IN THE COURT OF APPEALS OF IOWA

No. 8-727 / 08-0301
Filed November 13, 2008

BONIFACE LOU SCHULZ,
Petitioner-Appellee,

vs.

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

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge.

The Iowa Department of Transportation appeals from the ruling on judicial review reversing Boniface Schulz's license revocation. **REVERSED.**

Thomas J. Miller, Attorney General, and Christine Blome, Assistant Attorney General, Ames, for appellant.

John W. Hofmeyer III, Oelwein, for appellee.

Considered by Huitink, P.J., and Vogel and Eisenhauer, JJ.

VOGEL, J.

The Iowa Department of Transportation (DOT) appeals from the ruling on judicial review reversing Boniface Schulz's license revocation. We reverse.

Background Facts and Proceedings.

After refusing a preliminary breath test on January 27, 2007, Boniface Schulz was arrested on suspicion of operating while intoxicated. Upon arriving at police headquarters, Officer Jason Chopard read Schulz the implied consent advisory and made a written request for a chemical test of Schulz's breath. Schulz signed the form authorizing the test. After instructing Schulz on the procedure, Officer Chopard twice attempted to administer the test using a DataMaster. During both tests, the machine indicated that Schulz was providing an insufficient breath sample.[1] After the second test, Chopard marked her efforts as a refusal.

The DOT then revoked Schulz's driver's license for an implied consent test refusal pursuant to Iowa Code section 321J.9 (2007). Schulz requested and received a DOT hearing, contesting the allegation that she refused the test. An administrative law judge (ALJ) affirmed the revocation based on implied consent refusal and this decision was affirmed on intra-agency appeal. However, on judicial review, the district court reversed, concluding substantial evidence did not support that Schulz had refused the test. The DOT appeals.

[1] While the tests ultimately were deemed insufficient, the first test initially provided a .106 blood-alcohol-concentration reading and the second a .120 reading.

Scope of Review.

On judicial review, the district court was empowered to grant relief from the DOT's decision if its decision "is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Just because the interpretation of the evidence is open to a fair difference of opinion does not mean the commissioner's decision is not supported by substantial evidence. *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 603 (Iowa 2004). An appellate court should not consider evidence insubstantial merely because the court may draw different conclusions from the record. *Fischer v. City of Sioux City*, 695 N.W.2d 31, 33-34 (Iowa 2005). Moreover,

> [m]aking a determination as to whether evidence "trumps" other evidence or whether one piece of evidence is "qualitatively weaker" than another piece of evidence is not an assessment for the district court or the court of appeals to make when it conducts a substantial evidence review of an agency decision. It is the [agency's] duty as the trier of fact to determine the credibility of the witnesses, weigh the evidence, and decide the facts in issue. The reviewing court only determines whether substantial evidence supports a finding according to those witnesses whom the [agency] believed.

Arndt v. City of Le Claire, 728 N.W.2d 389, 394-95 (Iowa 2007) (citations and quotations removed).

Test Refusal.

The statements and conduct of the arrestee and police officer, as well as the surrounding circumstances, are considered in determining if a chemical test has been refused. *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988). Anything less than unqualified, unequivocal consent is a refusal.

Id. We thus review this case to determine whether substantial evidence supports the agency's conclusion that Schulz refused the test.[2]

Initially, Schulz refused the preliminary breath test. Later, after arriving at the police station, Officer Chopard, along with Sergeant Thangman, explained the breath test process. Schulz reportedly equivocated as to whether she would submit to the test and "kept changing her mind." After further discussion with the officers, and consulting with her attorney, she finally consented in writing to take the DataMaster breath test. However, on the two occasions that the officers attempted to administer the test, Schulz did not provide a sufficient breath and the machine registered an insufficient sample. According to Officer Chopard, Schulz "didn't even try [to blow] at all" and "it didn't even look like she was blowing." It seemed to him as though "she was blowing for a little bit and then stopping" despite his clear instructions of the necessity for a constant, full breath. After the two attempts and repeated instructions, Officer Chopard regarded Schulz's poor compliance as a refusal and so noted on the implied consent advisory form.

Schulz reportedly told officers something about a breathing problem and she later entered into evidence a pulmonary test performed more than two weeks prior to her arrest. However, the report noted that "normal spirometric values indicate the absence of any significant degree of obstructive pulmonary impairment and/or restrictive ventilator defect." Furthermore, the post-test

[2] We agree with the district court's conclusion that Iowa Code section 321J.13(6)(b)(2) does not apply to this situation.

comments stated Schulz had put forth "fair effort at best [and] did not follow instructions/coaching."

In light of the appropriate scope of our substantial-evidence review, we conclude the district court improperly weighed the evidence to overrule the agency's findings. Here, substantial evidence clearly supports the agency's determination that Schulz refused the breath test. Officer Chopard's observations about her repeated, minimal effort in providing a breath sample coupled with the readings provided by the DataMaster support the agency's determination on this issue. We therefore reverse the district court's ruling on judicial review.

REVERSED.