IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jay Olson,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20120352**
	)	
v.	)	**District Ct. No. 27-2012-CV-00003**
	)	
North Dakota Department of Transportation,	)	
	)	
Appellant.	)	

APPEAL FROM THE DISTRICT COURT
MCKENZIE COUNTY, NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID W. NELSON

BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

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STATEMENT OF ISSUE

Whether the hearing officer reasonably determined that Officer Blood ascertained that Olson had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample as required in the state toxicologist's approved method?

STATEMENT OF CASE

On December 10, 2011, Officer Daniel Blood (Officer Blood) arrested Jay Olson (Olson) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix (App.) 26. A Report and Notice, including a temporary operator's permit, was issued to Olson after chemical test results indicated Olson's blood alcohol concentration was .25 percent by weight. Id. The Report and Notice notified Olson of the Department's intent to suspend his driving privileges. Id.

In response to the Report and Notice, Olson requested an administrative hearing. Tr. Ex. 1d. The hearing was held on January 4, 2012. App. 1. In accordance with N.D.C.C. § 39-20-05(2), the hearing officer considered four broad issues, as follows:

> (1) [w]hether 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) [w]hether the person was placed under arrest;
>
> (3) [w]hether the person was tested in accordance with N.D.C.C. section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and;

(4) [w]hether the test results show the person had an alcohol concentration of at least eighteen one-hundredths of one percent by weight.

App. 1; Transcript ("Tr.") at Exhibit ("Ex.") 2.

Following the hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Olson's driving privileges for a period of 180 days. App. 23-25. Olson requested judicial review of the hearing officer's decision. App. 29-31.

STATEMENT OF FACTS

On December 10, 2011, at 12:00 a.m. Officer Blood initiated a traffic stop of Olson's vehicle for weaving within its lane and crossing the fog lines on two occasions. App. 5-6, 26. After activating his patrol car's emergency lights, Officer Blood observed Olson's vehicle making a wide turn into the opposing lane of traffic, before pulling over and stopping. App. 7-8. Officer Blood approached the vehicle and identified Olson by his driver's license and detected the odor of an alcoholic beverage from the vehicle. App. 8. Officer Blood also noted that Olson's speech was slurred. Id. Olson admitted consuming alcohol. Id.

Olson agreed to submit to field sobriety testing as requested by the officer. App. 8. Olson failed the three standardized field sobriety tests – the horizontal gaze nystagmus, the walk-and-turn and one-leg stand. App. 9-11. Olson also was unable to correctly perform the partial alphabet test and the Romberg balance test. App. 11-13. It took Officer Blood ten minutes to administer all of Olson's field sobriety tests. App. 21-22. Prior to conducting the field sobriety tests, Officer Blood noticed that Olson had chewing tobacco in his mouth. App.

18. Officer Blood had Olson remove the chewing tobacco prior to the administration of the field sobriety tests. App. 18-19.

Following the field sobriety tests, Officer Blood recited the implied consent advisory and requested Olson submit to an S-D5 onsite screening test. App. 13. Olson agreed. App. 13-14. The test was performed according to the approved method at 12:17 a.m. and the results showed that Olson's blood alcohol content was above the legal limit. App. 14, 18.

Officer Blood placed Olson under arrest for driving under the influence of alcohol at 12:18 a.m. App. 14. Officer Blood transported Olson to the McKenzie County Law Enforcement Center. App. 14, 17. Officer Blood again recited the implied consent advisory and requested that Olson submit to a chemical breath test on the Intoxilyzer 8000. App. 15. Olson agreed. Id. The test began at 12:30 a.m. and Olson's first breath sample occurred at 12:32 a.m. App. 27. The results of the Intoxilyzer test indicated Olson's blood alcohol concentration was .25 percent by weight. Id.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

In his Order reversing the hearing officer's decision, Judge Nelson stated:

> The arresting officer did not ascertain a twenty minute waiting period as required by the Approved Method to Conduct Breath Tests with the Intoxilyzer 8000. N.D.C.C. § 39-20-07 governs the interpretation of chemical test results. This section applies to both criminal and civil proceedings involving the allegations that a person operated a motor vehicle under the influence of alcohol. In order for the test results to be admitted into evidence, it must be shown that the sample was properly obtained and the test was fairly administered. N.D.C.C. 39-20-07(5). As such the Hearing Officer's reliance on the Intoxilyzer 8000 test result to suspend the Petitioner was in error.

App. 32.

Judgment was entered on August 24, 2012. App. 33. Notice of Entry of Judgment was filed the same day. App. 34. The Department appealed the Judgment to this Court. App. 35. The Department requests this Court reverse the judgment of the McKenzie County District Court and reinstate the administrative suspension of Olson's driving privileges for a period of 180 days.

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

The hearing officer's finding that the twenty minute waiting period was established is not against the greater weight of the evidence.

On appeal to the district court Olson contended the state toxicologist's approved method for conducting an Intoxilyzer test was not followed. Olson specifically asserted "the NDDOT cannot show that a twenty minute waiting period was ascertained before Officer Blood administered the Intoxilyzer test to [Olson]." App. i. Doc. 15. at 4.

This Court has observed that "'[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5).'" Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Johnson v. N.D. Dep't of Transp., 2004 ND 59, ¶ 11, 676 N.W.2d 807). This Court also has observed that "'[f]air administration of an Intoxilyzer test may be established by proof that the method approved by the State Toxicologist for conducting the test has been scrupulously followed.'" Buchholtz, 2008 ND 53, ¶ 10, 746 N.W.2d 181 (quoting Buchholz v. N.D. Dep't of Transp., 2002 ND 23, ¶ 7, 639 N.W.2d 490). However, this Court has noted, "'scrupulous' compliance does not mean 'hypertechnical' compliance." Id.

The "APPROVED METHOD TO CONDUCT BREATH TESTS WITH THE INTOXILYZER 8000" states in pertinent part as follows:

> Before proceeding, the operator must ascertain that the subject has had nothing to eat, drink, or smoke within twenty minutes prior to the collection of the breath sample by answering the question "20 Minute Wait?." The operator should then answer "Y" or "N."

Tr. Ex. 8, page 2 of 4.

Olson's argument is that because Officer Blood did not explicitly testify at the hearing as to when he began the twenty minute waiting period the Department failed to meet its burden of proof that the approved method was followed. Olson's argument is meritless.

Two factors show that the hearing officer reasonably determined that the approved method was followed in this case. First, the Intoxilyzer Test Record and Checklist shows that the approved method was followed. N.D.C.C. § 39-20-05(4) provides, in part, that a certified copy of the Intoxilyzer checklist is prima facie evidence of its contents without further foundation. The term "prima facie evidence" is defined as meaning "[e]vidence good and sufficient on its face . . . and which if not rebutted or contradicted, will remain sufficient." Black's Law Dictionary 1071 (5th ed. 1979). "If a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver's responsibility to produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere possibility of error." Berger v. State Highway Comm'r, 394 N.W.2d 678, 688 (N.D. 1986).

Officer Blood answered "Y" or yes on the Intoxilyzer Test Record and Checklist in response to the question of whether the twenty-minute waiting period

had been ascertained. App. 27. In addition, just above his signature, Officer Blood certified he had followed the approved method, part of which required the operator to ascertain the twenty-minute waiting period. Id. Thus, when Olson's Intoxilyzer test record was admitted into evidence, Officer Blood's statement that he ascertained the 20-minute waiting period became "prima facie evidence" that the twenty-minute waiting period was ascertained. Prima facie evidence is not rebutted simply by asserting that it was not established how the waiting period was ascertained. Rather, Olson was required to present actual evidence contradicting the prima facie evidence that the twenty-minute waiting period was ascertained. See Thorsrud v. Dir., Dep't of Transp., 2012 ND 136, ¶ 10, 819 N.W. 2d 483 (stating, "once the record and checklist was received into evidence, Thorsrud had the burden to present sufficient evidence to rebut the prima facie evidence of fair administration by proving Officer Nielsen had not followed the approved method").

A more careful look at this Court's decision in Thorsrud is helpful. In analyzing whether the Department had met its burden to show that the twenty-minute waiting period had been ascertained, the Court stated:

> Under N.D.C.C. § 39-20-05(4), once the Intoxilyzer Test Record and Checklist was admitted into evidence, the Department "establish[ed] prima facie [its] contents without further foundation" that Officer Nielsen had followed the approved method and ascertained the twenty-minute waiting period. The Intoxilyzer Test Record and Checklist is "presumed to be sufficiently complete to show fair administration until the defendant shows that 'the evidence as a whole clearly negates the presumed fact.'" State v. Zimmerman, 516 N.W.2d 638, 642 (N.D. 1994) (citing N.D.C.C. § 12.1-01-03(4)(a)). Therefore, a driver may rebut the Department's documentary foundation of fair administration by establishing either a deviation from approved procedures or a lack of fair

> administration despite compliance with approved procedures. State v. Erickson, 517 N.W.2d 646, 648 (N.D. 1994) (citing Zimmerman, at 642).

Id. at ¶ 10. The Court found Thorsrud had sufficiently rebutted the Department's documentary foundation of fair administration by "present[ing] testimonial evidence, corroborated by cross-examination of Officer Nielsen, that established she was allowed to use the restroom without supervision during the twenty-minute waiting period." Id. However, the Court indicated that Thorsrud's rebuttal of the Department's documentary prima facie showing did not mean the test was not fairly administered. The Court indicated, "'[o]nce the defendant has successfully rebutted the prosecution's prima facie showing, the prosecution may present testimony to show fair administration despite defendant's rebuttal.'" Id. at ¶ 12 (quoting Erickson, 517 N.W.2d at 648-49). The Court then looked to whether other evidence had been presented in the case proving the test was performed according to the approved method and found that it had been. Id. at ¶¶ 12-13.

Unlike Thorsrud, here, Olson did not rebut the prima facie showing that the twenty-minute waiting period was ascertained. When the hearing officer offered the Intoxilyzer Test Record and Checklist into evidence, Olson did not object. App. 16. Thus, it cannot reasonably be argued that the hearing officer erred on approved method grounds by admitting the Intoxilyzer Test Record and Checklist into evidence. Id. Olson, thereafter, failed to present evidence showing the test was not fairly administered.

Second, even if this Court believes that Olson sufficiently rebutted the prima facie showing of fair administration because Officer Blood failed to explicitly testify as to when he explicitly cleared Olson's mouth of chewing tobacco, other evidence in the record proves the twenty-minute waiting period was ascertained. Officer Blood stopped Olson's vehicle at 12:00 a.m. App. 26. A DUI investigation followed and Olson was subsequently arrested by Officer Blood at 12:18 a.m. App. 14. During the DUI investigation, Officer Blood had Olson perform several field sobriety tests, including the horizontal gaze nystagmus, walk-and-turn, one-leg stand, partial alphabet, and Romberg balance test. App. 9-13. Prior to beginning the field sobriety tests, Officer Blood had Olson clear out the chewing tobacco in his mouth. App. 18-19. According to Officer Blood the field sobriety tests took ten minutes for him to administer. App. 21-22. Officer Blood then administered an S-D5 onsite screening test at 12:17 a.m. App. 18. Olson's mouth was, therefore, cleared at 12:07 a.m. (ten minutes before the administration of the S-D5 onsite screening test), as the hearing officer found. App. 24.

Following arrest, Officer Blood transported Olson to the McKenzie County Law Enforcement Center, ten blocks away. App. 14, 17. Officer Blood provided the implied consent advisory and Olson agreed to submit to an Intoxilyzer test. Tr. 15. The Intoxilyzer test was initiated at 12:30 a.m. App. 19, 27. Olson's first breath sample occurred at 12:32 a.m. App. 27. Accordingly, Officer Blood ensured that Olson had nothing to eat, drink, or smoke from 12:07 a.m. through

the time of his first breath sample on the Intoxilyzer machine at 12:32 a.m., twenty-five minutes after his mouth was cleared of tobacco.

Given Officer Blood's testimony, the Intoxilyzer test record, and the lack of evidence refuting the testimony and test record, the hearing officer reasonably determined that the approved method was followed.

CONCLUSION

The Department respectfully requests that this Court reverse the judgment of the McKenzie County District Court and affirm the Department's decision suspending Olson's driving privileges for 180 days.

Dated this 29th day of October, 2012.

State of North Dakota
Wayne Stenehjem
Attorney General

By: _____
Michael Pitcher
Assistant Attorney General
State Bar ID No. 06369
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

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	)	
Appellant.	)	

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

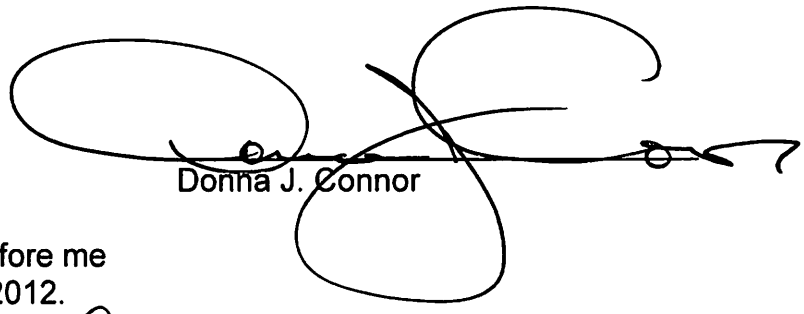
Donna J. Connor states under oath as follows:

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 29th day of October, 2012, I served the attached **BRIEF OF APPELLANT and APPENDIX OF APPELLANT** upon Jay Olson, by and through his attorney Jeff L. Nehring, by placing a true and correct copy thereof in an envelope addressed as follows:

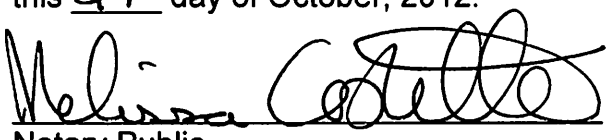
Jeff L. Nehring
Attorney at Law
716 Second Street West
Williston, ND 58801

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 29th day of October, 2012.



Notary Public

MELISSA CASTILLO
Notary Public
State of North Dakota
My Commission Expires Oct. 15, 2013