

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Louis Keller,)	
)	
Petitioner/Appellant,)	Supreme Ct. No. 20140341
)	
v.)	District Ct. No. 08-2014-CV-01131
)	
North Dakota Department of)	
Transportation,)	
)	
Respondent/Appellee.)	

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

HONORABLE GAIL HAGERTY

BRIEF OF APPELLEE

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STATEMENT OF ISSUE

[¶1] Whether the hearing officer abused her discretion in admitting Keller's Intoxilyzer 8000 test results into evidence, after the operator manually aborted the test when Keller would not provide a second breath sample?

STATEMENT OF CASE

[¶2] On February 18, 2014, Officer David Stewart (Officer Stewart) of the Bismarck Police Department arrested Richard Louis Keller (Keller) for the offense of driving a vehicle while under the influence of intoxicating liquor (DUI). Appendix (App.) 29. A Report and Notice, including a temporary operator's permit, was issued to Keller after Intoxilyzer test results indicated Keller's alcohol concentration was 0.135 percent by weight. Id. The Report and Notice notified Keller of the Department's intent to suspend his driving privileges. Id.

[¶3] In response to the Report and Notice, Keller requested an administrative hearing. App. 32. The hearing was held on March 12, 2014. App. 4. 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 eight one-hundredths of one

percent but less than eighteen one-hundredths of one percent by weight.

App. 6.

[¶4] Evidence in the record showed that Keller had a previous suspension in 2011 for having a blood alcohol concentration over the legal limits. App. 34. Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision suspending Keller's driving privileges for a period of 365 days. App. 24-26. Keller requested judicial review of the hearing officer's decision.

STATEMENT OF FACTS

[¶5] The Department accepts the Facts as set forth in Petitioner's brief and as described in the hearing officer's decision.

PROCEEDINGS ON APPEAL TO DISTRICT COURT

[¶6] Keller appealed the administrative decision to the Burleigh County District Court. App. 3. With respect to Keller's submission to the chemical Intoxilyzer test, the hearing officer found that "Intoxilyzer testing was done in accordance with the state toxicologist's approved method, with test results showing an alcohol concentration of .13% within two hours of time Mr. Keller was driving." App. 25, ll. 13-16. The hearing officer, thereafter, concluded: "Mr. Keller was arrested for DUI, was properly tested to determine his alcohol concentration after the arrest, and had test results showing that he had an alcohol concentration of at least .08% within two hours of the time he was driving." App. 25, l. 24 – App. 26, l. 3.

[¶7] Judge Hagerty affirmed the hearing officer's decision suspending Keller's driving privileges for 365 days. App. 64-68. In determining that the hearing officer did not abuse her discretion in admitting Keller's Intoxilyzer test result, even though the operator aborted the test, Judge Hagerty noted "[t]he record clearly demonstrates at the time the test operator aborted the test Keller had provided one adequate breath sample and was unwilling or unable to provide a second sample." App. 66, ¶7. After citing to relevant portions of the Approved Method regarding the procedures when any one of the two breath samples are deficient, Judge Hagerty wrote:

The record clearly indicates a second breath sample was not going to be obtained. The only difference in the result of the test as it was admitted and the result of the test had the test operator allowed the test to "time out" would be the notation in the AC column of line 07 and the language of the cross-reference asterisk below the test record. Additionally, there is nothing in the record, and Keller makes no argument, indicating that the result of the first sample was affected by the second sample being aborted. In fact, the Approved Method provides that when a second sample is not obtained, the first sample is a valid test. The differences that would be present had the second breath sample administration not been aborted do not "go to the scientific accuracy of the sample" and did not substantially affect the test results. *Schwind*, 462 N.W.2d 147, 152 (N.D. 1990).

App. 67, ¶9.

STANDARD OF REVIEW

[¶8] "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.

[¶9] 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)).

[¶10] 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).

[¶11] “When an ‘appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency’s order unless it finds the agency’s order is not in accordance with the law.’” Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646 N.W.2d 704). The “[i]nterpretation of a statute is a question of law fully reviewable on appeal.” State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

LAW AND ARGUMENT

The hearing officer reasonably found the Intoxilyzer test was fairly administered and the results were reliable and authentic.

A. This Court reviews the administrative hearing officer's evidentiary ruling for abuse of discretion.

[¶12] Keller raises the issue of whether his Intoxilyzer test results were inadmissible. This Court reviews the administrative hearing officer's ruling for an abuse of discretion. See Knudson v. Dir., N.D. Dep't of Transp., 530 N.W.2d 313, 317-18 (N.D. 1995). An abuse of discretion occurs when a hearing officer acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id. Thus, the broad question, properly framed, is whether the hearing officer abused her discretion in admitting Keller's Intoxilyzer test results into evidence.

B. Keller's Intoxilyzer test was properly admitted into evidence.

[¶13] This Court has observed that "[t]he admissibility of an Intoxilyzer test result is governed by N.D.C.C. § 39-20-07(5)." 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." 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." Potratz v. N.D. Dep't of Transp., 2014 ND 48, ¶ 20, 843 N.W.2d 305 (quoting, Buchholtz v. Dir., N.D. Dep't of Transp., 2008 ND 53, ¶ 10, 746 N.W.2d 181. Even when there is a deviation from the state toxicologist's directions, the test results may be admitted if the deviation could not have

substantially affected the test results. Schwind v. Dir., N.D. Dep't of Transp., 462 N.W.2d 147, 152 (N.D. 1990); see also Wagner v. Backes, 470 N.W.2d 598, 600 (N.D. 1991) (“When . . . we have been able to say that the deviation involved some clerical or ministerial aspect of an approved method and, therefore, could not have affected the test results, we have upheld a license suspension.”).

[¶14] The hearing officer admitted Keller’s Intoxilyzer Test Record and Checklist into evidence. App. 17, ll. 19-21; App. 30. As noted on the Intoxilyzer Test Record and Checklist, Officer Stewart tested Keller’s alcohol content on February 18, 2014. App. 30. Officer Stewart also noted on the Intoxilyzer Test Record and Checklist that “I followed the approved method and the instructions displayed by the Intoxilyzer in conducting this test.” Id.

[¶15] Keller argues his test record should not have been admitted into evidence because the officer manually aborted the test. Keller specifically alleges the approved method does not describe the outcome when a test is aborted and therefore expert testimony was needed. Keller’s argument is misplaced.

[¶16] In this case Officer Stewart manually aborted the Intoxilyzer test instead of allowing the machine to “time out” during Keller’s attempt to provide the second subject test breath sample. However, it is uncontested that at that point in time Keller had already satisfactorily provided his first subject test breath sample and that Keller had decided he was done attempting to blow into the machine for the second subject test sample. In that regard, Officer Stewart testified:

For the second test he attempted to blow once, then he attempted to blow again and then he decided he was done. He wasn’t trying to not cooperate, but he wasn’t going to blow anymore.

At this point in time, I should have let the machine time out. Without thinking about it, I hit the end test button.

App. 17, ll. 9-14. Officer Stewart's testimony on this point was unrefuted. Keller simply would not or could not provide a second breath sample.

[¶17] According to the approved method, after subject test one is completed, the Intoxilyzer will purge the sample chamber with room air, conduct a room air test, introduce an ethanol gas standard and analyze it, and then inform the operator to place another clean mouthpiece on the breath tub and instruct the subject to blow into the machine. See App. 40-41. The approved method then explains:

If the subject does not blow with sufficient pressure and/or time to achieve an adequate breath sample, "Please Blow Until Tone Stops" will reappear with intermittent beeps. The subject has another three minutes to provide an adequate breath sample.

App. 41, at 15b. In interpreting the test, the approved method states:

- B. If any breath sample is determined to be deficient, meaning the subject did not provide a breath sample or did not provide an adequate breath sample, the instrument will print "**Subject Test" followed by "#.###*" with the highest alcohol concentration obtained during the test. The asterisk (*) cross-references a message printed below on the test record.
 - 1. If any one of the two breath samples rendered by the subject is deficient or the subject does not provide one of the two samples, the single test obtained shall constitute a valid test and the three digits for that test will be reported as the breath alcohol concentration.

App. 42. Here, the asterisk references that Officer Stewart aborted the test. As the officer testified this was a simple mistake. Yet, the officer's testimony is also clear that Keller was not going to provide the breath sample for subject test 2. Therefore, in accordance with the approved method the single breath sample


obtained (subject test 1) would constitute a valid test. Therefore, Keller's valid subject test 1 of a 0.135 percent by weight was Keller's reported test result. A reasoning mind reasonably could have inferred from the testimony provided that subject test 2 would have timed out without a reported alcohol concentration because Keller would not blow into the tube and therefore his first sample would constitute a valid test result. The hearing officer did not abuse her discretion in admitting the test record into evidence.

CONCLUSION

[¶18] The Department respectfully requests that this Court affirm judgment of the Burleigh County District Court and affirm the hearing officer's decision suspending Keller's driving privileges for 365 days.

Dated this 9th day of December, 2014.

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Transportation,)	AFFIDAVIT OF SERVICE
)	BY MAIL
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STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

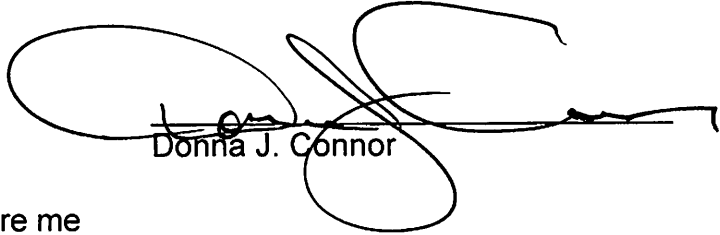
[¶1] Donna J. Connor under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.


[¶3] I am of legal age and on the 9th day of December, 2014, I served the attached **BRIEF OF APPELLEE** upon Richard Louis Keller, by and through his attorney Justin Vinje, by placing a true and correct copy thereof in an envelope addressed as follows:

Justin Vinje
Attorney at Law
120 North 3rd Street, Ste. #210
Bismarck, ND 58501

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 9th day of December, 2014.


Notary Public

