TRANSPORTATION APPEAL TRIBUNAL OF CANADA

Citation: *Shaun Curtis Davis v. Canada (Minister of Transport)*, 2022 TATCE 67 (Review)

TATC File No.: H-4608-01

Sector: Aviation

BETWEEN:

Shaun Curtis Davis, Applicant

- and -

Canada (Minister of Transport), Respondent

Heard by: Videoconference on August 24 and 25, 2022

Before: Dr. Thomas V. Davis

Rendered: December 21, 2022

REVIEW DETERMINATION AND REASONS

Held: Pursuant to subsection 7.1(7) of the *Aeronautics Act*, the Tribunal refers the matter back to the Minister of Transport for reconsideration of its decision to refuse to renew the applicant's unrestricted medical certificate.

I. BACKGROUND

[1] The applicant, Mr. Shaun Curtis Davis, is a 52-year-old commercial pilot, qualified on helicopters and fixed-wing aircraft, with more than 8,000 hours of flight time.

[2] An incident occurred at Lagos Airport, Nigeria, in 2016 where Mr. Davis was denied boarding a commercial flight due to alcohol consumption. This incident will be described in greater detail below.

[3] When Transport Canada (TC) became aware of this incident, Mr. Davis was assessed as unfit by the Regional Aviation Medical Officer (RAMO) on January 11, 2017. The reason for the unfit assessment was a diagnosis of alcohol use disorder. TC required additional information, and his case was referred to the Aviation Medical Review Board (AMRB).

[4] Over the next three years, TC made multiple requests for information from Mr. Davis and multiple referrals to the AMRB when information was received. During this time, Mr. Davis was not flying and attended multiple assessments and treatments regarding alcohol use disorder.

[5] Following another review by the AMRB, Mr. Davis was found fit for a restricted category 1 medical certificate. Mr. Davis received a letter dated February 20, 2020 (Exhibit 1-JJ, pp. 187-189), from the RAMO advising him that he was fit for a category 1 medical certificate with the restriction "with an accompanying pilot fully qualified on type" and requiring certain follow-up requirements. Mr. Davis received a letter dated February 24, 2020, from TC (Exhibit 1-KK, pp. 190-193) advising him that although he did not meet the required medical standards of the *Canadian Aviation Regulations (CARs)*, namely Standard 424.17(4), Medical Requirements Table, Medical Category 1, paragraph 1.3(b) and Medical Category 3, paragraph 3.3(b), the RAMO had recommended the application of flexibility. Mr. Davis was not having his unrestricted category 1 medical certificate renewed but was "considered medically fit to hold a restricted Airline Transport Pilot Licence – Helicopter (ATPL-H) and restricted Commercial Pilot Licence – Aeroplane (CPL-A), provided [he] meet and continue to meet" certain requirements.

[6] Following the February 24, 2020, decision by TC not to renew his unrestricted category 1 medical certificate, Mr. Davis filed a request with the Transportation Appeal Tribunal of Canada (Tribunal) to have this decision reviewed.

II. PRELIMINARY ISSUES

A. Applicant's public hearing request

[7] On July 26, 2022, Mr. Davis made a request to the Tribunal to have his review hearing held in public.

[8] The Minister of Transport (Minister) objected to the hearing being held in public and referred to paragraph 9 of the Tribunal Practice Directive #2. The applicant argued that it was

solely the applicant's right to have the hearing in private or confidentially and that he, as the applicant, waived that right.

[9] Subsection 15(4) of the *Transportation Appeal Tribunal of Canada Act (TATC Act)* states in part:

> **(4)** Hearings shall be held in public. However, the Tribunal may hold all or any part of a hearing in private if it is of the opinion that
>
> > **(a)** a public hearing would not be in the public interest;
> >
> > **(b)** medical information about a person may be disclosed and the desirability of ensuring that, in the interests of that person, the information is not publicly disclosed outweighs the desirability of adhering to the principle that hearings be open to the public; […]

[10] Paragraph 9 of the Tribunal Practice Direction #2 states in part:

> 9. The Tribunal has determined that hearings held to review a decision made by the Minister of Transport pertaining to a medical certificate pursuant to the *Canada Shipping Act, 2001* or the *Aeronautics Act* are to be held in private, as it is of the opinion that this type of hearing satisfies the requirement set out at paragraph 15(4)b) of the [*TATC*] *Act*. […]

[11] The Tribunal finds that the key phrase with respect to the ruling is "in the interests of that person," as stated in paragraph 15(4)(b) of the *TATC Act*. The person best qualified to determine the "interests of that person" is the individual affected by the decision, in this case the applicant, Mr. Davis. Mr. Davis was briefed that the determination of the hearing would be made public as per the process for other, non-medical Tribunal review hearings.

[12] Mr. Davis's request to have his review hearing held in public was granted.

B. Minister's request for a third CMC

[13] On August 9, 2022, the Minister sent an email to the Tribunal requesting a third case management conference (CMC) to include the presiding member to discuss "some of the witnesses that have been subpoenaed by the Applicant."

[14] The Minister did not provide details of the need for a discussion of witnesses.

[15] The applicant did not provide submissions on this matter.

[16] Given the lack of detail in the Minister's request, the opportunity at the hearing to discuss these issues as they arise, and the short time frame before the scheduled hearing, a ruling was made to deny the Minister's request for a third CMC.

C. Subpoena of witnesses

[17] The applicant raised the issue of witnesses not being present before the hearing. The parties agreed to address this issue on the second day, prior to Mr. Davis presenting his case. The issue was dealt with on the second day to enable Mr. Davis to have time to formulate his arguments.

[18] Mr. Davis had subpoenaed three witnesses who were not present. The issue to be decided was whether these witnesses should be compelled to attend.

[19] The Minister submitted a motion to quash the summons of witnesses and relied on the Federal Court decision *Canada (Citizenship and Immigration) v. Mahjoub*, 2010 FC 1193, regarding the applicable test when quashing a subpoena. Paragraph 7 of this decision refers to another Federal Court decision, *Laboratoires Servier v. Apotex Inc.*, 2008 FC 321, that outlined the two main considerations that apply to a motion to quash a subpoena:

(a) Is there a privilege or other legal rule which applies such that the witness should not be compelled to testify?

(b) Is the evidence from the witnesses subpoenaed relevant and significant in regard to the issues the Court must decide?

[20] All parties were in agreement that part (b) of the test is the main consideration that is relevant to determine whether to quash a subpoena. No arguments were received concerning part (a) of the test. Since there is no evidence of privilege, the Tribunal concurs with the parties that part (b) of the test is the main consideration of the test that is applicable.

[21] The Minister's representative argued that the applicant had the burden of proof to demonstrate that any witness called would give information relevant to the issue before the Tribunal. The Federal Court[1] finds that the burden of proof remains with the party seeking to sustain the subpoena; therefore, the Tribunal agreed that it was the applicant's duty to establish that the witnesses would give relevant evidence.

[22] Mr. Davis was asked to provide the relevance of evidence that he anticipated to obtain from the three witnesses in question, particularly considering the extensive amount of evidence already presented by the Minister to the hearing.

[23] Mr. Davis argued that the three witnesses in question, Dr. H. Langille, Ms. C. Newnham and Ms. M. Chartrand, were necessary to shed light on the internal processes of Civil Aviation Medicine (CAM) at TC and how information reached the decision makers. The Minister's representative argued that the evidence to be presented by these witnesses was either not relevant to the issue under review or was already presented in the form of either testimony of Dr. E. Brook or in documents submitted.

[24] After reviewing Mr. Davis's and the Minister's representative's arguments, it was clear that the evidence from two of the witnesses would be concerning administrative procedures within CAM which did not affect materially the decision in question before the hearing. The presumed evidence from the other witness was already in evidence in testimony and documents submitted by the Minister.

[25] Therefore, the Tribunal ruled to quash the subpoenas of the three witnesses in question to attend the hearing.

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[1] *Canada (Citizenship and Immigration) v. Mahjoub*, 2010 FC 1193, paragraphs 8 and 9.

[26] The issue of subpoenaed witnesses not attending a hearing is a serious one and this ruling should in no way be viewed as a precedent in future hearings.

III. ANALYSIS

[27] The issue before the Tribunal is whether the applicant ceased to meet the medical requirements for the issuance of an unrestricted medical certificate.

A. Legal framework

[28] Paragraph 7.1(1)(b) of the *Aeronautics Act* provides that the Minister may decide to refuse to renew a Canadian aviation document on the grounds that the applicant "ceases to meet the qualifications necessary for the issuance of the document or to fulfil the conditions subject to which the document was issued".

[29] The medical requirements for the issuance of a certificate are found in *CARs* Standard 424.17(4), Medical Requirements Table. Specifically, paragraph 1.3(b) states:

> **1.3** The applicant shall have no established medical history or clinical diagnosis which, according to accredited medical conclusion, would render the applicant unable to exercise safely the privileges of the permit, licence or rating applied for or held, as follows:
>
> […]
>
> **(b)** alcohol or chemical dependence or abuse; […]

[30] Standard 424.04(1)(a) of the *CARs* refers to international medical standards, and states:

> (a) Minimum medical fitness requirements for the various types of licence are broadly defined by international agreement through the International Civil Aviation Organization (ICAO). Canadian medical requirements honour this agreement, and procedures and standards outlined in this document reflect International Standards and Recommended Practices.

[31] Standard 424.05(1) of the *CARs* provides flexibility under special circumstances, where the following conditions are met:

> (a) Accredited medical conclusion indicates that the applicant's failure to meet any requirement, whether numerical or otherwise, is such that exercise of the privileges of the permit or licence applied for is not likely to affect air safety. The Licensing Authority shall be satisfied that any relevant ability, skill or experience of the applicant has been given due consideration.
>
> (b) The permit or licence is endorsed with any special limitation or limitations when the safe performance of the permit or licence holder's duties is dependent on compliance with such limitations or restrictions.
>
> (c) The applicant complies with any required conditions.

[32] The International Civil Aviation Organization *Manual of Civil Aviation Medicine* (ICAO manual) gives guidance on alcohol issues and states:

> 9.1.3 Annex 1 requirements on mental fitness, applicable to all categories of licences and ratings, are as follows:
>
> > 6.3.2.2 The applicant shall have no established medical history or clinical diagnosis of:
> >
> > […]

> b) a mental or behavioural disorder due to use of psychoactive substances; this includes dependence syndrome induced by alcohol or other psychoactive substances; […]

[33] Section 9.12.15 of the ICAO manual states:

> 9.12.15 The diagnoses of alcohol abuse or dependence should lead to a suspension of medical certification until the person has shown a period of sobriety in a context of medical and psychological follow-up. This period of sobriety has traditionally been a period of three years.

[34] Section 9.12.16 of the ICAO manual goes on to discuss the possibility of recertification earlier than three years by the use of early intervention, treatment, and monitoring.

B. Relevant issues and events regarding the assessment

(1) Incident at Lagos Airport on June 1, 2016

[35] In his testimony before the Tribunal and in information provided to Dr. D. McKibbon[2] (Exhibit 1-U, pp. 101-119), Mr. Davis outlined the series of events that occurred on June 1, 2016, that eventually led to the TC actions. This information was not disputed.

[36] On June 1, 2016, Mr. Davis went to Lagos Airport, Nigeria, for a flight to the U.K. after completing a work assignment of six weeks' duration in Nigeria. Mr. Davis was accompanied by a group of other employees also heading home. Mr. Davis was not scheduled for any flight duties and was flying as a passenger.

[37] After proceeding through security, the group went to the airport lounge where they celebrated going home with drinks. The number of drinks consumed is not totally clear, but Mr. Davis has estimated he drank 5 or 6 gin and tonic drinks over a 3.5- to 4-hour time frame before departure (Exhibit 1-U, p. 107). On arrival at approximately 11 p.m. at the final security check prior to boarding the aircraft, Mr. Davis was denied boarding. He was subsequently taken to an employee break room where he stayed until the following morning, when he was picked up by the company chief pilot and base manager.

[38] After being picked up, he was driven to see an associate of Dr. F. Okupa who performed a breath alcohol test. Mr. Davis thought the result of this test was either 0.016 or 0.16. It was subsequently reported as 0.18 g/dl in later information from Dr. Okupa. No documentation of the alcohol test result was submitted to the hearing.

[39] Mr. Davis flew home on June 2, 2016.

[2] The evidence refers to Dr. McKibbon as "Dr.", and he will be referred to as such throughout the determination. However, the Tribunal notes that based on his signature block in Exhibit 1-U (p. 119), it is not certain that he holds a doctorate degree. While this is noted for accuracy, it has no impact on the determination.

(2) Civil aviation medical examination report dated November 28, 2016

[40] A civil aviation medical examination report (MER) (Exhibit 1-C, pp. 23-25), detailing Mr. Davis's aviation medical examination on November 28, 2016, was received at CAM on January 24, 2017.

[41] In this MER, box 12 in the Review of Systems (ROS) section was checked "Yes." This would indicate that the applicant at some point had been treated for alcohol or substance abuse. Also, in the same ROS section under box 16, asking for weekly alcohol intake (units), it was reported as zero.

[42] In the comments section of the MER, the CAME, Dr. Okupa, had written: "Had alcohol problems. Said to have reported this to Transport Canada and the [indecipherable word] has sent a separate report to Canada."

[43] In the Recommendation section of the MER, Dr. Okupa recommended "Fit" for category 1. He answered "No" to "Was a renewal assigned?", "No" to "Do you recommend further examination?" and "No" to "Are you sending a separate confidential report?"

[44] After receipt of the MER, CAM sent Mr. Davis a letter on December 6, 2016 (Exhibit 1-D, pp. 26-28), requesting a report from his attending physician or specialist in addiction medicine, as well as the reports from any treatment programs he had undergone.

(3) TASC Substance Abuse Initial Assessment

[45] Subsequent to the letter of December 6, 2016, CAM received a Management Referral Form from Bristow Group, his employer at the time, dated August 6, 2016 (Exhibit 1-G, pp. 42-43), and a Substance Abuse Initial Assessment (SAIA) by the Treatment Assessment Screening Center (TASC) dated August 30, 2016 (Exhibit 1-E, pp. 29-38). Mr. Davis was referred by his company for a SAIA stating that he had been denied boarding a commercial flight heading off shift due to intoxication, and that he had elevated alcohol levels 10 hours later. The management referral also stated that the medical doctor in Nigeria will not authorize a return to work until Mr. Davis receives counselling.

[46] The TASC SAIA Chief Complaints section states: "Client was referred to TASC for a comprehensive assessment with treatment recommendations by his employer for allegations of substance use. Client was accused of using alcohol while on the job."

[47] As part of the assessment, Mr. Davis was administered the Substance Abuse Subtle Screening Inventory (SASSI-3) and the Michigan Alcohol Screening Test (MAST). On the SASSI-3, Mr. Davis was profiled as a "'Low Probability of having a moderate to severe Substance Use Disorder' (with a 'defensiveness' score of '9' which could indicate a lack of truthfulness during assessment)." On the MAST, Mr. Davis scored as "Non-Alcoholic."

[48] The diagnosis on the TASC SAIA was "303.90 Alcohol Use Disorder (Moderate)." The conclusion of the assessment states:

> Based on the results of the comprehensive substance abuse assessment, it is the professional opinion of this clinician that the client need not participate in any type of treatment services at this

> time. It is the opinion of this clinician that client does not need to participate in random urine testing.

[49] Subsequently, in a letter dated February 19, 2018 (Exhibit 5), Ms. V. Loree Adams, Clinical Director for TASC, wrote Dr. McKibbon the following:

> … I recommend that an updated assessment be completed. This recommendation is based on several factors, including, the length of time that has passed since the assessment, lack of details regarding the incident that led to the assessment, i.e., BAC level, **a diagnoses** [*sic*] **of Alcohol Use Disorder-moderate which was not substantiated by the DSM V criteria**…. [emphasis added]

(4) Letter from the Nigerian Civil Aviation Authority dated December 15, 2016

[50] CAM received a copy of a letter to Mr. Davis dated December 15, 2016, from the Nigerian Civil Aviation Authority (Exhibit 1-F, pp. 39-41). This letter stated Dr. Okupa had done an alcohol test on June 2, 2016, which was positive at 0.18 g/dl. This test would have been approximately 10 hours after Mr. Davis was denied boarding the commercial flight. This letter also stated that Mr. Davis had three counts of driving while impaired (DWI). The Nigerian Civil Aviation Authority required Mr. Davis to submit a rehabilitation report from the Banner Thunderbird Chemical Dependency Intensive Outpatient Program (CDIOP) program director.

[51] Mr. Davis attended the Banner Thunderbird Behavioral Health Intensive Outpatient – Chemical Dependency Program from September 12, 2016, to November 23, 2016. CAM received copies of the multidisciplinary treatment plan (Exhibit 1-H, pp. 44-48), the treatment plan review (Exhibit 1-I, pp. 49-51) and a letter from the attending therapist, Dr. J. Witter Ph.D., dated December 16, 2016 (Exhibit 1-J, pp. 52-53). The diagnosis in the treatment plan was alcohol use disorder (moderate). The letter from Dr. Witter was very positive and stated the following:

> He demonstrated a calm and mature attitude towards recovery and appeared to be taking sobriety and recovery very seriously. Shaun attended the requisite number of AA meetings….
>
> Presently, I am not aware of any reasons that would prevent her [*sic*] from returning to work.

(5) Three counts of DWI

[52] In the letter from the Nigerian Civil Aviation Authority (Exhibit 1-F), there is reference to convictions for driving and alcohol. The sentence reads: "It was also noted that you had three previous DWIs […] as well." It appears the "also noted" refers to the first sentence of the letter which states the Authority was in receipt of an MER from Dr. Okupa dated November 28, 2016 (Exhibit 1-C). The MER dated November 28, 2016, does not mention the three counts of DWI nor does the report from Banner Thunderbird (Exhibits 1-I and 1-J) make any mention of the driving infractions. Likewise, there is no mention in the Management Referral Form from Bristow Group (Exhibit 1-G) of any driving infractions.

[53] Mr. Davis testified that he did not drive in Nigeria and did not have a Nigerian driver's licence. He stated that Bristow Group required the employees to travel in company vehicles with a company supplied driver and an escort.

[54] Mr. Davis submitted to CAM driving records from Arizona, Newfoundland, Alberta, and Saskatchewan (Exhibit 1-P, pp. 70-78). These records covered the period from 1988 to 2017 and

showed no driving convictions. Mr. Davis did admit to a 24-hour roadside suspension which occurred in Saskatchewan in 1992 (Exhibit 1-U, p. 106).

[55] There are a number of concerns and inconsistencies regarding the issue of the three counts of DWI. There is no evidence as to how Dr. Okupa was aware of these alleged driving infractions. There is no reference to these alleged infractions in the company referral to Banner Thunderbird Behavioral Health Center (Exhibit 1-G). Mr. Davis was not living in Nigeria but was there for work assignments which lasted a period of weeks. Finally, and most significantly, Mr. Davis testified that he did not have a Nigerian driver's licence and did not drive in Nigeria but travelled via a company vehicle with a company driver and escort. Given the inconsistencies, the lack of evidence and the testimony from the applicant, I am not convinced that these three instances of DWI occurred.

(6) AMRB memorandum dated April 21, 2017

[56] Mr. Davis's case was referred to the AMRB by Dr. H. Langille, the RAMO, on March 28, 2017. In the referral memo (Exhibit 1-K, pp. 54-55), Dr. Langille refers to an incident in 1999 where Mr. Davis "suffered a head injury while intoxicated by alcohol." She also notes the blood alcohol level of 0.18 g/dl on June 2, 2016, ten hours after the boarding refusal. Also noted were the three convictions for DWI, but Dr. Langille noted that Mr. Davis denies these convictions.

[57] The full AMRB reviewed Mr. Davis's case on April 12, 2017, and a memorandum was issued on April 21, 2017 (Exhibit 1-L, pp. 56-57). The memorandum makes note of the 1999 "alcohol-related" head injury (see further details of this incident below), the alcohol level of 180 mg/dl, and three convictions for impaired driving, where it is also noted that Mr. Davis denies them. The memorandum also mentions that he had a diagnosis of alcohol use disorder (moderate), but no treatment was recommended on completion, and there was no evidence of a relapse prevention program. The AMRB psychiatrist recommended that a restricted category might be considered only with evidence of ongoing sobriety. The AMRB internist expressed concern that the pilot might not be candid about his drinking behaviour. The conclusion of the AMRB was to defer a recommendation pending further reports requested by the RAMO.

[58] Subsequent to the AMRB April 2017 review of Mr. Davis's file, CAM received from Mr. Davis an Alcoholics Anonymous/Narcotics Anonymous meeting attendance sheet (Exhibit 1-M, pp. 58-61) covering 32 meetings in the period January 15 to May 1, 2017, and laboratory results done on June 30, 2017 (Exhibit 1-N, pp. 62-67). Of note in the laboratory testing was that all liver function tests were within the normal range. Also noteworthy was the gamma-glutamyl transferase (GGT) level, a sensitive marker for alcohol use disorder, was reported as 31 with 11-63 u/l being the lab normal range.

(7) Incident in 1999

[59] Dr. Langille, in her referral to the AMRB dated March 28, 2017 (Exhibit 1-K), refers to an incident in 1999 where she states that Mr. Davis suffered a head injury while intoxicated by alcohol. Submitted in evidence was a document from the High Level Medical Clinic dated August 16, 1999, written by a Dr. D. Breugem (Exhibit 1-B, pp. 21-22) which states: "Found in

ditch in pool of water 07:00 Aug 14 by passers by. No recollection of what happened; no witnesses as yet. Left party drunk 05:00? Back of pick-up rolled off??" I must note the use of the question marks and the fact that there was no mention of alcohol testing. It is clear that Dr. Breugem is not stating that Mr. Davis was intoxicated, only that this was a possibility. Later in the same document, Dr. Breugem again used question marks when he states: "Put off work until 23/8? any longer due to? concussion/alcohol intoxication?" The multiple question marks in this document make it clear that Dr. Breugem was not sure exactly what happened on August 14, 1999, and it would be inappropriate to draw the conclusion from this document that Mr. Davis was intoxicated or that he sustained an "alcohol-related injury." It is also noted that CAM took no action after receipt of this document.

[60] The report from High Level Medical Clinic goes on to note that Mr. Davis had a CT scan with no abnormality detected. Dr. Breugem was aware Mr. Davis was a pilot and placed him off work until August 23, 1999.

[61] In testimony, Mr. Davis stated that he had drinks the night before and fell out of the back of the truck where he was riding when it went around a sharp bend. The truck driver did not notice that Mr. Davis had fallen out. Mr. Davis stated that his last drink was 6 to 7 hours prior to the incident.

(8) Civil aviation MER dated October 23, 2017

[62] On October 30, 2017, CAM received a new MER for Mr. Davis dated October 23, 2017 (Exhibit 1-S, pp. 95-98). This aviation medical examination was performed by CAME Dr. K. Helleur in Calgary, Alberta.

[63] Dr. Helleur found Mr. Davis to be fit for a category 1 medical certificate. However, Mr. Davis had answered "No" to the question: "Have you ever been refused issue or renewal of a Civil Aviation Licence for medical reasons?" He also answered "No" to question #12 in the Review of Systems section which asks the applicant if he ever had or has been treated for "[a]lcohol or substance abuse." Clearly, Mr. Davis gave false answers to these questions. This is particularly puzzling in light of the fact that he had communicated with CAM concerning his aviation medical status by letter (Exhibit 1-R, p. 82) only six days before the examination by Dr. Helleur. Mr. Davis stated in his testimony that his answers to these questions were consistent with the advice from his lawyer. It is noted that Mr. Davis signed the "Statement of Applicant" section of the MER which clearly states: "I am aware that it is an offence under the *Aeronautics Act* to knowingly make a false declaration."

[64] The MER dated October 23, 2017 (Exhibit 1-S) was assessed as unfit by the RAMO, Dr. Langille, on November 6, 2017.

(9) Dr. McKibbon's report dated February 27, 2018[3]

[65] In November 2017, Mr. Davis approached Dr. Helleur regarding seeing a specialist in addiction medicine. Dr. Helleur put Mr. Davis in contact with Dr. McKibbon as noted in her

[3] Note: The report (Exhibit 1-U) is incorrectly dated February 27, 2017. The date should read February 27, 2018.

letter to Dr. Langille dated February 28, 2018 (Exhibit 1-T, pp. 99-100). Included with her letter, with Mr. Davis's permission, was a copy of Dr. McKibbon's report (Exhibit 1-U).

[66] Dr. McKibbon is a psychologist and workplace consultant with extensive experience with substance use disorders and the aviation environment. Dr. McKibbon was the Employee Assistance Program (EAP) Senior Manager for a U.S.-based commercial airline providing mental health and substance abuse services. He is a qualified substance abuse professional under the U.S. Department of Transportation regulations. Dr. McKibbon met with Mr. Davis in person on five occasions and once by phone, as well as performed an extensive review of documentation. As part of Dr. McKibbon's evaluation, Mr. Davis was administered the MAST and the Alcohol Use Disorders Identification Test (AUDIT). On both the MAST and the AUDIT, Mr. Davis scored below the threshold level for harmful drinking. During the evaluation, Mr. Davis acknowledged receiving a 24-hour driving suspension in 1992 in Wascana Lake, Saskatchewan.

[67] As part of the evaluation, Dr. McKibbon contacted the clinical director of TASC who performed a review of the SAIA file of Mr. Davis. The TASC clinical director confirmed that the diagnosis of "Alcohol Use Disorder-Moderate" was not substantiated by the DSM-V criteria (Exhibit 1-U, p. 109).

[68] The conclusion of Dr. McKibbon's evaluation was that Mr. Davis had alcohol intoxication without use disorder. He also concluded that Mr. Davis had adjustment disorder with mixed anxiety and depressed mood with contributing stressors of unemployment, reduced financial resources, and inability to perform vocational duties due to medical certificate revocation.

(10) AMRB memorandum dated April 11, 2018

[69] After receipt of Dr. McKibbon's report, Dr. Langille again referred Mr. Davis's file to the AMRB on March 18, 2018 (Exhibit 1-V, pp. 120-123).

[70] The full AMRB met on April 4, 2018, to review Mr. Davis's case. A memorandum dated April 11, 2018 (Exhibit 1-W, pp. 124-125), outlined the AMRB's decision to again defer and continue the unfit assessment pending receipt of evidence of ongoing sobriety and participation in a relapse prevention program.

[71] The AMRB memorandum contains the following paragraph: "The board psychiatrist was skeptical of the new addictions assessment since the screening was subjective (and the pilot was defensive) thus hindering a diagnosis. The abuse documented in 2016 was objective and […] no evidence was submitted in respect to driving while in Nigeria." This will be discussed further below.

C. Did the applicant cease to meet the medical requirements for a medical certificate without restrictions?

[72] Following receipt of an MER dated November 28, 2016, indicating that Mr. Davis had "alcohol problems," CAM did not renew Mr. Davis's medical certificate and sought further information.

[73] Further information obtained included a copy of a letter from the Nigerian Civil Aviation Authority (Exhibit 1-F) indicating that Mr. Davis had three previous counts of DWI and requiring a report of rehabilitation treatment. CAM also received a TASC SAIA dated August 24, 2016 (Exhibit 1-E) with a diagnosis of alcohol use disorder (moderate).

[74] Acting in accordance with the applicable regulations and guidelines, CAM assessed Mr. Davis as unfit and gave him direction as to how he could regain his aviation medical certification. Even though the incident had not been connected to operating an aircraft, the opinion of the CAME and the noted three counts of DWI made this decision reasonable considering the TC mandate of flight and public safety.

[75] What followed was a confusing and frustrating (for both parties) series of requests for information and provision of information by Mr. Davis that never quite fulfilled the requirements. Finally, in October 2017, Mr. Davis connected with a knowledgeable Canadian CAME, Dr. Helleur, who performed an aviation medical examination. For reasons that are not clear, Mr. Davis did not answer all the questions on the MER truthfully, which further cemented CAM's opinion that Mr. Davis had an alcohol problem.

[76] In December 2017, with the assistance of his CAME, Mr. Davis was assessed by a very experienced substance abuse professional with extensive aviation experience, Dr. McKibbon. After seeing Mr. Davis in person on five occasions as well as through a telephone interview, Dr. McKibbon produced a comprehensive report which Mr. Davis submitted to CAM. Dr. McKibbon's professional opinion is significant; he stated: "[I]t is my professional opinion that Mr. Davis did not, and continues to not meet criterion for Substance Use Disorder per the DSM-V, the FAA [Federal Aviation Administration] criteria for substance dependence, or the ICAO criteria for problematic use" (Exhibit 1-U, p. 118). Further, Dr. McKibbon did not recommend any further substance use disorder treatment nor any need to attend recovery meetings.

[77] In addition, Dr. McKibbon contacted TASC who made the initial diagnosis of alcohol use disorder (moderate). The clinical director of TASC acknowledged that the diagnosis was not substantiated by the DSM-V criteria. This is noted in Dr. McKibbon's report (Exhibit 1-U, p. 114) and in a letter to Mr. Davis dated February 19, 2018 (Exhibit 5). Also of note is that in the original assessment, the TASC clinician gave the opinion that Mr. Davis did not need to participate in any type of treatment and did not need to participate in random urine testing (Exhibit 1-E, p. 38).

[78] In April 2018, the AMRB had in its possession Dr. McKibbon's report and was aware that the original diagnosis by TASC did not meet the DSM-V diagnostic criteria. All screening tests done had also confirmed that Mr. Davis did not meet the criteria for alcohol use disorder.

[79] In April 2018, Mr. Davis did not have a diagnosis of alcohol use disorder as determined by a comprehensive assessment by an experienced, reputable and aviation knowledgeable substance abuse specialist. There was no longer any diagnosis on which to base a restriction on Mr. Davis's medical certificate.

[80] At this point, there should have been a thorough review by CAM and the AMRB with the new information from both Dr. McKibbon and TASC that Mr. Davis did not meet the criteria for alcohol use disorder and that the original diagnosis was incorrect. The logical conclusion of such a review would have been reinstatement of Mr. Davis's unrestricted category 1 aviation medical certificate.

[81] The full AMRB met in April 2018. The memorandum from this meeting (Exhibit 1-W) is telling with the following statement concerning the AMRB psychiatrist's opinion: "The board psychiatrist was skeptical of the new addictions assessment since the screening was subjective (and the pilot was defensive) thus hindering a diagnosis. The abuse documented in 2016 was objective and […] no evidence was submitted in respect to driving while in Nigeria." The screening in 2016 was equally subjective and did not meet the criteria for diagnosis. The "abuse" documented in 2016 was a single incident of being intoxicated while not on duty for flight operations. If this was the definition of abuse, then many thousands of currently flying pilots would meet this definition. Mr. Davis did submit evidence from Alberta, Arizona, Newfoundland and Saskatchewan in which he had held a driver's licence and there were no convictions. As noted previously, Mr. Davis could not submit a driving record from Nigeria as he testified that he has never held a Nigerian driver's licence.

[82] There is no doubt that the AMRB was influenced by Mr. Davis failing to answer positively to questions on alcohol on his recent MER, but that should not have resulted in a continuation of a path dictated by a diagnosis of alcohol use disorder that was not valid.

[83] In January and February 2020, the AMRB again reviewed Mr. Davis's case. This review was conducted after receipt of additional test results including negative monthly drug and alcohol screening tests, normal liver enzymes and a third Substance Use Assessment Report dated October 23, 2019 (Exhibit 1-EE, pp. 161-175). The Substance Use Assessment Report was written by Dr. K. Dela Cruz, a registered psychologist and an International Certified Addiction Professional. In the report, Dr. Dela Cruz noted that as part of the evaluation, Mr. Davis completed the Addiction Severity Index 5th Edition and was deemed to have no alcohol use disorder. In her report, the psychologist made note of the incident of falling out of a truck, although the date was misstated as 2007 rather than the correct date of 1999. She also noted the history of a driving suspension due to alcohol consumption in 1992. The conclusion of this evaluation was that "Mr. Davis would not meet the criteria of Alcohol Use Disorder."

[84] Dr. Dela Cruz's Substance Use Assessment Report was the third assessment by three different substance abuse specialists in three different countries that came to the same conclusion: Mr. Davis does not and did not have an alcohol use disorder.

[85] In January 2020, the AMRB psychiatrist reviewed Mr. Davis's file again and then the full AMRB reviewed the file in February 2020. Based on these reviews, TC sent Mr. Davis a letter on February 24, 2020, advising him that he would be issued a restricted category 1 medical certificate. Mr. Davis then filed a request with the Tribunal to have this decision reviewed.

[86] Without a diagnosis of alcohol use disorder or dependence, *CARs* Standard 424.17(4), Medical Requirements Table, paragraph 1.3(b) does not apply nor do sections 6.3.2.2 and 9.12.15 of the ICAO manual.

[87] There has been an abject failure on the part of CAM and the AMRB to objectively consider the evidence and change their opinion accordingly as the facts changed. Mr. Davis, although not blameless in this fiasco, has been severely negatively impacted by this process.

[88] I find that Mr. Davis did not cease to meet the medical requirements for a medical certificate without restrictions as the evidence is that he does not now and did not in the past have an alcohol use disorder.

IV. DETERMINATION

[89] Pursuant to subsection 7.1(7) of the *Aeronautics Act*, the Tribunal refers the matter back to the Minister of Transport for reconsideration of its decision to refuse to renew the applicant's unrestricted medical certificate.

December 21, 2022

(Original signed)

Dr. Thomas V. Davis

Member

Representations

For the Minister: Alexandre Petterson

For the Applicant: Self-represented