SERVED: January 16, 2013

NTSB Order No. EA-5646

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, 2013

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. JAMES WILSON SMITH, Respondent.	Docket SE-19035

OPINION AND ORDER

1. *Background*

Respondent appeals the oral initial decision of Administrative Law Judge Alfonso J. Montaño, issued October 13, 2011.[1] By that decision, the law judge determined respondent violated 14 C.F.R. §§ 91.7(a)[2] and 91.13(a).[3] The law judge ordered a 60-day suspension of all

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

[2] Section 91.7(a) provides, "[n]o person may operate a civil aircraft unless it is in an airworthy condition."

respondent's airman certificates, including his private pilot certificate. We remand the case to the law judge for clarification on his findings of fact and conclusions of law concerning the § 91.7(a) charge.

A. *Facts*

On February 21, 2010, respondent operated a Cessna 210D carrying two passengers from Opa Locka Airport in Florida to Athens-Ben Epps Airport in Georgia. Just prior to that flight, while taxiing the aircraft at Opa Locka, respondent collided with a parked aircraft, a Citation 560 XL. At the time of the collision, the tail cone of the Citation XL was approximately four feet over the line delineating the perimeter of the taxiway, and respondent relied upon the taxiway lines as he operated the aircraft on the taxiway to avoid colliding with any other aircraft. Respondent's Cessna 210D had Flint Aero tip tanks installed on it in 1996. Exh. R-15. The left-hand tip tank was the component that struck the Citation XL. The collision resulted in a scratched area on the wing tip (containing the tip tank) of the Cessna 210D. Exhs. A-7 and A-11(a) (photographs showing damage to wing tip).

Personnel from the fixed-base operator at Opa Locka—Miami Executive Aviation (MEA)—instructed respondent not to leave the airport until he provided them with his identification. Respondent initially refused to provide such information. Believing respondent appeared in a hurry to leave, one MEA employee parked a golf cart in front of the Cessna to prevent respondent from departing. After later providing the MEA employees with some contact information, respondent operated the aircraft from Opa Locka to Athens.

(..continued)

[3] Section 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."

Upon departing Opa Locka, respondent believed his aircraft was in an airworthy condition after the collision with the Citation XL, because his inspection of the aircraft showed it merely withstood a paint scratch. Nevertheless, the morning after the collision, respondent contacted Robert McDowell, respondent's regular aircraft mechanic, because he preferred to keep his aircraft free of scratches.[4]

Mr. McDowell inspected the aircraft on February 23, 2010. The logbook records indicated, "Inspected left-hand wing tip and tank mounting. No defects. Sanded and painted scratched left-hand tip tank leading edge with customer furnished paint." Exh. A-17. With regard to his inspection of the aircraft, Mr. McDowell only observed a "paint scratch on the left wing tip," which "appeared to be only paint removal." Tr. 608. Mr. McDowell did not observe any broken fibers or exposed fiberglass, nor did he see any wrinkling, denting, or evidence of a diagonal energy transfer. Id. at 608-09.

B. *Procedural Background*

As a result of the foregoing, the Administrator issued an order dated February 4, 2011, suspending respondent's private pilot certificate for a period of 60 days. The Administrator's order, which serves as the complaint in this case, alleged respondent violated 14 C.F.R. §§ 91.7(a), and 91.13(a) and (b).[5] As to the § 91.7(a) violation, the Administrator appeared to proceed on the theory that the aircraft did not comply with the requirements of its type certificate

[4] Mr. McDowell stated as follows: "[Respondent] told me that he had touched another airplane with his wing tip. You know, he has a paint scratch on the wing tip and, you know, he just wanted it to be inspected to make sure that it was, again, airworthy. He felt that it was airworthy, but he wanted to be careful, so he just wanted to make sure it was, indeed, airworthy." Tr. 608.

[5] Section 91.13(b), entitled "Aircraft operations other than for the purpose of air navigation," states, "[n]o person may operate an aircraft, other than for the purpose of air navigation, on any part of the surface of an airport used by aircraft for air commerce (including areas used by those aircraft for receiving or discharging persons or cargo), in a careless or reckless manner so as to endanger the life or property of another."

following the collision.[6] With regard to the § 91.13(a) violation, the Administrator alleged respondent violated § 91.13(a) in two ways: first, by operating the aircraft in an unairworthy condition, and second, by exhibiting a lack of situational awareness when he collided with the Citation XL on the taxiway. Finally, concerning the charge that respondent violated § 91.13(b), the Administrator contended respondent's failure to provide identification and other information to MEA employees immediately following the collision amounted to a violation of § 91.13(b).[7]

The case proceeded to hearing on June 7, 8, and 9 and October 12 and 13, 2011. Both sides called several expert witnesses to testify on the issues. Inspectors Ronald Rakestraw and Edward Levy, both of whom are FAA principal avionics inspectors, opined respondent violated § 91.7(a) because the aircraft could not have complied with its type certificate following the collision. Inspector Rakestraw inspected the aircraft on February 22, 2010, and took photographs of it. Exh. A-11(a). He noted, "minor paint damage and unknown structural damage" on the left-hand wing tip. Tr. 255. With regard to the Administrator's theory that the aircraft was unairworthy as a result of this damage, Inspector Levy stated the scratches on the left-hand wing tip of the aircraft rendered it unairworthy "until somebody went to the Cessna

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[6] To be airworthy an aircraft must: (1) conform to its type certificate and applicable Airworthiness Directives; and (2) be in a safe condition for operation. Administrator v. Doppes, 5 NTSB 50, 52 n. 6 (1985) (citing 49 U.S.C. § 1423(c) [subsequently recodified as 49 U.S.C. § 44704(d)(1)]). Therefore, to carry the burden of proof, the Administrator need only prove an aircraft operator violated one of the two prongs.

[7] In particular, at the hearing, the Administrator's attorney stated as follows:

> Immediately after the collision with the XL, when Mr. Smith was initially uncooperative with Miami Executive, he turned off his engine. He canceled his previous clearance. He pushed back his aircraft. During this time his actions could have arguably been for purposes other than air navigation. Thus, the Agency argues that Mr. Smith's carelessness was an ongoing event from the moment he began taxiing down the taxiway towards the Citation XL, the other aircraft, until he put the aircraft into the hangar in Athens.

Tr. 809-810.

manual and made a determination of how deep the gouge can be, or how big the damage is." Tr. 322. Neither Inspector Levy nor Inspector Rakestraw reviewed the aircraft's type certificate or the supplemental type certificate (STC) applicable to the Flint Aero tip tanks to determine whether the aircraft complied with its type certificate.[8]

Mr. Ryland Roatman provided expert testimony on respondent's behalf concerning operation and maintenance of Cessna 210 aircraft. Mr. Roatman opined a mechanic must reference any STCs that may apply to an aircraft in conducting an annual inspection. In this regard, Mr. Roatman stated, "[t]he STC is a modification to the original type certificate of the aircraft. So in this instance the tip tanks are changed, the tip of the wing, so whatever Cessna had there, it doesn't apply anymore; the STC does." Tr. 724. Respondent's attorney presented Mr. Roatman's testimony in support of his argument that review of the aircraft's type certificate, as modified by the STC applicable to the tip tanks, was necessary to determine whether the aircraft was unairworthy under § 91.7(a).

C. *Law Judge's Oral Initial Decision*

At the conclusion of the hearing, the law judge found the Administrator proved respondent violated §§ 91.7(a) and 91.13(a), but did not prove respondent violated § 91.13(b). The law judge provided an assessment of the facts, and found the Administrator's witnesses more credible than respondent and Mr. McDowell. The law judge also did not credit the testimony of Mr. Roatman concerning his opinion that respondent's aircraft was still airworthy, despite the collision with the Citation 560 X. The law judge cited Administrator v. Scuderi,[9] for

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[8] See Tr. 268 (Inspector Rakestraw testified he was unaware of any "technical data from the manufacturer of the Flint Aero tip tank that requires an inspection, if the tip tank has physical contact with an object").

[9] NTSB Order No. EA-5321 (2007).

the finding that respondent's aircraft was not airworthy following the collision until the aircraft underwent an inspection to ensure compliance with its type certificate. In particular, the law judge stated:

> Mr. Smith should have had an inspection completed on his aircraft before flying the aircraft after the collision with the Cessna Citation XL in this case. The Board found in Scuderi and I too find that in this case the Respondent was aware of the potentially unsafe condition and that leads me to conclude that when he operated the aircraft after the collision, that resulted in a violation of 91.7(a).

Initial Decision at 923-24. The law judge further stated respondent's conduct in operating the aircraft on the taxiway so close to the Citation XL was careless and reckless; in this regard, the law judge referred to his determination that respondent's testimony concerning the operation on the taxiway was not credible. However, the law judge determined the Administrator failed to establish respondent violated § 91.13(b) because the Administrator provided no evidence indicating respondent's operation of the aircraft was for purposes other than air navigation.[10] The law judge rejected respondent's argument that he was eligible for a waiver of sanction pursuant to the Aviation Safety Reporting Program (ASRP), because he found respondent's conduct in continuing on the taxiway so close to the Citation XL was deliberate.[11] The law judge deferred to the Administrator's choice of sanction, based upon the relevant sections of the

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[10] The Administrator did not appeal this determination.

[11] Under the ASRP, the Administrator may waive the imposition of a sanction, despite the finding of a regulatory violation, as long as certain requirements are satisfied. Aviation Safety Reporting Program, Advisory Circular 00-46D at ¶ 9c (Feb. 26, 1997). The Program involves filing a report with the National Aeronautics and Space Administration (NASA), which may obviate the imposition of a sanction where: (1) the violation was inadvertent and not deliberate; (2) the violation did not involve a criminal offense, accident, or action found at 49 U.S.C. § 44709; (3) the person has not been found in any prior FAA enforcement action to have committed a regulatory violation for the past five years; and (4) the person completes and mails a written report of the incident to NASA within ten days of the violation.

Administrator's Sanction Guidance Table,[12] in ordering a 60-day suspension of respondent's certificate.

D. *Issues on Appeal*

Respondent presents many arguments on appeal. In particular, respondent contends the law judge violated his due process rights,[13] as well as 49 U.S.C. § 44709(d)(3)[14] when he did not admit into evidence a letter of interpretation from the FAA's chief counsel concerning airworthiness under § 91.7(b).[15] Respondent also argues the Administrator did not fulfill the burden of proof concerning the airworthiness charge under § 91.7(a). Furthermore, respondent contends he did not violate § 91.13(a), because the Administrator did not prove a violation of

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[12] FAA Compliance and Enforcement Program, FAA Order 2150.3B (Oct. 1, 2007).

[13] The Constitution's due process clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const, amend. V. In general, we have held that when a respondent has had the opportunity to present and cross-examine witnesses at the administrative hearing, neither the law judge nor the Administrator has denied the respondent due process of law. See, e.g., Administrator v. Nadal, NTSB Order No. EA-5308 at 7 n.6 (2007).

[14] At the time of the hearing in this case, 49 U.S.C. § 44709(d)(3) provided as follows:

> When conducting a hearing under this subsection, the Board is not bound by findings of fact of the Administrator but is bound by all validly adopted interpretations of laws and regulations the Administrator carries out and of written agency policy guidance available to the public related to sanctions to be imposed under this section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law.

Section 44709(d)(3) has since changed, to remove the deference requirement. Pilot's Bill of Rights, Pub. L. 112-153, § 2(c)(2), 126 Stat. 1159, 1161 (Aug. 3, 2012).

[15] Section 91.7(b) states: "The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur." Respondent argues § 91.7(b) provided him with the authority to determine the aircraft was airworthy following the collision. In this regard, respondent contends § 91.7(b) is contrary to the Administrator's contention that a mechanic with an airframe and powerplant certificate was required to inspect the aircraft immediately following the collision.

§ 91.7(a).[16] In this regard, respondent argues the law judge erred in determining respondent's operation of the aircraft on the taxiway was careless and reckless, in violation of § 91.13(a). Concerning the sanction, respondent contends the law judge erred in concluding respondent was ineligible for a waiver of sanction under the ASRP, because his conduct was inadvertent and not deliberate. Respondent also argues the law judge should not have accepted the Administrator's Sanction Guidance Table into evidence, as the Table is neither "validly adopted" nor "publicly available" as 49 U.S.C. § 44709(d)(3) required.

2. *Decision*

On appeal, we review the law judge's decision *de novo*, as our precedent requires.[17]

A. Two-Prong Airworthiness Test

Airworthiness under § 91.7(a) requires an aircraft comply with its type certificate *and* be in a condition for safe operation.[18] As a result, to prevail on an airworthiness charge, the Administrator need only prove the aircraft fails to meet one of the two prongs.

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[16] The Administrator routinely includes a § 91.13(a) careless and reckless allegation in complaints alleging violation of operational regulations. The Administrator proves a charge under § 91.13(a) when an operational violation has been charged and proven. See, e.g., 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). The Administrator may elect to pursue an independent charge of § 91.13(a), which is not based upon any operational violation, provided the respondent has received adequate notice of the Administrator's pursuit of the charge as independent rather than residual. Administrator v. Bassett, NTSB Order No. EA-5195 (2005).

[17] Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 at 2 n.5 (1993); Administrator v. Wolf, NTSB Order No. EA-3450 (1991); Administrator v. Schneider, 1 N.T.S.B. 1550 (1972) (in making factual findings, the Board is not bound by the law judge's findings).

[18] Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985); see also, e.g., Administrator v. Haddock, NTSB Order No. EA-5539 at 11 (2010), aff'd on other grounds, Haddock v. Babbitt, No. 11-2194, 2012 WL 2899322 (4th Cir. July 17, 2012); Administrator v. Surratt and Walker, NTSB Order No. EA-5514 at 16-17 (2010).

1. *Compliance with Type Certificate*

In cases such as this one, where the Administrator seeks to prove noncompliance with the first prong of the airworthiness test, the record must contain the documents with which the Administrator maintains the respondent did not comply.[19] Such documents may include the type certificate, type certificate data sheet, applicable airworthiness directives, or STCs. The record before us does not contain any such evidence, nor does it contain testimony indicating FAA staff reviewed the type certificate or similar documents to determine whether the aircraft complied with the requirements of the type certificate or STC.

2. *In a Condition for Safe Operation*

Under the second prong, the Administrator may prove the charge by showing, by a preponderance of the evidence, the aircraft at issue was not in a condition for safe operation. For this second prong of the inquiry, our precedent does not require that the Administrator prove the respondent had *actual knowledge* that the aircraft was not in a condition for safe operation but rather permits us to consider whether respondent *knew or should have known* the aircraft was not in a condition for safe operation.[20]

As the law judge stated in his decision, the facts of Administrator v. Scuderi[21] are most similar to the case at issue here. In Scuderi, although the Administrator did not submit the type

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[19] Administrator v. Opat, NTSB Order No. EA-5290 at 10 (2007) (finding the Administrator failed to prove the first prong when the Administrator submitted the TCDS and the master minimum equipment list into evidence but neither document addressed whether the landing gear could be pinned in place).

[20] See Administrator v. Thibert, NTSB Order No. EA-5306 at 7-8 (2007); Administrator v. Opat, NTSB Order No. EA-5290 (2007). See also Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994); Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985); Administrator v. Anderson, NTSB Order No. EA-3976 at 4-5 (1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 6 (1992).

[21] Supra note 9.

certificate into evidence, the Board nevertheless determined the Administrator proved the respondent operated his Cessna 182 when it was in an unairworthy condition, because the aircraft's wingtip struck a Beechcraft King Air and caused damage to both aircraft. In particular, the glare shield on the respondent's Cessna 182 bent during the collision. The respondent bent the glare shield back into place and took off, after declining to present his pilot certificate, medical certificate, logbook, and other items upon the request local law enforcement. An FAA inspector who testified at the hearing stated the respondent violated § 91.7(a) because he failed to have the aircraft inspected or take appropriate corrective action before taking off. The inspector opined the fact that the aircraft was later found to comply with its type certificate did not absolve the respondent of culpability, because the respondent took off when the aircraft was "in an unknown condition."[22] The Administrator argued both prongs of the airworthiness test in Scuderi, and the Board resolved the case by finding the respondent knew or should have known the aircraft was not in a condition for safe operation. Specifically, the Board stated, "while the Administrator has not presented evidence to prove that respondent's aircraft did not conform to its type certificate, the Administrator has nevertheless shown that the aircraft was not in a condition for safe operation when respondent operated the aircraft."[23]

Scuderi is one of only two opinions in which we have analyzed a § 91.7(a) charge resulting from the collision of two aircraft.[24] The other opinion is Administrator v. D'Attilio,[25]

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[22] Id. at 5.

[23] Id. at 10.

[24] The Board has issued two other opinions involving collisions, but neither of these opinions include a detailed analysis of § 91.7(a) violation. Administrator v. Speroni, NTSB Order No. EA-4710 (1998); Administrator v. McKenna, NTSB Order No. EA-3960 (1993); see generally Administrator v. van der Horst, NTSB Order No. EA-5179 (2005) (resolving charge that the respondent operated an unairworthy Lindstrand Balloon, Model A-150, when, after colliding with a cement wall and thereby causing damage to the balloon envelope and injuring

in which the Board held the respondent violated § 91.7(a)[26] when he collided a Hughes Helicopter, Model 369D, with another helicopter approximately five minutes after departure. The respondent and the other pilot landed, reviewed the damage, and then switched aircraft. The Board found the respondent's operation of the other helicopter after the collision constituted a violation of § 91.29(a). The Board's analysis in D'Attilio was not based upon the two-prong airworthiness standard we now use, but instead was based on the general notion an aircraft must undergo an inspection following a collision to ensure airworthiness. Specifically, the Board stated:

> Respondent is both a pilot and a licensed [A&P] mechanic. He, therefore, cannot claim, as the holder of only a pilot certificate might, that he failed to appreciate the necessity for a close visual examination of the rotor blades, after the collision, to insure that their structural integrity had not been compromised. Thus, his decision to operate the helicopter without, in reality, even attempting to ascertain the aircraft's condition for safe flight is arguably a more serious breach of his obligation as an airman not to operate an unairworthy aircraft than is presented where an airman not trained as a mechanic operates an aircraft with a known deficiency whose impact on airworthiness may not be fully understood. In any event, respondent's decision to operate the aircraft without first inspecting it properly, and despite the fact that the collision had produced a vibration or shaking in the aircraft of then unknown origin, reflected a callous disregard for the lives of his passengers that we find inexcusable, given his broad-based aviation knowledge and experience.[27]

(..continued)
passengers, the respondent immediately took off on another passenger-carrying flight after conducting a preflight inspection; the law judge granted the respondent's appeal, stating no one inspected the load tapes on the balloon, which were the basis for the Administrator's § 91.7(a) charge).

[25] NTSB Order No. 7 NTSB 637 (1990).

[26] At the time, § 91.7(a) was codified as 14 C.F.R. § 91.29(a).

[27] 7 NTSB at 639-40 (text also including a footnote, which states, "[r]espondent testified that he saw only minor damage. However, notwithstanding respondent's insistence that he could adequately inspect the condition of the rotors in a matter of a few minutes before they had even stopped spinning, we note that a subsequent, thorough inspection disclosed that in addition to other damage requiring correction, two of the five rotor blades required replacement and two required repair.").

Although the Board's test for determining airworthiness has evolved over time, we believe Scuderi and D'Attilio are consistent, as both reach the logical conclusion that a collision resulting in visible damage further requires an aircraft to undergo an inspection to ensure its continued airworthiness.

In Administrator v. Yialamas,[28] the Board reversed the law judge's determination that the Administrator proved the respondent violated § 91.7(a). The Administrator had alleged the respondent operated his Piper Seneca in an unairworthy condition during two flights when the elevator trim cable was "damaged and frayed."[29] Prior to the flights, the respondent had arranged for a repair station to review the aircraft's autopilot. Upon this review, the repair station manager determined the elevator trim cable was frayed. The respondent elected not to have the repair station make the repairs to the autopilot, and picked up his aircraft. The repair station placarded both the autopilot and trim as inoperative, and the repair station manager informed the respondent that he believed the trim was in an unairworthy condition. The repair station manager did not, however, tell the respondent the *aircraft* was unairworthy. The respondent then took the aircraft to another mechanic who evaluated it. Upon receiving a price quote from the second mechanic, the respondent decided the price was too high, and asked the mechanic to put the aircraft back together. The mechanic testified he told the respondent "he did not think the airplane should be flown with the frayed trim cable because if it broke in flight it could interfere with other flight control cables," but testified the respondent stated he planned to

[28] NTSB Order No. EA-5111 (2004).

[29] Id. at 2.

fly it anyway.[30] Like the first mechanic, this second mechanic acknowledged he never told the respondent he thought the *aircraft* was unairworthy.

In evaluating Yialamas under the two-prong standard applicable to § 91.7(a) charges, the Board held the Administrator failed to prove the first prong because she did not provide the type certificate into evidence. The Board then held the record did not support a finding that the aircraft was unsafe. The Board stated the respondent could not be charged with knowledge the aircraft was unairworthy because neither of the two mechanics who reviewed the aircraft opined the aircraft was unairworthy. In addition, both mechanics signed the aircraft's logbook describing the completed repairs (which were unrelated to the autopilot or trim), and returned the aircraft to service. Since the aircraft had been returned to service, the Board determined, therefore, the Administrator could not prove the respondent had knowledge that the aircraft was not in a condition for safe operation.

B. *The Case at Issue*

1. Knew or should have known

Based upon this long line of precedent, we apply this standard of whether the pilot *knew or should have* known that the aircraft was not in a condition for safe operation. Applying this consideration to the case at issue, the record indicates respondent knew or should have known the aircraft should have undergone an inspection before he departed from Opa Locka. For example, the Administrator's witness testified an inspection was necessary, following the collision, to ensure the aircraft met its type design.[31] This logic is consistent with our line of precedent concerning the "knew or should have known" standard. In the case at issue,

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[30] Id. at 4.

[31] Tr. 331.

respondent collided with another aircraft, and the photographs admitted into evidence at the hearing show visible damage to the paint on respondent's aircraft. Such damage constituted both actual and implied knowledge on respondent's part that an inspection was necessary. Moreover, respondent promptly contacted his mechanic to request an inspection of the aircraft once he arrived in Athens. This immediate contact indicated respondent knew or should have known his aircraft may not have been in a condition for safe operation.

In addition, the law judge made a credibility finding unfavorable to both respondent and respondent's mechanic. In particular, the law judge stated he could not find credible respondent's description of his conduct on the taxiway immediately following the collision. The law judge summarized the testimony of Messrs. Hampton and Peralta, who described respondent as "uncooperative at best, accepting fault for the collision, and in a hurry to leave," and stated, "Mr. Smith's own testimony contradicts his statement that he was not in a hurry to leave."[32] The law judge stated he found the testimony of Messrs. Hampton and Peralta more credible than respondent's "self-serving version of the events."[33]

Regarding respondent's testimony concerning the collision at Opa Locka, the law judge stated respondent's testimony describing "his thorough inspection he claims to have conducted on the Cessna 210 after the collision" was not credible.[34] The law judge observed, "while he took numerous photographs after the collision, not one of those photos were of the wing on the

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[32] Initial Decision at 915.

[33] Id.

[34] Id.

Cessna 210 he was piloting, which would indicate the degree of damage to the aircraft or the lack thereof."[35]

In addition, the law judge did not find credible the testimony of respondent's friend and mechanic, Mr. McDowell, who inspected respondent's aircraft shortly after respondent arrived in Athens. In this regard, the law judge stated Mr. McDowell contradicted himself about whether the inspection he performed determined the collision did not compromise the aircraft. The law judge also determined Mr. McDowell's logbook entries did not document a thorough review of the damage to the aircraft or an extensive examination of the damaged wing. The law judge recalled at the hearing,

> [c]ounsel for [r]espondent essentially told [Mr. McDowell] on direct examination what the correct entry should have been, and Mr. McDowell simply answered that that is the inspection that he should have done and should have been described in the logbook. After that discussion he repeated portions of the description that have been provided by counsel throughout his testimony. I didn't find that convincing. He did not document the more detailed inspection he told Mr. Rakestraw he would perform. I at this day do not believe that he performed the inspection that he claimed he had conducted.[36]

We defer to our law judges' credibility assessments unless they are arbitrary and capricious.[37] In this instance, the law judge's credibility assessments were not arbitrary and capricious, as they were logically based on the law judge's observations, and not contrary to the evidence in the record.[38] The law judge's observations and credibility findings indicate

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[35] Id. at 916.

[36] Id. at 906.

[37] Administrator v. Porco, NTSB Order No. EA-5591 at 10-11 (2011) (citing Administrator v. Jones, 3 NTSB 3649 (1981), and Administrator v. Smith, 5 NTSB 1560 (1986)), aff'd Porco v. Huerta, No. 11-1312, slip op. at 2 (D.C. Cir. May 21, 2012) (per curiam).

[38] Initial Decision at 906-907, 914-16.

respondent knew or should have known the aircraft might not have been in an airworthy condition.

2. *Reason for remand*

Although the evidence at the hearing clearly shows that respondent *knew or should have known* the aircraft might not have been airworthy when he flew it, this evidence does not result in immediate resolution of the case. In Scuderi, Yiamalas and all the other cases in our jurisprudence, the Administrator proved the aircraft was, in fact, not in a condition for safe operation. The record before us appears to show the aircraft *might not have been* in a condition for safe operation. The record does not contain the type certificate or substantive testimony on either of the two requisite prongs of the airworthiness test. Inspector Levy opined the scratches on the left-hand wing tip of the aircraft rendered it unairworthy until someone inspected the aircraft while reviewing the aircraft's manual. However, Inspectors Levy and Rakestraw did not provide specific testimony concerning the requirements of the type certificate, nor did they conclusively state the aircraft was not in a condition for safe operation and provide testimony to support that conclusion. This apparent absence of evidence, leads us to determine a remand to the law judge is necessary. The law judge made conclusions of law that the aircraft was not in a condition for safe operation. We request the law judge provide us specific findings of fact based upon the evidence to support that conclusion of law. At this juncture, it is not clear to us that the Administrator fulfilled his burden in this regard by proving either the aircraft did not comply with its type certificate or was not in a condition for safe operation. The record must contain the type certificate (or other relevant documents, such as the STC) or testimony concerning it. In the alternative, under the second prong of the airworthiness test, the record must contain evidence proving the aircraft was not in a condition for safe operation at the time respondent operated it.

C. *Careless or Reckless Operation*

The Administrator also alleged respondent violated § 91.13(a), in two ways: first, by operating the aircraft on the taxiway while not maintaining situational awareness, and second, by taking off and operating the aircraft en route from Opa Locka to Athens when it was not in an airworthy condition. Our precedent unequivocally establishes when the Administrator proves an operational violation, he also proves a violation of § 91.13(a).[39] Therefore, we reserve ruling on the residual § 91.13(a) charge until such time as the law judge provides us resolution of the § 91.7(a) charge.

D. *Other Arguments on Appeal*

As stated above, respondent also appeals other aspects of the law judge's decision, and presents an evidentiary argument. In particular, respondent contends the law judge violated respondent's due process rights, as well as 49 U.S.C. § 44709(d)(3) when he excluded a letter of interpretation from the FAA's chief counsel concerning airworthiness under § 91.7(b). As for the sanction, respondent contends he is eligible for a waiver of sanction under the ASRP, and that the law judge should not have accepted the Administrator's Sanction Guidance Table into evidence. Given our decision to remand this case, we decline to rule on these issues at this juncture.

3. *Conclusion*

Consistent with the foregoing, we find additional examination of the evidence in light of the two-prong standard is necessary. We remand this case to the law judge for further findings

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[39] See, e.g., Administrator v. Seyb, NTSB Order No. EA-5024 at 4 (2003) (stating that, "[u]nder the Administrator's interpretation of her regulations, a charge of carelessness or recklessness under § 91.13(a) is proven when an operational violation has been charged and proven," and that, "[t]he cases that have established this policy are too numerous to list").

of fact and conclusions of law. At his discretion, the law judge may permit the parties to file additional briefs to address the issues raised in this decision.

ACCORDINGLY, IT IS ORDERED THAT:

This case is remanded to the law judge for further findings of fact and conclusions of law.

HERSMAN, Chairman, HART, Vice Chairman, and SUMWALT, ROSEKIND, and WEENER, Members of the Board, concurred in the above opinion and order.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the matter of:                  *
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J. RANDOLPH BABBITT,               *
ADMINISTRATOR,                     *
Federal Aviation Administration,   *
                                   *
                  Complainant,     *
     v.                            *    Docket No.:  SE-19035
                                   *    JUDGE MONTAÑO
JAMES WILSON SMITH,                *
                                   *
                  Respondent.      *
* * * * * * * * * * * * * * * * * *
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U.S. Tax Court
Russell Federal Bldg & Courthouse
11th Floor, Courtroom 1136
75 Spring Street

Thursday,
October 13, 2011

The above-entitled matter came on for hearing, pursuant to Notice, at 1:00 p.m.

BEFORE: ALFONSO J. MONTAÑO
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

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On behalf of the Respondent:

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13 ORAL INITIAL DECISION AND ORDER
14 ADMINISTRATIVE LAW JUDGE MONTAÑO: This is an Oral
15 Initial Decision. This is a proceeding under the provisions of 49
16 USC Section 44709, formerly Section 609 of the Federal Aviation
17 Act, and the provisions and Rules of Practice in Air Safety
18 Proceedings of the National Transportation Safety Board.
19 This matter has been heard before this Administrative
20 Law Judge and, as provided by the Board's Rules, I have elected to
21 issue an Initial Oral Decision in this matter.
22 Pursuant to notice this matter came for trial on June
23 7th and 8th, 2011. The hearing was continued to October the 13th
24 and 14th [sic]. The Administrator was represented by one of his
25 staff counsel, Taneesha Marshall, Esquire, of the Southern Region,

1 Federal Aviation Administration. Respondent, Mr. James Smith, was
2 represented by Mr. Alan Armstrong, Esquire.
3 The parties were afforded full opportunity to offer
4 evidence, to call, examine and cross-examine witnesses and make
5 arguments in support of their respective positions. I will not
6 discuss all of the evidence in detail in this case. I have,
7 however, considered all the evidence, both oral and documentary.
8 That which I do not specifically mention is viewed by me as being
9 either corroborative or as not materially affecting the outcome of
10 this decision.
11 James Wilson Smith appealed the Administrator's Order of
12 Suspension dated February 4th, 2011, pursuant to 821.31(a) of the
13 Board's Rules. The Administrator filed a copy of that Order of
14 Suspension on February 10th, 2011, which serves as the complaint
15 in this case.
16 The Administrator ordered the suspension of any and all
17 pilot certificates held by the Respondent, including his pilot's
18 certificate number 0016175A1 for a period of 60 days. The
19 Administrator alleged that on February 21st, 2010, Respondent,
20 while operating and taxiing a Cessna 210, with tail number N3854-
21 Yankee, collided with a parked aircraft, identified as a Cessna
22 Citation 568-XL, tail number XAUHQ.
23 The Administrator alleges that the collision caused
24 damage to both aircraft. Subsequently the Respondent operated the
25 Cessna 210, which has been identified with tail number 3854-

1 Yankee, from Opa-Locka Airport in Florida to Athens Ben Epps
2 Airport in Athens, Georgia. The Administrator alleges that the
3 Respondent's aircraft was not in an airworthy condition after the
4 runway collision. The Administrator alleges that the Respondent
5 violated Section 91.7(a) of the Federal Aviation Regulations, also
6 91.13(a) of the Regulations, and 91.13(b) of the Federal Aviation
7 Regulations.
8 As to the agreements in this case, in his amended answer
9 to the Administrator's Order of Suspension and complaint,
10 Respondent admitted Paragraphs 1 and 2. As Respondent has
11 admitted those two paragraphs, the allegations in those paragraphs
12 are deemed as establish for the purpose of a decision.
13 Respondent denies Paragraph 3, except for the reference
14 to the aircraft identified by tail number XAUHQ. He also denied
15 the allegations in Paragraphs 4, 5, 6, 7, 8, 9 and 10 and 11, and
16 he further denies violating the sections of the Federal Aviation
17 Regulations as alleged by the Administrator.
18 Respondent also raised five affirmative defenses, which
19 were included in his amended response or his amended reply to the
20 complaint.
21 As far as the exhibits in this case, the Administrator
22 moved for the admission of Exhibits A-1, A-2, A-3, A-4, A-6, A-7,
23 A-9, A-10, A-11, A-11-A, A-12, A-13, A-14, A-16, A-17, A-18, A-20
24 and A-21. Those exhibits were admitted into evidence.
25 Respondent moved for the admission of Exhibits R-1, R-2,

1 R-3, R-4, R-5, R-6, R-7, R-8, R-9, R-10, R-11, R-12, R-13, R-14,
2 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25. He also moved for the
3 admission of Administrator's Exhibit A-30, which was admitted as
4 one of his exhibits, and the final exhibit admitted by the
5 Respondent was Exhibit R-35. These exhibits, as I indicated, are
6 admitted into evidence.
7 As far as the testimony in this case is concerned, the
8 Administrator presented the testimony of David Hampton, Angel
9 Peralta, Ricardo Garcia, Officer Nathaniel Franco, Special Agent
10 Steve Tochterman, Aviation Inspector Edward Levy, Aviation
11 Inspector Ron Rakestraw, who is qualified as an expert witness in
12 aviation airworthiness and avionics, over the Respondent's
13 objection.
14 Respondent testified on his own behalf and he also
15 presented the testimony of Robert F. McDowell, who is qualified as
16 an expert in airframe and powerplant mechanics. He also has a
17 certification of inspection authority. He is qualified as being
18 knowledgeable -- he was also qualified as being knowledgeable in
19 Flint Aero tip fuel tanks.
20 The Respondent also presented the expert opinion of
21 another expert, and his testimony will be discussed in this
22 decision. Respondent's second expert was Mr. Ryland Roatman, who
23 testified as a Respondent expert, who holds an ATP rating, CFI
24 instrument rating and he is an A&P with an inspection
25 authorization. He was qualified as an expert in aircraft

1 maintenance and piloting. The Administrator did not object to his
2 qualifications in those areas of expertise.
3 DISCUSSION
4 I will discuss the testimony and credibility of the
5 witnesses as they relate to the specific factual issues and my
6 discussion of the alleged violations of the Federal Aviation
7 Regulations.
8 The first issue I will discuss is whether or not
9 Respondent violated Section 91.13(b). 91.13(b) provides that no
10 person may operate an aircraft other than for the purpose of air
11 navigation on any part of the surface of an airport used by
12 aircraft for air commerce, including areas used by the aircraft
13 for receiving or discharging persons or cargo, in a careless or
14 reckless manner so as to endanger the life and property of
15 another.
16 Respondent maintains that the Administrator has not
17 sustained his burden of proof in proving by a preponderance of
18 evidence a violation of 91.13(b). Respondent maintains that the
19 Administrator submitted no evidence that Respondent operated his
20 aircraft on the surface of the airport in Miami Executive Airport
21 for the purposes other than air navigation. Mr. Smith testified
22 that he filed an IFR flight plan to fly from Opa-Locka Executive
23 Airport in Florida to Ben Epps Airport in Athens, Georgia. His
24 instrument flight plan is admitted into evidence as
25 Administrator's Exhibit A-3.

1 The exhibit also indicates that he obtained a weather
2 briefing for his flight from Opa-Locka to Ben Epps Airport and
3 that is at Exhibit A-4. Exhibit A-4 is a personal statement from
4 David L. Winston, which documents that he provided instrument
5 clearance for Mr. Smith and he issued taxiing instructions to
6 Mr. Smith. Mr. Smith testified that he obtained weather
7 information and he filed an instrument flight rules plan from
8 Miami to Athens.
9 Mr. Smith's testimony on this point is credible and not
10 contradicted by the Administrator's cross-examination or
11 contradicted by any witnesses presented by the Administrator. The
12 testimony and the Administrator's own exhibits establish that
13 Mr. Smith operated his aircraft on the surface of Opa-Locka
14 Executive Airport with the intention to operate the aircraft in
15 air navigation.
16 The Administrator argues that because of the inability
17 to obtain prehearing information and response to the letter of
18 investigation, the Administrator was uncertain as to whether or
19 not any of the purposes or any of the movement by Mr. Smith on the
20 surface of the Opa-Locka Executive Airport was for purposes other
21 than air navigation. Admittedly, the exhibits in this case and
22 the facts in this case are certainly a number of facts relative to
23 what occurred with the aircraft stopping and taking off again.
24 The aircraft had to be stopped by a golf cart. Those allegations
25 are all there. That's the Administrator's argument is that's why

1 this specific citation was charged in this case.
2 However, I don't have any evidence that proves that
3 Mr. Smith was on the surface of Opa-Locka airport for any other
4 reason than for air navigation. Based on the evidence before me I
5 find that the Administrator has not establish by a preponderance
6 of reliable probative and credible evidence that Respondent
7 violated 14 CFR, 91.13(b).
8 I now turn to the alleged violation of 91.7(a) of the
9 Federal Aviation Regulations, which deals with airworthiness. The
10 Administrator presented the testimony of four witnesses to prove
11 this violation: provided the testimony of Miami Executive Airport
12 Line Technician Damon Hampton; Customer Service Representative
13 Angel Peralta; Officer Nathan Franco of the Athens Police
14 Department; FAA Inspector Ron Rakestraw; and also provided -- the
15 Administrator also provided the testimony of Mr. Edward Levy.
16 Mr. Hampton testified that he was working as a line
17 technician and shift leader at the time of the incident, and he
18 was told by two other line technicians about the collision between
19 Respondent's aircraft and the Cessna Citation XL jet. He went to
20 the ramp immediately after the accident. Mr. Hampton also holds a
21 private pilot's certificate. He indicated that he saw Respondent
22 pushing a Cessna 210 away from the Cessna Citation XL.
23 He testified that he tried to get identifying
24 information from Mr. Smith, but the Respondent refused to provide
25 the information. According to Mr. Hampton, Mr. Smith told him,

1 "You have my information, just bill me." Mr. Hampton testified
2 that Mr. Smith said, "I did not see the plane, just bill me."
3 Mr. Hampton signed a statement, a written statement, about the
4 incident, admitted as Administrator's Exhibit 1, in which
5 Respondent was described as saying repeatedly that he was not
6 paying attention when he was taxiing out. He repeatedly said,
7 "Send me the bill, because I have to go."
8 Respondent disputes that he made any such statement, the
9 statements that Mr. Hampton has indicated that he made, or that
10 are documented in the exhibit.
11 Mr. Hampton also indicated he observed damage to both
12 planes and described the damage to Respondent's airplane as a
13 scratch on the left wing and it was dented in. He testified that
14 the Cessna Citation XL was also dented and had scratches from the
15 impact. Mr. Hampton further testified that Respondent took photos
16 of the two aircraft and when Mr. Hampton tried to obtain his
17 identifying information, the Respondent refused to provide it and
18 he said he had to leave.
19 Because he could not obtain identifying information from
20 the Respondent, he called Angel Peralta, who is the customer
21 service representative, for assistance. Mr. Peralta arrived on
22 the scene and also asked Mr. Smith for identifying information.
23 He was also refused, and returned to the field base operation and
24 was apparently told that he should try to obtain Mr. Smith's pilot
25 information.

1 He came back and, according to Mr. Hampton, by the time
2 Mr. Peralta arrived the second time, Mr. Smith had boarded his
3 plane, started the engine and was trying to leave. He testified
4 that Mr. Peralta had to pull the golf cart he was riding on in
5 front of Respondent's aircraft to stop him from leaving.
6 Mr. Hampton testified that after Mr. Smith backed up his
7 plane, that he was able to taxi past the Cessna XL without
8 colliding with it. Mr. Hampton also testified that he believed
9 that there was enough room for the Cessna 210 to taxi between the
10 Cessna Citation XL and the other aircraft on the other side of the
11 taxi lane, which was also a Cessna 2, a private jet.
12 On cross-examination he admitted that the photographs
13 taken by the Respondent that were shown to him at the hearing
14 showed the Cessna XL's tail protruding into the taxiway. I found
15 Mr. Hampton's testimony to be credible both on direct and cross-
16 examination.
17 Angel Peralta then testified that he received a call to
18 come out to the ramp by Mr. Hampton to assist in obtaining
19 identifying information from Mr. Smith. He testified that he came
20 out to the flight line and spoke to Mr. Smith. He asked Mr. Smith
21 for his driver's license because he thought the collision should
22 be handled as an auto accident, would have been, and he would call
23 the local police.
24 Mr. Peralta testified that Mr. Smith refused to provide
25 the driver's license because the police did not have jurisdiction

1 over the collision. Mr. Peralta returned to the FBO, where he was
2 told to go back and obtain Mr. Smith's pilot license information.
3 Mr. Peralta then indicated that when he took a golf cart back to
4 the flight line, Mr. Smith was in the aircraft and the engine and
5 propeller were running, and he signaled Mr. Smith to stop the
6 engine and, according to Mr. Peralta, Mr. Smith refused to stop
7 the engine. Mr. Peralta then drove the golf cart in front of the
8 Cessna 210 to stop it from leaving the scene.
9 Mr. Smith shut down the engine and spoke to Mr. Peralta
10 and provided his pilot's license. Mr. Peralta testified that he
11 saw damage to the Cessna Citation XL, but did not recall damage to
12 the Cessna 210. Mr. Peralta testified he suggested to Mr. Smith
13 that he have a mechanic look at the damage to his aircraft, but
14 Mr. Smith declined, saying that he had to leave before it got
15 dark.
16 On cross-examination he agreed that the photos at
17 Exhibits R-6 through R-11 showed the tail section of a Cessna
18 Citation XL protruding into the taxiway.
19 I have found Mr. Peralta to be a credible witness both
20 on direct and cross-examination.
21 Ricardo Garcia was called to testify and to describe the
22 damage to the Cessna Citation XL jet, which had resulted when
23 Respondent's aircraft collided with it. Mr. Garcia is an aviation
24 surveyor with Air Claims, Incorporated. He inspected the Cessna
25 Citation XL, identified damage to the left tail cone. He spoke to

1 Respondent by telephone and asked him if he was going to file a
2 claim with his own insurance company, and Mr. Smith indicated,
3 according to Mr. Garcia, that he was not going to file a claim.
4 He testified that the damage to the Cessna Citation XL required a
5 complete replacement of the flange. He also testified that as an
6 A&P mechanic, he testified that unless you are certified as an
7 A&P, you cannot determine, or as he put it, cannot airworthy an
8 aircraft back into service.
9 He also testified that a visual inspection of damage to
10 an aircraft would not be sufficient to assess all the damage that
11 may have occurred to the aircraft. There may be hidden
12 damage, he indicated, that a visual inspection would not reveal.
13 On cross-examination he testified it would be a concern
14 to him if the aircraft had been parked, the Cessna Citation XL
15 was parked with its tail protruding into the taxiway. He was not
16 aware on cross-examination that personnel from the airport had
17 moved the aircraft from where it had been parked at the time of
18 the collision.
19 Special Agent Steven Tochterman testified that he was
20 informed by the FAA Southern Region about the incident, and he was
21 asked if there were assets available in Athens to meet the
22 Respondent's plane when it landed. He contacted the Athens Police
23 Department and arranged for them to meet Respondent at the
24 airport.
25 Officer Nathan Franco testified that he had received a

1 call from Special Agent Tochterman who requested he go out to Ben
2 Epps Airport in Athens to meet the Respondent and inspect his
3 aircraft for damage and to obtain copies of Respondent's pilot's
4 license and medical certificate.
5 According to Officer Franco, Mr. Smith initially refused
6 to provide the information he requested, but then relented when
7 the officer indicated that the FAA told him that Smith had to
8 provide the information, as a pilot, that the information was
9 being requested by the local law enforcement official.
10 During his inspection of the aircraft Officer Franco did
11 not see any damage to the left wing of Respondent's aircraft, but
12 he did notice a scratch on the right wing tip, which he
13 photographed. He testified that he was not able to conduct a
14 thorough examination or inspection of the airplane, as Mr. Smith
15 and his two passengers were moving the airplane into Mr. Smith's
16 hangar as he was conducting his inspection and taking photos.
17 Officer Franco also testified that Mr. Smith refused to
18 identify the passengers that were with him on the flight and had
19 instructed his passengers not to provide any information to
20 Officer Franco.
21 Mr. Ron Rakestraw is the FAA employee who testified and
22 who actually inspected the damage to the Cessna 210 involved in
23 the collision in this case. He was issued a repairman certificate
24 in 1995, received an A&P certificate in 2005. He was qualified as
25 an expert in aviation airworthiness and avionics, and as principal

1 avionics inspector.

2 He testified that he traveled to Ben Epps Airport the
3 day following the incident of February 21st, 2010, to inspect
4 Respondent's aircraft. He contacted Mr. Smith and requested
5 permission to inspect the plane. Mr. Smith agreed and was
6 cooperative. Smith had Mr. Rakestraw contact Mr. Smith's A&P
7 mechanic, Mr. Robert McDowell, III, who took Mr. Rakestraw to
8 inspect the aircraft.

9 Inspector Rakestraw took photographs of the damage to
10 the aircraft and he testified that after inspecting the aircraft
11 he described the damage as paint damage and testified that there
12 was unknown structural damage, as well. The Exhibit at
13 Administrator's A-11 indicates that in his initial report -- or in
14 his report he indicates that the damage to the aircraft was paint
15 damage.

16 During the hearing he testified that the damage would
17 lead him to conclude that further inspection was necessary to look
18 for hidden damage. He testified that based on the photographs of
19 the damage he had taken and his inspection of the aircraft, he
20 would have submitted the aircraft for hidden damage inspection or
21 review of the technical data to see what inspections were
22 required. He would not be able to determine if there was any
23 other damage to the aircraft, only through visual inspection.

24 He also testified that just by visual inspection of the
25 paint damage would not be enough to determine airworthiness. He

1 did not know if the damage was isolated to the area of impact or
2 there may be damage inside the wing.
3 On cross-examination he agreed under 91.7(b) that a
4 pilot-in-command of civil aircraft is responsible for determining
5 if an aircraft is airworthy. He also agreed that there was no
6 Federal Aviation Regulation that required that an aircraft
7 mechanic has to determine if an aircraft is airworthy after a
8 collision of the nature that occurred in this case. He agreed
9 that A-11 reported the extent of the damage after inspection was
10 described as an impact that resulted in paint damage.
11 Mr. Rakestraw could not describe any other damage to
12 Respondent's aircraft. In response to cross-examination questions
13 he testified that the paint damage rendered the aircraft
14 unairworthy. He testified that the paint damage from the
15 collision possibly made the aircraft unairworthy structurally, but
16 he could not know until further inspection was conducted.
17 Mr. Rakestraw indicated Mr. McDowell had not completed an
18 examination of the wing to determine if there was any other damage
19 to the aircraft when he spoke to Mr. McDowell and thus
20 Mr. Rakestraw could not determine if the aircraft was airworthy at
21 that time. Mr. Rakestraw testified that he left the inspection
22 confident that Mr. McDowell would conduct a more thorough review
23 of the left wing of the aircraft. He also testified that after
24 his conversation with McDowell he understood the aircraft would
25 not be flown until Mr. McDowell completed his inspection.

1 I found Mr. Rakestraw's testimony to be credible, both
2 on direct and cross-examination.
3 The Administrator next called Mr. Edward Levy to
4 testify. He is a principal avionics inspector. Mr. Levy is also
5 a private pilot. He testified he reviewed all of the evidence
6 compiled in this case, analyzed the information, then made
7 conclusions as to the violations of Federal Aviation Regulations.
8 He testified he tried to contact Mr. Smith without
9 success. He sent him a letter of investigation, in response to
10 which he received information from Mr. Smith's A&P mechanic,
11 Mr. McDowell. Based on the evidence that Mr. Levy compiled and
12 analyzed, he made recommendations as to the applicable violations
13 of the Federal Aviation Regulations.
14 As to the recommendations relative to the violation of
15 Section 91.7(a) dealing with airworthiness, he testified that
16 airworthiness, as defined in 14 CFR Section 3.5, that's the
17 definition that indicates airworthy means that the aircraft
18 conforms to its type design and is in a condition for safe flight.
19 Mr. Levy testified that a pilot can make determinations
20 as to whether an aircraft is in a condition for safe flight under
21 the Federal Aviation Regulations, but a pilot is not qualified to
22 make determinations as to whether an aircraft conforms to its type
23 design. Mr. Levy testified that only a certificated mechanic, A&P
24 mechanic, or mechanic with inspection authorization, can determine
25 if an aircraft meets its type design.

1 Mr. Levy testified that after the collision between
2 Respondent's Cessna 210 and the Cessna Citation XL occurred, the
3 airworthiness of the Cessna 210 aircraft was unknown. He
4 testified that as the result of the collision there might be
5 microscopic cracks or other damage inside of the left wing that
6 could not be determined or identified by visual inspection.
7 Because of the potential damage to the aircraft, the aircraft
8 could possibly not conform to it type design and certification.
9 Mr. Levy testified that until the aircraft was inspected by an A&P
10 and the damage or condition was compared to the Cessna manuals for
11 the aircraft and technical data, then the aircraft's
12 unairworthiness was unknown and was, in his view. unairworthy.
13 On cross-examination he admitted that a pilot-in-command
14 under 91.7(b) can make decisions as to whether an aircraft was
15 safe for flight, but again he testified a pilot cannot make
16 airworthy type design certification determination.
17 He testified that the aircraft manufacturer, of a Cessna
18 210 in this case, produced maintenance manuals which are
19 instructions for continued airworthiness, which make sure that all
20 aircraft specifications of all of the drawings and reliability
21 analysis that are in the aircraft type design are maintained. He
22 testified that if you follow the maintenance manual specification
23 and instructions, then by definition the type design will be met.
24 That is because the instructions of continued airworthiness are
25 part of the type design certificate letter.

1 Mr. Levy testified that that determination can only be
2 made by a certificated mechanic, who would compare the damage to
3 the Cessna 210 to the Cessna manuals and if none exists, or the
4 damage is not specified in the Cessna manual, then he indicated
5 that FAA Circular 43.13 would provide technical information which
6 must be reviewed and compared to the condition of the aircraft to
7 make a determination as to airworthiness relative to type design.
8 In repeating his testimony, he testified that an A&P
9 mechanic must make that determination because pilots do not have
10 the training or the expertise unless they are an A&P or have an
11 inspection authority or a certificated mechanic. Under part of
12 the cross-examination he testified that under some hypothetical
13 scenarios a pilot-in-command can make airworthiness determinations
14 as part of the type design certification. Those hypotheticals
15 were different than the facts that are presently before me.
16 On further cross-examination Mr. Levy admitted that he
17 cannot cite a regulation which indicates that a pilot cannot make
18 a determination as to type design, but he also testified that
19 there's no regulation that indicated that a pilot can make a
20 determination as to type design.
21 Upon my questioning, Mr. Levy agreed that there was no
22 evidence in the record for me that the Cessna manual or technical
23 information would inform a pilot or Respondent in this case that
24 he would have to have an A&P inspect the wing after the collision.
25 I found Mr. Levy's testimony to be credible, both on

1 direct and cross-examination.

2 Mr. Smith testified on his own behalf and he also

3 presented the testimony of two experts. His first expert was

4 Mr. Robert McDowell, III. Mr. McDowell has an A&P rating and an

5 inspection authorization rating. He currently owns and runs Aero

6 Services, Incorporated. His company performs inspections and

7 repairs, does modification, major and minor alteration, and also

8 does progressive inspections of many aircraft.

9 He has worked on aircraft with Flint Aero tip tanks and

10 has installed four sets of the tanks himself. He testified that

11 when Flint Aero tip tanks are installed, it requires a

12 supplemental type rating.

13 He was qualified as an expert witness, as an A&P with

14 inspection authority, and he was also found to be knowledgeable in

15 the area of Flint Aero tip tanks. He testified that he considers

16 Mr. Smith his friend, that Mr. Smith has provided counsel to him

17 as a friend, and that if he needed anything, he believed he could

18 call Mr. Smith.

19 He testified that on October 23rd, 2010, there is an

20 entry in the aircraft log for the Cessna 210 in this case. That

21 entry log is at Administrator's Exhibit A-17. He testified that

22 Mr. Smith called him in the morning after the incident and told

23 him that he had touched another plane with his wing tip, Mr. Smith

24 told him that there was a paint scratch on the wing tip, and that

25 he wanted it repaired. He said he told Mr. McDowell that he

1 wanted the aircraft to be inspected to make sure it was airworthy.
2 He testified he made a visual inspection of the wing.
3 Mr. McDowell testified he made a visual inspection of the wing,
4 determined if there was any evidence of diagonal energy transfer,
5 to determine if the impact was significant enough that in that
6 type of an instance it would cause a transfer of energy diagonally
7 over the length of the wing.
8 He made a logbook entry after his inspection, which
9 simply indicated left-hand wing tip tank and tank mounting, no
10 defects, sanded and painted scratched left-hand tip tank, leading
11 edge, with customer-furnished paint. A-17 specifically describes
12 his entry into the logbook.
13 Respondent's counsel in his direct examination
14 essentially got him to admit that the logbook entry was sparse,
15 and the logbook entry should have involved more extensive
16 description of the inspection that he had completed. Mr. McDowell
17 agreed that counsel for Respondent, when he described what type of
18 an entry should have been included in the aircraft logbook.
19 When asked whether after his visual inspection he was
20 satisfied that the aircraft conformed to its type rating, he
21 answered that he did not do an annual inspection. When asked if
22 based on examination of the aircraft he was satisfied that there
23 was no compromise to the aircraft, he answered no, and that's at
24 the transcript at page 613.
25 He testified that a Cessna structural repair manual does

1 not exist for the Cessna 210. He testified that it is the pilot's
2 or Mr. Smith, in this case, who returns the aircraft to service by
3 flying it. He indicates that an A&P mechanic or a certificated
4 mechanic or mechanic with an inspection authority does not return
5 an aircraft to service. He testified that when Inspector
6 Rakestraw arrived, he went over with Mr. Rakestraw the examination
7 of the aircraft wing.
8 Mr. McDowell told Mr. Rakestraw that he intended to look
9 at the structure in more detail and to look into the inspection
10 manual for the Flint Aero tip tank. He testified that when he
11 completed his inspection, that he had no question that the
12 aircraft met its type certification and was airworthy.
13 He testified that Mr. Smith could determine if the
14 aircraft was safe for flight and in conformity with its type
15 certificate based on the description that Respondent's counsel
16 gave him of the visual inspection, purportedly performed by
17 Mr. Smith.
18 Mr. McDowell stated that Mr. Smith could make that
19 determination because Mr. Smith was a pilot, and as a pilot he has
20 the ultimate responsibility for airworthiness, which includes a
21 determination as to airworthiness relative to type design.
22 On cross-examination Mr. McDowell indicated that
23 Mr. Smith had performed some legal work for his wife. He
24 testified that a pilot cannot sign off on an annual inspection.
25 He testified that a pilot cannot fly an aircraft without an A&P

1 signature on the annual inspection, unless that pilot obtained a
2 ferry permit. He testified that he is familiar with the manuals
3 that pertain to the Cessna 210, and admitted that he had to be
4 familiar with the manuals and have them available for him to
5 perform maintenance on the Cessna 210 and to perform annual
6 inspections.
7 He testified that he had extensive training to become an
8 A&P and training to become a mechanic with inspection authority
9 rating, and he testified that he had to be tested to obtain those
10 ratings. He testified that that training was different from the
11 training he had received to become a private pilot.
12 I asked him to describe in more detail the inspection
13 that he had told Mr. Rakestraw that he was going to perform. He
14 had testified that he went through the inspection of the wing and
15 when he went through the inspection of the wing, he told
16 Mr. Rakestraw that he was going to do a more extensive examination
17 of the wing.
18 He testified that he performed the more detailed
19 inspection. When I asked why that more detailed inspection was
20 not described in the aircraft log, he replied he did not have a
21 good answer for that question. He indicated that he should have
22 written it in the entry into the logbook.
23 He agreed that a pilot and other individuals rely on his
24 entries in the aircraft logbooks for annual inspections and rely
25 on his entry to determine whether an aircraft is airworthy or if

1 maintenance was done properly. He has to sign his name, along
2 with his A&P certificate number.
3 He agreed that I could not rely on his entry and logbook
4 for February 23rd, 2010, to know with certainty that he performed
5 the more detailed inspection he represented to Mr. Rakestraw that
6 he would perform.
7 I did not find Mr. McDowell to be credible. He
8 contradicted himself, first by saying that he was not satisfied
9 that the inspection he had performed disclosed that there was no
10 compromise to the aircraft. He then testified that his inspection
11 disclosed that there was no compromise to the aircraft.
12 Mr. McDowell's logbook entries do not document a
13 thorough review of the damage to the Cessna 210 or an extensive
14 examination of the damaged wing. Counsel for Respondent
15 essentially told him on direct examination what the correct entry
16 should have been, and Mr. McDowell simply answered that that is
17 the inspection that he should have done and should have been
18 described in the logbook.
19 After that discussion he repeated portions of the
20 description that have been provided by counsel throughout his
21 testimony. I didn't find that convincing. He did not document
22 the more detailed inspection he told Mr. Rakestraw he would
23 perform. I at this day do not believe that he performed the
24 inspection that he claimed he had conducted. Mr. McDowell
25 testified that Mr. Smith is his friend and has counseled him and

1 performed legal services for his wife. He is Mr. Smith's
2 exclusive mechanic and he has stated that if he needed anything,
3 he could always call on Mr. Smith. I do not find his testimony to
4 be objective, convincing or credible.
5 The Respondent then called as his second expert,
6 Mr. Ryland Roatman. He testified he holds an ATP rating, a CFI
7 rating, which means certified flight instructor. He's also
8 certified flight instructor for instrument ratings. He is an A&P
9 mechanic with inspection authorization. He was qualified as an
10 expert in aircraft maintenance and piloting. The Administrator
11 did not object to his qualification in these areas of expertise.
12 He testified he reviewed the transcript and the exhibits
13 in this case. He first testified that the taxi strips painted on
14 the surface of the airport were mandated by the FAA and the pilot
15 can reasonably rely on those taxi strips to indicate to him that
16 the taxiway is clear.
17 He testified that the aircraft the Respondent was
18 piloting, the 1964 Cessna 210, because of its high wing
19 configuration, made it difficult to see the leading edge of the
20 wing tip, so that the pilot had to lean forward to view the wing
21 tip. He testified that the FAA certified that the 210 was
22 airworthy, with the knowledge of that visibility problem.
23 He testified that Flint tip tanks add 3 feet to the
24 wingspan of the Cessna 210 at issue in this case, or that was
25 involved in the accident in this case. He indicated that the

1 Flint tip tanks are made of sturdy fiberglass and that the tail
2 cone of the Cessna Citation XL is made of aluminum. He testified
3 that the Flint tip tanks were sturdy pieces of equipment.
4 As to the type certification, he testified that
5 determination as to type certificate or type design did not
6 require access to blueprints, as counsel stated that Mr. Levy had
7 indicated and there is testimony to that effect in the record. He
8 indicated that it was what he described as a FAR-3 certification,
9 Rule 3 -- FAR 23 and 24, and he indicated that FAR 23 and 24 did
10 not exist in 1964. He testified that the addition of the Flint
11 tip tanks to Respondent's aircraft required a supplemental type
12 certificate. He testified that the supplemental type certificate
13 to include the wing tips was not considered by Mr. Levy, when he
14 made his analysis of what violations of the regulations were
15 applicable to this case; and, therefore, Mr. Levy's analysis is
16 incorrect or incomplete.
17 He testified that there was a 1964 Cessna 210 structural
18 repair manual. An annual was completed on 7/25/09 and was still
19 in effect on the date of the incident. He indicated that the
20 maintenance log indicated that the VORs and transponder checks
21 were up to date and that the aircraft was deemed airworthy.
22 As to the logbook entry indicating that the damage to
23 the left-hand wing tip required a paint touchup, did not require a
24 log entry. He indicated that a pilot could have done the paint
25 touchup as preventative maintenance.

1 As to the 91.7(b) of the regulations, he testified that
2 the pilot-in-command is responsible for determining if an aircraft
3 is in a condition for safe flight. He testified that this
4 regulation gave Mr. Smith the authority to return the aircraft to
5 service after the collision. He testified that he believed that
6 Mr. Smith made an evaluation and determined that the aircraft was
7 safe for flight.
8 As to Administrator's Exhibit 6 and 12, he indicated
9 that Officer Franco and Mr. Levy did not indicate that there was
10 any damage to Respondent's aircraft. He indicated that there was
11 some discrepancy in what Officer Franco indicated and Mr. Levy
12 indicated that he had -- Mr. Franco had indicated after his
13 inspection. He testified over objection that FAR 91.7(a) was not
14 violated by Respondent because the airplane was airworthy. That
15 was his testimony as to why there was no violation as to 91.7(a).
16 He testified that the report prepared by Mr. Rakestraw
17 did not in his view indicate the Respondent's aircraft was
18 unairworthy. When questioned as to violation of 91.13(d) over
19 objection, he testified that based on his review of the record and
20 exhibits, Respondent did not violate the regulations. He said
21 that the Respondent called for weather briefing, filed an IFR
22 flight plan, and issued taxi instructions. The purpose Respondent
23 was on the taxiway was for the purpose of air navigation.
24 As to the filing of a NASA report, he testified that the
25 Respondent was eligible for a waiver because in his opinion the

1 collision or any other violation that was charged in this case,
2 was not deliberate and was inadvertent. That was the extent of
3 that testimony, didn't explain why.
4 When I asked him, he agreed with me that taxiing towards
5 two aircraft and recognizing potential harm was a deliberate act
6 on the part of Mr. Smith. He testified that he did not believe
7 that as to Section 91.13(a), careless and reckless charge, he
8 testified that he did not believe that the Respondent's conduct in
9 this case and the collision that resulted was careless and
10 reckless because the Respondent would have to have been moving
11 faster and there would have had to have been more damage. He
12 really didn't tell me where that standard came from. He agreed
13 with me though that something being careless and reckless does not
14 have to involve high speed or extensive damage.
15 He said that the only reckless conduct in the case was
16 Mr. Peralta driving the white golf cart in front of the
17 Respondent's aircraft.
18 On cross-examination he testified that the pilot could
19 not sign off on maintenance to an aircraft, only an A&P could do
20 that. He testified he had never signed off on maintenance
21 performed as a pilot, only has an A&P or a certificated mechanic
22 with inspection authority.
23 He testified that the preventative maintenance a pilot
24 is allowed to perform requires an aircraft logbook entry. A pilot
25 can return an aircraft to service after preventative maintenance

1 performed by the pilot. He testified that the pilot can sign off
2 on preventative maintenance performed and perform preventative
3 maintenance that is allowed to be performed by a pilot under the
4 regulations.
5 He testified that Mr. McDowell's logbook entry at A-17
6 did not describe more than a visual inspection. He agreed that a
7 collision between aircraft can create energy transfer to a wing
8 and cause damage that is not detectible to the naked eye.
9 Counsel quoted Respondent's testimony as to how
10 Mr. Smith described proceeding to taxi with the knowledge that
11 there were two aircraft parked protruding into the taxiway. He
12 said that he would tell the pilot to be careful, if that was the
13 case, and he would instruct the pilot to be sure that he did not
14 strike one of the planes protruding into the taxiway. That would
15 be his instructions to a pilot that he was instructing, that would
16 be faced with the type of situation that Mr. Smith was faced with
17 in this case.
18 On my questioning, he indicated that a collision of this
19 type in the case could result in hairline or microscopic cracks in
20 the wing that were not visible to the naked eye. He testified
21 that in order to determine if that occurred, you would have to
22 have a look inside the wing. He testified that after the
23 collision had occurred in this case, it would have been prudent
24 for Mr. Smith to have an A&P look at the damage to determine if
25 the aircraft was airworthy. He indicated that based on his review

1 of the record in this case, he did not think an A&P or mechanic
2 was available to Mr. Smith in this case.
3 From his review of the record, he testified that
4 Mr. Smith continued to taxi toward the two aircraft protruding
5 into the taxiway was deliberate. That was in response to one of
6 the questions I asked him. He testified that he thought that the
7 collision with the aircraft Citation XL was inadvertent because
8 Mr. Smith did not intend to hit the aircraft.
9 I found Mr. Roatman's testimony and opinions to be
10 conclusory. He did not really provide evidence or discussion as
11 to the basis for his opinions. I give no weight to his testimony
12 that in order for Respondent to be found careless and reckless, he
13 would have had to have been going faster in the situation and the
14 collision would have had to have caused more damage. As to his
15 opinions that the Respondent did not violate Section 91.7(a), the
16 basis for his opinion being that the airplane was airworthy, but
17 he did not explain why. He did not examine the aircraft and could
18 not point to any record in the evidence to demonstrate that the
19 aircraft was airworthy.
20 Mr. Smith, as I stated, testified on his own behalf, as
21 well. Mr. Smith testified as to the impact between the aircraft
22 he was piloting, Cessna 210 and the Cessna Citation XL private
23 jet. He testified that he was taxiing slowly and cautiously
24 because he knew that it was close to the Cessna XL and another
25 Cessna 2, a small jet on the other side of the taxiway.

1 He testified that he judged he could clear it. He
2 testified he felt a very slight impact and immediately applied the
3 brakes and cut the engine. He also described his feeling the
4 airplane move a little. He got out and he testified he made a 30-
5 minute inspection of the damage of the entire wing. He testified
6 that he knew by his senses that it was not a serious impact. He
7 was there and he knows what he felt.
8 Paint damage, he testified, was only to the primer and
9 there was no cracks, leaks or exposed fiberglass. He testified
10 that there was no wrinkling of the skin on the aluminum part of
11 the wing and there were no gaps between the flaps and there was no
12 narrowing of any gaps along the wing.
13 His 30-minute inspection of the damage led him to
14 believe that the aircraft was airworthy, and he decided as the
15 pilot-in-command to proceed with his flight. He testified at the
16 time of the inspection he was fully aware and was conscious of
17 making sure that the airplane was airworthy.
18 He testified that he believed that there was no
19 substantial structural damage but he had his mechanic look at the
20 aircraft the next day to determine if the aircraft was airworthy.
21 Mr. Smith also testified as to the events that occurred
22 on the taxiway after the collision. His testimony was markedly
23 different from the testimony provided by Mr. Hampton and
24 Mr. Peralta.
25 Mr. Smith, as I've indicated, denied ever saying, "I did

1 not see the plane, just bill me." He denied repeatedly saying
2 that he was not paying attention when he taxied or saying, "Just
3 send me the bill, I have to go." He denied that he was in a
4 hurry. He testified that a lineman came up to him after the
5 collision and asked him for his identifying information, to which
6 he responded, "You already have that information," and the
7 information was not provided to that lineman. That lineman, I
8 believe, was Mr. Hampton.
9 The next line person he saw was a man who he indicated
10 pulled up in a golf cart in front of him in a reckless manner. He
11 testified that he motioned this individual to get out of the way.
12 This individual refused, and therefore he shut down his engine and
13 got out of the aircraft.
14 He testified that he didn't remember what that person
15 asked him, but that Mr. Smith indicated that he gave that person
16 his pilot's license. It was photocopied and returned to him.
17 After that he testified he told that person, "Have a nice day."
18 He also testified that he cooperated with the police
19 that were waiting for him when he landed in Athens, Georgia later
20 that night, provided his pilot's license and medical certificate
21 only after he was told that the FAA indicated that he had to
22 provide the information.
23 I have listened to Mr. Smith's testimony and have had a
24 chance to judge his credibility and to view his presence here in
25 the courtroom and the witness stand, and after reviewing all of

1 the evidence and his testimony and testimony of all the other
2 witnesses, I cannot find that I can find Mr. Smith's description
3 of what occurred on the taxiway after the collision to be
4 credible.
5 Mr. Hampton and Mr. Peralta described him as
6 uncooperative at best, accepting fault for the collision, and in a
7 hurry to leave. Mr. Smith's own testimony contradicts his
8 statement that he was not in a hurry to leave. He testified that
9 he wanted to leave the airport before dark and was concerned about
10 an approaching weather front.
11 I find the version of events of the description by
12 Mr. Hampton and Mr. Peralta to be more credible than Mr. Smith's
13 self-serving version of the events. Mr. Peralta and Mr. Hampton,
14 they have nothing to lose in this case, while Mr. Smith has the
15 potential of losing his pilot's license for 60 days.
16 Mr. Smith's lack of credibility on these events lead me
17 to find him not to be a credible witness. I don't believe his
18 description of his interactions with Mr. Peralta and Mr. Hampton
19 and his interactions with the police that were waiting for him and
20 his two passengers when they landed in Athens, Georgia.
21 I do not find that his uncorroborated description of the
22 impact of the collision or, as he described it, the touching of
23 the wing, with the Cessna Citation XL, to be credible. Further, I
24 find that his uncorroborated description of his thorough
25 inspection he claims to have conducted on the Cessna 210 after the

1 collision, to be credible. While he took numerous photographs
2 after the collision, not one of those photos were of the wing on
3 the Cessna 210 he was piloting, which would indicate the degree of
4 damage to the aircraft or the lack thereof.
5 As I've indicated, I have listened to Mr. Smith's
6 testimony, his demeanor here in the courtroom, and based on my
7 analysis of all the evidence, I have to find that I did not find
8 that he is a credible witness.
9 Thus, this leads me to the discussion of the violation
10 of 91.7(a). Again, 91.7(a) provides that no person may operate a
11 civil aircraft unless it is in an airworthy condition.
12 The Administrator has the burden of proving that the
13 aircraft was unairworthy by a preponderance of the evidence. In
14 cases in which the Administrator has alleged that an operator has
15 violated 14 CFR 91.7(a), the Board has long held that the standard
16 for airworthiness consists of two prongs: one, whether the
17 aircraft conforms to its type certificate and applicable
18 airworthiness directives; and, two, whether the aircraft is in a
19 condition for safe operation.
20 In determining whether an aircraft is airworthy, in
21 accordance with the aforementioned standard, the Board considers
22 whether the operator knew or should have known of any deviation in
23 the aircraft's conformance with its type certificate. The
24 Administrator maintains that after Respondent's aircraft, Cessna
25 210, collided with parked Cessna Citation XL, it sustained damage

1 to the wing. The Administrator maintains the Respondent should
2 have had an aircraft A&P mechanic inspect the damage to determine
3 if the aircraft was airworthy after the collision and to determine
4 whether or not the aircraft still met its type certificate or type
5 design after the collision. Respondent did not have an A&P
6 mechanic inspect the damage. The Administrator maintains that
7 Respondent's aircraft was unairworthy as to its type certificate
8 and type design.
9 Further, the Administrator maintains the Respondent was
10 not qualified to make a determination as to whether the Cessna 210
11 conformed to its type certificate after the collision. The
12 Administrator asserts that the Cessna 210 aircraft remained
13 unairworthy until it was inspected by an airframe and powerplant
14 mechanic. The Administrator asserts that only a certificated
15 mechanic, an A&P mechanic, or a mechanic with an inspection
16 authorization is competent or authorized to determine if an
17 aircraft conforms to its type certificate and type design.
18 The Administrator maintains that the certificated A&P or
19 IA have the training to determine if the aircraft meets its type
20 certificate or type design. Pilots do not have the training or
21 expertise unless they are an A&P or a mechanic with an inspection
22 authority or certificated mechanic. Pilots can make
23 determinations as to whether or not the aircraft is in condition
24 for safe flight, and this is done usually by a preflight
25 inspection.

1 The Administrator argues that they have proven by a
2 preponderance of the evidence that whether the Cessna 210 met its
3 type certificate was unknown after the collision with the Cessna
4 XL and it remained unknown until it would have been inspected by
5 an A&P to determine whether or not it met its type certificate and
6 type design.
7 Respondent, on the other hands, maintains that Mr. Smith
8 as the pilot-in-command has the authority to determine if an
9 aircraft meets its type certificate, type design, as well as
10 making determinations that the aircraft is in a condition for safe
11 flight. Respondent maintains that after the collision Mr. Smith
12 made a thorough inspection of the damage and determined that the
13 aircraft was in a condition for safe flight, and that it meets its
14 type certificate or type design, therefore, the aircraft was
15 airworthy.
16 Respondent argues that no regulation prohibits a pilot
17 from making a determination as to whether an aircraft meets its
18 type certificate or type design. Respondent maintains that the
19 Administrator has not proven by a preponderance of the evidence
20 that the Cessna 210 piloted by the Respondent was not airworthy.
21 Further, Respondent argues that the Administrator's
22 investigation in this matter was flawed because Mr. Levy did not
23 consider the supplemental type certificate issued to the Cessna
24 210 because of the installation of the Flint Aero tip tanks.
25 First, as I've indicated, I do not find Mr. Smith's

1 uncorroborated description of how he claimed to have performed his
2 inspection of the aircraft after the collision to determine -- I
3 do not find that credible. His testimony relative to the
4 inspection that he had performed is uncorroborated. He had two
5 passengers in the aircraft which he indicated, I believe, helped
6 him back the aircraft away after the collision, but they did not
7 testify and did not corroborate Mr. Smith's description of the
8 impact or the inspection that he claims he performed.
9 In reviewing the testimony presented by the parties, I
10 have found Mr. Garcia's testimony to be credible. He testified
11 that he is an A&P mechanic. He testified that unless you are a
12 certified A&P mechanic, you cannot airworthy an aircraft back into
13 service. He also testified that a visual inspection of damage to
14 an aircraft would not be sufficient to assess all the damage that
15 may have occurred or have occurred to the aircraft, and that there
16 may be hidden damage that visual inspection could not reveal.
17 I found Mr. Levy's testimony to be credible and he too
18 testified that only a certificated mechanic or an A&P mechanic or
19 a mechanic with an inspection authority can make a determination
20 as to whether an aircraft meets its type certificate or type
21 design. The pilot does not have the competency or authority to
22 make that determination.
23 I also found Mr. Rakestraw to be credible when he
24 testified that whether the Cessna 210 was airworthy after the
25 collision with the Cessna Citation XL was unknown at that time and

1 it remained unknown until the A&P mechanic examined the damage.
2 Respondent's expert, Mr. Roatman, testified that he
3 believed the pilot can make that determination as to whether an
4 aircraft meets the type certificate or type design. He is an A&P
5 mechanic with inspection authorization; however, he also testified
6 that he has never signed off on such determination or any other
7 maintenance as a pilot. As indicated, I did not give
8 Mr. Roatman's testimony much weight, as it was conclusory without
9 explanation as to the basis for his opinions, and his standard for
10 what constitutes careless or reckless conduct was simply not
11 credible. However, he did testify candidly and credibly when he
12 testified that it would have been prudent for the Respondent to
13 have a mechanic inspect the Cessna 210 after the collision.
14 I did not find Mr. McDowell's testimony to be credible.
15 He testified that he performed detailed inspection relative to the
16 airworthiness of Mr. Smith's Cessna 210, but did not document it
17 in the logbooks. When confronted with this fact, he basically
18 indicated he did not have an answer as to why that documentation
19 was not in the logbook and that document is required by the
20 Federal Aviation Regulations.
21 Thus, in weighing the evidence in this case, I give the
22 Administrator's witnesses and experts' opinion the greater weight
23 and I find that their testimony that the Respondent as a pilot did
24 not have the expertise or competence to make a determination as to
25 whether the Cessna 210 in this case still met its type design or

1 type certificate after the collision with the Cessna XL.
2 Having made that finding, I must look at the case law
3 for guidance in assisting me in making my decision. Respondent
4 argues that the *Administrator vs. Doty* case is controlling. The
5 Board held in that case that they would not apply a strict
6 liability standard to the facts of that case. The case involved
7 violation of Federal Aviation Regulations 91.7(b) and 91.9. The
8 case does not involve type certification of an aircraft or
9 determination as to whether or not an aircraft meets its type
10 design or type certification.
11 It does hold that the National Transportation Safety
12 Board will not apply a strict liability standard to the facts
13 specifically in that case. That case involved a situation where
14 jet fuel was put into the tanks of an aircraft that required
15 aviation fuel, as it was a piston-driven type of an aircraft. The
16 Board found that the pilot was not responsible for the conduct of
17 others in filling the aircraft with the wrong type of fuel.
18 The Administrator cites a number of cases, the most
19 relevant of which is *Administrator vs. Scuderi*. That case
20 involves an allegation that respondent operated a Cessna 182
21 aircraft so close to another aircraft that it caused a collision
22 hazard and that respondent operated the aircraft in a careless and
23 reckless manner.
24 The wing tip of Respondent's aircraft in that case
25 struck the wing tip of another aircraft. The facts indicate that

1 the aviation inspector, Mr. Shapiro, who was called to investigate
2 the accident, went to the airport to investigate the incident but
3 by that time the respondent had already flown away in his
4 aircraft. Mr. Shapiro testified that given the circumstances of
5 the collision, respondent should have had arranged for an internal
6 complete inspection of the aircraft before operating it again.
7 He also testified that despite the fact that
8 respondent's mechanic subsequently inspected the aircraft and
9 found it airworthy, it did not render respondent any less culpable
10 because he took off in the aircraft after the collision when it
11 was in an unknown condition. A witness for the respondent, who
12 was on board the plane with respondent, indicated that he did not
13 feel the collision but respondent told him that respondent's
14 aircraft merely scraped the wing of the other aircraft.
15 The Administrative Law Judge in that case found that the
16 Respondent experienced a lapse in judgment when he failed to have
17 an aircraft inspection completed before operating the aircraft
18 after the collision. He found that in failing to have the
19 inspection completed, rendered him in violation of the Federal
20 Aviation Regulations. The Administrative Law Judge found that the
21 respondent violated 91.7(a). On appeal, the NTSB Board affirmed
22 the ALJ's findings.
23 I find that this case is similar to the case before me
24 and provides legal precedent to show guidance. Similar to the
25 case, the Respondent departed the airport and the condition of his

1 aircraft was unknown. Respondent requested his mechanic perform
2 an inspection to determine if the aircraft, the Cessna 210, was
3 airworthy the next day after the collision.
4 In *Scuderi* the Administrative Law Judge found that an
5 inspection should have been conducted prior to leaving the
6 airport, and because it was not, that constituted a violation of
7 91.7(a). The Board agreed with that determination, that finding,
8 and affirmed the decision and also concluded that based on their
9 conclusion the respondent violated 91.7(a). They also concluded
10 that the respondent's operation of the aircraft subsequent to the
11 collision was careless and reckless and in violation of 91.13(a).
12 In the case before me, Mr. Smith indicated that after
13 the collision he was concerned and conscious of the question as to
14 whether the Cessna 210 was airworthy. As in *Scuderi*, Mr. Smith
15 did not dispute that he was aware of damage to the wing tip,
16 although he argues it was minor paint damage. Despite his belief
17 that the damage to the Cessna 210 after the collision was merely
18 paint damage, he asked his mechanic, Mr. McDowell, the very next
19 day to inspect the aircraft to determine if it was airworthy.
20 I find as the ALJ, and the Board affirmed in *Scuderi,*
21 that Mr. Smith should have had an inspection completed on his
22 aircraft before flying the aircraft after the collision with the
23 Cessna Citation XL in this case. The Board found in *Scuderi* and I
24 too find that in this case the Respondent was aware of the
25 potentially unsafe condition and that leads me to conclude that

1 when he operated the aircraft after the collision, that that
2 resulted in a violation of 91.7(a). Therefore, I find that the
3 Administrator has proven by a preponderance of the evidence that
4 the Respondent violated Section 91.7(a).
5 I must mention also that while there has been
6 significant discussion of the Flint Aero tip tanks in this case,
7 the issue that I feel turns the decision in this case is whether
8 or not the aircraft was airworthy at the time after the collision.
9 The issue is whether or not the airworthiness of the Cessna 210
10 after the collision was known. I don't find that the fact that it
11 had Aero tip tanks to really affect that determination because, as
12 in *Scuderi*, the Board and the ALJ in that case concluded that an
13 inspection should have been conducted after the collision and
14 before the pilot resumed flying the aircraft.
15 I now turn to the issue of whether Respondent was in
16 violation of 14 CFR, 91.13(a), which provides that no person may
17 operate an aircraft in a careless or reckless manner, so as to
18 endanger the life or property of another.
19 As I have found that the Respondent was in violation of
20 FAR 91.7(a), I also find, and using *Scuderi* as guidance, that the
21 Respondent violated Section 91.13(a). Specifically, I find the
22 Respondent was careless and reckless in that he flew his aircraft
23 from Opa-Locka Airport in Florida to Ben Epps Airport in Athens,
24 Georgia, when it was not airworthy or its airworthy condition was
25 unknown. In making the flight he placed the lives of his two

1 passengers and himself in danger. The Administrator has cited
2 case law which ruled that such a finding can be made, and again,
3 specifically, *Scuderi*.
4 However, the Administrator also argues that the
5 Respondent was careless and reckless in that the aircraft he was
6 piloting collided with the parked Cessna Citation XL, so the
7 Administrator is arguing that there is a basis for me to find that
8 the Respondent violated Section 91.13(a). The Administrator
9 provided testimony from Mr. Ricardo Garcia, who described the
10 damage to the Cessna XL jet, which resulted when the Respondent's
11 aircraft collided with it.
12 Mr. Garcia is an aviation surveyor with the Air Claims,
13 Incorporated. As I've indicated, he inspected the Citation XL and
14 identified damage to the tail cone. He spoke to Respondent about
15 whether he was going to file a claim with his own insurance
16 company, and as I previously indicated, Mr. Smith indicated that
17 he was not going to file a claim.
18 He testified that the damage to the Citation XL required
19 the complete replacement of a flange. Therefore, the
20 Administrator through this testimony has established that the
21 collision caused damage to the property of another, that being the
22 Cessna Citation XL.
23 The Administrator also presented testimony of Inspector
24 Levy as to Respondent's violation of 91.13(a). Mr. Levy testified
25 that the issue was one of basic pilot situational awareness. He

1 testified that as an experienced pilot, it is incumbent upon
2 Mr. Smith to recognize and avoid a collision with another aircraft
3 or obstacle. While the tail sections of the Citation XL may have
4 been protruding into the taxiway -- that may have been, as
5 Mr. Levy testified, a contributing factor -- it was still the
6 responsibility of the Respondent as pilot-in-command to maintain
7 situational awareness and to avoid the collision with the Cessna
8 Citation XL.
9 The testimony from Mr. David Hampton also indicated
10 Respondent was careless or reckless when he collided with Cessna
11 Citation XL. As previously noted, when he arrived at the scene,
12 Respondent was pushing the Cessna 210 away from the Cessna
13 Citation XL. He heard Mr. Smith say that it's my fault, I did not
14 see the plane. Administrator's Exhibit A-1, page 2, indicates
15 that the pilot said repeatedly he was not paying attention when he
16 was taxiing out, "Just send me the bill, because I have to go."
17 Again, Respondent argued the statements in the report
18 are not accurate and they were simply made to protect the Miami
19 Executive Airport FBO from liability, as they improperly parked
20 the Cessna Citation XL and the Cessna 2. I do not find this
21 assertion credible. As I previously noted, I found Mr. Hampton's
22 testimony is credible.
23 Respondent argues that the Respondent relied on the red
24 taxi lane strips and exercised due caution. Respondent argues
25 that the taxiway lanes are mandated by the FAA and require the

1 aircraft not protrude into the taxiway. Thus, Respondent was
2 within the required lanes when the collision occurred.
3 Respondent also maintains that the Miami Executive
4 Aviation was negligent in parking the Cessna Citation XL and the
5 Cessna 2 jet protruding into the taxiway. But for that
6 negligence, Respondent seems to maintain that the collision would
7 not have occurred. However, Respondent, a seasoned litigator,
8 testified that he did not file a claim against the Miami Executive
9 Airport or sue them for damages to his aircraft, because, as he
10 stated, that would be antagonistic.
11 When I asked him if it was Miami Executive Airport's
12 negligence that was at fault for the collision, he indicated that
13 he thought that they were negligent; however, again, he has not
14 filed a claim against Miami Executive Airport or the FBO on the
15 field and has not filed a claim against the Cessna Citation XL.
16 Respondent also maintains that the high wing design of
17 the Cessna 210 obstructed his view of the Cessna Citation XL and
18 Respondent's expert testified that the FAA certified the 210 as
19 airworthy as to its design with knowledge of that visual
20 difficulty. Thus, Respondent seems to claim that the FAA type
21 design certification of the Cessna 210 high wing aircraft
22 contributed to the cause of the collision. He also maintains that
23 the Flint Aero tip tanks added another 3 feet to the wingspan of
24 his aircraft, which also obstructed his view.
25 In renewing his defense, it appears that there are a

1 number of other parties at fault for the collision, as Respondent
2 is arguing in this case, but I do not find those defenses and
3 testimony relative to those arguments to be credible or
4 persuasive.
5 Respondent testified that he was familiar with the Miami
6 Executive air ramp and he had been there, I think, at least 15
7 times. He testified that as he began to taxi, he saw the two
8 aircraft were protruding into the taxiway, the Cessna Citation XL
9 and the Cessna 2, both private jets and heavier aircraft than the
10 Cessna 210.
11 He saw them as he was approaching them. He testified "I
12 thought I could get through, but obviously misjudged where my
13 airplane was as far as the Cessna Citation XL was concerned." And
14 that's at transcript at page 574.
15 He indicated he proceeded slowly because he knew he was
16 close and that he felt the collision. The evidence supports the
17 conclusion that Respondent knew that the two aircraft were
18 protruding into the runway taxiway, presented a possibility of
19 collision hazard. He continued to taxi anyway. He slowed his
20 aircraft because he knew it would be close. His own testimony
21 demonstrates that he knew that there was a potential for collision
22 between his aircraft, the Cessna 210, and the Cessna Citation XL
23 or the Cessna 2, but he deliberately proceeded anyway in the face
24 of the hazard of potential collision.
25 Mr. Levy testified that Mr. Smith as a pilot had to have

1 situational awareness to avoid a hazard. Mr. Smith had the
2 opportunity to avoid the collision. Respondent has presented no
3 evidence or regulation or testimony that indicates that Mr. Smith
4 has to blindly follow the taxi lines, within the red taxi lines,
5 despite the fact that there were other aircraft protruding into
6 the taxiway and the protrusion of those other aircraft presented a
7 collision hazard. He had the power to stop taxiing, ask the Miami
8 Executive Air to move his plane or to seek assistance in helping
9 get his aircraft, the Cessna 210, past the two jets that were
10 protruding into the airway. He did neither. He deliberately and
11 purposely proceeded to taxi in the face of the collision risk, and
12 it is apparent that he assumed that risk.
13 The consequences of assuming that risk of collision is
14 what occurred in this case, a collision. The collision was not
15 inadvertent because Mr. Smith proceeded deliberately to taxi in
16 the face of the recognized collision potential. He knew that if
17 he continued to taxi it could cause a collision and his deliberate
18 action brought about that collision, not an inadvertent event.
19 Based on the evidence in this case, I find that the
20 Administrator has proven by a preponderance of the evidence that
21 Respondent was in violation of Federal Aviation Regulation
22 91.13(a), that he was reckless and careless in the operation of
23 the aircraft, of the Cessna 210, which caused damage to the
24 property of another. Both the Cessna 210 and the Cessna Citation
25 XL were damaged. From the evidence before me, neither aircraft

1 belonged to Mr. James Wilson Smith.

2 Having discussed my finding based on my evaluation of

3 all the evidence in this case, I now make the following specific

4 findings of fact and conclusions of law.

5 FINDINGS OF FACTS AND CONCLUSIONS OF LAW

6 First I am going to address Respondent's five

7 affirmative defenses. First of all, I do not find that the

8 Respondent has proven by a preponderance of the evidence that the

9 Administrator's complaint fails to state a violation of Federal

10 Aviation Regulations.

11 Secondly, I do not find that the Respondent has proven

12 by a preponderance of the evidence his second affirmative defense.

13 I have specifically found that the Respondent did not exercise all

14 reasonable care in the circumstances. My decision in this case is

15 not an application of a doctrine of strict liability, but is based

16 on a careful analysis of the evidence and testimony in this case,

17 weighing the credibility and looking at case law and determining

18 whether or not the Respondent was in violation of the regulations

19 in this case as they relate to the specific facts of this case.

20 As to his third defense, Respondent indicates that he

21 relied upon the taxiway boundary markings. I have discussed the

22 evidence in the body of my decision and will not repeat my

23 findings here, as I have just indicated what those findings are.

24 Respondent's fourth defense is deny each and every

25 allegation in the complaint that has not already been specifically

1 denied.

2 Respondent's fifth defense is a paragraph-by-paragraph

3 denial of the Administrator's complaint.

4 I will address these defenses in my findings of fact and

5 conclusions of law relative to the Administrator's complaint.

6 As to the Administrator's complaint in this case, I make

7 the following findings of fact and conclusions of law.

8 As previously indicated, the Respondent does not dispute

9 Paragraphs 1 and 2 of the order of suspension, the complaint in

10 this case.

11 As to Paragraph 3, I find that the Administrator has

12 proven by a preponderance of evidence that while taxiing aircraft

13 N3854Y at OPF you, the Respondent, collided with a parked

14 aircraft, XAUHQ, a Cessna 560XL, the property of another.

15 As to Paragraph 4, I find the Administrator has proved

16 by a preponderance of the evidence in this case that a collision

17 caused damage to both the aircraft with the tail number N3854Y and

18 the aircraft with the tail number XAUHQ.

19 As to Paragraph 5, I find that the Administrator has

20 proven by a preponderance of evidence that as a result of the

21 collision you, the Respondent, was instructed by airport personnel

22 not to leave OPF until you provided your identification and

23 personal information.

24 As to Paragraph 6, I find that the Administrator has

25 proven by a preponderance of the evidence that he refused

1 initially to turn off the aircraft engine to provide his
2 identification.
3 As to Paragraph 7, I find that the Administrator has
4 proven by a preponderance of the evidence the facts of this case,
5 that airport personnel put a golf cart in front of N3854-Yankee
6 with the engine running to prevent it from leaving the air field.
7 As to Paragraph 8, I find that the Administrator has
8 proven by a preponderance of evidence that after providing the
9 requested information, he then operated the aircraft off OPF to
10 AHN.
11 I find that the Administrator has proven by a
12 preponderance of the evidence that when, as in Paragraph 9, that
13 when Respondent departed OPF for the above flight, N3854-Yankee
14 was not in an airworthy condition.
15 I have found the Administrator has proven by a
16 preponderance of evidence the allegation in Paragraph 10, that the
17 Respondent's operation of N3854 Yankee was careless or reckless in
18 that it endangered the life and property of others.
19 As to Paragraph 11, as the result, the Administrator
20 alleges that the Respondent violated the following sections of
21 Federal Aviation Regulations: Section 91.7(a), that no person may
22 operate a civil aircraft unless it is in airworthy condition;
23 Section 91.13(a), that no person may operate aircraft in a
24 careless and reckless manner, so as to endanger the life and
25 property of another.

1 I find that as to Section 91.13(b) that the
2 Administrator has not proven by a preponderance of evidence that
3 the Respondent violated that section of the Federal Aviation
4 Regulations, as I have found. The Administrator has proven by a
5 preponderance of evidence that there was a violation by the
6 Respondent of Sections 91.7(a) and 91.13(a).
7 As to the sanction, having found that the Administrator
8 has proven the specific allegations I have cited, the
9 Administrator's complaint by a preponderance of reliable probative
10 credible evidence, and I now turn to the sanction imposed by the
11 Administrator in this case.
12 As to the appropriate sanction in this case, by statute,
13 deference is to be shown to the choice of sanction chosen by the
14 Administrator in the absence of any showing that the deference is
15 to an interpretation which is arbitrary, capricious or not in
16 conformity with the law.
17 Respondent has argued that the sanction guidelines
18 should not be given deference due to the fact that they were not
19 validly adopted or publicly available. He makes constitutional
20 argument to that effect. That objection is beyond my authority to
21 decide, but the objection is preserved for appeal should the
22 Administrator [sic] choose to appeal my ruling as to the deference
23 regarding the sanction.
24 As there has been no other showing that the
25 Administrator's choice of sanction is arbitrary or capricious or

1 not in accordance with the law, I find that the Administrator's
2 60-day suspension in this case is within the sanction guidelines.
3 Certainly a 60-day suspension is applicable to both violations I
4 have found in this case individually; however, I defer to the
5 Administrators 60-day suspension in this case. As it is within
6 the guidance table, I must give deference to that choice of
7 sanction chosen by the Administrator; therefore, I affirm the
8 Administrator's sanction.
9 Now, the Respondents filed an ASRP or an NASA report
10 and, therefore, argues that he is entitled to a waiver of the
11 sanction in this case. One of the exhibits entered into evidence
12 by the Respondent was the circular of the FAA, U.S. Department of
13 Transportation, Federal Aviation Administration, Advisory
14 Circular, AC No. 00-46, dated February 26, 1997, which describes
15 aviation safety reporting.
16 On page 3 of that report, and I'll quote from the
17 report, that the filing of a report with NASA concerning an
18 incident or occurrence involving the violation of 49 USC, Subtitle
19 7, or the FAR, as considered by the FAA to be indicative of a
20 constructive attitude. Such an attitude will tend to prevent
21 further violations. Accordingly, although I find a violation may
22 be made, neither a civil penalty nor certificate suspension will
23 be imposed if the violation was inadvertent or not deliberate or
24 the portion of the circular goes on to discuss criminal offenses
25 and other actions that are not applicable to the case before me.

1 What is applicable to me is whether or not the
2 violations in this case were inadvertent and not deliberate. As I
3 have found, Mr. Smith deliberately and purposely proceeded to taxi
4 in the face of a collision risk that he recognized. His testimony
5 indicates and supports that conclusion.
6 He assumed the risk by continuing to taxi. The
7 consequences of assuming that risk was a collision and that's what
8 occurred. The collision that occurred in this case was because of
9 Mr. Smith's deliberate action in proceeding to taxi. The
10 collision was not inadvertent because Mr. Smith proceeded
11 deliberately to taxi in face of recognized collision potential.
12 He knew that if he continued to taxi it could cause a collision
13 and his deliberate action brought about that collision.
14 Based on my review of all the evidence in this case, I
15 do not find that Mr. Smith is entitled to a waiver of the sanction
16 in this case. Therefore, I will ask the court reporter to start a
17 new page, which will be headed as an order.
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1 ORDER

2 IT IS ORDERED, ADJUDGED AND DECREED that I find that the
3 sanction brought by the Administrator in this case is appropriate
4 and warranted and in the public interest in air commerce and air
5 safety; and, therefore, I find that the Administrator's Order of
6 Suspension, and complaint herein, must be and shall be affirmed as
7 I have read it into the record.

8 Any and all pilot's certificates held by the Respondent,
9 including his private pilot's certificate number 001617531, be,
10 and are hereby, suspended for a period of 60 days.

11

12 _____

13 ALFONSO J. MONTAÑO

14 Administrative Law Judge

15

16 APPEAL

17 ADMINISTRATIVE LAW JUDGE MONTAÑO: As to the appeal
18 rights in this case, the Respondent and the Administrator both
19 have appeal rights. I have placed sheets on the court reporter's
20 desk which describe the process by which the parties can file an
21 appeal in this case, and those will be handed to the parties after
22 we go off the record in this case.

23 I would ask the parties to review, and I'm sure they
24 have reviewed them in the past and are familiar with them, as both
25 counsel are lawyers that have practiced in these cases, that there

1 are deadlines that have to be met as far as filing an appeal and
2 deadlines that have to be met as to filing a brief in support of
3 that appeal.
4 With that said, that concludes my Oral Initial Decision
5 and with that, there is nothing further that I need to address in
6 this case, so will go off the record at this point in time.
7 (Whereupon, at 2:31 p.m., the hearing in the above-
8 entitled matter was adjourned.)
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CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: James Wilson Smith

DOCKET NUMBER: SE-19035

PLACE: Atlanta, Georgia

DATE: October 13, 2011

was held according to the record, and that this is the original, complete, true and accurate transcript which has been compared to the recording accomplished at the hearing.

_____

David Garcia-Ledford
Official Reporter