

SERVED: September 29, 2008

NTSB Order No. EA-5408

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of September, 2008

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ROBERT A. STURGELL,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-17989
v.)	
)	
PATRICK SEAN RICE,)	
)	
Respondent.)	
)	
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OPINION AND ORDER

Respondent appeals the written initial decision of Administrative Law Judge William R. Mullins, served in this proceeding on December 4, 2007.¹ By that decision, the law judge upheld the Administrator's amended order of suspension, affirming violations, as alleged, of 14 C.F.R. §§ 61.3(c), 91.13(a), and 91.151(b),² and modified the 90-day suspension of respondent's

¹ A copy of the law judge's decision is attached.

² Sections 61.3, 91.13, and 91.151 state, in relevant part:

airline transport pilot certificate sought by the Administrator to a 75-day suspension.³ We deny respondent's appeal as to the violations, but grant his appeal in part as to sanction.

The Administrator's March 5, 2007 order of suspension (as

(..continued)

Sec. 61.3 Requirement for certificates, ratings, and authorizations.

* * * * *

(c) Medical certificate. (1) Except as provided for in paragraph (c)(2) of this section, a person may not act as pilot in command or in any other capacity as a required pilot flight crewmember of an aircraft, under a certificate issued to that person under this part, unless that person has a current and appropriate medical certificate that has been issued under part 67 of this chapter, or other documentation acceptable to the Administrator, which is in that person's physical possession or readily accessible in the aircraft.

* * * * *

Sec. 91.13 Careless or reckless operation.

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

* * * * *

Sec. 91.151 Fuel requirements for flight in VFR conditions.

* * * * *

(b) No person may begin a flight in a rotorcraft under VFR conditions unless (considering wind and forecast weather conditions) there is enough fuel to fly to the first point of intended landing and, assuming normal cruising speed, to fly after that for at least 20 minutes.

³ The Administrator does not appeal the reduction in sanction. The law judge stated that he modified the sanction to account for the fact that although the Administrator's original order sought a 90-day suspension, the Administrator amended his order, without changing the sanction, to withdraw the charge that respondent also violated 14 C.F.R. § 91.9(a).

amended on July 10, 2007), filed as the complaint in this proceeding, alleged that on August 9, 2006, respondent operated a Bell 206 helicopter, N121RH, on a passenger-carrying flight in the Orlando metropolitan area that terminated in an unscheduled, hard landing due to fuel exhaustion. The complaint also alleged that at the time of the accident flight, respondent did not have in his possession a current and appropriate medical certificate. Respondent does not dispute that on the day of the accident his second-class medical certificate had expired. It is also not disputed that the helicopter lost power, forcing respondent to execute an auto-rotation to a hard landing in an abandoned lot, while respondent was attempting to divert to Orlando Executive Airport due to cockpit indications that the aircraft was low on fuel.

At the hearing, the Administrator presented the testimony of two FAA inspectors assigned to investigate respondent's hard landing, as well as a mechanic who responded to the scene and assisted the FAA inspectors with a post-accident examination of the fuel system. The percipient witnesses on-scene at the landing site testified that there were no indications of spilled or leaking fuel. Approximately 40 ounces of fuel was ultimately drained from the aircraft. During a subsequent FAA examination of the fuel system, the cockpit gauge indicated empty and, when fuel was added incrementally, the gauge was observed to depict the fuel quantity added with reasonable accuracy and within design specifications (the gauge actually slightly underreported the fuel on board). In addition, the fuel boost pumps were found

to operate normally, and no fuel leaks were noted.

One of the FAA inspectors, Clifford Baggett, also visited Magic Air, the Kissimmee, Florida, operator of N121RH and respondent's employer, the day after the accident. He testified that the landing facility has a Bowser fuel tank next to the helicopter pad, from which pilots fuel their aircraft in accordance with the needs of each flight. Inspector Baggett retrieved a spreadsheet from Magic Air listing the flights made by N121RH on the day of the accident, and the accident flight was scheduled as a 45-minute flight. The Hobbs meter on the helicopter indicated that the flight lasted approximately 90 minutes before it ran out of fuel.

Inspector Baggett also testified that according to FAA records, respondent's second-class medical certificate, which was required for the passenger-carrying flight, expired prior to August 9, 2006.

The Administrator also presented the testimony of Christina Stops, a Magic Air employee who prepared the daily sales sheet for N121RH on the day of the accident. Ms. Stops testified that the passengers were sold a 45-minute tour. Ms. Stops also testified that respondent discussed the route of flight with the passengers, and then left her to go fuel the aircraft while she briefed the passengers. Ms. Stops testified that there is a fuel log for the Bowser tank, but she did not know where the log was or whether an entry was made for the fueling of the accident flight.

Respondent testified on his behalf. At the time of the

accident, he was a helicopter pilot for the Seminole County Sheriff's Office but also flew part time for Magic Air. Respondent testified that he fueled the helicopter immediately prior to the accident flight, and that he planned for a 90-minute flight. He testified that he used a conservative fuel burn estimate of 25 gallons-per-hour, and, planning for a reserve of 30 minutes, ensured that the fuel gauge indicated he had the requisite fuel. Respondent testified that according to the fuel gauge he had 52 gallons of fuel aboard prior to the flight. He also testified that there is no reliable way to visually confirm the amount of fuel in the aircraft, and that it was necessary to rely on the aircraft's fuel gauge.

Turning to the accident sequence, respondent testified that approximately 90 minutes into the flight a fuel boost pump caution light illuminated when the helicopter was approximately 1.5 miles from Orlando Executive Airport. He turned the aircraft towards the airport to make an immediate landing, and, while doing so, he stated he observed the fuel gauge rapidly go from an indication of approximately 17 gallons to zero. He declared an emergency and, ultimately, landed the helicopter hard in the abandoned lot after the engine quit.

Respondent also introduced the deposition testimony of one of the passengers, Damian Winterburn, an Australian citizen. Mr. Winterburn, who is not a pilot, stated that he recalled watching the fuel gauge drop to empty and estimated that it took approximately 15 to 20 minutes. Respondent also introduced a recorded television interview of Mr. Winterburn at the scene of

the accident, in which he stated that, "it just seemed like the fuel gauge kept going and seemed like it ran out of fuel on the way down ... I was thinking, 'is fuel coming out?'" Exhibit R-7.

Respondent also presented testimony from two witnesses who corroborated respondent's claims that due to the helicopter's configuration, the pilot could not visually inspect the fuel quantity, and, instead, had to rely on the fuel gauge to determine the amount of fuel aboard.

After the hearing, the law judge issued a written decision wherein he found that a preponderance of the evidence demonstrated there were no discrepancies with the helicopter's fuel system on the day of the accident, that the gauges were in proper working order, and that the accident occurred due to fuel exhaustion which he found was due to respondent's failure to fill N121RH with enough fuel for the flight.⁴ The law judge, citing the "Lindstam doctrine," concluded that the evidence presented by the Administrator was sufficient to establish a *prima facie* case of respondent's carelessness, which led to fuel exhaustion during the accident flight, and respondent failed to present sufficient evidence to rebut the presumption of carelessness.⁵ Indeed, the

⁴ The law judge also found that respondent's second-class medical certificate was expired on the day he flew the accident flight, but respondent admitted during his testimony that he was unaware that his second-class medical had expired on June 30, 2006, until Inspector Baggett brought it to his attention after the accident.

⁵ See Administrator v. Lindstam, 41 C.A.B. 841 (1964), and subsequent cases. Under the Lindstam doctrine, the Administrator need not allege or prove specific acts of carelessness to support a violation of § 91.13(a). Instead, using circumstantial evidence, he may establish a *prima facie* case by creating a reasonable inference that the incident at hand would not have occurred but for carelessness on the respondent's part. The

law judge noted that respondent's only exculpatory evidence was his claim, not credited by the law judge, to have fueled the aircraft with 52 gallons prior to the flight.⁶ Accordingly, he affirmed the Administrator's order of suspension, but modified it to a 75-day suspension to account for the withdrawn § 91.9 charge.

On appeal, respondent's principle arguments are: (1) the law judge's findings that there were no discrepancies with the fuel system and that the fuel gauges were working properly at the time of the accident were erroneous and not supported by the hearing evidence; (2) the law judge's finding that respondent did not fuel the aircraft with enough fuel to complete the flight is not supported by the record; (3) the law judge erroneously found a violation of § 91.151(b) solely on the basis of his determination that the accident occurred because of fuel

(..continued)

burden then shifts to the respondent to come forward with an alternative explanation for the event sufficient to overcome the inference of carelessness.

⁶ We do not disturb a law judge's credibility findings unless they are shown to be clearly erroneous. See Administrator v. Smith, 5 NTSB 1560, 1563 (1986). We read the law judge's decision to contain a finding that on the whole he considered respondent's testimony not entirely credible, and we discern insufficient record evidence to reverse this conclusion. We note, however, that the law judge's additional observation—that if respondent was unaware that his second-class medical certificate had expired, then "it is probable he also was incorrect about the amount of fuel added to N121RH prior to the flight"—would not stand alone to justify a diminished credibility finding. Ultimately, however, this distinction does not matter for we agree with the law judge that the preponderance of the evidence clearly demonstrates that the helicopter made a forced landing due to fuel exhaustion, and, because the evidence indicates that there were no discrepancies that would cause an errant fuel indication or a fuel leak, this occurred because respondent took off with insufficient fuel aboard.

exhaustion; and (4) the 75-day suspension is arbitrary and not in accordance with precedent.⁷

We need not devote significant discussion to respondent's arguments, for we think the record adequately supports the law judge's ultimate finding that the preponderance of the evidence supports the Administrator's charge that respondent violated §§ 61.3(c), 91.13(a), and 91.151(b). First, however, we find there is no dispute by respondent, and overwhelming evidence that respondent violated § 61.3(c) when he flew the passenger-carrying flight without having a valid second-class medical certificate. It makes no difference if this was an inadvertent error, or whether he was able to subsequently obtain the proper certification after the accident.

Turning to the Part 91 violations, we think the overwhelming evidence supports the law judge's logical conclusion that the accident was caused by fuel exhaustion, and that this occurred because the flight departed without sufficient fuel for the flight. The testimony was consistent that the fuel gauge indications were reliable, and that there were no indications on scene or during subsequent inspection and testing that there was any fuel leak. Indeed, the only evidence that an adequate amount of fuel was aboard the flight at the time of takeoff was

⁷ Respondent also repeats arguments made before the law judge that Inspector Baggett acted improperly because he was responding to the accident on behalf of the NTSB. We have reviewed the record in this case, and find this argument, under the circumstances of this case, to be without merit. Nonetheless, we note that the NTSB policies and preferences that respondent alludes to are for protecting the integrity of the NTSB investigative process and findings, neither of which are at issue in this enforcement proceeding.

respondent's summary claim that he fueled it to ensure he had the planned 52 gallons aboard. Yet, consistent with the law judge's assessment of respondent's "diminished credibility," we note that when pressed for details about his actions to ensure that he loaded sufficient fuel to achieve 52 gallons aboard, respondent's testimony was not strong. See Tr. at 193-95. Moreover, respondent's explanation for why he could not obtain records or other evidence to demonstrate the fuel he loaded aboard the aircraft prior to the flight was not persuasive. See Tr. at 185-89. In short, we have insufficient basis to disturb the law judge's determination that respondent's claim to have fueled the aircraft to 52 gallons should be discredited. The preponderance of the evidence demonstrates that respondent's helicopter ran out of fuel, and that this occurred not due to a mechanical issue but because it departed with insufficient fuel for the flight. Thus, the record supports the § 91.151(b) charge, and, as a residual violation, also the § 91.13(a) charge.⁸

Finally, respondent argues that the 75-day suspension is not consistent with precedent, and arbitrary. First, we note that the Administrator did not introduce the sanction guidance table into evidence at the hearing, or otherwise provide convincing evidence of the rationale for the choice of sanction. Moreover,

⁸ The focus by the parties, and the law judge, on the Lindstam doctrine is misplaced. The Lindstam doctrine applies only to charges of carelessness, and specifies that one method of establishing carelessness is the burden-shifting analytical model. Here, however, the issue is not merely carelessness, but the dual, interdependent charges of §§ 91.13 and 91.151(b). In light of the record in this case, it is not necessary to rely on the paradigm of Lindstam to assess the record evidence.

we note that the range of sanction appears to be between 30 and 60 days for fuel exhaustion cases, where there are no aggravating circumstances such as an unfavorable compliance disposition or a history of prior violations.⁹ The law judge's sanction determination is owed no deference, for it provides no substantive explanation for how it was calculated. Finally, even on appeal, the Administrator provides no meaningful explanation of what range his sanction guidance table specifies for the violations at issue in this case, or, importantly, an explanation about how the facts of this case should be analyzed within the range of possible sanctions. In the only recent case we can discern that involved solely a violation of § 61.3(c), and from which we can draw a conclusion about a reasonable sanction for that charge, in the absence of any meaningful guidance from the Administrator in this case, the sanction imposed was a 15-day suspension.¹⁰ Accordingly, without the benefit of the Administrator's application of his guidance to the specific facts of this case, we are constrained to reduce respondent's sanction to a 60-day suspension.¹¹ Our determination as to sanction takes into account precedent in fuel exhaustion cases and expired

⁹ See, e.g., Administrator v. Holmgaard, NTSB Order No. EA-4799 (1999); Administrator v. Meacham, NTSB Order No. EA-4633 (1998); Administrator v. Vogt, NTSB Order No. EA-4143 at n.17 (1994) (reciting range of sanctions imposed in various fuel exhaustion cases).

¹⁰ See Administrator v. Brune, NTSB Order No. EA-4108 (1994).

¹¹ In future cases, we encourage the Administrator to present evidence of the sanction guidance table, and evidence or argument addressed to the validity of choice of sanction in the context of the specific facts of each case. In the absence of such a record, we cannot defer to the Administrator's sanction for we

medical certificate cases, and factors in the fact that multiple violations are present in the instant case. Moreover, we note that this sanction appears to fall within the range established in the Administrator's guidance.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted, in part, with regard to sanction;
2. The law judge's initial decision, except as modified as to sanction, is affirmed; and
3. The 60-day suspension of respondent's air transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.¹²

ROSENKER, Acting Chairman, and SUMWALT, HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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have no way to assess its validity.

¹² For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to 14 C.F.R. § 61.19(g).

SERVED DEC. 4, 2007

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

ROBERT STURGELL, *
Acting Administrator *
FEDERAL AVIATION ADMINISTRATION, *
COMPLAINANT, *
*

v. *

. PATRICK SEAN RICE, *
RESPONDENT *
*

Docket No.: SE-17989
JUDGE MULLINS

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WRITTEN INITIAL DECISION

STATEMENT OF THE CASE

On August 9, 2006, Patrick Sean Rice, Respondent, acted as pilot-in-command of a Bell helicopter model 206B-III, registration N121RH operated by Magic-Air Adventures. The passengers scheduled the flight for the purpose of photographing several locations in the Orlando area. The flight lasted approximately ninety (90) minutes before a fuel pump caution light illuminated. Mr. Rice attempted to divert to the Orlando Executive Airport approximately one and a half miles away. Mr. Rice reset the fuel pump light, but it remained

illuminated. After turning in-bound to Orlando Executive Airport, Mr. Rice declared an emergency and decided to land the aircraft in an abandoned parking lot because the fuel quantity gauge indicated zero minutes of fuel. While attempting to land the aircraft, the engine quit and Mr. Rice conducted an emergency auto rotation procedure that resulted in a hard landing in the abandoned parking lot about one and a half miles from the Orlando Executive Airport. As a result of an investigation for the NTSB, fuel exhaustion was determined to be the cause of the engine failure.

As a result of this accident, the Administrator issued an Order of Suspension dated March 21, 2007, seeking to suspend Respondent's Airline Transport Pilot's Certificate for a period of 90 days. That Order alleged regulatory violation of Federal Aviation Regulations (FARs) 61.3(c), 91.9 (a), 91.13(a), and 91.151(b).

By Answer filed April 5, 2007, Respondent denied all of the regulatory violations. The Administrator, by Amendment filed July 10, 2007, withdrew the regulatory violation of FAR 91.9(a), but did not reduce the sanction.

For the reasons stated below, the Order of Suspension as to the regulatory violation is affirmed and a suspension of 75 days will be ordered.

ISSUES

- (1) Does the Lindstam doctrine apply?
- (2) Did the Administrator establish a prima facie case of carelessness under the Lindstam doctrine?

(3) If the Lindstam doctrine did apply, did Respondent's evidence overcome that presumption?

SUMMARY OF THE EVIDENCE

A. Exhibits.

The Administrator submitted the following exhibits, which were admitted into evidence:

(A-1) Letter from Chris Johnson giving a brief summary of his actions and observations on August 9, 2006.

(A-2) Weight and balance data and equipment list amendment for Bell 206B-III, serial number 3443, aircraft registration N121RH.

(A-5) Daily sale sheet for aircraft N121RH on August 9, 2006.

(A-6) Statement of Aviation Safety Inspector David King dated August 10, 2006.

(A-7) Aviation Safety Inspector Clifford Baggett's record of visit with Patrick Sean Rice and Aviation Safety Inspector Michael Conley on August 24, 2006.

(A-8) Aviation Safety Inspector Michael Conley's record of conference with Patrick Sean Rice and Aviation Safety Inspector Clifford Baggett on August 24, 2006.

(A-9) Fuel receipt from Marathon Flight Service dated August 9, 2006 at 14:16.

The Respondent submitted the following exhibits which were admitted into evidence:

(R-1) Training certificates for Patrick Sean Rice.

(R-2) Bell Jet Ranger-III Rotocraft Flight Manual Section 3, Operational Information, for aircraft N121RH.

(R-3) Photograph of N121RH including the range extender located behind the starboard passenger door.

(R-4) Video disc depicting a range extender similar to the one installed on N121RH.

(R-5) Written statement of Patrick Sean Rice to Lieutenant Hunan of the Seminole County Sheriff's Department dated August 10, 2006 describing the accident on August 9, 2006.

(R-6) ASRS database document describing the type of range extender used on N121RH.

(R-7) News video interview of Damian Winterburn at the scene of the accident on August 9, 2006.

B. Testimony

The Administrator presented testimony from Chris Johnson, an A&P mechanic with inspection authorization and pilot employed by Universal Air Service. Mr. Johnson performed maintenance service on N121RH and responded to the scene of the accident on August 9, 2006 to arrange a trailer to transport the aircraft. (TR 39). Mr. Johnson testified to his observations of N121RH and that there was no obvious presence of spilled or leaking fuel at the scene of the accident. (Exhibit A-1). Mr. Johnson assisted the FAA Inspectors and was present when the fuel gauge and fuel system were tested. Mr. Johnson stated that when the electrical power was applied to N121RH the fuel gauge indicated empty, and that less than a quart of fuel was drained from the aircraft. (TR 44-45). Mr. Johnson testified that fuel was added to the aircraft, and the fuel gauges were accurate and actually indicated that the aircraft had slightly less fuel than was added. (TR 45). Mr. Johnson further testified that the fuel boost pumps operated properly and no fuel leaks were noted. (TR 46).

The Administrator also called David King, a principle maintenance inspector employed by the FAA. Mr. King provided airworthiness assistance to Aviation Safety Inspector Clifford Baggett. Mr. King was present during the

inspection on August 10, 2006. Mr. King testified that the fuel system and fuel gauges operated properly on N121RH. Mr. King stated that approximately 40 ounces of fuel was drained from the aircraft. (TR 59). He further testified that that when fuel was added to the aircraft, the fuel gauges read less than the actual amount of fuel that was put in the tanks. When five gallons of fuel was added, the fuel gauge indicated three gallons, and when ten gallons was added, the fuel gauge indicated seven gallons. (TR 61). Mr. King testified that it was common for a fuel gauge to be adjusted to include a margin of safety. (TR 61-62).

The Administrator called Michael Conley, a training program manager employed by the FAA. Mr. Conley attended a conference with Aviation Safety Inspector Clifford Baggett and Mr. Rice on August 24, 2006. Mr. Conley testified that during the conference Mr. Rice stated that he was aware that N121RH ran out of fuel, but did not know why the aircraft ran out of fuel. (TR 77). Mr. Conley submitted a written statement based on his conference with Mr. Baggett and Mr. Rice. (Exhibit A-8). Mr. Conley testified that he did not confer with Mr. Baggett before making his written statement. (TR 78).

The Administrator called Clifford Baggett, a training center program manager employed by the FAA. Mr. Baggett was the Aviation Safety Inspector who was on call and was contacted about the accident. Mr. Baggett stated that he was placed in a conference call with the "Atlanta Comm Center" and a representative of the NTSB. (TR 85-86). Mr. Baggett did not go to the scene of the accident on August 9, 2006, but arranged for the aircraft to be brought to a

secure location. (TR 90-91). Mr. Baggett did speak with Mr. Rice on the evening of August 9, 2006. Mr. Baggett testified that Mr. Rice indicated to him that the engine quit and he conducted an emergency autorotation procedure into an abandoned parking lot. (TR 89). Mr. Baggett stated that he checked Mr. Rice's records and determined that Mr. Rice did not hold a current second class medical certificate on August 9, 2006. (TR 106). Mr. Baggett testified that his observations during the inspection of N121RH were essentially the same as those of Mr. King. (TR 94). Mr. Baggett testified that he visited Magic Air Adventures after completing the inspection on N121RH. (TR 95). He observed a Bowser fuel tank next to the helicopter pad. (TR 95). Mr. Baggett received a spreadsheet listing the flights taken for N121RH on August 9, 2006. (TR 95-96). The flight was scheduled for 45 minutes on the spreadsheet, but Mr. Baggett testified that the Hobbs meter indicated that the flight lasted approximately ninety (90) minutes. (TR 99). Mr. Baggett testified that he spoke to Mr. Rice a few times after the accident including the in-person meeting on August 24, 2006. Mr. Baggett's written statement concluded that the cause of the accident was fuel exhaustion. (Exhibit A-7).

The Administrator called Christina Stops, an employee of Magic Air on August 9, 2006. Ms. Stops prepared the daily sales sheet for N121RH on August 9, 2006. (TR 125). Ms. Stops testified that the passengers were sold a 45-minute tour, and that the passengers discussed the route of flight with Mr. Rice before the flight. (TR 126-27). Ms. Stops further testified that Mr. Rice advised her that he was going to fuel the aircraft while she briefed the passengers. (TR

128). Ms. Stops stated that there is a fuel log for the Bowser tank, but she did not know if an entry was made on the fuel log for this flight. (TR 129). Ms. Stops was also unaware of the whereabouts of the fuel log. (TR 131).

The Respondent called Patrick Sean Rice to testify on the events surrounding the accident on August 9, 2006. Mr. Rice is employed by the Seminole County Sheriff's Office Aviation Unit and flies part-time for Magic Air. Mr. Rice testified that he landed N121RH on the helipad next to the Bowser tank after a previous flight in order to fuel the aircraft. (TR 156). Mr. Rice was unaware that his second class medical certificate had lapsed on June 30, 2006 until Mr. Baggett brought it to his attention on August 10, 2006. (TR 149).

Mr. Rice testified that the only way to confirm the fuel quantity was by reading the fuel gauge because the fuel range extender device does not allow for a visual inspection inside the tank. (TR 152-53). Mr. Rice testified that he fueled N121RH immediately prior to the flight at issue. (TR 156). The passengers advised Mr. Rice that they wanted to take pictures of several sites around the Orlando area. Mr. Rice testified that he planned for an hour and a half flight based on the passengers' requested route of flight, and conducted the performance planning on a Magic Air computer. (TR 154-56). Mr. Rice testified that using a fuel burn 25 gallon-per-hour, he planned to start the flight with 52 gallons of fuel. This flight plan allowed for a 1.5 hour flight with a 30 minute reserve. (TR 155-56). Mr. Rice testified that he fueled the N121RH out of the Bowser tank and confirmed that 52 gallons of fuel was on board by looking at the fuel gauge. (TR 156-57). Mr. Rice stated that according to the aircraft's flight

manual, N121RH would burn only 23 gallons per hour considering the cruise speed, outside air temperature, and aircraft weight. (TR 158-60).

Mr. Rice testified that approximately 90 minutes into the flight, a boost pump caution light illuminated. (TR 166). They were approximately one and a half miles from the Orlando Executive Airport, and Mr. Rice turned the aircraft toward the airport to make an immediate landing. (TR 166-67). While turning toward the airport, Mr. Rice testified that the fuel gauge dropped from an indication of 17 gallons to zero. (TR 168). Mr. Rice declared an emergency and landed the aircraft in an abandoned parking lot. (TR 169). Mr. Rice testified that at approximately ten feet above the ground the engine quit and he performed an emergency autorotation procedure. (TR 169).

Mr. Rice spoke to Mr. Baggett on two occasions on the evening of August 9, 2006 to discuss the flight. Mr. Rice also met with Mr. Baggett in person on August 24, 2006 at Mr. Baggett's office. Mr. Rice testified that Mr. Baggett wanted Mr. Rice to admit that he made mistakes on August 9, 2006. (TR 180-81). Mr. Rice further testified that Mr. Baggett became loud and told Mr. Rice that he could go easy on him, or he could go hard on him, and that Mr. Rice would not win this case. (TR 180-81).

The Respondent called Adam Iaquinto, a pilot employed by the Orange County Sheriff's Office and former employee of Magic Air Adventure. Mr. Iaquinto testified regarding the procedures he followed while flying N121RH with the fuel extender attached. Mr. Iaquinto testified that using a 25 gallon-per-hour fuel flow rate for performance planning was a conservative number for N121RH.

(TR 140). Mr. Iaquinto further testified that the fuel tanks in N121RH were not topped off for tourist flights because the aircraft would be over maximum weight limitations. (TR 141). Mr. Iaquinto testified that the fuel range extender made a visual inspection of the fuel tank impossible and that the pilots were required to use the fuel gauge to check the quantity of fuel. (TR 142).

The deposition of Damian Winterburn, a passenger on the August 9, 2006 flight, was read into evidence. Mr. Winterburn's deposition was taken on July 3, 2007. In the deposition, Mr. Winterburn stated that he recalled watching the fuel gauge drop to empty and it took approximately fifteen to twenty minutes. (TR 203). In a TV news interview on August 9, 2006, Mr. Winterburn stated that "it just seemed like the fuel gauge kept going and seemed like it ran out of fuel on the way down...I was thinking, 'is fuel coming out?'" (Exhibit R-7).

The Respondent called Stephen Weaver, an Aviation Safety Inspector employed by the FAA for the North Florida Flight Standards District Office. Mr. Weaver testified about the type of fuel extender installed on N121RH. (TR 209). Mr. Weaver stated that he does not believe that the bottom of the fuel bladder is visible when the fuel range extender is installed. (TR 209). Mr. Weaver testified that the only way to determine the amount of fuel onboard is to observe the cockpit fuel gauge. (TR 209).

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

- (1) The accident on August 9, 2006 was caused by fuel exhaustion.

- (2) There were no discrepancies with the fuel system in N121RH on August 9, 2006, and no leaks or spilled fuel was found at the scene of the accident.
- (3) The fuel system and fuel gauges in N121RH were in proper working condition on August 9, 2006.
- (4) Respondent did not fill N121RH with enough fuel to complete the flight in issue.
- (5) Respondent's second class medical certificate lapsed on June 30, 2006, and Respondent was not aware of this until his conversation with Mr. Baggett on August 10, 2006.

DISCUSSION

A. Lindstam Doctrine

The Lindstam doctrine states that the FAA may establish a prima facie case of carelessness by circumstantial evidence. Lindstam, 41 CAB 841 (1964). If the only explanation of an accident is pilot carelessness, then the Administrator has made his case and the Respondent must come forward with sufficient rebuttal evidence. Administrator v. Doster, 1986 WL 82322, 9 (1986). The Lindstam doctrine is applicable to every phase of the operation of an aircraft, including the forced landing in this case. Id.

The Administrator presented evidence that on the day of the accident there were no discrepancies with the fuel system in N121RH. Chris Johnson testified that there was no obvious presence of spilled or leaking fuel at the scene. He further testified that less than a quart of fuel was drained from the fuel tanks on N121RH after the accident. David King, a FAA Inspector, testified that the fuel systems and fuel gauges on N121RH were tested and operated properly. The evidence presented by the Administrator was sufficient to establish that the

cause of the hard landing on August 9, 2006 was fuel exhaustion. Thus, applying the Lindstam doctrine the Administrator established a prima facie case of carelessness by the Respondent.

Respondent failed to present sufficient evidence to rebut the presumption of carelessness in this case. The only evidence presented by Respondent as to the amount of fuel in N121RH for the flight at issue was his own testimony that he fueled the aircraft himself before the flight. No witnesses or records at the Magic Air facility, such as a fuel receipt, were presented to corroborate the amount of fuel that was put into the aircraft prior to the flight. Respondent's testimony alone was not sufficient to rebut the presumption of carelessness because of his diminished credibility when examining his entire testimony. Respondent's second class medical certificate had lapsed on June 30, 2006, prior to the accident on August 9, 2006. Respondent testified that the lapse of his second class medical certificate was an oversight on his part, and that his only explanation for the lapse was that he simply "missed it." (TR 150). Respondent was not aware his medical certificate had lapsed until Mr. Baggett brought this detail to his attention on August 10, 2006. If Respondent missed this detail, it is probable he also was incorrect about the amount of fuel added to N121RH prior to the flight at issue.

The Lindstam doctrine applies in this case to establish a prima facie case of carelessness against Respondent. Respondent failed to provide sufficient evidence to rebut the presumption of carelessness.

B. Authority of FAA to Investigate

The NTSB is charged with investigating aircraft accidents and incidents; however, due to limited resources an NTSB investigator will typically only respond to an accident site when a fatality has occurred. When no fatality has occurred, an FAA investigator will respond in place of an NTSB investigator. The purpose of an NTSB accident investigation is to ascertain the cause of the accident, and to promote safety. NTSB accident investigations are not conducted for the purpose of gathering information to use in issuing sanctions.

Respondent produced un rebutted evidence that Inspector Baggett's investigation was conducted in a heavy-handed manner. Respondent was interviewed by Mr. Baggett at Mr. Baggett's office on August 24, 2006. Mr. Baggett's interview with Respondent focused on attempts by Mr. Baggett to encourage Respondent to confess that he made a mistake on August 9, 2006. The interview was not focused on ascertaining the cause of the accident to promote safety. The Administrator did not produce any evidence that rebutted Respondent's comments regarding his interview with Mr. Baggett.

However, even if Mr. Baggett's investigation was conducted for the benefit of the NTSB and not the FAA, the testimony of Chris Johnson and Davis King presented by the Administrator was sufficient to establish that the cause of the accident was fuel exhaustion. Under the Lindstam doctrine, this evidence was sufficient to establish a prima facie case against Respondent, and Respondent failed to rebut that evidence.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law that:

- (1) The Administrator established a prima facie case of carelessness under the Lindstam doctrine.
- (2) Respondent failed to present sufficient testimony to rebut the presumption of carelessness.
- (3) The Order of Suspension should be reduced to reflect the Administrator's amended Complaint of July 10, 2007 deleting the violation of Federal Aviation Regulation 91.9(a).

ORDER

It is therefore Ordered that safety in air commerce and safety in air transportation, and a preponderance of the reliable and probative evidence requires an affirmation of the Administrator's alleged regulatory violations as issued; however, since one of the four original regulatory violations was withdrawn, the undersigned finds that the appropriate sanction would be a 75-day suspension of Respondent's Air Transport Pilot Certificate.

AND IT IS SO ORDERED.

ENTERED this 4th day of December 2007 at Arlington, Texas.

WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE

APPEAL (WRITTEN INITIAL DECISION)

Any party to this proceeding may appeal this written initial decision by filing a written notice of appeal within 10 days after the date on which it was served (the service date appears on the first page of this decision). An original and 3 copies of the notice of appeal must be filed with the:

National Transportation Safety Board
Office of Administrative Law Judges
Room 4704
490 L'Enfant Plaza East, S.W.
Washington D.C. 20594
Telephone: (202) 314-6150 or (800) 854-8758

That party must also perfect the appeal by filing a brief in support of the appeal within 30 days after the date of service of this initial decision. An original and one copy of the brief must be filed directly with the:

National Transportation Safety Board
Office of General Counsel
Room 6401
490 L'Enfant Plaza East, S.W.
Washington, D.C. 20594
Telephone: (202) 314-6080

The Board may dismiss appeals on its own motion, or the motion of another party, when a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

A brief in reply to the appeal brief may be filed by any other party within 30 days after that party was served with the appeal brief. An original and one copy of the reply brief must be filed directly with the Office of General Counsel in Room 6401.

NOTE: Copies of the notice of appeal and briefs must also be served on all other parties to this proceeding.

An original and one copy of all papers, including motions and replies, submitted thereafter should be filed directly with the Office of General Counsel in Room 6401. Copies of such documents must also be served on the other parties.

The Board directs your attention to Rules 7, 43, 47, 48 and 49 of its Rules of Practice in Air Safety Proceedings (codified at 49 C.F.R. §§ 821.7, 821.43, 821.47, 821.48 and 821.49) for further information regarding appeals.

ABSENT A SHOWING OF GOOD CAUSE, THE BOARD WILL NOT ACCEPT LATE APPEALS OR APPEAL BRIEFS.