ORIGINAL

20000222

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Cody Darrell Henderson, Appellee, v. Director, North Dakota Department of Transportation, Appellant.	)	**Supreme Ct. No. 20010222** **District Ct. No. 01-C-12**

APPEAL FROM THE DISTRICT COURT
ADAMS COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT

HONORABLE RONALD L. HILDEN

REPLY BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Reid A. Brady
Assistant Attorney General
State Bar ID No. 05696
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. Whether the hearing officer reasonably determined Henderson drank prior to driving to the lake and properly concluded Deputy Heinert had probable cause to believe Henderson had driven while under the influence.

II. Whether Henderson's criminal proceeding is irrelevant.

III. Whether no evidence suggests systemic disregard of the law.

IV. Whether the issue of whether there was probable cause for actual physical control need not be reached because there was probable cause for driving while under the influence.

LAW AND ARGUMENT

I. The hearing officer reasonably determined Henderson drank prior to driving to the lake and properly concluded Deputy Heinert had probable cause to believe Henderson had driven while under the influence.

Henderson contends the hearing officer erred in finding Henderson drove while under the influence of alcohol. (Brief of the Appellee at 10.) The hearing officer never made such a finding. Rather, the hearing officer concluded Deputy Heinert had reasonable grounds to believe Henderson had been driving while under the influence of alcohol. In reaching that conclusion, the hearing officer reasonably made the implied finding Henderson had drunk prior to driving to the lake.

A. The hearing officer's finding is based upon Deputy Heinert's plain testimony Henderson admitted drinking prior to driving.

Henderson argues the hearing officer's finding is unreasonable because it is based on an assumption. (Brief of Appellee at 13-14.) Although during cross-examination, Henderson's attorney characterized Deputy Heinert's interpretation of Henderson's admission as an "assumption," the characterization does not discredit Henderson's admission. Deputy Heinert plainly testified Henderson admitted he drank prior to driving to the lake. (A 8, ll. 24-27; A 9, ll. 1-2; A 28, ll. 6-19; A 64, ll. 26-27; A 65, ll. 1-11.)

B. Deputy Heinert's testimony is internally consistent.

Henderson asserts Deputy Heinert's testimony is inconsistent and thus the hearing officer's finding is unreasonable. (Brief of Appellee at 13.) Henderson emphasizes Deputy Heinert did not refer to Henderson's admission during certain portions of Deputy Heinert's testimony. For instance, Deputy Heinert testified he

asked Henderson what had happened and Henderson said he had just driven to the lake and gotten stuck. In response to a cross-examination question inquiring whether Henderson explained what he and his girlfriend were doing at the lake, Deputy Heinert testified Henderson said they went to check on persons and the fishing. Those excerpts, however, are consistent with Deputy Heinert's testimony regarding Henderson's admission. Deputy Heinert testified Henderson's admission resulted from Deputy Heinert's inquiry regarding whether Henderson had drunk anything. Deputy Heinert thus appropriately did not refer to Henderson's admission at the times emphasized by Henderson.

C. The testimony of Henderson and his girlfriend does not outweigh the testimony of Deputy Heinert.

Henderson suggests the hearing officer's finding is unreasonable because both his testimony and his girlfriend's testimony contradict the finding while only Officer Heinert's testimony supports the finding. (Brief of Appellee at 17.) However, the number of witnesses testifying for each side does not determine the weight of the evidence. See Herb Hill Ins., Inc. v. Radtke, 380 N.W.2d 651, 654 (N.D. 1986). Moreover, resolving the conflict between the testimony of Deputy Heinert and Henderson and his girlfriend was within the exclusive province of the hearing officer. See Torstenson v. Moore, 1997 ND 159, ¶ 8, 567 N.W.2d 622. Given Deputy Heinert's plain testimony Henderson admitted drinking prior to driving, the hearing officer's finding was one reasonable inference from the evidence. See Russell v. Moore, 1997 ND 111, ¶ 10, 564 N.W.2d 278 (recognizing "when more than one reasonable inference can be made from the

evidence, a reviewing court must affirm the inference made by the hearing officer"); see generally Fox v. Fox, 2001 ND 88, ¶ 14, 626 N.W.2d 660 (indicating "[a] choice between two permissible views of the evidence is not clearly erroneous when the trial court's findings are based . . . on credibility determinations").

Henderson similarly contends the hearing officer must explain her credibility determinations. (Brief of Appellee at 10-11.) Henderson cites no case demonstrating a hearing officer must explain why the hearing officer credited a lay witness's testimony rather than another's conflicting testimony. Although case law indicates the Workers' Compensation Bureau, in resolving conflicts in evidence, must clarify inconsistencies in medical testimony, no cited cases indicate simple credibility determinations of lay witnesses require elaboration. See Negaard-Cooley v. North Dakota Workers Compensation Bureau, 2000 ND 122, ¶ 18, 611 N.W.2d 898 (noting the Bureau's duty to clarify inconsistent medical evidence).

D. Henderson's admission was properly considered.

Henderson contends his admission he was driving was inadmissible hearsay. (Brief of Appellee at 14-15.) Henderson waived that issue because he did not raise it at the administrative hearing, in his specifications of error, or before the district court. See Aalund v. North Dakota Workers Compensation Bureau, 2001 ND 32, ¶ 12, 622 N.W.2d 210 (noting "in appeals from administrative agency decisions, courts may consider only those grounds identified in specifications of error"). Regardless, Henderson's admission withstands a hearsay challenge because it is an admission by a party opponent. See N.D.R.Evid. 801(d)(2)(i).

The foregoing shows the hearing officer reasonably found Henderson drank prior to driving to the lake. When combined with the other circumstances,

Henderson's drinking prior to driving to the lake demonstrates Deputy Heinert had probable cause. The other circumstances include: (1) the engine to Henderson's pickup was running, (2) the pickup was stuck in snow and Henderson was shoveling near a tire, (3) Henderson's girlfriend was sitting in the passenger seat, and (4) Henderson had a strong odor of alcohol on his breath and his speech was slurred. Deputy Heinert, accordingly, reasonably could have believed Henderson had been driving while under the influence of alcohol.

II. Henderson's criminal proceeding is irrelevant.

Henderson includes a document from his criminal proceeding and suggests the outcome of the criminal proceeding is relevant. (Brief of Appellee at 2.) An administrative hearing, however, is separate and distinct from a criminal proceeding. See State v. Storbakken, 552 N.W.2d 78, 82 (N.D. 1996). "A dismissal or acquittal of the related criminal charge is irrelevant to the disposition of the administrative proceeding[.]" Id. The criminal proceeding involving Henderson thus is irrelevant. Moreover, the criminal proceeding, which apparently occurred nearly four months after the administrative hearing, was not part of the record before either the hearing officer or the district court and thus should not be considered. See Torstenson v. Moore, 1997 ND 159, ¶ 10, 567 N.W.2d 622 (explaining "[e]xcept to the extent otherwise provided by statute, "the agency record constitutes the exclusive basis for administrative agency action and judicial review of an administrative agency action").

III. No evidence suggests systemic disregard of the law.

Citing Madison v. North Dakota Dep't of Transp., 503 N.W.2d 243 (N.D. 1993), Henderson argues there was systemic disregard of the law justifying the

reversal of the Department's decision. (Brief of Appellee at 16-17.) In Madison, the Department's hearing officer improperly waived the Rules of Evidence during a driver's license revocation hearing. 503 N.W.2d at 246. The notice of hearing form included a preprinted, blanket waiver of the Rules of Evidence. Id. This Court concluded the Department had misread or ignored the amended statute which required it to give specific reasons justifying a waiver of the Rules of Evidence. Id. This Court indicated the hearing officer "perpetuated the institutional non-compliance" by refusing to apply the Rules of Evidence "simply because the Notice of Hearing form had, as part of its standard language, waived the Rules." Id. at 247. This Court further observed "the Department ha[d] continued to waive the Rules of Evidence despite district court instructions to the contrary." Id. Being "concerned about this systemic disregard of law," this Court noted "conduct which is 'potentially prejudicial' to the accused, if 'commonplace,' may warrant reversal." Id. at 246-47 (citation omitted). This Court accordingly reversed the revocation. Id. at 247.

No evidence suggests systemic disregard of the law in this case. Henderson essentially asserts the hearing officer's credibility determinations show systemic disregard of the law. The hearing officer has the duty to make credibility determinations, and a choice between two reasonable inferences from the evidence neither is unreasonable nor constitutes disregard of the law. See Russell v. Moore, 1997 ND 111, ¶ 10, 564 N.W.2d 278. Moreover, Henderson does not show, or even contend, the alleged disregard of the law in this case is of a type that is systemic. Henderson, thus, has not demonstrated systemic disregard of the law.

IV. The issue of whether there was probable cause for actual physical control need not be reached because there was probable cause for driving while under the influence.

Henderson suggests there was not probable cause to believe he was in actual physical control of the pickup. (Brief of Appellee at 21-27.) An officer only needs to have probable cause to believe either the person was driving while under the influence of alcohol or the person was in actual physical control while under the influence of alcohol. See N.D.C.C. § 39-20-05(2). Deputy Heinert had probable cause to believe Henderson had driven while under the influence. See supra argument at Part I. The issue of whether there was probable cause to believe Henderson had actual physical control, therefore, is unnecessary to resolve.

CONCLUSION

The Department respectfully requests this Court reverse the district court's judgment and reinstate the administrative suspension.

Dated this 27th day of November, 2001.

State of North Dakota
Wayne Stenehjem
Attorney General

BY: _____
Reid Brady
Assistant Attorney General
ID No. 05696
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant

e:\brady\dot\briefs\hendersonreplybrf11-21-01.doc