

SERVED: February 3, 1992

NTSB Order No. EA-3481

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 14th day of January, 1992

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BARRY LAMBERT HARRIS,  
Acting Administrator,  
Federal Aviation Administration,

Complainant,

v.

LLOYD CONNER, III,

Respondent.

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Docket SE-9766

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins on August 3, 1989, at the conclusion of an evidentiary hearing.<sup>1</sup> By that decision, the law judge affirmed an order of the Administrator suspending respondent's airman pilot certificate for his alleged violation of section 135.227(a)(2) of the Federal Aviation Regulations ("FAR"), 14 CFR Part 135.<sup>2</sup> The law judge rejected

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<sup>1</sup> That portion of the hearing transcript containing the initial decision and order is attached.

<sup>2</sup> FAR section 135.227(a)(2) provides:

(continued...)

that part of the Administrator's order finding a violation of section 91.9,<sup>3</sup> and reduced the sanction from a 45-day to a 15-day suspension. We deny the appeal.

On January 18, 1988, respondent was pilot-in-command of N2614U, a Cessna Model 402C, on an early morning cargo flight from Albuquerque, NM. It had snowed the night before, and the aircraft had been parked outside. The record shows that, just prior to takeoff and for the relevant time afterwards, the temperature hovered around freezing. Exhibits A-10 and R-3. It was no longer snowing, but the humidity was quite high.

A number of persons, including respondent, worked on cleaning the snow and ice off the aircraft while it was at the loading area. The record does not disclose any further check of the aircraft's surfaces prior to its takeoff roll, nor the amount of time that passed between leaving the loading area and takeoff.

Well into the takeoff roll, respondent experienced buffeting. He aborted the takeoff. The aircraft hydroplaned past the end of the runway into dirt and sand, tearing off the landing gear. Respondent and his one passenger were slightly injured.

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<sup>2</sup>(...continued)

(a) No pilot may take off an aircraft that has -  
(2) Snow or ice adhering to the wings or stabilizing or control surfaces. . . .

<sup>3</sup> FAR section 91.9 (currently 91.13(a)) provides:

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

The Administrator sought to establish that respondent failed to ensure that the wings and stabilizing and control surfaces were free of ice and snow before takeoff. At the hearing, however, the Administrator produced no eye witnesses. Instead, FAA accident investigator Hernandez testified (by deposition) that the primary cause of the crash was overnight ice buildup on the surface of the aircraft, including the wings and the horizontal stabilizers. Tr. at pps. 29 and 50-51. The investigator had taken pictures approximately 1 and 1/2 hours after the accident. Those pictures showed ice on considerable portions of the aircraft, including the wings and stabilizers -- ice that was underneath the snow, dirt and sand tossed up when the aircraft slid off the runway.

The investigator further testified that he had spoken to respondent shortly after the accident.<sup>4</sup> Respondent allegedly had said that, in brushing off the snow from the aircraft in readying it for takeoff, he had felt "something rough" on the wing surface, but couldn't see what it was because it was "dark." Tr. at p. 25.

Respondent denies making these statements. Tr. at p. 129. He claims that the Cessna's wings, stabilizers and controls were cleared of all snow and ice before taxiing. Three witnesses, two of whom participated in the brushing and scraping of the aircraft, support this contention. Respondent suggests two

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<sup>4</sup> Respondent returned to the airport after being treated at the hospital for concussion and lacerations.

possible causes of the ice build-up on the aircraft: either slush on the runway during the takeoff roll hit the aircraft and froze; or the ice buildup occurred after the accident, perhaps when the aircraft skidded into the snow beyond the runway.

In finding a violation of section 135.227(a)(2), the law judge rejected the suggestion that slush during the takeoff roll caused the buildup, noting his difficulty in believing that the aircraft's speed would allow ice to build up over the wing. Further, he noted that respondent had not participated in all the snow and ice removal, being away from the aircraft for some time (and, thus, his knowledge was limited to what he personally did and what he was able to see in his final check). The law judge suggested that perhaps there was insufficient light at the loading area for all the ice, especially what might have existed under the wings, to be seen. Ultimately, he concluded that there was ice on the wings before the takeoff roll. He did not specify where or at what specific time the ice developed.<sup>5</sup>

Respondent contends that the Administrator's evidence is inadequate in the face of the contrary eyewitness accounts. In his attempt to show that the evidence does not support the law judge's conclusion, respondent also identifies two erroneous, subsidiary findings of fact in the initial decision.

As respondent correctly notes, the Administrator must prove

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<sup>5</sup> The law judge declined to affirm the alleged violation of section 91.9. Absent a section 91.9 violation, he reduced the sanction to a suspension of 15 days. The Administrator has not appealed from either of these actions.

his case by a preponderance of the reliable, probative, and substantial evidence. Here, the law judge was required to decide what version of events he found more credible. That his finding accepted the testimony of the accident investigator, rather than accounts of those more directly involved, is not error, unless the law judge's credibility determinations were arbitrary and capricious. See, e.g., Administrator v. Jones, 3 NTSB 3649, 3651 (1981). Based on our review of the record, we find the law judge's credibility assessment reasonable and will not disturb it. We further find that his ultimate finding was based on a preponderance of reliable, probative, and substantial evidence.

It was not arbitrary or capricious to conclude that the ice on the wings was not caused by the Cessna's slide beyond the runway or that slush would not have built up on the aircraft during the takeoff roll.<sup>6</sup> Accordingly, we cannot find it unreasonable or unsupported in the record for the law judge to have rejected these suggested explanations. Significantly, the law judge did not conclude that the ice was on the aircraft when it left the loading area. He concluded only that it was on the aircraft in violation of section 135.227(a)(2) at the time the takeoff roll began.<sup>7</sup> This finding is not inconsistent with

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<sup>6</sup> Respondent places too much weight on Administrator v. Nunn, 3 NTSB 1251 (1978). That case does not stand for the proposition that, when circumstantial evidence is relied upon, respondent's testimony must expressly be rejected.

<sup>7</sup> It is quite possible that ice sufficient to cause a wing stall or buffeting could build up from the time respondent checked the aircraft in the loading area and the time of actual takeoff  
(continued...)

respondent's testimony that the aircraft was freed of all ice at the loading area. Nevertheless, and as noted, a violation of section 135.227(a)(2) would still occur.

Respondent is correct that the law judge made two erroneous statements regarding the testimony. The law judge erred in stating that Witness Schipp "didn't talk about ice at all" and that Witness Jenkins did not testify about lighting. These errors, however, do not warrant reversal. As to Mr. Schipp's testimony, the law judge noted other evidence that ice was scraped off. Thus, his misrecollection was harmless error. The misstatement regarding Mr. Jenkins's testimony is also harmless. As the Administrator points out, the law judge found there was lighting at the loading site.<sup>8</sup>

Finally, respondent argues that suspension of his certificate will not enhance aviation safety. Respondent claims, in effect, that this accident could not have been avoided and will be repeated in similar weather conditions absent a study of operating procedures. This claim, however, relies in great part

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<sup>7</sup>(...continued)  
roll. With high humidity, dew (or water remaining from the snow and ice previously on the aircraft) could freeze. Under this scenario, the Cessna could well have been free of ice at the loading area, yet takeoff would still violate section 135.227(a)(2). Given the weather conditions, it was respondent's obligation, prior to takeoff, to check the aircraft as often as might be necessary to ensure no ice buildup. That could require a further check of the aircraft immediately prior to takeoff.

<sup>8</sup> We also note that the law judge did not discuss or explicitly rely on Witness Hernandez's testimony regarding his conversation with respondent. Respondent's comments could easily be viewed as a damaging admission against interest.

on respondent's theory that ice formed on the wings during takeoff roll -- a version of events rejected by the law judge. We concur with the law judge's determination that ice had formed on the aircraft before takeoff roll.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The initial decision is affirmed.
3. The 15-day suspension of respondent's airman pilot certificate shall commence 30 days after service of this opinion and order.<sup>9</sup>

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>9</sup> For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).