ALR HEARING EXCERPT OF TESTIMONY

TESTIMONY OF TERRY ROBINSON

OCTOBER 12, 2005

TERRY ROBINSON,

having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BOYD:

Q. Okay. Terry, did you bring the maintenance records and the test information logs pertaining to instrument No. 68-13018?

A. Yes, I did.

Q. Thanks. And so the maintenance records pertaining to this consist of five pages; is that right?

A. Yes, sir.

Q. Basically what you're showing during the applicable time period is you are showing that you checked for RFI, you checked for interferent, again you checked for RFI. All these are showing really no problems as far as interferent or the RFI; is that correct?

A. Yes, sir.

Q. But I noticed on March 31, 2005, Christi detected an unstable reference. Could that be the chopper motor?

A. No. Actually, what that is, is that's what the instrument detects, but when it's reported on the display of the instrument and what is reported as in the test log, it's called an improper zero set. I believe it's number -- there is a key in the back there of the test log and it's No. 10 on the operational message list.

Q. Okay.

A. An improper zero set generally means that the person that's delivering the sample did not wait until the auto zero set was completely finished. And on the EN instrument, if the person blows too soon, there's a period, a very short period, in there in which you won't get an improper sample, but you will get an improper zero set, if it occurs at a very small window during the auto zero set.

Q. So when the instrument is actually taking air, room air, in during one of the purges, I suppose, and you below too early during a purge, it's detecting alcohol vapor and they think it's being introduced from the room?

A. Part of -- part of your statement there is correct. When it actually occurs is after the air blank and prior to the subject samples and prior to the reference sample there's another step called the auto zero. It's one that some people refer to them as birds. I don't understand why, but there's little greater-than symbols. Eight of them will scroll across the display and that's the auto zero set.

And if a person -- if the operator allows

a person or in this case if the TS were to blow just a little bit before that auto zero set was done, since during that step the instrument is expecting not to see any alcohol because it's setting to zero and it does see -- does see alcohol or even detects a breath sample being delivered, even if there is no alcohol, such as with the TS in that particular little time space, that's what it says. It will say unstable reference. It will then say improper zero set and when it prints the test record out, it will say improper zero set and that's what is included -- excuse me, that's what is recorded on the test log as well.

Q. Was this done during a check by --

A. Yes.

Q. -- by Christi Swearingen? So she actually blew into the machine while it was in this status of the zero set?

A. I will say she probably blew a little bit too soon --

Q. Okay.

A. -- during the auto zero set.

Q. But does that mean that Christi had alcohol on her breath?

A. No. You can -- you get the auto zeroes -- when you get the improper zero set, it's just a physically that you are blowing a little bit too soon during the auto zero set. Now, you can have alcohol present. You may not have alcohol present, such as that case there where Christi

blew. It's just a -- it's a matter of providing a specimen when this is one when the instrument does not expect there to be one being delivered.

Q. Okay. Just the detect there's something going through the flow sensor?

A. Right.

Q. Okay. Okay. And then again we check with the interferent RFI and we're finding no errors for the 30 days prior to and 30 days following this test; is that correct?

A. That's correct.

MR. BOYD: Okay. I'll offer DX-1.

THE COURT: It's admitted.

MS. ANGELMAN: No objection.

THE COURT: Okay. No. 1 is admitted.

Q. (By Mr. Boyd) And these are the test information logs for that applicable period; is that correct?

A. Yes.

MR. BOYD: I'll call this DX-2. I'll offer the test information logs.

MS. ANGELMAN: No objections.

THE COURT: Admitted.

Q. (By Mr. Boyd) Okay. And then -- now, getting some activity during this applicable time period when I'm seeing question marks for some of these tests, can you tell me what that means?

A. That's -- if you look at the heading on that column --

Q. Uh-huh.

A. -- it says it's an abbreviation for reference result.

Q. Okay.

A. Now, if that particular situation that occurred on that test occurred before the reference analysis was conducted, it would show question marks simply because there was no result obtained for that step on that test.

Q. Okay. So what does this mean? When you see the question marks, does that mean there was no result obtained for a reference sample?

A. I'm trying to see -- okay. If you look in the final column on that test that you are looking at, you see the No. 10.

Q. Yeah.

A. That's another improper zero set.

Q. Okay.

A. Okay. On that subject test, same scenario which I have just described to you. Okay. Now, the reason -- what I can tell you about that is that that instance on that test occurred during the first sample delivery. The reason I can say that is because if you go over to the next column to the left under reference result, there are question marks and that means that that step had not yet

been done by the instrument. That step that I'm referring to is the reference analysis and that comes after the first subject analysis.

Q. So somebody tried to blow during the air blank or what?

A. No. If you blow during the air blank, you are going to get a different indication called improper sample.

Q. Okay. So at what stage did this person apparently blow?

A. That, again, same scenario, blew during the auto zero set, just before it was finished.

Q. Okay.

A. Okay. You can -- if you blow as soon as the first symbol, greater-than symbol, starts to scroll across, you will get an improper sample. If it's almost finished and there are eight little indicators that come up, about one each half a second, and you don't let the words "please blow into mouthpiece," you don't let that come up before the subject blows, in other words, if you blow towards the end of the auto zero set, that's what you get is an improper zero set. And that's what that No. 10 means.

Q. I also noticed on 3-10, Mr. Pinkly (phonetic) was doing an inspection test. He had these question marks again.

A. Right.

Q. And this time you had message error reading 4?

A. Okay. I believe No. 4 is an interferent and

that's when we entered, intentionally introduced an acetone sample into the sample chamber by blowing through a simulator which has a water and acetone solution in it. Now, we do that as -- we do that during the first sample request. So, there again, the test will be invalidated, so that the question marks represent that the reference analysis was not conducted. That's why the question marks are there.

Q. Okay. And, okay. Now, after the March events where you had the spurious results from one of your -- again, this is -- okay. Now, this is -- of course, this instrument is what you call the EN model machine, the five-digit intoxilyzer; is that correct?

A. Yes, sir.

Q. Okay. Now, after the March events where you had the spurious results, SWIFS crated up the two involved machines in the false negative tests and shipped them back to the Scientific Director or to CMI?

A. We hand carried them to Austin.

Q. Okay. And did you communicate to them what the problems were and what you wanted them to check out?

A. We just told them what the problem was and we left it up to them and their expertise to investigate it and to see if they could come up with a reason or solution to why they were doing it.

Q. And did they come up with that solution?

A. Yes, they did.

Q. And was that the memo from the Scientific Director --

A. Yes, sir.

Q. -- to all the technical supervisors?

A. Yes, sir, that's correct.

Q. Okay. Did -- to your knowledge did the Scientific Director ever communicate these problems to CMI?

A. Yes, sir, I believe they did, because after -- they kept the instruments in Austin for approximately a month once they figured out what the problem was to evaluate further. And then they were in communication at some point, I don't know exactly when, but they shipped the instruments from their laboratory to CMI sometime in April, I believe.

Q. Did CMI report back to the Scientific Director with regard to their activities as far as checking out these problems related to the EN models?

A. I believe what occurred was that the Office of the Scientific Director reported the results that they obtained as far as what the problem was that they found, which is recorded in the letter that I believe you have a copy of.

Q. Yeah.

A. And passed that information on to CMI as to what they found. And I believe all CMI did was basically duplicate what the Office of the Scientific Director had done and just to satisfy for themselves that that could

occur. And between the two of them, they have gone back and forth as far as recommendations about what to do to alleviate that problem, so that it wouldn't occur in the future.

Q. Did CMI make any recommendations with regard to what could be done to the instruments to make them better or not suffer from that problem?

A. Actually, I think the recommendation actually was a combination of both CMI's engineers and the Office of the Scientific Director about what they had -- about what their plan was to do.

Q. What was their plan?

A. Their plan was to remove the small celluloid valve that's in the instrument and place some larger celluloid valves in them, which didn't directly have anything to do with this issue. The more directly regarding this issue --

[At this time the tape was turned over by the Court.]

A. Not only on the EN, but on the 68 and in operator's school, I actually somebody blew all the way so there was 16. And when it does that, it blanks out and it starts over again. I think I actually saw a guy do about 23 asterisks.

Q. Okay.

A. He was a triathlete.

Q. So it could just go on forever?
A. Yes. As long as the person continues to blow, yes, sir.
Q. Okay. Now, either you or Christi had told me that SWIFS was in the process of purchasing equipment to calibrate the flow sensors on the ENs. Did you ever purchase that additional equipment?
A. Yes, we have that.
Q. What did you get?
A. What did we get? A flow meter and a compressor.
Q. Okay. And who did you purchase that from?
A. The compressor we got from Home Depot and the flow meter we got from VWR Scientific.
Q. Okay. Now, they have plans or CMI had a plan to put together a package of replacement parts to put into these EN machines to alleviate this problem that you were experiencing in March; is that correct?

A. Yes, sir.
Q. But did they ever put those packages together?
A. Not to my knowledge. It has not been done yet.
Q. So you have been doing like ad hoc work on these ENs, trying to get to accomplish a similar result?
A. No, sir. Through the recommendation of the Department of Public Safety's Office of the Scientific Director, we have checked all of our ENs with a vacuum to

see if we could get the valves to stick. If we couldn't get them to stick, we just leave them alone. They're fine. They won't -- it won't happen because the vacuum pressure we're using is about ten times anything that a human being could suck back into that instrument and cause that valve to stick. So if it's not sticking, we just leave it. The only one that we have actually changed is the one that was involved in this test.

Q. The one that produced the zero result?

A. Right.

Q. Okay. Have you ever tried to stick the valves on the aft end of the sample chamber?

A. The exhaust valve?

Q. Yes.

A. Yeah. You are basically doing the same thing with -- you can do it with the vacuum pump, if you put your finger over the valve, the one-way valve, in the back and pump it up with the vacuum. You can do the same thing and try to get it to stick.

Q. Can you get those to stick?

A. I have never been able to do that.

Q. Okay. So what would happen, theoretically, if the -- if the one-way valves on the aft end of the sample chamber, the exhaust valves, if they stuck?

A. It would basically close the system. Instead of it being open, it would be closed.

Q. Could it pressurize the sample chamber?
A. Potentially, yes, sir.
Q. And if you pressurize the sample chamber, what would you get as far as a subject test?
A. You could probably, because basically that's what happened with the zero test, only it wasn't because of that valve sticking, it was because of the one-way valve sticking and that's in the block attached to the sample chamber. Basically, the same thing would happen. It would be possible to get a valid test, only in this case the sample would reach the sample chamber and there potentially, if the subject blew long enough, it could slightly elevate the alcohol concentration because of the pressurization.
Q. Okay. Now, you were the Associate Editor of the Alcohol Testing Alliance, is that correct, the Journal of the Alcohol Testing Alliance, is that correct, back in June of 1997?
A. Yes, sir. I have been a couple of times.
Q. Okay. And you were involved in the comparison of the breath specimen to simultaneous blood draws; is that correct?
A. I believe I peer reviewed that information, yes, sir. I wasn't actually involved in that.
Q. So you weren't present during the testing?
A. I don't recall if that study was one that was done at Texas A&M. I was involved in one that was done at DPS.

Q. Okay. Were you -- did they establish a criteria? When they did those simultaneous breath and blood draws, did they establish a criteria for how many asterisks they would try to obtain on the breath test, whether 1 or 23?

A. I don't recall.

Q. Okay. You don't know how they did that?

A. It was a long time ago. I don't recall.

Q. Okay. Now, do you know if the Scientific Director has since conducted any experiments related to conducting, trying out one asterisk sample for a valid test versus 10 or 16 or 20 asterisk samples and comparing those two samples of two valid breath tests conducted in close proximity?

MS. ANGELMAN: I would object to the relevance. I don't know how that's relevant to this.

THE COURT: I'll let it go, but you've got one minute.

A. Since that study was done, I don't believe -- I may be mistaken, but I don't believe and I'm not -- I don't think there have been any specific blood-to-breath studies done by the Scientific Director.

Q. (By Mr. Boyd) Okay. I did not see any criteria in the Journal of the Alcohol Testing Alliance related to that June '97 issue as far as how many asterisks -- of them recording a number of asterisks. Do you know

that they did or did not?

A. I doubt very seriously, if they did. But, again, I would have to look at the research, but I doubt if they did.

Q. Wouldn't that be a relevant test for you -- wouldn't you think that would be a relevant test to do to compare one asterisk versus six or eight asterisks and compare those to blood?

A. Well, you have got to remember all the asterisks are showing you is how long someone blows.

Q. Yeah, but the length of the blow can increase the --

A. That's incorrect. That's an incorrect statement right there, because what it is that causes the difference in the numbers is the volume of the sample provided, not how long they blow. And there's no way currently with this instrumentation to measure the volume of the sample.

THE COURT: Okay, that's it.

[End of Excerpt of Testimony]

DEFENSE EXHIBIT NO. 1

Intoxilyzer maintenance records.

DEFENSE EXHIBIT NO. 2

Text information logs.

STATE OF TEXAS *
COUNTY OF DALLAS *

I, NANCY BREWER, Certified Court Reporter, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings held in the above-captioned and numbered cause, as they were transcribed from audio tapes, to the best of my ability.

SUBSCRIBED to by me on this the 12th day of October, 2005.

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NANCY BREWER, CSR, NO. 5759
My Commission Expires 12-31-2006