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Feasel v. Idaho Transp. Dept. Appellant's Brief Dckt. 35720

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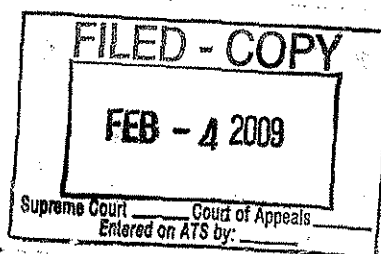
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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY ALAN FEASEL,)
)
 Petitioner-Respondent,)
)
 vs.)
)
 STATE OF IDAHO, DEPARTMENT OF)
 TRANSPORTATION,)
)
 Respondent-Appellant.)
 _____)

Supreme Court Case No. 35720
D.C. No. CV OC 0800408



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE D. DUFF MCKEE
Sr. District Judge

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I.

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from the district court's reversal of the Idaho Transportation Department's suspension of Petitioner-Appellee Feasel's (hereinafter "Feasel") driver's license following Feasel's rear-ending a vehicle, failing several field sobriety tests, and a test indicating fluoxetine ("Prozac") in his system. The Idaho Transportation Department ("Appellant") specifically appeals the district court's determination that as a condition of suspending Feasel's license, Appellant was required to present evidence establishing Prozac was an intoxicating substance that caused the impairments exhibited by Feasel, and that said evidence was not presented.

B. Course of Proceedings Below.

Feasel's driver's license was suspended after police responded to a report that Feasel had rear-ended a vehicle at the intersection of Broadway and Front Street, Boise, Idaho. Feasel conceded he had ingested multiple prescription medications and failed several field sobriety tests administered by Officer J. Tucker with the Boise Police Department. (Clerk's Exh. 1, Admin. R. at 003-004). Feasel was arrested for driving under the influence (DUI), and submitted to a breath alcohol test. That test resulted in .00% BAC. (Clerk's Exh. 1, Admin. R. at 004). It also transpired that Feasel was driving without privileges and he was cited accordingly. (Clerk's Exh. 1, Admin. R. at 005).

While an administrative license suspension (ALS) was served on Feasel, the suspension was cancelled pending the result of a urine test. (Clerk's Exh. 1, Admin. R. at 008). Subsequently, a report regarding a urinalysis performed by the Idaho State Police Forensic

Services Laboratory was received indicating the presence of fluoxetine, commonly known as Prozac, in Feasel's system. (Clerk's Exh. 1, Admin. R. at 009). Feasel was notified, on October 30, 2007, of an administrative license suspension and timely requested an administrative hearing. (Clerk's Exh. 1, Admin. R. at 011-015).

Hearing Officer Michael Howell held a telephonic hearing on November 27, 2007. Hearing Officer Howell upheld the suspension. (Clerk's Exh. 1, Admin. R. at 028-031). Finding that the condition of the driver at the time of the incident is all that is relevant, the Hearing Officer Howell held "[t]he officer gave numerous indications that the driver was impaired. Those observations combined with the results showing the presence of drugs were sufficient to establish a violation of I.C. §§ 18-8004 and 18-8002A." (Clerk's Exh. 1, Admin. R. at 030).

Feasel filed a timely Petition for Judicial Review. (Clerk's R. at 00004-00007; Clerk's Exh. 1, Admin. R. at 038-041). Judge D. Duff McKee used a Memorandum Decision on September 2, 2008, reversing the order of the Idaho Transportation Department suspending Feasel's driving license and ordering the action be dismissed. (Clerk's R. at 00042-00050). Appellant filed a Notice of Appeal on September 30, 2008, seeking review of the district court's decision. (Clerk's R. at 00051-00053).

C. Statement of the Facts.

Shortly before 7:00 a.m. on July 20, 2007, Feasel rear-ended a vehicle at the intersection of Broadway and Front Street in Boise, Idaho. Officers M. Chally and J. Tucker responded. Officer Tucker submitted an affidavit, indicating Feasel admitted to having taken Ambien CR, Lithium, Prozac and Wellbutrin. During the field sobriety tests conducted by Officer Tucker,

Feasel exhibited slurred speech and impaired memory, and Feasel failed the gaze nystagmus, walk and turn, and one leg stand tests. (Clerk's Exh. 1, Admin. R. at 003-004).

During the telephonic hearing held November 27, 2007, Feasel's daughter read the warning labels on Feasel's Ambien, Wellbutrin, Lithium and Prozac prescription bottles. As to Ambien, the evidence was that it caused drowsiness or dizziness, and Feasel had been warned that his ability to drive might be impaired. Feasel was cautioned to use care until he became familiar with its effects. (Clerk's Exh. 2, Tr. at 9, ln. 12-16). Feasel was warned a side effect of Wellbutrin was drowsiness, and was further warned to use care when operating a car. (Clerk's Exh. 2, Tr. at 10, ln. 10-13). Similarly, Feasel was warned Lithium had a side effect of drowsiness and to use care when operating a vehicle. (Clerk's Exh. 2, Tr. at 11, ln. 3-6). As to Prozac, Feasel was warned that taking the medicine "may lesson [sic] your ability to drive." (Clerk's Exh. 2, Tr. at 11, ln. 9).

It is undisputed Feasel had a valid prescription for the aforementioned drugs. (Clerk's Exh. 2, Tr. at 13, ln. 24). Feasel testified he had been on Lithium and Prozac for approximately three (3) years, but Ambien and Wellbutrin for only about a month. (Clerk's Exh. 2, Tr. at 14, ln. 20, through 15, ln. 6). Feasel claimed he had never noticed a problem in the past while taking the four medications. (Clerk's Exh. 2, Tr. at 15, ln. 7-8).

Feasel presented testimony from Loring Beals ("Beals"), a toxicologist, regarding the effects of Prozac. Mr. Beals opined that if a person is not reasonably certain of the effects of Prozac he or she should not drive. (Clerk's Exh. 2, Tr. at 21, ln. 1-6). Beals further opined that urine tests were generally useless in that they did not draw conclusions regarding quantitative amounts. (Clerk's Exh. 2, Tr. at 21-23).

It is undisputed Feasel struck another vehicle shortly before officers responded. It is undisputed Feasel exhibited slurred speech and poor memory. It is undisputed Feasel failed multiple field sobriety tests. It is undisputed there was no alcohol detected in Feasel's system. It is undisputed Feasel had ingested at least one (1) prescription drug, although he admitted to consuming up to four (4) prescription drugs. It is undisputed drowsiness is a side effect of Feasel's prescription medications, and that Feasel had been warned about the potential side effects while operating a vehicle. While these basic facts are undisputed, the legal conclusions to be drawn from the facts were the subject of the appeal to district court and are the subject of the present appeal.

D. Standard of Review.

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. Idaho Code §§ 49-201, 49-330, 67- 5201(2), 67-5270. The district court was obligated to affirm the agency action except upon a finding that "the agency's findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) not supported by substantial evidence on the record as a whole; or
- (e) arbitrary, capricious, or an abuse of discretion."

Idaho Code § 67-5279(3).

In an appeal from a district court acting in its appellate capacity pursuant to the Idaho Administrative Procedures Act, the appellate court reviews the agency record independently

of the district court opinion. *Howard v. Canyon County Bd. of Comm'rs*, 128 Idaho 479, 480, 915 P.2d 709, 710 (1996). The appellate court does not substitute its judgment for that of the agency regarding the weight of the evidence presented, but rather defers to an agency's findings of fact unless said findings are clearly erroneous. Idaho Code § 67-5279(1); *In re Bowman*, 135 Idaho 843, 25 P.3d 866 (Ct. App. 2001) (citing *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998)). "In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record." *Archer v. State Dept. of Transp.*, 145 Idaho 617, 618, 181 P.3d 543, 545 (Ct. App. 2008).

The interpretation of a statute is an issue of law over which an appellate court exercises free review. *Corder v. Idaho Farmway, Inc.*, 133 Idaho 353, 358, 986 P.2d 1019, 1024 (Ct. App. 1999). In reviewing a discretionary decision of a lower court, the appellate court must review the lower court's decision for an abuse of discretion. In its review, the appellate court must determine: "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the court reached its decision by an exercise of reason." *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991).

II.

ISSUE PRESENTED ON APPEAL

Whether the district court erred in finding no legal cause to believe that Petitioner-Appellee Feasel was under the influence of drugs or other intoxicating substances such that

the Idaho Transportation Department was proper in suspending Petitioner-Appellee Feasel's driver's license pursuant to Idaho Code § 18-8002A(4).

III.

ARGUMENT

Suspending driving privileges in accordance with Idaho Code § 18-8002A "is a civil penalty separate and apart from any other suspension imposed for a violation of other Idaho motor vehicle codes or for a conviction of an offense." *In re Bowman*, 135 Idaho at 845, 25 P.3d at 868. At the administrative hearing, the burden of proof rests squarely upon the driver to provide specific enumerated grounds to vacate the suspension. *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003). A hearing officer is obligated to uphold the suspension, unless the hearing officer finds by a preponderance of the evidence that the driver has shown one of several grounds enumerated in Idaho Code § 18-8002A(7) for vacating the suspension. Those grounds include:

1. The peace officer did not have legal cause to stop the person;
2. The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other intoxicating substances in violation of Idaho Code §§ 18-8004, 18-8004C or 18-8006;
3. The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of Idaho Code §§ 18-8004, 18-8004C or 18-8006;
4. The test results for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the

requirements of Idaho Code § 18-8004(4) or whether the testing equipment was functioning properly when the test was administered; or

5. The person was not informed of the consequences of submitting to an evidentiary test.

See Idaho Code § 18-8002A(7).

Simply put, “[i]t is unlawful for any person who is under the influence of ... drugs ... to drive or be in actual physical control of a motor vehicle within this state” Idaho Code § 18-8004(1)(a). When an individual shows an alcohol concentration of less than 0.08, “other competent evidence of drug use other than alcohol” is used in determining the guilt or innocence of the defendant. Idaho Code § 18-8004(3). In the present case, there was a .00% blood alcohol content, but evidence of Prozac in Feasel’s system. Feasel admitted to ingesting additional prescription medications. Feasel was under the influence of Prozac and/or the other prescription medications he conceded he ingested, to the extent that he struck another vehicle, exhibited poor memory, was confused, and failed multiple field sobriety tests. Having established these basic facts, Appellant was *obligated* to suspend Feasel’s license. Feasel presented no evidence at the hearing to rebut the basic fact that he had consumed drugs and he failed the field tests for sobriety.

A. The district court effectively shifted the burden in license suspension matters from the driver to the Idaho Transportation Department.

The Idaho Legislature enacted Idaho Code § 18-8002A during the 1993 legislative session. The stated purpose of the legislation was to:

(1) Provide safety for all persons using the highways of this state by quickly revoking the driving privileges of those persons who have shown themselves to be safety hazards by driving with a blood alcohol content which exceeds the legal limit provided for in Section 18-8004, Idaho Code; and

(2) To guard against the potential for an erroneous deprivation of the driving privilege by providing for an administrative hearing on the revocation, if requested, within seven days of service of the notice of suspension; and

(3) To join with 31 other states in realizing a significant reduction in alcohol-related traffic fatalities through this cost effective legislation.

(H 252, 1993).

The intention of the legislation is clear that individuals who are a danger to the travelling public be removed from the road, whether that danger stems from alcohol use or drug use. The Idaho Court of Appeals has described the legislative intent as follows:

The purpose of the statute is to provide maximum safety for all persons using the highways of this state by quickly revoking the driving privileges of those persons who drive with a blood alcohol content which exceeds the legal limit provided for in I.C. § 18-8004. In addition, the statute was intended to deter driving while under the influence.

In re Bowman, 135 Idaho at 846-47, 25 P.3d at 869-70 (citations omitted).

As to the administrative license suspension, the ultimate finding of the driver's guilt or innocence on the DUI charge is not a factor.

The facts as found by the hearing officer shall be independent of the determination of the same or similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of those criminal charges shall not affect the suspension required to be imposed under the provisions of this section.

Idaho Code § 18-8002A(7).

At the administrative license suspension hearing, the results of any tests for the presence of drugs shall be admissible, as is the sworn statement of the arresting officer and the accompanying documents. The burden of proof is on the driver challenging the suspension. Idaho Code § 18-8002A(7); *Archer v. State Department of Trans.*, 145 Idaho 617, 620, 181 P.3d 543, 546 (Ct. App. 2008). In the present case, Appellant was presented with a sworn statement satisfying the statutory requirements. There was no evidence at the

license suspension hearing submitted to rebut the basic facts of diminished capacity and drug use. Therefore, whether Feasel understood he was under the influence or the amount of drugs in his system was not relevant as to a license suspension.

This statute has explicitly been found to be remedial in nature and not punitive. *State v. Reichenberg*, 128 Idaho 452, 915 P.2d 14 (1996). Hence, the portion of Idaho Code § 18-8004 dealing with competent evidence to find guilt or innocence has no application. The district court has essentially added a requirement that the Appellant establish, as a condition precedent, that the particular drug was not only intoxicating but it was intoxicating as to that driver. Further, the district court would prohibit the Appellant from relying upon an officer's sworn statement regarding indicia of intoxication as grounds for the determination that the drug was intoxicating as to that driver. Not only does this effectively shift the burden from the driver to the Appellant, it essentially rewrites the statute and makes it virtually impossible for the Appellant to suspend a license based on drugs or other intoxicating substances. Now, rather than relying on a sworn statement of intoxication and the presence of drugs on a test, the Appellant would be required to obtain the testimony of a toxicologist before a license could even be suspended. This rewriting of the statute is clearly in contravention of the legislature's intent and beyond the scope of the district court's authority.

B. The statute does not require Appellant to establish the quantity of drugs in a licensee's system.

The Idaho Transportation Department's obligations regarding administrative license suspensions are governed by Idaho Code § 18-8002A. Appellant is obligated to suspend a driver's license, upon:

receipt of the sworn statement of a peace officer that there existed legal cause to believe a person had been driving or was in actual physical control of a motor vehicle **while under the influence of alcohol, drugs or**

other intoxicating substances and that the person submitted to a test and the test results indicated an alcohol concentration **or the presence of drugs** or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code.

Idaho Code § 18-8002A(4) (emphasis added).

When interpreting a statute, a court should construe the statute as a whole to give effect to the legislative intent. *In re Bowman*, 135 Idaho at 846, 25 P.3d at 869. The plain meaning of the statute shall be adopted, unless the plain meaning leads to absurd results. *Id.* The plain meaning of Idaho Code § 18-8002A(4) provides that upon a test establishing the *presence* of drugs and evidence that the driver is under the influence, a suspension is mandatory. In the present case, there was a test establishing the presence of Prozac, as well as indicia that Feasel was influenced by the drug (hitting another vehicle, failing field sobriety tests, and exhibiting confusion and poor concentration).

The State is not required to establish a quantity of drugs in a defendant's system in a prosecution for driving under the influence. *State v. Lesley*, 133 Idaho 23, 981 P.2d 748 (1999). Recently, the Idaho Supreme Court also noted "the State's test need only demonstrate the mere presence of drugs," not the amount of drugs. *Reisenauer v. State Department of Transportation*, 145 Idaho 948, 951, 188 P.3d 890, 893 (2008) (noting that while the amount of the drug is not required, the drug must be intoxicating).

C. The district court improperly determined that evidence pertaining to any drugs beyond fluoxetine (Prozac) was not relevant.

The district court determined that while evidence was offered regarding Ambien CR, Lithium, and Wellbutrin, "none of the other drugs were revealed in the laboratory test. The evidence pertaining to the other drugs, then, is not relevant here." (Clerk's R. at 00043). It is unknown whether these drugs had time to metabolize to the point where it could be found in

Feasel's urine at the time of the test. Feasel did not contend he was "only" affected by Prozac at the license suspension hearing. The hearing officer could not ignore the fact that Feasel specifically admitted under oath the ingestion of those drugs. The hearing officer properly considered all of the evidence before him, including the scientific evidence. The district court improperly determined the other drugs were not relevant to the license suspension hearing.

D. Feasel ingested intoxicating drugs prior to driving.

The district court concluded "[a]ll drugs are not alike" and the term "intoxicating substance" is not defined in the statute. (Clerk's R. at 00045). While the term "intoxicating substance" has not been defined, the Idaho Court of Appeals has previously held that lithium is a "drug" for the purpose of the statute prohibiting driving under the influence of an intoxicant. *State v. Goerig*, 121 Idaho 108, 822 P.2d 1005 (Ct. App. 1991). Mr. Goerig consumed four (4) glasses of beer, in addition to taking prescription medication to control his manic depression. *Id.* 121 Idaho at 111, 822 P.2d at 1008. Mr. Goerig declined to take a breathalyzer test, which was the subject of a separate appeal, and a jury found Mr. Goerig guilty of driving under the influence of drugs. *Id.* The court concluded "lithium is a drug for the purposes of I.C. § 18-8004(5)" and held "the fact that Goerig was legally entitled to take lithium because it had been prescribed to him is not a defense to a charge of driving under the influence of intoxicants." *Id.* 121 Idaho at 113, 822 P.2d at 1010.

The Florida District Court of Appeal addressed a case involving driving under the influence of prescription drugs, including fluoxetine (Prozac). *Hoffman v. State*, 743 So.2d 130 (1999). In *Hoffman*, the driver ran into a parked truck with its flashers on, the officer noted bloodshot, glassy eyes and slurred speech, and the driver failed various field sobriety

tests. While there was no evidence of alcohol use, a urine test revealed three (3) prescription medications, including Prozac, Soma and Xanax, and the driver was aware of the warnings not to operate a motor vehicle while using the medications. *Id.* 121 Idaho at 131. The testifying toxicologist stated that there may be no ill effects with the drugs taken in proper amounts, that if used to excess there may be the results noted by the officer, and that the urine test was unable to detect the quantity of the drugs in the driver's system. *Id.* The court noted:

The three elements of DUI are driving, being under the influence, and being impaired....[I]t is unnecessary for the toxicologist to be able to estimate the degree of impairment caused by the existence of drugs. Nor does the toxicologist have to testify as to the amount of the drugs in the person's system.

Id. (citations omitted).

The Idaho Supreme Court, in the recent decision of *Reisenaur v. State Department of Transportation, supra*, determined:

[A]ny drug must be intoxicating in order for § 18-8002A to apply. Otherwise, one could lose his driver's license simply because he had taken a Children's Tylenol before hitting the highway. The Department has not alleged or proved that Carboxy-THC is intoxicating, and since the test results revealed only the presence of Carboxy-THC, Reisenauer met his burden of proving that the results did not show the presence of drugs or other intoxicating substances.

Reisenauer, 145 Idaho at 952, 188 P.3d at 894.

The drugs taken by Feasel all indicate they may have an effect on driving and/or cause drowsiness, which would impair an individual's ability to safely operate a vehicle. In fact, in his probable cause affidavit, Officer Tucker indicated Feasel stated he had "knowledge that he was not to operate a motor vehicle while taking these medications."

(Clerk's Exh. 1, Admin. R. at 003-004). While Feasel does not specifically recall making that statement, the hearing officer properly considered the statement as part of the record.

In the present case, the drug(s) taken by Feasel were intoxicating as to him, as reflected by the traffic accident, observations of the officer, and the results of the field sobriety test. Lithium and fluoxetine (Prozac) have been deemed by other courts to be a drug for purposes of statutes outlawing driving under the influence and the evidence supports the finding by the hearing officer that Feasel was under the influence of intoxicating drug(s).

E. The peace officer's statements regarding impairment are relevant and admissible.

The district court determined that while an officer has the ability to render lay opinion testimony regarding a driver's stage of intoxication or drunkenness, an officer is not permitted to testify regarding the influence of drugs on a driver. (Clerk's R. at 00044-00045). The district court's determination is based on the "common knowledge" that "the ingestion of a sufficient quantity of alcohol *will* impair one's ability to operate a motor vehicle." (*Id.* at 00044) (emphasis in original).

The hearing officer considered the test results, together with Feasel's sleepiness, incoherence, and poor memory in conjunction with Feasel's failure of several field sobriety tests in determining Feasel failed to establish grounds for reversing the license suspension. The district court did not properly consider the sworn statement of the officer that Feasel was unable to pass several field sobriety tests, including gaze nystagmus, walk and turn, and one leg stand. (Clerk's Exh. 1, Admin. R. at 004).

The district court concluded that an officer's opinion on public drunkenness might suffice, until and unless a blood alcohol content (BAC) test shows less than the statutory level for drunkenness. Under this analysis, an ALS action could *never* take place if drugs

were the cause of a driver's impairment rather than alcohol because the tests by their nature establish the presence of drugs rather than the amount of drugs or the effect a drug has on a particular person. The statute, however, only requires the *presence* of drugs coupled with impairment and the statute does not differentiate between an officer's ability to render an opinion on impairment based on alcohol versus drugs or other intoxicating substances.

As a general matter, "in a prosecution for driving a motor vehicle while intoxicated, driving a motor vehicle while under the influence of intoxicating liquor or drugs, or similar offense, calls for no extraordinary or unusual limitations on the use of circumstantial evidence to establish those elements." *Driving While Intoxicated or Under Influence of Liquor or Drugs*, 8 Am.Jur.2d, Automobiles § 982.

In order to be found guilty of the crime of driving under the influence, a person must have drugs in his or her system, must be driving and must be "under the influence" of the drug. Idaho Code § 18-8004(1)(a). The phrase "under the influence" denotes impairment of physical or mental function that relates to one's ability to drive. No specific degree or state of intoxication is required, but only a showing that enough of the substance has been ingested as to influence or affect the ability to drive. *State v. Gleason*, 123 Idaho 62, 844 P.2d 691 (1992). Impairment may be demonstrated by observation of some type of ascertainable conduct or effect, and may be proven by direct or circumstantial evidence. *State v. Andrus*, 118 Idaho 711, 800 P.2d 107 (1990); *State v. Bronnenberg*, 124 Idaho 67, 856 P.2d 104 (1993).

Feasel concedes he was tired and at times incoherent, and the audio tapes from the conversation bear out the officer's testimony. The hearing officer properly determined the

officer's sworn statement was admissible. The district court's determination that said evidence is not permitted should be reversed.

F. Hearing Officer Howell's findings of fact regarding impairment were supported by the record.

The hearing officer determined the incoherence, poor memory, and failed field sobriety tests, coupled with the officers' field observations, provided sufficient evidence of impairment. The district court found there was no foundation to support that opinion, because drugs versus alcohol was the substance at issue. The district court lacked authority to substitute its judgment for that of the agency's findings of fact, because the findings were supported by uncontroverted evidence. Idaho Code § 67-5279(1); *Archer v. State Dept. of Transp.*, 145 Idaho 617, 618, 181 P.3d 543, 545 (Ct. App. 2008) (holding an agency's factual determinations are binding on the reviewing court, if said determinations are supported by substantial competent evidence in the record). Appellant respectfully submits this reviewing court should affirm the findings of impairment as supported by the record.

In 2002, the Idaho Legislature amended Idaho Code § 18-8004 to add subsection seven (7), providing that when person is charged with driving under the influence of any drug, the fact that the drug was obtained legally "shall not constitute a defense against any charge of a violation of the provisions of this chapter." Idaho Code § 18-8004(7). The stated purpose for amending Idaho Code § 18-8004 is as follows:

In *United States v. Patzer*, the United States Court of Appeals for the Ninth Circuit ruled that under subsection (5) of Section 18-8004 of the Idaho Code, anyone under the influence of marijuana can lawfully operate a motor vehicle in the State of Idaho provided the driver's ability to operate the vehicle is not impaired. This statutory interpretation has created an internal inconsistency with Section 18-8004(1), which prohibits the operation of a motor vehicle under the influence of drugs or intoxicating substances.

The legislation will clarify that under Idaho law, merely driving or being in actual physical control of a motor vehicle under the influence of drugs or intoxicating substances, including marijuana, is a crime. The legislation eliminates former subsection (5) of 18-8004 which requires proof of impairment of the driver's ability to safely operate the vehicle, notwithstanding evidence that the operator is under the influence of drugs or alcohol.

(SB 1421, 2002).

Testimony from Feasel's daughter, Ms. Patricia Feasel, included statements regarding the warning labels on the prescription medications. Ms. Feasel testified Feasel's Ambien prescription bottle included the statement "side effects: may cause drowsiness or dizziness. This drug may impair the ability to drive or operate machinery. Use care until you become familiar with its effects." (Clerk's Exh. 2, Tr. at 9, ln. 12-15). Regarding Wellbutrin, the medication bottle contained the statement "may cause drowsiness. Alcohol may intensify this effect. Use care when operating a car or dangerous machinery." (Clerk's Exh. 2, Tr. at 10, ln. 11-13). The lithium bottle contained the warning "[m]ay cause drowsiness. Alcohol may intensify this effect. Use care when operating a car or dangerous machinery." (Clerk's Exh. 2, Tr. at 11, ln. 3-5). The fluoxetine (i.e. Prozac) bottle included the following warning: "May cause drowsiness. Taking this medicine alone or with alcohol may lesson your ability to drive or perform [] hazardous tasks. Do not take other medicines without checking with your doctor or pharmacist." (Clerk's Exh. 2, Tr. at 11, ln. 8-11).

Feasel did not dispute at the hearing that he was impaired from the medication, but rather stated that he had not previously noted impairment or loss of control from the medication. Specifically, Feasel testified:

Q. Again, I'll ask you, did you ever have any incidence of losing control or feeling like you were impaired from using these prescribed medications when driving?

A. Not until that morning.

(Clerk's Exh. 2, Tr. at 15, ln. 23, through 16, ln. 1).

Feasel was nodding off while behind the wheel even as the first officer on the scene was speaking to him. Feasel was in almost a trance-like state and he claimed he had used Ambien approximately eight (8) or nine (9) hours before for the first time. While Feasel did not recall indicating to the officer that he was not supposed to operate a vehicle, he did not refute any of the statements made by the officer in his affidavit. (Clerk's Exh. 2, Tr. at 15, ln. 10-14). Given the failure of several field sobriety tests, not to mention the rear-end collision, it was reasonable for the hearing officer to conclude Feasel was under the influence of drug(s) in violation of the ALS statute.

IV.

CONCLUSION

The district court improperly shifted the burden on a license suspension hearing from the driver to the Idaho Transportation Department. The hearing officer appropriately evaluated the evidence before him, and determined none of the criteria for setting aside the license suspension had been met. The Department had a sworn statement from the officer, together with undisputed testimony that Feasel had ingested numerous prescription medications that rendered him incapable of safely operating a vehicle. Feasel had struck another vehicle, failed multiple field sobriety tests, was drowsy and at times incoherent when speaking with the officer, and a test revealed the presence of fluoxetine (Prozac) in his system. Given these factors, the Department properly suspended Feasel's driver's license and said suspension should be affirmed on appeal. Therefore, it is respectfully submitted that

the decision of the district court dismissing the Department's suspension of Mr. Feasel's driver's license should be reversed.

Dated this 7 day of February, 2009.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane
MICHAEL J. KANE
Attorneys for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3 day of February, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Mr. Robert A. Wallace
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U.S. Mail
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Michael Kane
MICHAEL J. KANE