3-1-2010

Wanner v. State, Dept. of Transportation Respondent's Brief Dckt. 37059

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE M. WANNER,

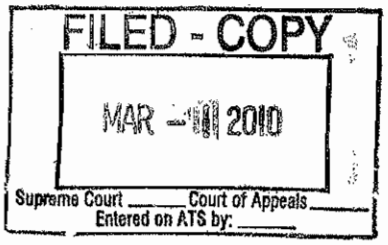
Petitioner/Respondent,

vs.

STATE OF IDAHO,
DEPARTMENT OF
TRANSPORTATION

Respondent/Appellant.

CASE NO. 37059-2009



RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District
of the State of Idaho, in and for the County of Franklin

Honorable David C. Nye, District Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case

Statutes

Administrative Rules

I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves an administrative license suspension ("ALS") arising from I.C. § 18-8002A.

B. STATEMENT OF FACTS

Wanner does not contest the Statement of Facts as submitted by the State of Idaho and Department of Transportation. Wanner also does not disagree with the portion of the State's Brief entitled "Course of Proceedings Below" for the purpose of determining this appeal.

II.
ISSUES PRESENTED ON APPEAL

1. Whether the District Court erred in its determination that Wanner is entitled to an administrative hearing on his non-commercial driving privileges pursuant to I.C. § 18-8002 and/or I.C. § 18-8002A?

2. Whether the District Court erred in its determination that the Notice of Suspension Form violated Wanner's due process rights?

III.
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. *See I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270.* In an appeal from the decision of the district court

acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.,* 137 Idaho 337 340, 48 P.3d 666, 669, (Ct.App.2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. *I.C. § 67-5279(1); Marshall*, 137 Idaho at 340. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.,* 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall,* 137 Idaho at 340. 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. *Urrutia v. Blaine County, ex re. Bd. Of Comm's,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340.

IV.

ARGUMENT

A. WANNER IS ENTITLED TO AN ADMINISTRATIVE HEARING PURSUANT TO I.C. § 18-8002 AND I.C. § 18-8002A.

ITD argues that the District Court, in its appellate capacity, lacked the "jurisdiction" to hear Wanner's appeal because Wanner did not request a hearing pursuant to I.C. § 18-8002A. This argument is misplaced for several reasons.

Wanner has a CDL. Wanner was operating his non-commercial vehicle on August 7, 2008. *R. at 17-18.* He was arrested on the suspicion of Driving Under the Influence. *R. at 17-19.* Wanner was read an Idaho Transportation Department ("ITD") Suspension Advisory Form. *R. at 14-15.* Based upon his review of the ITD Suspension Advisory Form, Wanner submitted to

the breath testing. *R. at 16.* Due to the vagueness of the ITD Advisory Form, Wanner believed that his commercial license and non-commercial privileges would only be suspended for 90 days. *R. at 14-15.* Wanner became aware of the error in his understanding when the ITD sent him a letter advising him that he lost his commercial driving privileges, absolutely, for one year. *R. at 64-64, Tr. P.4, at 10-21.*

When Wanner realized that he was misinformed about the status of his commercial driving privileges, he instructed his counsel to file a *Request for Administrative Hearing. R. at 5-6.* This *Request* was forwarded to ITD on August 21, 2008. *R. at 5-6.*

In response, ITD mailed to Wanner a response entitled *Notice of Untimely Request for Hearing*, dated August 22, 2008. *R. at 4.* This is the only factual inquiry ITD made on the merits of Wanner's claim. ITD, in that *Notice*, informed Wanner:

> Your suspension for failing an evidentiary test will become effective September 06, 2008, for a period of 90 days. ***You may appeal the denial of your hearing to the District Court for a judicial review within 28 days from the date of this Notice***.

R. at 4. (emphasis added).

In response, on September 18, 2008, Wanner filed a *Notice of Petition for Judicial Review of the Administrative Order and Request for Stay of License Suspension.* Thus, according to the ITD's *Notice*, Wanner's September 18, 2008 filing of *Notice of Petition for Judicial Review* was filed within the twenty-eight day requisite period, and was thus timely. *R at 1-2.*

This *Notice of Petition for Judicial Review, et. al.;* stated:

1. Defendant was not adequately notified of the seven day requirements to request a hearing; and
2. The notice of such requirement is difficult to understand, written in small print, fails to adequately notify him of the ramifications of his failure to request a hearing, and written in a manner which is difficult to read.

R. at 1-2. In other words, Wanner alleged that the ITD Suspension Advisory Form is statutorily flawed.

Correspondingly, ITD immediately filed a dispositive motion claiming that the District Court had no jurisdiction to hear the appeal. This jurisdictional argument was presented to the District Court on January 12, 2009, when the ITD filed a *Motion to Dismiss* alleging that because Wanner did not file within the seven day period of time, he was not entitled to judicial review, that said request was jurisdictional in nature, and dismissal was appropriate. *R at 47-55.* In essence, ITD argues that if an aggrieved party does not file for an ALS hearing within seven days mandated by statute, the right to appeal, regardless of reason, extinguishes by virtue of the District Court never being vested with jurisdiction.

The District Court responded to the *Motion to Dismiss*, and the "seven day extinction" argument, as follows:

> Wanner's Notice of Petition for Judicial Review states that review is requested because Wanner was not adequately notified of the time limit for requesting an appeal, the notice was improper and/or insufficient, and the police officer did not properly advise him of his rights in accordance with Idaho Law. Thus, IDOT's motion to dismiss goes to the very crux of the appeal and is hereby **denied**.

R at 57.

The District Court was correct in denying this *Motion to Dismiss*. This issue was raised again as an argument against the underlying merits of the appeal. The District Court made the determination that this judicial appeal was timely for two legal reasons:

1. The appeal was filed within the requisite forty-two (42) days for filing an appeal, and thus, the District Court, sitting in its appellate capacity, had the judicial jurisdiction and authority to hear the merits of the argument; and
2. The whole issues of this appeal as to whether the administrative license suspension noted would appropriately place a commercial driver on notice that if he did not request a hearing within seven days, that his commercial driving privileges would be revoked, absolutely, for a period of one year. *R at 57.*

ITD presents no authority to support the contention that a failure to request a hearing within seven days extinguishes jurisdiction from the District Court (in its appellate capacity) to review whether Idaho Law was appropriately followed. There is a reason why this authority is lacking. Idaho Appellate Courts have determined that jurisdiction does vest, to overturn an agency's decision, in certain scenarios. ITD made no factual inquiry other than making the decision that the request for hearing was untimely, and thus, ITD's decision was to suspend Wanner's license.

> A Court may overturn an agency's decision where its findings, inferences, conclusions or decisions: (a) **violates statutory or constitutional provisions**; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. *I.C. § 67-5279(3).* The Party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of a party has been prejudiced.

Archer v. ITD, 1456 Idaho 617, 619, 181 P.3d 543, 545 (Ct. App. 2008). (string cite deleted).

The District Court ruled that ITD, here, "violate[d] a statutory or constitutional provision" and the District Court was correct in this ruling.

Put simply, ITD would prefer this Court adopt a rule of law that regardless of how faulty the ALS suspension form advises, the result may not be appealed if it leads a motorist astray and a request is untimely. This absolutism is not only contrary to this Court's prior holding in *Archer*, but it is also contrary to good public policy.

Hypothetically speaking, what if the Suspension Form had a typographical error which advised motorists that they had 14 days to request a suspension hearing rather than the statutory 7 days? ITD asserts that every motorist is required to know the law with ignorance being no excuse. Does this mean, in those cases, that the motorist who, relying upon the Advisory Form (as he has a right to do), files a request on the fourteenth day, has no right to appeal? If ITD's absolutist argument is accepted, this hypothetical has a chilling result – the ITD advises wrong, but there is no "jurisdiction" to redress the incorrectness of the advisory. What incentive is there for ITD to properly advise, in good faith, if this absolutist method is accepted?

Secondly, the State implies that "a failure to exhaust administrative remedies" effectively eliminates the right to appeal. In the *Notice of Untimely Request for Hearing,* ITD informed Wanner that he had 28 days to appeal the decision to District Court. By the agency's own statement, this was the procedure Wanner was to follow to effectuate his appeal.

Also, this argument misses the whole point of the appeal. Wanner was misinformed, or at the very least under-informed, as to the requisite consequence of failing to request a hearing within seven days of service of the suspension. Wanner will explore this argument in greater detail in the next section, however, Wanner was under-informed as to his rights, as to his commercial driving license, he did not realize the appropriate consequences for failing to request a hearing until ***after*** the time for requesting a hearing had expired. He became aware of the consequences of said failure by virtue of IDT's letter to him suspending his commercial driving license privileges for one year, absolutely.

Finally, the District Court was correct in remanding the matter to the ITD for a determination consistent with the appeal. Once again, ITD's "decision" was to suspend Wanner's license. The District Court did not affirm that decision. "If the agency's decision is not affirmed on appeal, 'it shall be set aside . . . and remanded for further proceedings as necessary.'" *Archer,* 145 Idaho at 619.

B. THE DISTRICT COURT DID NOT ERR IN ITS DETERMINATION THAT THE NOTICE OF SUSPENSION FORM DENIED WANNER DUE PROCESS

This District Court in its *Decision on Appeal From Administrative Hearing* correctly identifies the standard by *I.C. § 67-5279* to review as to whether there is a "violation of constitutional or statutory provision" *I.C. § 67-5279(3)(a). R at 105.* The Court correctly ruled,

> Idaho Law imposes further consequences to commercial driving privileges which **should be, but are not, contained in the Notice**. Idaho Code § 49-335(2) requires a person holding a class A, B, or C driver's license to be disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if they fail a test to determine a driver's alcohol. The court has no reason to doubt that had Petitioner been notified of this statutory provision, he would have

> timely filed for his administrative hearing. **Constitutional due process requires that Petitioner should have been given sufficient notice of the full consequences of failing the evidentiary test.** He was not given this notice and should be allowed the opportunity of an administrative hearing in front of the Idaho Transportation Department. *Due process requires that drivers with CDLs, who are driving non-commercial vehicles at the time of suspension, be given notice of the impact of I.C. § 49-335(2) and its one year disqualification in the Notice of Suspension. Without that notice CDL drivers cannot make an informed decision regarding whether to file an appeal under I.C. § 18-8002 and I.C. § 18-8002A within the required seven days. Therefore, because proper notice was not given, Petitioner is entitled to a hearing under I.C. § 18-8002, I.C. § 18-8002A, and I.C. § 49-326(4).*

R at 120. (emphasis added).

The Court ruled that the administrative license suspension given to Wanner was constitutionally and statutorily vague as to advising Wanner as to his rights for driving with a CDL in a non-commercial vehicle.

I.C. § 18-8002A enables law enforcement to, when suspicious of a motorist driving under the influence of intoxicants, to request the motorist to submit to testing. In context of this statute, the legislature requires law enforcement, upon making such request, to advise a motorist of the consequences of submitting to the evidentiary testing, or, alternatively refusing to submit to the evidentiary testing. Clearly, the legislature intended that, prior to penalizing (in a civil fashion) a motorist by abdicating driving privileges, the motorist must make a knowing, intelligent, and voluntary decision to submit to testing.

The pertinent part of the Automatic License Suspension Advisory Form, as it existed when Wanner was stopped, reads as follows:

For failing evidentiary testing (pursuant to Section 18-8002A, Idaho Code):

You have been served this *Notice of Suspension* by a peace officer you had reasonable grounds to believe that you were operating a vehicle while intoxicated. Section 18-8002, Idaho Code requires you to take an evidentiary test or tests to determine your alcohol concentration and/or the presence of any drugs or other intoxicating substances. After submitting to the test(s), you may, when practicable, have additional tests conducted (at your own expense).

If you take the evidentiary test(s) and results indicate an alcohol concentration of .08 or greater (.02 or greater if you are under 21 years of age), or the presence of drugs or other intoxicating substances in violation of provisions of Section 18-8004, 18-8004C, and 18-8006, Idaho Code, the peace officer shall:

1. A. Seize your driver's license (unless you are an out-of-state resident).

   B. Issue a temporary driving permit which shall be valid for thirty (30) days from the date of service indicated on the reverse side of this *Notice of Suspension*, if you have surrendered a current valid Idaho license. If you are **operating a commercial motor vehicle,** any temporary permit issued will not provide commercial driving privileges of any kind.

   C. Serve you with this *Notice of Suspension* that becomes effective thirty (30) days after the date of service indicated on the reverse side of this notice. Failure of an evidentiary test will result in a ninety (90)-day suspension of driving privileges, with absolutely no driving privileges during the first thirty (30) days of the suspension. You may request restricted privileges during the final sixty (60) days of this suspension. If this is not your first failure of an evidentiary test within the last five (5) years, all you driving privileges will be suspended for one (1) year with absolutely no driving privileges of any kind.

2. If you **are operating or are in physical control of a commercial vehicle** and the evidentiary test result indicates an alcohol concentration of: ...

R at 15.

The *Notice of Suspension* Advisory Form was drafted by ITD. ITD (with guidance from the Idaho Supreme Court and the Idaho legislature) was sole arbiter as to what to include in the *Notice of Suspension* Form. *I.C. § 18-8002A* requires law enforcement to give certain warnings. ITD has chosen to deviate, slightly, from the statute when drafting this advisory.

The Court of Appeals addressed what occurs when the Advisory Suspension Form is vague and ambiguous. In *Virgil v. State,* 126 Idaho 946, 895 P.2d 182 (Ct.App.1995) found "ambiguity" when the former suspension form used the terminology "explain why" as opposed to "show cause" at the administrative hearing. *Virgil*, 126 Idaho at 947-948. The Court correctly deemed that there was a significant difference between being advised that you have the right to "explain why" versus "showing cause" at a hearing, and that incorrect advisement did not properly inform motorists of the consequences of failing or submitting to testing. *Id.* Based on this distinction, the Court of Appeals found that the Twin Falls Police did not properly advise Virgil, and **reversed** the license suspension. *Id.*

> Idaho law requires strict adherence to the statutory language of I.C. § 18-8002(3). This court has previously held that the information required by I.C. § 18-8002 is set forth "in no certain terms," *Beem,* 119 Idaho at 291, and that our Supreme Court has "emphatically discountenanced interjection of judicial gloss upon the legislature's license suspension scheme." *Id.* at 292. Additionally, our Supreme Court has stated that the license of a driver who refuses to submit to a requested test will be reinstated "if he can establish at the show cause hearing that he was not *completely* advised of his rights and duties under the statute." *Matter of Griffiths*, 113 Idaho 364, 370, 744 P.2d 92, 98 (1987) (emphasis added).

Virgil, 126 Idaho at 948.

Here, as the District Court correctly holds, there are three motorist categories by which the ALS advisory warnings <u>*can*</u> apply:

1. A non-commercial driver driving a non-commercial vehicle;
2. A commercial driver (one with a CDL) driving a non-commercial vehicle; and
3. A commercial driver (with a CDL) operating a commercial vehicle at the time of stop.

Wanner was in Category 2 of the motorist categories on the day of the stop. Wanner has a commercial driver's license, but was operating a non-commercial vehicle at the time of stop.

In the Suspension Form at issue, ITD included warnings commensurate with what occurs if you are driving under the influence with commercial driving privileges. It advises what will occur if a motorist is driving a commercial vehicle, at the time of stop. It lists the consequences if a motorist fails testing while driving a semi-truck. ITD decided to include the portions of the suspension form regarding commercial licenses. However, by the way it chose to word the suspension, it misleads and under-informs, partly, because it excludes an entire category of motorist. The ITD form implies that if a motorist has a CDL, but is ***not*** driving a commercial vehicle, the driver is only subject to the penalties for non- commercial drivers. ITD has a duty, once it starts to advise, to inform appropriately. Pursuant to *Virgil*, does this form **completely** advise a motorist such as Wanner? Absolutely not. Due process requires more.

As the District Court correctly held, this advisory form does not appropriately address the consequences associated with failure of evidentiary testing for person driving with their CDL in a non-commercial vehicle. The form is vague. The District Court agreed that a person in Wanner's position would react the way Wanner did. Under the mistaken belief that his license (CDL and non-commercial license) would only be suspended for 90 days, Wanner allowed the suspension to go into effect without contesting it. By a plain reading of the advisory form, Wanner's interpretation of what would happen with his driving license privileges (his CDL) is correct—that since this was a non-commercial setting, Wanner would lose his license for the mandatory period—90 days.

The District Court ruled, correctly, that the advisory form was insufficient to satisfy due process requirements for motorists that fit into Wanner's category. Consequently, the District Court remanded the matter for an Administrative Hearing to test the sufficiency of the Advisory Form.

This is consistent with this Court's prior ruling in the matter of the driver's license suspension of *Halen v. State*, 136 Idaho 829, 41 P.3d 257 (2002). In this case, the Supreme Court stated:

> Idaho Code section 18-8002A requires that upon being asked to submit to a BAC a motorist must be given information regarding the consequences of submitting to and failing the BAC, by having a blood alcohol content that exceeds the legal limit. I.C.§ 18-8002A(2). *Specifically, motorists must be informed, among other things, that if they submit to and fail a BAC, a civil license suspension will be enforced against them.* I.C.§ 18-8002A(2). Motorists are entitled to similar information regarding the consequences of refusing to submit a BAC. I.C.§ 18-8002(3). Motorists who refuse to submit to requested tests are entitled to have their licenses reinstated if they can establish at the refusal hearing that they were not completely advised according to these code sections.

Id at 834 (citing *In re Griffiths* 113 Idaho 364, 370, 744 P.2d 92, 98 (1987).

The ITD wants to rely upon the old adage that "ignorance of the law is no excuse." ITD argues that because there are separate rules and statutes that regulate a motorist driving with a commercial driver's license privilege, that motorist is obligated to know the rules and laws. However, ITD elected, on its own volition, to advise motorists with CDLs in its advisory form. Once election was made, it subjected itself to doing so in good faith to advise properly and comply with due process requirements. As this Court has held in *Halen*, if the advisory form is incorrect or vague, the motorist has the right, at the administrative license hearing, to have his license reinstated due to faulty instruction.

> Whether a driver's license is required only for delivering bread, commuting to work, transporting children or the elderly, meeting medical appointments, attending social or political functions, or any combination of these or other purposes, the revocation or suspension of that license, even for a six-month period, can and often does constitute a severe personal and economic hardship.

Berlinghieri v. Department of Motor Vehicles, 657 P.2d 383, 387, 388 (Cal. 1983).

The California Court, in recognizing the importance of once driver's license to perform one's business trade, or personal necessities, recognize that decision in this regard should be given heightened scrutiny. *Id.* While there is no fundamental constitutional "right to work" standards in which eviscerate one's right to work should be analyzed very closely. *Id.*

V.

CONCLUSION

Based on the foregoing, this Court must affirm the District Court, and further, affirm the remand or a subsequent Idaho Transportation Department administrative license hearing. The ALS hearing should be held in accordance with findings of the District Court.

DATED this 26 day of February, 2010.

MAY, RAMMELL & THOMPSON, CHTD.
Attorneys for Respondent

AARON N. THOMPSON

CERTIFICATE OF SERVICE

I certify that on this date a copy of the *Respondent's Brief* was served on the following named persons at the addresses shown and in the manner indicated.

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DATED this 26 day of February, 2010

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE M. WANNER, Petitioner/Respondent, *vs.* STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION Respondent/Appellant.	CASE NO. 37059-2009

CERTIFICATE OF COMPLIANCE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

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Dated and certified this 26 day of February, 2010.

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