1) drug impairment is inconsistent with (a) his flying skills during the emergency landing (which were praised by witnesses quoted in a newspaper article), (b) testimony from the Air St. Thomas principal operations inspector that he was surprised by respondent's positive results, and (c) respondent's voluntary submittal to the urine test; and (2) the FAA did not disprove the possibility that the hydraulic fluid respondent was exposed to the day of the test

[8] We note that respondent's hair tests lacked many of the indicia of reliability that were present for the urine test results. For example, respondent presented no evidence (other than his own testimony) regarding the sample collection methodology, chain of custody, determination of results (i.e., what cutoff level was used), or certification of the laboratories used. Nor are these areas yet governed by any federal standards.

could have caused the positive test result.

The factual circumstances respondent cites do not disprove the positive urine test results. Nor does his suggestion that hydraulic fluid could be to blame for the positive results. It was not, as respondent claims, "incumbent on the FAA to produce scientific evidence showing that hydraulic fluid cannot adulterate urine to make it appear to contain cocaine." To the contrary, a respondent has the burden of proving an affirmative defense.[9] He presented no scientific or medical evidence to support this theory, nor did he even properly notify the Administrator of this defense by including it (or any other theory pertaining to adulterants) in his answer to the Administrator's complaint or in his pre-trial discovery responses.[10] Nonetheless, the Administrator presented testimony at the hearing from Dr. Keller that he consulted a scientist at the One Source Laboratory about whether PABA or hydraulic fluid could have caused a positive result, and was told that neither would have any effect on the results. (Tr. 59, 76.)

Thus, we agree with the law judge that, in light of all the evidence in the record, the positive urinalysis test results are

[9] Department of Transportation regulations governing drug and alcohol testing also clearly state that, "the employee has the burden of proof that a legitimate medical explanation exits. The employee must present information meeting this burden at the time of the verification interview." 49 CFR 40.137(c).

[10] We recognize that respondent mentioned his exposure to hydraulic fluid to the lab employee who collected his sample, and to Dr. Keller. However, we think more was required to put the Administrator on notice that he planned to assert hydraulic fluid contamination as an affirmative defense at the hearing.

"conclusive" for purposes of this proceeding.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

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

ENGLEMAN CONNERS, Chairman, ROSENKER, Vice Chairman, and CARMODY, HEALING, and HERSMAN, Members of the Board, concurred in the above opinion and order.