IN THE COURT OF APPEALS OF IOWA

No. 3-455 / 12-2054
Filed July 24, 2013

BRANDON DEAN WATSON,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Christopher McDonald, Judge.

Brandon Dean Watson appeals the district court's ruling on judicial review affirming the one-year disqualification of his commercial driver's license for operating a commercial motor vehicle with a blood alcohol concentration above the legal limit of 0.04, in violation of Iowa Code section 321.208(1)(a) (2009). **AFFIRMED.**

Billy J. Mallory of Brick Gentry, P.C., West Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Michelle R. Linkvis, Assistant Attorney General, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Brandon Dean Watson appeals the district court's ruling on judicial review affirming the one-year disqualification of his commercial driver's license (CDL) for operating a commercial motor vehicle with a blood alcohol concentration above the legal limit of 0.04, in violation of Iowa Code section 321.208(1)(a) (2009). He asserts the court erred in determining the officer needed only reasonable grounds to believe that Watson had a blood alcohol concentration of .04 or greater, rather than .08 as set out in Iowa Code section 321J.2, to administer a chemical test. Finding no basis upon which to superimpose the requirements of sections 321J.6 upon this CDL disqualification, we affirm.

I. Background Facts and Proceedings.

On October 22, 2010, Watson was driving a commercial motor vehicle in Monroe County, Iowa. Iowa State Trooper Bartt Carney stopped Watson for a speeding violation. Watson consented to the trooper's request to sample Watson's breath using a DATAMASTER unit. The test results indicated Watson had a blood alcohol concentration of .041, which is in excess of the legal limit for drivers operating commercial vehicles under Iowa Code section 321.208. Watson received notice of a one-year disqualification of is CDL.

Watson appealed the disqualification. An administrative law judge (ALJ) upheld the disqualification, as did a reviewing officer on intra-agency appeal.

Watson then filed a petition for judicial review. The district court held a hearing and the parties discovered the transcript from the ALJ hearing was

missing. The district court remanded the case back to the Iowa Department of Transportation (IDOT).

ALJ David Lindgren conducted a second hearing, limiting Watson to presenting testimony relevant to the issue of whether the DATAMASTER's .04 margin of error applies to a CDL revocation. ALJ Lindgren issued a ruling on July 29, 2011, concluding section 321J.12(6)'s margin of error does not apply to section 321.208. Watson's CDL disqualification was upheld by the ALJ and by a reviewing officer.

Watson filed a second petition for judicial review. The district court affirmed in part and reversed in part, ruling the IDOT correctly found that margin of error did not apply to a CDL revocation, but Watson should have been allowed to present his argument that there was not probable cause or reasonable suspicion to administer the test when the matter was remanded.

The margin-of-error issue was appealed and our supreme court recently affirmed. *See Watson v. Iowa Dep't of Transp. Motor Vehicle Div.*, 829 N.W.2d 566, 568-71 (Iowa 2013) (rejecting Watson's claim that section 321J.12(6) required the IDOT, before making a determination of alcohol concentration for the purpose of suspending a noncommercial license, adjust chemical test results downward by the test's standard margin of error).

ALJ John Priester presided at an administrative hearing on March 8, 2012, at which Watson asserted Trooper Carney lacked the requisite probable cause or reasonable suspicion required to administer a chemical test. The ALJ observed

that the issue was "whether the trooper had reasonable grounds to believe [Watson] was operating a commercial motor vehicle while over the legal limit."

Trooper Carney testified that he stopped Watson at about 8 a.m. on October 22, 2009, for speeding. When Watson was in the squad car with him, Watson "smelled of alcohol" and "had recorded two clues on the [horizontal gaze nystagmus] HGN field sobriety test." Watson told Carney he had had several alcoholic beverages the previous evening, the last of which at about 11 p.m. Based on those indicators, Trooper Carney requested a preliminary breath test of Watson. On cross-examination, Trooper Carney acknowledged, "I did not have reasonable grounds to believe that he would be over the .08 limit; but I did believe I had enough grounds to believe he possibly could be over the .04 limit."

Watson's counsel contended that to seek a breath test the officer needed reasonable grounds to believe Watson was operating a motor vehicle while under the influence or with an alcohol concentration of .08 or more, and argued the officer did not have those grounds. The ALJ ruled:

> The Department of Transportation has authority to disqualify a licensee's commercial motor vehicle license for one year "upon a conviction or final administrative decision that the person has committed any of the following acts or offenses . . . while operating a commercial motor vehicle or noncommercial vehicle and holding a commercial driver's license: (a) Operating a commercial motor vehicle with an alcohol concentration, as defined in section 321J.1, of 0.04 or more." Iowa Code § 321.208(1)(a).
>
> The only issues to be determined in an administrative driver's license revocation hearing are "whether an officer had reasonable grounds to believe the person was operating a motor vehicle while intoxicated and whether the person submitted to a test and either failed or refused it." *Casper v. Iowa Department of Transportation*, 506 N.W.2d 799, 802 (Iowa Ct. App. 1993).
>
> The test to determine whether there was "reasonable grounds" to believe the person was operating in violation of Iowa

> Code section 321.208 is met "when the facts and circumstances known to the officer at the time action was required would have warranted a prudent person's belief that an offense has been committed," *State v*. *Braun*, 495 N.W.2d 735,738-39 (Iowa 1993).
>
> . . . .
>
> The trooper did not need reasonable grounds to believe that [Watson] was operating a motor vehicle while intoxicated to invoke implied consent. [Watson] was operating a commercial motor vehicle. The trooper only needed reasonable grounds to believe that [Watson] was operating a commercial motor vehicle with a breath alcohol level of [0.04[1]], half of that required to be under the influence.
>
> The trooper detected the odor of alcohol on [Watson] and [Watson] admitted consuming alcohol the night before. [Watson] then showed clues of intoxication on the horizontal gaze nystagmus test. These indicators did not show that [Watson] was over the legal limit of 0.08, however they gave the trooper reasonable grounds to believe that [Watson] was operating a commercial motor vehicle with an alcohol level over 0.04. The trooper possessed grounds to request a breath test and the test result was over 0.04. The disqualification is found to be correct and shall be upheld.

On appeal, the reviewing officer went "a step further" and concluded, "The appellant's speed, odor, statement, and performance on field sobriety testing provided reasonable grounds to believe that he was operating [in] violation of section 321J.2."

When Watson appealed the IDOT decision to the district court, he argued that "the reviewing officer correctly concluded that the Department was required to establish that Officer Carney was required to have reasonable grounds to believe Watson was operating while intoxicated or with an alcohol concentration of 0.08 or greater," but substantial evidence did not exist to support the agency's conclusion the officer had such reasonable grounds.

---

[1] The decision states .004, which is a typographical error.

The IDOT argued that the officer did not invoke implied consent under Iowa Code section 321J.6, which requires the reasonable grounds as to the commission of an offense under Iowa Code section 321J.2, but rather "[t]he issue is whether the officer had reasonable grounds to believe the petitioner was operating a [commercial] motor vehicle with an alcohol concentration of .04 or greater, under Iowa Code section 321.208(12)(a), and thus properly disqualified petitioner's CDL under Iowa Code section 321.208(1)(a)."

On September 25, 2012, the district court "decline[d] to incorporate the higher section 321J.2 standard into the plain and unambiguous text of the applicable statute." The court held the IDOT reviewing officer erred in applying the higher section 321J.2 standard as it "needed only to determine whether Officer Carney had reasonable grounds to believe that Watson was operating a commercial motor vehicle with alcohol concentration of 0.04 or greater." The court found that in light of the officer's acknowledgment that he did not have grounds to believe Watson was operating a motor vehicle with alcohol concentration of 0.08 there was not substantial evidence to support the reviewing officer's finding of a violation of 321J.2. However, that error did not prejudice Watson's substantial rights because the "Department needed only to determine that Officer Carney had reasonable grounds to believe that Watson was operating a commercial motor vehicle with an alcohol concentration of 0.04 or greater," which the ALJ found, and for which there was substantial supporting evidence. Finally, the court found that the implied consent standard asserted by

Watson, Iowa Code § 321J.6, was inapplicable to CDL license revocation provisions of section 321.208.

Watson's motion for reconsideration was denied and he now appeals. Watson contends the disqualification of his CDL should be reversed because Trooper Carney did not have reasonable grounds to believe he was operating a motor vehicle in violation of Iowa Code section 321J.2, and did not properly invoke implied consent pursuant to section 321J.6.

II. Scope and Standard of Review.

> Iowa Code chapter 17A governs judicial review of agency actions. The district court reviews for errors at law. On appeal, we apply the standards of chapter 17A to determine whether we reach the same conclusions as the district court. If we reach the same conclusions, we affirm; otherwise we may reverse. We will uphold the IDOT's factual findings if, after reviewing the record as a whole, we determine substantial evidence supports the findings.

Watson, 829 N.W.2d at 568 (citations omitted).

III. Discussion.

Watson argues the district court erred in (1) determining the officer needed only have had reasonable grounds to believe he was operating a commercial vehicle with a blood alcohol concentration of .04 or greater, (2) ruling the officer properly invoked implied consent pursuant to Iowa Code section 321J.6 and that implied consent was not applicable, and (3) finding his CDL was properly disqualified under section 321.208. We agree with the district court's ruling and therefore affirm.

Watson's appeal hinges on the applicability of implied consent under section 321J.6, which incorporates the definition of the offense of operating while

under the influence.[2] Watson argues that because the conditions set forth in section 321J.6(1) were not present (i.e., reasonable grounds to believe he had an alcohol concentration of .08), implied consent was not properly invoked, and his CDL is not subject to disqualification.

Watson acknowledges that section 321.208—under which the CDL disqualification was imposed "provides no requirements or directions for implied consent," but argues nonetheless that "under Iowa law, it is clearly required, even in commercial vehicle cases." The cases cited by Watson, however, do not support that position. *See State v*. *Hutton*, 796 N.W.2d 898 (Iowa 2011) (involving person charged with operating while intoxicated while driving noncommercial vehicle and whether an advisory was faulty, rendering consent involuntary); *Dickerson v*. *Iowa Dep't of Transp*., No. 10-10126, 2010 WL 2384866 (Iowa Ct. App. June 16, 2010) (involving the driver's license of a motorist, who was driving a personal vehicle but held a CDL).

---

[2] Section 321J.6 provides in part,

> A person who operates a motor vehicle in this state under circumstances which give reasonable grounds to believe that the person has been operating a motor vehicle in violation of section 321J.2 or 321J.2A is deemed to have given consent to the withdrawal of specimens of the person's blood, breath, or urine and to a chemical test or tests of the specimens for the purpose of determining the alcohol concentration or presence of a controlled substance or other drugs, subject to this section. The withdrawal of the body substances and the test or tests shall be administered at the written request of a peace officer having reasonable grounds to believe that the person was operating a motor vehicle in violation of section 321J.2 or 321J.2A, and if any of the following conditions exist: . . . .

Section 321J.2(1)(b) states, "A person commits the offense of operating while intoxicated if the person operates a motor vehicle . . . [w]hile having an alcohol concentration of .08 or more."

Watson was driving a commercial motor vehicle and was issued a notice of disqualification of his CDL for one year pursuant to Iowa Code section 321.208. Iowa Code section 321.208 is entitled "Commercial driver's license disqualification" and provides for CDL disqualification as follows:

> (1) A person is disqualified from operating a commercial motor vehicle for one year upon a conviction or final administrative decision that the person has committed any of the following acts or offenses in any state or foreign jurisdiction while operating a commercial motor vehicle:
>
> (a) Operating a commercial motor vehicle with an alcohol concentration, as defined in section 321J.1, of 0.04 or more.
>
> . . . .
>
> (11) Upon receiving a record of a person's disqualifying conviction, administrative decision, suspension, or revocation, the department shall, by rule, without preliminary hearing and upon thirty days' advance notice, disqualify the person from operating a commercial motor vehicle upon a highway.
>
> (12) (a) *A person is disqualified from operating a commercial motor vehicle if the person either refuses to submit to chemical testing required under chapter 321J or submits to chemical testing and the results show an alcohol concentration as defined in section 321J.1 of 0.04 or more*. The department, upon receipt of the peace officer's certification, subject to penalty for perjury, *that the peace officer had reasonable grounds to believe the person to have been operating a commercial motor vehicle with an alcohol concentration of 0.04 or more and* that the person refused to submit to the chemical testing or *submitted to chemical testing and the results show an alcohol concentration as defined in section 321J.1 of 0.04 or more*, *shall*, *without preliminary hearing and upon thirty days' advance notice*, *disqualify the person from operating a commercial motor vehicle upon a highway*.

Iowa Code § 321.208 (emphasis added).

The legislature has distinguished commercial drivers from ordinary drivers. *See Watson*, 829 N.W.2d at 570. Commercial drivers are held to a higher standard than noncommercial drivers because they drive larger vehicles and are entrusted with safety-sensitive tasks, such as transporting people and hazardous

materials. *Wiebenga v. Iowa Dep't of Transp.*, 530 N.W.2d 732, 735 (Iowa 1995). That higher standard is evidenced in section 321.208's lower alcohol concentration tolerance: a person is disqualified from operating a commercial motor vehicle if that person operated a "commercial motor vehicle with an alcohol concentration, as defined in section 321J.1, of 0.04 or more," (subsection (1)), or "submits to chemical testing and the results show an alcohol concentration as defined in section 321J.1 of 0.04 or more" (subsection (12)).

We note that a commercial licensee is subject to disqualification upon "a conviction or final administrative decision that the person has committed" the offense of "operating a motor vehicle while intoxicated, as provided in section 321J.2, subsection 1."[3] *See* Iowa Code § 321.208(2)(a) (2009 Supp.). But conviction of operating while intoxicated is not required. It is sufficient that the commercial licensee "[o]perat[ed] a commercial motor vehicle with an alcohol concentration . . . of .04 or more." *Id.* § 321.208(1)(a).

One principle of statutory interpretation is that "legislative intent is expressed by omission as well as by inclusion and that the express mention of certain sections implies the exclusion of others." *Watson*, 829 N.W.2d at 570 (citations omitted). While section 321.208 refers the IDOT to section 321J.1 to determine alcohol concentration in the CDL suspension context,[4] there is no reference in section 321.208 to section 321J.6.

---

[3] Section 321J.2(1)(b) provides that a person is operating while intoxicated when a person has an alcohol concentration of .08.

[4] Section 321J.1(1) defines alcohol concentration as "the number of grams of alcohol per any of the following:" (a) one hundred milliliters of blood; (b) two hundred ten liters of breath; or (c) sixty-seven milliliters of urine.

In *Watson*, 829 N.W.2d at 568-71, the supreme court rejected the Watson's claim that section 321J.12(6) required the IDOT to adjust chemical test results downward by the test's standard margin of error. There, the court stated:

> Applying these principles of interpretation and policy here, we cannot conclude the legislature intended its margin of error provision in section 321J.12(6) would apply in the CDL suspension context. The provision, by its express terms, refers only to sections *321J.2 and 321J.2A—sections governing license revocations for noncommercial licensees*. The margin of error provision makes no reference to section 321.208, which governs license revocations for commercial drivers. The express directive requiring the margin of error adjustment in the noncommercial licensee context and the absence of any reference to such adjustment in the CDL context together inform our conclusion that the legislature never intended margin of error adjustment of CDL operators' test results.

Watson, 829 N.W.2d at 570 (emphasis added). As noted in the emphasized language, section 321J.2 governs license revocations for noncommercial licensees.

Section 321.208, however, governs license disqualifications for commercial licensees. Section 321.208 expressly mentions section 321J.1, but makes no mention of 321J.6, which supports the conclusion that the legislature did not intend section 321J.6 implied consent to come into play. Moreover, section 321.208(12)(a) requires the IDOT to disqualify a person from operating a commercial motor vehicle upon a highway "upon receipt of the peace officer's certification . . . *that the peace officer had reasonable grounds to believe the person to have been operating a commercial motor vehicle with an alcohol concentration of 0.04* and that the person refused to submit to the chemical testing or *submitted to chemical testing and the results show an alcohol concentration as defined in section 321J.1 of 0.04 or more*." (Emphasis added.)

This language would be mere surplusage if we were to superimpose section 321J.6 implied consent upon it. *See Neal v. Annett Holdings, Inc.*, 814 N.W.2d 512, 520 (Iowa 2012) (noting that in interpreting a statute "each term is to be given effect, and we will not read a statute so that any provision will be rendered superfluous" (internal quotation marks and citations omitted)); *see also* 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:6, at 230 (7th ed. 2007) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.").

We find no error in the district court's affirmance of Watson's CDL disqualification and we affirm.

AFFIRMED.