

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Bruce Van Arnold Beck,

Appellee,

v.

Director, North Dakota Department of
Transportation,

Appellant.

Supreme Ct. No. 20210312

District Ct. No. 30-2021-CV-00491

APPEAL FROM THE AUGUST 30, 2021,
JUDGMENT OF THE DISTRICT COURT
MORTON COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE BRUCE ROMANICK

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	3
	<u>Paragraph</u>
Statement of Issues	1
Statement of Case	2
Statement of Facts.	5
Proceedings on Appeal to District Court	9
Standard of Review	12
Law and Argument	14
The admissible evidence established that Beck's Intoxilyzer test was administered within two hours after he had been driving or was in actual physical control of his vehicle	14
Conclusion	24

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u>Dawson v. N.D. Dep’t of Transp.</u> , 2013 ND 62, 830 N.W.2d 221	11
<u>Ertelt v. N.D. Dep’t of Transp.</u> , 491 N.W.2d 736 (N.D. 1992)	17
<u>Geiger v. Hjelle</u> , 396 N.W.2d 302 (N.D. 1986)	20
<u>Glaser v. N.D. Dep’t of Transp.</u> , 2017 ND 253, 902 N.W.2d 744.....	10, 11, 21
<u>Haynes v. Dir., Dep’t of Transp.</u> , 2014 ND 161, 851 N.W.2d 172.....	12, 13
<u>Isaak v. Sprynczynatyk</u> , 2002 ND 64, 642 N.W.2d 860.....	17
<u>Kobilansky v. Liffbrig</u> , 358 N.W.2d 781 (N.D. 1984)	17
<u>Knudson v. Dir., N.D. Dep’t of Transp.</u> , 530 N.W.2d 313 (N.D. 1995)	15
<u>Osaba v. N.D. Dep’t of Transp.</u> , 2012 ND 36, 812 N.W.2d 440.....	16
<u>Sonsthagen v. Sprynczynatyk</u> , 2003 ND 90, 663 N.W.2d 161	16

Statutes and Rules

N.D.C.C. ch. 28-32.....	12
N.D.C.C. § 28-32-24(1)	16
N.D.C.C. § 28-32-46	12
N.D.C.C. § 39-06-22	17
N.D.C.C. § 39-08-01	3, 9
N.D.C.C. § 39-08-01(1)(a)	14
N.D.C.C. § 39-20-01	3
N.D.C.C. § 39-20-02	3
N.D.C.C. § 39-20-04.1(1)	15
N.D.C.C. § 39-20-05(4)	17

STATEMENT OF ISSUES

[¶1] Whether the District Court erred in granting Beck’s appeal and reversing the Hearing Officer’s Decision when it determined that the evidence did not show that Beck was chemically tested within two hours of driving or being in actual physical control of a vehicle.

STATEMENT OF CASE

[¶2] Officer Jacob Aiello (Officer Aiello) of the Mandan Police Department arrested Bruce Van Arnold Beck (Beck) on April 4, 2021, for driving under the influence of alcohol. Appendix (App.) 35. A Report and Notice, including a temporary operator’s permit, was issued to Beck, after chemical Intoxilyzer breath test results indicated Beck’s alcohol concentration was .141 percent by weight. Id. The Report and Notice notified Beck of the North Dakota Department of Transportation’s (Department) intent to suspend his driving privileges. Id.

[¶3] In response to the Report and Notice, Beck requested an administrative hearing. Id. at 7. The administrative hearing was held on April 30, 2021, at which time the hearing officer considered the following issues:

- (1) Whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor in violation of N.D.C.C. section 39-08-01 or equivalent ordinance;
- (2) Whether the person was placed under arrest;

- (3) Whether the person was tested in accordance with N.D.C.C. section 39-20-01 and, if applicable, section 39-20-02; and
- (4) Whether the test results show the person had an alcohol concentration of at least eight one-hundredths of one percent but less than eighteen one-hundredths of one percent by weight.

App. 7, at lines (ll.) 11-22; Index # 6.

[¶4] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Beck's driving privileges for a period of 91 days. App. 40. Beck requested judicial review of the hearing officer's decision. App. 42-43.

STATEMENT OF FACTS

[¶5] On April 4, 2021, at about 3:12 a.m., Officer Aiello received a dispatch call to locate a truck that had been reported by a caller to be driving with its hazard lights activated and which the caller thought had been in an accident. App. 10, ll. 1-14. Dispatch also reported that a second caller had advised that the truck was a red pickup. App. 13, ll. 19-24. Other officers from the Mandan Police Department had found a parked semi-truck that had damage consistent with being hit and began an accident investigation. App. 10, ll. 19-20; App. 11, l. 12 – App. 13, l. 4.

[¶6] A Morton County Deputy Sheriff informed Officer Aiello that he had located the truck at 2922 37th Street Northwest, Mandan, in front of a shop. App. 11, ll. 3-8. Officer Aiello responded to the address and upon arrival observed a red pickup with its hazard lights activated which appeared to have front end

damage consistent with the accident reported. App. 14, ll. 8-10. Officer Aiello observed the driver's side door of the pickup was open and saw an individual sitting in the driver's seat and noticed that the air bags had been deployed and the individual had an injury on his face. App. 14, ll. 13-14; App. 15, l. 7; App. 16, ll. 5-7; App. 26, ll. 5-6, 23. The individual was identified as Beck. App. 14, ll. 13-17. Beck declined medical assistance offered by Officer Aiello. App. 16, ll. 7-8.

[¶7] Officer Aiello detected an odor of alcoholic beverage coming from Beck's breath, and saw he had bloodshot and glossy eyes. Id. at ll. 13-18. Without being questioned by Officer Aiello Beck informed the officer that he had been drinking. App. 16, l. 24 – App. 17, l. 4.

[¶8] Following the administration of field sobriety tests and an onsite screening test, Officer Aiello arrested Beck for driving under the influence. App. 21, ll. 15-19. Beck subsequently consented to and submitted to a chemical breath test on the Intoxilyzer 8000 which showed his alcohol concentration was 0.141 percent by weight. App. 36.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶9] At the administrative hearing, Beck argued the Department failed to prove when he was driving and therefore could not show that his chemical test was performed within two hours of the time of driving. App. 29, ll. 16-19. The hearing officer found:

At 3:12 a.m. Mandan police were notified of a vehicle crash. It was reported that the striking party had left the location. A vehicle description was given. Officer Aiello was responding to the location of the crash, when a notification was given that a

Morton County Deputy had located a vehicle matching the description and a second address was given. Officer Aiello responded to that location and observed a vehicle matching the description, which appeared to have front end damage, consistent with the crash report. Officer Aiello observed an individual sitting in the driver's seat of the vehicle at 3:41a.m. Officer Aiello observed that the airbags in the vehicle had deployed and the driver, later identified as Mr. Bruce Beck had injuries to his face, consistent with the reported crash.

App. 40. The hearing officer concluded, Beck was properly arrested for driving under the influence of alcohol, tested in accordance with N.D.C.C. § 39-08-01, and that Beck's test results showed he had an alcohol concentration over the legal limit. Id. In reaching these conclusions, the hearing officer noted:

Mr. Beck argues that the time of driving cannot be established on the record, and thus it cannot be shown that the test was taken within two hours of the time of driving. The record does show conflicting times of driving. The crash report shows the time of crash as 3:00a.m. The report and notice shows that the time of driving was 3:12a.m. And Officer Aiello stated that he first observed Mr. Beck in the drivers seat of the vehicle at 3:45a.m. The test in this matter was completed at 4:21a.m. Two hours prior to that would have been 2:21a.m. a time prior to all of the times established in the record. Thus even if the time of driving was at the earliest[t] time, the testing would have been completed within two hours. The greater weight of the record shows that the test was completed within two hours of the time Mr. Beck was driving or in actual physical control of a motor vehicle.

Id. The hearing officer issued her findings of fact, conclusions of law, and decision suspending Beck's driving privileges for a period of 91 days. Id.

[¶10] Beck appealed the administrative decision to the Morton County District Court. App. 42-43. Beck alleged there was no admissible evidence to support a time of driving and, therefore, insufficient evidence that the chemical test was performed within two hours of driving. App. 3, at Index # 19. The

Department opposed Beck's assertion and relied on Glaser v. N.D. Dep't of Transp., 2017 ND 253, 902 N.W.2d 744, to support its argument that the crash report was admissible evidence and provided a sufficient factual basis for the hearing officer to determine a time frame regarding Beck's accident to conclude the chemical testing was done within two hours from that time.

[¶11] On August 25, 2021, Judge Bruce Romanick issued a Memorandum and Order Reversing Hearing Officer's Decision. App. 44-52. Judge Romanick relied on Dawson v. N.D. Dep't of Transp., 2013 ND 62, 830 N.W.2d 221 to conclude that the time of driving was put into question at the hearing because Officer Aiello testified the time of driving listed on the Report and Notice was the dispatch time and because Beck objected to the crash report. App. 48-50.

Judge Romanick ruled:

The hearing officer's findings regarding the time of driving are based on circumstantial evidence and assumptions, without evidentiary support. The hearing officer acknowledges the conflicting times of driving between the officers' reports. She tries to rectify this conflict by concluding that regardless of which time may be correct, all of the times listed in the reports are within the two hour time requirement. This conclusion ignores the fact that there is simply nothing in the record supporting either the 3:00 A.M. time of crash, or the 3:12 A.M. time of driving. Nothing in the record established where the 3:00 A.M. timeframe came from, and the 3:12 A.M. timeframe is clearly Officer Aiello's best guess, unsupported by his own personal observations of Beck's driving.

Therefore, the times of driving indicated on the Report and Notice and the crash report in this case have no support in the record, and a reasoning mind could not have reasonably concluded the time of driving under the facts of this case. Because the time of driving cannot be determined, the Department is unable to establish Beck's chemical test was administered within two hours of Beck's driving.

App. 51, ¶¶ 23-24. In its ruling, the district court made no reference to Glaser. Id. Judgment was entered on August 30, 2021. App. 53. The Department appealed the Judgment to this Court. App. 55-56. The Department requests this Court reverse the judgment of the Morton County District Court and reinstate the hearing officer's decision revoking Beck's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶12] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges." Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

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.

[¶13] “In an appeal from a district court’s review of an administrative agency’s decision, [the Court] review[s] the agency’s decision.” Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court “do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record.” Id.

LAW AND ARGUMENT

The admissible evidence established that Beck’s Intoxilyzer test was administered within two hours after he had been driving or was in actual physical control of his vehicle.

[¶14] Section 39-08-01(1)(a), N.D.C.C., provides “[a] person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if . . . [t]hat person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.”

[¶15] Section 39-20-04.1(1), N.D.C.C., authorizes the Department to suspend a person’s operator’s license, if the findings, conclusion, and decision from an administrative license suspension hearing confirm that the “test results show

that the arrested person was driving or in physical control of a vehicle while having an alcohol concentration of at least eight one-hundredths of one percent by weight.” N.D.C.C. § 39-20-04.1(1). “In order to rely upon the chemical test results, the test must have been performed within two hours of either driving or actual physical control.” Knudson v. Dir., N.D. Dep’t of Transp., 530 N.W.2d 313, 318 (N.D. 1995).

[¶16] “The admissibility of evidence in administrative hearings is determined in accordance with the North Dakota Rules of Evidence.” Osaba v. N.D. Dep’t of Transp., 2012 ND 36, ¶ 8, 812 N.W.2d 440 (citing N.D.C.C. § 28-32-24(1)). “Evidentiary rulings in administrative hearings are reviewed under the abuse of discretion standard. Id. (citing Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 9, 663 N.W.2d 161). “An abuse of discretion occurs if a hearing officer acts in an arbitrary, unreasonable, or capricious manner or if the hearing officer misinterprets or misapplies the law.” Id. (citing Sonsthagen, at ¶ 9).

[¶17] N.D.C.C. § 39-20-05(4), provides that the regularly kept records of the director may be introduced at a hearing and that those records are prima facie evidence of their contents without further foundation. In Isaak v. Sprynczynatyk, 2002 ND 64, 642 N.W.2d 860, the Supreme Court considered whether Michael Isaak’s central driving record showing a prior violation was admissible as a “regularly kept record” of the director notwithstanding that there is no explicit reference to a central driving record in N.D.C.C. § 39-20-

05(4). Id. at ¶ 9. The Supreme Court answered the question in the affirmative, explaining as follows:

Section 39-20-05(4), N.D.C.C., does not list ‘driving record’ as a record deemed to be a regularly kept record, but nothing in the statute suggests this list is an exhaustive compilation of regularly kept records. Further, N.D.C.C. § 39-06-22 provides: The director shall file all accident reports and abstracts of court records of convictions received by the director under the laws of this state and in connection therewith maintain convenient records or make suitable notations in order that an individual record of each licensee showing the convictions of such licensee and the traffic accidents in which the licensee has been involved shall be readily ascertainable and available for the consideration of the director upon any application for renewal of license and at other suitable times.

Thus, the director has a statutory obligation to regularly keep driving records. Accordingly, Isaak’s driving record is a regularly kept record, and establishes prima facie its contents.

Id. at ¶ 9 (emphasis added.) Thus, Isaak stands for the proposition that there are “regularly kept records” of the director that are admissible under N.D.C.C. § 39-20-05(4) without further foundation, and which constitute prima facie evidence, even though the records are not specifically listed in the statute. See also Kobilansky v. Liffrig, 358 N.W. 2d 781, 788 (N.D. 1984) (Report and Notice constitutes a “regularly kept record” of the director even though it is not specifically listed in N.D.C.C. § 39-20-05(4)). Here it cannot be reasonably questioned that the Motor Vehicle Crash Report (App. 38-39) is a regularly kept record of the director and as such constitutes prima facie evidence without further foundation. See Ertelt v. N.D. Dep’t of Transp., 491 N.W.2d 736, 739 (N.D. 1992) (holding that the officer’s crash report constituted a record or

report of a public agency – the Department of Transportation – and is not inadmissible on hearsay grounds).

[¶18] The specific question on appeal is whether Beck rebutted the information as to the time of the accident as noted on the Motor Vehicle Crash Report. At the hearing, the hearing officer identified and offered a Motor Vehicle Crash Report, prepared by Officer Jacob Valleroy, as Exhibit 1, page 10-11. See App. 38-39. The Motor Vehicle Crash Report was provided to Beck in advance of the hearing. See App. 3, at Index # 7. The hearing officer admitted the Motor Vehicle Crash Report into evidence. App. 29, ll. 10-11. The Motor Vehicle Crash Report unequivocally indicates that the time of the accident was 3:00:00 (3:00 a.m.) App. 38. When Officer Valleroy's Motor Vehicle Crash Report was admitted into evidence, the information indicating the time of the accident was 3:00 a.m. became "prima facie evidence." Although, Beck challenged the admissibility of the Motor Vehicle Crash Report on foundation and hearsay grounds, the hearing officer properly overruled the objection because the Motor Vehicle Crash Report was admissible as a regularly kept record of the Department.

[¶19] Beck did not rebut the prima facie showing that he was involved in an accident at 3:00 a.m. on April 4, 2021. The Department does not contest that Officer Aiello did not know the exact time of driving. Officer Aiello noted the time of driving on the Report and Notice (App. 35) as 0312 (3:12 a.m.) which he testified was approximately the time he received the dispatch call about a

red pickup truck involved in an accident. App. 26, ll. 12-17. It was reported that the red pickup truck had collided with a parked semi-truck and then drove away from the scene of the accident. App. 10, ll. 11-22; App. 39. Officer Aiello's testimony did call into question the accuracy of the time of driving on the Report and Notice. However, Officer Aiello testified he did not complete or prepare the Motor Vehicle Crash Report. App. 11, l. 12 – App. 12, l. 4. Instead, the crash report was prepared by Officer Valleroy. App. 38-39. Officer Aiello had nothing to do with preparing the crash report. App. 11, l. 25 – App. 12, l. 4. Therefore, while the time of driving on the Report and Notice may have been called into question there is no evidence calling into question the 3:00 a.m. time Officer Valleroy designated on the Motor Vehicle Crash Report for when the accident occurred.

[¶20] The record is simply silent on how Officer Valleroy determined the time of the accident on the Motor Vehicle Crash Report. However, objecting to the crash report on hearsay and foundation grounds does not rebut the time of the accident on the crash report as incorrectly determined by the district court. Instead, once the crash report was admitted, it was Beck's duty to rebut the prima facie showing of the time of the accident. Beck failed to do so. Beck did not testify at the hearing as to the time of the accident and an unfavorable inference can be drawn by the lack of contrary testimony. See Geiger v. Hjelle, 396 N.W.2d 302, 303 (N.D. 1986) (“[f]ailure of a party to testify permits an

unfavorable inference in a civil proceeding” and “the hearing officer could also consider the lack of contrary evidence”).

[¶21] While the Department cannot solely rely on the time of driving as noted on the Report and Notice as prima facie evidence, nothing in the record prevents the Department from relying on evidence of the time of the accident in Officer Valleroy’s Motor Vehicle Crash Report. In fact, this very same issue was addressed by the Supreme Court in Glaser v. N.D. Dep’t of Transp., 2017 ND 253, 902 N.W.2d 744, wherein the Court held:

The crash report, coupled with reasonable inferences made by the Department hearing officer, establishes a time frame when Glaser was driving. Based on this record, the hearing officer specifically found Glaser was driving within two hours of the chemical test. Because we conclude a reasoning mind could reasonably conclude Glaser was driving within two hours of the chemical test, the hearing officer’s determination to suspend Glaser’s license was in accordance with the law.

We conclude Glaser failed to rebut the prima facie evidence of the time of the accident. We reverse the judgment and reinstate the hearing officer’s suspension of Glaser’s driving privileges for two years.

Id. at ¶¶ 18-19. In Glaser as here, the motorist, Glaser, argued the Department failed to present admissible evidence showing the chemical Intoxilyzer test was administered within two hours of driving. Id. at ¶ 5. Likewise, Glaser also argued that the motor vehicle crash report, which was prepared by a separate officer and not the testifying officer, and which contained the time of the accident was inadmissible for lack of foundation and hearsay. Id. Yet, on appeal this Court relied on the crash report and the reasonable inference

drawn by the hearing officer to conclude the Department had established a time frame when Glaser was driving, and to hold that Glaser had failed to rebut the prima facie evidence of the time of the accident. Id. at ¶¶ 18-19.

[¶22] The question here is not how Officer Valleroy came up with the time of the accident on the crash report but whether Beck rebutted Officer Valleroy's designation of the time of the accident. Further, it is uncontested that following the accident, the red pickup Beck was driving, did not remain on scene but instead fled the scene and continued to drive until it was later found located at 2922 37th Street Northwest, Mandan, in front of a shop. App. 10-11. Thus, the two-hour time limit for testing was not initiated at the time of the accident but would have started some time thereafter as the vehicle continued to be driven following the accident.

[¶23] Beck did not rebut the prima facie showing of the time of the accident from Officer Valleroy's Motor Vehicle Crash Report. Beck did not present any testimony or other evidence contradicting the prima facie showing. The greater weight of the evidence indicates Beck's chemical test was administered within two hours of the time of driving.

CONCLUSION

[¶24] The Department requests this Court reverse the Judgment of the Morton County District Court and affirm the Hearing Officer's Decision suspending Beck's driving privileges for a period of 91 days.

Dated this 15th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

Supreme Ct. No. 20210312

District Ct. No. 30-2021-CV-00491

[¶1] The undersigned certifies pursuant to N.D.R.App.P. 32(a)(8)(A), that the Brief of Appellant contains 18 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Century 12 point font.

Dated this 15th day of December, 2021.

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IN THE SUPREME COURT

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**CERTIFICATE OF SERVICE
BY ELECTRONIC MAIL**

Supreme Ct. No. 20210312

District Ct. No. 30-2021-CV-00491

[¶1] I hereby certify that on December 15, 2021, the following documents:
**BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE and APPENDIX
TO BRIEF OF APPELLANT** were filed electronically with the Clerk of Supreme
Court. Service is being accomplished upon Bruce Van Arnold Beck, by and
through his attorney, Michael R. Hoffman at hoffmanmike@yahoo.com and
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