

CIVIL AVIATION TRIBUNAL

BETWEEN:

Thomas Blackwell, Appellant

- and -

Minister of Transport, Respondent

LEGISLATION:

Aeronautics Act, S.C., c. A-2, s. 6.9

Canadian Aviation Regulations SOR/96-433 s. 602.01, 605.03(1)(a)

Suspension, Reckless, Low flying over built-up area, Built-up area, Flight authority

Appeal decision

Faye H. Smith, Samuel J. Birenbaum, Suzanne Racine

Decision: May 21, 2002

The appeal is dismissed. We uphold the determination of the Hearing Officer rendered following the review hearing that Mr. Blackwell did contravene section 602.01 and paragraph 605.03(1)(a) of the Canadian Aviation Regulations on May 7, 2000 and confirm the suspension of 20 and 4 days, respectively, for a suspension of 24 days in total. The said suspension will commence on the fifteenth day following service of this determination.

An appeal hearing on the above matter was held Friday, January 18, 2002, at 10:00 hours at the offices of Victory Verbatim, in the city of Toronto, Ontario.

BACKGROUND FACTS

The facts are as set out in the body of the reasons for the review determination at pages 1 and 2:

On May 7, 2000, Dietmar Zschogner, the contract aircraft maintenance engineer (AME) for 30,000 Island Air carried out the installation of an overhauled engine on a deHavilland Beaver, C-GBZH at his base at McKellar Lake. Upon completing engine run-ups and high speed taxi tests, Mr. Zschogner informed Mr. Blackwell that the aircraft was ready to fly whereupon Mr. Blackwell inspected the aircraft and discussed with his AME the necessity for a test flight.

Legally, there must be a satisfactory test flight after an engine change, prior to the aircraft being certified as airworthy.

Mr. Blackwell proposed that after take-off from McKellar Lake, he would circle the lake, and if everything was "in the green," he would proceed to his base at Parry Sound just 16 km (10 statute miles) away. After circling the lake, Mr. Blackwell, judging that everything seemed normal, set course for Parry Sound at 1,500 feet. When he was within gliding distance about 1.5 to 2 miles from Parry Sound, the engine oil pressure reduced to the "red" line, and Mr. Blackwell did a precautionary landing on Mill Lake. He determined that a serious oil leak had developed and oil was dropping into the water from the aircraft. A boat arrived and towed the aircraft to the dock. As there was about one gallon of oil remaining, this meant that the oil loss was about four gallons in the short time since leaving McKellar Lake.

Mr. Zschogner arrived at Mill Lake shortly after and removed the cowlings and inspected the engine but could not find the source of the leak. More oil was added to the engine and Mr. Zschogner disconnected the two oil breather lines in turn and tied them into plastic bottles. High-speed taxi tests were performed but there was no evidence of oil leaking out of these lines. The lines were reconnected, cowlings were replaced and the oil was wiped off the bottom of the aircraft. More taxi tests were done and there was some evidence of additional leaking; however, oil pressure was now normal.

Mr. Blackwell decided that he would ferry the aircraft the short distance to his base, following the Seguin River which took him directly over the town of Parry Sound. He flew at low level and close to the house of Mr. Beagan who subsequently reported the low flying aircraft to the Department of Transport. Following the latter's investigation, Mr. Blackwell received a Notice of Suspension of his commercial pilot licence for a total of 24 days being 20 days for an alleged operation of the aircraft in a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person and 4 days for an alleged operation of an aircraft when its flight authority (i.e. certificate of airworthiness) was not in force.

Following the review hearing, the Tribunal Member confirmed the suspension of Mr. Blackwell's commercial pilot licence for a total of 24 days as originally assessed by the Minister.

GROUND FOR APPEAL

It is from that determination that Mr. Blackwell appeals on these stated grounds:

1. Selective acceptance of testimony by the key witness (AME).
2. New evidence to be presented establishing that actions allegedly taken by the same key witness was not technically possible.
3. New evidence from Transport Canada that will establish the testimony of the key witness (AME) was fabricated.

Respecting grounds 2 and 3, Mr. Blackwell and the Minister's representative were notified in advance of the hearing of the Tribunal's ruling on the motion brought by Mr. Blackwell for the

introduction of new evidence on the appeal. The motion was rejected on the basis that the Tribunal was of the view that such evidence sought to be introduced was not necessary for the purposes of the appeal and further that the evidence would have been available at the time of the review hearing.

THE LAW

Section 602.01 of the *Canadian Aviation Regulations* (CARs) states:

602.01 No person shall operate an aircraft in such a reckless or negligent manner as to endanger or be likely to endanger the life or property of any person.

Paragraph 605.03(1)(a) of the CARs states:

605.03 (1) No person shall operate an aircraft in flight unless
(a) a flight authority is in effect in respect of the aircraft;
[...]

THE APPEAL

At the opening of the appeal hearing, Mr. Blackwell indicated that the aircraft as identified in the reasons for the review determination was not owned by him. It would appear that the registration letters of the aircraft have been juxtaposed in the review determination and that in fact the aircraft is correctly cited in the Notice of Suspension as a Beaver (DHC2) aircraft, registered C-GBZH.

APPELLANT'S SUBMISSIONS

The appellant summarized the discrepancies in the evidence of the AME as follows: When asked in cross-examination, found at page 71 of the transcript of the review hearing, whether there was oil under the aircraft, Mr. Zschogner could not answer with certainty. Again on the next page of the transcript, the AME was asked whether there was oil spewing on the underside of the aircraft after the high-speed taxi and his answer was that he could not recall that.

Mr. Blackwell next referred to page 127 of the transcript referring to his own evidence that he taxied the aircraft, powered up and powered down several times out on the lake. He stated that before he took off to proceed back to Parry Sound, he did a fast taxi where he got the r.p.m. up to 2200, which is not full power but is getting there, and he thought that it would reveal an additional oil leak. He stated in evidence that if that happened, he was not going anywhere. He shut the airplane down again and climbed underneath and looked for the oil but there was no oil. The appellant specifically disputes the last line of the first full paragraph of page 2 of the review determination that there was evidence of additional leaking.

The appellant references page 2 at the 3rd paragraph citing that a discussion then took place as to whether the aircraft could be ferried the short 1.5 miles to Parry Sound. Mr. Zschogner advised

against it as there had been a substantial oil leak, which had not been found. However, he did not ground the aircraft. Mr. Blackwell thereupon decided that he would fly the aircraft the short distance to his base.

The appellant references page 3 of the determination at the bottom of the page where the Tribunal Member summarizes the evidence of Mr. Zschogner to the effect that there was a discussion with Mr. Blackwell about whether the aircraft could be flown to Parry Sound. Mr. Zschogner was not happy with this, as he had not found the source of the leak. Mr. Blackwell decided that he would fly the aircraft the 1.5 miles to Parry Sound Harbour.

When asked whether he had done anything to negate the maintenance release while it was on Mill Lake and then more specifically was the aircraft uncertified when it left Mill Lake? Mr. Zschogner answered: Absolutely not, that he put the cowlings back on and he did remember that there was very little oil in the aircraft and that was a concern that he had.

At page 62 of the transcript, Mr. Zschogner's evidence states that he recalled suggesting "Well, let's call the office and get somebody to bring another case of oil." And at page 63, when asked by the Tribunal Member "Did you say, 'Well, if you put more oil in, maybe there will be enough oil to get you to Parry Sound'? Is that the sort of thing that took place?" to which the witness answered "I would say so." Further, at page 64 when asked by the Tribunal Member what his opinion was, he stated "That if there's a sufficient oil, if we would get some oil, you know, in a short period of time, that, yes, it could be flown. I mean, it was quite obvious that the aircraft was functioning properly."

Regarding the addition of oil to the aircraft, Mr. Zschogner, while under cross-examination, states at page 65 "... oil was put into that engine and again the aircraft went out on the water to do more taxiing, high speed taxiing. So, there was still a concern about the consumption when I looked back into that oil tank.... You know, I mean this is the whole thing is—is regarding a loss of oil here."

The Hearing Officer then asked Mr. Zschogner "Was oil added to the aircraft on Mill Lake?" to which he responded "Oh, yes, for sure there was oil added." On pages 68 and 69, there is a discussion of how much oil was added and at page 69 Mr. Zschogner states that he wanted to top the engine up but it did not happen, oil was added but not to the capacity which is around five gallons. He further states "And—and, you know, my operation of the aircraft is, you know, you need at least that three gallons. I mean, that's a figure I always used when I was flying these aircraft."

Mr. Blackwell contrasted this to his own evidence given at pages 123, 124 and 125 as follows: He states at the bottom of page 123 and at the top of the next page that Mr. Zschogner worked on the aircraft at Mill Lake, that he had "disconnected one of the lines and he had a Javex bottle or an oil bottle or something and he said he thought that there might be a problem with the—the vacuum line and he undid the line and put it into this bottle and then he had me go out and taxi around, power up and power down a couple of times, to see if it was blowing oil into this plastic bottle." There was no oil and he then checked the other one with the same result. Mr. Zschogner

then reconnected the lines and said "I can't find anything wrong with the airplane. The engine compartment's clean. The hoses seem to be connected properly. I don't know what's wrong."

Mr. Blackwell further testified in chief that "we discussed whether or not we should fly it back and how much oil it needed. We only had enough oil to top it up to the—I think three—no, it was two-and-three-quarter gallons indicated on the stick and he said, "There's one in the engine and you can't fly it with less than three. So,'—it was just enough." Mr. Blackwell also testified at this point that they discussed the route "and we agreed that the most direct route would be a straight line, which was along the river. And my judgment was that if we were going to do it that would be the best route because if something else happened, that afforded an additional margin of safety for us to set down on the river."

Additionally, at page 170 in cross-examination—Mr. Blackwell confirmed that Mr. Zschogner could not find anything wrong with the aircraft.

In fact, it was Mr. Blackwell's submission that Mr. Zschogner did not advise him against it, it was not uncertified and he did not sign anything in the log book.

He further submitted that at page 73, Mr. Zschogner could not recall a discussion about the safest route to take but stated that obviously it would be the shortest possible distance to the base but he reiterated that he had no recollection of the actual conversations. This is in contrast to Mr. Blackwell's testimony at page 125 mid page referred to above and page 126 at the top of the page.

The appellant takes issue with the Hearing Officer's reference to the decision of Mr. Blackwell to fly the aircraft indicating that he did not make this decision in isolation but rather following discussions at Mill Lake as indicated in Mr. Zschogner's evidence at pages 60 to 69 and pages 123 to 127 of his own evidence.

Mr. Blackwell also takes issue with the 4th paragraph at page 4 of the reasons for the determination wherein the Hearing Officer states: "seems that he expected that as Mr. Zschogner was the AME, he should have definitely grounded the aircraft at Mill Lake." On the contrary, Mr. Blackwell stated that he had no expectation that the aircraft would be grounded at all. In response to the question on cross-examination of "Did you tell Mr. Blackwell that there was a defect on that aircraft that affected the airworthiness of that aircraft"? Mr. Zschogner answered at page 83 "Those words, no."

In his submission Mr. Blackwell asserts that there is no consistency in Mr. Zschogner's testimony, and submits that we cannot believe him at all as his testimony is different from the reports of the Transport Canada inspectors.

Additionally, Mr. Blackwell contradicts the finding of the Hearing Officer being the last sentence on the 4th paragraph of page 4 of the reasons for the determination which stated: "Had he circled overhead Mill Lake, climbing to a safe height, before heading for Parry Sound Harbour, he would not have disturbed Mr. Beagan, and there would have been no incident." Rather, Mr. Blackwell states that taking time to go to 10,000 feet to coast to Parry Sound would

have caused an engine failure since the problem itself was not exhibited until airborne and after a time and we would have had an engine failure.

Regarding the risk involved, Mr. Blackwell stated that what he did was reasonable in the circumstances given the information he had at the time as set out on page 127 above.

Mr. Blackwell's evidence in chief as found at page 149 was that if he had believed there was any danger to crashing or injury, personal injury, to anyone, he would not have continued the flight.

SUBMISSIONS ON BEHALF OF THE MINISTER

The Minister's representative states that while there is divergent testimony, Mr. Zschogner and Mr. Blackwell agree on the salient points.

He states that Exhibit M-6 being the log book entry is self explanatory. He refers to pages 47 and 48 of the transcript summarized as follows: Mr. Zschogner stated that he told Mr. Blackwell that he had not done a test flight and that he (Mr. Blackwell) would have to do one. He stated:

And—and I suggested to him that he would take the airplane up, taxi to the main part of the lake because the wind wasn't in—in the favour that I would take off, and to do an actual test flight, do a circuit, come back down, and that I would have a look for any oil leaks, and at that time we would initiate that he did a satisfactory test flight. ... That's what I told him to do. ... Do a test flight and come back. ... He told me that—well, if the engine's running fine that he was going to continue on to Parry Sound. ... I had told him that he had to do a test flight ..."

The Minister submits that Mr. Blackwell decided that he would perform the test flight en route to Parry Sound, sixteen kilometres away and during the flight to Parry Sound, the oil pressure started to decrease significantly and when it started to approach the red line for minimums, Mr. Blackwell cut the power and glided to a landing on Mill Lake after a flight of about six or seven minutes. He further submits that Mr. Blackwell recognized that there was a serious problem with the engine, that the AME, Dietmar Zschogner, attended on the aircraft at Mill Lake and could not determine the source of the oil leak (reference the transcript at pages 119, 120 and 122.).

The Minister therefore submits that the Member's finding that the final decision to fly or not to fly from Mill Lake was Mr. Blackwell's decision and urges that this finding was not unreasonable because it was based on the following facts:

- a) Mr. Blackwell was the pilot-in-command of C-GBZH
- b) Mr. Blackwell testified that he told Dietmar Zschogner that, "We can't leave it (the aircraft) here." (page 125 of the transcript)
- c) Mr. Blackwell testified that he used his own judgment when he made the decision to fly from Mill Lake to Parry Sound (page 126 of the transcript).

The Minister submits that the Member's finding that Mr. Blackwell admitted there was a risk in flying from Mill Lake to Parry Sound was not unreasonable because it was based on the statement made by Mr. Blackwell that, in his judgment, he would stay over the river for an added margin of safety (reference the transcript at page 126).

Finally, the Minister submits that the finding of the Tribunal Member that Mr. Blackwell flew low over Parry Sound was not unreasonable because it was based on the testimony of William Beagan whom the Member described as a highly articulate person.

DISCUSSION

The evidence in this case is not complicated, but it is divergent and at times confusing. The appeal panel does not agree with the submission of Mr. Blackwell that it is purely a question of credibility and that owing to the divergent testimony of Mr. Zschogner, we should overturn the review determination. Obviously, the Hearing Officer judged the testimony of the witnesses and as he observed the witnesses first hand, he was the best judge of oral testimony, and while one might have a different view of the evidence, we see no compelling reason to overturn this determination on the basis of credibility.

Following the engine change on the Beaver, C-GBZH, the AME Mr. Zschogner checked the aircraft, including a high-speed taxi test, and was satisfied that it was airworthy, subject to a test flight, without which the aircraft was operated without a valid certificate of airworthiness from Mill Lake to Parry Sound Harbour.

We note the Hearing Officer's reference at the 5th paragraph on page 3 of his reasons for determination wherein he reviews Mr. Zschogner's evidence: "He described the engine change he had carried out on the Beaver, C-GBZH. He had checked the aircraft after the engine change, including a high-speed taxi test, and was satisfied that it was airworthy, subject to a test flight. He summoned Mr. Blackwell to his base at McKellar to collect the aircraft. Mr. Blackwell arrived the next morning, May 7, 2000, to fly the aircraft. There was a necessity for an engine change test flight, and Mr. Blackwell decided that he would perform the test flight en route to Parry Sound—ten miles away, but he would circle McKellar first, after take-off, and if everything was 'in the green,' he would proceed to Parry Sound."

Did Mr. Blackwell believe that a satisfactory test flight had been completed? When he said that he would perform the test flight en route to Parry Sound, is it not reasonable to assume that the test flight could not be said to be satisfactory until he reached his destination of Parry Sound. To say that the test flight is completed in a satisfactory manner when he circled around a few times at the beginning of the flight, before continuing on to Parry Sound, is to truncate the flight into segments or legs that really never took place. It was intended to be one flight from lift-off in McKellar Lake to touch down in Parry Sound. In the result, the test flight was not satisfactory because during the flight to Parry Sound, the oil pressure started to decrease significantly and when it started to approach the red line for minimums, Mr. Blackwell cut the power and glided to a landing on Mill Lake after a flight of six to seven minutes (see transcript of the proceedings at page 120, lines 13–27).

Clearly, the aircraft had been released for return to service subject to a successful test flight (see Exhibit M-6). Once the test flight had been successfully completed, it should have been entered in the log book and then the aircraft could have been flown. As this was not done, the aircraft was flown from Mill Lake to Parry Sound Harbour without a proper flight authority and so the elements of the alleged contravention of paragraph 605.03(1)(a) were made out.

Additionally, it was not necessary for the AME to ground the aircraft to prevent its further flight since the operation of this aircraft was subject to a satisfactory test flight and until this event occurred, the aircraft had no valid flight authority to permit it to fly.

In the reasons for determination at the bottom of page 3, the evidence of Mr. Zschogner is summarized as follows: "There was a discussion with Mr. Blackwell about whether the aircraft could be flown to Parry Sound. He [Mr. Zschogner] was not happy with this, as he had not found the source of the leak. Mr. Blackwell decided that he would fly the aircraft the 1½ miles to Parry Sound Harbour." At page 4, 3rd paragraph, the Hearing Officer states: "Nevertheless, there was an airworthiness defect on the aircraft at Mill Lake. No rectification had been made to repair the oil leak, as its source had not been determined. Mr. Zschogner testified that he had said 'NO' when asked whether the aircraft could be flown to Parry Sound. He was clearly not happy with it being flown to the base at Parry Sound, despite its proximity to Mill Lake."

The key issue therefore is whether the pilot, knowing what he knew at Mill Lake, should have taken off to fly to Parry Sound. The question of whether the flight from Mill Lake to Parry Sound Harbour was a matter of negligence or recklessness has been discussed by the Hearing Officer in his reasons for determination. The Hearing Officer found that the evidence was clear: the serious oil leak which plagued the aircraft on its short flight from McKellar to Mill Lake was not repaired at Mill Lake. The subsequent discussion at Mill Lake respecting the shortest and the safest route to take to Parry Sound Harbour which would be over the Seguin River was itself an indication of the appreciation of the risk involved in additional flight of this aircraft.

The definitions of reckless and negligence as found in the frequently cited case of *Regina v. Abat*^[1] are cited at page 5 of the review determination:

[...] 'negligence' to mean simply failure to exercise reasonable skill and prudence in the circumstances, whether there is advertence or not. [...] 'recklessness' is aimed at those who are more culpable than the merely negligent inasmuch as to be reckless one must perceive the risk and deliberately decide to run it.

While a finding of negligence or recklessness would have been sufficient, in this case, the Hearing Officer found clear evidence of both. He further determined that Mr. Blackwell admitted that he perceived the risk, which is why he said that he chose the most direct route to Parry Sound, and he deliberately decided to run that risk.

We concur with the conclusion reached by the Hearing Officer and find that in following the Seguin River and flying very low over Parry Sound, the pilot contravened the regulations cited and endangered himself, persons and property on the ground, as well as the aircraft itself.

DETERMINATION

The appeal is dismissed. We uphold the determination of the Hearing Officer rendered following the review hearing that Mr. Blackwell did contravene section 602.01 and paragraph 605.03(1)(a) of the *Canadian Aviation Regulations* on May 7, 2000 and confirm the suspension of 20 and 4 days, respectively, for a suspension of 24 days in total.

Reasons for Appeal Determination by:

Faye Smith, Chairperson

Concurred:

Dr. Samuel J. Birenbaum, Member

Suzanne Racine, Member

[\[1\]](#) Unreported, March, 19, 1984, Sask. Prov. Ct.