UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: RONALD HAYDON WHITLEY
FAA Order No. 2009-4

Docket No. CP07EA0008
FDMS No. FAA-2007-27918[1]

Served: January 14, 2009

DECISION AND ORDER[2]

Administrative Law Judge (ALJ) Isaac D. Benkin issued a written initial decision[3] on January 30, 2008,[4] holding that Respondent Ronald Whitley violated 14 C.F.R. §§ 39.7,[5] 91.7,[6] 91.405(a),[7] and 91.409(a)(1),[8] by operating a flight from Warrenton, VA,

[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 Administrator's civil penalty decisions, along with indexes of the decisions, the rules of practice, and other information, are available on the Internet at the following address: *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty*. In addition, Thompson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the website.

[3] The hearing was held in Washington, DC, on January 24-25, 2008.

[4] A copy of the written initial decision is attached. (The ALJ's order is not attached to the electronic versions of this decision and is not included on the FAA Web site.)

[5] Section 39.7 provides as follows:

> What is the legal effect of failing to comply with an airworthiness directive? Anyone who operates a product that does not meet the requirements of an applicable airworthiness directive is in violation of this section.

[6] Section 91.7(a) provides as follows:

> No person may operate a civil aircraft unless it is in an airworthy condition.

[7] Section 91.405 provides as follows:

> Each owner or operator of an aircraft –

to Fredericksburg, VA, on or about December 31, 2004. The ALJ held that Whitley violated these regulations by operating N6046N when it:

(1) was not in compliance with three airworthiness directives (ADs);

(2) was unairworthy;

(3) had maintenance discrepancies that had not been repaired; and

(4) was overdue for an annual inspection.

The ALJ assessed a $3,700 civil penalty, as sought by Complainant.

Whitley filed an appeal, arguing that it was error for the ALJ to hold that the aircraft was unairworthy and not in compliance with three ADs. Whitley argued, in the alternative, that the ALJ failed to give proper weight to mitigating factors, and as a result, the $3,700 civil penalty was excessive. After review of the record in this case, Whitley's appeal is denied, and the ALJ's findings are affirmed to the extent specified in this decision. The $3,700 civil penalty assessed by the ALJ is affirmed.

I. The Evidence

At the time of the events giving rise to this action, Whitley owned a Cessna 185 aircraft, registration number N6046N. The aircraft was fitted with pontoon floats enabling it to take off from, or land on, water, as well as at conventional airports.

> (a) Shall have that aircraft inspected as prescribed in subpart E of this part and shall between required inspections … have discrepancies repaired as prescribed in part 43 of this chapter ….

[8] Section 91.409(a)(1) provides as follows:

> (a) Except as provided in paragraph (c) of this section, no person may operate an aircraft unless, within the preceding 12 calendar months, it has had --
>
> (1) An annual inspection in accordance with part 43 of this chapter and has been approved for return to service by a person authorized by § 43.7 of this chapter[.]

FAA Inspector Anthony Serio inspected N6046N on April 24, 2002, while it was undergoing maintenance at Hagerstown Aircraft Services (HAS). Inspector Serio was making a routine visit to HAS at the time. After the inspection, Inspector Serio issued a condition notice stating: "Severe rust and corrosion on engine mount near and behind exhaust system. Cracking on exhaust stack collectors both sides." (Exhibit A-1 at 1.) According to the condition notice, which Serio attached to the control wheel, these discrepancies constituted "an imminent hazard to safety" and "operation of the aircraft prior to correction" would "be contrary to pertinent Federal Aviation Regulations." (Exhibit A-1 at 1.) The condition notice explained further that a special flight permit, commonly called a "ferry permit," would be required if the discrepancies were not corrected before operation. (Exhibit A-1 at 1.)[9]

Tracey Potter, the owner of HAS,[10] testified that the engine mount, "which is a cradle-type device that supports the engine and attaches [the engine] to the airframe, had some pretty severe corrosion and rust," and that the exhaust system had several cracks. (Tr. 56; Exhibit A-2, items 27 and 28.) He testified that he explained to Whitley that these conditions "were genuine dangers," and advised that the engine mount should be replaced and the exhaust system should be removed and either repaired or replaced. (Tr. 58.) According to Potter, Whitley responded that he did not want to make these repairs at that time due to the expense. (Tr. 59.) HAS discontinued the annual inspection. After a lengthy legal dispute with Whitley about payment for services, HAS

[9] Under 14 C.F.R. § 21.197(a)(1), the FAA may issue a special flight permit "for an aircraft that may not currently meet applicable airworthiness requirements but is capable of safe flight," for the purpose of "flying the aircraft to a base where repairs, alterations or maintenance are to be performed."

[10] Potter holds a mechanic certificate with airframe and powerplant (A & P) ratings and an inspection authorization (IA). (Tr. 47-48.)

closed out the work order on August 30, 2004. Potter wrote on both the work order and the maintenance entry that N6046N was *not* approved for return to service. (Tr. 71-73; Exhibit A-2 at 2; Exhibit A-3 at 1.)

Potter testified that in his opinion, the aircraft was not airworthy because it did not conform to its type design and it was not in a safe condition for flight. (Tr. 86-87, 97.)

In late summer or early fall, 2004, JRA Executive Air, Inc. (JRA), another repair station in Hagerstown, MD, towed N6046N to its shop from HAS. David Schober, JRA's Director of Maintenance,[11] observed a number of maintenance discrepancies, including the engine mount corrosion and exhaust system cracks. (Tr. 112.) JRA fabricated and installed heat shields on the section of the exhaust pipe that is close to the engine mount to prevent further degradation of the engine mount assembly. JRA also performed other maintenance to prepare the aircraft for a ferry flight.[12] (Tr. 114; Exhibits A-4 at 2 and A-6.) JRA did not repair or replace the engine mount or the exhaust assembly. Although N6046N was overdue for an annual inspection, Whitley did not ask JRA to perform an annual inspection. (Tr. 113-114, 118.) Schober testified that he understood that Whitley wanted a ferry permit so that he could fly the aircraft to a maintenance facility where the annual inspection could be performed. (Tr. 118, 139.)

On October 7, 2004, the Baltimore Flight Standards District Office (FSDO) issued a special flight permit for N6046N to fly from Hagerstown, MD, to Warrenton,

[11] Schober holds a mechanic certificate with A & P ratings, and an IA, as well as commercial pilot, flight instructor, and ground instructor certificates. He is also a Designated Airworthiness Representative. (Tr. 104.)

[12] JRA also made other repairs, including removing bird nesting material, replacing the dead battery, and removing water from and sealing the floats. (Tr. 133; Exhibit A-4 at 2.)

VA, for maintenance purposes.[13] The special flight permit stated that it would expire upon N6046N's arrival in Warrenton or by October 11, 2004, and set forth several limitations, including:

- the flight had to be made by the most direct and expeditious route;
- only the pilot and necessary flight personnel could be on board the flight;
- the aircraft could not be flown over congested areas; and
- a certificated mechanic or repair station was required to inspect N6046N and determine that the aircraft was safe for the intended flight from Hagerstown, MD, to Warrenton, VA, *prior* to the flight.

(Exhibit A-5 at 1) (emphasis added.)

Schober inspected the aircraft as required by the ferry permit. He prepared a maintenance entry stating: "This aircraft has been inspected and has been found safe for the intended flight in accordance with the special Flight Permit dated 10/7/04 from HGR [Hagerstown] to W66 [Warrenton]." (Exhibit A-4 at 1.) Schober testified that he explained the ferry permit's limitations to Whitley. (Tr. 127; Exhibit A-6.) After receiving the ferry permit, Whitley flew N6046N from Hagerstown to Warrenton on October 7, 2004. (Tr. 127, 160.)

Schober testified that in his opinion, the aircraft was not airworthy because of the extent of the engine mount corrosion, the exhaust system leakage, and the fact that it was overdue for an annual inspection. (Tr. 141.)

Whitley contacted Ron Gatewood, then the Director of Maintenance at Skyworld Aviation at the airport in Warrenton in December 2004, and stated that N6046N had a

[13] Whitley claims in his brief that he was "misled" regarding the ability of the repair facilities in Warrenton to perform the maintenance needed by N6046N. The record contains no evidence on this issue. Whether he was misled, as he claims, is irrelevant.

landing gear problem. Gatewood looked at the aircraft but did not have the appropriate manuals to fix N6046N's landing gear. He performed no maintenance on the aircraft. Gatewood testified that the aircraft was visible from his shop while it was at the airport and that he never saw anybody performing any maintenance on it. (Tr. 155.)

According to the airport records, N6046N remained in Warrenton until December 31, 2004. (Tr. 160.) On or about December 31, 2004, Whitley flew N6046N from Warrenton. (Tr. 28, 159, 160.)[14] It arrived at Shannon Airport in Fredericksburg, VA, on December 31, 2004, or in the very beginning of January 2005.[15] (Tr. 268.)

In January 2005, Whitley contacted mechanic Roberta Boucher,[16] whose repair facility – The Plane Doctor – is located at Shannon Airport, and asked her to check the landing gear up light switch on N6046N. (Tr. 168, 169.) While working on the switches, she noticed that the engine mount was "extremely corroded" and that the exhaust collectors were cracked. (Tr. 170, 171.) Boucher alerted FAA Aviation Safety Inspector

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[14] During his investigation, Keymont asked Whitley if Whitley knew how the aircraft had gotten from Warrenton to Fredericksburg. Whitley replied that he had "no idea." (Tr. 263.) The FAA apparently did not learn with certainty that Whitley flew N6046N from Warrenton to Fredericksburg until oral argument at the hearing, when in response to a question posed by the ALJ, Whitley responded that he had flown the aircraft. (Tr. 28.) Whitley's counsel later stipulated that Whitley flew N6046N from Warrenton to Fredericksburg. (Tr. 159.)

As the agency attorney explained, the FAA, rather than the National Transportation Safety Board (NTSB), had jurisdiction over this matter because the action was based upon Whitley's status as the owner/operator, not as the pilot, of N6046N. (Tr. 23-25.) Compare 49 U.S.C. § 46301(d)(7)(A), which provides that "[t]he Administrator may impose a penalty on a person (except an individual acting as a pilot, …) after notice and an opportunity for a hearing on the record," with 49 U.S.C. § 46301(d)(5)(B), providing that "an individual acting as a pilot, … may appeal an order imposing a penalty under this subsection to the" NTSB.

[15] Shannon Airport is 22.8 NM from Warrenton, VA. (Tr. 388.) The record contains no evidence regarding whether N6046N was flown nonstop to Shannon Airport or what route the pilot took. It is presumed in this decision that Whitley flew nonstop from Warrenton to Shannon Airport.

[16] Boucher holds a mechanic certificate with A & P ratings, an IA, and a private pilot certificate with glider, single-engine land and sea, and multi-engine land and sea ratings. (Tr. 164-165.)

John Keymont[17] at the FAA's Richmond FSDO about the condition of N6046N in February 2005. Boucher testified at the hearing that she told Inspector Keymont that N6406N was unsafe and unairworthy. (Tr. 182.)

On March 4, 2005, Inspector Keymont conducted a ramp inspection, visually inspecting N6046N while he walked around the aircraft's exterior. He did not open up the cowling during his inspection. (Tr. 266-267.)[18]

After conducting the ramp inspection, he issued a condition notice, identifying three items as posing an "imminent hazard to safety" as follows:

- exhaust stack/muffler assy [assembly] is loose at attaching clamps;
- stall warning port appears clogged; and
- air inlet filter appears to be disintegrating.

(Exhibit A-13 at 1.) According to this notice, operation of N6046N prior to correction of these discrepancies would be contrary to the FAR, and a special flight permit would be necessary for any flight before the repairs were accomplished. (Exhibit A-13 at 1.)

Inspector Keymont requested that Whitley provide him with N6046N's complete maintenance records. (Tr. 271-272.) Whitley's attorney provided Inspector Keymont with the aircraft maintenance logbooks (three volumes), the engine logbook, the propeller logbooks, and the weight and balance data on April 21, 2005. (Exhibit A-16.)

[17] Inspector Keymont has been employed at the FAA's Richmond FSDO since September 1997. He holds a mechanic certificate with A & P ratings and an IA. (Tr. 252-253.) The ALJ found Keymont qualified as an expert in aircraft maintenance and repair generally. (Tr. 296.)

[18] Consequently, he could not check for any engine mount corrosion or cracks in the exhaust system assembly near the engine mount.

When the inspector examined the logbooks, he found an entry for an annual inspection dated September 3, 2000, on the *last* page of the aircraft logbook then in use.[19] (Tr. 289-290; *see* Exhibit A-15 at 32.) He testified that the next annual inspection had been due on the last day of September 2001, under 14 C.F.R. § 91.409(a)(1). (Tr. 297-298.) Consequently, he concluded, N6046N was overdue for an annual inspection when it was flown from Warrenton to Fredericksburg in late December 2004 or early January 2005. (Tr. 299.)[20]

Inspector Keymont testified that operation of N6046N with the maintenance discrepancies written up in the condition notice was a violation of Section 91.405(a) because owners are required to correct discrepancies that arise between annual inspections prior to flight. (Tr. 374.)

Inspector Keymont also reviewed the record regarding AD compliance submitted by Whitley's attorney.[21] (See Exhibit A-20.) After comparing that record with a list of the ADs that applied to this aircraft, he determined that the aircraft was not in compliance with three ADs when it was flown from Warrenton to Fredericksburg. (Tr. 302-303, 352, 354, 357, 359, 439.) Specifically, he determined that the aircraft had not had the annual inspection of the seat and seat rails for cracking required by AD 1987-20-03 since September 1999. (Tr. 350-354; Exhibit A-17.) He also could not find a record of

[19] Aircraft logbooks #1 and #2 were filled and had been closed. The aircraft logbook then in use was aircraft logbook #3.

[20] The inspector telephoned Whitley to discuss the aircraft's condition. During the conversation, Inspector Keymont asked if the aircraft was overdue for an annual inspection, and Whitley responded that it "may be." While Inspector Keymont was describing options for addressing the aircraft's issues, he heard a "click" and then the telephone line was disconnected. (Tr. 263-264.)

[21] Keymont testified that the owner is required to keep a record indicating the current status of compliance with applicable AD in the maintenance records. (Tr. 352-353.)

compliance prior to that flight in either the AD compliance list or the aircraft logbooks with AD 2000-06-01, pertaining to the fuel strain assembly, or with AD 1993-05-06, requiring action to prevent failure of the ignition switches. (Tr. 354-360, Exhibits A-18, A-19, A-20.)

In June 2005, Whitley asked Geoffrey Peterson,[22] the owner of Rising Phoenix Aviation at Manassas Airport, to inspect N6046N to determine what maintenance the aircraft needed. According to Peterson, Whitley stated that N6046N had a loose exhaust pipe and landing gear indicator problems, but that he knew of no other airworthiness problems. (Tr. 204; Exhibit A-9 at 1.)

While reviewing the maintenance records that Whitley had provided, Peterson realized that some records were missing. (Tr. 219.) He obtained missing records from HAS, the Plane Doctor, and JRA. (Tr. 219; Exhibit A-9 at 2.)[23]

Peterson inspected N6046N on June 5, 2005, in Fredericksburg.[24] He did a walk-around inspection and then inspected the engine after the engine cowling was removed. (Tr. 205, 210.) Peterson observed "some pretty significant corrosion pitting" on the engine mount. (Tr. 209.) He wrote in an e-mail message[25] that the "engine mount [is] badly corroded pretty much all over, some areas [are] worse." (Exhibit A-7 at 1.) He also found that one of the two exhaust collectors was cracked and that the other exhaust

[22] Peterson holds a mechanic certificate with A & P ratings and an IA. In addition, he holds a commercial pilot certificate with instrument, airplane and single-engine land ratings. (Tr. 199.)

[23] These records do not appear to be included in Exhibit A-15.

[24] Peterson inspected N6046N approximately 5 months after the flight to Fredericksburg that is the subject of this action.

[25] Peterson sent this e-mail message to Inspector Keymont on June 9, 2005.

collector was loose. (Tr. 210.) He testified at the hearing that in his opinion, corrosive exhaust gas blowing through the exhaust pipe crack onto the engine mount had caused the engine mount corrosion. (Tr. 222.) He considered continued exhaust gas leakage as presenting a potential fire hazard and a limited carbon monoxide poisoning hazard. (Tr. 223.)

Subsequently, Peterson sent Whitley and his attorney a list of discrepancies that needed correction before a ferry permit could be obtained to fly the aircraft from Shannon Airport in Fredericksburg to another location for repairs and perhaps an annual inspection. (Tr. 240.)[26] He also described the work that would be necessary before the aircraft could pass an annual inspection. (Exhibit A-8; Exhibit A-9 at 2.)

Peterson wrote that the exhaust system required temporary repairs before it could be approved for a ferry permit. (Exhibit A-8 at 1.)[27] He wrote further that to pass an annual inspection, the exhaust system needed to be repaired or overhauled. Regarding

[26] When Peterson contacted Inspector Keymont in early June, Keymont stated that N6046N would need a ferry permit if it was flown out of Shannon Airport and that he wanted to inspect N6046N personally before he issued a special flight permit. (Tr. 213, 219.)

[27] Peterson wrote as follows:

> 1. I want to remove the exhaust system from the left side of the aircraft and have it TIG welded locally to prevent the crack from expanding or completely breaking during the ferry flight, which would cause a fire hazard. The crack shows signs of wanting to fracture in a radial direction, as well as a vertical crack about 1 inch long. The hardware that holds the muffler on needs to be replaced as well, as it is corroded and is a possible reason for the looseness of the exhaust pipe that also must be addressed before the ferry flight. This is only a temporary repair for the ferry flight. The complete exhaust system needs to go to an exhaust system CRS [certified repair station] to be inspected and repaired as required, and reinstalled after repairs are completed.

(Exhibit A-8 at 1.)

the engine mount, Peterson concluded that the engine mount, mounting, hardware and mount dampeners required repair, overhaul or replacement. (Exhibit A-8 at 2.)[28]

According to Peterson, he had a "heated telephone conversation" with Whitley on July 11, 2005. (Tr. 230; Exhibit A-9 at 3.) Afterwards, Peterson informed Whitley's attorney that he would not provide any additional maintenance assistance to Whitley, and returned the maintenance records. (Exhibit A-9 at 3.)

II. Initial Decision

The ALJ held that Whitley violated 14 C.F.R. § 91.7 because N6046N was unairworthy during the flight from Warrenton to Fredericksburg. He held that the aircraft was unairworthy because:

- it had not had an annual inspection;
- the engine mount "showed evidence of substantial corrosion;" and
- the exhaust risers were cracked.

The ALJ held that due to these issues, N6046N did not conform to its type certificate, and was unsafe for flight. (Initial Decision at 8.) The ALJ found that "[e]ach of these things could well have resulted in a crash that might have caused severe injury or death to the pilot, to passengers and to people on the ground." (Initial Decision at 8.)

The ALJ held that Whitley violated 14 C.F.R. § 39.7 by operating N6046N from Warrenton to Fredericksburg when it did not conform to three applicable ADs. In this regard, the ALJ wrote that "[t]here is no evidence of compliance in either the aircraft's

[28] Peterson had additional concerns. For example, he testified, the propeller was overdue for a required overhaul. In his experience, propellers that go for an extended period of time without an overhaul – especially propellers on aircraft exposed to salt water – have internal corrosion issues that are not detectible through inspection. (Tr. 247-248.)

mechanical logbooks or in the separate AD log that was maintained pursuant to the FAR." (Initial Decision at 9.)

The ALJ also held that Whitley violated 14 C.F.R. § 91.405, as well as 14 C.F.R. § 91.7(a), by failing to have the maintenance discrepancies remedied before operating N6046N from Warrenton to Fredericksburg. Finally, he held that by operating N6046N when it was overdue for an annual inspection, Whitley violated 14 C.F.R. § 91.409(a). (Initial Decision at 10.)

The ALJ assessed a $3,700 civil penalty, as sought by Complainant. He wrote that Whitley committed the violations knowingly and willfully, and, therefore, "the FAA is entitled to collect … every cent that it has demanded." (Initial Decision at 12.)

III. Analysis

On appeal, Whitley argues that the ALJ erred in finding (1) that the aircraft was unairworthy during the flight from Warrenton to Fredericksburg, and (2) that Whitley failed to comply with the three ADs prior to that flight. Whitley also argues that the $3,700 civil penalty assessed by the ALJ was too high and that a lower civil penalty is appropriate due to mitigating factors that the ALJ failed to consider.[29]

A. Airworthiness. To be airworthy, an aircraft must (1) conform to its type design approved under a type certificate or supplemental type certificate and to applicable ADs, and (2) be in a condition for safe operation. In the Matter of Kilrain, FAA Order No. 1996-18 at 10 (May 3, 1996), *petition for reconsideration denied,* FAA Order No. 1996-23 (August 13, 1996), *petition for review denied*, Kilrain v. FAA, No. 96-3587

[29] While Whitley contests the ALJ's findings that he violated Sections 91.7 and 39.7, he does not challenge the findings that the aircraft was operated with unresolved discrepancies and when overdue for an annual inspection in violation of Sections 91.405(a) and 91.409(a)(1) respectively.

(3rd Cir. May 1, 1997). Both prongs of this test must be met before an aircraft may be deemed airworthy. Airworthiness and "flyability" are not synonymous concepts. Copsey v. NTSB, 993 F.2d 736, 739 (10th Cir. 1993); In the Matter of USAir, FAA Order No. 1996-25 at 13 (August 12, 1996).

The ALJ held that the aircraft was in an unsafe condition for flight when it was flown from Warrenton to Fredericksburg due to the engine mount corrosion and the cracks in the exhaust risers. These findings are supported by the preponderance of the evidence, and consequently, the ALJ correctly held that N6046N was unairworthy.

The uncontradicted evidence regarding the unsafe condition posed by the corrosion prior to the flight was as follows. According to the condition notice issued by Inspector Serio in April 2002, the engine mount corrosion that he observed constituted an "imminent hazard to safety." (Tr. 97; Exhibit A-1 at 1.) Potter testified that engine mount tubes are made of chrome alloy steel tubing approximately fifty-thousandths of an inch thick. He testified that he observed[30] pits that were about half that thickness.[31] (Tr. 88.) Potter testified that this severe corrosion rendered the aircraft unsafe. Schober, who examined the aircraft approximately three months before the aircraft was flown to Fredericksburg, observed "significant pitting" in the areas where the exhaust stacks came in close proximity to the engine mount. He testified that the pitting that he observed

[30] Potter based these assessments upon his observation of the engine mount. He testified that he did not think that it was necessary to measure the pits with a micrometer because the pitting was so deep. (Tr. 87.)

[31] He testified that while it is common to see a little corrosion or rust on an engine mount in float planes, N6046N's engine mount corrosion was "very, very severe," and that he had never seen such severe engine mount corrosion on an aircraft that was flying. (Tr. 63.)

"was probably a quarter to half the way through the wall thickness of the tubing." (Tr. 113.)

There is no evidence in the record that the engine mount was repaired or replaced prior to the time that the aircraft was flown to Fredericksburg on or about December 31, 2004. If anything, the engine mount would have continued to deteriorate during the time between the inspections by Potter, Serio and Schober and the operation to Fredericksburg on or about December 31, 2004. In January 2005, Boucher observed an "extremely corroded" engine mount. (Tr. 170-171.) Consequently, it is appropriate to conclude that the engine mount was severely corroded when N6046N was flown to Fredericksburg on or about December 31, 2004.

This severely corroded engine mount supported an engine and propeller weighing approximately 500 to 600 pounds. (Tr. 63.) If the engine mount failed, the results could have been catastrophic. It is no wonder that Potter and Serio regarded the engine mount corrosion as rendering the aircraft unsafe for operation.

The ALJ also correctly held that the preponderance of the evidence proved that the aircraft was in an unsafe condition for operation due to the exhaust system discrepancies. The mechanics who observed the aircraft both before and after N6046N was flown to Fredericksburg concluded that the aircraft was in an unsafe condition for flight due to the exhaust system discrepancies. Whitley presented no contrary evidence regarding the condition of the exhaust system or the hazards that it posed.

Inspector Serio and Potter examined the aircraft within the two-year time frame preceding the operation from Warrenton to Fredericksburg. Inspector Serio included the cracking on the exhaust stack collectors on the condition notice dated April 24, 2002, as

an item that he considered as posing an imminent hazard to safety. (Exhibit A-1.) Potter testified that the exhaust system cracking that he observed presented a "genuine danger," and that the aircraft was not in a safe condition for flight due to the condition of the exhaust system. (Tr. 58, 97.) There is no evidence in the record that the exhaust assembly was repaired prior to the operation of the aircraft from Warrenton to Fredericksburg on or about December 31, 2004. While N6046N was in Boucher's shop in early 2005, she noticed that the exhaust collectors were cracked and that the exhaust risers were "pretty well worn." (Tr. 171.)

During his testimony, Peterson, who examined the aircraft about 6 months after the aircraft arrived in Fredericksburg, explained the nature of the safety risk presented by the cracks in the exhaust system. He testified that exhaust gas leaking through the cracks in the exhaust system created a potential fire hazard as well as a limited carbon monoxide hazard. (Tr. 223; Exhibit A-8 at 1.) Peterson was concerned that a particular crack in the exhaust system would expand further, perhaps resulting in that part of the exhaust system completely breaking off, thereby causing a fire hazard. (Exhibit A-8 at 1.)

Both Keymont and Peterson also were concerned that the exhaust assembly was loose. Keymont included the loose exhaust assembly in the condition notice that he issued on March 4, 2005, as presenting an imminent hazard to safety.

Whitley argues in his appeal brief that he relied upon Schober's certification that the aircraft was safe for the flight from Hagerstown to Warrenton and that he ensured that the aircraft was in the same condition as it had been when Schober inspected it prior to that ferry flight. (Respondent's Appeal Brief at 5.) However, if Whitley actually relied upon Schober's certification that the aircraft was safe for the intended flight, his reliance

was not justified because the ferry permit had expired.[32] Importantly, Schober had certified that the aircraft was safe for only that one flight from Hagerstown to Warrenton. Even if Whitley were entitled to rely on the prior certification that N6046N was safe for a flight from Warrenton to Fredericksburg, that certification depended upon an inspection by a mechanic. However, there is no evidence of any inspection of the aircraft immediately before the aircraft was flown from Warrenton to Fredericksburg or that there was any such certification for the issuance of a ferry permit.[33]

Moreover, there is a difference between a finding that an aircraft is in a safe condition for an intended flight with specific limitations under a ferry permit, and a determination that an aircraft is airworthy (and therefore in a safe condition for flight) when an aircraft is returned to service after an annual inspection. When an aircraft is signed off as airworthy after an annual inspection, there is no limitation regarding the number of flights that the aircraft may make, the distance of those flights, or the conditions in which the aircraft may fly (beyond those imposed by the manufacturer and FAA regulations.)[34] This decision interprets the safety prong of the test for airworthiness

[32] Counsel's assertion that Whitley relied upon Schober's certification pertaining to the ferry permit is unsupported by evidence in the record. Whitley did not testify and, there is no evidence in the record to show that he relied upon the ferry permit, inspected the aircraft himself, examined the engine mount corrosion or exhaust pipe cracks, or thought that the aircraft was in a safe condition for flight despite the discrepancies identified in the condition notice. *See* n.40 *infra*.

[33] In this regard, Schober testified that N6046N might have been safe for an additional ferry flight but "someone would have to make a further determination at that point." (Tr. 138.) He said that whether N6406N was safe for further flight is "an unknown quantity" in the absence of such a determination. (Tr. 138.) Keymont testified similarly. He said that he did not know whether N6406N was in a condition for safe flight between Warrenton and Fredericksburg. (Tr. 457.)

[34] For example, Schober testified that when he opened the cowling, he observed discrepancies that would have precluded him from returning N6046N to service as airworthy after an annual inspection, but that he thought that it was safe for the ferry flight to Warrenton. (Tr. 134.)

as requiring that the aircraft be in a safe condition for flight generally, not as found to be safe for a particular flight under the conditions and authority of a ferry permit.

Whitley argued in his appeal brief as follows:

> According to 14 C.F.R. 91.7(b), the pilot in command of a civil aircraft is responsible for determining whether an aircraft is in a condition for safe flight. As such, Mr. Whitley, as pilot in command, was the only person who could decide if the aircraft was safe for his trip from Warrenton to Fredericksburg.

(Respondent's Appeal Brief at 5.) Section 91.7(b) makes it the pilot in command's responsibility not to operate an aircraft that is in an unsafe condition. Contrary to Whitley's argument, Section 91.7(b) does not give the pilot the exclusive authority to determine the airworthiness of an aircraft, including whether the aircraft is in a safe condition for flight. Importantly, Section 91.7(b) did not authorize Whitley, as pilot in command, to ignore a condition notice issued by an FAA inspector regarding discrepancies creating an imminent hazard to flight and the assessments by certificated mechanics that the aircraft had discrepancies rendering the aircraft unairworthy.

The aircraft also did not meet the first prong of the airworthiness test because it was not in compliance with three airworthiness directives when it was operated to Fredericksburg from Warrenton. In the Matter of Kilrain, FAA Order No. 1996-18 at 10 (mechanic returned aircraft to service in an unairworthy condition when aircraft did not meet requirements of an AD.) FAA Inspector Keymont examined the maintenance records and found no entries reflecting that the requirements of these three ADs had been met prior to the flight to Fredericksburg. (Tr. 354, 357, 359.) Complainant may sustain its burden of proving that required maintenance has not been accomplished based upon the absence of entries reflecting the performance of that maintenance in the aircraft's maintenance records. In the Matter of American Air Network, Inc., FAA Order No.

2008-10 at 32 (October 7, 2008); In the Matter of High Exposure, FAA Order No. 2003-7 (September 12, 2003).

Each of the ADs in question permitted flight *under a ferry permit* to a location for the accomplishment of the AD. (Tr. 433-435; Exhibit A-17 at 5, A-18 at 2, and A-19 at 3.) However, the FAA did not authorize the flight from Warrenton to Fredericksburg through the issuance of a ferry permit. No mechanic had inspected the aircraft and signed it off as safe for a particular flight under certain limitations. The evidence, therefore, supports the ALJ's finding that N6046N did not conform to three ADs. Consequently, Whitley violated both 14 C.F.R. § 39.7, by operating an aircraft that did not meet the requirements of three ADs and Section 91.7, by operating an aircraft that did not meet the first prong of the test for airworthiness.

Whitley argues in his appeal brief that Inspector Keymont's investigation was inadequate because he had very little knowledge about the actual flight,[35] did not seek records pertaining to maintenance performed after the flight,[36] and did only a cursory inspection of the aircraft himself. However, there was ample evidence in the aircraft's maintenance records both before and after the flight to prove that the aircraft was unairworthy. The question is not whether Inspector Keymont did an adequate investigation, but whether the preponderance of the evidence in the hearing record proved that the aircraft was unairworthy. *See* In the Matter of High Exposure, FAA Order

[35] Had Whitley cooperated with Keymont during the investigation, Keymont would have had more information about the flight in question. Consequently, Keymont can hardly be faulted for not knowing the exact date or other details about the flight from Warrenton to Fredericksburg.

[36] He argued that Keymont should have obtained records pertaining to a ferry permit that was issued permitting N6046N to fly to Hummel Field and to an annual inspection performed there.

No. 2003-7 at 13, n.28 ("It is irrelevant whether Complainant could have conducted a more thorough investigation prior to initiating this action.")

Whitley also argues that Complainant's case was based upon evidence "from witnesses, many of whom had previous legal entanglements with Mr. Whitley, and thus, were either vindictive or biased." (Initial Decision at 4-5.) This argument is not persuasive. While Potter and Boucher had been involved in lawsuits with Whitley, Schober and Peterson had not. The witnesses' testimony regarding the discrepancies was consistent. None of the mechanics who had examined the aircraft testified that N6046N was airworthy, and Potter and Schober specifically testified that prior to the flight, the aircraft was in an unairworthy condition. (Tr. 58, 141.)

Finally, as the ALJ noted in his decision, the aircraft was operated in an unairworthy condition during the flight in question because it was operated with unresolved maintenance discrepancies and when it was more than 2 years overdue for an annual inspection. *See* In the Matter of USAir, Inc., FAA Order No. 1996-25 at 12-13 (finding that an aircraft that is overdue for a legally required inspection is unairworthy); In the Matter of General Aviation, Inc., FAA Order No. 1998-18 at 13 (October 9, 1998) (an aircraft with unresolved mechanical discrepancies is unairworthy.)[37]

For the reasons stated above, the ALJ's finding that the aircraft was unairworthy when it was flown to Fredericksburg is affirmed.[38]

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[37] An aircraft's airworthiness certificate is not effective unless the maintenance required by 14 C.F.R. Parts 43 and 91 has been accomplished. (Tr. 375.) *See* 14 C.F.R. § 21.197(a)(1) (regarding duration of a standard airworthiness certificate.) Annual inspections, repairs of maintenance discrepancies between required inspections, and compliance with ADs are required under Part 91. (Tr. 375.)

[38] This decision neither affirms nor reverses the ALJ's finding that the aircraft did not conform to its type design due to the engine mount corrosion and cracked exhaust system. It is unnecessary

B. Civil Penalty. Whitley argues in the alternative that a civil penalty of $1,100 is appropriate. He argues that the ALJ failed to consider the minimal degree of hazard presented during the brief flight from Warrenton to Fredericksburg and the corrective action taken by Whitley after that flight. This argument is rejected.

Whitley argues that the 10-minute flight from Warrenton to Fredericksburg on or about December 31, 2004, was shorter and posed less of an actual hazard than the 60-minute flight that N6046N made from Hagerstown to Warrenton under the authority of a ferry permit on October 7, 2004.[39] The hazards associated with flying an aircraft with severe engine mount corrosion and a significantly cracked and loose exhaust assembly, however, cannot be considered "minimal." In addition to those conditions, the aircraft was not in conformance with three ADs. N6046N had not had an annual inspection since September 2000, and as a result, there is no way of knowing what discrepancies would have been detected if timely annual inspections had been performed. The relatively short

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to decide whether N6046N conformed to its type design because it has been found that the aircraft was unairworthy due to its unsafe condition, its noncompliance with three ADs, and the its operation with unresolved discrepancies.

[39] This argument presumes facts not in evidence. The record contains no evidence regarding the time that it took for Whitley to fly from Hagerstown to Warrenton or from Warrenton to Fredericksburg. Also, the record contains no evidence regarding the flight paths that Whitley flew on these trips. *See* n.40 *infra*.

Whitley also refers in his brief to what he says was a 60-minute flight from Fredericksburg to Hummel Field in Saluda, VA, under the authority of a subsequently-issued ferry permit. No witnesses testified on Whitley's behalf about the flight or the work that was done before or after the ferry permit was issued. Inspector Keymont testified that the Richmond FSDO issued the ferry permit for the flight to Hummel Field but that he had not seen the permit or the records documenting any maintenance performed before the permit was issued. (Tr. 394-396.) The ALJ rejected Exhibits R-1 and -2, which Whitley's attorney claimed were maintenance records relating to the flight permit's issuance and the annual inspection subsequently performed at Hummel Field. The ALJ explained that "what happened after these violations were alleged to have occurred is irrelevant," and that no witness who could authenticate the documents was available. (Tr. 481-482.) Whitley's attorney made a proffer about what the records would show had they been introduced, but he did not argue on appeal that the ALJ's ruling on these documents was in error.

distance is not a mitigating factor because, as Inspector Keymont testified, general aviation accidents occur most frequently during takeoff and landing. (Tr. 377.)

Whitley also contends that the degree of hazard presented by the violations was minimal because the three ADs were "non-safety related." (Appeal Brief at 12.) However, ADs are, by definition, safety-related. Under 14 C.F.R. § 39.5, the FAA issues ADs when it finds that "(a) an unsafe condition exists in the product; and (b) the condition is likely to exist or develop in other products of the same type design."

Whitley also argues that he took "immediate actions to address the FAA concerns," and that this swift corrective action constitutes a mitigating factor, warranting a lower civil penalty. (Respondent's Appeal Brief at 14.) He contends that a repair station in Hummel Field later "completed all the corrective actions required by the FAA." (Respondent's Appeal Brief at 14.)

Preliminarily, there is no evidence of corrective actions in the record.[40] The ALJ rejected the unauthenticated maintenance records purportedly reflecting maintenance that occurred in September 2005 and October 2006 (documents marked respectively as Exhibits R-1 and R-2).[41]

Further, under the case law, an otherwise appropriate civil penalty may be reduced based upon corrective action, but only where there is sufficient and specific evidence of swift or comprehensive action that is positive in nature, such as sending employees to special training or instituting programs to ensure compliance with the safety regulations. In the Matter of Detroit-Metropolitan-Wayne County Airport, FAA Order

[40] "Unsubstantiated and unsupported factual allegations by attorneys in briefs do not constitute evidence." In the Matter of Northwest Airlines, Inc., FAA Order No. 1998-22 at 5 (December 7, 1998).

[41] *See* n.39, *supra*.

No. 1997-23 at 5 (June 5, 1997). By positive, the Administrator means action to prevent *future* violations from occurring. *See e.g.*, In the Matter of Alika Aviation, Inc., FAA Order No. 1999-14 at 11 (December 22, 1999), in which the Administrator held that terminating an employee "does nothing positive to ensure that other or future employees do not make this same mistake."[42] Subsequent performance of maintenance that should have been completed *before* a flight does not constitute positive corrective action justifying a reduction in an otherwise appropriate civil penalty.

As the ALJ wrote in his decision:

> During his cross-examination, Inspector Keymont testified that the maximum civil penalty that FAA Order No. 2150.3 authorized for the violations committed by Mr. Whitley was $5,500. The FAA has sought a considerably lower civil penalty, $3,700, in its complaint. The violations he committed were not minor ones, nor were they inadvertent. They were committed knowingly and willfully, with his full understanding that he had no business – under the federal aviation safety program – flying his aircraft from Warrenton to Fredericksburg while it was not in airworthy condition, had been un-inspected for more than four years and was out of compliance with three applicable ADs. There is no evidence that any of the mitigating factors set forth in 49 U.S.C. § 46301(e) is present in a way that could reduce the amount of the penalty.

(Initial Decision at 11-12.)

[42] The Administrator found sufficient evidence of comprehensive and positive corrective action in In the Matter of Westair Commuter Airlines, Inc., FAA Order No. 1993-18 at 11-12 (June 10, 1993) (including issuance of memos to mechanics regarding taxiing procedures, meetings to review procedures, restricting taxiing operations to only 8 of 30 mechanics, requiring all mechanics to take extra training before they could taxi aircraft); and In the Matter of Delta Air Lines, FAA Order No. 1992-5 (January 15, 1992) (including adjusting the electronic gate's timing, issuing reminders to staff, and removing the gate's remote access capability).

III. Conclusion

Based upon the foregoing, Whitley's appeal is denied. The ALJ's decision is affirmed to the extent specified in this decision. The $3,700 civil penalty is assessed.[43]

[Original signed by Robert A. Sturgell]

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

[43] This decision shall be considered an order assessing civil penalty unless Respondent files a petition for review within 60 days of service of this decision with the U.S. Court of Appeals for the District of Columbia Circuit of the U.S. court of appeals for the circuit in which the respondent resides or has its principal place of business. 14 C.F.R. §§ 13.16(d)(4), 13.233(j)(2), 13.235 (2007). *See* 71 Fed. Reg. 70460 (December 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases.)