ORIGINAL

20070032

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert A. Bienek,

Petitioner/Appellant,

v.

Department of Transportation,

Respondent/Appellee.

Supreme Ct. No. 20070032

Grand Forks Co. No. 18-06-C-01102

APPEAL FROM THE DISTRICT COURT
GRAND FORKS COUNTY, NORTH DAKOTA
NORTH EAST CENTRAL JUDICIAL DISTRICT

HONORABLE DEBBIE G. KLEVEN

RESPONDENT/APPELLEE'S RESPONSE TO BRIEF FOR PETITIONER/APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Zachary E. Pelham
Assistant Attorney General
State Bar ID No. 05904
Office of Attorney General
500 North Ninth Street
Bismarck, ND 58501-4509
Phone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Respondent/Appellee.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert A. Bienek,	)	
	)	
Petitioner/Appellant,	)	**Supreme Ct. No. 20070032**
	)	
v.	)	**Grand Forks Co. No. 18-06-C-01102**
	)	
Department of Transportation,	)	
	)	
Respondent/Appellee.	)	

APPEAL FROM THE DISTRICT COURT
GRAND FORKS COUNTY, NORTH DAKOTA
NORTH EAST CENTRAL JUDICIAL DISTRICT

HONORABLE DEBBIE G. KLEVEN

RESPONDENT/APPELLEE'S RESPONSE TO BRIEF FOR PETITIONER/APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Zachary E. Pelham
Assistant Attorney General
State Bar ID No. 05904
Office of Attorney General
500 North Ninth Street
Bismarck, ND 58501-4509
Phone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Respondent/Appellee.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

STATEMENT OF ISSUE

Robert A. Bienek ("Bienek") was twice "convicted" of driving under the influence of alcohol ("DUI")—once by a criminal court and once by the North Dakota Department of Transportation ("Department"). "Conviction" includes a determination by an authorized administrative tribunal of a violation of the law. A commercial driver's licenseholder is disqualified for life after two DUI "convictions." Bienek's commercial driving privileges were disqualified for life. Should the Court affirm the Department's decision that it is an authorized administrative tribunal capable of determining a DUI violation occurred?

STATEMENT OF THE CASE

The Department is satisfied with Bienek's Statement of the Case, to the extent it provides an adequate chronology of this appeal.

STATEMENT OF FACTS

In June 2006, Bienek was convicted of driving while intoxicated ("DWI") in Minnesota. (Appendix ("App.") 23-24.) Bienek did not dispute this conviction. (App. 8, lines ("ll.") 10-13.) Bienek was driving a noncommercial vehicle. (App. 19.)

On April 26, 1990, Bienek was arrested for driving under the influence of alcohol ("DUI") in North Dakota. (App. 26, 29.) While the criminal case against Bienek was dismissed by the Grand Forks Municipal Court on July 6, 1990, the Department determined that Bienek's driving privileges should be administratively suspended for violating N.D.C.C. ch. 39-20. (App. 10, ll. 2-8; 26; 29-30.) The record does not provide a reason for the criminal dismissal. Bienek does not dispute that the Department suspended his driving privileges in 1990. Bienek was driving a noncommercial vehicle. (Bienek Br. 2.)

STANDARD OF REVIEW

The Administrative Agencies Practice Act governs an appeal from an administrative decision disqualifying a commercial driver's licenseholder from operating a commercial motor vehicle. N.D.C.C. chs. 28-32 and 39-06.2. The appeal is civil in nature. *Knoll v. N.D. Dep't of Transp.*, 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. *Id.*

The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

Findings by an administrative agency are sufficient if the reviewing court is able to understand the agency's rationale. *In re Boschee*, 347 N.W.2d 331, 336 (N.D. 1984). A court must not make independent findings of fact or substitute its judgment for that of the agency. *Bryl v. Backes*, 477 N.W.2d 809, 811 (N.D.

1991). A reviewing court, rather, determines only "whether a reasoning mind reasonably could have determined that the factual conclusions reached were proved by the weight of the evidence from the entire record." *Id.* (citation omitted). Legal questions, such as interpreting a statute, are fully reviewable by this Court. *Bjerklie v. Workforce Safety & Ins.*, 2005 ND 178, ¶ 9, 704 N.W.2d 818.

LAW AND ARGUMENT

I. Bienek was Properly Disqualified from Operating a Commercial Motor Vehicle for Life.

The appeal hinges on the interpretation of the statutorily defined word "conviction." The definition of conviction, found at N.D.C.C. § 39-06.2-02(8), applies to administrative driving privilege suspensions under N.D.C.C. ch. 39-20, the implied consent chapter. The Department is authorized as an administrative tribunal to determine whether a violation involving DUI, pursuant to N.D.C.C. ch. 39-20, occurred. The Department's position is legally correct and is set forth below.

A. "Conviction" under N.D.C.C. ch. 39-06.2 includes a determination by an authorized administrative tribunal of a violation of the law.

North Dakota law mimics the Federal Commercial Motor Vehicle Safety Act of 1986. N.D.C.C. § 39-06.2-01. The explicit purpose of the Commercial Driver's Licenses chapter "is to implement the federal Commercial Motor Vehicle Safety Act of 1986 . . . . This chapter is a remedial law which should be liberally construed to promote the public health, safety, and welfare." *Id.* North Dakota adopted this statute in 1989.[1]

---

[1] The relevant portions of N.D.C.C. § 39-06.2-02(8) have remained the same since the chapter was first enacted. *See* 1989 N.D. Sess. Laws Ch. 461, § 4. It should be noted that N.D.C.C. § 39-06.2-10(8), which requires lifetime disqualification of commercial driving privileges upon a second DUI conviction, became effective August 1, 2003. *See* 2003 N.D. Sess. Laws ch. 322, § 5.

A commercial driver's licenseholder is subject to stricter consequences for driving under the influence of alcohol. "For a second *conviction* of driving while under the influence [of alcohol] . . . while operating a *noncommercial* motor vehicle, a commercial driver's licenseholder *must* be disqualified from operating a *commercial* motor vehicle for life." N.D.C.C. § 39-06.2-10(8) (emphasis added).

"Conviction," as the term is used in N.D.C.C. ch. 39-06.2, is defined as: "an unvacated adjudication of guilt, or a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or an authorized administrative tribunal. . . ." N.D.C.C. § 39-06.2-02(8) (emphasis added). While use of the word "guilt" intimates a criminal context, the definition includes individuals who have been determined by an authorized administrative tribunal to have "violated or failed to comply with the law." *Id.* Reading N.D.C.C. § 39-06.2-10(8), together with N.D.C.C. § 39-06.2-02(8), the Department determined Bienek must be disqualified for life from holding a commercial driver's license. (App. 35-36.)

B. A violation of N.D.C.C. ch. 39-20 for driving under the influence, as determined by the Department, is a "conviction" in the context of N.D.C.C. ch. 39-06.2.

Bienek was convicted of two disqualifying offenses. Bienek does not dispute his June 2006 Minnesota DWI conviction. (App. 8, ll. 10-13.) But Bienek argues that he was not "convicted" by an authorized administrative tribunal when his driving privileges were administratively suspended by the Department for driving under the influence of alcohol in 1990. (Bienek Br. 6-9.) Bienek's argument is without merit.

Bienek's admission that he was administratively suspended in 1990 for DUI means the Implied Consent statute, N.D.C.C. ch. 39-20, was applied.[2] All implied consent actions involve individuals who are placed under arrest for driving, or being in actual physical control of, a vehicle while under the influence of alcohol. North Dakota Century Code § 39-20-01 states, in part: "[t]he test or tests must be administered at the direction of a law enforcement officer only after placing the person . . . under arrest and informing that person that the person is or will be charged with the offense of driving or being in actual physical control of a vehicle upon the public highways while *under the influence* of intoxicating liquor. . . ." (Emphasis added.) Bienek's admission that his driving privileges were suspended by the Department in 1990, as well as the Department's central records, establish that he was "convicted" of driving under the influence of alcohol. (App. 10, ll. 2-8; App. 26.)

Under N.D.C.C. § 39-20-03.1(1), a law enforcement officer is required to issue a temporary operator's permit valid for twenty-five days to a licensed driver when the results of a chemical test administered in accordance with N.D.C.C. ch. 39-20 are over the legal limit. "The temporary operator's permit serves as the director's official notification to the person of the director's intent to revoke, suspend, or deny driving privileges in this state." *Id.* Pursuant to N.D.C.C. § 39-20-05(1), a driver may *choose* to challenge the proposed suspension; a driver has 10 days after issuance of the temporary operator's permit to decide whether to request an administrative hearing. "If no hearing is requested within the time limits in this section . . . the expiration of the temporary operator's permit serves as the director's official notification to the person of the revocation, suspension,

[2] The relevant portions of the current Implied Consent act were in effect in 1990. *See* 1989 N.D. Sess. Laws ch. 478, §§ 1-2; 1989 N.D. Sess. Laws ch. 479, § 2.

or denial of driving privileges in this state." N.D.C.C. § 39-20-05(1).

When an adult driver to whom a temporary operator's permit is issued makes a timely request for an administrative hearing, the hearing officer must make findings of fact on four broad issues following the hearing, as follows:

> [W]hether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance . . . ; whether the person was placed under arrest . . . ; whether the person was tested in accordance with section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent by weight . . . .

N.D.C.C. § 39-20-05(2). The Department is required to make a determination on each of these four issues when an adult driver requests an administrative hearing. But the question is whether the suspension of driving privileges of a person who does not request an administrative hearing reflects a determination by the Department of the same four issues and, if so, whether it is a "determination" by the Department, within the meaning of N.D.C.C. § 39-06.2-02(8) and N.D.C.C. § 39-06.2-10(8), that Bienek violated the DUI law.

For the Department to suspend driving privileges under N.D.C.C. ch. 39-20 based upon chemical tests above the legal limit, N.D.C.C. § 39-20-03.1(3) requires the law enforcement officer to forward a "certified written report" to the Department. The "certified written report" is called the "Report and Notice." *Ding v. Dir., N.D. Dep't of Transp.*, 484 N.W.2d 496, 498 (N.D. 1992.) The second sentence in N.D.C.C. § 39-20-03.1(3) requires that the certified written report "show": 1) "the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while in violation of section 39-08-01, or equivalent ordinance," 2) "the person was lawfully arrested," 3) "the person was tested for alcohol concentration under this chapter," and 4)

"the results of the test show that the person had an alcohol concentration of at least eight one-hundredths of one percent by weight . . . ." (Emphasis added).

These four points in N.D.C.C. § 39-20-03.1(3) correspond exactly with the four issues that a hearing officer must resolve under N.D.C.C. § 39-20-05(2) when the driver requests a hearing. Thus, in order for the Department to suspend a person's driving privileges under N.D.C.C. ch. 39-20, the Department must have on file the law enforcement officer's certified written report that essentially makes a prima facie showing on the same four points at issue when an administrative hearing is requested. Under the second sentence in N.D.C.C. § 39-20-03.1(3), and the last sentence in N.D.C.C. § 39-20-05(1), the suspension of driving privileges of an adult driver who does not request an administrative hearing under N.D.C.C. ch. 39-20 necessarily requires and reflects a *determination* by the Department on these four points.

The Department's suspension of Bienek's driving privileges in 1990, pursuant to N.D.C.C. § 39-20-03.1(3), was based on, in part, a determination that the officer had reasonable grounds to believe that Bienek had been driving or was in actual physical control of a vehicle while in violation of section 39-08-01, or equivalent ordinance and that the results of the test showed Bienek had an alcohol concentration of at least ten one-hundredths of one percent by weight. The North Dakota Supreme Court has observed that the term "reasonable grounds" as used in N.D.C.C. ch. 39-20 is synonymous with the term "probable cause." *Zietz v. Hjelle*, 395 N.W.2d 572, 574 (N.D. 1986).

The hearing officer recommended that Bienek *not* be disqualified from operating a commercial motor vehicle for life because the hearing officer concluded that the Department's determination in 1990 was not a "conviction" for "driving under the influence." (App. 33.) Specifically, the hearing officer

observed in his conclusions of law that "[n]either an administrative hearing or a report and notice to the director determines 'guilt' as to the offense of driving under the influence or whether the person actually violated or failed to comply with the law in regard to driving under the influence." (*Id.*) But this appellate court need not reach the question of whether or not the Department's action in 1990 was an "adjudication of guilt" because it is clear, echoing the statutory language in N.D.C.C. § 39-06.2-02(8) and N.D.C.C. § 39-06.2-10(8), the Department's action in 1990 was a "determination" by an "authorized administrative tribunal" of violating or failing to comply with the DUI law.

Bienek's argument on appeal is the same as the hearing officer's conclusion of law. (Bienek Br. 8-9.) Specifically, Bienek argues "[t]he hearing officer was correct in his conclusion that the process for suspending Mr. Bienek's commercial driver's license did not speak to a determination of guilt, and therefore was not a 'conviction.'" (*Id.* at 9.) But this statement ignores the fact that the administrative implied consent procedure operates completely separate from the criminal process. *See generally* N.D.C.C. ch. 39-20. Bienek was given the chance to dispute any adverse administrative action in 1990, but chose not to.

Bienek's argument presumably is in response to a statement in the Department's final decision issued on August 15, 2006. (App. 35-36.) Specifically, the last sentence in the conclusions of law states that "[t]he driving record supports that [Bienek] was found guilty and/or violated the state's DUI laws." (*Id.* at 36.) This was not a definitive contention that Bienek was "found guilty" of an offense in 1990. Rather, it is a contention that Bienek either was "found guilty" or "violated the state's DUI laws" or both, in 1990.

Bienek apparently contends that a determination by the Department that the law enforcement officer had "reasonable grounds" to believe Bienek drove or was in actual physical control of a vehicle while under the influence of alcohol is not good enough because it is not the same as a conviction in criminal court. Likewise, in the hearing officer's recommended conclusions of law, the hearing officer concluded that the administrative determination under N.D.C.C. ch. 39-20 is not a determination that "someone committed the offense of driving under the influence. . . ." (App. 33.) The error in Bienek's contention, and the hearing officer's recommended conclusion of law, however, is that they apply a definition of "conviction" that is much more narrow than the expansive definition in N.D.C.C. § 39-06.2-02(8). All that is required under N.D.C.C. §§ 39-06.2-02(8) and 39-06.2-10(8) is an administrative determination that Bienek violated or failed to comply with the DUI law; this occurred in 1990 when his driving privileges were suspended. There is no requirement that the administrative determination be based on proof beyond a reasonable doubt.

N.D.C.C. § 39-08-01(1)(a) makes it unlawful for a person to drive or be in actual physical control of a vehicle if the person has an alcohol concentration above the legal limit. And N.D.C.C. § 39-08-01(1)(b) makes it unlawful for a person to drive under the influence of intoxicating liquor. The administrative determination in 1990 arising out of the second sentence in N.D.C.C. § 39-20-03.1(3) and the last sentence in N.D.C.C. § 39-20-05(1) – that Bienek drove or was in actual physical control of a vehicle while in violation of N.D.C.C. § 39-08-01 and his alcohol concentration was above the legal limit – is, for all practical purposes, an administrative determination that Bienek violated the DUI law and, thus, a "conviction" of driving under the influence within the meaning of N.D.C.C. § 39-06.2-02(8) and N.D.C.C. § 39-06.2-10(8). Bienek's conviction in 1990, in

conjunction with the conviction in 2006, required the Department to disqualify Bienek from operating a commercial motor vehicle for life.

C. The Department is an authorized administrative tribunal regardless of whether a hearing is held.

The Department is an "authorized administrative tribunal." Though this term is not specifically defined in N.D.C.C. ch. 39-06.2, it is in other statutes. "Tribunal" is defined in the child support realm as "a court, *administrative agency*, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage." N.D.C.C. § 14-12.2-01(22) (emphasis added). North Dakota Rule of Professional Conduct 1.0(p) defines "tribunal" as "a court, an arbitrator in a binding arbitration proceeding or a legislative body, *administrative agency* or other body acting in an adjudicative capacity." (Emphasis added). And workers compensation claims are administered by a "special tribunal or administrative agency." *Vickery v. N.D. Workers Comp. Bureau*, 545 N.W.2d 781, 784 (N.D. 1996). Because the Department was "authorized" by statute to suspend Bienek's driving privileges in 1990, the Department is an "authorized administrative tribunal." *See* N.D.C.C. ch. 39-20.

It is of no consequence that Bienek chose not to request an administrative hearing regarding his DUI violation in 1990. The Department issued "official notification" that Bienek's driving privileges would be suspended. A determination[3] was made by the Department, authorized by N.D.C.C. ch. 39-20,

[3] Bienek notes "determination" is not defined in Title 39. (Bienek Br. 8.) Yet many other words are not defined in Title 39, such as "authorized administrative tribunal." "If no definition to a word contained in a certain section is given, the word is to be understood in its ordinary sense, construed according to the context in which it lies, and interpreted to give a reasonable result." *Ames v. Rose Township Bd. of Township Supervisors*, 502 N.W.2d 845, 850 (N.D.1993); N.D.C.C. § 1-02-02. It is quite obvious what the word "determination" means in the context of N.D.C.C. § 39-06.2-02(8)—a decision made by the authorized administrative tribunal that a violation or failure to comply with the law occurred.

that Bienek drove while under the influence of alcohol.

D. The pertinent legislative history as to N.D.C.C. ch. 39-06.2 is helpful, but it is not necessary to define "conviction."

In its final decision, the Department cites legislative history in support of the contention that the Department's action in 1990 reflected an "adjudication of guilt" within the meaning of the definition of "conviction" in N.D.C.C. § 39-06.2-02(8). (App. 36.) Yet extrinsic aids, including legislative history, are resorted to only when statutory language is ambiguous. *Leet v. City of Minot*, 2006 ND 191, ¶ 13, 721 N.W.2d 398. If statutory language is clear and unambiguous, legislative intent is presumed clear from the face of the statute. *Id.* The statutory language of N.D.C.C. § 39-06.2-02(8) is clear.

While the Department cited legislative history in its Findings of Fact, Conclusions of Law and Decision, the legislative history merely supported the plain interpretation of N.D.C.C. § 39-06.2-02(8). (App. 36.) The federal legislative history states that administrative per se DUI determinations, like Bienek's 1990 suspension by the Department, should be included as a "conviction" for purposes of disqualifying commercial driving privileges. (*Id.*) The comment in the final rule implementing the Federal Motor Carrier Safety Improvement Act of 1999, which was adopted by North Dakota in August 2001, merely supports the Department's sound reading of N.D.C.C. § 39-06.2-02(8).

E. It is not relevant that N.D.C.C. § 39-06.2-10(8) was not enacted until after Bienek's first DUI "conviction."

It is of no consequence that Bienek's first DUI conviction occurred in 1990, about 13 years before N.D.C.C. § 39-06.2-10(8) was enacted. Borrowing from a recent North Dakota Supreme Court quotation, and inserting the same

rationale in this appeal, the following is an accurate representation of the law as applied here:

> The Department's application of N.D.C.C. § 39-06.2-10(8) cannot be said to be retroactive merely because [Bienek's] first DUI conviction in [1990] occurred before the effective date of the subsection. It was [Bienek's] second DUI offense, an offense that occurred after the effective date of the subsection in 2003, that triggered the ninety-nine year driver's license suspension.

Lentz v. Sprynczynatyk, 2006 ND 27, ¶ 13, 708 N.W.2d 859. That there is no "foreseeable stopping point as to how far back the first offense may be" has been deemed irrelevant. (Bienek Br. 16.) The point made by this Court in *Lentz* applies: so long as the triggering conviction occurred after enactment of N.D.C.C. § 39-06.2-10(8), consideration of a previous "conviction," regardless of when it occurred, is proper under the law.

II. Bienek Waived His Due Process and Statutory Construction Arguments.

It is well established that an appellant waives arguments not raised at lower proceedings. This Court has stated: "[i]t is well settled that one of the guidelines for an appeal on any issue or contention is that the issue on appeal was adequately raised in the lower court." *Williams County Soc. Servs. Bd. v. Falcon*, 367 N.W.2d 170, 176 (N.D. 1985); *see also Skjonsby Truck Line, Inc. v. Elkin*, 325 N.W.2d 271, 275 (N.D. 1982) (general rule "also applies to consideration of issues on appeal from administrative agency proceedings").

Two of Bienek's arguments were not raised below. First, Bienek argues the definition of "conviction" under N.D.C.C. § 39-06.2-08(2) "renders this statute void-for-vagueness." (Bienek Br. 9-12.) Second, Bienek argues Title 39 conflicts with the definition of "conviction" under N.D.C.C. § 39-06.2-02(8). (*Id.* at 12-14.) Because these arguments were not raised before, they should not be considered. (*See* Appellee Appendix at 1-18 (Bienek's district court brief does

not contain these arguments); *see also* App. 3-12 (the administrative transcript does not contain any reference to either argument).)

It is also well settled that issues are precluded on appeal if they are not adequately specified in the appellant's specifications of error. *See Dettler v. Sprynczynatyk*, 2004 ND 54, ¶¶ 12, 21, 676 N.W.2d 799 (holding failure to particularly state issue in specifications of error preclude appellate review of the issues); *see also Vetter v. N.D. Workers Comp. Bureau*, 554 N.W.2d 451, 454 (N.D. 1996) (holding specifications of error must "identify what matters are truly at issue with sufficient specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed"); *Falcon*, 367 N.W.2d at 176 (holding "[i]t is well settled that one of the guidelines for an appeal on any issue or contention is that the issue on appeal was adequately raised in the lower court."). Bienek did not include his due process or statutory construction arguments in his specifications of error. (Appellee Appendix at 19.) Because neither of these issues was addressed in Bienek's specifications of error, they are not properly before this Court and should not be considered.

Alternatively, should the Court consider Bienek's "void-for-vagueness" and "conflict with Title 39" arguments, the arguments should be rejected on their merits.

Bienek's due process void-for-vagueness argument is without merit. While the due process void-for-vagueness doctrine is applicable in the civil context, the argument fails here. *See Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 755 (N.D. 1989) (explaining void-for-vagueness doctrine applies to both criminal and civil statutes). This Court has held that "[a] statute is not unconstitutionally vague if its language, 'when measured by common understanding and practice, give adequate warning of the conduct proscribed

and marks boundaries sufficiently distinct for judges and juries to fairly administer the law.'" *W. Gas Res., Inc. v. Heitkamp*, 489 N.W.2d 869, 873 (N.D. 1992) (quoting *Stoner*, 446 N.W.2d at 755). And neither is a statute unconstitutionally vague if extrinsic aids are necessary to understand the statute. *Id.* This Court has also held that a reasonable person standard is used in determining whether the meaning of the statute gives adequate warning of prohibited conduct. *State v. Tranby*, 437 N.W.2d 817, 821 (N.D. 1989).

Bienek seems to argue that because he was ignorant of the law, he should be excused. (Bienek Br. 9-12.) But this is untenable; ignorance of the law is not an excuse. *Berg v. Hogan*, 322 N.W.2d 448, 452 (N.D. 1982). Chapter 39-06.2 is not vague as to the consequences of a conviction of DUI. "Conviction" explicitly includes violations of law determined by an authorized administrative tribunal. The Department is an authorized administrative agency, just as it was in 1990.

Bienek's statutory construction argument also fails on its merits. The definition of "conviction" in N.D.C.C. ch. 39-06.2, which applies specifically to commercial driver's licenses, does not conflict with other chapters in Title 39. (*See* Bienek Br. 12-14.) N.D.C.C. ch. 39-06.2 already addresses this issue: "To the extent that this chapter conflicts with general driver's licensing provisions, this chapter prevails." Because the overarching issue involves whether two "convictions" under N.D.C.C. § 39-06.2-10(8) took place, the definition of "conviction" under N.D.C.C. ch. 39-06.2 necessarily applies. In fact, it is only under N.D.C.C. ch. 39-06.2 that the specific definition of conviction applies.

That N.D.C.C. § 39-06-30 also defines conviction is irrelevant for purposes of commercial driving privileges. The North Dakota Century Code provides:

> Whenever a general provision in a statute is in conflict with a special provision in the same or in another statute, the two must be construed, if possible, so that effect may be given to both provisions, but if the conflict between the two provisions is irreconcilable the special provision must prevail and must be construed as an exception to the general provision, unless the general provision is enacted later and it is the manifest legislative intent that such general provision shall prevail.

N.D.C.C. § 1-02-07. Because N.D.C.C. ch. 39-06.2 is specific to the very issue in this appeal – that is – whether commercial driving privileges can be disqualified for life for a second "conviction" of driving under the influence of alcohol – it is axiomatic that the definition of "conviction" under N.D.C.C. ch. 39-06.2 applies.

CONCLUSION

The Department respectfully requests that this Court affirm the Department's final decision dated August 15, 2006, disqualifying Bienek from operating a commercial motor vehicle for life.

Dated this 5th day of April, 2007.

State of North Dakota
Wayne Stenehjem
Attorney General

By: Zachary E. Pelham

Zachary E. Pelham
Assistant Attorney General
State Bar ID No. 05904
Office of Attorney General
500 North Ninth Street
Bismarck, ND 58501-4509
Phone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellee.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Robert A. Bienek, Petitioner/Appellant, v. Department of Transportation, Respondent/Appellee.	**Supreme Ct. No. 20070032** **Grand Forks Co. No. 18-06-C-01102** **AFFIDAVIT OF SERVICE BY MAIL**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 5th day of April, 2007, I served the attached **RESPONDENT/APPELLEE'S RESPONSE TO BRIEF OF PETITIONER/APPELLANT and APPENDIX OF RESPONDENT/APPELLEE** upon Robert A. Bienek, by and through his attorney Kerry S. Rosenquist, by placing a true and correct copy thereof in an envelope addressed as follows:

Kerry S. Rosenquist
Attorney At Law
301 N 3rd St., Ste. 3000
Grand Forks, ND 58203

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Donna J. Connor

Subscribed and sworn to before me
this 5th day of April, 2007.

Susan Pickart
Notary Public

SUSAN PICKART
Notary Public
State of North Dakota
My Commission Expires Sept. 5, 2012