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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Derek Pokrzywinski, Appellant, v. North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20140043** **District Ct. No. 50-2013-CV-00218**

APPEAL FROM THE DISTRICT COURT
WALSH COUNTY, NORTH DAKOTA
NORTHEAST JUDICIAL DISTRICT

HONORABLE M. RICHARD GEIGER

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Other Authorities

STATEMENT OF ISSUES

I. Pokrzywinski was arrested for driving under the influence of alcohol. A Report and Notice notified him the Department intended to revoke his driving privileges. Under N.D.C.C. § 39-20-04 the Report and Notice must show the officer had probable cause to arrest. The Report and Notice contains a section titled "Officer's statement of probable cause" in which the arresting officer checked a box indicating "crash" and another box indicating "odor of alcoholic beverage" with further explanation that Pokrzywinski "admitted consuming 2 beers." Does the Department have jurisdiction to revoke Pokrzywinski's driving privileges?

II. Whether the hearing officer's finding that Pokrzywinski had the capacity to and did refuse to submit to a blood test requested by the officer is against the greater weight of the evidence?

STATEMENT OF CASE

On May 31, 2013, Trooper Anthony DeJean (Trooper DeJean) of the North Dakota Highway Patrol arrested Derek Pokrzywinski (Pokrzywinski) for the offense of driving under the influence of intoxicating liquor (DUI). App. 6. A Report and Notice, including a temporary operator's permit, was issued to Pokrzywinski after Pokrzywinski refused to submit to a chemical blood test requested by the trooper. Id. The Report and Notice notified Pokrzywinski of the Department's intent to revoke his driving privileges. Id.

In response to the Report and Notice, Pokrzywinski requested an administrative hearing in accordance with N.D.C.C. § 39-20-05. Transcript ("Tr.") at Exhibit ("Ex.") 1c. The hearing was held on July 9, 2013, at which time the hearing officer considered the following issues:

(1) [w]hether a law enforcement officer had reasonable grounds to believe [Pokrzywinski] had been driving or was in actual physical control of a vehicle while under the influence of

intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;

(2) [w]hether [Pokrzywinski] was placed under arrest; and

(3) [w]hether [Pokrzywinski] refused to submit to the test or tests.

Tr. Ex. 2.

Evidence was presented at the hearing showing that Pokrzywinski had a previous driving under the influence conviction in 2008. Tr. Ex. 1e. Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision revoking Pokrzywinski's driving privileges for a period of three years. Tr. 79-85. Pokrzywinski requested judicial review of the hearing officer's decision. Judge M. Richard Geiger affirmed the hearing officer's decision. App. 12-17. The Judgment was entered December 18, 2013. App. 19. Notice of Entry of Judgment was provided on December 19, 2013. App. 4, at Doc. 32. Pokrzywinski appealed from the Judgment to this Court. App. 20. The Department asks this Court to affirm the Judgment of the Walsh County District Court and the administrative revocation of Pokrzywinski's driving privileges for three years.

STATEMENT OF FACTS

On June 15, 2013, at approximately 8:30 p.m. Pokrzywinski was involved in a single vehicle motorcycle crash on Walsh County Road 15 approximately three miles west of Pisek, North Dakota. Tr. 4-5, 28. Walsh County Sheriff's Deputy Richard Sherlock (Deputy Sherlock) responded to the dispatch call. Tr. 4. Upon arrival on scene, Deputy Sherlock observed Pokrzywinski on a back

board, saw that he had multiple injuries and was bleeding from his head. Tr. 5-7. Deputy Sherlock spoke briefly with Pokrzywinski, and Pokrzywinski acknowledged he had consumed a couple beers, hit a pothole and lost control. Tr. 6. Deputy Sherlock saw that Pokrzywinski's eyes were bloodshot and watery and that a strong odor of an alcoholic beverage was coming from him. Id.

Trooper Matthew Peschong (Trooper Peschong) arrived on scene, was briefed by Deputy Sherlock and took over the investigation. Tr. 10. The trooper spoke to Aaron Nord, the reporter of and eye witness to the accident, who told Trooper Peschong that Pokrzywinski had a large number of drinks, that he had tried to take Pokrzywinski's keys from him at the bar, and that after the crash, Pokrzywinski told him he was going 90 miles per hour when he crashed. Tr. 14-17. The skid marks at the scene were consistent with excessive speed. Tr. 19.

Trooper Peschong contacted Trooper Anthony DeJean (Trooper DeJean) and requested he arrest Pokrzywinski at Altru Hospital in Grand Forks and obtain a blood draw. Trooper DeJean went to Altru Hospital arriving before the ambulance. Tr. 21-22, 33. As Pokrzywinski was wheeled in, Trooper DeJean could smell the odor of alcohol as Pokrzywinski went by. Tr. 35. Pokrzywinski was conscious and alert at the scene of the crash and during transport. Tr. 28, 39. Pokrzywinski was in an exam room for at least one hour before Trooper DeJean was allowed contact with him. Tr. 35-36. Trooper DeJean asked Pokrzywinski how much he had to drink, and Pokrzywinski said he had two beers to drink. Tr. 36. Trooper DeJean could smell the odor of alcohol on Pokrzywinski's person and in the exam room. Id. Trooper DeJean advised

Pokrzywinski that he was under arrest for driving under the influence. Tr. 36-37; App. 6. More than two hours had passed since the crash, and therefore, no implied consent advisory was given. Tr. 37. Nevertheless, Trooper DeJean asked Mr. Pokrzywinski for a blood draw to be tested. Id. Pokrzywinski refused to submit to the test. Tr. 37-38. Pokrzywinski asked whether he had to provide a blood sample. Tr. 38. Trooper DeJean said he could not provide Pokrzywinski any legal advice. Id. Pokrzywinski refused to submit to the blood draw. Tr. 37-38.

Trooper DeJean called Trooper Peschong and relayed that Pokrzywinski had refused the blood test. Tr. 37. Trooper Peschong subsequently called back and advised Trooper DeJean to recite the implied consent advisory to Pokrzywinski. Id. Trooper DeJean returned to Pokrzywinski's hospital room and read the implied consent advisory and Pokrzywinski again refused the test. Id. Trooper DeJean explained that when he went back into the exam room the second time Pokrzywinski was more sedated and was mumbling, but Trooper DeJean was able to tell the difference between a mumbled yes and a mumbled no response. Tr. 37-38. This second conversation took place at around 10:48 p.m., about 10 minutes after the first conversation. Tr. 41.

Pokrzywinski testified at the hearing that he had no recollection of the accident, conversing with emergency personnel at the crash site, or speaking with the trooper in the hospital. Tr. 53-54. Pokrzywinski only remembers slowing down on the roadway due to bad gravel and waking up the next morning in the hospital around 6:00 a.m. Tr. 53-54. Pokrzywinski described his injuries as his

head being scalped back five inches, loss of his pinkie finger on his right hand, severe loss of skin on his fourth finger, broken color bone, and road rash on other parts of his body. Tr. 57. Pokrzywinski did not know whether he suffered any type of concussion. Id.

Pokrzywinski's mother, Patricia Kouba (Ms. Kouba), also testified at the hearing. Ms. Kouba indicated she received a call notifying her of her son's accident around 8:40 p.m. and after making sure her younger children had someone to care for them, she went to the hospital. Tr. 66. She arrived at the hospital just as the Park River ambulance was leaving. Tr. 66-67. At that time Pokrzywinski had already been treated. Tr. 67. Ms. Kouba observed that Pokrzywinski's head and arm were wrapped and his face had a lot of blood. Tr. 67-68. Ms. Kouba was kept out of the room for quite some time by hospital staff until she persisted in seeing her son. Tr. 68. According to Ms. Kouba, Pokrzywinski was not thinking straight, because he was not able to say much more than "I'm okay, mom", while staring at the ceiling rather than looking at her. Tr. 68. Ms. Kouba said that she had to consent to medical treatment because Pokrzywinski was unable to, and because he was refusing treatment. Tr. 69. Ms. Kouba did not speak to any law enforcement personnel at the hospital. Tr. 67.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

Pokrzywinski appealed the administrative decision to the Walsh County District Court. App. 10-11. With respect to Pokrzywinski's argument the Department lacked jurisdiction to revoke his driving privileges due to

Pokrzywinski's perception the Report and Notice did not establish probable cause to arrest, the hearing officer ruled:

> Although the Report and Notice lists only "crash", "odor of alcohol" and "admitted consuming 2 beers" as probable cause to arrest, the statements are true and in the context of a severe crash are sufficient for the Department to exercise jurisdiction over Mr. Pokrzywinski's driving privileges. These facts are distinctly different from those found in Aamodt v. N.D. Department of Transportation, 2004 ND 134 where the only description of vehicle behavior was "already stopped."

App. 9.

In regards to the issue of whether Pokrzywinski was in a condition rendering him unable to refuse the requested blood test, the hearing officer made the following findings:

> Trooper DeJean went to Altru hospital arriving before the ambulance. As Mr. Pokrzywinski was wheeled in, Trooper DeJean could smell the odor of alcohol as he went by. Mr. Pokrzywinski was conscious and alert at the scene of the crash and during transport. Mr. Pokrzywinski was in an exam room for at least one hour before Trooper DeJean was allowed contact with him. Trooper DeJean asked how much he had to drink and Mr. Pokrzywinski replied, "Two beers." Trooper DeJean could smell the odor of alcohol on Mr. Pokrzywinski's person and in the exam room. Trooper DeJean advised Mr. Pokrzywinski that he was under arrest for DUI. More than two hours had passed since the crash, and therefore, no implied consent advisory was given. Nevertheless, Trooper DeJean asked Mr. Pokrzywinski for a blood draw to be tested. Mr. Pokrzywinski said "No." Mr. Pokrzywinski asked whether he had to. Trooper DeJean told him that he could not give him legal advice. Mr. Pokrzywinski refused. After consulting with NDHP Lt. Hummel, Trooper DeJean went back to Mr. Pokrzywinski, read him the implied consent advisory and again requested a blood draw. Mr. Pokrzywinski was very sedated and difficult to understand. His head was bandaged. Nevertheless, he mumbled, "No."

App. 8. The hearing officer thereafter made the following applicable conclusions of law:

> Mr. Pokrzywinski was arrested for DUI and refused to provide a blood sample for testing. . . . Mr. Pokrzywinski argues that he did not have the capacity to refuse/withdraw his consent to a blood draw due to his medical condition. Although the single page of medical record offered into evidence is somewhat helpful, it does not provide a complete analysis of Mr. Pokrzywinski's neurological condition at the time he first refused the blood draw. Their [sic] is no specific information contained in the note from the hand doctor that his injuries affected his mental status.

Id. The hearing officer thereafter referenced a standard jury instruction on "Failure to Produce [Evidence][Witness]" and inferred that other medical records which were not produced by Pokrzywinski would be unfavorable to him in regards to his capacity to consent or refuse the requested blood test. App. 8-9. The hearing officer then concluded:

> N.D.C.C. § 39-20-03 (consent of person incapable of refusal not withdrawn) does not apply to a driver who is conscious and alert when asked to submit to a test. There is no credible evidence that Mr. Pokrzywinski was unconscious or incompetent when he refused the blood test the first time. The hearing officer concludes that Mr. Pokrzywinski effectively refused consent to the first request for a blood draw sufficient to revoke his driver's license.

App. 9.

Judge Geiger affirmed the hearing officer's decision finding the Department had jurisdiction to suspend Pokrzywinski's driving privileges for 3 years. App. 13-14. In regards to Pokrzywinski's argument the Report and Notice failed to sufficiently show probable cause to arrest, Judge Gieger wrote:

> The statement of probable cause within the report indicates that the subject vehicle operated by the appellant was involved in a crash, that there was an odor of alcoholic beverage on the appellant/driver, and that he admitted to drinking alcoholic beverages – two beers. The probable cause test for DUI cases requires both signs of impairment and an indication of alcohol consumption. Moran v. NDDOT, 543 NW 2d 767, 770 (ND 1996). Probable cause to arrest for driving under the influence exists

> where there has been an accident coupled with other evidence of alcohol consumption. Presteng v. Director, NDDOT, 1998 ND 114, ¶ 8, 579 NW 2d 212. Consequently, I conclude that the Report and Notice sufficiently established on its face probable cause to arrest the appellant for DUI.

App. 14. The district court also affirmed the hearing officer's decision finding that Pokrzywinski refused to submit to a chemical blood test after the accident. In making this ruling the district court relied on facts showing that Pokrzywinski was conscious during his encounter with Trooper DeJean and understood the inquiries put forth to him. App. 15. The district court also relied on the fact that medical evidence did not establish that Pokrzywinski was incapable of refusing. App. 15-16. While the court acknowledged evidence in the record could suggest Pokrzywinski may have been incapable of refusing at certain times while at the hospital the timeline of that incapacity was not specified and was in conflict with the evidence that Pokrzywinski was capable of refusing during his conversation with the trooper. App. 16. Thereafter, the court stated:

> Given all the evidence cited and absent other evidence that at that particular point in time either by way of additional medical records or testimony from medical providers or others that the appellant was incapable of refusal, this Court must defer to the findings made by the hearing officer. There is evidence in the record to support those findings. Both factually and as a matter of law, those determinations are supported by the record.

Id.

STANDARD OF REVIEW

"An appeal from a district court decision reviewing an administrative license suspension is governed by the Administrative Agencies Practice Act, Chapter 28-32, N.D.C.C." McPeak v. Moore, 545 N.W.2d 761, 762 (N.D. 1996).

"This Court reviews the record of the administrative agency as a basis for its decision rather than the district court decision." Lamb v. Moore, 539 N.W.2d 862, 863 (N.D. 1995) (citing Erickson v. Dir., N.D. Dep't of Transp., 507 N.W.2d 537, 539 (N.D. 1993). "However, the district court's analysis is entitled to respect if its reasoning is sound." Kraft v. State Bd. of Nursing, 2001 ND 131, ¶ 10, 631 N.W.2d 572.

This Court's review "is limited to whether (1) the findings of fact are supported by a preponderance of the evidence; (2) the conclusions of law are sustained by the findings of fact; and (3) the agency's decision is supported by the conclusions of law." McPeak, 545 N.W.2d at 762 (citing Zimmerman v. N.D. Dep't of Transp. Dir., 543 N.W.2d 479, 481 (N.D. 1996)).

Findings by an administrative agency are sufficient if the reviewing court is able to understand the basis of the fact finder's decision. 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). Rather, a reviewing court 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).

LAW AND ARGUMENT

I. The Report and Notice showed there was probable cause to arrest Pokrzywinski for driving under the influence of alcohol.

Following an arrest for driving or being in actual physical control of a vehicle while under the influence of alcohol and the person's refusal to submit to chemical testing, N.D.C.C. § 39-20-04 directs the law enforcement officer to

immediately issue a temporary operator's permit to the person. The statute directs that, within five days of issuing the temporary operator's permit, the law enforcement officer must forward to the Department a "certified written report," which must show, among other things, that the officer had reasonable grounds (probable cause) to believe that the arrestee had been driving a motor vehicle while under the influence of alcohol. Cf. N.D.C.C. § 39-20-03.1(4). The "certified written report" is the Report and Notice. Ding v. Dir., N.D. Dep't of Transp., 484 N.W.2d 496, 498 (N.D. 1992).

In Aamodt v. N.D. Dep't of Transp., 2004 ND 134, 682 N.W.2d 308, the Supreme Court considered the question of whether the failure of the Report and Notice to show that the law enforcement officer had probable cause to arrest Brian Aamodt deprived the Department of authority to suspend his driving privileges. As shown by the Report and Notice admitted as Exhibit 1b in the Pokrzywinski appeal, the bottom of the Report and Notice form contains a box entitled, "OFFICER'S STATEMENT OF PROBABLE CAUSE." Tr. Ex. 1b. Two boxes are contained under that heading. Id. In Aamodt, the officer checked the "already stopped" square in the box on the left and the "odor of alcoholic beverage" square in the box on the right. Aamodt, 2004 ND 134 at ¶ 10. No other information was provided under the "OFFICER'S STATEMENT OF PROBABLE CAUSE" heading in the Report and Notice in Aamodt. Id.

The Department conceded in Aamodt that this was insufficient to show probable cause but argued that this did not deprive the Department of authority to suspend Aamodt's driving privileges. Id. The Supreme Court disagreed,

concluding that the statutory provision in N.D.C.C. § 39-20-03.1(3) is "basic and mandatory" and that, as a result of the deficient Report and Notice, the Department did not have authority to suspend Aamodt's driving privileges. Id. at ¶ 26. Pokrzywinski's reliance on Aamodt is misplaced.

In Moran v. N.D. Dep't of Transp., 543 N.W.2d 767 (N.D. 1996), the Supreme Court summarized the probable cause test for driving under the influence (DUI) cases as follows:

> In order to arrest a driver for driving under the influence, the law enforcement officer first must observe some signs of impairment, physical or mental. See State v. Salhus, 220 N.W.2d 852 (N.D. 1974). Further, the law enforcement officer must have reason to believe the driver's impairment is caused by alcohol. See id.; see also Keane v. Com'r of Public Safety, 360 N.W.2d 357 (Minn. Ct. App. 1984). Both elements - - impairment and indication of alcohol consumption - - are necessary to establish probable cause to arrest for driving under the influence.

Id. at 770. Thus, probable cause is a two-prong test requiring evidence of impairment and evidence of alcohol consumption.

The Report and Notice in Aamodt stated that the odor of an alcoholic beverage had been detected. Aamodt, 2004 ND 134 at ¶ 10. Thus, the Report and Notice satisfied the second prong of the Moran test that requires an indication of alcohol consumption. However, in Aamodt, there was no indication at all below the "OFFICER'S STATEMENT OF PROBABLE CAUSE" heading suggesting that Aamodt had been impaired. Id. at ¶ 10. Therefore, there was no information in the Report and Notice in Aamodt satisfying the first prong of the Moran test, which requires an indication of impairment. Moran, 543 N.W.2d at 770.

By way of contrast, in this case, the space below the "OFFICER'S STATEMENT OF PROBABLE CAUSE" heading clearly states that Pokrzywinski had been involved in a "crash." Tr. Ex. 1b. In Presteng v. Director, North Dakota Department of Transportation, 1998 ND 114, 579 N.W.2d 212, the only evidence that Allen Presteng was impaired was that he had been involved in a two-snowmobile accident. Id. at ¶ 2. When a highway patrol officer met with Presteng at the hospital, Presteng could not recall how the collision occurred. Id. at ¶ 3. The only other evidence gathered was that Presteng had bloodshot, glassy eyes and the odor of an alcoholic beverage on his breath. Id. Presteng was arrested for DUI. Id. He subsequently argued that there was not probable cause for the arrest. Id. at ¶ 6.

The Supreme Court observed as follows:

> We have previously found probable cause to arrest for driving under the influence where there has been an accident coupled with other evidence of alcohol consumption. See Wilhelmi, 498 N.W.2d at 156; Moser v. North Dakota State Highway Comm'r, 369 N.W.2d 650, 653 (N.D. 1985) (additionally considering a lack of suggestion of another cause of a vehicle roll-over). The fact an accident occurred is at least suggestive of impairment even though there may be other factors which are relevant to the actual cause of the accident. As we have clearly stated:
>
> > While other causes of an accident are relevant to the ultimate weight of the evidence at trial, other possible causes do not negat[e] the reasonableness of a belief that alcohol probably contributed to an accident when there is reasonable evidence of alcohol consumption. The inquiry is whether the officer had reason to believe that unlawful activity probably occurred, not whether there is sufficient evidence for a criminal conviction.

Presteng, 1998 ND 114 at ¶ 8 (quoting Wilhelmi v. Dir., of the Dep't of Transp., 498 N.W.2d 150, 156 (N.D. 1993)). Thus, just as the crash in Presteng, standing by itself, was sufficient evidence of impairment to make a DUI arrest, even if factors aside from alcohol consumption could have contributed to the crash, the crash in this case, standing alone, was sufficient evidence of impairment to arrest Pokrzywinski for DUI. It follows that the first prong of the Moran test is satisfied.

The Report and Notice pertaining to Pokrzywinski does contain reasonable evidence of alcohol consumption, namely, the notation of an "odor of an alcoholic beverage" and the explanation of "admitted consuming 2 beers." Tr. Ex. 1b. Since the space below the OFFICER'S STATEMENT OF PROBABLE CAUSE" includes an indication of both impairment and alcohol consumption, the Report and Notice satisfied the basic and mandatory statutory provision in N.D.C.C. § 39-20-03.1(3). Therefore, the Department had jurisdiction to hold a hearing and to revoke Pokrzywinski's driving privileges.

II. The hearing officer reasonably found that Pokrzywinski refused the chemical blood test requested by Trooper DeJean.

Under N.D.C.C. § 39-20-03, "[a]ny person who is dead, unconscious, or otherwise in a condition rendering the person incapable of refusal, must be deemed not to have withdrawn the consent provided by section 39-20-01 and the test or tests may be given." Pokrzywinski alleges that due to the seriousness of his injuries at the time Trooper DeJean requested a blood test, he was incapable of refusing. Pokrzywinski's argument is erroneous because the record does not clearly establish that Pokrzywinski was incapable of refusing the request for a blood test. In fact, the weight of the evidence in the record suggests

Pokrzywinski was capable of, and did in fact refuse the officer's requested blood test.

North Dakota law is specific and requires all motor vehicle operators who have been arrested for driving under the influence of intoxicating liquor to consent to a chemical test to determine their blood-alcohol concentration. Krabseth v. Moore, 1997 ND 224, ¶ 7, 571 N.W.2d 146; N.D.C.C. § 39-20-01. If the driver refuses to submit to testing "none may be given" but then the driver faces revocation of the privilege to drive. N.D.C.C. § 39-20-04(1). The driver's license is revoked for a time period set forth in the statute. This Court has held that "the failure to submit to a test, whether by stubborn silence or by a negative answer, can be a refusal." Mayo v. Moore, 527 N.W.2d 257, 260 (N.D. 1995). Whether a driver refuses to take a test is a question of fact. Obrigewitch v. Dir., N.D. Dep't of Transp., 2002 ND 177, ¶ 14, 653 N.W.2d 73.

Pokrzywinski is not arguing that he was dead or unconscious while at Altru Hospital in Grand Forks, but that due to his injuries he was "otherwise in a condition rendering him incapable of refusal." This Court has never addressed this specific issue, but it has dealt with cases involving chemical tests being administered to people severely injured. In State v. Bauder, 433 N.W.2d 552 (N.D. 1988), a highway patrol officer arrested Bauder at the hospital while she "appeared to be unconscious and directed that a blood sample be drawn." The trial court relied on N.D.C.C. § 39-20-03 to show that the trooper was authorized to obtain the blood sample. Id. Bauder attempted to suppress the blood test results alleging the officer did not have probable cause to arrest. Id. The trial

court agreed with Bauder's argument but the Supreme Court reversed finding a sufficient basis for probable cause. Id.

By contrast, in State v. Hansen, 444 N.W.2d 330 (N.D. 1989), this Court reviewed the suppression of a blood-sample test taken in a hospital from a conscious driver. "[T]he blood sample was obtained without a search warrant, without Hansen's consent, and without first placing Hansen under arrest." Id. at 331. The prosecution contended that N.D.C.C. § 39-20-01.1 permitted the warrantless withdrawal of a driver's blood without any requirement of a prior arrest, after an accident resulting in death or serious bodily injury. This Court held this section ambiguous, reviewed its legislative history, and concluded that, while it uses probable cause to believe that the driver is under the influence, "a serious constitutional question arises if we interpret Section 39-20-01.1 to not require an arrest." Id. at 332. Because the Supreme Court thought that "an arrest is not only a statutory requirement, [N.D.C.C. § 39-20-01], but a constitutional one as well," it concluded that the statute nevertheless required an arrest, not just probable cause. Id. at 332-33. The Hansen Court further explained:

> We note that had Hansen been incapacitated, the State had available to it Section 39-20-03, N.D.C.C. . . . Other jurisdictions permitting the test without an arrest involve semiconscious or unconscious defendants. E.g. State v. Oevering, 268 N.W.2d 68 (Minn. 1978).

Id. at 334 n.2. Thus, even though Hansen was seriously injured she was not incapacitated, and therefore, the State could not rely on N.D.C.C. § 39-20-03 to require a chemical test without Hansen's consent or her first being placed under

arrest. Accord Wilhelmi v. Dir., 498 N.W.2d 150 (N.D. 1993) (holding that an arrest is not a statutory precondition for directing a blood test of a driver incapacitated in an accident). Therefore implicit in the Hansen Court's decision is that N.D.C.C. § 39-20-03 does not apply if the subject is conscious, alert and able to answer questions.

In the case at hand, there is no evidence Pokrzywinski was unconscious or incapacitated at the time Trooper DeJean talked with him and requested the blood test, and therefore the officer was obligated to ask for Pokrzywinski's consent to a chemical test. The evidence in the record shows Pokrzywinski stated he would not consent to the officer's requested blood test. Tr. 37. Additionally, Pokrzywinski provided concise and coherent answers to several questions prior to the trooper's request for a blood test. In fact, Pokrzywinski told Trooper DeJean he had two beers to drink when asked how much he had consumed. Tr. 36. Pokrzywinski had also told Deputy Richard Sherlock, at the scene of the accident, that he had a couple of beers, hit a pothole, and lost control of his motorcycle. See Tr. 6. Additionally, when Trooper DeJean requested the blood draw, Pokrzywinski's first response was to ask if he had to submit to the test. Tr. 38, ll. 5-6. This information shows that Pokrzywinski was aware of his surroundings and understood what was being asked of him. This is true regardless of whether Pokrzywinski had a memory of these events at a later date.

In Brown v. Director of Revenue, 164 S.W.3d 121 (Mo. Ct. App. 2005), a case factually similar to this case, the Missouri Court of Appeals held that a

motorist failed to rebut the prima facie case showing of his refusal to submit to chemical tests with evidence that he was unconscious when he was given the implied consent warning. Id. at 127. The court found that Brown's "statements refusing to take the test were coherent, lucid, logical, and contextually appropriate." Id. at 126-27. Further, the court found that Brown's "sole witness did not testify that petitioner was unconscious at any time he saw him", that Brown's "injuries [did] not lead to the conclusion that petitioner had been unconscious at the time the implied consent law warning was read", and that "[t]here were no medical records supporting a conclusion that petitioner was unconscious at that time." Id. at 127. The court distinguished this case from Nace v. Director of Revenue., 123 S.W.3d 252 (Mo. Ct. App. 2003).

In Nace, the Missouri Court of Appeals found sufficient evidence to rebut the prima facie showing of refusal. Unlike Brown, the motorist provided more than her own testimony that she had no memory of refusing the requested blood test because of her injuries. Additional testimony was provided by the motorist's brother, mother and a state trooper. Id. at 254. The motorist's brother testified by deposition that he arrived at the hospital 15 minutes after his sister was involved in the accident, and she did not recognize him and was semi-conscious. Id. at 257. Nace's mother testified when she arrived at the hospital one hour and 15 minutes after the accident, Nace was not alert and did not answer questions until the following afternoon. Id. Further, a fire department report and statements by the trooper who performed field tests on Nace, suggested Nace was also unconscious prior to arriving at the hospital. Id. at 257-58. The trooper

specifically indicated that Nace's eyes would not stay open when he was performing the horizontal gaze nystagmus test. Id. at 258.

Based on this evidence the Missouri Court of Appeals held:

> This additional evidence showing the extent of Ms. Nace's injuries, the testimony of her brother and mother and the fire department report, makes this case different from both Cartwright and Berry, where neither person introduced additional evidence of his injuries and coherency during questioning. The evidence Ms. Nace presented shows more than that she did not knowingly refuse, which is what concerned the court in Cartwright. This evidence supports a finding that she simply could not have been aware enough of anything to refuse, consent, or attach any meaning to what Trooper Whitehead asked. Refusal means declining to take the chemical test when requested to do so of *one's own volition.* Mount, 62 S.W.3d at 599 (emphasis added). The extensive evidence showing that Ms. Nace was at least unaware, if not incoherent, both before and shortly after Trooper Whitehead spoke with her, is sufficient to support a finding that Ms. Nace was incapable of acting on her own volition and refusing to give a blood sample.

Id.

Here, Pokrzywinski has failed to adduce any evidence that he was injured to the point that he was incapable of refusing to submit to the test. A reasonable person in Trooper DeJean's position would have perceived Pokrzywinski's statement refusing the blood test, as an unambiguous and clear refusal. Tr. 37-38. Further, while Pokrzywinski's medical record has a statement indicating "Loss of consciousness" no evidence was provided explaining when this loss of consciousness took place. It is uncontested that at the time Trooper DeJean was speaking to Pokrzywinski he was not unconscious and there was no evidence provided to the trooper that Pokrzywinski had been going in and out of consciousness prior to their conversation. In fact, the ambulance personnel told

Trooper DeJean that Pokrzywinski remained conscious the entire trip from Walsh County to Altru Hospital in Grand Forks. Tr. 39. Further, Patricia Kouba's (Pokrzywinski's mother), testimony did not contradict this, and showed that Pokrzywinski was not unconscious at any time she talked with him.

Additionally, no evidence was presented by Pokrzywinski to establish what medications if any were administered, when they were administered, and there effects. In regard to the medical evidence adduced at the hearing the hearing officer specifically found as follows:

> Mr. Pokrzywinski argues that he did not have the capacity to refuse/ withdraw his consent to a blood draw due to his medical condition. Although a single page of medical record offered into evidence is somewhat helpful, it does not provide a complete analysis of Mr. Pokrzywinski's neurological condition at the time he first refused the blood draw. There is no specific information contained in the note from the hand doctor that his injuries affected his mental status. Mr. Pokrzywinski is asserting his medical condition as a defense to the proposed revocation and he has exclusive control over his medical information. North Dakota Standard Jury Instruction C-80.30 provides:
>
> > Failure to Produce [Evidence] [Witness]
> > If a Party has failed to [offer evidence under control of the Party] [produce a witness] and 1) the [evidence] [witness] would be available to that Party by the exercise of reasonable diligence, 2) the [evidence] [witness] was not equally available to the adverse Party, 3) a reasonably prudent person under the same or similar circumstances who had reason to believe [it] [the testimony] to be favorable, would have [offered the evidence] [produced the witness], and 4) no reasonable explanation for that failure is given, you may infer that the [evidence] [testimony of the witness] would have been unfavorable to that Party.
>
> The hearing officer infers that other more specific medical records that were not offered to provide a more accurate evaluation would be unfavorable to Mr. Pokrzywinski's argument on the issue of mental capacity to consent or refuse a blood test.

Tr. 83, l. 6 – Tr. 84, l. 10.

The hearing officer's findings are sound. Pokrzywinski, therefore, failed to support his affirmative defense and establish that he was incapable of refusing. This is in contrast to the drivers in the cases cited by Pokrzywinski, where sufficient evidence rebutting the prima facie showing of refusal occurred. See Hughey v. Dep't of Motor Vehicles, 235 Cal.App.3d 752, 756 (Cal. Ct. App. 1991) (where a neurologist testified that Hughey had suffered a serious head injury during the accident which would account for his bizarre combative behavior and amnesia, and that it would have made it difficult, if not impossible, for Hughey to have understood the officer's admonition and significance of refusal); Douglas v. Comm'r of Pub. Safety, 385 N.W.2d 850, 851 (Minn. Ct. App. 1986) (Medical records relating to Douglas' accident were admitted into evidence, and Dr. Florian Brion testified as to his condition including Douglas' orientation and disorientation); Stiles v. Comm'r of Pub. Safety, 369 N.W.2d 350-51 (Minn. Ct. App. 1985) (Directly following the accident, Stiles had a seizure and became unconscious and was "oriented only to person" and was "repeating the same question over and over again." Stiles had also sustained a concussion and was being administered medical treatment at the time the officer requested testing).

CONCLUSION

The Department respectfully requests that this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision revoking Pokrzywinski's driving privileges for a period of three years.

Dated this 1st day of May, 2014.

State of North Dakota
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IN THE SUPREME COURT RECEIVED BY CLERK SUPREME COURT MAY 01 2014

STATE OF NORTH DAKOTA

Derek Pokrzywinski, Appellant, v. North Dakota Department of Transportation, Appellee.	)	**Supreme Ct. No. 20140043** **District Ct. No. 50-2013-CV-00218** **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 1st day of May, 2014, I served the attached **BRIEF OF APPELLEE** upon Derek Pokrzywinski, by and through his attorney Robert J. Woods, by placing a true and correct copy thereof in an envelope addressed as follows:

Robert J. Woods
Attorney at Law
P.O. Box 178
Forest River, ND 58233

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 1st day of May, 2014.

Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2019