

**UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC**

In the Matter of: WINE COUNTRY HELICOPTERS, INC.

FAA Order No. 2008-12

Docket No. CP06WP0013
FDMS No. FAA-2006-26022¹

Served: December 15, 2008

ORDER

On June 10, 2008, Administrative Law Judge Richard C. Goodwin (ALJ) served a written initial decision, assessing a \$55,000 civil penalty against Respondent Wine Country Helicopters, Inc. (“Wine Country”) for violations of 14 C.F.R. §§ 135.293(a) and (b), 135.299, and 91.13(a).² After the time for filing a notice of appeal had elapsed, the agency attorney sent an Order Assessing Civil Penalty,³ along with a copy of the ALJ’s initial decision, to Wine County’s counsel and to its owner, Allen Wayne Lackey. On August 18, 2008, Wine Country filed a document entitled “Respondent’s Motion for Relief Requesting an Order Setting Aside the Order Assessing Or In The Alternative Motion for Order *Nunc Pro Tunc* With Attached Declarations ...” (“Motion for Relief”).⁴

¹ Materials filed in the FAA Hearing Docket (except for materials filed in security cases) are also available for viewing at the following Internet address: www.regulations.gov. For additional information, see <http://dms.dot.gov>.

² The ALJ presided over an evidentiary hearing held on January 16-18, 2008, in San Francisco, CA.

³ Complainant was seeking to collect the penalty assessed by the ALJ at the hearing.

⁴ On August 7, 2008, Wine Country served copies of the Motion for Relief to the agency attorney and the ALJ but mistakenly sent the motion for relief to the National Transportation Safety Board (NTSB), rather than to the FAA Hearing Docket. Wine Country corrected its mistake and filed the Motion for Relief with the FAA Hearing Docket on August 18, 2008. (See Amended Certificate of Service attached to the Motion for Relief.)

Counsel for Wine Country, Philip Johnson, Esq., asserts that neither his client nor he received the initial decision before July 31, 2008, when he received a copy of the initial decision, along with the written Order Assessing Civil Penalty.⁵ Wine Country requests that the Order Assessing Civil Penalty be set aside and requests additional time in which to file an appeal or motion to reconsider the initial decision. In the alternative, Wine Country seeks an order *nunc pro tunc* providing the same relief.

The Rules of Practice, 14 C.F.R. Part 13, subpart G, do not provide for a motion for the ALJ to reconsider the initial decision. Once the ALJ issues the initial decision, he loses jurisdiction over the case. Only the Administrator may reverse or modify an initial decision. In the Matter of Degenhardt, FAA Order No. 1990-90 at 6 (August 16, 1990). Under 14 C.F.R. § 13.233, if a party seeks reversal or modification of an initial decision, that party must file a notice of appeal, and perfect that notice by filing an appeal brief.

Wine Country's motion for relief shall be construed as a notice of appeal. A notice of appeal, however, will be dismissed if it is late-filed in the absence of a showing of good cause for the delay. Under 14 C.F.R. §§ 13.233(a) and 13.211(e), a party must file a notice of appeal no later than 15 days after the service of a written initial decision.⁶ Thus, Wine Country's notice of appeal from the written initial decision was due no later than June 25, 2008. Wine Country, however, did not file its notice of appeal in the FAA Hearing Docket until August 18, 2008, long after the expiration of the 15-day period.

⁵ In an attached declaration, Lackey asserted that he received a copy of the initial decision for the first time on August 5, 2008.

⁶ Section 13.233(a) provides in pertinent part “[a] party shall file the notice of appeal not later than 10 days after ... service of the written initial decision on the parties....” Section 13.211(e), the “mailing rule,” provides an additional 5 days in which to respond after service by mail.

A late-filed notice of appeal will only be excused based upon a showing of good cause. *E.g.*, In the Matter of Europex, Inc., FAA Order No. 2000-11 (May 11, 2000).

Wine Country has demonstrated good cause for the late-filing of its notice of appeal because, according to his declaration, Mr. Johnson did not receive the initial decision in a timely fashion.

Mr. Johnson averred that he left Shaw, Terhar and LaMontagne, LLP, at the end of May 2008 and moved to a new address. He explained that he sent the ALJ a letter regarding his new address dated June 5, 2008, five days before the ALJ served the initial decision, and attached a copy of that letter.⁷ Nonetheless, the initial decision was sent to his former Shaw, Terhar, and LaMontagne address.⁸

Wine Country submitted the declaration of Mr. Johnson's former legal assistant/secretary, who was responsible for forwarding his mail to his new address after his departure. The legal assistant declared that she did not recall receiving the initial decision in early June, and that if she had received it, she would have forwarded it immediately to Mr. Johnson. She declared further, "If he did not receive such a document from this office, we did not receive it." (Declaration of Nicki Lombardo.)

Wine Country suggests that the initial decision may be lost in the U.S. Postal System (USPS) and that the USPS failed to deliver the decision. In any event, Mr. Johnson claims that he did not receive the copy that was sent to him by the ALJ.

⁷ He also sent a copy of the change of address notice to the agency attorney, and to the NTSB Office of General Counsel, instead of to the FAA Hearing Docket. It does not appear that the FAA Hearing Docket ever received the change of address letter dated June 5, 2008.

⁸ The ALJ sent the initial decision to Mr. Johnson by regular U.S. Mail, addressed as follows: Philip L. Johnson, Esq., Shaw, Terhar, & LaMontagne, LLP, 707 Wilshire Blvd., Suite 3060, Los Angeles, CA 90017. See the service list attached to the initial decision, available for viewing at www.regulations.gov.

Wine Country argues that it did not knowingly or willingly relinquish its right under 14 C.F.R. §13.233 to appeal from the initial decision, and that “a failure by the U.S. Postal System to deliver the initial decision should not be the basis for a waiver of that important right.” (Respondent’s Motion for Relief at 4.)

Wine Country’s argument has merit. Mr. Johnson fulfilled his responsibility to keep the ALJ informed about his address change. In the Matter of Nissen, FAA Order No. 2005-15 at 4 (December 15, 2005). Nonetheless, Mr. Johnson did not receive the initial decision before the time for filing a notice of appeal ran out. Consequently, he was unable to file a timely notice of appeal.

In light of the above, Wine Country’s notice of appeal is accepted. Wine Country is granted 50 days from the date of service of this order in which to perfect its appeal by filing an appeal brief as required by 14 C.F.R. § 13.233.⁹

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[Original signed by Vicki S. Leemon]

VICKI S. LEEMON¹⁰
Manager, Adjudication Branch, AGC-430

⁹ Section 13.211(e)’s mailing rule will apply. Consequently, Wine Country has a total of 55 days from the date of service of this order in which to file its appeal brief.

¹⁰ Issued under authority delegated to the Chief Counsel and the Assistant Chief Counsel for Litigation by Memorandum dated October 27, 1992, under 49 U.S.C. § 322(b) and 14 C.F.R. § 13.202 (*see* 57 Fed. Reg. 58,280 (1992)) and redelegated by the Assistant Chief Counsel for Litigation to the Manager, Adjudication Branch, by Memorandum dated August 6, 1993.