

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

McKayla Hanson,	)	
	)	Supreme Court No. 20220071
Appellee,	)	
	)	
v.	)	District Court No. 08-2021-CV-01326
	)	
Director, North Dakota	)	
Department of Transportation,	)	
	)	
Appellant.	)	

**BRIEF OF THE APPELLEE**

Appeal from the March 8, 2022 Judgment of the District Court Reversing Hearing Officer's Decision

Burleigh County District Court  
South Central Judicial District  
The Honorable David E. Reich, Presiding

**ORAL ARGUMENT REQUESTED**

Dated May 3, 2022

/s/ Lloyd C. Suhr  
Lloyd C. Suhr (ID # 05405)  
Attorney for the Appellee  
120 N. 3<sup>rd</sup> St., Suite 225  
P.O. Box 2393  
Bismarck, ND 58502  
(701) 223-3874  
lawfirm@suhrandlofgren.com

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### **ORAL ARGUMENT REQUESTED**

[¶1] The Appellee (Hanson) respectfully requests oral argument. It may be helpful to develop the issues and arguments.

### **STATEMENT OF THE ISSUES**

[¶2] Whether the Department's findings of fact were not supported by a preponderance of the evidence?

[¶3] Whether the Department's conclusions of law were not supported by the findings of fact?

### **STATEMENT OF FACTS**

[¶4] On June 12, 2021 at approximately 1:21 a.m., Burleigh County Sheriff's Deputy Kyle Haman (Haman) was on duty. (R4:3:16-25). Haman was heading eastbound on Burleigh Avenue when he observed a vehicle come to a stop at the intersection of Burleigh Avenue and South 12<sup>th</sup> St. for what he believed to be an unusual length of time. (R4:4:5-10). The vehicle continued eastbound and came to a complete stop at the intersection of East Burleigh Avenue and University Drive but did not activate its turn signal until it had already come to a complete stop. (R4:4:11-13). Haman conducted a traffic stop. (R4:4:14-17). Haman spoke to the driver, who was identified as Hanson. (R4:4:19-25; R4:5:1-3).

[¶5] Haman noted Hanson had glossy, red eyes and he could smell alcohol on her breath while speaking with her. (R4:5:10-13). Hanson admitted to drinking alcohol. (R4:5:16-19). Field sobriety tests were administered. (R4:5:23-25; R4:6; R4:7:1-23).

[¶6] Hanson recite the implied consent advisory for a screening breath test, and Hanson agreed to take it. (R4:7:25; R4:8:1-5). Haman administered the screening test. (R4:8:6-16).

[¶7] Haman placed Hanson under arrest for driving under the influence, recited the implied consent advisory for a chemical, and requested the same. (R4:8:18-25; R4:9:1-6). Haman subsequently administered a chemical test with an Intoxilyzer 8000. (R4:9:7-14).

[¶8] Hanson submitted a timely request for a hearing before the Department. (R5:4). A hearing was scheduled for June 21, 2021. (R6).

[¶9] Haman testified as the sole witness at the hearing. (R4).

[¶10] The Department offered several exhibits during the hearing. One of them was identified as “Exhibit 1” (R5). It consisted of five (5) pages, including an Intoxilyzer Record and Checklist showing that the chemical testing device used was Intoxilyzer 8000, serial # 80-004945. (R5:3).

[¶11] Another exhibit was identified as “Exhibit # 7” (R11). It consisted of four (4) pages, the first of which being a state form entitled “Intoxilyzer 8000 Installation and Repair Checkout”. (R11:1). A handwritten entry on the document shows that the specific device to which this form related bore serial # 80-004945. Id. The form has a box near the top of the page labeled “Reason for Install/Repair”. Id. There are three options, each setting out a specific and different documentary purpose. Id. The first is “Install After Receiving From Crime Laboratory”. Id. That box was not checked. Id. The second is “Install After Location Change”. Id. That box was not checked. Id. The third is “Other (Specify)”. Id. That box was checked. A

handwritten notation immediately following that third box shows that, in this case, the form was documenting “monthly tests”. Id. The form was signed and dated March 1, 2021. Id. Although the signature is illegible, the remaining three (3) pages of the document indicate that Haman is the one who conducted the monthly testing being documented by the form. (R11:2-4).

[¶12] Another exhibit was identified as “Exhibit # 8”. (R12). It consisted of ten (10) pages. Id. it set out the approved method to conduct breath testing with the Intoxilyzer 8000. Id. Under the approved method, the Intoxilyzer 8000 must be installed by a field inspector prior to use. (R12:4).

[¶13] Hanson objected to the admission of “Exhibit # 1” on the grounds that there was no evidence in the record that the Intoxilyzer device was installed by a field inspector. (R4:22:10-21). The Department overruled the objection and summarily admitted “Exhibit # 1” into evidence. (R4:22:22-23).

[¶14] The Department issued a written decision on July 9, 2021. (R16). The findings of fact stated that “Deputy Haman administered the Intoxilyzer fairly and in accordance with the approved method within two hours of the time of driving” and that “Deputy Haman is also the field inspector that installed the Intoxilyzer 8000 used in this matter”. Id. The conclusions of law stated that “Ms. Hanson was... tested in accordance with N.D.C.C. 39-20-01.” Id.

[¶15] Hanson timely filed and served a Notice of Appeal and Specification of Errors on July 14, 2021. (R1). The District Court issued a Memorandum Reversing the Department and reinstating Hanson’s driving privileges on December 28, 2021.

(R30). Judgment was entered on March 8, 2022. (R40). Notice of Entry of Judgment was entered on March 8, 2022. (R41).

## **ARGUMENT**

### **A. Standard of Review**

[¶16] Under N.D.C.C. § 28-32-46, the Department's decision must be affirmed unless:

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.

[¶17] The Department's evidentiary rulings are reviewed under the abuse of discretion standard. Filkowski v. Dir., N.D. Dep't of Transp., 2015 ND 104, ¶ 6, 862 N.W.2d 785 (citing Potratz v. N.D. Dep't of Transp., 2014 ND 48, ¶ 7, 843 N.W.2d 305). A hearing officer abuses their discretion if they act in an arbitrary, unreasonable, or unconscionable manner, or if they misinterpret or misapply the law. Id. (citing Dawson v. N.D. Dep't of Transp., 2013 ND 62, ¶ 12, 830 N.W.2d 221). Deference is given to the Department's findings of fact. Id. (citing Keller v. N.D. Dep't of Transp., 2015 ND 9, ¶¶ 4-5, 858 N.W.2d 316). Questions of law are,

however, fully reviewable. Id. (citing Barros v. N.D. Dep't of Transp., 2008 ND 132, ¶ 8, 751 N.W.2d 261).

**B. The Department's findings of fact are not supported by a preponderance of the evidence**

[¶18] Upon the trial of any civil action or proceeding arising out of acts alleged to have been committed by any individual while driving under the influence of intoxicating liquor, evidence of the alcohol concentration as shown by a chemical analysis of the breath is admissible. N.D.C.C. § 39-20-07. The section further provides that:

The results must be received into evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee.

N.D.C.C. § 39-20-07(5).

[¶19] The Department found that Haman administered the Intoxilyzer 8000 in accordance with the approved method and that he was the field inspector who installed it. (R16). These findings are unsupported by the record.

[¶20] "Exhibit # 7" (R11:1) is, by both its title and plain text, a multi-purpose form. It can be used to document device installation after receipt from the crime lab, or installation after relocation from one place to another, or other non-installation tasks such as maintenance or routine testing. Id. The specific purpose for which the form is being used in any given case is designated by which box on the form is checked. It is indisputable that neither of the "installation" boxes were checked

in this case. Only the “other” box was checked, and that was to document monthly testing not installation. Id.

[¶21] Haman did not testify that he installed the device in this case, nor was he even asked if he had installed it. (R4). No other witness testified at the hearing at all, let alone about the question of installation. Id.

[¶22] There is no evidence in the record that the device in this case was installed by a field inspector. Accordingly, the Department’s findings are not supported by a preponderance of the evidence, which requires support by “the greater weight of the evidence.” Reynolds v. North Dakota Workmen’s Compensation Bureau, 328 N.W.2d 247, 249 (N.D. 1982) (citing Power Fuels, Inc. v. Elkin, 283 N.W.2d 214, 219 (N.D. 1979)).

[¶23] The holding in Ell v. Dep’t of Transportation, 2016 ND 164, 883 N.W.2d 464 is controlling on the issue in this case and mandates that the District Court’s Order be affirmed. Ell was stopped for speeding. Id. at ¶ 2. After field sobriety and preliminary breath testing, he was arrested for driving under the influence. Id. A chemical breath test was subsequently administered, which showed an alcohol concentration greater than the legal limit. Id. After an administrative hearing, the hearing officer found that the chemical test was administered fairly and in accordance with the approved method and ordered Ell’s driving privileges suspended for 91 days. Id. at ¶ 4. Ell appealed to the district court, which affirmed the decision. Id.

[¶24] In reversing, the North Dakota Supreme Court observed that “ ‘[i]f the documentary evidence and testimony does not show scrupulous compliance with

the methods approved by the director of the state crime laboratory or the director's designee, the evidentiary shortcut provided by N.D.C.C. § 39-20-07 cannot be used and fair administration of the test must be established through expert testimony.' ” Id. at ¶ 19 (quoting State v. Van Zomeren, 2016 ND 98, ¶ 10, 879 N.W.2d 449). This Court rejected the Department's assertion that an exhibit showing that the device had been inspected was legally sufficient, concluding “[i]t is not clear from the approved method or from any other evidence in the record that inspection of a testing device is the same as installation of the device.” Id. at ¶ 20. The exhibit established inspection, but it did not establish installation by a field inspector. Id. Since the record did not show scrupulous compliance with the approved method, and there was no expert testimony that the testing was fairly administered, the Department's findings were not supported by a preponderance of the evidence, and it was an abuse of discretion to admit the test results. Id. at ¶¶ 21-22.

[¶25] The same conclusion is warranted in this case. Here, just as in Ell, the record of “monthly tests” only establishes an inspection of the device. That record of inspection does not establish installation by a field inspector any more than the inspection record in Ell did. Further, just as in Ell, there was no expert testimony to fill this evidentiary void and establish that the test was fairly administered. The Department's arguments that this evidentiary record nonetheless somehow shows installation must fail here just as it did in Ell.

**C. The Department's conclusions of law are unsupported by the findings of fact**

[¶26] The Department's conclusions of law provided that "Ms. Hanson was ... tested in accordance with N.D.C.C. section 39-20-01". (R16). Again, since there is no documentation in the record showing that the Intoxilyzer 8000 was installed by a field inspector, and the Department did not present any expert testimony to show that the test was fairly administered, the conclusions of law are not supported by the factual findings.

**CONCLUSION**

[¶27] The Department's findings of fact were not supported by a preponderance of the evidence. The Department's conclusions of law were not supported by the findings of fact. The Department abused its discretion in admitting "Exhibit # 1" (R5) for the purpose of establishing installation by a field inspector. The District Court's Memorandum and Order Reversing the Department must be affirmed.

Dated May 3, 2022

*/s/ Lloyd C. Suhr*  
Lloyd C. Suhr (ID # 05405)  
Attorney for the Appellee  
120 N. 3<sup>rd</sup> St., Suite 225  
P.O. Box 2393  
Bismarck, ND 58502  
(701) 223-3874  
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**CERTIFICATE OF COMPLIANCE**

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[¶1] The undersigned hereby certifies the Brief of the Appellee complies with the page limitations set forth in Rule 32 of the North Dakota Rules of Appellate Procedure.

[¶2] The Brief has eleven (11) pages according to the word processing page counting feature.

Dated May 3, 2022.

*Isl Lloyd C. Suhr*

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Lloyd C. Suhr (ID # 05405)  
Attorney for the Appellee  
120 N. 3<sup>rd</sup> St., Suite 225  
P.O. Box 2393  
Bismarck, ND 58502  
[lawfirm@suhrandlofgren.com](mailto:lawfirm@suhrandlofgren.com)

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**CERTIFICATE OF SERVICE**

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[¶1] The undersigned hereby certifies that on May 3, 2022, I filed the **Brief of the Appellee** and **Certificate of Compliance** with the Clerk of the North Dakota Supreme Court by electronic means using email address [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) with a copy electronically sent to Assistant Attorney General Michael Pitcher at his designated address for e-filing, [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) and to the best of my knowledge said filing and service are in accordance with N.D. R. App. P. 25.

Dated May 3, 2022.

*Isl Lloyd C. Suhr*  
\_\_\_\_\_  
Lloyd C. Suhr (ID # 05405)  
Attorney for the Appellee  
120 N. 3<sup>rd</sup> St., Suite 225  
P.O. Box 2393  
Bismarck, ND 58502  
[lawfirm@suhrandlofgren.com](mailto:lawfirm@suhrandlofgren.com)