

however, reduced to 30 days the Administrator's proposed 150-day suspension of respondent's commercial pilot certificate. We deny the appeal.

Art and Marie Bellingham own a parcel of land in Birkenfeld, OR, part of which had in the past been used as a landing strip and in more recent years was used as pasture. Adjacent to the landing strip were two hangars. Respondent spoke with Mr. Bellingham concerning his use of a hangar to house his new helicopter, and obtained permission to land at the site. We are here concerned with the events of June 3, 1991, when respondent apparently determined to land to investigate further his potential use of the hangar.³

Although, as we will shortly discuss, there is considerable disagreement in the testimony regarding the time of the incident and respondent's involvement in it, it is undisputed that at some
(..continued)

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with any routes or altitudes specifically prescribed for helicopters by the Administrator.

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³Our discussion does not reference numerous issues and testimony introduced by the parties nor does it decide questions that are not critical to our analysis.

time on June 3 respondent and co-pilot/student Brian Tolley flew over Art Bellingham's pasture and airstrip. Respondent acknowledges that, on final approach to land there, they noticed that the helicopter had spooked two horses, horses they had not noticed before. Accordingly, they immediately aborted the landing and left the area. Respondent did not thereafter see the path(s) taken by the two horses. It is also undisputed that a horse belonging to Art Bellingham's nephew Jeffrey and his wife Tami escaped from that pasture and was found running up the road. The horse was agitated and had some recent injuries.⁴ The horse's owners, who had not witnessed the events, determined that respondent had caused the injury to the horse, and filed a complaint with the FAA.⁵

Briefly to summarize, the Administrator contends that respondent's low flight caused two horses owned by the Bellinghams to injure themselves with one, in its fright, breaking through the pasture's barbed wire fence. According to the Administrator, respondent's attempt to land at the airstrip was premature, having failed thoroughly to reconnoiter the area. Also according to the Administrator, while the respondent was

⁴The horse's physical and emotional state and monetary value are the subject of testimony so extensive that we will not belabor it here. Resolution of the degree of injury or changed value is unnecessary to establish a violation of the cited regulations.

⁵The Bellinghams unsuccessfully sought \$69 in medical fees from respondent. The parties did not dispute the law judge's repeated statement that, apparently, had respondent paid the \$69, the Administrator's complaint would not have been brought.

flying the base leg of his approach to the landing strip, he flew too low over three other horses, one with a rider, 13 1/2 year-old Charlynn Vickers, injuring two of the horses, including the one she was riding and causing potential harm to her.

Respondent answers that he was in the area in the morning only and that, because the general opinion was that the helicopter flight that scared the horses did not occur until late afternoon, he could not have been the party responsible for the injury to the Bellingham's horse. He denied seeing either the Vickers' horses or Charlynn Vickers.

Both the Administrator and respondent offered numerous witnesses and written statements of eyewitnesses. The Administrator's two key eyewitnesses were Harold Vickers (Charlynn's grandfather) and George Richardson, both neighboring property owners.

Mr. Vickers testified that, on June 3, 1991, at about 4:00-4:30 P.M., while he was watching Charlynn riding, a white (with red and blue) helicopter flew directly overhead, as low as 20-25 feet.⁶ The helicopter flew on towards the airstrip and he saw horses in Art Bellingham's pasture run from it. Mr. Vickers testified that helicopter flights in the area were rare, and that this was the only aircraft he heard or saw that day. He later saw respondent's helicopter and identified it as the offending aircraft. Mr. Vickers' granddaughter also testified to seeing a

⁶It is undisputed that respondent's helicopter is white with a horizontal red and blue stripe and a front plexiglas bubble.

red and white helicopter with a "bubble" front, but had no specific recollection of the time.

Mr. George Richardson, another neighbor and eyewitness (and Art Bellingham's brother-in-law) testified that he saw a helicopter at 40-45 feet altitude appearing to make an approach to land at the airstrip, but that it had scared some horses in the field, and the horses were running before it. According to Mr. Richardson, the helicopter turned to avoid causing further commotion and flew in the direction of the local store. The landscape prevented Mr. Richardson from seeing more of the helicopter, but he saw the horses run onto the road towards the nearby store and tavern where, according to the testimony (see infra), one was captured.⁷

Although he agreed with Mr. Vickers that these events occurred at approximately 4:00,⁸ Mr. Richardson recanted a written statement made 1 week after the incident in which he identified the helicopter using respondent's number and described it as white with red and blue.⁹ At the hearing, respondent explained that he had been given the aircraft's number, possibly

⁷Apparently, only one horse broke through the fence.

⁸There was some inconsistency between his hearing and deposition testimony. At the hearing, he testified the time of the incident was shortly before 4:00. At his deposition, he stated sometime between 4:00 and 4:30. Tr. at 94, 104.

⁹At his deposition, Mr. Richardson described the helicopter as silver with a maroon stripe, and although he testified later in the deposition and at the hearing that he was almost positive about the color, he also said "I wasn't watching the helicopter that great." Exhibit C-31 at 18.

by Jeff Bellingham, and had not seen it himself, and might also have used a description someone else gave him. Despite his earlier description fitting respondent's helicopter, at the hearing Mr. Richardson insisted that the helicopter he saw was silver and maroon, and with different features. He saw respondent's helicopter approximately 1 month after the incident and said it was not the one he had seen on June 3. He also stated, contrary to Mr. Vickers' testimony, that helicopters were not uncommon in the area.

Tami Bellingham testified next. She did not see any part of the incident.¹⁰ Although she testified as to injuries one of her horses sustained, and the horse's prior and subsequent value, her more pertinent testimony concerned developments after that day that led her to inform the FAA that it was respondent who caused the injury to her horse.

Both the Administrator and respondent proffered more than a dozen witnesses, many of whom were in the area of the tavern and store when the horse appeared. Sharon Kaiser, who worked at the store, remembered seeing the horse, but could not recall exactly when. Her shift began at 3:00 P.M. Six men who were in the tavern area when the horse appeared testified that this occurred between 2:30 and 3:30, most testifying that this happened shortly after 3:00. All who were asked the question denied having seen a

¹⁰Notably, however, although Mr. Richardson testified that Art Bellingham had denied seeing a helicopter when he returned home at approximately 4:00, Tami Bellingham testified that Marie Bellingham, who arrived home at the same time as her husband, told Tami that she had heard the helicopter. Tr. at 209.

helicopter at all.¹¹ One witness, a friend of respondent's, testified that he had heard a helicopter in the morning, and noted that the local mill owned a burgundy and silver helicopter.¹² These witnesses testified that the subject horse had escaped the pasture before, had injured itself before, and was high-tempered, suggesting that the horse's predicament and injuries were independent of any action by respondent.¹³

Respondent testified that he and Mr. Tolley left his house at approximately 9:30 A.M., trailered the helicopter to the take-off point, took off at approximately 10:30, and were in the area of the airstrip at approximately 11:30. Tr. at 767, 774-775. The co-pilot's testimony is not substantially different. Tr. at 387, 398-399. Respondent testified that, after overflying the horses, he flew the helicopter across the road and landed in a field some distance behind the store.¹⁴ Respondent introduced

¹¹On the other hand, in testimony that is inconsistent with all other testimony, including respondent's, Elsie Hamilton testified that she saw a helicopter getting ready to land near the store while she was driving to work at the tavern near 11:00 A.M.

¹²On rebuttal, the Administrator introduced evidence to show that the mill did not own that helicopter on the date in question. Tr. at 914.

¹³There was extended testimony on this point, and considerable testimony intended to impeach the credibility of various witnesses.

¹⁴There is a great deal of discussion regarding where respondent landed. In addition to Ms. Hamilton's testimony, there is hearsay testimony from Sharon Kaiser that perhaps he landed alongside the store. The testimony from the men at the tavern would suggest that, if respondent landed in the afternoon, he did not do so close to the store, thus supporting his story generally.

telephone records ostensibly to show that in the afternoon he was at home on the phone,¹⁵ and his sister testified that she had talked to him on the telephone at approximately 3:00 P.M. (when, according to the Administrator, he was flying). Respondent recanted a statement (Exhibit C-41) written in August 1991 that he and Mr. Tolley were flying at about 1:00 P.M. for 1 hour and the incident occurred "at the end of our time," (i.e., at approximately 2:00).

The law judge specifically rejected the hearing testimony of Mr. Richardson altering his description of the helicopter. Tr. at 957. He accepted the Vickers' testimony, but for the matter of the time, noting that both had only estimated it.¹⁶ To set the time of the flight, the law judge returned to respondent's initial statement, concluding that the event occurred at approximately 2:00 P.M., with the horse arriving at the tavern approximately 1 hour later. In reaching his decision, the law judge noted that respondent had offered to pay the Bellinghams the \$69 medical expenses.

On appeal, respondent challenges the law judge's conclusions regarding the time of the flight and the identification of the helicopter, yet he offers no good reason to overturn these

¹⁵Respondent did not explain to the law judge's satisfaction a phone call from the house at 10:13 A.M. when, according to his testimony, he had left with Mr. Tolley at approximately 9:30. Tr. at 811.

¹⁶The record shows that 4:00-4:30 was the usual post-school day time Charlynn rode in the arena, but this was the first day of summer vacation. Exhibit C-15.

findings. Admittedly, the initial decision is based on circumstantial evidence, as no witness noticed the number of the low-flying helicopter. But there is considerable evidence supporting the law judge's decision.

Any decision in this case depends substantially on credibility determinations. There were 18 witnesses testifying at the hearing. They were residents of the area who either saw a relevant portion of the unfolding events or thought they knew something about them, and it is clear from merely reading the record that some witnesses were less than completely neutral. Birkenfeld is a small community and it appears this incident has caused considerable division of loyalties. In such circumstances, determining credibility is an especially difficult but crucial task for which deference to the law judge's decision is especially important, absent compelling reason. Administrator v. Smith, 5 NTSB 1560, 1563 (1987). No such reason has been given here.

None of the eyewitnesses actually looked at a watch. With none of the witnesses on a strict schedule, and with recollection not committed to writing for some time, it is not unusual that time estimates ultimately varied considerably. Mr. Vickers could have lost track of time, having been working on his tractor for much of the day. Mr. Richardson's timing estimate is based on references to other events and appears too compressed. See Tr. at 94. See also Exhibit C-31 deposition at 23, which indicates the incident occurred before 3:30.

In concluding that the 4-4:30 estimates were somewhat mistaken, the law judge was able to credit most of the other evidence, i.e., respondent's earlier statement that the horse overflight occurred at approximately 2:00, and all the testimony that the horse appeared at the store at approximately 3:00,¹⁷ and produce a cohesive, reasonable account of events. Respondent's telephone records do not prove that it was he and no other that made the afternoon calls, nor must we reverse the law judge because Mr. Tolley seems to have had another appointment that afternoon. As the law judge noted, Mr. Tolley's equivocal and nonspecific testimony is not a model of compelling evidence.

As to the identification of the helicopter, respondent also offers no good reason to overturn the law judge's finding, including his rejection of Mr. Richardson's changed testimony. The law judge's credibility analysis is integral to that rejection.¹⁸ Moreover, and despite the role Tami and Jeffrey Bellingham played in Messrs. Richardson and Vickers' identification of respondent and his helicopter, respondent admitted he was flying in the immediate area, his testimony regarding his landing pattern tracked that of Messrs. Vickers and Richardson, and there is absolutely no evidence that there was any helicopter other than respondent's in the area that day.

¹⁷Ms. Hamilton's testimony that she saw a helicopter at approximately 11:00 is somewhat vague (see Tr. at 676) and not necessarily reliable, departing as it does even from respondent's testimony at the hearing that he was not in the area until 11:30.

¹⁸We note Mr. Richardson's lack of total confidence in his recollections. Exhibit C-31 deposition at 22.

Respondent argues it was error for the law judge to find that he should have seen the Vickers' and Bellingham's horses. Yet he does not demonstrate error in the law judge's conclusion that respondent failed to take sufficient precautions, based as it is, in part, on Mr. Tolley's inability to recollect whether a reconnoiter pass was made and in the law judge's rejection of respondent's protestations that sufficient reconnoitering was done. Although we may agree, in the abstract, that a pilot, after having taken all possible precautions, should not be faulted for spooking horses that suddenly appear out of tree cover, this does not excuse respondent's failure to see Charlynn Vickers in the riding arena.

Respondent also claims, as a legal matter, that his conduct is excused in § 91.119's exception for takeoffs and landings. He has not made the required showing, however, that it was necessary, for this landing in a helicopter, to overfly the Vickers' arena (which is considerably distant from the hangars) at extremely low altitude. See Administrator's Reply at 34.¹⁹

Finally, respondent argues that it was error for the law judge to deny respondent's motion to dismiss for failure of the Administrator to make a prima facie case. Respondent's argument, however, is premised on his version of the facts, a version disputed by the Administrator's witnesses, and a version

¹⁹The Administrator also points out that, to qualify for the exception, it must be shown that the landing site is appropriate. Administrator v. Harrington, NTSB Order No. EA-3767 (1993). Respondent admitted that he would not have attempted the landing had he known there were horses in the pasture. Tr. at 849.

ultimately rejected by the law judge despite his initial misgivings. The law judge not only considered the oral arguments of counsel, but a more thorough and detailed written motion and reply. We find no abuse of discretion in his denial of the motion to dismiss.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.²⁰

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

²⁰For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).