IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sandra Twoey	:	
	:	
v.	:	No. 1089 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	Submitted: December 10, 2010
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE P. KEVIN BROBSON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: February 10, 2011**

The Department of Transportation, Bureau of Driver Licensing (DOT) appeals from the order of the Court of Common Pleas of Centre County (trial court) that sustained Sandra Twoey's (Licensee) appeal from DOT's suspension of her commercial driver's license (CDL) for refusing to consent to chemical testing after an automobile accident. At issue is whether Licensee needed to provide competent medical testimony to establish that her injuries and the interaction of drugs with alcohol prevented her from knowingly refusing to submit to chemical testing. We apply our recent decision in Kollar v. Department of Transportation, Bureau of Driver Licensing, 7 A.3d 336 (Pa. Cmwlth. 2010), and we conclude Licensee needed to provide competent medical testimony to support her claim. Accordingly, we reverse the trial court's order.

Licensee crashed her vehicle in a single car accident. Police officers

arriving on the scene found two people caring for Licensee outside her vehicle. One of the police officers detected the odor of alcohol emanating from Licensee. Licensee acknowledged drinking approximately five beers. Later, she admitted consuming only four beers. The police officer thought Licensee's nose was broken and bleeding. Accordingly, the police officer summoned emergency personnel.

Emergency personnel arrived and placed Licensee in an ambulance. Within minutes, Licensee became combative and refused to allow them to set up an IV. Emergency personnel radioed an emergency room physician for direction. The emergency room physician directed the emergency personnel to administer Licensee a dose of the sedative Ativan, which they did. Licensee calmed down. Emergency personnel set up the IV and drove her to the hospital.

At the hospital, Licensee again became combative. At one point, three security guards restrained her to prevent her from striking others. Hospital personnel administered another dose of Ativan. While she was calm, a police officer read Licensee the O'Connell[1] warnings and asked her to sign a Form DL-26, which contained the warnings. Licensee refused to sign the form and refused to give a blood sample. Licensee also asked to speak with her partner before she would consider submitting to chemical testing. The officer registered Licensee's conduct as a refusal.

[1] Dep't of Transp., Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873 (1989).

Subsequently, DOT imposed a one-year suspension of Licensee's CDL for violating the Pennsylvania Implied Consent Law, 75 Pa. C.S. §1547(b)(1)(i). See also 75 Pa. C.S. §1613(e). Licensee appealed the suspension.

At a hearing before the trial court, Licensee testified and presented copies of her medical records from her treatment at the hospital. Licensee acknowledged drinking alcohol prior to driving. She testified to suffering an injury to her nose and ribs as a result of her accident. The medical records indicated Licensee sustained a broken nose in the accident. The medical records also confirmed that emergency personnel and hospital personnel each administered Licensee a dose of Ativan. The medical records did not reference any rib injury.

One of the responding police officers also testified. The officer testified he observed Licensee's nose injury, but did not observe any rib injury.

Licensee's counsel argued the sedative effects of the two doses of Ativan, combined with severe pain from nose and rib injuries, prevented Licensee from understanding the consequences of refusal. The trial court agreed and sustained Licensee's appeal. In a very short opinion, the respected trial court concluded Licensee did not need to present medical testimony regarding her inability to comprehend the warnings, because Licensee sustained her burden through her medical records. DOT appeals.[2]

---

[2] Our review is limited to determining whether the trial court committed an error of law or abused its discretion, and whether necessary findings of fact were supported by substantial evidence. Reinhart v. Dep't of Transp., Bureau of Drive Licensing, 946 A.2d 167 (Pa. Cmwlth. 2008).

The Implied Consent Law, set forth in 1547 of the Vehicle Code, 75 Pa. C.S. §1547(b)(1)(i), requires DOT to suspend a person's driving privileges for one year for refusing to submit to chemical testing. The burden of proof is well established:

> To sustain a suspension of operating privileges under Section 1547 of the Vehicle Code, DOT must establish that the licensee: (1) was arrested for driving under the influence by a police officer who had reasonable grounds to believe that the licensee was operating or was in actual physical control of the movement of the vehicle while under the influence of alcohol; (2) was asked to submit to a chemical test; (3) refused to do so; and (4) was warned that refusal might result in a license suspension. Once DOT meets this burden, the licensee must then establish that the refusal was not knowing or conscious or that the licensee was physically unable to take the test. The determination of whether a licensee was able to make a knowing and conscious refusal is a factual one that is to be made by the trial court. Such factual finding must be affirmed so long as sufficient evidence exists in the record to support the finding.

Kollar, 7 A.3d at 339-40 (citations omitted). In this case, Licensee concedes DOT met its burden. Thus, the burden shifted to Licensee to establish her refusal was not knowing or conscious or that she was physically unable to take the test.

Licensee argues the combination of the effects of the sedative with the pain from her injuries, rendered her physically unable to take the test and also rendered her refusal unknowing. Licensee relies on this Court's decisions in Department of Transportation, Bureau of Driver Licensing v. Groscost, 596 A.2d 1217 (Pa. Cmwlth. 1991) and Department of Transportation, Bureau of Traffic Safety v. Day, 500 A.2d 214 (Pa. Cmwlth. 1985) to argue that hospital records, when combined with a licensee's and a police officer's credible testimony

concerning a licensee's injuries, can provide a sufficient basis to support an incapacity defense.

Recently, in Kollar, a trial court sustained a licensee's appeal because the licensee proved she was not capable of a knowing refusal. In reversing, we discussed the need for competent medical testimony when evaluating whether injuries were sufficient to prevent a licensee from knowingly refusing to consent:

> A driver's self-serving testimony that she was incapable of providing a knowing and conscious refusal of chemical testing is insufficient to meet the licensee's burden of proof. Medical testimony is generally required in order to establish a licensee was unable to provide a knowing and conscious refusal to submit to chemical testing. The medical expert must rule out alcohol as a contributing factor to the licensee's inability to offer a knowing and conscious refusal in order to satisfy the licensee's burden. Indeed, if the motorist's inability to make a knowing and conscious refusal of testing is caused in whole or in part by consumption of alcohol, the licensee is precluded from meeting her burden as a matter of law.

7 A.3d at 340 (citations omitted) (footnote omitted).

Factually, in Kollar the licensee presented the testimony of an emergency room physician who treated her following an accident. The emergency room physician testified the licensee was unconscious for a period and that she suffered a concussion, rib contusions, and two lacerations requiring sutures. The emergency room physician also opined that the licensee's injuries impacted her ability to comprehend the police officer's request that she submit to testing as well as the consequences of her refusing to submit to testing. However, the emergency room physician could not rule out alcohol as a factor in the licensee's refusal. The

Court acknowledged that "medical testimony will not be required … when severe incapacitating injuries are obvious." Id. at 340 n.2. However, the Court rejected the licensee's impairment defense because the expert's testimony was equivocal and the expert did not rule out the possibility that alcohol was a contributing factor to her refusal.

Applying Kollar here, we conclude Licensee failed to meet her burden. Licensee's injuries were far less serious than those of the licensee in Kollar. Unlike the licensee in Kollar, here Licensee was not diagnosed with a concussion. As the present case involves less severe injuries than those in Kollar, competent expert testimony is also necessary in this case. Licensee provided no such evidence. Her failure to do so precludes her from meeting her burden as a matter of law.

Further, the cases upon which Licensee relies are distinguishable. In both Groscost and Day, the licensees sustained severe and incapacitating injuries. In Groscost, the licensee suffered "a deep facial laceration 2½ to three inches long" and needed five days of hospitalization. Id. at 1220.

Similarly, in Day, the licensee suffered "multiple injuries including: a broken arm, an injured leg, and blows to the back of the head. The result of these injuries was rambling speech, confusion, and at times, a total loss of memory." Id. at 215. This Court concluded the licensee's "physical condition, and all the attendant circumstances" provided a sufficient basis to support an incapacity defense. Id.

In contrast, in other cases involving fewer, less apparent injuries, this Court required medical testimony to establish the nexus. In Department of Transportation, Bureau of Driver Licensing v. Dauer, 416 A.2d 113, 114 (Pa. Cmwlth. 1980), the licensee suffered a "severe" blow to the head, which impaired his memory of events surrounding the accident. However, the licensee's speech was not impacted and the licensee did not suffer any other physical injuries. This Court concluded the licensee needed to provide medical proof to establish the concussion and severe blow to the licensee's head rendered the licensee physically incapable of knowingly refusing to submit to a chemical test. Accord Maletic v. Dep't of Transp., Bureau of Driver Licensing, 819 A.2d 640, 644-45 (Pa. Cmwlth. 2003) (*en banc*) (concluding a licensee whose head trauma injuries consisted of "a lump on her forehead that was black and blue and swelling" who also had two black eyes, and who was able to converse with the officer and attending emergency personnel, did not meet her burden absent medical testimony).

We find the circumstances of this case more similar to those of Maletic and Dauer than to those of Groscost and Day. Unlike in Groscost, Licensee was not hospitalized for a several day period; rather, she was released from the hospital several hours after her admittance after medical personnel concluded she was sober. Additionally, unlike the licensee in Day, Licensee was able to speak. As Licensee's injuries were not as incapacitating or severe as were the licensees' injuries in Groscost and Day, we conclude Licensee needed expert testimony to explain how her injuries prevented her from understanding the

situation. Additionally, this expert testimony needed to establish alcohol played no role in Licensee's refusal. Kollar.

Of further note, this case involves the additional component of alcohol/drug interaction. Usually, parties may not establish drug interactions through non-expert, written means. See, e.g., Dep't of Trans., Bureau of Motor Vehicles v. Cassidy, 521 A.2d 59 (Pa. Cmwlth. 1987) (trial court erred in taking judicial notice by means of the Physician's Desk Reference, of the impact of a prescription drug licensee had taken with alcohol licensee had consumed). Licensee does not attempt to address this authority.

For the above reasons, we conclude the trial court erred. Accordingly, as in Kollar, we reverse the trial court's order.

____

ROBERT SIMPSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Sandra Twoey	:	
	:	
v.	:	No. 1089 C.D. 2010
	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

O R D E R

AND NOW, this 10th day of February, 2011, the order of the Court of Common Pleas of Centre County in the above captioned matter is **REVERSED**.

____

ROBERT SIMPSON, Judge