IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew C. Wagner	:	
	:	
v.	:	No. 1646 C.D. 2010
	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing,	:	Submitted: April 8, 2011
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER[1] **FILED: September 13, 2011**

Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing (Department) appeals from the Order of the Court of Common Pleas of Dauphin County (trial court) that sustained Matthew C. Wagner's (Licensee) statutory appeal from the suspension of his driver's license due to his failure to submit to chemical testing pursuant to the Implied Consent Law, Section 1547(b)(1)(i) of the Vehicle Code, 75 Pa. C.S. § 1547(b)(1)(i). On appeal, the Department argues that the trial court erred in sustaining Licensee's appeal

[1] The majority opinion was reassigned to the authoring judge on May 6, 2011.

because, *inter alia*, its determination that Licensee was not capable of knowingly or consciously refusing to submit to chemical testing is not supported by substantial, competent evidence in the record. For the following reasons, we reverse.

By letter mailed on April 23, 2009, the Department notified Licensee that his license would be suspended for one year due to his refusal to submit to chemical testing on March 4, 2009. (Letter from Department to Licensee at 1 (April 23, 2009), R.R. at 12a (Notice).) Licensee filed an appeal to the trial court, which held multiple de novo hearings.

At the first de novo hearing, the Department offered Licensee's certified driving records (Certified Record). The Certified Record included, in relevant part, the Notice and the March 4, 2009, Implied Consent warnings (DL-26 Form), indicating that Licensee had refused chemical testing. (Department Ex. A, R.R. at 217a-19a, 221a.) The DL-26 Form was signed by Pennsylvania State Trooper Joseph M. Harper (Trooper Harper) and by Licensee, who, in doing so, indicated that Trooper Harper read him the DL-26 Form. (Department Ex. A, R.R. at 221a.)

The Department also presented Trooper Harper's testimony describing the events of that evening as follows. Trooper Harper stopped Licensee for multiple traffic violations, having observed Licensee driving erratically. (Hr'g Tr. at 4, August 4, 2009, R.R. at 19a.) While Trooper Harper spoke with Licensee, he observed that Licensee had slurred speech, glassy eyes, and alcohol on his breath. (Hr'g Tr. at 5, R.R. at 20a.) After asking Licensee to get out of his car and move

to the rear of his car, Trooper Harper noted that Licensee was unstable on his feet. (Hr'g Tr. at 5, R.R. at 20a.) Trooper Harper stated that Licensee refused to perform any field sobriety tests, but did ultimately consent to provide a breath sample for a preliminary breath test (PBT), the result of which was 0.147, over the legal limit of 0.08. (Hr'g Tr. at 5-6, R.R. at 20a-21a; Trooper Harper's Report, April 16, 2009, R.R. at 225a.) Trooper Harper then arrested Licensee for driving under the influence (DUI) and transported Licensee to Harrisburg Hospital for a blood test. (Hr'g Tr. at 6-7, R.R. at 21a-22a.) After reading the four required paragraphs of the DL-26 Form in their entirety,[2] Licensee signed the DL-26 Form, acknowledging that Trooper Harper had read him the Implied Consent warnings. (Hr'g Tr. at 6-7, R.R. at 21a-22a.) Despite receiving those warnings, Licensee refused the blood test, and Trooper Harper noted Licensee's refusal. (Hr'g Tr. at 6-8, 21a-23a.) Trooper Harper explained that he had observed people in diabetic shock and that, in his experience, a person in diabetic shock is not verbally responsive – which Licensee clearly was. (Hr'g Tr. at 30, R.R. at 63a.) Trooper

[2] The DL-26 Form provides the following information: (1) the licensee is under arrest for DUI in violation of Section 3802(a) of the Vehicle Code, 75 Pa. C.S. § 3802(a); (2) the officer is requesting a chemical test of a particular type (blood, urine, etc.); (3) it is the officer's duty to inform the licensee that, if the licensee refuses to submit to the chemical test, the licensee's operating privileges will be suspended for at least one year, that if the licensee refuses and is convicted or pleads guilty to violating Section 3802(a) of the Vehicle Code (related to impaired driving), the licensee is subject to more severe penalties, the same as he was convicted of driving with the highest rate of alcohol; and (4) it is the officer's duty to inform the licensee that the licensee does not have the right to speak with an attorney, or anyone else, before deciding whether to submit and that any request to speak to an attorney or anyone else after being provided the warnings or remaining silent when asked to submit to chemical testing will constitute a refusal, resulting in the suspension of the licensee's operating privileges and other enhanced criminal penalties if convicted of impaired driving. (See DL-26 Form read by Trooper Harper to Licensee, R.R. at 221a.)

Harper further indicated that he can distinguish between the "fruity smell" of a person's breath, indicating that the person is in diabetic shock, and the smell of alcohol, indicating the consumption of alcohol. (Hr'g Tr. at 124, March 11, 2010, R.R. at 210a.) According to Trooper Harper, Licensee's breath smelled of alcohol and was not "fruity." (Hr'g Tr. at 124, R.R. at 210a.)

The Department, at the trial court's direction, also presented a video of the traffic stop filmed by the dash camera of Trooper Harper's police cruiser. A review of that video reveals that Licensee consented to the PBT only after being assured that the test results were not admissible in court. (Department's Ex. B; Hr'g Tr. at 22-24, October 14, 2009, R.R. 55a-57a.) The video further indicates that Licensee admitted to having a couple of drinks with dinner. (Department's Ex. B; Hr'g Tr. at 22-23, R.R. at 55a-56a.)

Licensee did not testify on his own behalf, but introduced the testimony of Joseph Citron, M.D., J.D., a board-certified ophthalmologist, whom the trial court accepted as an expert. (Hr'g Tr. at 30, March 11, 2010, R.R. at 115a.) Dr. Citron explained his background as a general physician and a specialist in ophthalmology, as well as about diabetes, diabetic shock/hyperglycemic attack, and the cognitive effects of such attacks. (Hr'g Tr. at 39-43, 50-51, 53-55, R.R. at 125a-29a, 136a-37a, 139a-41a.) Dr. Citron explained that a person in the midst of diabetic shock or a hyperglycemic attack lacks the capacity to consent to medical treatment, which Dr. Citron equated to being unable to knowingly and consciously refuse a chemical test. (Hr'g Tr. at 66, R.R. at 152a.) Dr. Citron noted, after reviewing Licensee's medical records, that Licensee was diagnosed with Type II (adult-onset)

diabetes on March 30, 2009, (Hr'g Tr. at 36, R.R. at 122a), about 26 days after Licensee's refusal. After reviewing the video, Trooper Harper's testimony, and Licensee's medical records,[3] Dr. Citron testified that Licensee

> *could* have been manifesting this beginning of the loss of cognitive function [due to his undiagnosed diabetic condition but] . . . that [loss of cognitive function] *also could* be the result of being intoxicated from alcohol. Not having been there and only watching this tape, not knowing what the odor smelled like, I had several different choices, *not one of which at this moment I could say specifically, it's this one and not the other*.

(Hr'g Tr. at 58-59, R.R. 144a-45a (emphasis added).) Nevertheless, Dr. Citron proceeded to opine that, due to "rapid change in [Licensee's] demeanor," which "can be consistent with my presumption that this could . . . this is a hyperglycemic episode" and not related to consumption of alcohol, Licensee would have had difficulty in understanding the DL-26 Form and could not knowingly and consciously refuse the requested blood test on March 4, 2009. (Hr'g Tr. at 63, 66, 71-73, R.R. at 149a, 152a, 157a-59a.)

The trial court credited Dr. Citron's testimony, partly due to the fact that the Department did not present any rebuttal expert testimony. (Trial Ct. Order at 5-6, July 27, 2010.) Based on that testimony, the trial court concluded that Licensee established "the nexus between [Licensee's] diabetic state and his inability to understand the [DL-26 Form]" and, therefore, Licensee's appeal should be sustained. (Trial Ct. Order at 6.) The Department appealed and, at the trial court's request, submitted a Concise Statement of Matters Complained of on Appeal

[3] Dr. Citron acknowledged that he has never personally examined Licensee. (Hr'g Tr. at 77, R.R. at 163a.)

(Concise Statement). In the Concise Statement, the Department argued, *inter alia*, that the trial court erred in finding Dr. Citron's testimony unequivocal and that the trial court's decision was not based on substantial evidence because Licensee did not testify. The trial court rejected these arguments, as well as the Department's other arguments, in its Opinion filed pursuant to Pa. R.A.P. 1925(a). The trial court held that Dr. Citron's testimony was not equivocal in any way and that there is no support, either in the Vehicle Code or case law, for the Department's contention that a licensee is required to testify in order to successfully assert the defense that the licensee's refusal was not knowing or conscious. (Trial Ct. Op. at 13-16.)

On appeal,[4] the Department argues that the trial court erred in sustaining Licensee's appeal because: (1) a licensee must testify in order to "meet his burden of proving that he was not capable of knowingly or consciously refusing to submit" to chemical testing;[5] (2) Licensee could not establish that his refusal was not knowing and conscious where he failed to present competent medical evidence to support that assertion and where Licensee's medical expert could not rule out the effect that alcohol may have had on his ability to refuse; and (3) the trial court erroneously concluded that it was "constrained to find for the driver" because the

[4] Our review in a license suspension case is "to determine if the factual findings of the trial court are supported by competent evidence, and whether the trial court committed an error of law or an abuse of discretion." Nornhold v. Department of Transportation, Bureau of Driver Licensing, 881 A.2d 59, 61 n.4 (Pa. Cmwlth. 2005).

[5] The Pennsylvania Association for Drunk Driving Defense Attorneys has filed an amicus curiae brief in opposition to the Department's position that there be an absolute requirement that a licensee testify in order to assert this defense.

Department did not present an expert to rebut Dr. Citron's testimony. (Department's Br. at 8.) For the ease of our analysis, we will address the second issue first because, as the Department acknowledges, if we conclude that Dr. Citron's testimony was equivocal, there is no competent evidence to support the trial court's finding that Licensee's refusal was not knowing and conscious and the other issues become moot. (Department's Br. at 18.)

The Department asserts that Dr. Citron's testimony was equivocal because it was based merely on possibilities and that Dr. Citron "failed to state unequivocally that [Licensee's] condition actually made him incapable of knowingly or consciously refusing testing[. H]is supposition that [Licensee] was suffering diabetic shock when he was arrested for DUI is not enough to prove [Licensee's] alleged diabetes excuses his refusal." (Department's Br. at 31.) Licensee, in response, argues that Dr. Citron's statements should not be taken out of context and that Dr. Citron's testimony, when taken as a whole, was clear that on March 4, 2009, Licensee was suffering from diabetic shock, which impacted Licensee's ability to understand the DL-26 Form and rendered his refusal of the blood test not knowing or conscious.

The Department bears the initial burden in a license suspension proceeding to 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 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.

Kollar v. Department of Transportation, Bureau of Driver Licensing, 7 A.3d 336, 339 (Pa. Cmwlth. 2010). If the Department satisfies its burden, the licensee must present evidence that he or she was not physically capable of taking the test or that the refusal was not knowing or conscious. Pappas v. Department of Transportation, Bureau of Driver Licensing, 669 A.2d 504, 508 (Pa. Cmwlth. 1996). The determination of whether the licensee's refusal was knowing and conscious is a question of fact for the trial court. Kollar, 7 A.3d at 340. The trial court's finding will be affirmed if it is supported by substantial, competent evidence in the record. Id.

In trying to establish that a refusal was not knowing or conscious, a licensee's self-serving testimony that he or she was incapable of providing such refusal does not satisfy the licensee's burden of proof. Ostermeyer v. Department of Transportation, Bureau of Driver Licensing, 703 A.2d 1075, 1077 (Pa. Cmwlth. 1997). Rather, medical testimony is generally required[6] for the licensee to meet the required burden of proof and that testimony "must rule out alcohol as a contributing factor to the licensee's inability to offer a knowing and conscious refusal." Kollar, 7 A.3d at 340. Notably, if a licensee'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 [his or] her burden as a matter of law." Id. A competent medical opinion must be given within a reasonable degree of medical certainty, but such opinions and "testimony []will be

[6] Where a licensee's injuries are obviously severe and incapacitating, an expert medical opinion is not required to validate the licensee's averred inability to make a knowing and conscious refusal. Ostermeyer, 703 A.2d at 1077.

deemed incompetent if it is equivocal." Id. The question of whether medical testimony is equivocal is a question of law fully reviewable by this Court on appeal. City of DuBois v. Beers, 547 A.2d 887, 890 (Pa. Cmwlth. 1988). In making this determination, we must view the expert's testimony as a whole to determine whether the expert's opinion is based on possibilities. Kollar, 7 A.3d 340. Further, this Court has also considered whether "substantial evidence may be predicated upon testimony which is so neutralized by self[-]contradiction, that it would prevent a reasonable mind from concluding that it could possibly form the substantial evidence upon which to base a finding." Feinberg v. Unemployment Compensation Board of Review, 635 A.2d 682, 684 (Pa. Cmwlth. 1993). In doing so, our Court has stated that:

> [t]estimony which is so uncertain or inadequate or equivocal or ambiguous or contradictory as to make a verdict of a jury or findings of a trial judge or the findings of an administrative fact finder mere conjectures is not adequate in lawsuits or substantial in administrative proceedings as a matter of law.

Id. (quoting Novaselec v. Workmen's Compensation Appeal Board, 332 A.2d 581, 583-84 (Pa. Cmwlth. 1975)).

After reviewing Dr. Citron's testimony, we acknowledge that Licensee is correct that Dr. Citron opined, within a reasonable degree of medical certainty, that Licensee's refusal was not knowing or conscious. (Hr'g Tr. at 106-07, R.R. at 192a-93a.) Licensee contends that, because Dr. Citron so opined, there can be no doubt that his testimony was unequivocal. However, when one reviews Dr. Citron's testimony more closely, it reveals that this opinion was based on conflicting and ever-shifting assumptions of the facts and evidence in this matter.

It is well-settled that a medical expert need not utter certain rote formulations to satisfy a party's burden of proof. See e.g., Moyer v. Workers' Compensation Appeal Board (Pocono Mountain School District), 976 A.2d 597, 599 (Pa. Cmwlth. 2009) (stating that "there are no 'magic words' a medical expert must say to establish causation"); Campbell v. Workers' Compensation Appeal Board (Pittsburgh Post-Gazette), 954 A.2d 726, 731 (Pa. Cmwlth. 2008) (same). However, we believe that the contrary also may be true. A medical expert's utterance of "the magic words," i.e., that he or she opines "within a reasonable degree of medical certainty" that something is true, should not be accepted without question where those words are based on contradictory, uncertain, ambiguous, or speculative testimony in the record. If an expert testified, within a reasonable degree of medical certainty, that a licensee was incapable of giving a knowing and conscious refusal, but the remainder of the expert's testimony, including the basis on which that opinion is made, is riddled with uncertainty, contradiction, conflict, or based merely on possibilities, it would be an error of law to conclude that the testimony is unequivocal simply because the expert used the "magic words" at the end of his testimony. Here, although Dr. Citron opined, within a reasonable degree of medical certainty, that Licensee was suffering from diabetic shock on March 4, 2009, which prevented him from having the capacity to give a knowing and conscious refusal, the reasoning for that opinion was based on contradictory beliefs about what the presented evidence revealed.

For example, as Licensee points out in his brief, Dr. Citron testified during his direct testimony that his belief that Licensee was suffering from diabetic shock, or acute ketoacidosis, was based on "the rapidity or quickness of [the] time frame"

during which Licensee's cognitive abilities were degenerating. (Licensee's Br. at 21 (quoting Hr'g Tr. at 69, R.R. at 155a).) Dr. Citron's complete testimony at this point in his direct testimony was:

> *It's my opinion that this is due to something else because of the rapidity or quickness of time frame*. Again, not having clinical laboratory backup, it's more of a hierarchy. *I can't totally eliminate the ethanol. It's been my experience to see rapid decomposition of a person from other things rather than alcohol*.

(Hr'g Tr. at 68-69, R.R. at 154a-55a (emphasis added).) Dr. Citron repeatedly relied upon Licensee's "rapid change in [] demeanor," which he considered "consistent with [his] presumption that this could - - this is a hyperglycemic episode," as the basis of his conclusion that Licensee was, in fact, suffering from such an episode when he was asked to submit to the blood test and refused. (Hr'g Tr. at 63, R.R. at 149a.) However, Dr. Citron acknowledged, on cross-examination, that he did not see a rapid change to Licensee's demeanor in the video, but stated the change must have occurred after the video and been referred to in "one of the reports" from the hospital. (Hr'g Tr. at 92, R.R. at 178a.) When asked whether he had reviewed other reports, Dr. Citron answered that he was "not sure what I reviewed now." (Hr'g Tr. at 93, R.R. at 179a.) Additionally, after referring to Trooper Harper's report, which indicated nothing remarkable about Licensee's demeanor at the hospital, counsel for the Department asked, "[w]e have no testimony about his behavior at the hospital being anything other than as in the Trooper's report; isn't that correct?," to which Dr. Citron responded, "[n]ot that I can put my hands on now or try to, yes." (Hr'g Tr. at 95, R.R. at 181a.) On re-direct, Licensee's counsel asked Dr. Citron about the absence of evidence of substantial impairment on the video and whether that presentation must have

occurred at the hospital; Dr. Citron indicated "[t]hat it was somewhere in the scenario and it was not evident in the video, but it was not what I was able to observe on the video." (Hr'g Tr. at 105, R.R. at 191a.)

Recognizing that Dr. Citron essentially admitted that there was no evidence in the record to support his assumption that Licensee suffered from a rapid change in demeanor, Licensee's counsel asked Dr. Citron to, "[f]or the sake of argument[,] . . . remove from your consideration the rapid diminution of faculties portion of our discussion" and whether anything he observed in the video supported his conclusion that Licensee was suffering from diabetic shock or whether he had changed his opinion. (Hr'g Tr. 105, R.R. at 191a.) Dr. Citron replied that his opinion had not changed or lessened in certainty because, according to Dr. Citron, it appeared on the video that Licensee's repeated questioning about the legal significance of the PBT was evidence that Licensee did not understand Trooper Harper's responses. (Hr'g Tr. at 106, R.R. 192a.) However, this statement contradicts his *repeated* assertions that there was *nothing in the video* that supported his belief that Licensee was suffering from diabetic shock. It also conflicts with Dr. Citron's earlier statement that any lack of understanding that occurred in the video could have been the result of nervousness, alcohol intoxication, or the "beginning of the loss of cognitive function." (Hr'g Tr. at 58, R.R. at 144a.)

Additionally, we note that, although he acknowledged that Licensee admitted to consuming alcohol, Dr. Citron could not say if that consumption of alcohol had any effect on Licensee's behavior that night, stating "I can't say if it

did or it didn't." (Hr'g Tr. at 97-98, R.R. at 183a-84a.) Dr. Citron agreed that Licensee's inability to understand Trooper Harper's explanation regarding the PBT could "also be consistent with someone who had consumed too much alcohol." (Hr'g Tr. at 97, R.R. at 183a.) Finally, Dr. Citron's opinion was based on his use of a "differential diagnosis," which he characterized as stating which of three possibilities "is more likely and which is less likely and which is third likely." (Hr'g Tr. at 70, R.R. at 156a.) In Kollar, this Court concluded that the physician's testimony was equivocal where he testified that the licensee's injuries were "more likely than not" the cause of the licensee's inability to provide a knowing and conscious refusal. Kollar, 7 A.3d at 342. In so holding, our Court noted that "the phrase 'more likely than not' can be interpreted as nothing more than a 51% chance that a fact or circumstance existed. A medical opinion is equivocal if it is merely based on possibilities." Id.

After reviewing Dr. Citron's testimony as a whole and the record evidence, we conclude that Dr. Citron's testimony was "neutralized by self[-]contradiction," Feinberg, 635 A.2d at 684, and was based on the assumption that Licensee suffered a rapid change in his demeanor, which is not supported by any evidence in the record. When this lack of evidence became apparent, Dr. Citron searched for some other evidence to support his opinion, even evidence he previously had indicated contained no support for his opinion, i.e., the video. Additionally, Dr. Citron could not rule out whether Licensee's consumption of alcohol had an effect on his cognitive state, and Dr. Citron's opinion was the equivalent of the more-likely-than-not opinion rejected in Kollar. For these reasons, we conclude that Dr.

Citron's testimony was equivocal and, therefore, not competent to support the trial court's finding that Licensee's refusal was not knowing or conscious.[7]

Accordingly, the trial court's Order is reversed.[8]

RENÉE COHN JUBELIRER, Judge

[7] We note and understand the trial court's concern regarding the Department's trial strategy in this matter. (Hr'g Tr. at 49-50, R.R. at 135a-36a; Trial Ct. Op. at 7-10.) Given the nature of the stakes involved in this case and Licensee's defense based on the opinion of a medical expert, which we believe to be highly relevant to the question of whether Licensee was *medically* capable of giving a knowing and conscious refusal, the decision of the Department to not call a rebuttal witness is somewhat questionable. In not calling a rebuttal witness, the trial court was without any opposing expert opinions against which Dr. Citron's testimony could be judged. Moreover, our decision here is not intended to condone the drafting of the 9-page *Concise* Statement, which the Department submitted to the trial court. (Trial Ct. Op. at 19-20.) Given the nature of this matter, such a statement is in no way *concise*.

[8] Because of our resolution of this issue, the Department's other arguments are rendered moot. To the extent that the Department requests this Court to, nevertheless, rule on its contention that a licensee *must* testify on his or her own behalf in order to be able to assert this defense, we note that, because we resolved this matter on the equivocality issue, any further discussion would be dicta.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Matthew C. Wagner	:	
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	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
	:	
Appellant	:	

O R D E R

NOW, September 13, 2011, the Order of the Court of Common Pleas of Dauphin County in the above-captioned matter is hereby **REVERSED** and the twelve-month suspension of Matthew C. Wagner's driver's license is hereby **REINSTATED.**

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RENÉE COHN JUBELIRER, Judge