SERVED: March 13, 2014

NTSB Order No. EA-5710

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 13th day of March, 2014

MICHAEL P. HUERTA, Administrator, Federal Aviation Administration, Complainant, v. BENJAMIN F. COATS, Respondent.	)	Docket SE-19400

OPINION AND ORDER

1. ***Background***

Respondent, who proceeds *pro se*, appeals the oral initial decision of Chief Administrative Law Judge Alfonso J. Montaño, issued on June 12, 2013.[1] By that order, the law judge affirmed the Administrator's emergency order revoking respondent's airman medical certificate on the basis respondent's pre-employment drug test yielded a positive result for the

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

presence of marijuana. As a result, the law judge concluded respondent lacked the qualification necessary to hold the certificate.[2] We deny the appeal.

A. *Facts*

Respondent, seeking employment as a professional pilot, tested positive for marijuana metabolites in a routine pre-employment drug screening conducted October 3, 2012, under the provisions of 49 C.F.R. part 40.[3] The Administrator issued an emergency order on November 27, 2012, revoking respondent's first-class airman medical certificate on the basis the positive result disqualified respondent from holding the certificate.[4]

The emergency order served as the Administrator's complaint in this appeal, which proceeded to a hearing before the law judge on June 11 and 12, 2013.[5] The parties stipulated, *inter alia*, to the sanction of revocation for a positive drug test result and to positive confirmation tests of both the originally-tested urine sample and a split sample.[6] At the hearing, respondent asserted the initial test of the sample, which triggered further confirmation testing, was unreliable and improper because it did not comply with the relevant Department of Transportation (DOT) drug testing regulations.[7]

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[2] Title 14 C.F.R. §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) disqualify an individual from possession of, respectively, a first-, second-, and third-class medical certificate on the basis of "[a] verified positive drug test result" during the preceding two years.

[3] Exh. A-4 at 59. The screening was conducted for purposes of respondent's employment as a pilot for an air carrier operating under 14 C.F.R. part 135.

[4] See supra note 2.

[5] Respondent waived the procedures normally applicable in emergency proceedings.

[6] Tr. 11-13.

[7] Tr. 13 (respondent stating to the law judge, "I'm only stipulating the results for the confirmation test of the initial sample and also the split same analysis, but not of the initial test, the initial sample. That is—that is what I'm disputing.").

Ms. Crystal Ritz, a Quest Diagnostics employee who collected respondent's urine sample, testified in detail regarding the collection procedure and acknowledged she neglected to check two boxes on the custody and control form for the specimen: a box indicating the "reason for test" and a box indicating the "drug tests to be performed."[8] Ms. Ritz explained, however, she did not consider the omission to be a fatal flaw. Both the medical review officer who examined the form and verified respondent's confirmed positive test results and the Federal Aviation Administration (FAA) official whose office processes investigations of positive drug tests testified the error was harmless.[9]

Ms. Dawn Hahn, the laboratory operations manager at the Quest Diagnostics laboratory that processed respondent's urine sample, testified as an expert witness and explained, page by page, Quest's documentation package for the testing in this case, which the law judge admitted into evidence as an exhibit.[10] Ms. Hahn testified the urine sample was subjected to two stages of testing: an initial test and a confirmation test. She explained the initial test determines the presence of multiple marijuana metabolites and expresses the result in the form of the "ratio of the donor's specimen to a calibrator of known concentration."[11] She testified the regulatory maximum concentration of marijuana metabolites, or cutoff, for an initial test—50 nanograms of metabolites per milliliter (ng/mL)—was assigned a value of one for purposes of reporting the results, and the initial test of respondent's sample produced a ratio of 2.539, rendering the initial

[8] Tr. 46, 54; see Exh. A-4 at 5.

[9] See Tr. 117, 125-26.

[10] The law judge qualified Ms. Hahn as an expert in the areas of forensic drug testing, Quest chain-of-custody procedures and "as to the results in this case." Tr. 65. The documentation package was admitted into evidence as Exhibit A-4.

[11] Tr. 81.

test positive for marijuana metabolites.[12] Ms. Hahn testified the sample then moved to confirmation testing, which, unlike the initial test "for the majority of [marijuana] metabolites," numerically measured the presence of a single, specific metabolite called Delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA). To return a positive result for the confirmation test, the cutoff value for the presence of THCA is 15 ng/mL.[13] In this case, the confirmation test of respondent's sample indicated a concentration of THCA at 42 ng/mL.[14]

Respondent testified on his own behalf and challenged the reliability and validity of the drug test, arguing, *inter alia*, the initial test should have been regarded as negative because the confirmation test result of 42 ng/mL was less than the cutoff for the initial test of 50 ng/mL of multiple metabolites.[15] The law judge denied respondent's request to testify as an expert in the field of analytical chemistry, on the basis respondent had failed to comply with the requirement of the law judge's prehearing order and Federal Rule of Civil Procedure (FRCP) 26(a)(2). The prehearing order citing the Federal Rule stated, as an express condition of tendering expert witnesses, each party needed to provide the opposing side and the law judge with advance notice of intent to call expert witnesses along with supporting documentation.[16] After the Administrator's attorney objected on the basis that respondent had failed to identify himself as an expert pursuant to the prehearing order, the law judge did not permit respondent to testify as an

[12] Tr. 81, 83; see Exh. A-4 at 32; 49 C.F.R. § 40.87(a).

[13] Tr. 89, 105.

[14] Tr. 89; see Exh. A-4 at 56; 49 C.F.R. § 40.87(a).

[15] Tr. 200.

[16] Prehearing Order, dated February 25, 2013.

expert.[17] However, the law judge permitted respondent, who holds a bachelor's degree in chemistry and has completed graduate coursework in chemistry, to testify "as a layperson and as a person [who] has knowledge of chemistry."[18]

B. *Law Judge's Order*

At the conclusion of the hearing, the law judge issued an oral initial decision affirming the Administrator's emergency order of revocation. The law judge found "the expert testimony of Ms. Hahn to be persuasive, credible, and substantively grounded in the evidence in this case."[19] Based on Ms. Hahn's testimony and the evidence the Administrator's attorney introduced at the hearing, the law judge determined respondent's test results were well above the cutoff levels for the initial and the confirmation test.[20] The law judge stated respondent did not dispute his split sample returned a positive test result for marijuana metabolites. Regarding the measurement of metabolites, the law judge stated he "[found] it credible that [the] result of 42 [on the confirmation test] [wa]s well above the cutoff level of 15 for the confirmation test. A positive finding of 42 on the confirmation test does not relate to the initial testing with a cutoff level of 50."[21]

Following the law judge's initial decision, respondent filed a motion for reconsideration. The law judge denied respondent's motion on August 16, 2013. Respondent then filed a timely

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[17] Tr. 195-96 (respondent's request to be qualified as expert, and Administrator's objection), Initial Decision at 271-72 (law judge's statement recounting respondent's request to testify as expert and law judge's denial of request).

[18] Tr. 196, 198-99.

[19] Initial Decision at 283.

[20] Id.

[21] Id. at 284.

appeal of the law judge's decision.

C. *Issues on Appeal*

On appeal, respondent argues the drug test was invalid for lack of reliability. First, respondent contends the Administrator failed to establish how the numerical result of the initial test (2.539) is linked to the concentration cutoff of 50 ng/mL. Respondent also argues the confirmation test, which indicated the presence of THCA at 42 ng/mL, is evidence *per se* the initial test was flawed and vitiated the test results in their entirety. Respondent asserts the initial test's threshold concentration amount for establishing the presence of marijuana metabolites is 50 ng/mL; because his urine contained only 42 ng/mL of THCA according to the confirmation test, respondent argues the Administrator cannot prove he violated §§ 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2), as charged. Furthermore, respondent asserts the final laboratory report showing the test results did not specifically label THCA as the marijuana metabolite contained in his urine; he contends this lack of specific identification is a fatal flaw under the DOT drug testing regulations. Finally, respondent contends the law judge exhibited bias against him by denying respondent's request to testify as an expert on his own behalf.

2. *Decision*

We review a law judge's decision *de novo*.[22]

A. *Initial Test and Confirmation Test*

1. *Credibility Findings*

To begin, respondent presents no basis to disturb the law judge's detailed findings as to

[22] Administrator v. Dustman, NTSB Order No. EA-5657 at 6 (2013) (citing Administrator v. Smith, NTSB Order No. EA-5646 at 8 (2013), 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) (explaining, in making factual findings, the Board is not bound by the law judge's findings)).

Ms. Hahn's credibility or the reliability and validity of the test results. On appeal, we will not overturn a law judge's credibility determination unless a party can establish the credibility determination was arbitrary and capricious.[23] In this case, the law judge determined Ms. Hahn's testimony was credible and reliable and warranted greater weight than the testimony of respondent.[24] The law judge tied these determinations to findings of fact. We find no evidence the law judge's credibility determinations were arbitrary and capricious;[25] therefore, we give deference to such determinations.

2. *Drug testing process*

A urine sample analysis, such as the one at issue, must conform to the requirements of 49 C.F.R. § 40.87, which specifies cutoff concentration levels for both initial and confirmation tests. For initial tests, the regulation specifies a cutoff concentration level of 50 ng/mL of multiple "marijuana metabolites."[26] For confirmation tests, in contrast, the regulation specifies a cutoff concentration level of 15 ng/mL of just one metabolite—THCA.[27] A test result equal to or greater than the cutoff value is reported as a positive result.[28]

The gravamen of respondent's argument is the initial test was invalid, as evidenced by a confirmation test result of 42 ng/mL, which was less than the cutoff level of 50 ng/mL of THCA

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[23] Administrator v. Porco, NTSB Order No. EA-5591 at 13 (2011), aff'd, 472 Fed.Appx. 2 (D.C. Cir. 2012).

[24] Initial Decision at 283-84.

[25] In his initial decision, the law judge provided detailed analysis of Ms. Hahn's testimony. Id. at 282-84.

[26] 49 C.F.R. § 40.87(a).

[27] Id.

[28] Id. § 40.87(b)-(c).

and other metabolites in the initial test. Respondent's argument, however, rests on a flawed premise: as Ms. Hahn explained in her testimony, 49 C.F.R. § 40.87(a) requires the initial test to measure for *multiple* metabolites; therefore, the concentration involves a higher cutoff level than the confirmation test, which measures for just *one* metabolite, THCA, and accordingly involves a lower cutoff level. The laboratory results admitted into evidence establish the initial test produced a positive value of 2.539, which is greater than the value of one assigned to the 50 ng/mL initial test cutoff concentration 49 C.F.R. § 40.87(a) establishes.[29] Ms. Hahn explained in detail how the calibration value of one and the initial test result were computed.[30] As the law judge explained on the basis of Ms. Hahn's testimony, "[a] positive finding of 42 [ng/mL] on the confirmation test does not relate to the initial testing with a cutoff level of 50 [ng/mL]."[31]

To the extent respondent argues the initial test result should have been expressed in terms of the precise amount of metabolites in the sample instead of a ratio value, we find no authority to support his contention. Title 49 C.F.R. § 40.87 does not, on its face, require results for marijuana tests to be reported in the manner respondent urges. Rather, section 40.87 requires, for an initial test, a result at or above the cutoff concentration must trigger a confirmation test, and a result at or above the cutoff concentration on a confirmation test must be reported "as confirmed positive."[32] Furthermore, the regulation specifically requires quantitative reporting

[29] Exh. A-4 at 32.

[30] Tr. 80-83.

[31] Initial Decision at 284.

[32] 49 C.F.R. § 40.87(b), (c).

only of results for *codeine* or *morphine* exceeding a certain concentration level.[33] In the absence of any language in the regulation specifically requiring *quantitative* reporting of results for *marijuana* tests, we find no merit in respondent's argument that the regulation somehow requires quantitative reporting of initial test results.[34] Nor do we find any basis in the regulation to support respondent's contention that the confirmation test report's failure to identify the metabolite found as THCA was a fatal flaw in the test. Ms. Hahn explained the confirmation test tested for THCA specifically,[35] and multiple pages of the Quest laboratory results package admitted into evidence reflect THCA was the specific metabolite identified in confirmation testing.[36]

Similarly, we find no support for respondent's suggestion that the law judge's finding of a positive initial test was predicated on finding an initial test concentration of 2.539 ng/mL instead of a positive 2.539 ratio. As the Administrator concedes in his reply brief, the Administrator's response to respondent's petition for reconsideration erroneously referred to the initial test result as a concentration level of 2.539 ng/mL rather than as a ratio of 2.539. The law judge's initial decision, as well as the order denying respondent's petition for reconsideration, reflect the law judge understood the relevant distinctions between results of initial and confirmation tests and did not base his ultimate conclusions on an erroneous finding that the initial test produced a

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[33] Id. § 40.87(d).

[34] Because § 40.87 requires quantitative reporting of results only for codeine and morphine, one can reasonably presume the drafters of the regulation fully understood the difference between quantitative and qualitative reporting, and intentionally chose to require only *qualitative* reporting for marijuana metabolites. In this regard, the plain language of the regulation alone refutes respondent's argument of an *implied* requirement of quantitative reporting for marijuana metabolites.

[35] Tr. 89.

[36] See Exh. A-4 at 40, 46, 56.

concentration measurement of 2.539 ng/mL. Moreover, the Administrator's emergency order did not include allegations of a specific measurement of marijuana metabolites, nor did it cite a ratio; instead, it alleged respondent's drug test result was positive. The Administrator's erroneous inclusion of "ng/mL" alongside 2.539 did not prevent respondent from proceeding with his defense, nor does it impugn Ms. Hahn's testimony concerning the ratio, which the law judge found credible and persuasive.

Finally, to the extent respondent argues Ms. Ritz's failure to check boxes on the custody and control form somehow rendered the drug test invalid, respondent cites neither any authority to support that proposition nor any evidence to explain how the administrative error tainted the test results. As the Board explained in Administrator v. Flores, "respondents who seek to invalidate the results of a drug test after the Administrator has presented a *prima facie* case on the authenticity of the specimen and accuracy of the test should produce evidence, 'circumstantial or otherwise, which would support a finding that the integrity of [the] specimen [was] compromised.'"[37] Such error as occurred was harmless.[38] Respondent does not identify any evidence contradicting the law judge's findings; instead, he presents his own conclusions, based on theories for which he offers no authority or factual support. Overall, we affirm the law judge's conclusions concerning the validity and reliability of the initial and confirmation test results.

B. *Evidentiary Rulings*

Respondent next argues the law judge demonstrated bias toward him by improperly

[37] NTSB Order No. EA-5279 at 3 (2007) (quoting Administrator v. Corrigan, NTSB Order No. EA-4806 at 6 (1999)).

[38] See id. (stating, "we have previously recognized that a *de [minimis]* procedural violation may not automatically render a drug test result invalid.").

denying his request to testify on his own behalf as an expert in analytical chemistry. Our law judges have significant discretion in overseeing testimony and evidence at hearings, and we review our law judges' evidentiary rulings under an abuse of discretion standard, after a party can show such a ruling prejudiced him or her.[39]

As the law judge noted, his prehearing order specifically referred respondent to the requirements of FRCP 26(a)(2) and recited the rule's requirements. In particular, FRCP 26(a)(2) requires a party who intends to call an expert witness to identify each expert witness and provide the judge and the opposing side with a copy of the expert's curriculum vitae along with a statement of the anticipated expert testimony.[40] In view of respondent's undisputed failure to observe the requirements of the prehearing order and the rule, the law judge's decision not to permit respondent to testify as an expert, but to consider respondent's testimony in the light of his expertise and education in chemistry, was not an abuse of discretion.[41]

In addition, respondent asserts the law judge worked with the Administrator's attorney to engage in "legal bullying"[42] and allowed "scientific and administrative errors, legal trickery, and technicalities to prevail in his judgment for his employer, the government."[43] Regarding such

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[39] Administrator v. Walker, NTSB Order No. EA-5656 at 15n.39 (2013). See also Administrator v. Giffin, NTSB Order No. EA-5390 at 12 (2008) (citing Administrator v. Bennett, NTSB Order No. EA-5258 (2006)). We will not overturn a law judge's evidentiary ruling unless we determine that the ruling was an abuse of discretion. See, e.g., Administrator v. Martz, NTSB Order No. EA-5352 (2008); Administrator v. Zink, NTSB Order No. EA-5262 (2006); Administrator v. Van Dyke, NTSB Order No. EA-4883 (2001).

[40] Prehearing Order; see also tr. 198-99.

[41] See Administrator v. Turmero, NTSB Order No. EA-5547 at 3 (2010) (finding no abuse of discretion in law judge's exclusion of witnesses on basis of party's failure to comply with terms of prehearing order).

[42] Appeal Br. at 7

[43] Id. at 8.

claims of bias, we have held, in order to disqualify a law judge for bias or prejudice, "the bias or prejudice must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge has learned from his or her participation in the case."[44] We have carefully reviewed the record for the case *sub judice* and do not find the law judge exhibited bias. First, the law judge overruled the Administrator's objections on multiple occasions.[45] In addition, in not permitting respondent to testify as an expert, the law judge took time to explain his rationale for the ruling, which was consistent with his prehearing order and the requirements of the FRCP.[46] The law judge's rulings were based on his application of the Federal Rules of Evidence and FRCP. Respondent has not established the law judge's evidentiary rulings stemmed from an extrajudicial source.

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 respondent's airman medical certificate is affirmed.

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

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[44] Administrator v. Lackey, NTSB Order No. EA-5419 at 11 (2008), aff'd, Lackey v. FAA, 386 Fed. Appx. 689, 2010 WL 2781583 (9th Cir. 2010); see also Administrator v. Steel, 5 NTSB 239, 243 n.8 (1985).

[45] See, e.g., tr. 45, 46, 53, 146, 160, 162.

[46] Tr. 195-99.

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of:	*	
	*	
MICHAEL P. HUERTA, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,	*	
	*	
Complainant,	*	
v.	*	Docket No.: SE-19400
	*	JUDGE MONTAÑO
BENJAMIN F. COATS,	*	
	*	
Respondent.	*	

Vol. 2

National Labor Relations Board
Suite 305 Courtroom
901 Market Street
San Francisco, California

Wednesday,
June 12, 2013

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

BEFORE: ALFONSO J. MONTAÑO
Chief Administrative Law Judge

APPEARANCES:

On behalf of the Administrator:

DAVID KESSLER, ESQ.
LACEY JONES
Federal Aviation Administration
Office of the Regional Counsel
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818-329-3763

On behalf of the Respondent:

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6947 Meadowood Trail
Redding, California
910-578-3557

ORAL INITIAL DECISION AND ORDER

This has been a proceeding under the provisions of 49 USC 44709, which was formerly 609 of the Federal Aviation Administration Act. And this hearing was also held under the provisions of Practice in Air Safety Proceedings of the National

Transportation Safety Board.

Mr. Benjamin Franklin Coats, II, the Respondent, appealed the Administrator's November 7, 2012, Emergency Order of Revocation on December 12, 2012. The Administrator filed his Emergency Order of Revocation, which, pursuant to 821.31(a) of the Board's Rules, serves as the complaint in this case.

The Administrator ordered the revocation of Mr. Coats' first-class medical certificate and any other certificates issued to him by the Administrator. The Administrator's order was based on the finding of a verified positive pre-employment drug test that Mr. Coats underwent on October the 3rd, 2012. The Administrator, therefore, argues that based on the verified drug test, the Respondent is not qualified to hold any FAA airman medical certificate under Section 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) of the Federal Aviation Administration regulations.

This matter has been heard before me as the Administrative Law Judge that's been assigned to this case and, as provided by the Board's Rules, I have elected to issue an oral initial decision in this case.

Pursuant to notice, this matter came on for trial on June 11, 2013, in San Francisco, California. The Administrator was represented by one of his staff counsel, Mr. David B. Kessler, Esq., of the Office of Regional Counsel in Kansas City, Missouri. Mr. Coats represented himself during these proceedings.

The parties were afforded full opportunity to offer

evidence, to call, examine and cross-examine witnesses, and make arguments in support of their respective positions. Mr. Coats has been present in the courtroom throughout the proceedings and has participated in all of the stages of the hearing in this case.

I will not discuss all of the evidence in detail. I have, however, considered all of the evidence, both oral and documentary. That which I do not specifically mention is viewed by me as being corroborative or does not materially affect the outcome of this decision, or of the case.

Now, the case was initially filed as an Emergency Order of Revocation. Mr. Coats waived the emergency nature of the proceedings so that he could try to obtain an attorney. So the statutory timeline was waived; however, this case was scheduled as soon as possible.

AGREEMENTS

First, I'd like to talk about the agreements between the parties. The Respondent has admitted paragraph 1 and 2 of the Administrator's complaint, and as well as paragraphs 5 through 8 of the Administrator's complaint. As to those paragraphs of the Administrator's complaint, those have been admitted and, therefore, have been established for the purpose of this decision.

The parties also informed me at the beginning of the hearing that they had agreed as far as some stipulations were concerned. The parties stipulated and agreed that the reason that the Respondent was tested on the date in issue here was for pre-

employment testing for a prospective employer.

They also stipulated that I should take judicial notice of the regulations, specifically the regulations relative to the sanction in this case. The parties stipulated that a verified positive test is disqualifying and that the appropriate sanction is revocation of an airman's medical certificate.

The parties stipulated that the split sample was verified positive and that everything involving that split sample is uncontested. Mr. Coats, however, contests the issue as to whether or not that split sample was provided within the time -- there's a dispute as to whether or not he requested this split sample and as to when it occurred. And I'll address that in my decision.

The parties stipulated that the medical review officer in this case is disabled and was unable to attend the hearing. They agreed that he was qualified as an expert to testify as a medical review officer, has an expertise as a medical review officer, and is qualified to testify as to the test results in this case. Because of his unavailability, Dr. Samuels' deposition was admitted into evidence as an exhibit and portions of that deposition was read into the record.

As far as the exhibits are concerned, the Administrator moved for the admission of Exhibits A-1 through A-7. The exhibits were admitted into evidence with no objection from the Respondent.

The Respondent moved for the admission of Exhibits R-2,

R-3, R-4, R-5 and R-6, which were admitted over the Administrator's objection. And Respondent moved for the admission of R-7 and R-8, which were not admitted into evidence, but they are part of the record, as I mentioned during the course of this proceeding, in the event the Respondent seeks an appeal in this case, if appropriate.

DISCUSSION

What I will first do is discuss each of the witnesses' testimony and then I'll address that testimony relative to the issues I must address in this case.

The Administrator, of course, has the burden of proof and he presented his evidence first. He presented the testimony of Ms. Crystal Ritz; he presented the testimony of Lacey Ann Jones; also provided the testimony of Ms. Hahn; and, as I indicated, Dr. Samuels' testimony was admitted into evidence as part of his deposition. Ms. Hahn's first name is Dawn Hahn and she's a toxicologist and testified and was qualified as a medical expert, which I will discuss in a few minutes.

Ms. Ritz testified first. She's employed by Quest Diagnostics in Rolla, Missouri. She testified she's a phlebotomist and her employment involves collecting blood samples and she also performs collection for drug tests. Her certification for completing the Quest Diagnostics, Department of Transportation, urine drug testing course was admitted into evidence as A-1. That has been -- she has been a phlebotomist and

a collector, she testified, for 20 years.

She testified that she is the collector that obtained Respondent's urine sample in this case on October 3rd, 2012, and filled out the forms documenting the collection and the chain of custody, which has been admitted into evidence as Exhibit A-2.

Ms. Ritz testified that the Respondent came in for a pre-employment drug test, as I've indicated that has been stipulated to. She testified that the procedure generally that follows is that a person providing the sample is given a urine collection checklist to review, to familiarize themselves as to the process and will know what to expect during the course of the testing. The checklist has been admitted as Exhibit A-3.

The Respondent was required to provide his Social Security number, which is used to track the sample, and he must also -- or the donor must also be able to provide a picture identification.

She testified that she would then fill out the custody and control form identified, and take the donor back to the collection area. The donor is requested to empty his or her pockets of the contents, which the contents of which are locked up for safe keeping. She places blue dye in the toilet bowl, takes down the flush handle so that the toilet cannot be flushed.

She testified that she then picks a donor kit -- or, actually, allows the donor to select a specimen kit, which she then takes from the donor and opens it in his presence. She gives

it to the donor. She gives the donor the specimen cup and instructs the donor to produce 45 to 50 milliliters of urine and the donor is requested not to flush the toilet.

She testified that the donor then brings it -- the sample back to her and she must read the temperature within four minutes and notes on the form at A-2 that the temperature for that specimen in issue in this case was between 90 and 100 degrees Fahrenheit, which is within the range acceptable for the urine specimen.

She then stated that she has the donor wash his hands and she unlocks the donor's belongings and returns them to him. She then divides the sample between two specimen bottles that are in the sample kit that the donor has chosen, and then she places labels on both of the bottles in the donor's presence. The labels have a bar code on them and the specimen identification code, which is identified in the photographs in Exhibit A-4, page 60 through 61. Those photographs were admitted first by the Respondent. The labels also include a collection date and she testified that she asked the donor to initial the label as well.

The photos at 61 has a number bar code and a collection number 12488BR-1. The date of the collection is October 3, 2012. And on the label are the initials BFC. The Administrator maintains that the initials BFC are those of the Respondent's, Benjamin Franklin Coats.

She testified that she then places the sample bottles in

a bag for transport in the presence of the donor. She places the top page of the custody and collection form in the bag, and then she then indicates on the form that it is a split sample. She signs the form with the date and time. In this case, it's October 3, 2012, and the collection was made at 9:55.

She indicates that the donor then fills out Step 5 on the form and he signs the form. On Exhibit A-2, Section 5 is signed and dated by Mr. Coats. His birth date is also included in Section 5.

Ms. Ritz then testified that the top cover, as I indicated, the top copy of the form goes to the testing facility in the specimen bag. She indicated that she seals the bag in the presence of the donor. Ms. Ritz testified that she then goes through the urine collection checklist with the donor that she had given the donor before the testing started, and the two then go through each step, placing a check mark on what was done. Ms. Ritz testified she signed and dated the form and the form also has the signature and date provided by Mr. Coats.

Above the signature line in bold letters is a sentence that reads, "Donor and collector agree that all of the above procedures have been completed and the urine submitted is that of the donor signed below and has not been tampered with."

Ms. Ritz testified that she does not recall anything unusual about the process in Mr. Coats' case. She did testify that he looks familiar to her, but she could not specifically

identify all of the procedures or steps that she went through during the collection process. She did state that she did go through the procedures she described and that the documents that were submitted into evidence appear to support that testimony.

On cross-examination, Mr. Coats expressed his concern, first, that Ms. Ritz was not the collector that collected his urine sample on October 3, 2012. He indicated that he believed that the person that collected his sample was blonde and that had a different appearance.

I asked Ms. Ritz to provide her driver's license and her employee identification for Mr. Coats to review. He reviewed that; I reviewed that. Certainly, based on that and looking at her on the witness stand, I found that she was the person she purports to be, and as to whether or not she was the person who actually took the sample from Mr. Coats, she testified that it was her signature on the forms that were submitted with the sample and it is her testimony that she was the person who collected the sample from Mr. Coats.

She was also asked on cross-examination how the labels depicted on page 60 and 61 were attached to the sample bottles. She explained that they were placed over the top of the bottle and down the sides to ensure that the samples were not tampered with.

She admitted that she did not check two boxes on the custody and control form at A-2. She also admitted this in a letter that she wrote to the FAA investigator, Ms. Kimberly

Greenberg, which that letter has been admitted as part of Exhibit R-3.

She agreed that the item number 12 on the urine collection checklist indicates that the custody and control form was completed and was not accurate, as she did not fill out the reason for the test or the drug test to be performed. As I noted, both the collector and Mr. Coats signed the checklist.

She testified on cross-examination that during her 20 years as a collector she had made mistakes in the past, but her record is good. On redirect, she testified that she had never made a mistake that invalidated any test result. If she had made a mistake that had invalidated the test or would have stopped the test from being performed, she would have been required to prepare and sign an affidavit describing that error. She testified she was not required to file such an affidavit in this case.

On recross, she was asked if her letter to Investigator Greenberg was an affidavit in this case. Ms. Ritz indicated it was not an affidavit, simply a letter which indicated she did not fill out the two boxes on the form. She was not asked to fill out an affidavit in this case because she testified it was not a fatal mistake.

In response to my questions, she indicated that a fatal mistake would occur if she did not sign and date the form or indicate that the sample was at the correct temperature range. If those mistakes were made, the test sample would not be tested at

all.

I found the witness to be credible, both on direct and cross-examination. She freely admitted she made mistakes in checking the boxes on the custody and control form, which indicated the purpose of the test was for pre-employment testing in this case, and what tests were to be performed. I believe her testimony that there were no fatal mistakes that would invalidate the test results in this case.

Ms. Dawn Hahn then testified for the Administrator. She testified she is a Quest Laboratory operations manager and also bears the title of "responsible person and custodian of records" for Quest Laboratories. She has been so employed since September of 2010 and she has been a responsible person since August of 2006.

She testified she has a Bachelor of Arts Degree in Medical Technology and has been trained in toxicology since 1990 and has passed the national examination conducted by the Forensic Toxicology Certification Board. She was qualified as an expert in forensic drug testing, an expert in the chain of custody of lab specimens, and she was also qualified as an expert competent to testify as to the laboratory results in this case. The Respondent had no objections to qualifying the witness in those specific areas of expertise.

Ms. Hahn testified as to the contents of A-4, which was admitted without objection from the Respondent. The document is

entitled, "Documentation Package Provided by Quest Diagnostics, Incorporated." The document cover sheet indicates that the 88 pages of the document relate to donor ID 253-29-9559, which has been identified as Mr. Coats' Social Security number. There is a specimen ID number, which is identified as 3939553, as indicated on the bar code. And there was also an accession number assigned to the sample, which is 124388B.

The cover indicates that the Respondent's specimen screened positive for marijuana enzyme through an immunoassay technique, and confirmed positive for marijuana metabolite by gas chromatography/mass spectrometry. The specimen was assessed by pH, creatinine and general oxidant testing and was determined to be acceptable, and the following review of the 88 pages of analytical data and chain of custody, document a positive test result for marijuana metabolites in this case.

Ms. Hahn testified as to the chain of custody and testing process that was performed on Respondent's urine sample. She testified the sample was received and verified by Respondent's Social Security number, which is on the sample bottle labels and custody and control form. The custody and control form was reviewed. She testified that it did not matter that Ms. Ritz did not check the box that the test was for pre-employment or the box as to what tests were specifically be performed.

Ms. Hahn testified that the form indicates that it is a Department of Transportation drug test and the box that was

checked also indicates that it was for Department of Transportation agency, which was indicated as the Federal Aviation Administration. She testified there's only one panel that is performed for Department of Transportation tests, so the fact that the tests to be performed was not checked by Ms. Ritz did not invalidate, one, the commencement of the testing or, two, the test results that resulted from the laboratory testing.

She testified the seals on the sample bottles are scanned into the computer and an accession number is assigned to the test sample. If the bar code on the bottle does not match, it is not conducted. If it appears that the sample has been tampered with or is leaking, the test is not conducted. If the collector did not sign and date the custody and control form, the test would not be conducted.

She testified that the sample was conducted in this case. The sample is then batched along with 70 other samples for testing. An aliquot is taken from each sample bottle. An aliquot is a small sample amount from the principal sample bottle. The contents of the entire bottle is not tested, but only a small sample. That bottle is then placed into storage. The aliquot is sent for testing and, as I indicated, the rest of the sample is put back into storage.

The initial testing is performed by the use of an Olympus analyzer using enzyme immunoassay. If the results are below a cutoff standard, the result is negative. If the result is

above the cutoff standard, then it is referred for a confirmation test. The federal cutoff standard for marijuana in an enzyme immunoassay test. The standard for marijuana is 50.

She testified that the cutoff for marijuana and any other drug cutoffs are assigned a value of 1,000, based on the calibrator, which contains the cutoff concentration for the cutoff. Ms. Hahn testified that the calibration for marijuana, as part of her testimony, was the 797, as indicated on page 16 of the exhibit. 797 for the test is at least roughly equivalent or equivalent to the 50 test, the 50 cutoff standard that is indicated by the federal rules. She indicated if the test falls below 50, or below 797, that the test is negative. And if it is above that number, the test sample is referred for confirmation testing.

Ms. Hahn testified that the initial test results for the Respondent's sample on page 32, the fourth line down, indicates a result of 2.539, which is above the 797 she testified this specific machine was calibrated for, specifically the machine that was used to perform the initial test in this case.

The Respondent's sample was then sent for confirmation testing. A new and fresh aliquot was obtained from the Respondent's stored sample and sent for confirmation testing. That is done through mass spectrometry. The concentrations of drug in each donor's specimen is determined by comparison of the response of the specimen to the response of calibrations, as the

calibrators of known concentration. If the donor's specimen has a concentration of drugs less than the client-specific cutoff, the test of the specimen is negative. If the specimen has a concentration above the client-specific cutoff, the test is positive. The test contains negative and positive quality controls.

Ms. Hahn testified that page 44 of Exhibit A-4 indicates the sample from Respondent was verified for the confirmation test. Page 45 indicates an autotune report, which indicates the mass spectrometer was operating properly. She testified that the Respondent's result in the mass spectrometer test is at page 46 of Exhibit A-4. The cutoff level for marijuana for federal testing is 15. The results of the Respondent's sample for marijuana metabolite for the mass spectrometry confirmation test is 42, as is depicted on line 6 of page 46.

She testified that the results of the positive test is reviewed by a certifying scientist. The certifying scientist also reviews the custody and control form. He reviews all internal control documents and internal chain of custody documents. If the reviewing scientist is satisfied that all of the documents establish that the sample belongs to the donor and the test results belong to the donor, then the results are released. The reviewing scientist was Mr. James Lind in this case.

She testified that once the information is confirmed, that Mr. Lind provided the report of the results to the medical

review officer via fax with the results listed on the custody and control form.

Ms. Hahn testified that the MRO will perform his work based on the custody and control form, which has been admitted into evidence as Exhibit A-5. That report indicates a marijuana metabolite of 42, which is, again, the results of the mass spectrometry test, which is above the cutoff level of 15. The form also indicates that a box is checked, which indicates the test is positive for marijuana metabolite and, in parens, it appears to indicate A9 THCA, which is the confirmatory test for marijuana metabolites.

Ms. Hahn testified that in her expert opinion that the chain of custody and control of the Respondent's sample was not broken. She testified that the sample was identified by Respondent's Social Security number, specimen numbers which matches, as indicated on A-2, and which is also the same form on which the final result was reported on Exhibit A-5.

Ms. Hahn also testified in her expert opinion that the results of Respondent's testing were positive for marijuana in the initial test and the confirmation test as well.

Ms. Hahn agreed that the initial test was a qualitative test and not a quantitative test. She agreed to that on cross-examination. On cross-examination, she testified that the results were measured at a range of 25 above or 25 below the cutoff point. And she testified that the Olympus instrument used for the initial

test is calibrated at a cutoff level of 50.

She agreed that a quantitative assay would provide what the exact number over or under the cutoff point is; however, she testified that that was not necessary because the initial test is qualitative and identifies results as positive if they're over 25 of the cutoff or negative if they're below 25 the cutoff level.

She testified that, again, that 1,000 does imply -- on cross-examination -- a cutoff, in this case, and a cutoff for the initial test is again 50 nanograms per milliliter.

When asked if she was sure, she testified that page 26 indicated a result level of 2.539, which is two times greater than the cutoff of 1,000, which she testified is equal to the cutoff of 50. As I previously mentioned, a specific machine in this case was calibrated to a number of 700, which that result on that machine indicated that his result was well over the 700 level that was calibrated for the test instruments specifically used in Mr. Coats' sample.

Respondent then asked if the confirmation test indicated a metabolite level that did not match the initial test. He pointed out that the initial test level was 50 and the confirmation level was 42. He indicated that 42 is below the cutoff level of 50.

Ms. Hahn testified that there are two different tests using two different methods. The cutoff for the confirmation test is 15 and the confirmation tests specifically for marijuana

metabolites. She testified on redirect that the two tests -- the initial test had a cutoff level of 50 nanograms per milliliter and the confirmation test, which utilizes a cutoff level of 15, which are identified in the federal rules as the cutoff levels for federal testing. She testified that whether the test results were qualitative or quantitative was, in her opinion, of no consequence because the results of both tests were above the cutoff levels for both the initial and the confirmation test.

Ms. Lacey Jones was then called to testify. First, she was called to testify or read into the record portions of the deposition of the medical review officer, Dr. Melvin Samuels. The parties had agreed that Melvin Samuels is disabled and could not be at the hearing and, therefore, is unavailable, which provides a basis for the admission of his deposition testimony in this case. The parties agreed that -- both agreed that that deposition would be admitted into evidence without objection.

Ms. Jones read into the record sections from page 14, in which Dr. Samuels testified that the specimen identification was important to identify the specimen. She read testimony from page 15, that indicates that when a Department of Transportation test is indicated on a custody and control form, the test automatically includes testing for marijuana, cocaine, PCP, opiates and amphetamines. He testified that even if a checkmark is omitted on the custody and control form, the Department of Transportation test would still, in any event, test those specific drugs, which

again are for marijuana, cocaine, PCP, opiates and amphetamines.

Dr. Samuels testified he reviewed the custody and control sheet, found that the form described the specimen at a normal range of 60 milliliters of urine in the specimen. He testified that the form indicated that the urine was at an acceptable temperature.

He testified that the form that he reviewed, again, was positive for marijuana at 42 nanograms per milliliter. He indicates that it takes 15 nanograms per milliliter of the confirmatory test to be identified as positive.

He testified on deposition that the initial screening testing cutoff is 50. He testified there are two different ways to confirm marijuana testing. One is done by immunoassay and the second is done through an electronically-conducted test. He testified that it was signed by the certifying scientist in this case.

He testified that a split sample was performed and that a second sample was positive, as well. He testified in his deposition that he contacted Mr. Coats and told him the possible reasons for a positive marijuana test. When asked if he detected any problems with the custody and control form or the specimen collection, he responded that he did not. When asked if there was any reasons to question the integrity of the lab or any person within the process that might implicate a false positive, he indicated no. He provided his expert opinion that based on his

review of the custody and control form and the final results of the confirmatory test in this case, that the Respondent had marijuana metabolites in his system.

The Respondent was given an opportunity to have parts of the transcript of Dr. Samuels read into the record, however, he declined to do that.

At the conclusion of that portion of her testimony, Ms. Jones continued her testimony as the manager of the Special Investigations Branch. She's with the Drug Abatement Division in Washington, D.C. and she has worked in that area for seven years.

She became aware of this case at the end of October 2012. She received information that the MRO had confirmed that Respondent tested positive in a pre-employment test. She reviewed the database for the FAA relative to what certificates were held by the Respondent and found that he has a commercial pilot certificate and a medical certificate.

She assigned the case to Ms. Kimberly Greenberg, who issued a letter of investigation to the Respondent. Ms. Jones is the supervisor that assigns investigators to these cases, reviews the cases, before she makes a determination that they should be referred to general counsel for consideration of legal action.

She testified that Ms. Greenberg interviewed the medical review officer and prepared the enforcement investigative report. She testified that based on the evidence obtained, she reviewed the sanction guidelines at 2150.3B, and determined that the table

called for revocation of an airman medical certificate if the allegations were proven.

Dr. Tilton, the federal aviation air surgeon, after review of the information, recommended revocation of Mr. Coats' medical certificate in this case. She testified that she was aware, based on her review of the case, that Ms. Ritz had made errors in completing the custody and control form; however, she testified that they were administrative flaws and not fatal flaws, which would invalidate the test results or would prohibit the test from being conducted.

She testified that fatal flaws are identified and enumerated at Section 40.199(b), which lists those specific fatal errors, which are: (1), if the sample indicates that the custody and control form was not signed and dated by the collector; (2) the specimen seal is broken; (3) that there is leakage from the specimen bottle. She testified that those specific incidences are considered fatal flaws and would cancel the testing before the testing began. She also testified that if the test did not include a collection number, that would also be considered a fatal error.

She testified that failure to check boxes as to the type of test, whether the test was pre-employment, or to check a box as to what specific tests were to be performed are not, according to the regulations, considered fatal mistakes.

She testified that the cutoff level for testing for

marijuana in the regulations indicate that for the initial phase, the cutoff is 50 nanograms per milliliter, and for the confirming test it's 15 nanograms per milliliter. She testified that there was nothing she heard in the testimony that would invalidate the positive test results in this case.

On cross-examination, she was questioned as to why the investigator never returned calls he made to her. Ms. Jones testified that the guidelines of 2150.3B do not require the investigator to contact the Respondent, other than performing or providing a letter of investigation. She testified a letter of investigation had been sent in this case and the Respondent was provided an option to respond.

She testified that if the calls were made to her, that she would have returned those calls, as that is important to her, but she could not testify why Ms. Greenberg, the investigator in this case, did not. Ms. Jones testified that she would have returned the calls because it's important to her, if they were made to her, because since she is the manager, that customer issues are certainly something she would be interested in hearing about.

She was asked why the investigator asked Ms. Ritz to send a letter relative to the errors on the custody and control form. Ms. Jones testified that the Administrator sought information regarding the errors and the errors were evaluated, considered, and found to be minor and not fatal errors.

When asked if the list of the fatal flaws in the regulations was an exhaustive list, she testified it was relative to fatal errors. She testified it was not uncommon for minor errors to occur in the collection process. She testified on cross-examination that there was no regulatory standard or regulation as to when or how many non-fatal errors would rise to the level to invalidate a positive drug test.

In response to questions regarding 49 CFR 40.109, which provides that minor administrative errors could result in actions brought again the collection site or the collection site employee, Ms. Jones testified that provision did not apply to actions against airmen or respondents. She testified that she reviewed the enforcement investigative report in this case and she testified that she understood that Mr. Coats initially declined to split sample.

With the conclusion of her testimony, the Administrator rested. The Respondent then had the opportunity to present his case. After some discussion as to whether he wanted to proceed with his case, he decided he would, which, of course, is documented in the record.

Mr. Coats testified on his own behalf. He testified that there were procedural errors in the testing process. Two errors were committed by the collector and one error was committed by the medical review officer. The two errors by the collector were that she did not mark the type of testing to be performed in

this case, that it was not indicated that it was a pre-employment test and she did not check the box which indicated which tests were to be performed. Mr. Coats testified that the MRO made an error in not ordering the split testing that had been requested by Mr. Coats.

Mr. Coats testified that the split sample was not tested until months after his request, and that test was only conducted after, as he put it, he made a federal case of it. He does not dispute, however, that the split sample was positive or that the split sample was conducted, but he testified that it goes to show that this is another indication of another error in the testing process. Mr. Coats does question if the initial sample and the split sample were his samples at all.

He testified that he maintains that the testing conducted by Quest Diagnostics was in error, because the testing used was qualitative rather than quantitative testing as required by the regulations. He does not specifically cite which regulation -- or provides any case law to support his position.

Furthermore, he argues that the confirmation test is not a positive test at all because the marijuana metabolite identified in the test was 45, and he testified the cutoff level for marijuana is 50; therefore, we should not even be having a hearing in this case because the purported positive drug test is not a positive drug test at all.

During his testimony, he attempted to qualify himself as

an expert so that he could testify as to the testing conducted in this case. He was not qualified as an expert because he had not provided notice to the Administrator that he would attempt to call himself as an expert and did not comply with the Federal Rules of Civil Procedure. He did not provide his curriculum vitae or a report of what he was going to rely upon and, therefore, he could not be qualified as an expert in this case.

I have no documentation before me as to Mr. Coats' qualifications. He testified he was a scientist, he has a degree in chemistry and a master's degree in theoretical chemistry and he worked as a teacher, a college professor. However, there's nothing before me or that was provided to the Administrator to substantiate that.

He did indicate that that could be substantiated by a telephone call or a review of his resume on the internet; however, the Federal Rules of Evidence do not provide for that type of qualification during the course of a proceeding and requires an exchange of information, identification of experts beforehand. That did not occur in this case. I could not qualify Mr. Coats as an expert in any area of expertise. I informed him he could testify as a layperson and, certainly, as the person who underwent the testing.

He testified that he had undergone another pre-employment drug test on October 10th, 2012, which resulted in a negative result; however, the test results were not admitted into

evidence due to objections as to the authenticity of the document, which indicates that it is one of six pages, and we only have in court today or yesterday the first page of the six. There is no testimony as to how the test was performed or testimony to testify as to the chain of custody as to the lab test and testimony from the lab to validate the test results. He testified that the marijuana metabolites remain in the body for one month based on the literature that he has read. As I indicated, that test was not admitted into evidence. It is part of the record, in the event Mr. Coats decides to appeal this decision.

Again, Federal Rules of Evidence apply. In a prehearing conference conducted last week, as I mentioned on the record, I informed Mr. Coats that if he wished to introduce that evidence, he should study the Federal Rules of Evidence so that he could determine what was necessary to ensure that he could admit that exhibit into evidence.

Mr. Coats also testified that the numerous errors conducted in this case should invalidate the test results. He indicated that A-3, the urine sample specimen checklist, also included an error as to the custody and control form being completed. He argues that that is direct, as the two boxes on the custody and control form were not checked. He admitted, also, that he signed the checklist form, as well, indicating that that had been done.

He testified that the initials on the sample bottle were

not his initials. He testified that he had questioned the positive test results from the beginning because he does not use marijuana. He testified that in his conversations with the medical review officer, Mr. Coats confirmed that he did not smoke marijuana, he did not eat marijuana, and he was not exposed to marijuana, and did not have a medical prescription for medical marijuana or the pharmaceutical equivalent of medical marijuana. He, therefore, questioned whether the samples that were tested in this case were, in fact, his specimens.

He testified that the samples tested could have been someone else's urine specimens. He testified that the samples could have been mislabeled. He speculated that perhaps the collector switched the samples for someone she knew and used the Respondent's sample because she would be sure that since he was a pilot, that his specimen would be a clean specimen.

He testified that perhaps the collector or collection facility did not agree with the changing attitudes as to the legalization of marijuana. He testified that trying to prove that he did not use marijuana -- and I believe that this is what I heard -- is like trying to prove the existence of God, meaning that it could not be done.

Cross-examination was brief. Respondent stated his initials for the record. He agreed that the cutoff level for the confirmation test is 15, as indicated in the regulation, and the level for the confirmation test in this case was 45. Mr. Coats

then testified that the results of 45, again, is not a positive result because there is nothing in Exhibit A-5 which indicates the 45 was relative to testing to THC --

MR. KESSLER: You might mean 42, Your Honor. I believe you --

ADMINISTRATIVE LAW JUDGE MONTANO: I'm sorry, yes, 42. Thank you.

MR. KESSLER: Yes, sir.

ADMINISTRATIVE LAW JUDGE MONTANO: He indicates that there was nothing on A-7 which indicates that 42 was relative to testing of TCH. However, as I've indicated, the test results at Exhibit A-5, he indicates that the testing is for THC.

In discussing the issues I have to resolve, I believe the best way to discuss the evidence in this case is to approach it by addressing Respondent's affirmative defenses.

As I've indicated, I found the testimony of Ms. Ritz to be credible. I found -- and I should state at this point, I did find the testimony of Ms. Hahn to be credible. I found the testimony of Ms. Jones to be credible, both on direct and cross-examination.

I essentially believe that based on the testimony and the evidence produced by the Administrator at the close of his case, that the Administrator had proved a prima facie case of the allegations that were brought forth in the complaint in this matter. And that's why I believe that the best way to discuss the

evidence in this case and the issues is to approach it by addressing the Respondent's affirmative defenses.

Again, the Respondent maintains that he does not believe his urine specimen was the specimen that were tested in this case. He speculates that the collector must have mistakenly mislabeled the sample and the positive urine specimen tested belonged to someone else. He also speculates that perhaps the collector, Ms. Ritz, needs someone with positive results, and switched the sample -- Respondent's sample because she believe the Respondent's sample would be negative, since he's a pilot.

Respondent, himself, admitted that these theories are speculation. I do not disagree with his characterization of that description.

I found the testimony of Ms. Ritz to be credible, again, both on direct and cross. She readily admitted to the errors on the custody and control form. She was not evasive or non-responsive to any questions asked of her under oath. She was not asked about switching Respondent's specimen with the specimen of another, nor was she questioned on cross-examination to establish to any degree that she mislabeled the specimen bottles in this case. I believe she followed the usual procedures to collect Respondent's sample, labeled and sealed the specimen bottles in the presence of the Respondent and that the Respondent initialed or placed his initials on those bottles.

Those bottles contain a specimen number and a Social

Security number for identification and tracking purposes. I am convinced by her testimony and the totality of the evidence in this case that she committed no fatal errors in the collection of Respondent's urine sample.

The Administrator presented the expert testimony of Ms. Hahn relative to the chain of custody and testing of Respondent's urine sample. She testified how Respondent's specimen was received and handled by the testing laboratory. She testified in detail as to the identification of the sample by Social Security number and specimen number and that the sample was assigned an accession number for testing within the lab.

She testified as to how the sample was handled for the initial test and how, once found positive, the lab tech checked the chain of custody form and the internal control forms to ensure that there was a clear chain of custody relative to the specimen in this case; the specimen in this case, specifically the specimen of Mr. Coats.

She testified that when the sample was referred for confirmation testing, that there was procedure used to ensure that the proper sample was used for that second test and each sample was taken from the stored sample and tested anew. Once a positive test result was identified in the confirming test, the reviewing scientist again reviewed the chain of custody documents to confirm the proper specimen had been tested, the same form that was sent to the lab for testing with the specimen number and Respondent's

Social Security number was returned with the final test results, what's included in the final test results.

The Respondent did not question the chain of custody as described by Ms. Hahn, but instead whether or not the testing was quantitative or qualitative. Therefore, I find her description of the chain of custody and her opinion as to the chain of custody to be unrebutted.

Respondent argued that he does not use marijuana and, therefore, a positive result could not possibly be attributed to him. He argues that, again, proving that he does not use marijuana is similar to proving the existence of God. I do not believe the task to be that difficult. All I had before me is the Respondent's uncorroborated assertions that he does not use marijuana. Respondent could have provided character witnesses to testify in his behalf, they've known him for a period of time and they know him not to use marijuana. That testimony, if credible, could corroborate Respondent's assertion that he does not use marijuana. Because there is no such corroborating testimony, I can only characterize the testimony of Mr. Coats to be self-serving. Certainly, he has an interest in testifying that he does not use marijuana.

As to Respondent's assertion that he does not use marijuana is uncorroborated, I can only find that those assertions, again, are self-serving, unconvincing, and I do not find them credible. Thus, based on the evidence before me, I

cannot find that the Respondent has proven his affirmative defense that the urine sample tested by the laboratory in this case were not his urine specimens. He has not proven his affirmative defense by a preponderance of the evidence.

I do find that the Administrator, as I have indicated, has proven by a preponderance of the evidence that the Respondent's sample was tested, there was a clear chain of custody, that the Administrator has established through the testimony of Ms. Ritz and Ms. Hahn, that it was, indeed, Respondent's urine specimen that was tested for the initial test and the confirmation test.

Respondent argues that there, again, are multiple errors in the collection and testing and in his request for a split sample in this case, and that should establish a basis to invalidate the positive test results in this case. The Respondent provides no evidence that the errors by the collector, Ms. Ritz, somehow resulted in a false positive drug test, nor does he provide any evidence other than argument that the medical review officer's error as to the split sample somehow compromised his sample and, thereby, caused a false positive test result.

Again, I must note that the Respondent has stipulated to the fact that the split sample was properly tested and that it was found to be positive. His concern that he argued that, again, that as far as the split sample is concerned, that the sample was not his and, as I've indicated, he has not proven that affirmative

defense by a preponderance of the evidence.

Ms. Ritz testified that the errors she readily admitted to are not fatal errors that would render the urine sample untestable or invalidate the test results. Those administrative errors were minor and did not affect the testing of his sample and, certainly, did not affect the positive test results. As I've indicated, I found Ms. Ritz to be a credible witness.

Ms. Hahn testified that the errors admitted by Ms. Ritz did not affect the testing of Respondent's sample. She testified that if the custody and control form indicated that the testing is for the Department of Transportation purposes, there is one and only one panel of tests that are performed, and that included all of the tests that were performed in this case.

Dr. Samuels testified in his deposition, which was read into the record, that whenever a Department of Transportation test is indicated on the custody and control form, the tests that are automatically performed are: THC testing, cocaine, PCP, opiates and amphetamines. THC is for marijuana. He testified under oath, and subject to cross-examination during the deposition, that even if the check is omitted on the custody and control form, that those specific drug tests are tested for in any event.

Ms. Jones testified that there are specific fatal errors identified in the regulations which would essentially stop any testing from being performed and invalidate the process. She testified that those errors in this case are minor administrative

errors and that they were not fatal to the testing of the specimen. And in response to questioning by Respondent, she testified that there was no regulation which provided that numerous non-fatal errors would raise to the level of nullifying the positive test result.

Based on the evidence before me, I cannot find that the Respondent has proven by a preponderance of the evidence that the errors in this case in any way invalidate or should invalidate the positive drug test results in this case. And that what is of critical importance in this case is the positive drug test. The errors that occurred in this case do not affect, based on the testimony before me, the validity of the drug test. And, therefore, I cannot find that the Respondent has proven this affirmative defense by a preponderance of the evidence.

I do find the Administrator has proven by a preponderance of the evidence that the errors in this case admitted by the collector are minor, non-fatal errors which do not affect, let alone invalidate, the positive drug testing in this case.

As to the split sample, again, the Respondent has stipulated that a split sample was tested and that it was positive and, therefore, I cannot find -- or there is no evidence for me to find that split level was not a positive test result.

Respondent also argues that the testing by Quest Diagnostics on the samples at issue in this case is flawed and

invalid. He argues that the regulations require a quantitative test and the laboratory conducted qualitative testing. Respondent does not specifically cite the regulation nor cite case law to support his argument.

Respondent also argues that the final positive test report, which is the confirmation report, which cites marijuana metabolite at 42 is not a positive drug test because the level of 42 falls below the federal regulatory cutoff of 50. The only evidence provided by Respondent on this point is his assertions, as he states, as a chemist and a scientist. As noted, Respondent was not qualified as an expert witness in any specific field.

The Administrator presented the expert opinion of Ms. Hahn, who was qualified as an expert without objection from Respondent. She thoroughly described the testing process in this case. While going through Exhibit A-4, she testified that the initial test utilized a cutoff level of 50, as required by federal regulations. She testified as to how the testing instruments are calibrated and used to perform the initial test of the specimen.

She testified that the initial test was positive, as it was well above the federal cutoff level of 50, as indicated on page 26 and 42 of Exhibit A-4. She testified that the second confirming test is conducted utilizing mass spectrometry, which is different from the initial test and uses a cutoff level of 15, as required, again, by the federal regulations. That confirming test resulted in a positive finding of a level of 42, which is above

the cutoff level for the confirming test of 15, again which is used for the confirmation test.

She testified that the confirmation test is a positive test result and that the finding of 42 relates to that test and does not relate to the initial testing level with a cutoff level of 50. In essence, I take her testimony to mean that the Respondent was comparing two different test results to using two different types of testing instruments and different testing levels.

She testified that Quest Diagnostics perform thousands of similar drug tests all over the country a day and that their procedures and testing is reviewed by the federal government four times a year and the procedure has never been questioned or found to be invalid. She also testified that it does not matter if the test is qualitative or quantitative because the end result is that both tests were well above the cutoff level for both the initial and the confirmation test. Dr. Samuels also testified in his deposition that there are two different tests conducted, an initial screening and a confirmation test, and that there are two different testing procedures used.

Based on the evidence before me, I cannot find that the Respondent has proven by a preponderance of the evidence that the testing conducted by Quest Diagnostics is flawed and invalid. I find that the expert testimony of Ms. Hahn to be persuasive, credible, and substantively grounded in the evidence in this case.

I found her testimony to warrant the greater weight than the testimony of the Respondent in this case. Her testimony is supported by the evidence, which establishes that the Respondent's test results were well above the cutoff levels for the initial and the confirmation test.

Furthermore, I find the testimony of Ms. Hahn as to the finding of a positive marijuana metabolite at the level of 42 to relate to the confirmation test, I find it credible that that result of 42 is well above the cutoff level for the confirmation test. A positive finding of 42 on the confirmation test does not relate to the initial testing with a cutoff level of 50.

I do not find that the Respondent's arguments that the final testing finding is not a positive drug test to be supported by the evidence in this case. Based on the evidence provided by the Administrator's witnesses, it is a positive drug test.

I do find that the Administrator has proven by a preponderance of the evidence that the test performed by Quest Diagnostics were performed in accordance with the regulations and have been established as positive test results for the initial and confirming test in this case. I find those tests to be accurate.

I should also note that the Respondent also raised the defense that the initials on the label of the specimen bottle were not his. He has presented no evidence to establish that he did not initial the labels on the specimen bottles except for his own assertion.

He also raised the issue that Ms. Ritz was not the collector that collected his sample in the samples at issue in this case. Again, he did not ask her on cross-examination about that. Based on the evidence before me, I cannot find that the Respondent has proven his affirmative defense that those were not his initials on the specimen bottles or that Ms. Ritz was not the person who collected his sample. He has not proven that affirmative defense by a preponderance of the evidence.

He also raised questions as to the thoroughness of the FAA investigation of this case, specifically about why calls were not returned to him that he had made to the investigator in this case. However, the thoroughness or completeness of the investigation does not invalidate a positive drug test. Certainly, there is nothing else in the investigation that has been established to in any way be insufficient for the Administrator to bring this action.

I find that the FAA investigation was a thorough investigation to the extent that there was a reasonable basis in fact and law to bring this certificate action. Again, even if I found that Ms. Greenberg should have returned Mr. Coats' telephone calls, that, in and of itself, in no way would invalidate the positive test results in this case.

I must also find that based on all of the evidence before me, I do find that the Administrator has proven, again, his prima facie case by a preponderance of the evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having made these findings, I will now make specific findings of fact and conclusions of law using the Administrator's complaint in this case.

As to the Emergency Order of Revocation, which is the emergency complaint in this case, the Respondent has admitted paragraphs 1 and 2, and I believe -- and paragraphs 5 through 8. Since he has admitted those specific paragraphs in his answer to the complaint, I found that those have been admitted and they will be considered established for the purpose of decision.

Therefore, I will begin with paragraph 3 of the Administrator's complaint, which states that the subject drug test was conducted pursuant to the provisions of Title 49 of the Code of Federal Regulations, CFR, Part 40, procedures for transportation workplace drug and alcohol testing programs. The Administrator has by a preponderance of the evidence proven the allegations in paragraph 3.

I find that the Administrator has proven the allegations in paragraph 4 by a preponderance of the evidence. Paragraph 4 specifically reads, "That incident to the above pre-employment drug screen, you tested positive for marijuana."

As to paragraph 9, the Administrator has proven by a preponderance of the evidence that the Respondent was provided an opportunity to have a split sample tested. The Administrator, I believe, has not by a preponderance of the evidence established

that the Respondent did not request that a split sample be tested. However, I do find that evidence establishes that a split sample of the Respondent's urine specimen was tested, was found to be positive. The parties stipulate that that test was performed, was positive, and, as I found that split sample that was tested -- albeit, if I give all deference to the Respondent's position on this, even though it was provided later, it still resulted in a positive test result and that test result has been shown to be based upon the Respondent's urine specimen.

As to the allegations in paragraph 11, I find that the Administrator has proven by a preponderance of the evidence that, "Based on the foregoing, medical review officer verified your test results are positive and notified the FAA." The Administrator has done that though his questioning of Dr. Samuels through the deposition that is a part of this case.

As to paragraph 12, I find that the Administrator has proven by a preponderance of the evidence that, as a consequence of a verified positive drug test result, Baron, the company that was going to hire the Respondent and required a pre-employment drug screen, did not hire the Respondent as a pilot.

I have found that the Administrator has proven by a preponderance of the evidence that the federal air surgeon of the Federal Aviation Administration reviewed the information relative to your positive drug test results verified by Baron's medical review officer and acquired under the Department of Transportation

workplace drug testing programs. Ms. Jones testified that the surgeon general [sic] reviewed the positive drug test and recommended revocation. That was never -- there was no evidence presented by the Respondent that that allegation has not been proven.

I have found that, and I find that as to paragraph 14 that based on the noted review, the federal air surgeon has found that based on your verified positive drug screen test, which has been proven by a preponderance of the evidence in this case, the Respondent is not qualified to hold any FAA airman medical certificates under 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) of the Federal Aviation Regulations.

Those are the specific findings of facts and conclusions that I make relative to the Administrator's complaint in this case. I will now, based on the findings I have made as to the specific findings of facts and conclusions of law, as well as the findings I have made relative to the Administrator's meeting his prima facie case and the Administrator [sic] not proving any of his affirmative defenses, I will now turn to the sanction that the Administrator has imposed in this case.

In addressing the issue of sanction in this case, I must note that on August 3rd, 2012, Public Law 112-153, known as the Pilot's Bill of Rights, was signed into law by the President of the United States and became effective immediately. The Pilot's Bill of Rights specifically strikes from 49 USC 44709 language

which provides that in a case involving airmen certificate denials, the Board is bound by all validly adopted interpretations of law and regulations the Administrator carries out unless the Board finds that interpretation to be arbitrary, capricious or otherwise not in accordance with the law.

It also strikes from 49 USC 44709 and 44710 language that in cases involving amendments, modifications, suspensions or revocations of airmen certificates, the Board is bound by all validly adopted interpretations of law and regulations the Administrator carries out in a written agency policy guidance available to the public relating to sanctions to be imposed under the section unless the Board finds an interpretation is arbitrary, capricious, or otherwise not in accordance with the law.

I mention this because the passage of the Pilot's Bill of Rights requires me to perform a different type of analysis as to whether or not the sanction chosen by the Administrator is appropriate and warranted in, specifically, this case. Prior to the passage of the Pilot's Bill of Rights, I was bound by statute to give deference to the Administrator. After passage of the Pilot's Bill of Rights, I consider varying factors to determine whether or not the proposed sanction is warranted and is proven to be appropriate in this case.

That analysis is not necessary in this case because the parties, as was indicated in the record and on the record, have stipulated that the appropriate sanction, should the Administrator

prove his case, in this case is revocation. Since the parties have stipulated that that is the appropriate sanction, certainly that is an agreement by the parties that I will not invalidate. I, therefore, find by stipulation the sanction of revocation is appropriate in this case, as agreed to by the parties.

ORDER

Based on all of the evidence before me and my review of all of the testimony and documentary evidence, I find that the Administrator's Emergency Order of Revocation, the complaint herein, be, and is hereby, affirmed as issued.

I find that the Administrator has proven his allegation in his complaint by a preponderance of the evidence.

Secondly, I find that the Respondent's first-class medical certificate issued to him on July 11, 2012, and any other medical certificate issued to him by the Federal Aviation Administration are revoked.

This Order is entered on the 12th day of June 2013, in San Francisco, California.

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ALFONSO J. MONTAÑO

Chief Administrative Law Judge

APPEAL

ADMINISTRATIVE LAW JUDGE MONTAÑO: Having found that the Administrator has proven the allegation by a preponderance of evidence in his complaint and that the Respondent has not proven his defenses by a preponderance of the evidence in this case, that concludes my decision in this case.

There are appeal rights that certainly are available to both parties and both parties can appeal my decision to the five-Board -- five-member Board on the National Transportation Safety Board. I have handed out the appeal pages which goes through where and when an appeal must be made and where an appeal must be sent and it also indicates the time frames in which an appeal has to be made and when. And specifically, I would ask the parties to review those appeal rights carefully in deciding if either party should appeal my decision, that those decisions -- that those time frames must be complied with.

The Board will review my decision and determine whether or not I have made an error of law or whether or not I have abused my discretion. They may either affirm -- they may either reverse, remand the case, or affirm my decision. Certainly that appeal process is available to the parties. That is the beauty of the legal system that I operate in and that we all operate in. If there's an appeal, my decision is not the final word, and there certainly is further appeal from the Board decision, should either party wish to appeal higher than that level.

I appreciate the parties' presentation of their evidence. That's the decision I feel I had to make based on the evidence in this case. I appreciate your patience in going through those decisions. Certainly, I need to articulate this decision to establish why I find as I have found in this case.

Thank you all very much and that concludes my oral initial decision and we will go off the record and thank you all very much.

(Whereupon, at 10:57 a.m., the hearing in the above-entitled matter was adjourned.)

CERTIFICATE

This is to certify that the attached proceeding before the

NATIONAL TRANSPORTATION SAFETY BOARD

IN THE MATTER OF: Benjamin F. Coats

DOCKET NUMBER: SE-19400

PLACE: San Francisco, California

DATE: June 12, 2013

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.

_____

Damion Matthews
Official Reporter