

10-3-2011

# In re Hubbard Appellant's Brief Dckt. 38969

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE SUSPENSION )  
OF THE DRIVER'S LICENSE OF LINDA )  
LEE HUBBARD )

LINDA LEE HUBBARD, )

Petitioner/Appellant, )

-vs- )

STATE OF IDAHO, DEPARTMENT OF )  
TRANSPORTATION, )

Respondent )  
\_\_\_\_\_ )

Supreme Court Docket  
No. 38969-2011

\_\_\_\_\_  
BRIEF OF PETITIONER/APPELLANT  
\_\_\_\_\_

APPEAL FROM THE DISTRICT COURT  
OF THE FOURTH JUDICIAL DISTRICT  
IN AND FOR VALLEY COUNTY

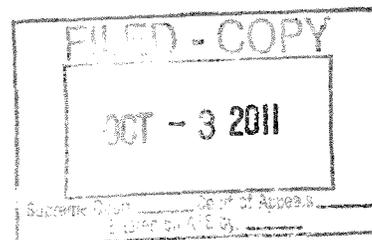
HONORABLE MICHAEL R. MCLAUGHLIN, DISTRICT JUDGE, PRESIDING

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**THE DISTRICT COURT ERRED IN AFFIRMING THE  
FINDINGS OF FACT AND CONCLUSIONS OF LAW AND  
ORDER OF THE ADMINISTRATIVE HEARING OFFICER OF  
THE IDAHO DEPARTMENT OF TRANSPORTATION.**

**A. The evidentiary test was not performed in compliance  
with the requirements of Idaho Code and ISP Forensic Services  
Standard Operating Procedures.**

**B. The evidence does not show that the testing instrument  
was functioning properly when Ms. Hubbard’s test was administered.**

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## STATEMENT OF THE CASE

**A. Nature of the Case.** This is an appeal from the administrative license suspension of Linda Lee Hubbard issued by Eric Moody, the Hearing Examiner for the Idaho Transportation Department, dated November 17, 2010, and from the Memorandum Decision of the Honorable Michael R. McLaughlin, District Judge, dated May 31, 2011, upholding the same.

**B. Course of Proceedings Below.** Following issuance of a Notice of Suspension by Trooper Wright on September 6, 2010, Ms. Hubbard requested a hearing before an Administrative Hearing Officer of the Idaho Department of Transportation. The hearing was held October 26, 2010. On October 28, 2010, the Hearing Officer issued his Findings of Fact and Conclusions of Law. **R. p. 4-12.** Following timely submission of a Motion for Reconsideration, on November 17, 2010, the Hearing Officer issued his Order denying the Motion and affirming the Findings of Fact and Conclusions of Law previously entered. **R. p. 13.**

On December 7, 2010, Ms. Hubbard filed a Petition for Judicial Review with the District Court. **R. p. 1-3.** Following briefing by both parties, and oral argument, the District Judge issued his Memorandum Decision on May 31, 2011, upholding the suspension. **R. p. 85-92.** The Notice of Appeal herein was filed July 8, 2011. **R. p. 93-95.**

**C. Statement of Facts.** Petitioner was arrested September 6, 2010, by Trooper Wright of the Idaho State Police on suspicion of Driving Under the Influence. After playing the ALS advisory tape and after the mandatory 15-minute waiting period, the petitioner provided two breath samples to Trooper Wright on his Lifeloc FC20. The results were .113 and .109. Consequently, Petitioner was given a Notice of Suspension. Since this was her second failure within five years, the suspension was for a period of one year.

The print-out from the Lifeloc FC20 carried by Trooper Wright reveals that prior to Mr. Hubbard's breath test, the last previous calibration check was done on August 27, 2010, at 02:28 hours, and showed a calibration result of .042, while the target range was .08. **R. p. 20.** Therefore, at the time of Ms. Hubbard's test, the machine was out of calibration by .038, far outside the acceptable range of +/- 10%.

Although he was required to do so by the ISP standard operating procedure, and by the terms of the Lifeloc Reference Manual, Trooper Wright had not logged this last calibration result, but had only logged the two previous results which were valid. **R. p. 21.**

Despite these errors, the Department of Transportation Hearing Officer and the District Judge upheld the suspension of her license based upon the results of the Lifeloc breath test.

**ISSUES PRESENTED ON APPEAL**

**DID THE DISTRICT COURT ERR IN AFFIRMING THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE ADMINISTRATIVE HEARING OFFICER OF THE IDAHO DEPARTMENT OF TRANSPORTATION.**

**A. Was the Evidentiary Test Performed in Compliance with the Requirements of Idaho Code and ISP Forensic Services Standard Operating Procedures.**

**B. Was the Testing Instrument Functioning Properly When Ms. Hubbard's Test Was Administered.**

## ARGUMENT

### Legal Standards:

The administrative license suspension statute, I.C. § 18-8002A, requires that the hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension. Those grounds include:

(d) The tests 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 section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered....

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate 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 that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998). If the agency's decision is not affirmed on appeal, " it shall be set aside ... and remanded for further proceedings as necessary." I.C. § 67-5279(3)

Failure to abide by the regulations set forth in the standard operating procedures and training manuals renders a breath test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results. *In re Driving Privileges of Schroeder*, 147 Idaho 476,477, 210 P.3d 584 (Idaho App. 2009)

**Argument:**

The breath testing equipment in question is a Lifeloc FC20, serial # 90203842 kept in Trooper Wright's vehicle. The Idaho State Police maintain a Reference Manual, with the most recent version being effective August 20, 2010. **R. p. 23-56.** The ISP also has adopted an Idaho Standard Operating Procedure for Breath Alcohol Testing, with the relevant version being Effective August 27, 2010. **R. p. 57-74.**

Based upon a review of the evidentiary test results (**R. p. 20 and attached hereto as Exhibit 1**) and the coinciding instrument operation log for the Lifeloc #90203842 (**R. p. 21-22 and attached hereto as Exhibit 2**), it is clear that the instrument was not functioning properly immediately prior to Ms. Hubbard's evidentiary test, during the test, nor in the days following. The evidentiary test results are therefore invalid pursuant to ISP standard operating procedure.

The instrument operation log (**Exhibit 2**) for the Lifeloc used to test Ms. Hubbard indicates wide fluctuation in performance verifications over the months preceding her evidentiary test.

Ms. Hubbard's Lifeloc printout (**Exhibit 1**) shows the last performance verification prior to her submitting a breath sample was completed on August 27, 2010 at 0228 hours with a result of .042. This result is well outside the +/- 10% range of the known .080 target for the simulator solution.

Curiously, although Trooper Wright obtained three results from the August 27<sup>th</sup> calibration check, only the two valid results were logged on Exhibit 2. These were .083 obtained at 0224, and .082 obtained at 0227. The .042 result, obtained at 0228, is not on the log. Failing to log the invalid result is contrary to ISP standard operating procedure, and specifically contrary to the requirements set forth in the Reference Manual at pages 6 and 27. **R. p. 28 and 49.** There is no valid reason for Trooper Wright to have ignored this requirement.

The provision on Page 6 (**R. p. 28**) states:

***“Log or print the results as the instrument will overwrite successive wet check results.”***

The provision on Page 27 (**R. p. 49**) states:

***“You must print or log each wet check result as soon as the result appears. The instrument can store only the most recent result.”***

We know that the .042 value was the last result obtained on August 27<sup>th</sup> verification check, because the Lifeloc instrument has the ability to save only the last run performance verification. The instrument automatically deletes the previous verification and saves the most current. This value was printed out along with the results of Ms. Hubbard’s tests.

Therefore the .042 performance verification was the last valid simulator solution check and should have resulted in the instrument being taken out of service for repair. In the alternative, additional performance verifications should have been run by Trooper Wright *prior* to testing the Petitioner, so that two valid results in sequence were obtained prior to her test. This was not done.

Standard Operating Procedure 5.1.5 provides in pertinent part, as follows:

5.1.5 Acceptable results for a 0.08 or 0.20 performance verification is a pair of samples in sequence that are both within +/- 10% of the performance verification solution target value. Target values and ranges of acceptable results are included in a certificate of analysis for each solution lot series, prepared by, and available from, the ISPFS.

The note set forth thereafter on page 11 states: “...the results of the initial performance verification may not be within the acceptable range, therefore the performance verification may be repeated until a pair of satisfactory results are obtained.” (**See R. p. 66 – 67**).

No consecutive pair of valid test results were obtained prior to the test of Ms. Hubbard.

Because the *last* performance check prior to Ms. Hubbard’s test was completely out of the acceptable range, Trooper Wright should have either run additional checks to get two valid results in sequence, or taken the machine out of service.

SOP 5.1.5 states that if the *initial* performance verification is not within the acceptable range, it is to “be repeated until a pair of satisfactory results are obtained.”

However, in this case, the .042 result was the last one and no effort was made to either run additional tests or to recalibrate the machine. The machine should not have been used on Ms. Hubbard under these conditions.

The obvious reason for this requirement is so an officer is not driving around with a machine that cannot be relied upon to function properly when the need may arise. If it is not known to be functioning correctly, the SOP requires that it be retested or taken out of service.

The log reveals that the instrument completed performance verifications on September 6, 2010 with results of .081/.081 and on September 9, 2010 with results of .090/.089. The verifications for the two week period surrounding Ms. Hubbard's evidentiary test fluctuated between .042 and .090 for a simulator solution lot with a known value of .080. This wide variation of results is not acceptable.

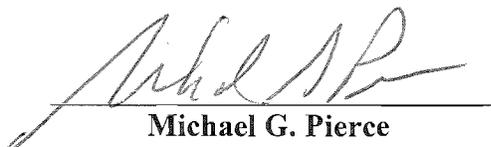
Failure to comply with the requirements of the SOP and the instrument Reference Manual render the breath test results inadmissible.

### **CONCLUSION**

Ms. Hubbard's evidentiary test was administered on an instrument that had failed the performance verification immediately prior with a .042 result and fluctuated to the high range of a .090 result with a known target of .080 for the verification three days following. This instrument was not properly verified and should have been taken out of service.

Consequently, the hearing officer's findings, and the decision of the District Court must be overturned and Ms. Hubbard's driving privileges must be restored to her.

**Dated** this 30th day of September, 2011.

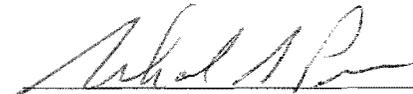


**Michael G. Pierce**  
Attorney for Appellant  
Linda Lee Hubbard

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that I have this 30th day of September, 2011, caused two (2) copies of the foregoing document to be served by U.S. Mail, first class postage prepaid, upon::

Michael J. Kane, Esq.  
Michael Kane & Associates, PLLC  
P. O. Box 2865  
Boise, Idaho 83701

  
\_\_\_\_\_  
Michael G. Pierce

Lifeloc Technologies, Inc.  
Sequence 06.24d  
Serial No. 90203842  
Units: BAC

Last Calibrated:  
Cal Standard: .000  
Time: 10:27  
Date: 07/08/2008

Last Check:  
Cal Standard: .000  
Result: .001  
Time: 02:18  
Date: 09/06/2010

Lifeloc Technologies, Inc.  
Sequence 06.24d  
Serial No. 90203842  
Units: BAC

Event No.: 111  
Date: 09/06/2010

#	Type	Time	Result
1)	Air Blank	01:25	.000
2)	Auto Test	01:26	.113
3)	Air Blank	01:28	.000
4)	Auto Test	01:28	.109

Last Calibrated:  
Cal Standard: .000  
Time: 10:27  
Date: 07/08/2008

Last Check:  
Cal Standard: .000  
Result: .042  
Time: 02:28  
Date: 09/27/2010

Hubbard, Linda  
Subject

L.D. HUBBARD LINDA

Tpr. Mark Wright  
Operator

EXHIBIT  
2

SEP 09 2010 ITD RECD

Exhibit 1

003

INSTRUMENT SERIAL #

90203842

LOT NUMBER:

.20-9110

.08-9802

LOCATION:

JSP Meridian

DATE	TIME	SUBJECT'S NAME	SUBJECT TEST RESULTS	OPERATOR'S NAME	CALIBRATION CHECK RESULTS	SIM TEMP IN RANGE (°)	COMMENTS
*6/10/10	2052	Hanson, Bryan L.	.018/.017	Wright			DUT
*6/11/10	0329	Munroe, Leigh A	.140/.145	Wright			DUT 810002003
6/11/10	0424/038	Cal V .08		Wright	.075/.075	✓	Cal V .08 Ada Co. ID
6/11/10	050/055	Cal V .20		Wright	.184/.181	✓	Cal V .20 ISPR3
7/1/10	0308	Waldron, Carrie	.165/.160	Matkin			DUT-McCall PD
7/1/10	0334	Cal V .08		Wright	.082	✓	Cal V .08 McCall
7/5/10	0324	Narby, Skyler W.	.087/.096	Wright			DUT 810002082
7/5/10	0429	Nielsen, Kallie	.145/.145	Wright			DUT 810002083
7/5/10	0506/058	Cal V .08		Wright	.078/.078	✓	Cal V McCall PD
7/7/10	0645/047	Cal V .20		Wright	.193/.194	✓	Cal V .20 Meridian
*7/16/10	1501	Stelman, Jimmy	.052/.049	Wright			DUT
8/21/10	013/016	Cal V .20		Wright	.193/.195	✓	Cal V .20 Meridian 208
8/22/10	0436/049	Ortiz, Cynthia	.079/.076	Wright			DUT 810002975
8/26/10	0231	Byars, David	.075/.070	Wright			DUT 810003056
8/27/10	0057	Parsons, James	.191/.191	Wright			DUT - Valley County
8/27/10	0204/027	Cal V .08		Wright	.083/.082	✓	DUT 08 Cal V McCall PD 208
9/6/10	0126	Hubbard, Linda	.113/.109	Wright			DUT 810003164
9/6/10	0218/020	Cal V .08		Wright	.081/.081	✓	Cal V .08 McCall PD 208

\* indicates (watch time)

CERTIFIED COPY

Officer

Date

Notary Public for Idaho

Residing at

My Commission Expires



10-23-08

030

PM: 10:02:11 PM

Exhibit A

Instrument Serial #: 90203842

Lot Number: 9802 / 910

DATE	TIME	SUBJECT'S NAME	SUBJECT TEST RESULTS	OPERATOR'S NAME	CALIBRATION CHECK RESULTS	SW TEMP IN MOUNT (°)	COMMENTS
9/1/10	1923/1925	Cal V .08		Wright	.090/.089	✓	.08 Cal ✓ McCall PJ
9/17/10	1820/1924	Cal V .08		Wright	.081/.081	✓	.08 Cal ✓ McCall PJ
9/19/10	0010	Johnson, Gary	Ins. Ins. / 108	Wright			DUT B10003319
9/19/10	0004	Megawee, Summer	.123/.113	Wright			DUT B10003322
9/19/10	1717/1719	Cal V .08		Wright	.083/.083	✓	.08 Cal ✓ McCall PJ
9/21/10	0015/0017	Cal V .20		Wright	.177/.199	✓	.20 Cal ✓ Morrison JSP
9/21/10	0053	Ferguson, Peter	.133/.119	Wright			DUT B10003491
10/3/10	0332/0334	.08 Cal V		Wright	.086/.074		.08 Cal ✓ Ada Tail

\* Indicates catch time

Certified Copy

Officer \_\_\_\_\_ Date \_\_\_\_\_

Notary Public for Idaho \_\_\_\_\_

Residing at \_\_\_\_\_

My Commission Expires \_\_\_\_\_

031