IN THE COURT OF APPEALS OF IOWA

No. 7-835 / 06-1764
Filed December 28, 2007

MICHAEL LEE SCARBROUGH,
Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF TRANSPORTATION,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

The Iowa Department of Transportation appeals from a district court ruling on judicial review reversing a license revocation order. **REVERSED.**

Thomas J. Miller, Attorney General, and Carolyn J. Olson, Assistant Attorney General, Ames, for appellant.

Robert G. Rehkemper of Gourley, Rehkemper & Lindholm, P.L.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Mahan and Zimmer, JJ.

MAHAN, J.

The Iowa Department of Transportation (DOT) appeals from a district court ruling on judicial review reversing a DOT order revoking the driver's license of Michael Lee Scarbrough.

I. Background Facts and Prior Proceedings

On April 7, 2006, a Polk County deputy arrested Scarbrough for operating a motor vehicle while intoxicated. At the Polk County Jail, the deputy read Scarbrough an implied consent advisory form and requested a breath sample for chemical testing. Scarbrough checked the "consent" box and signed the form. The deputy instructed him to blow a long steady breath into the DataMaster breath analyzer. Scarbrough's first attempt to provide a breath sample was unsuccessful. After repeated instructions from the deputy to "blow harder," the second attempt produced an alcohol concentration result of only .043. The deputy placed him in a holding cell and went to discuss the situation with a fellow officer. The deputy returned and said he was going to certify that Scarbrough had refused to take the test because he refused to properly blow in the analyzer. Scarbrough asked to perform the test again, but the deputy would not allow him to do so.

Scarbrough requested a hearing to contest the revocation. Scarbrough and the deputy testified at the telephonic hearing before the administrative law judge (ALJ). The deputy testified that Scarbrough purposely tried to sabotage the test. He claimed Scarbrough tensed up his muscles and made his face flush so that it appeared he was blowing very hard. However, his lungs did not deflate and no air moved through the tube. When the deputy told him to "blow harder,"

Scarbrough responded by letting out a short burst of air. The deputy told him to blow harder again, and Scarbrough responded with another short burst of air. This process continued three or four times until the DataMaster printed a result. The deputy told him that he did not believe he had blown properly into the machine and put him back in the holding cell.

Scarbrough's testimony painted a much different picture. He claimed he followed all of the officer's instructions. When the officer told him to blow harder, he did, and the machine produced the slip of paper. He also said the deputy never accused him of faking the test until forty-five minutes after he had blown into the analyzer.

The ALJ concluded Scarbrough did not refuse the test and issued a decision rescinding the revocation of driving privileges. The DOT filed an administrative appeal. The reviewing officer reversed the ALJ's decision and revoked Scarbrough's driving privileges. The reviewing officer adopted the deputy's version of events and concluded Scarbrough's uncooperative actions constituted a refusal.

Scarbrough filed a petition for judicial review in district court. The district court reversed the agency's decision. The court put particular emphasis on the fact that the DataMaster printed out a result card and concluded there was no evidence Scarbrough "tricked" the DataMaster machine or that the DataMaster test was somehow invalid. The court went on to state

> [T]here is no substantial evidence to support the [DOT's] claim that [Scarbrough] refused to provide a breath sample. The DataMaster registered a legitimate sample and provided a test result that [Scarbrough's] breath alcohol concentration was below the legal limit. The deputy could have restarted the test or requested a

> second test. These same facts weigh in favor of [Scarbrough's] claims. Therefore the decision of the agency must be reversed.

The DOT appeals from this ruling, claiming there was substantial evidence to support the agency's decision that Scarbrough deliberately failed to comply with the deputy's repeated instructions.

II. Standard of Review

Iowa Code chapter 17A governs review of license revocation decisions under Iowa Code chapter 321J. *See* Iowa Code § 321J.14 (2005); *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 845-46 (Iowa 1991). When the district court exercises its power of judicial review the court acts in an appellate capacity to correct errors of law on the part of the agency. *Heartland Express, Inc. v. Terry*, 631 N.W.2d 260, 265 (Iowa 2001). In reviewing the district court's decision, this court applies the standards of chapter 17A to determine whether our conclusions are the same as those of the district court. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 464 (Iowa 2004). If they are the same, we affirm; otherwise we reverse or grant other appropriate relief. Iowa Code § 17A.19(10).

Our review is not de novo, but is limited to correction of errors at law. *Salis v. Employment Appeal Bd.*, 437 N.W.2d 895, 896 (Iowa 1989). Our court is bound by the hearing officer's findings of fact if those findings are supported by substantial evidence. *Id.* However, we are not bound by an agency's legal conclusions and may correct misapplications of the law. *Id.*

III. Merits

There is some dispute as to whether the alleged refusal is a question of law or a question of fact. The DOT argues our supreme court's decision in

Hoppe v. Iowa Department of Transportation, 402 N.W.2d 392 (Iowa 1987), establishes that the existence of the alleged refusal is a question of fact properly resolved by the administrative agency. Conversely, *Ginsberg v. Iowa Department of Transportation*, 508 N.W.2d 663, 664 (Iowa 1993), indicates that refusal is a legal question, properly resolved by the court.

In *Hoppe*, a driver was arrested for operating while intoxicated. 402 N.W.2d at 392. He initially agreed to submit to a chemical breath test, but when it came time to take the test he allegedly became combative and threw the consent form at the officer. *Id.* at 393. The officer considered this conduct to be a refusal and certified that he had refused to submit to chemical testing. *Id.* The driver disputed the officer's testimony at the hearing and testified that he only became belligerent when the officer refused to give him the test. *Id.* The agency adopted the officer's version of events and found the driver's uncooperative conduct constituted a refusal. *Id.* On appeal, our supreme court stated that "[w]hether [the driver's] conduct constituted a de facto refusal is, on the record made before the agency, a question of fact." *Id.* The court went on to affirm the agency's decision, noting there was substantial evidence to support the agency's decision. *Id.*

In *Ginsberg*, a driver arrested for operating while intoxicated asked to speak with his attorney prior to the chemical breath test. 508 N.W.2d at 664. After speaking with his attorney, the driver said he also wanted to take a blood or urine test. *Id.* The officers asked if he was refusing to take the breath test. *Id.* The driver said he was not refusing to take the breath test, but that he wanted a blood or urine test as well. *Id.* The officers treated this as a refusal. *Id.* The

court stated that the question of whether his conduct constituted a refusal was a "legal question." *Id.* The court went on to conclude the driver was not refusing the test requested by police; he was only attempting to assert his right to additional independent testing. *Id.*

We find *Hoppe* controls our analysis of the present case. In *Ginsberg*, there was no dispute over the facts. The only question was whether a driver who requested a blood or urine test in conjunction with a breath test had refused to take the breath test. Because there was no factual dispute between the parties, the court analyzed the case as a question of law. However, *Hoppe*, like the present case, involved a factual dispute about whether the driver did or did not do what the officer alleged. Accordingly, we find Scarbrough's alleged uncooperative behavior must be analyzed as a question of fact, rather than a question of law.

It is the role of the agency to determine the credibility of witnesses and the weight to be given to any evidence. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998). Such judgment calls are clearly within the province of the agency and should be left for the agency to make. *IBP, Inc. v. Harpole*, 621 N.W.2d 410, 420 (Iowa 2001). These factual findings are binding on appeal if supported by "substantial evidence in the record made before the agency when the record is viewed as a whole." Iowa Code § 17A.19(8)(f); *accord Reed*, 478 N.W.2d at 846. Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. *Reed*, 478 N.W.2d at 846. Conversely, evidence is not insubstantial merely because it would have supported contrary inferences, or because two inconsistent conclusions could be

drawn from it. *Id.* Therefore, the ultimate question is not whether the evidence supports a different finding, but whether the evidence supports the findings actually made by the agency. *Id.*

Scarbrough and the deputy presented conflicting testimony. Scarbrough testified that he blew as hard as he could, while the deputy testified that Scarbrough first tried to deceive him by pretending to blow into the machine and then tried to manipulate the test by only blowing small puffs of air into the mouthpiece. The agency found the deputy's testimony more credible. We find the agency's decision to reject Scarbrough's testimony and adopt the deputy's version of events was supported by substantial evidence in the record.

Our case law firmly establishes that "anything less than an unqualified, unequivocal consent is a refusal." *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988)). In light of the fact that Scarbrough made several attempts to sabotage the results of his chemical breath test, we, like the agency, find Scarbrough's actions constituted a de facto refusal.

Scarbrough offers the additional argument that the result card conclusively proves he provided an adequate sample of air. We disagree. As noted in the manual for the DataMaster unit, and in the deputy's instructions at the time of the test, Scarbrough was to provide "a long and steady breath" into the DataMaster mouthpiece. Rather than follow the deputy's instructions, Scarbrough tried, on two occasions, to manipulate the test by providing a sample that contained only small puffs of air. In *Ludtke v. Iowa Department of Transportation*, 646 N.W.2d 62, 67 (Iowa 2002), our supreme court stated that there is no "assumption that an adequate breath sample is always obtained when the machine locks in and

produces a hardcopy printout." We acknowledge that the type of machine used in this case is different than the type of machine used in *Ludtke*, but still refuse to assume a breath sample is adequate merely because the analyzing machine produced a result. Therefore we find the printed result was not conclusive proof that Scarbrough provided a proper breath sample. *See Ludtke*, 646 N.W.2d at 68-69 (noting the relevant distinction between "mouth air" and "deep lung air" in chemical breath tests).

Scarbrough's remaining argument that he should have been given a third[1] chance to properly perform the test is meritless.

IV. Conclusion

We hold that when the record is viewed as a whole, there is substantial evidence to support the decision of the DOT. The ruling of the district court is reversed and the decision of the DOT is reinstated.

REVERSED.

[1] On appeal, Scarbrough contends he should have been given a "second" chance, but his testimony at the hearing clearly indicates his first attempt produced no result and his second attempt produced the disputed result.