

SERVED: March 26, 2010

NTSB Order No. EA-5515

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 25th day of March, 2010

_____)	
J. RANDOLPH BABBITT,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-18799
v.)	
)	
BENJAMIN L. MAGRO,)	
)	
Respondent.)	
)	
_____)	

OPINION AND ORDER

Respondent appeals the oral initial decision of Administrative Law Judge William A. Pope, II, in this matter, issued following an evidentiary hearing held on February 24, 2010.¹ By that decision, the law judge affirmed the

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

Administrator's emergency order,² which revoked all mechanic and medical certificates that respondent holds, including two second-class medical certificates. The Administrator's amended order, issued February 4, 2010, charged respondent with violating 14 C.F.R. § 120.33(b), based on the allegation that respondent performed a safety-sensitive function while he had a prohibited drug in his system.³ The amended order alleged that respondent performed maintenance on a Bell helicopter on November 18, 2009, and that, on November 25, 2009, respondent submitted to a random drug test, which was positive for marijuana.⁴ The amended order consequently alleged that respondent lacked the qualifications to hold any FAA-issued airman medical certificate, under 14 C.F.R. §§ 67.107(b)(2),

² This case proceeds pursuant to the Administrator's authority to issue immediately effective orders under 49 U.S.C. §§ 44709(e) and 46105(c), and in accordance with the Board's Rules of Practice governing emergency proceedings, codified at 49 C.F.R. §§ 821.52–821.57.

³ Section 120.33(b), entitled "Use of Prohibited Drugs," provides as follows:

No certificate holder or operator may knowingly use any individual to perform, nor may any individual perform for a certificate holder or an operator, either directly or by contract, any function listed in subpart E of this part while that individual has a prohibited drug, as defined in this part, in his or her system.

⁴ Respondent's urine contained delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), which is a metabolite detectible in one's urine after marijuana use.

67.207(b)(2), and 67.307(b)(2).⁵ On February 9, 2010, respondent stipulated to the following facts:

1. Respondent smoked marijuana between the dates of October 31, 2009 and November 11, 2009, while on vacation.
2. Chain of custody regarding the testing of the urine specimen is not disputed.
3. Respondent performed maintenance on a helicopter, owned by Coastal Helicopter, Inc., on November 18, 2009.
4. The maintenance that [r]espondent performed on November 18, 2009 is a safety-sensitive function.
5. On November 30, 2009, [r]espondent's urine specimen [submitted November 25, 2009] tested positive for marijuana metabolites. Gas Chromatography/Mass Spectrometry (GC/MS) confirmed a positive test result of 35 ng/ml for ... THCA.
6. The information contained in the Quest Diagnostics Laboratory report is accurate and uncontested.
7. Respondent lacks the qualifications to be the holder of any FAA-issued medical certificate as he has a history of substance abuse within the preceding two (2) years.
8. Dr. Rapaport, the Medical Review Officer (MRO) for Coastal Helicopter, verified [r]espondent's positive drug test result.

Exh. A-3 at 1-2. The Administrator also stipulated to certain facts, including the fact that the tests performed on respondent's urine sample were to determine the presence of THCA, which is "the major metabolite found in urine after the

⁵ Section 67.107(b)(2) provides that, in order to be eligible for a first-class airman medical certificate, a person must have no history of substance abuse within the preceding 2 years. Sections 67.207(b)(2) and 67.307(b)(2) include identical language, but apply to second- and third-class medical certificates, respectively.

use of marijuana.” Id. at 2, ¶ 3. The Administrator also stipulated to the fact that the presence of the above-named metabolite is not evidence of current use of marijuana, or of current impairment. Id. at 2, ¶¶ 5–6. The Administrator further stipulated that, “[t]here is no evidence that [respondent] used marijuana or any other prohibited substance after November 11, 2009.” Id. at 3, ¶ 7.

Based on the stipulated facts, the Administrator’s counsel filed a motion for summary judgment, to which respondent filed a reply and a counter-motion for summary judgment. The law judge, however, ordered a hearing, which both parties agreed would consist only of legal arguments, as no factual issues were in dispute.⁶ The Administrator’s counsel argued that the revocation of respondent’s mechanic certificate is based upon the discovery of a prohibited drug in respondent’s system, “as evidenced by a drug test which confirmed the presence of marijuana

⁶ At the hearing, the Administrator provided the following documents as exhibits: the amended order, which functions as the complaint at issue; respondent’s answer to the amended order; the stipulations described above; the Administrator’s motion for summary judgment; and respondent’s response and counter-motion to the motion for summary judgment. The Administrator also submitted copies of the following regulations: 14 C.F.R. §§ 120.33(b), 120.7(m), 49 C.F.R. §§ 40.85, and 40.87(a). The record also included copies of the relevant portions of the Administrator’s Sanction Guidance Table, which provides that revocation is the appropriate sanction for a violation of 14 C.F.R. § 120.33(b), as well as copies of Administrator v. Gabbard, NTSB Order No. EA-5293 (2007), and Administrator v. Kalberg, NTSB Order No. EA-5240 (2006).

metabolites." Tr. at 29. The Administrator's counsel asserted that, "marijuana metabolites are a prohibited drug in accordance with the [C.F.R.]" Tr. at 30. The Administrator's counsel stated that the Administrator derives this conclusion from the combination of regulations that the Administrator's counsel submitted into the record; in particular, the Administrator's counsel contended that § 120.33(b) refers to a "prohibited drug, as defined in this part," and that § 120.7(m) states as follows: "*Prohibited drug* means marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, as specified in 49 CFR 40.85." Exhs. A-6, A-7. Section 40.85, in turn, provides as follows:

§ 40.85 What drugs do laboratories test for?

As a laboratory, you must test for the following five drugs or classes of drugs in a DOT drug test. You must not test "DOT specimens" for any other drugs.
(a) Marijuana metabolites.

Exh. A-8. The Administrator's counsel also described 49 C.F.R. § 40.87(a), which specifies the cutoff concentrations and lists specific metabolites for which the Administrator tests. Exh. A-9 (listing the cutoff level in the confirmation test at 15 ng/mL). Both parties agreed that the level of marijuana metabolites in respondent's urine was 35 ng/mL.

The Administrator's counsel asserted that § 120.33(b) imposes a strict liability standard, because the regulation does not expressly require a showing of impairment, but only requires

a positive drug test result. Based on this assertion, the Administrator's counsel contended that the instant case was distinguishable from Administrator v. Holland, NTSB Order No. EA-5472 (2009), in which the Board recently determined that the Administrator did not prove that the respondent in that case had violated 14 C.F.R. § 91.17(a)(3).⁷ The Administrator's counsel stated that § 120.33(b) sets forth a strict liability standard because the Administrator believes that people who perform safety-sensitive functions should *never* use prohibited substances. Tr. at 41. The Administrator's counsel argued that § 120.33(b) does not allow for any discretion with regard to revoking one's certificate; in particular, he asserted that, if someone has a prohibited drug in his or her system, as defined by § 40.85, then the Administrator must revoke his or her certificate. With regard to whether marijuana metabolites fall within the category of "prohibited drug" under the regulation at issue, the Administrator's counsel engaged in the following colloquy with the law judge:

ADMINISTRATIVE LAW JUDGE POPE: I don't quite -- I'm not sure I understand exactly what you're saying when you say the metabolite is a prohibited drug. A metabolite is not the prohibited drug. It's a

⁷ Section 91.17(a)(3) provides that, "[n]o person may act or attempt to act as a crewmember of a civil aircraft-- (3) While using any drug that affects the person's faculties in any way contrary to safety."

substance that is produced in the body in reaction to the prohibited drug, I believe; is [that not] correct?

MR. ZAPPALA: Judge, that's not correct according to the regulations. I'm referencing Administrator's Exhibits A-6 through A-9. 120.7, which is Administrator's Exhibit A-7, paragraph (m) defines prohibited drug. Here's the definition. "Prohibited drug means marijuana, cocaine, opiates, PCP, and amphetamines as specified in 40.85." 40.85: "As a laboratory, you must test for the following five drugs or classes of drugs in DOT drug tests. You must not test DOT specimens for any other drugs: (a) marijuana metabolites." According to 40.85, marijuana metabolites [are] a prohibited drug.

Tr. at 43-44. The Administrator's counsel concluded that respondent violated § 120.33(b), and that revocation of his mechanic certificate was therefore appropriate.

In rebuttal, respondent's counsel argued that the Administrator did not fulfill the burden of proof on the violation of § 120.33(b). Respondent's attorney first asserted that the Administrator did not provide evidence that respondent had a prohibited substance in his system at the time that respondent performed the safety-sensitive function of working on the Bell helicopter on November 18, 2009, as charged in the complaint. In particular, respondent's counsel stated that the Administrator only proved that, on November 25, 2009, respondent's urine contained 35 ng/mL of marijuana metabolite, but that the Administrator did not establish what level of the metabolite was in respondent's system on November 18, 2009, or that respondent would have failed the confirmation test on

November 18, 2009. The Administrator's counsel objected to this argument, based on the stipulation to which the parties agreed; in particular, the Administrator's attorney stated that the medical review officer's verification of the positive test result constituted prima facie evidence that respondent violated § 120.33(b), and that respondent did not provide evidence that the level of metabolite in one's system could increase or decrease on its own. In a discussion with respondent's counsel concerning whether the Administrator proved that the level of marijuana metabolite in respondent's body at the time he performed the maintenance at issue exceeded the cutoff, the law judge stated: "I don't believe that there's any evidence that the metabolite quantity increases over a period of time; it decreases until it becomes not measurable. So with that said, I don't think that the burden is on the Administrator at this point. I think the burden is on [respondent]." Tr. at 68.

Respondent's counsel also asserted the alternative argument that marijuana *metabolite* is not a "prohibited substance" under the Federal Aviation Regulations (FAR). Respondent's counsel stated that § 120.7(m) does not say "marijuana metabolite," but instead categorizes "marijuana" as a "prohibited drug." Respondent's counsel disagreed with the Administrator's assertion that § 40.85 includes marijuana metabolite as a prohibited drug, and stated that § 40.85 merely sets forth the

testing protocol for laboratories. Respondent's counsel read portions of the Holland opinion into the record, and stated that Holland stands for the notion that § 40.85 only addresses drugs targeted for testing protocols, and does not list prohibited drugs; respondent's counsel further asserted that the Holland opinion states that metabolites are not prohibited drugs. Tr. at 73. Respondent's counsel argued that the Administrator's stipulations included an acknowledgement that respondent's urine was not tested for marijuana, but for marijuana metabolite. Based on this assertion, respondent's counsel contended that the Administrator did not fulfill the burden of proof that respondent violated § 120.33(b).⁸

At the conclusion of these oral arguments, the law judge issued an oral initial decision, in which he determined that the Holland opinion was distinguishable, and that the stipulated facts functioned to fulfill the Administrator's burden of proof that respondent violated § 120.33(b), thereby rendering respondent's mechanic certificate subject to revocation. The

⁸ Respondent's counsel also asserted that it was inappropriate for the Administrator to aver that § 120.33(b) provides a strict liability standard, because the Supreme Court has held that the imposition of a strict liability standard is subject to a specific notice requirement. The law judge acknowledged that § 120.33(b) does not include the term "strict liability," and determined that the standard is that the Administrator must prove, by a preponderance of the evidence, that the Administrator fulfilled each of the elements of § 120.33(b).

law judge found that § 120.33(b) prohibits any individual from performing a safety-sensitive function while he or she has a prohibited drug in his or her system, and that the parties did not dispute that marijuana is a prohibited drug. The law judge stated that § 120.33(b), unlike § 91.17(a)(3), does not include as an element of proof that the presence of the drug affected the person's faculties in any way. Initial Decision at 87. The law judge acknowledged that § 120.33(b) does not specifically mention metabolites, but stated that the testing protocols are designed to detect the presence of metabolites, and not the drug itself. The law judge stated that this case involves a different regulation from that which was at issue in Holland, and that § 120.33(b) prohibits any quantity of metabolites.⁹ In applying this standard to the facts of this case, the law judge concluded that respondent's positive drug test result on November 25, 2009, constituted prima facie evidence of the

⁹ The law judge stated as follows:

This case is distinguishable, however, from the Holland case. First, it does not involve the same regulation. It involves a violation of 91.17(a)(3), not [120.33(b)], and the elements of proof are different for proving the former. As I just pointed out, whether or not there was a sufficient quantity of metabolites of marijuana in the Respondent's system to affect his faculties is not an issue in this case. Any quantity of the drug is sufficient proof of violation of Section [120.33(b)].

Id. at 88.

presence of marijuana in respondent's urine 7 days earlier, when respondent performed a safety-sensitive function.¹⁰ The law judge stated that, if the presence of marijuana metabolite could not be considered evidence of the presence of marijuana in one's system, then it would be impossible to perform a drug test on someone who performs safety-sensitive functions. Id. at 89.

On appeal, respondent again argues that the presence of metabolite in his urine is not evidence of current use of marijuana, nor is it evidence of current impairment. Respondent argues that the Administrator produced no evidence that respondent used marijuana after November 11, 2009, nor that he had marijuana in his system on November 18, 2009. Respondent asserts that the principal issue of this case is whether marijuana *metabolite* is a prohibited drug, and argues that the law judge erred in relying on § 40.85 for the definition of "prohibited drug." Respondent contends that evidence of the presence of the metabolite is not sufficient to prove a violation of § 120.33(b), and that Holland stands for the notion that § 40.85 describes only drug testing protocols, rather than which drugs are prohibited. Respondent further argues that it is legally impermissible for the Administrator to impose a

¹⁰ The law judge also stated that the amount of metabolites in one's system does not increase over time, but dissipates. Id. at 90.

strict liability standard with regard to violations of § 120.33(b). The Administrator disputes each of respondent's arguments, and urges us to affirm the law judge's decision.

Respondent is correct that, in Holland, we held that the Administrator did not fulfill his burden of proof with regard to the elements of § 91.17(a)(3), which prohibits a person from acting as a crewmember "while using any drug that affects the person's faculties in any way contrary to safety." We determined there that the presence of a small amount of cocaine *metabolite* in the respondent's urine, prior to service later that day as pilot-in-command of a passenger-carrying flight, was insufficient to prove that, at the time the respondent acted as a crewmember, the respondent was affected by the drug. Here, however, the Administrator has charged respondent with violating § 120.33(b), which prohibits a certificate-holder from performing any safety-sensitive function "while that individual has a prohibited drug, as defined in [14 C.F.R. part 120], in his or her system." The alleged safety-sensitive function predated the submission of the urine sample in this case. We agree with the Administrator's contention and the law judge's conclusion that § 120.33(b) does not require the Administrator to prove that a certificate-holder was impaired at the time that he or she performed the safety-sensitive function; instead, § 120.33(b) only requires that the Administrator prove that the

certificate-holder had a prohibited drug in his or her system. In this regard, § 120.33(b) is significantly distinguishable from § 91.17(a)(3).

It is undisputed that respondent used marijuana between October 31, 2009, and November 11, 2009. It is also undisputed that respondent performed a safety-sensitive function on a Bell helicopter on November 18, 2009. Furthermore, respondent does not dispute that he took a random drug test on November 25, 2009, which indicated the presence of a marijuana metabolite in his system. The presence of marijuana metabolites in one's urine indicates that a person has consumed marijuana at some point in the not-distant past. In numerous cases, including Administrator v. Kalberg, NTSB Order No. EA-5240 (2006), we have presumed that the presence of marijuana metabolites in one's urine above the cutoff amount published in the FAR constitutes evidence that a person has consumed marijuana. Specifically, in Kalberg, we held that, even when the respondent claimed that he did not know that he had consumed marijuana in a cigar, the presence of marijuana metabolites in his urine nevertheless proved that he violated the FAR.¹¹

¹¹ See the following opinions, all of which involve the presence of certain drug *metabolites* in one's system: Administrator v. Swaters, NTSB Order No. EA-5400 (2008), aff'd, Swaters v. FAA, 568 F.3d 1315 (11th Cir. 2009) (holding that the respondent failed to impeach the Administrator's evidence that his urine specimen indicated the presence of cocaine, morphine, and heroin

In the instant case, the Administrator asserted, and the law judge affirmed, that testing for marijuana itself, rather than the presence of metabolites, was impractical, as such a test could only be accomplished by taking blood. Based on this fact, the Administrator's regulations provide that laboratories must test for "marijuana metabolites." 49 C.F.R. § 40.85(a). The Administrator's regulations also state that "marijuana" is a prohibited drug. In the context of § 120.33(b), combined with 14 C.F.R. § 120.7(m) and 49 C.F.R. § 40.85(a), the Administrator argues that the presence of marijuana metabolites in one's urine is evidence of the presence of marijuana in one's system.

(..continued)

metabolites); Administrator v. Gabbard, NTSB Order No. EA-5293 (2007), aff'd, Gabbard v. FAA, 532 F.3d 563 (6th Cir. 2008) (holding that the respondent was ineligible for a medical certificate and that revocation of his other airman certificates was appropriate under 14 C.F.R. § 135.249(b), because the respondent submitted to a random drug test, which was positive because it contained cocaine *metabolites*); Administrator v. Flores, NTSB Order No. EA-5279 (2007) (rejecting the respondent's challenges to the chain of custody of his urine specimen, which indicated that the respondent was ineligible for a medical certificate under 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), because it contained marijuana *metabolites*); Kalberg, supra (rejecting the respondent's affirmative defense that he did not violate 14 C.F.R. §§ 91.17(a)(3) and 121.455(b) because his consumption of marijuana was inadvertent and unknowing, and affirming the Administrator's order, which revoked the respondent's certificate in light of the discovery of marijuana *metabolites* in his urine). While these opinions do not directly address the argument of whether a metabolite is a "prohibited drug," their conclusions rest on the presumption of such.

We have long recognized that Congress has directed the Board to defer to the Administrator's interpretation of FAA regulations. 49 U.S.C. § 44709(d)(3); see also Garvey v. NTSB, 190 F.3d 571, 576-79 (D.C. Cir. 1999). In particular, 49 U.S.C. § 44709(d)(3) provides that the Board "is bound by all validly adopted interpretations of laws and regulations the Administrator carries out ... unless the Board finds an interpretation is arbitrary, capricious, or otherwise not according to law." In Holland, we determined that the Administrator did not submit evidence to prove that the respondent acted as a crewmember *while* his faculties were affected by a prohibited drug.¹² The Administrator did not charge the respondent in Holland with a violation of any other regulation, and did not allege that the respondent was ineligible for a medical certificate under 14 C.F.R.

¹² In this regard, we stated:

[W]e are constrained to rule against the Administrator because he has not met his burden in supporting his contention that the presence of metabolites (which are evidence of past use of an impairing substance) prior to flight as a crewmember is or should be prima facie evidence of impairment by a prohibited substance during a subsequent flight.

Holland, supra, at 14. This finding was limited to § 91.17(a)(3) as applied to the facts in the record, because we stated that, even if "the evidence showed that metabolites most likely remained in respondent's system at the time of flight, under § 91.17(a)(3), the evidence must also establish that the metabolite affected respondent's faculties adversely." Id. at 14-15.

§§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2). Overall, the Administrator's case in Holland failed due to a lack of proof concerning § 91.17(a)(3).

Also in the Holland opinion, in dicta, we stated that § 91.17(a)(3) did not define "prohibited drug," nor did it provide any references to other sections of the FAR that define "prohibited drug" or provide drug testing cutoffs for prohibited drugs. We speculated that, within § 91.17(a)(3), "a cross-reference to § 40.85 may be a sustainable interpretation of the regulatory structure to allow the Administrator to pursue an action for drug use or abuse under Part 121," but that § 91.17(a)(3) contained no such reference, and the Administrator only pursued the case under § 91.17(a)(3). Id. at 16. Therefore, the Administrator did not fulfill his burden of proof.

Here, respondent does not contest the Administrator's evidence, but has stipulated to the fact that he consumed marijuana on dates preceding the maintenance at issue, and that his urine tested positive for a marijuana metabolite only 7 days after he performed a safety-sensitive function. Respondent's argument rests on the notion that the FAR does not indicate that the presence of marijuana metabolites in one's urine is evidence that the person has the "prohibited drug" in his or her system. Respondent's sole source of support for this position is our

Holland opinion.¹³ Overall, respondent's argument only challenges the Administrator's interpretation of the FAR. Given that we must defer to the Administrator's interpretation of his own regulations, we reject respondent's appeal. Unlike Holland, the record does not lack proof that respondent's urine contained an amount of marijuana metabolite that indicates that he had consumed marijuana contemporaneous with or shortly before he performed maintenance on a helicopter. Respondent does not provide any evidence to establish that he did not have marijuana in his system, but only argues that the presence of marijuana *metabolite* is insufficient to prove that he violated § 120.33(b). We do not find this argument persuasive.

¹³ Respondent emphasizes that, in Holland, we stated as follows:

Section 91.17(a)(3) does not address or define metabolites, but merely references "any drug." The Administrator thus asks us to accept that, for purposes of § 91.17(a)(3), a metabolite is a "drug" of a prohibited type. However, the Administrator did not define "drug" in § 91.17 or in the record for this case in any manner different from the common meaning of the term.

Holland at 15. We further stated that Appendix I to Part 121 of the FAR lists "marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines" as prohibited drugs, and that § 91.17(a)(3) does not reference this Appendix. In dicta, we opined that, "§ 40.85 itself appears to address what substances are targeted in drug testing protocols, and not what is a prohibited drug, particularly for purposes of § 91.17(a)(3), or what quantity of each substance can result in a sanction." Id. at 15-16 (emphasis in original).

Section 120.33(b) prohibits a person's performance of a safety-sensitive function "while that individual has prohibited drug, *as defined in this part*, in his or her system" (emphasis added). As described above, § 91.17(a)(3), which was at issue in Holland, did not include such language. In this instance, § 120.7(m) states that "prohibited drug" means "marijuana," and further states, "*as specified in 49 CFR 40.85*" (emphasis added). Section 40.85, also described above, requires that labs test for "marijuana metabolites." The Administrator's counsel also submitted § 40.87 into the record, which states that certificate-holders' urine may not contain more than 15 nanograms per milliliter of such marijuana metabolites. Based on this combination of regulations, and the references therein, we do not believe the Administrator's interpretation of this set of regulations is arbitrary, capricious, or otherwise not according to law. Therefore, we defer to the Administrator's interpretation of the regulations, to the extent that the presence of marijuana metabolite(s) in one's system functions as evidence that the person consumed marijuana and thus had some quantity of the prohibited drug in his or her system.

With regard to respondent's argument that the Administrator's interpretation of § 120.33(b) is legally impermissible because the Administrator did not provide notice to the public that the FAA applies a strict liability standard

concerning violations of § 120.33(b), we note that this forum is not the appropriate venue in which to proffer such an argument. The Board's jurisdiction, as set forth at 49 U.S.C. § 1133, is limited to reviewing "the denial, amendment, modification, suspension, or revocation of a certificate issued by the Secretary of Transportation" under 49 U.S.C. §§ 44703, 44709, or 44710. To the extent that respondent asserts that the Administrator was required to publish a notice of the planned interpretation and accept comments on it under the Administrative Procedure Act (APA), we note that we have stated that anyone who seeks to challenge the Administrator's promulgation of a regulation "may do so in limited circumstances under the APA."¹⁴

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The law judge's initial decision is affirmed; and
3. The Administrator's emergency revocation of all mechanic and medical certificates respondent holds, including two second-class medical certificates, is affirmed.

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

¹⁴ Administrator v. Jablon, NTSB Order No. EA-5460 at 12 n.5 (2009) (citing 5 U.S.C. § 702).

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* * * * *
In the matter of: *
*
J. RANDOLPH BABBITT *
Administrator *
Federal Aviation Administration, *
*
Complainant, *
v. *
*
BENJAMIN L. MAGRO, *
*
Respondent. *
* * * * *

Docket No.: SE-18799
JUDGE POPE

Courtroom 1013
Thomas P. O'Neill Federal Building
10 Causeway Street
Boston, Massachusetts

Wednesday,
February 24, 2010

The above-entitled matter came on for hearing, pursuant
to Notice, at 9:46 a.m.

BEFORE: WILLIAM A. POPE, II
Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

MATTHEW J. ZAPPALA, Attorney
Federal Aviation Administration
Office of the Chief Counsel
New England Region
12 New England Executive Park
Burlington, Massachusetts 01803-5299
(781) 238-7046
(781) 238-7055 (fax)
Ematthew.zappala@faa.gov

On behalf of the Respondent:

PETER CHARLES LOWN
Peter C. Lown, P.C.
112 Chip Place, Suite 100
Stockbridge, Georgia 30281-5055
(404) 520-0171
(404) 506-9149 (fax)
peter@lownpc.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL INITIAL DECISION AND ORDER

ADMINISTRATIVE LAW JUDGE POPE: The following is my oral initial decision in the matter of the Administrator, Federal Aviation Administration, Complainant, versus Benjamin L. Magro, Respondent, Docket Number SE-18799.

This is a proceeding under the provisions of 49 U.S.C. Section 44709, formerly Section 609 of the Federal Aviation Act and the provisions of the "Rules of Practice in Air Safety Proceedings" of the National Transportation Safety Board.

Benjamin L. Magro, the Respondent, has appealed the Administrator's Amended Emergency Order of Revocation dated 4 February 2010, which, pursuant to Section 821.31(a) of the Board's Rules, serves as the complaint in which the Administrator ordered the revocation of all mechanic certificates and all medical certificates, including two second-class medical certificates, held by the Respondent, because he allegedly violated Section 120.33(b) of the Federal Aviation Regulations as a result of performing a function listed in subpart E while he had a prohibited drug in his system.

In his answer to the complaint, the Respondent admitted the allegations in paragraphs 1 through 5, 7, 9, 14 through 16. He denied the allegations in paragraph 6, 8, 10 through 13, and 17 of the complaint.

1 On February 16, 2010, the Administrator filed a motion
2 for summary judgment contending that the Administrator's answer
3 and stipulations of fact proved that he performed a safety
4 sensitive function while having a prohibited drug, marijuana, in
5 his system, as alleged in the complaint, and, therefore, the
6 Administrator is entitled to summary judgment as a matter of law.

7 On February 22, 2010, two days before this hearing, the
8 Respondent filed a response in opposition to the Administrator's
9 motion and filed a counter motion for summary judgment. In very
10 condensed form, the Respondent contends that his urine sample was
11 not tested for the presence of the drug, marijuana, but only for a
12 metabolite of marijuana, and the results of the tests for the
13 metabolite were equivocal and do not prove that he had even the
14 metabolites in a concentration above the cutoff level seven days
15 earlier when he performed the safety sensitive maintenance.

16 On February 9, 2010, the parties entered into a written
17 stipulation. In the interest of time, I am not going to read the
18 stipulation because I have summarized it later on in this
19 decision. However, it has been made a matter of record and is
20 available to be considered on appeal, if that should be the case.

21 Considering the Respondent's answer and the stipulations
22 he entered into, only paragraphs 10 and 11 of the complaint really
23 remain in dispute.

24 Paragraph 10 states, quote, "By reason of the facts and
25 circumstance set forth above, you reported for duty which require

1 the performance of safety sensitive functions while having a
2 prohibited drug in your system," end quote. Paragraph 11 states,
3 quote, "By reason of the facts and circumstances set forth above,
4 you lack the qualifications to be the holder of any FAA-issued
5 mechanic certificate."

6 Briefly, the admitted and stipulated facts are that from
7 October 31, 2009, through November 11, 2009, the Respondent smoked
8 marijuana. On November 18, 2009, he reported for work and
9 performed maintenance on a Bell Helicopter, which was a safety-
10 related function.

11 On November 25, 2009, he took a random drug test, which
12 was positive for marijuana.

13 On November 30, 2009, the results of the drug test were
14 verified positive for marijuana by an MRO, medical review officer.
15 The Respondent stipulated that he lacks the qualifications to hold
16 any FAA-issued medical certificate as he has a history of
17 substance abuse within the preceding two years and does not
18 contest the revocation of his medical certificates.

19 I find that the admitted and stipulated facts establish
20 that he violated FAR Section 120.33(b), as charged in the
21 complaint. That disqualifies him from holding any FAA-issued
22 airman medical certificate and further establishes a regulatory
23 basis for revoking his mechanic certificate.

24 The Respondent is charged with violating FAR Section
25 120.33(b). In substance, that regulation prohibits any individual

1 from performing a safety sensitive function while he has a
2 prohibited drug in his system. It is undisputed that marijuana is
3 a prohibited drug. That section does not include as an element of
4 proof that the presence of marijuana affected his faculties in any
5 way, as is required under FAR Section 91.17(a)(3).

6 The issues left in this case are primarily legal and not
7 factual in nature.

8 The Respondent, citing Administrator v. Holland, NTSB
9 Order Number EA-5472 (2009), contends that the presence of a
10 metabolite of marijuana does not prove the presence of the
11 prohibited drug marijuana in his system earlier when he performed
12 the safety sensitive maintenance, which is required by the plain
13 language of the regulation, which makes no mention of metabolites.
14 The testing protocols are addressed to detecting the presence of
15 the metabolites of marijuana, not to detecting the presence of the
16 drug itself.

17 In the Holland case, the Board found the FAA's
18 interpretation to be arbitrary, that a metabolite of a drug is
19 equivalent to the drug and that any level of metabolite would
20 suffice to prove a violation of Section 91.17(a)(3) by the
21 presence of the prohibited drug. In this case, asserts the
22 Respondent, there is no proof that even the metabolites of
23 marijuana were present in the Respondent's urine in a quantity
24 above the cutoff level seven days before the test, let alone that
25 the drug was present.

1 This case is distinguishable, however, from the Holland
2 case. First, it does not involve the same regulation. It
3 involved a violation of 91.17(a)(3), not 120.33(a)(3), and the
4 elements of proof are different for proving the former. As I just
5 pointed out, whether or not there was a sufficient quantity of
6 metabolites of marijuana in the Respondent's system to affect his
7 faculties is not an issue in this case. Any quantity of the drug
8 is sufficient proof of violation of Section 120.33(b).

9 Therefore, it is irrelevant whether a test given at
10 another time might have produced a lower result. The screening
11 and confirmation tests given to the Respondent on November 25,
12 2009, were above the cutoff level and were certified as positive
13 for the presence of marijuana by a medical review officer. That,
14 at the very least, is a prima facie evidence of the presence of
15 marijuana in the Respondent's urine seven days earlier, especially
16 in view of his admission that he had used marijuana seven days
17 before that.

18 The drug in this case, as I have just said, is
19 marijuana. In the Holland case, it was cocaine. According to the
20 Holland case, cocaine can be detected in the human body for only
21 three to four hours, while the metabolite, which is a molecular
22 compound produced by the body, is detectable for a longer period
23 of time. That appears to be the case with marijuana, only more
24 so. The Administrator stipulated and the Respondent did not
25 challenge the stipulation that the parent compound of marijuana,

1 delta-9-tetrahydrocannabinol, cannot be found in urine. It is
2 found only in blood.

3 Obviously, if the metabolite produced by the body from
4 marijuana, referred to by the shortened name of delta-9-
5 tetrahydrocannabinol-9-carboxylic acid, which is found in urine
6 after use of marijuana is not considered evidence of the presence
7 of marijuana in a subject's system, there would be no practical
8 way to have a workplace test for the illegal drug marijuana in a
9 worker's system, and public policy requires testing of persons
10 performing safety sensitive functions, as defined by the FARs for
11 the presence of illegal drugs, including marijuana.

12 In any event, that situation is recognized by the drug
13 testing regulations, which provide in 49 C.F.R. Part 40, subpart
14 F, Section 40.85, that laboratories must test for the drug
15 marijuana only by testing for marijuana metabolites.

16 I find, therefore, that a positive verified test showing
17 the presence of the metabolites of marijuana, as in this case, is
18 a test for the presence of the drug marijuana as used in FAR
19 Section 120.33(b).

20 The Holland case is inapposite in this regard.

21 As noted in the summary of evidence that I gave, the
22 undisputed facts are that the Respondent smoked marijuana from
23 October 31, 2009 through November 11, 2009, and that on November
24 25, 2009, he tested positive for marijuana. In the interim, he
25 performed safety sensitive maintenance functions on November 18,

1 2009. Accepting for purposes of argument that he did not use
2 marijuana after November 11, 2009, the metabolites of marijuana
3 were still in his urine when he was tested on November 25, 2009.
4 The MRO officer -- and that conclusion is obvious, and I so find,
5 that he had marijuana in his system when he performed the safety
6 sensitive maintenance functions on November 18, 2009, some seven
7 days before the random drug test.

8 It is not disputed that the metabolites of marijuana
9 dissipate as time passes. They do not increase. The undisputed
10 evidence of record, therefore, establishes that the Respondent
11 violated Section 120.33(b) of the Federal Aviation Regulations, as
12 alleged in the complaint, by performing safety sensitive functions
13 while having a prohibited drug in his system, namely, marijuana,
14 on November 18, 2009.

15 A case in point is Administrator v. Kalberg, NTSB Order
16 Number EA-5240 (2006). In the Kalberg case, the Board affirmed
17 revocation of the Respondent's airline transport pilot certificate
18 and first-class airman medical certificate because he violated FAR
19 Section 120.455, which is similar in its provisions to FAR Section
20 120.33(b).

21 The Board found that the Administrator presented a prima
22 facie case of Respondent's violation of FAR Section
23 91.17(a)(3), acting as a crewmember while using any drug that
24 affected the person's faculties in any way contrary to
25 safety; and FAR Section 121.455, performing directly or

1 indirectly any function listed in Appendix I to this part
2 while having a prohibited drug in his system; and, further,
3 was not qualified to hold an airman medical certificate. In
4 that case, the Board held that the Respondent had failed to
5 meet his burden of proving his affirmative defense of
6 inadvertent or unknowing ingestion of marijuana by a
7 preponderance of the evidence.

8 As in this case, the random drug test was given after
9 the Respondent performed a safety sensitive function. The same
10 situation occurred in the Holland case. The test there was
11 performed after the performance of the safety sensitive function.

12 Upon consideration of all the substantial, reliable and
13 probative evidence of record, I find that the Administrator has
14 proven by a preponderance of the evidence that the Respondent
15 violated FAR Section 120.33(b).

16 ORDER

17 ACCORDINGLY, It IS HEREBY ORDERED:

18 (1) The Administrator's Amended Emergency Order of
19 Revocation is affirmed;

20 (2) The Respondent's appeal is denied.

21

22

23

24 EDITED ON

WILLIAM A. POPE, II

25 MARCH 2, 2010

Administrative Law Judge