

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

In the Matter of: DAVID C. SIDDALL

FAA Order No. 2008-9

Docket No. CP05WP0016
FDMS No. FAA-2005-21047¹

Served: October 7, 2008

DECISION AND ORDER²

Respondent David C. Siddall (Siddall) has appealed the determination of Administrative Law Judge (ALJ) Richard C. Goodwin that Siddall: (1) flew over congested areas in his ultralight vehicle³ in violation of 14 C.F.R. § 103.15;⁴ and (2) in so

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: www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/AGC400/Civil_Penalty. In addition, Thomson/West publishes Federal Aviation Decisions. Finally, the decisions are available through LEXIS (TRANS library) and WestLaw (FTRAN-FAA database). For additional information, see the Web site.

³ 14 C.F.R. § 103.1 defines "ultralight vehicle" as a vehicle that:

- (a) Is used or intended to be used for manned operation in the air by a single occupant;
- (b) Is used or intended to be used for recreation or sport purposes only;
- (c) Does not have any U.S. or foreign airworthiness certificate; and
- (d) If unpowered, weighs less than 155 pounds; or
- (e) If powered:
 - (1) Weighs less than 254 pounds empty weight, excluding floats and safety devices which are intended for deployment in a potentially catastrophic situation;
 - (2) Has a fuel capacity not exceeding 5 U.S. gallons;
 - (3) Is not capable of more than 55 knots calibrated airspeed at full power in level flight; and
 - (4) Has a power-off stall speed which does not exceed 24 knots calibrated airspeed.

⁴ Section 103.15 provides: "No person may operate an ultralight vehicle over any congested area

doing, created a hazard to other persons or property in violation of 14 C.F.R. § 103.9(a).⁵

The ALJ assessed Siddall a civil penalty of \$1,250.⁶

I. Facts

Siddall flew a powered ultralight vehicle off a bluff called Kite Hill in Laguna Niguel, California on January 13, 2003. His friend, Kevin Keene, was flying behind him.⁷

Siddall's flight path is in dispute. The FAA alleges that: (1) Siddall flew over both Alicia Parkway and Aliso Creek Road; and (2) both thoroughfares were congested areas over which Siddall should not have flown. Siddall admits that he crossed Alicia Parkway, but he does not admit that he flew across Aliso Creek Road. At the end of his flight, Siddall returned to his starting point at Kite Hill.

Deputy Sheriff Jason Danks, who was patrolling at the time, received a call regarding individuals parachuting over the regional park and the adjacent neighborhoods. (Tr. 16.) According to his report, he arrived at the parking lot on the bluff at approximately 4:05 PM. (Exhibit C-5.) When he arrived there, he saw Siddall and Keene flying their ultralights. (Tr. 19.) He testified that he watched the two men flying

of a city, town, or settlement, or over any open air assembly of persons.”

⁵ Section 103.9(a) provides: “No person may operate any ultralight vehicle in a manner that creates a hazard to other persons or property.”

⁶ A copy of the ALJ's order is attached. (The ALJ's order is not attached to the electronic versions of this decision nor is it included on the FAA Web site.)

⁷ The FAA also brought a separate action against Keene for alleged violations involving his flight. The ALJ found that Keene violated 14 C.F.R. §§ 103.9(a) and 103.15, and assessed Keene a \$1,000 civil penalty.

for about 5 to 10 minutes. (Tr. 26, 44.)⁸

Deputy Danks testified that when Siddall landed, he approached Siddall in the parking lot on Kite Hill and questioned him. Deputy Danks reported the incident to the FAA. After an investigation, the FAA brought the instant civil penalty action against Siddall.

II. ALJ Decision

The ALJ found that Siddall flew over both Alicia Parkway and Aliso Creek Road. He also found that both the parkway and the road were “congested areas” within the meaning of 14 C.F.R. § 103.15, which prohibits operation of an ultralight vehicle over congested areas.⁹ The ALJ therefore concluded that Siddall violated Section 103.15. He also concluded that by operating over congested areas, Siddall created a hazard to persons and property in violation of Section 103.9(a).¹⁰

The ALJ assessed a civil penalty of \$1,250, which was \$950 less than the \$2,200 proposed by the FAA. The ALJ explained that although Siddall’s “action ... exposed the public traveling below to an unreasonable risk of danger,” Siddall’s “crossings were momentary and incidental to his aim of paragliding over park and woodland areas.” (Initial Decision at 6.)

⁸ Previously, Deputy Danks testified in the Keene case that he watched Siddall and Keene flying for approximately 2 minutes. The ALJ found the difference between Deputy Danks’ testimony at the hearing in this case that he watched the two men flying for approximately 5 to 10 minutes, and his testimony at the Keene hearing that he watched them for approximately 2 minutes, to be insignificant. The ALJ concluded that the difference did not affect Deputy Danks’ credibility. (Initial Decision at 2.)

⁹ For the text of this regulation, see note 4.

¹⁰ For the text of this regulation, see note 5.

III. Analysis

Siddall admits that he crossed Alicia Parkway, but he argues on appeal that he did not cross Aliso Creek Road. In any event, he asserts, neither thoroughfare was a “congested area.” Therefore, he did not violate the regulations, he claims.¹¹ He also challenges the credibility of the FAA witnesses who testified to the contrary.¹²

A. Did Siddall Cross Aliso Creek Road?

Deputy Danks testified numerous times that he saw Siddall fly over Aliso Creek Road. (Tr. 27, 28, 31, 56, 115.) Also, in his report written shortly after the incident, Deputy Danks wrote that Siddall flew over Aliso Creek Road. (Exhibit C-5.) The ALJ believed Deputy Danks’ testimony, stating that Deputy Danks “was in position to observe this accurately, as the road was less than 200 yards from where he was standing.” (Initial Decision at 3.) Siddall points to FAA Aviation Safety Inspector Robert Woods’ testimony that there was a 10-12 foot bank and claims that the bank would have blocked Deputy Danks’ view. Inspector Woods, however, testified that the bank did not extend

¹¹ Any arguments not specifically addressed have been found unworthy of discussion.

¹² For example, 6 months after the hearing, Siddall submitted a request to the FAA for records under the Freedom of Information Act (FOIA) that he believed would impugn Inspector Woods’ credibility. Later, after filing his appeal brief, Siddall filed an unlabeled document in which he argued that the FAA’s response to his FOIA request shows that Inspector Woods deliberately misled the ALJ at the hearing. Siddall argues that although the inspector claimed at the hearing that he repeatedly attempted to contact Siddall, the FAA’s response to his FOIA request contains only one letter from the inspector to Siddall.

The FAA moves to strike what it terms Siddall’s “additional brief.” Under 14 C.F.R. § 13.233(f), a party may not file more than one appeal brief without petitioning the FAA decisionmaker in writing first, which Siddall did not do. Further, the rule provides that leave may be granted only if the party demonstrates good cause for additional argument.

Assuming, *arguendo*, that Siddall’s filing is admissible, it does not show what Siddall insists that it shows. The inspector testified that he attempted to contact Siddall without success repeatedly (Tr. 135) and “[p]robably a dozen times” (Tr. 190). He did not testify that those attempts were limited to mail, as Siddall suggests. In fact, the inspector specifically testified that he attempted to telephone Siddall. (Tr. 135.)

“the whole way.” (Tr. 180.)¹³

Siddall also argues that Deputy Danks could not have seen any portion of his flight because Deputy Danks arrived at Kite Hill after Siddall had landed. Siddall points out that the ALJ found that he landed just before 4 PM, and Deputy Danks’ report states that the deputy arrived after that, at 4:05 PM. However, none of the citations that the ALJ provides states that Siddall landed just before 4 PM. The one that comes closest is the following testimony from Siddall: “A little bit before 4:00, I approached my – returning to the Kite Hill.” (Tr. 300.) This statement is unintelligible. Siddall’s own witness, Keene, testified that it was 4 PM when he and Siddall decided to return to Kite Hill. This indicates that they were still in the air at 4 PM.

Siddall has also argued that if Deputy Danks had watched Siddall fly for 2 minutes, as Deputy Danks testified in the Keene hearing, then he could not have flown: (1) the course drawn on the map at the hearing by Deputy Danks; or (2) an extended course that included all the places that Deputy Danks testified that he saw Siddall flying over, including Aliso Creek Road. (Appeal Brief at 11.) But the ALJ found that Deputy Danks watched Siddall fly for as many as 5 to 10 minutes, approximately, and the ALJ found that Aliso Creek Road was somewhat less than 200 yards from where Deputy Danks was standing. (Initial Decision at 3.) Thus, even if Deputy Danks watched Siddall for only approximately 2 minutes, he should have been able to see whether Siddall crossed Aliso Creek Road.

In any event, the ALJ believed Deputy Danks’ testimony regarding all these

¹³ The ALJ found, citing the map in the record, that to get to the Wilderness Park, one must fly over Aliso Creek Road. (Exhibits C-1 & C-2.) The map, however, does not show the inevitability of crossing Aliso Creek Road. (*Id.*)

matters. An ALJ's credibility determinations are not lightly overturned, given that the ALJ had the opportunity to observe the witnesses' demeanor. In the Matter of Gotbetter, FAA Order No. 2000-17 at 9 (August 11, 2000). The courts have stated that they will overturn credibility determinations only if "exceedingly improbable testimony" has been credited,¹⁴ the credited testimony was "impossible under the laws of nature,"¹⁵ or "a reasonable adjudicator would be compelled to a contrary conclusion."¹⁶

In this case, there is no evidence that the ALJ credited exceedingly improbable testimony or credited testimony that was impossible under the laws of nature. Similarly, there is no evidence that a reasonable adjudicator would be compelled to conclude that Siddall did not cross Aliso Creek Road. The credibility determinations of the ALJ in this case are owed deference and there is insufficient evidence in the record to overturn them.

B. Were Alicia Parkway and Aliso Creek Road "Congested Areas"?

Siddall argues that the ALJ erred in finding that Alicia Parkway and Aliso Creek Road were "congested areas" within the meaning of Section 103.15. Section 103.15 prohibits operating an ultralight vehicle over a congested area of a city, town, or settlement.

The statute and rules do not define "congested area." The ALJ was correct, however, that one must interpret Section 103.15 in light of its purpose. When the FAA promulgated Section 103.15, the FAA stated that its purpose was to protect "concentrations of the general public ... from the possible dangers inherent in the operation of vehicles of uncertificated, possibly unproven designs." 47 Fed. Reg. 38,770,

¹⁴ United States v. Johnson, 2008 WL 638614 at *3 (D.C. Cir. 2008).

¹⁵ United States v. Tyler, 512 F.3d 405, 411 (7th Cir. 2008).

¹⁶ Osonowo v. Mukasey, 2008 WL 918825 at *3 (8th Cir. 2008).

38,774 (September 2, 1982). The FAA also pointed out that “ultralight vehicles ... are flown by uncertificated pilots” *Id.*

There is no case law to date analyzing whether an area was congested under Section 103.15. The National Transportation Safety Board (NTSB), however, has interpreted the term “congested area” in the context of a different rule, the minimum safe altitude rule – *i.e.*, Section 91.119(b).¹⁷ The NTSB has held that moderate traffic on a highway is sufficient to make an area congested for purposes of the minimum safe altitude rule. Administrator v. Dutton, 7 NTSB 521, 523 (1990). According to the NTSB, traffic need not be “bumper-to-bumper” for a highway to constitute a “congested area.” Administrator v. Traub, NTSB Order No. EA-4188, 1994 WL 267753 at *2 (1994). While the Administrator is not bound by NTSB case law, the Administrator may follow it if it is persuasive. In the Matter of Richardson & Shimp, FAA Order No. 1992-49 at 9 n.13 (July 22, 1992).

Alicia Parkway is a major, six-lane thoroughfare through the city of Laguna Niguel, with three lanes in each direction. (Tr. 27.) Deputy Danks, who at the time had almost 12 years’ experience in law enforcement and had patrolled exclusively in Laguna Niguel for 4 years (Tr. 16, 100), testified that Alicia Parkway was heavily congested when Siddall crossed it (Tr. 79). In addition, Inspector Woods testified that Alicia Parkway is “always” busy. (Tr. 244.) Although FAA Aviation Safety Inspector Gary Suozzi testified that Alicia Parkway was congested at times and not congested at others, this does not conflict with Deputy Danks’ testimony that it was congested at the time of the incident.

¹⁷ Section 91.119(b) prohibits operating an aircraft over any congested area below an altitude of 1,000 feet above the highest obstacle.

As for Aliso Creek Road, Deputy Danks stated that it was a major thoroughfare and an “extremely busy” public street. (Tr. 27; Exhibit C-5.)¹⁸ Moreover, as Inspector Woods pointed out, there could be several people in each car (Tr. 244), increasing the number of the people on the ground and the magnitude of possible harm.

Siddall argues that Deputy Danks was not at Kite Hill when Siddall flew over Alicia Parkway and therefore could not have seen whether Alicia Parkway was congested, but this involves a credibility determination – *i.e.*, whether to believe Deputy Danks, who testified that he saw Siddall cross Alicia Parkway, or whether to believe Siddall. It also involves credibility determinations involving the amount of traffic – Deputy Danks, who testified that Alicia Parkway was heavily congested, versus Siddall and Keene, who testified that there was no traffic (Siddall) or very light to no traffic (Keene). (Tr. 312, 358.) As stated above, the ALJ’s credibility determinations are entitled to deference. The ALJ offered ample justification for his reliance on Deputy Danks’ testimony, citing his experience and familiarity with the area. The ALJ believed Deputy Danks, who had no reason to fabricate his testimony.¹⁹

Contrary to Siddall’s arguments, breaks in traffic do not necessarily show that a road is not congested. There could be a break in traffic and then an onslaught of cars thereafter. As the ALJ pointed out, it would be very difficult, if not impossible, for Siddall to time his flight to coincide with a break in traffic if the traffic is moderate, let

¹⁸ The ALJ noted also, citing a map in the record, that Aliso Creek Road feeds into state Route 73, a toll road. (Exhibit C-2.) To the ALJ, this was additional evidence that Aliso Creek Road was congested.

¹⁹ Concerning the photographs in the record of traffic on Alicia Parkway, Siddall argues that the photographer was not present at the hearing and it was not brought out at the hearing whether the photographs were random shots or were taken only when traffic was present. Even if the photographs should have been excluded, the FAA’s evidence is sufficient without them.

alone busy or heavily congested.

Finally, as the FAA points out, the record shows that the roadways are surrounded by significant residential, commercial, and governmental developments, including homes (Tr. 20; Exhibit C-1), a village center (Exhibit C-1), a strip mall (Tr. 183), a design shopping center (Exhibit C-1; Tr. 29-30), and a Federal building (Tr. 30; Exhibit C-2). The existence of these developments in the area suggests that there would be more cars (and therefore more people) on the ground that could be struck and injured in an accident caused by a falling ultralight vehicle. This type of adjacent development supports the conclusion that roads serving the area are likely to have enough traffic to constitute a congested area.

C. Did the ALJ Err in Excluding Certain Evidence?

Siddall argues that the ALJ erred by not admitting his videotape of the view from Kite Hill. (Appeal Brief at 7.) Siddall asserts that the videotape would have contradicted Deputy Danks' claim that he could see all the traffic on Alicia Parkway and that he could see Aliso Creek Road.

The ALJ issued a procedural order on June 27, 2005, mandating the exchange of amended exhibit lists within 55 days after service of the order. (Tr. 111.) Fifty-five days after service of the order would have been August 21, 2005. The ALJ also issued an order shortly before the hearing, on November 22, 2005, ordering Siddall to supply FAA counsel with all the documentary evidence that counsel had not yet received. Siddall failed to provide the videotape within these deadlines.

Siddall admitted that he did not make the videotape until the weekend before the hearing, and he did not produce it to the FAA until several business days before the

hearing, which took place on November 28 and 29, 2005. (*Id.*) FAA counsel stated that as a result, she did not have the opportunity to show it to key FAA witnesses Deputy Danks and Inspector Woods before the hearing. (Tr. 110-11.) As the ALJ noted, trial by ambush or surprise is not permitted. The videotape was an exhibit that could have been produced earlier; Siddall has not indicated that there were any extraordinary circumstances that prevented him from doing so. As a result, the ALJ did not abuse his discretion in excluding it.

Similarly, Siddall argues that the ALJ erred in excluding the statement of Wade Kloos dated November 14, 2004. (Appeal Brief at 7.) Siddall attempted to introduce the declaration at the hearing on November 28-29, 2005, even though it had not been produced before the hearing as required by the ALJ's procedural order. Siddall did not show good cause for failing to produce it. (Tr. 84-85.) Given Siddall's failure to comply with the ALJ's order, the ALJ did not err in excluding the statement.

D. Did the ALJ Err in Sequestering Siddall's Witness?

FAA counsel asked the ALJ to sequester the witnesses, with the exception of a witness who would assist FAA counsel. (Tr. 8-9.) The ALJ granted FAA counsel's request. (Tr. 10.) Siddall asked to have his friend Keene, who flew with him that day, assist him. (Tr. 229.) The ALJ ruled that Keene could not assist Siddall if Keene was going to testify. (Tr. 12-13.) Siddall argued that it was more difficult for him without Keene and that it helped to have someone there, but the ALJ did not change his ruling. (Tr. 229.)

On appeal, Siddall argues that the ALJ's ruling was in error. He asserts that Keene could have been a great help to him because Keene knew the case well and had

previously assisted in his own case arising out of the same incident. (Appeal Brief at 6.) Siddall complains that FAA counsel, who was a trained lawyer, had the assistance of one of her main witnesses, when he, who was *pro se*, had to struggle alone to conduct his defense, listen to the testimony, and make notes. (*Id.*) He insists that if FAA counsel could have a witness to assist her, then he should have had the same opportunity.

The purposes of sequestering witnesses are:

- (1) to keep witnesses from conforming their testimony to that of earlier witnesses;²⁰
- (2) to help detect untruthful testimony;²¹ and
- (3) to prevent witnesses from covering up inconsistencies in earlier testimony that have been revealed by the other witnesses.²²

Federal Rule of Evidence 615, “Exclusion of witnesses,” provides that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses”²³ The rule further provides as follows:

This rule does not authorize exclusion of (1) a party who is a natural person; or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney; or (3) a person whose presence is shown by a party to be essential to the presentation of the party’s cause; or (4) a person authorized by statute to be present.

The ALJ properly permitted Inspector Woods to assist FAA counsel because Inspector Woods fell under category (2). It is not uncommon for courts

²⁰ Geders v. United States, 425 U.S. 80, 87 (1976).

²¹ *Id.*

²² United States v. Ell, 718 F.2d 291, 293 (9th Cir. 1983).

²³ Strictly speaking, the Federal Rules do not apply in civil penalty cases, but when there is no civil penalty rule on point, they may be instructive. *E.g.*, In the Matter of Delaware Skyways, FAA Order No. 2005-6 at 7 n.12 (March 18, 2005).

to allow agency counsel to have an investigator at counsel's table to advise counsel during a hearing even if the agent is a witness. F. Rule Evid. 615, Advisory Committee Notes, 1974 Enactment. The FAA witness at issue was an employee of the FAA. Category (2) applies because the FAA is not a natural person, and FAA counsel designated Inspector Woods as the FAA's representative. Thus, Rule 615 authorized Inspector Woods to be present.

In contrast, the ALJ properly excluded Siddall's witness, Keene. Siddall has failed to show that Keene fell within any of the categories in Rule 615. The closest category into which he might fall is (3), "a person whose presence is shown by a party to be essential to the presentation of the party's cause." But Siddall never demonstrated that Keene's presence was essential to the presentation of his case. Siddall only told the ALJ that it was more difficult for him without Keene and that it helped to have someone there to assist him.

For these reasons, the ALJ did not err in excluding Keene from the courtroom during the testimony of other witnesses.

E. Was the Penalty Excessive?

Siddall argues that it is unfair to impose a \$1,250 civil penalty for a first-time offense, and the case should therefore be dismissed or the fine reduced. The statute and regulations, however, do not provide that cases involving first-time offenses should necessarily be dismissed or that the offender necessarily should be subject to a reduced civil penalty. Complainant sought the maximum civil penalty, \$2,200, but the ALJ determined that under the totality of the circumstances, a \$1,250 civil penalty would be appropriate. Siddall has provided no valid basis for reducing the proposed civil penalty

any further. The ALJ's sanction amount was entirely reasonable and was arrived at after careful consideration and balancing of the relevant factors, which included, on the one hand, the risk to people on the ground, and on the other hand, the brief and incidental nature of the crossings. The civil penalty of \$1,250 will stand.

For these reasons, this decision affirms the ALJ's decision and assesses a \$1,250 civil penalty.²⁴

[Original signed by Robert A. Sturgell]

ROBERT A. STURGELL
ACTING ADMINISTRATOR
Federal Aviation Administration

²⁴ 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 or 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 (Dec. 5, 2006) (regarding petitions for review of final agency decisions in civil penalty cases).