IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles T. Grad, Jr.	:	
	:	
v.	:	No. 199 C.D. 2008
	:	SUBMITTED: May 30, 2008
Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** September 18, 2008

The Department of Transportation, Bureau of Driver Licensing (Department), appeals from the order of the Court of Common Pleas of Lackawanna County (trial court) sustaining the appeal of Charles T. Grad, Jr. and rescinding the one-year suspension of his driving privilege imposed by the Department pursuant to Section 1547 of the Vehicle Code, 75 Pa. C.S. § 1547,[1] for his refusal to submit to chemical testing. The Department contends that Grad

[1] Section 1547 essentially mandates that if any person placed under arrest for driving under the influence is requested to submit to chemical testing and refuses to do so, the Department shall suspend the person's operating privilege for at least twelve months.

failed to meet his burden of proof that he was incapable of making a knowing and conscious refusal with unequivocal medical evidence. We reverse.

In March 2006, the Department notified Grad that it was suspending his driving privilege for one year, effective April 5, 2006, pursuant to 75 Pa. C.S. § 1547(b)(1)(i), due to his refusal to submit to chemical testing. Grad filed a timely appeal of the suspension and *de novo* hearings followed.

At the first hearing, Patrolmen Henry Zimmer (Zimmer) and William J. Maslar (Maslar), two officers from the South Abington Township Police Department, testified, as did Grad. According to their testimony, on February 16, 2006, at about 2:10 a.m., Zimmer was parked in his patrol car when he heard Grad's vehicle approaching at a high rate of speed, brake hard as he approached the patrol vehicle and then accelerate again as he passed the officer. Zimmer then pursued Grad at a high rate of speed, noticed Grad weaving, and caught up to Grad's vehicle when Grad turned off the main road. Zimmer continued to follow Grad as he proceeded to drive slowly to his residence, about a quarter of a mile away, and then pulled into his garage. Zimmer ran up to Grad's vehicle and announced his presence as a police officer. Grad complied with Zimmer's request that he exit his vehicle and produce his license. Zimmer testified that Grad had glassy and bloodshot eyes and that he detected the odor of alcohol on Grad's breath. Grad refused to take either a preliminary breath test or undergo a field sobriety test. Instead, he repeatedly asked for his father or a lawyer.

Thereafter, when Grad tried to walk back into the garage and became confrontational, Zimmer called for backup, whereupon Maslar and Sergeant Greg Winowich proceeded to the scene. Grad was taken down to the ground, handcuffed, arrested for suspicion of operating a vehicle under the influence of

alcohol and then delivered to the South Abington Police Station. In the patrol car on the way to the station, Zimmer verbally explained the Implied Consent Law. *See* 75 Pa. C.S. § 1547(b). At the police station, Zimmer read the Implied Consent DL-26 form, verbatim, to Grad. Zimmer and Maslar both testified that in answer to every question, Grad stated that he wanted to speak with his father or a lawyer and repeatedly ignored requests to take a chemical test. Grad, in turn, testified that, on the night in question, he had been intoxicated and he did not remember everything that occurred with perfect clarity because his memory may have been impaired by alcohol.

After the judge stated that he was going to deny the appeal, he mentioned to Grad's attorney that he had thought counsel was going to adduce testimony that Grad had some sort of physical or emotional impediment and that he was asking for his father because he needed medical attention. Grad's counsel responded, "He did have one, your Honor, subsequent to that because of the altercation. He did have one, your Honor. He did have a concussion that was examined subsequent to the altercation when he got thrown to the ground." Notes of Testimony (N.T.) at 63, Hearing of March 30, 2007, R.R. at 73a. After Grad's attorney filed a motion for reconsideration, the trial court entered an order directing the parties to submit additional testimony regarding the issue of Grad's medical condition.

A second hearing was held on August 21, 2007, to allow evidence of Grad's medical condition at the time of his arrest. The trial court found that Grad sustained a concussion during the incident, which vitiated his ability to make a knowing and conscious refusal to a request to submit to a chemical test. This finding was based on testimony by Grad's father, Dr. Charles Grad, Sr., a

practitioner of internal medicine. The trial court granted Grad's appeal and dismissed the charges and penalties against him including the suspension of operating privilege.

Prior to addressing the argument on appeal, we note that in order to suspend a licensee's operating privilege under Section 1547(b) of the Vehicle Code, the Department must demonstrate that:

> (1) Licensee was arrested for violating Section 3802 of the Vehicle Code by a police officer who had "reasonable grounds to believe" that Licensee was operating or was in actual physical control of the movement of the vehicle while in violation of Section 3802 (*i.e.*, while driving under the influence); (2) Licensee was asked to submit to a chemical test; (3) Licensee refused to do so; and (4) Licensee was specifically warned that a refusal would result in the suspension of his operating privileges and would result in enhanced penalties if he was later convicted of violating Section 3802(a)(1).

Martinovic v. Dep't of Transp., Bureau of Driver Licensing, 881 A.2d 30, 34 (Pa. Cmwlth. 2005). It is well-settled that anything less than an unqualified consent constitutes a refusal of chemical testing under Section 1547 of the Vehicle Code. *Hudson v. Dep't of Transp., Bureau of Driver Licensing*, 830 A.2d 594 (Pa. Cmwlth 2003).[2] Once the Department has met its burden of proof, the burden shifts to the licensee to prove that he was physically incapable of completing or performing the chemical test or that he was incapable of making a knowing and conscious refusal. *Martinovic*, 881 A.2d 30. While the determination of whether a

[2] There does not appear to be any dispute that Grad refused chemical testing. Grad repeatedly asked for his father and an attorney whenever he was requested to take a chemical test by the police officers. The Department has satisfied its *prima facie* burden of proof to suspend Grad's driving privilege for one year pursuant to Section 1547(b) of the Vehicle Code.

licensee's refusal was knowing and conscious is a question of fact, whether there is substantial competent evidence to support the trial court's factual determination is a question of law subject to plenary review by this court. *Dailey v. Dep't of Transp., Bureau of Driver Licensing*, 722 A.2d 772, 774 (Pa. Cmwlth. 1999).

The Department first argues that the trial court erred as a matter of law when it found that the licensee had satisfied his burden of proof that he was incapable of making a knowing and conscious decision to refuse chemical testing.[3] In the absence of obvious and severe injury, competent medical testimony is required to prove that a knowing and conscious refusal could not be made by the licensee. *Dep't of Transp., Bureau of Driver Licensing v. Walsh*, 606 A.2d 583 (Pa. Cmwlth. 1992). At the initial hearing, there was no testimony to support a finding that Grad had hit his head during a scuffle with police officers. During the second hearing, Grad testified that he had hit his head and became dazed. His father, Dr. Grad, testified that when his son was released from confinement, Grad was "scuffed up" and he had a "slight bruise" on his temple. This evidence does not establish obvious or severe injury. Therefore, Grad needed to offer competent medical evidence to support his burden of proof that he was incapable of making a knowing and conscious decision to refuse chemical testing.

Medical evidence must be unequivocal to support a licensee's contention that he was incapable of making a knowing and conscious refusal to submit to chemical testing. "Equivocal statements that a motorist's condition

[3] The Department also argues that the trial court erred as a matter of law by *sua sponte* raising the issue of whether Grad's refusal to submit to chemical testing was knowing and conscious. That argument is waived because it was not raised before the trial court. "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). *See also Dennis v. SEPTA*, 833 A.2d 348 (Pa. Cmwlth. 2003).

'could' have or 'may' have prevented him from [making a knowing and conscious decision to refuse chemical testing] are insufficient to meet that requirement." *Dep't of Transp., Bureau of Driver Licensing v. Wilhelm*, 626 A.2d 660, 663 (Pa. Cmwlth. 1993). The only evidence of Grad's medical condition is the testimony of Dr. Grad, Grad's father. Dr. Grad testified that the symptoms of a mild concussion are temporary amnesia, being dazed and confused, and headache. Although Dr. Grad did answer in the affirmative when asked whether, to a reasonable degree of medical certainty, his son had suffered a concussion on February 16, 2006, his further testimony indicates uncertainty. Dr. Grad later testified that **if** his son had suffered a concussion, "it's reasonable **to assume** that he would not have been able to understand the implications of taking the test or not taking the test." N.T. at 37, Hearing of August 21, 2007, R.R. at 112a (emphasis added). When Dr. Grad was asked again if he could say with a reasonable degree of medical certainty that his son was incapable of making a knowing and conscious decision to refuse chemical testing, he responded, "**Assuming** that he had – he had a concussion, yes, yes." N.T. at 38, R.R. at 113a (emphasis added). While some inconsistency in the testimony of a witness ordinarily goes to its weight and credibility rather than its competency, we believe that Dr. Grad's overall testimony was too equivocal to meet Grad's burden of proof.

The Department also argues that Grad failed to prove that his intoxication did not contribute to or cause his purported inability to make a knowing and conscious decision to refuse chemical testing. Part of the licensee's burden is to prove that his alcohol ingestion played no part in rendering him incapable of making a knowing and conscious refusal. *Dailey*, 722 A.2d 772. Both Grad and his attorney admitted that Grad was intoxicated the night he refused

chemical testing. Dr. Grad testified that he could not rule out his son's intoxication as a contributing factor to his son's decision to refuse chemical testing. Grad did not have a medical expert testify within a reasonable degree of medical certainty that the purported concussion alone would have prevented him from making a knowing and conscious refusal of chemical testing. Therefore, since Dr. Grad could not rule out alcohol as a contributing factor to any inability by Grad to understand the Implied Consent Law, Grad failed to satisfy his burden. *See, e.g., Barbour v. Dep't of Transp., Bureau of Driver Licensing*, 557 Pa. 189, 193, 732 A.2d 1157, 1160 (1999); *Zwibel v. Dep't of Transp., Bureau of Driver Licensing*, 832 A.2d 599, 606 (Pa. Cmwlth. 2003).

Accordingly, the order of the trial court is reversed.

BONNIE BRIGANCE LEADBETTER,
President Judge

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Commonwealth of Pennsylvania,	:	
Department of Transportation,	:	
Bureau of Driver Licensing,	:	
Appellant	:	

O R D E R

AND NOW, this 18th day of September, 2008, the order of the Court of Common Pleas of Lackawanna County in the above captioned matter is hereby REVERSED.

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BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Charles T. Grad, Jr.	:	
	:	
v.	:	No. 199 C.D. 2008
	:	
Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, Appellant	:	Submitted: May 30, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE KELLEY FILED: September 18, 2008

I respectfully dissent. The medical testimony of Dr. Charles Grad, Sr. was not equivocal under the clear standard of Barbour v. Department of Transportation, 557 Pa. 189, 732 A.2d 1157 (1999), substantial evidence supports the Trial Court's findings in this matter, and the Trial Court's credibility determinations and the weight accorded to the evidence presented thereto should control.

In Barbour, the Supreme Court expressly and plainly articulated the standard by which the equivocality of medical evidence in license suspension cases

should be measured, and in so doing, rejected this Court's prior escalation of that standard beyond the level of "a reasonable degree of medical certainty." In Barbour, the Supreme Court stated:

> Over the years, the Commonwealth Court has refined its interpretation of what constitutes "competent medical evidence" in this arena so that it now requires that the expert medical testimony must be certain and essentially without doubt in order for it to be sufficient to establish that the licensee's refusal was unconscious and unknowing. . .
>
> We find that this standard is a deviation from the norm. Traditionally, for medical evidence to be deemed competent, a litigant's expert witness need only tender an opinion with a *reasonable degree* of medical certainty. We find that this standard is far better adapted to the realities of the practice of medicine than is the standard [previously] developed by [Commonwealth Court]. **Medicine is an art, the practice of which is dependent upon computing probabilities rather than ascertaining absolute certainties. Requiring a physician to deliver an absolute opinion on a medical question ignores the nature of medicine. Thus, we find that the "reasonable degree of medical certainty" standard is applicable in the license revocation arena** . . .

Barbour, 557 Pa. at 193-194, 732 A.2d at 1160 (bold emphasis added; citations omitted).

In the matter *sub judice*, it is inarguable that Dr. Grad testified – both on direct examination, and again on cross-examination – that, within a reasonable degree of medical certainty, Licensee suffered a concussion and a concomitant inability to understand questions put to him, as well as a lack of capability to make

a knowing and conscious refusal.[1] R.R. 107a-108a, 112a-113a. Notwithstanding the Majority's reliance, in its examination of the testimony as a whole, upon Dr. Grad's use of the word "assume" in portions of his testimony, the above-cited testimony establishes that Dr. Grad unambiguously expressed the required reasonable medical certainty required under Barbour for unequivocal testimony. I further note that I agree with the Majority's qualified statement that any

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[1] Dr. Grad testified, on direct examination:

> Q: And so based upon your examination, your conversation with Dr. Gratz and your observation, you concluded with a reasonable degree of medical certainty that he had suffered a concussion?
> [objection; overruled]
> A: Yes.
>
> * * *
>
> Q: And, Doctor, based upon your experience, when a person has a concussion, some of the side effects are inability to comprehend that which is happening about them?
> A: Certainly
> Q: And an inability to understand when somebody is asking them a question? Yes?
> A: Yes.

Reproduced Record (R.R.) at 107a-108a.

Dr. Grad testified, on cross-examination:

> Q: Can you say with reasonable medical certainty that he was incapable of understanding the officer's warnings, that he would lose his license if he didn't take the test?
> A: If he had a concussion, okay, I think there's reasonable – there's a reasonable – it's reasonable to assume that he would not have been able to understand the implications of taking the test or not taking the test.
> Q: Well, can you say with reasonable medical certainty he was incapable of making a knowing and conscious refusal?
> A: Assuming that he had – he had a concussion, yes, yes.

(Footnote continued on next page…)

inconsistency that could generously be read into Dr. Grad's testimony goes to the weight and credibility to be afforded thereto, and is the sole province of the factfinder. It is axiomatic, in driver license suspension appeals, that the trial court is the ultimate fact finder in, and that questions of credibility and conflicts in evidence are solely for the trial court to resolve. Department of Transportation v. Wilhelm, 626 A.2d 660 (Pa. Cmwlth. 1993). As the fact finder, the trial court has discretion to accept or reject the testimony of any medical witness, in whole or in part, even if uncontradicted. Id.

The cited testimony constitutes competent substantial evidence[2] supporting the Trial Court's conclusion that Dr. Grad's testimony was sufficient to establish Licensee's inability to make a knowing and conscious refusal. Dailey v. Department of Transportation, 722 A.2d 772 (Pa. Cmwlth. 1999) (whether a licensee's refusal to submit to chemical testing was knowing and conscious is a question of fact; whether there is substantial competent evidence to support the trial court's factual determination in this regard is a question of law reviewable by this Court).

(continued…)

R.R. at 112a-113a.

[2] Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Millili v. Department of Transportation, 745 A.2d 111 (Pa. Cmwlth. 2000).

Additionally, I disagree with the Majority's reversal on the grounds that Licensee's alcohol consumption was not proven to not be a contributing factor to his refusal to consent to testing. The above-cited testimony of Dr. Grad is the equivalent of the evidence accepted by this Court in another head injury case where the trial court found such evidence to be credible. Barbour (trial court's grant of licensee's appeal upheld where medical expert acknowledged part of licensee's impairment was due to ingestion of alcohol); cf. Zwibel v. Department of Transportation, 832 A.2d 599 (Pa. Cmwlth. 2003) (trial court's denial of licensee appeal affirmed where trial court *rejected* licensee's testimony as not credible, and *rejected* medical testimony regarding the effect of prescribed medications on licensee's ability to refuse testing); Dailey (trial court's grant of licensee appeal reversed where trial court expressly found that two factors – alcohol consumption, and bipolar medication and concurrent tendency to drink as a symptom of bipolar condition – could *not* be separated in determining licensee's ability to make knowing refusal).

As such, I would affirm.

JAMES R. KELLEY, Senior Judge