

NTSB Releases 2009 Aviation Accident Statistics; On-Demand Accidents at Lowest Level in Last 20 Years

On April 8, 2010 the NTSB released preliminary aviation accident statistics for 2009 showing an overall decrease in U.S. civil aviation accidents that includes general aviation and on-demand Part 135 operations. In fact, on-demand Part 135

operations had the lowest number of accidents and fatal accidents for that type of air operation in the last 2 decades.

The total number of U.S. civil aviation accidents decreased from 1,658 in 2008 to 1,551 in 2009. Total fatalities also showed a decrease from 566 to 534. The majority of these fatalities occurred in general aviation and scheduled Part 121 operations.

General aviation accidents decreased from 1,566 in 2008 to 1,474 in 2009. There were 272 fatal general aviation accidents, down from 275 the year before. However, the accident rate increased to 7.20 per 100,000 flight hours in 2009 from 6.86 in 2008, due to the decrease in

the number total of flight hours. Although fatalities decreased from 494 to 474, the fatal accident rate increased to from 1.21 to 1.33.

Last year, one fatal accident occurred involving a scheduled Part 121 operator. On February 12, 2009, a Colgan Air, Inc., Bombardier DHC-8-400, operating as Continental Connection flight 3407, crashed outside of Buffalo, New York, resulting in 50 fatalities.

On-demand Part 135 operations reported 47 accidents in 2009, a decrease from 58 in 2008. Fatalities also decreased from 69 in 2008 to 17 in 2009. The accident rate decreased to 1.63 per 100,000 flight hours in 2009 from 1.81 in 2008. ■

American Association for Justice:

Increase Pilot Training to Improve Aviation Safety

Washington, D.C.— In response to last year's tragic crash of Colgan Air flight, operating as Continental Connection Flight 3407 and the FAA's Advance Notice on Proposed Rulemaking regarding pilot certifications, the AAJ recently submitted comments stating that the FAA should require more rigorous training for second in command pilots to better provide for safety in air travel for passengers.

While second-in-command (SIC) pilots are currently required to complete 190 flight time training hours to obtain commercial certification, citing little experience, inadequate training, poverty wages, long commutes and fatigue, the AAJ believes SIC should first be required to complete 1500 hours of flight time training and obtain their Air Transport Pilot certificates. "[Current regulations] do not provide enough training to ensure that dangerous situations are recognized, evaluated and responded to in a safe and timely manner."

The AAJ believes that requiring SIC obtain an Air Transport Pilot certificate would result in increased pilot skills, experience and, ultimately, salaries. Higher wages would then in theory translate into less turn over, keeping experienced pilots where they should be, the cockpit.

Further, touching on ongoing concerns

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Remarks by Judge William A. Pope, II Upon Retirement as an Administrative Law Judge of the National Transportation Safety Board

On June 3, 2010, I retired after 17 years as an Administrative Law Judge of the NTSB, and over 49 years of Federal service. On the occasion of my retirement, I would like to take time to thank the attorneys of the FAA and the attorneys in private practice who appeared before me for their exemplary professional conduct and litigation skill that they uniformly demonstrated in representing their respective clients.

It makes the job of the presiding judge immeasurably easier when the attorneys in the case conduct themselves with courtesy and professional expertise. I have always found that to be true of the FAA attorneys and the attorneys engaged in aviation safety practice who appeared in cases before me.

The hearings before the NTSB judges are, of course, adversarial in nature, so it is not possible for parties to a proceeding to win their respective positions. But, that does not mean that professional courtesy and the other hallmarks of legal professionalism should not be scrupulously observed. On this score, I have found that the attorneys appearing before me, whether representing the FAA or airmen, have always excelled, and in doing so have contributed greatly to the orderly and fair administration of justice in proceeding before the NTSB. I extend my congratulations and appreciation to each and every one of you.

I will greatly miss my work as an ALJ of the NTSB, and the professional association I have had with the members of the legal profession who appeared before me. I extend my best wishes to all of you, and I hope I will have the privilege of meeting all of you again in the future. ■

William A. Pope, II

We are entering the fourth month of the FAA's disclosure grace period, providing a safeguard against enforcement actions for pilots who come forward with previously unreported use of certain antidepressant medications. In the past, under FARs 67.107(c), 67.207(c), and 67.307(c) and 67.113(c), 67.213(c) and 67.313(c), the FAA has held that a diagnosis of depression and use of psychotropic medication was medically disqualifying.

On April 5, 2010 the FAA began considering the special issuance of medical certificates for pilots taking medications for mild to moderate depression, a condition that previously barred them from all flying duties. With a predicted 10% of the population dealing with depression, "We need to change the culture and remove the stigma associated with depression. Pilots should be able to get the medical treatment they need so they can safely perform their duties," according to FAA Administrator Randy Babbitt.

The new FAA policy is limited to four antidepressant medications, specifically Fluoxetine (Prozac), Sertraline (Zoloft), Citalopram (Celexa), or Escitalopram (Lexapro). This is a huge change from the FAA's general policy which was "AMEs should use caution in certifying airmen with vague psychological signs, particularly when the use of this group of antidepressants is drastically increasing in the society". See the FAA's Office of Aerospace Medicine's July 2007 report, Selective Serotonin Reuptake Inhibitors: Medical History of Fatally Injured Aviation Accident Pilots.

Previously, the FAA held that bereavement, dysthmic and minor depression were to be treated as something needing a FAA determination unless the condition was stable, resolved, without recurrent episodes and with no associated disturbance of thought. The pilot had to have used psychotropic medication(s) for less than 6 months and been off them for 3 months. Guide for Aviation Medical Examiners Decision Considerations . Item 47. Psychiatric Conditions.

What happens when a pilot discloses

that he or she has been treated for depression without taking one of the four drugs? The pilot will be grounded until all symptoms of the psychiatric condition being treated are improved by the single medication and the pilot is stable for 12 months. Those already taking the drug and have not yet reported it should be able to fly within a few months of reporting.

The FAA will require a consultation status report from the treating psychiatrist, with follow ups, a written statement from the pilot describing his or her history of antidepressant use and mental health status, a neurocognitive psychological report, and an evaluation from a Human Intervention and Motivation study (HIMS)-trained AME who has reviewed the reports and recommends a special-issuance medical certificate.

This exclusion is not an "open pass" for pilots, their medical certificate will remain special issuance so long as they remain on the medication. The pilot will continue to need annual HIMS AME visits and must see a psychiatrist every six months.

There is a caveat, the FAA policy is confined to depression. It does not extend to those who are merely consulting a therapist (e.g., for anxiety) even though there is no clinical diagnosis of depression. A pilot will not be allowed to fly while undergoing treatment. Once the treatment is complete, the pilot may return to flying. This is unfortunate as some people simply prefer talking to a professional about aspects of their life they aren't otherwise comfortable disclosing to family and friends.

Penalties

While the FAA will not take action against a pilot who discloses his depression or treatment within the 6 month period, there is no immunity from criminal prosecution under 18 U.S.C 1001 for making materially false, fictitious, or fraudulent statements or entry on the medical application. Immunity can only be offered by the Department of Justice (DOJ). However, the FAA and the Department of Transportation's Office of



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He is an associate attorney with Michael L. Dworkin and Associates, practicing in aviation regulatory and civil matters, including FAA enforcement, commercial transactions and insurance litigation. In addition to the NTSB Bar Association, he is an AOPA Legal Services Plan panel attorney and a member of the International Society of Air Safety Investigators. He has spoken before various Northern California aviation organizations.

Inspector General (DOT OIG), the office through which the FAA makes referrals for possible criminal prosecution, have agreed that the FAA will not refer cases of apparent intentional falsification to the DOT OIG for criminal investigation or prosecution.

Also, if an applicant falsifies any of the required information regarding their treatment or diagnosis on an application during or after the grace period, the FAA may take enforcement action based on that application and the previously falsified applications.

It will be interesting to see what other psychiatric and psychological conditions and medications will be considered in the future as the FAA gains experience and data under the new policy. DO NOT FORGET this grace period ends at midnight, September 30, 2010. ■

Synopsis:

U.S. Court of Appeals, District of Columbia Circuit. Decided June 8, 2010. The Federal Aviation Administration suspended the Airline Transport Pilot Certificates of Mark Turner and of Stephen Coonan for operating an “unairworthy” aircraft in violation of 14 C.F.R. § 91.7(a), the pilots appealed, and the FAA withdrew its complaints before an Administrative Law Judge could hear their appeal. The ALJ then awarded the pilots attorneys fees and expenses pursuant to the Equal Access to Justice Act (EAJA), codified as amended in relevant part at 5 U.S.C. § 504 (see also 28 U.S.C §2412), concluding each pilot was the “prevailing party” in his case.

The FAA appealed to the National Transportation Safety Board, which reversed the award. The pilots petitioned for review of the Board’s order and were denied.

Citing the three-part test for determining whether party has prevailed, as distilled from the Supreme Court’s decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department*

of Health and Human Resources, 532 U.S. 598 (2001), the NTSB held the pilots were not prevailing parties: They did not “prevail on any portion of the merits ... as the Administrator withdrew the charges before the [ALJ] could hold a hearing”; and the ALJ did not “issue an order akin to a court-supervised consent decree” because he “merely accepted the Administrator’s withdrawal of the charges.” The Board further concluded the ALJ “did not dismiss the case with prejudice or in any way alter the relationship of the parties.” The NTSB also held the pilots were not entitled to fees because § 504(a)(1) of the EAJA applies only where there was “an adversarial adjudication,” but the FAA did not defend

that argument in its brief to the court.

One member of the Board dissented. He maintained Buckhannon does not apply to this case because the Court’s holding there was limited to rejecting the “catalyst theory,” under which a party prevails if it “achieved the desired result because [its] lawsuit brought about a voluntary change in the defendant’s conduct,” 532 U.S. at 600, whereas the pilots here had not initiated proceedings but rather had successfully defended themselves against the FAA’s lawsuit.

Editorial note:

For a complete copy of the Court of Appeals’ holding, please email me at john@avialex.com. ■

“Disastrous” Trial Closes in France After Concorde Disaster

Hays Hettinger

NTSB Bar Association President, Tony Jobe, has authorized the revitalization of our Bar’s Select Committee on Aviation Public Policy and I have agreed to serve as its Chairman. Our immediate task is to report on the legal implications of the criminal trial that opened in February and closed May 28, 2010 in Pontoise, north of Paris, probing who is to blame for the 2000 Air France Concorde crash at La Patte d’Oie in Gonesse. It is intended that this will be a critical analysis and, hopefully, accepted later for publication in a law review.

The principal issue is the criminalization of what appears to have been no more than aviation negligence, and represents a reprise to an earlier article by this Committee published as *Aviation Professionals and the Threat of Criminal Liability—How Do We Maximize Safety?*, 67 *J. Air L. & Com.* 875 (Summer 2002).

Current Committee Members include: Tony Jobe; J.E. “Sandy” Murdock, former Chief Counsel FAA; Christa Hinckley; Bill Elder; Marty Raskin; Chris Kilgore; and our Newsletter Editor-in-Chief, John Van Geffen. Others may join us.

In the 4-month criminal probe, Continental Airlines, Inc., two of its employees and three French aviation officials were tried for manslaughter in the July 25, 2000 fiery crash of the jet, which plunged into a hotel shortly after takeoff from Roissy Charles de Gaulle airport, killing all 109 people aboard and four on the ground.

The French BEA (Bureau Enquetes-Accidents), equivalent to the U.S. NTSB, had found in its Accident Report of January 2002 that during takeoff from runway 26R, shortly before rotation, the No. 2 tire of the left landing gear ran over a metal strip, fallen five minutes earlier from a Continental MD-10 departing the same runway. Debris was thrown against the wing structure leading to a rupture of fuel tank 5. A major fire, fuelled by the leak, broke out immediately under the left wing. After takeoff, the aircraft was unable to gain speed or altitude, and after the No. 1 engine lost thrust, the angle of attack and bank increased sharply, thrust fell suddenly on Nos. 3 and 4, and the aircraft crashed

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Increase Pilot Training...

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with duty hours and pilot fatigue, the AAJ stated higher wages would result in pilots living closer to their home base and thus avoiding the often ridiculous commutes, sometimes over a hundred miles.

The AAJ also took the chance to call into question the FAA’s current practice of allowing academic credit in lieu of required flight hours, believing that experience in specific hazardous conditions should be mandatory, not an optional replacement for required flight hours.

AAJ President, Anthony Tarricone stated “The current level of training required for pilots is not substantial enough and has made the airways unsafe for passengers... The rigor of pilot certification should be first priority when it comes to improving flight safety.” ■