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Peck v. State, Dept. of Transp. Respondent's Brief Dckt. 38542

IN THE SUPREME COURT OF THE STATE OF IDAHO

RAYMOND SCOTT PECK, Appellant, vs. STATE OF IDAHO, DEPARTMENT OF TRANSPORTATION, Respondent.	DOCKET NO. 38542-2011 BONNER COUNTY CASE NO. CV-2010-0047

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
Of the State of Idaho in and for the County of Bonner

HONORABLE STEVE VERBY
District Court Judge

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STATEMENT OF THE CASE

A. Nature of the Case

Raymond Scott Peck (herein after Peck) appeals form the Dsitrict court's decision upon judicial review affirming the order of the Idaho Transporation Department (hereinafter ITD) suspending Peck's driver's license after Burton's failure of an evidentiary test and arrest for DUI.

B. Course of Proceedings

ITD agrees with the "Course of Proceedings" as described in the brief filed by the Appellant.

II.

STATEMENT OF THE FACTS

On December 2, 2009, Peck was arrested for Driving Under the Influence (DUI) by Sandpoint Police Officer Nolan Crossley in Bonner County, Idaho. Officer Crossley was conducting stationary speed enforcement on Highway 95 across from the North Info Center. *Agency Record, page 6.* He observed a vehicle traveling 45 mph in a 35 mph posted speed zone. Officer Crossley activated his overhead lights and stopped the vehicle. *Id.* He contacted the driver, who was identified as Raymond Peck, Jr. *Id.* The officer detected an odor of alcohol. *Id.* Peck refused to perform field sobriety tests. Peck was arrested and transported to the Sandpoint Police Department. Peck was then given an evidentiary breath test and Peck's results were .089/xx/.083/.086. *Id.* Officer Schneider served Peck with a Notice of Suspension and issued a permit for temporary driving privileges. *See Agency Record, page 1-2.*

Peck requested an administrative hearing on the proposed license suspension. The administrative hearing was held on December 29, 2009 before Hearing Officer Eric Moody. See Hearing Transcript. During the hearing, Peck testified and the officer did not. *Id.*

On January 8, 2010, the hearing officer issued his decision which sustained the ninety (90) day license suspension. *See Agency Record, pages 39-57.* In summary, the hearing officer found:

(1) Officer Crossley had legal cause to approach Peck's vehicle;

(2) Officer Crossley had legal cause to believe Peck had violated Idaho Code Section 18-8004;

(3) That the evidentiary tests indicated that Peck was in violation of Idaho Code Section 18-8004;

(4) That the evidentiary tests were performed in compliance with all requirements set forth in Idaho Code and ISP Forensic Services Standard Operating Procedures;

(5) That the evidentiary testing instrument functioned properly when the test was administered;

(6) That Peck was advised of the possible suspension of his Idaho Driver's privileges; and

(7) That Peck was not required to be informed of the CDL disqualification at the time of his arrest, pursuant to Idaho Code Section 18-8002(3) and 18-8002A(2).

Id.

On January 14, 2010, the Petitioner filed a Petition for Judicial Review. See Agency Record, page 50-54. On January 15, 2010, Honorable Judge Steve Verby issued an Order Staying the driver's license suspension pending this appeal.

Petitioner also writes that Peck's speeding ticket was dismissed and his DUI charge was resolved by a guilty plea and withheld judgment to an amended charge of inattentive driving. This evidence is not part of the record on this appeal and not relevant to this appeal. Judicial review of the hearing officer's decision is generally confined to the record unless the party requesting the additional evidence can demonstrate that the evidence falls within the statutory exceptions provided for in Idaho Code Section 67-5276. None of the exceptions apply herein.

III. CHARACTERIZATION OF THE ISSUES

1. Was the Notice of Hearing issued by the hearing officer inadequate such that the suspension should be vacated?

2. Was the Notice of Suspension inadequate because it failed to advise Petitioner of the requirements of Idaho Code Section 49-335(2)?

3. Are the documents used to support the suspension inadequate because they fail to identify the alleged acts as occurring in Idaho?

4. Did the officer have probable cause to stop Peck?

5. Were the BAC tests done properly?

6. Is Petitioner entitled to attorney fees?

IV.

ARGUMENT

A. STANDARD OF REVIEW

The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that the ITD suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. *Bennett v. State, Dept. of Transp., 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009).* The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has been notified of an ALS may request a hearing before a hearing officer designated by the ITD to contest the suspension. I.C. § 18-8002A(7). At the administrative hearing, the burden of proof rests upon the driver to prove any of the grounds to vacate the suspension. I.C. § 18-8002A(7); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003). 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:

> (a) The peace officer did not have legal cause to stop the person; or
> (b) 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 the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or
> (c) The test results did not show 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; or
> (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; or
> (e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

I.C. § 18-8002A(7). The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); *Kane,* 139 Idaho at 589, 83 P.3d at 133.

The Idaho Administrative Procedures Act (I.D.A.P.A.) 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. Recently, in *Bennett v. State Department of Transportation*, 147 Idaho 141, 206 P.3d 505 (Ct App 2009), the Court of Appeals restated the necessary standard of review for the Court. The Court stated, in pertinent part:

> 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, 48 P.3d at 669. 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, 48 P.3d at 669. 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 rel. Bd. of Comm'rs,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall,* 137 Idaho at 340, 48 P.3d at 669.
>
> 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); *Marshall,* 137 Idaho at 340, 48 P.3d at 669. 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).

Id., at 506-507. Therefore, in an ALS appeal the burden is on the Petitioner to establish that ITD erred in a manner specified in Idaho Code Section 67-5279(3), and then to establish that a substantial right has been prejudiced.

B. ARGUMENT

1. ADEQUATE HEARING NOTICE

Petitioner contended that his notice of the ALS hearing was not adequate and required that his driver's license suspension be vacated. This argument is without merit.

The Agency Record revealed the following:

1. December 8, 2009 a letter was sent from attorney John Finney requesting a hearing on the ALS suspension. The letter was sent via fax, therefore it was assumed that it was received by ITD on December 8, 2009. Agency Record, page 12-13.
2. December 15, 2009 a letter was sent from ITD with a Show Cause Letter with notice that the hearing date was extended due to a conflict in the hearing examiner's schedule. Agency Record, page 21.
3. December 15, 2009 a letter was sent from ITD with Notice of Telephonic Hearing to be held on **December 29, 2009** with Hearing Officer Mark Richmond at 11:00MT. Agency Record, page 20.
4. December 18, 2009 a letter was sent from ITD with Notice of Telephonic Hearing to be held on **December 9, 2009** with Hearing Officer Eric Moody at 11:00MT. Agency Record, page 22.[1]
5. December 18, 2009 a letter was sent from ITD with Show Cause Letter stating the hearing date was extended because of a change in the hearing officer. Agency Record, page 24.
6. Ultimately the hearing was held on December 29, 2009 before Hearing Officer Eric Moody at 11:00 MT. Agency Record, page 32 and Transcript, page 1.

Idaho Code Section 18-8002A(7) provides in pertinent part:

> (7) Administrative hearing on suspension. A person wo has been served with a notice of suspension after submitting to an evidentiary test may request an administrative hearing on the suspension before a hearing officer designated by the department. The request for hearing shall be in writing and must be received by the department within seven (7) calendar days of the date of service upon the person of the notice of suspension, and shall include what issue or issues shall be raised at the hearing. The date on which the hearing request was received shall be noted on the face of the request.
>
> **If a hearing is requested, the hearing shall be held within twenty (20) days of the date the hearing request was received by the department unless this**

[1] Interestingly, this Notice must contain a typographical error since the Notice contains a hearing date of December 9th, that precedes the date of the letter (December 18th). This Notice probably should have read December 29th, not December 9th.

> **period is, for good cause shown, extended by the hearing officer for one ten (10) day period.** Such extension shall not operate as a stay of the suspension and any temporary permit shall expire thirty (30) days after service of the notice of suspension, notwithstanding an extension of the hearing date beyond such thirty (30) day period. Written notice of the date and time of the hearing shall be sent to the party requesting the hearing at least seven (7) days prior to the scheduled hearing date. The department may conduct all hearings by telephone if each participant in the hearing has an opportunity to participate in the entire proceeding while it is taking place. [emphasis added].

Here, the hearing was held on December 29, 2009. This hearing date was within the time allowable by the statute (twenty days plus an extension by the hearing officer). There also was apparently no confusion on the part of the Peck regarding the date of the hearing. Judge Verby addressed this issue and wrote

> In this case, the hearing was held on December 29, 2009. Mr. Peck was represented at the hearing by his attorney, John Finney. Simply stated, the listing of an already passed date as being the date of the hearing did not affect any "substantial right" of Mr. Peck, as he did attend the hearing and the issues he raised were addressed.

R., p. 72. Therefore, no substantial right of the Petitioner was violated. As such, this argument was properly rejected by the District Court.

2. THE NOTICE OF SUPSENSION PROVIDES ADEQUATE NOTICE

Peck argued that the Notice of Suspension was not adequate because it failed to inform him of the provisions and consequences of Idaho Code Section 49-335(2). Peck did not argue that he did not receive the admonitions required by Idaho Code Sections 18-8002 and 18-8002A. Instead, he invitee the Court to **add language** to those code sections by including **other consequences** to the Suspension Advisory form. The District Court correctly declined the invitation.

The hearing officer concluded that the notice given to Peck complied with Idaho law and found:

1. Peck was read the Idaho Code Sections 18-8002 and 18-8002A advisory form prior to submitting to the evidentiary test.
2. Idaho Code Sections 18-8002(3) 18-8002A(2) does not mandate a driver be informed of the consequences noted in Idaho Code section 18-8004,

18-8004(c) and 18-8006 prior to a driver submitting, failing to complete, or refusing an evidentiary test.

3. Peck was advised of the consequences of refusing or failing evidentiary testing pursuant to Idaho Code Sections 18-8002 and 18-8002A.

Agency Record, page 52. The hearing officer's conclusion on this issue was correct.

Idaho law sets forth the requirements for the notice provided to drivers before taking the evidentiary breath test. Idaho Code Section 18-8002A(2) states in pertinent part:

> (2) Information to be given. At the time of evidentiary testing for concentration of alcohol, or for the presence of drugs or other intoxicating substances is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing, or if the person submits to and completes evidentiary testing and the test results indicate 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, the person shall be informed substantially as follows (but need not be informed verbatim):
>
> If you refuse to submit to or if you fail to complete and pass evidentiary testing for alcohol or other intoxicating substances:
>
> (a) The peace officer will seize your driver's license and issue a notice of suspension and a temporary driving permit to you, but no peace officer will issue you a temporary driving permit if your driver's license or permit has already been and is suspended or revoked. No peace officer shall issue a temporary driving permit to a driver of a commercial vehicle who refuses to submit to or fails to complete and pass an evidentiary test;
>
> (b) You have the right to request a hearing within seven (7) days of the notice of suspension of your driver's license to show cause why you refused to submit to or to complete and pass evidentiary testing and why your driver's license should not be suspended;
>
> (c) If you refused or failed to complete evidentiary testing and do not request a hearing before the court or do not prevail at the hearing, your driver's license will be suspended. The suspension will be for one (1) year if this is your first refusal. The suspension will be for two (2) years if this is your second refusal within ten (10) years. You will not be able to obtain a temporary restricted license during that period;
>
> (d) If you complete evidentiary testing and fail the testing and do not request a hearing before the department or do not prevail at the hearing, your driver's

license will be suspended. This suspension will be for ninety (90) days if this is your first failure of evidentiary testing, but you may request restricted noncommercial vehicle driving privileges after the first thirty (30) days. The suspension will be for one (1) year if this is your second failure of evidentiary testing within five (5) years. You will not be able to obtain a temporary restricted license during that period;

(e) If you become enrolled in and are a participant in good standing in a drug court approved by the supreme court drug court and mental health court coordinating committee under the provisions of chapter 56, title 19, Idaho Code, you shall be eligible for restricted noncommercial driving privileges for the purpose of getting to and from work, school or an alcohol treatment program, which may be granted by the presiding judge of the drug court, provided that you have served a period of absolute suspension of driving privileges of at least forty-five (45) days, that an ignition interlock device is installed on each of the motor vehicles owned or operated, or both, by you and that you have shown proof of financial responsibility; and

(f) After submitting to evidentiary testing you may, when practicable, at your own expense, have additional tests made by a person of your own choosing.

On December 3, 2009 Peck was served with a "Suspension Advisory" provided in pertinent part:

3. If you take and fail the evidentiary test(s) pursuant to Section 18-8002, Idaho Code:

A. Your Idaho driver's license...will be seized if you have it in your possession, and if it is current you will be issued a temporary permit. ...If you were driving a commercial vehicle, any temporary permit issued will not provide commercial driving privileges of any kind.

B. I will serve you with this NOTICE OF SUSPENSION that becomes effective thirty days from the date of service on this NOTICE, suspending your driver's license or privileges. ...You may request restricted privileges for the remaining 60 days of the suspension. Restricted driving privileges will not allow you to operate a commercial motor vehicle....

Agency Record, page 1.

Idaho law does not require that a driver be informed of every single consequence of the failure of an evidentiary test. Specifically, Idaho Code Sections 18-8002 and 18-8002A **do not** require law enforcement officers to inform drivers of every potential consequence of failing the evidentiary test. For example, Idaho Code Sections 18-8002

and 18-8002A does not require an officer to inform a driver of all potential charges that may be filed upon the driver's failure to the evidentiary testing. Although a one year suspension of a CDL is another consequence of both the refusal to submit to the testing and the failure of the testing, it is not a potential consequence of which a driver must be informed at the time of his arrest. Therefore, the failure to inform Peck of the consequences to his CDL was not necessary and the Notice of Suspension given to Peck complied with Idaho law. Furthermore, Judge Verby found that "no substantial right of Mr. Peck was prejudiced by ... the officer's failure to inform Mr. Peck of the potential one-year commercial driver's license suspension." R., p. 73.

3. THE AFFIDAVIT AND TESTS RESULTS ARE ADEQUATE.

Peck argues that the evidence submitted by the defective because the documents fail to allege that the acts occurred in the State of Idaho. The hearing officer rejected this argument finding the Exhibit 4 demonstrated that the alleged acts occurred in Idaho. Apparently, Petitioner's argument is that the hearing officer's conclusion that the relevant events occurred in Idaho was "not supported by substantial evidence in the record." Petitioner's argument is without merit.

The Probable Cause Affidavit submitted by Officer Crossley contains the following heading:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF **IDAHO**, IN AND FOR THE COUNTY OF **BONNER**

THE STATE OF IDAHO	)	
Plaintiff	)	COURT CASE NUMBER ____
	)	PROBABLE CAUSE AFFIDAVIT
PECK, Raymond S.	)	IN SUPPORT OF ARREST

* * *

State of Idaho,

County of Bonner

See Agency Record, page 5. Based upon the evidence in the file, including the above Affidavit, the hearing officer had substantial evidence to conclude that the incident at

issue occurred in Idaho. On this issue, Judge Verby agreed and stated: "in this case there is substantial evidence in the record to conclude that the alleged act occurred in Idaho." R., 74.

4. PROBABLE CAUSE FOR THE STOP

One of the grounds by with a hearing officer can vacate the ALS suspension is if the hearing officer finds that "the peace officer did not have legal cause to stop the person." Peck argues that the hearing officer's finding that there was legal cause for the stop was not supported by the evidence. Apparently, Peck's argument is that there insufficient proof that the speed limit was 35 mph. This argument is without merit.

The officer testified that there was a posted speed limit of 35 mph. The Probable Cause Affidavit submitted by the officer contained the following:

> On December 02, 2009 at approximately 2300 hours, I was parked conducting Stationary Speed Enforcement along the southbound shoulder of Highway 95 across from the North Info Center. I observed a single vehicle traveling Southbound towards me that I visually estimated to be doing 45 MPH. **As this stretch of Highway is posted at 35MPH...**[emphasis added].

Agency Record, page 6. At the hearing, Peck admitted that he was traveling 45 mph when he first noticed the officer. *Transcript, page 5, lines 10-12.* Peck did not refute the evidence that there was a posted speed limit of 35 mph. *See Transcript, page 1-12.*

On the issue of legal cause for the stop, the hearing officer made the following findings of fact:

1. Officer Crossley observed the vehicle driven by Peck travel 45 mph in a posted 35 mph speed zone.
2. Since Exhibit 4 specifically states a "posted speed limit" of 35 mph, it is assumed this area of highway met the requirements of Idaho Code Section 49-654(2)(a) and/or (b) even though there were no structures or buildings in the area prior to Peck being stopped.
3. Further in supporting that the posted speed limit was 35 mph, Exhibit 4 provides Officer Crossley had issued Peck a speeding citation.
4. Peck's argument regarding the posted speed limit is unsupportive and fails to meet his burden of proof.

5. Officer Crossley had legal cause to stop the vehicle driven by Peck.

Agency Record, pages 35-36. Certainly, the findings of the hearing officer are supported by substantial evidence.

Peck's argument is that there was insufficient proof that the speed limit was 35 mph. This argument ignores the undisputed fact that there was a **posted speed limit of 35 mph**. 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. *Bennett v. State, Dept. of Transp., 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009).*

Peck's argument appears to be that, even if the posted speed limit was 35 mph, that evidence does not prove the speed limit because Peck was not in a business district, residential district or an urban district. This argument also lacks merit.

Idaho's basic rule regarding speed limits is contained at Idaho Code Section 49-654. Section 2 of the statute provides in pertinent part:

> (2) Where no special hazard or condition exists that requires lower speed for compliance with subsection (1) of this section the limits as hereinafter authorized shall be maximum lawful speeds, and no person shall drive a vehicle at a speed in excess of the maximum limits:
>
> (a) Thirty-five (35) miles per hour or a lesser maximum speed adopted pursuant to section 49-207(2)(a), Idaho Code, in any residential, business or urban district; [emphasis added],
>
> (b) Thirty-five (35) miles per hour in any urban district;
>
> c) Seventy-five (75) miles per hour on interstate highways;
>
> (d) Sixty-five (65) miles per hour on state highways;
>
> (e) Fifty-five (55) miles per hour in other locations unless otherwise posted up to a maximum of sixty-five (65) miles per hour.

Idaho Code § 49-207 specifically allows cities to enact and enforce general ordinances prescribing additional requirements for the operation of vehicles upon the city's highways. *State v. Young, 144 Idaho 646, 167 P.3d 783 (Idaho App. 2006).* Idaho Code Section 49-207(2) & (3) provides:

> (2) Whenever local authorities in their respective jurisdictions, including the duly elected officials of an incorporated city acting in the capacity of a local authority, determine on the basis of an engineering or traffic investigation, and the residential, urban or business character of the neighborhood abutting the highway in a residential, business or urban district that the speed limit permitted under this title is greater than is reasonable and safe under the conditions found to exist upon a highway or part of a highway or because of the residential, urban or business character of the neighborhood abutting the highway in a residential, business or urban district, the local authority may determine and declare a reasonable and safe maximum limit which:
>
> (a) Decreases the limit within a residential, business or urban district; or
>
> (b) Decreases the limit outside an urban district.
>
> (3) Local authorities in their respective jurisdictions shall determine by an engineering or traffic investigation the proper maximum speed not exceeding a maximum limit of sixty-five (65) miles per hour for all arterial highways and shall declare a reasonable and safe maximum limit which may be greater or less than the limit permitted under this title for an urban district.

Residential, business and urban districts are defined. Idaho Code Section 49-105(11) defines the term "district" as follows:

> (a) Business district. The territory contiguous to and including a highway when within any six hundred (600) feet along the highway there are buildings in use for business or industrial purposes, including hotels, banks or office buildings, railroad stations and public buildings which occupy at least three hundred (300) feet of frontage on one side or three hundred (300) feet collectively on both sides of the highway.
>
> (b) Residential district. The territory contiguous to and including a highway not comprising a business district when the property on the highway for a distance of three hundred (300) feet or more is in the main improved with residences, or residences and buildings in use for business.
>
> (c) Urban district. The territory contiguous to and including any highway which is built up with structures devoted to business, industry or dwelling houses. For purposes of establishing speed limits in accordance with the provisions of section

> there was competent evidence in the form of the testimony of the department's engineer on the sealcoating project that the speed limit was forty-five miles per hour, rebutting any speed signs to the contrary. The trial court should have instructed the jury that the correct speed limit at the site of the accident was forty-five miles per hour based on the first brooming.

Id., at 549. Therefore the holding of *Debastani* concerned a jury instruction that did not conform with the evidence at the trial.

5. THE BAC TESTS WERE VALID

Petitioner argued that the BAC tests were invalid because Peck was belching during the observation period. Petitioner's argument is without merit.

The Probable Cause Affidavit from Officer Crossley stated the following:

> PECK was transported to the Sandpoint Police Department, where **I began the 15 minute monitoring period** and read him the ALS suspension advisory in its entirety, and requested a breath sample which he provided(.089/xxx) after not obtaining a second reading, **the fifteen minutes of observation was started agin** (sic). Following the second observation period, PECK again provided a breath sample (.083/.086) BrAC.

Agency Record, page 6 (emphasis added). Contrary to this, Peck testified during the ALS hearing. Peck stated as follows:

> Q: Was then an additional 15-minute waiting period started?
> A: Yes.
> Q: And during that 15-minute waiting period, at any time did you belch?
> A: Yes.
> Q: And did you have your mouth open at the time of the belch?
> A: Yes.
> Q: And did you also pat or I'll describe it as tap on your chest with your fist at the time of the belch?
> A: Yes.
> Q: And the officer was present when you did that?
> A: Yes.
> Q: And how much time from the belch until giving what would be the first sample of the second set of tests, how much time passed?
> A: Oh, I did it right away.
> Q: Less than one minute before taking the first breath test of the second sample?
> A: Yes.
> Q: And no additional 15-minute wait period was started after your belch. Is that correct?
> A: No, there was not.

Transcript, page 6-7.

The hearing officer, after reviewing the evidence, disagreed with Peck. In his findings, the hearing officer wrote:

1. Officer Crossley's affidavit states the evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.
2. I find it very doubtful that Officer Crossley would have ignored Peck tapping his chest, opening his mouth, and then belching prior [to] submitting to a breath sample at 00:48 on December 3, 3009.
3. Exhibit 3's BrAC results support this conclusion in that Peck's two subject tests only differed by .003 making the results a valid subject tests pursuant to ISP Forensic Services SOP Sections 3.2 and 3.2.3 requirements.
4. Further, this agreement noted in Exhibit 3's BrAC two tests further strongly refute the possibility that any mouth alcohol from Peck's **"alleged"** belching had skewed Exhibit 3 results before Peck was administered an evidentiary breath test.
5. Peck's evidentiary test was performed in compliance with Idaho Code and ISP Forensic Services SOPs.

Here, the hearing officer was presented with conflicting evidence: the officer's statement that he conducted two 15 minute observation periods and Peck's testimony that he belched during the observation period. The hearing officer weighed the conflicting evidence and concluded that Peck's testimony was not credible. In addition, the hearing officer found that the consistency of the BrAC results was further evidence that Peck's testimony regarding the "belch" was incredible.

Petitioner cited *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009), to support his argument that the suspension should be vacated. In Bennett, the petitioner challenged the ALS license suspension contending that she was coughing during the 15 minute observation period, during which time, the officer twice

left the room. The court further found that the evidence that the officer left the room was not specifically controverted by the officer's affidavit. The Court of Appeals held:

> Bennett bore the burden to prove grounds to vacate the suspension of her license. **Bennett testified that the officer left the room twice during the fifteen-minute monitoring period. The hearing officer did not find Bennett's [206 P.3d 509] testimony to lack credibility.** This testimony, then, would demonstrate that proper monitoring procedures were not followed, and that the test for alcohol concentration was, therefore, not conducted in accordance with the requirements of I.C. § 18-8004(4). The State presented only the officer's probable cause affidavit. The officer's form affidavit provides only generalized statements regarding employment of proper procedures. However, when specific, credible evidence demonstrates a violation of proper procedures, the affidavit alone is insufficient to support a finding that proper procedures were followed. Thus, the hearing officer's finding that the breath test was conducted in compliance with procedural standards is not supported by substantial evidence in the record as a whole. Therefore, the district court did not err in vacating the hearing officer's decision.

Id., at pages 508-509.

This case is factually distinguishable from the *Bennett* case. Here, there was no evidence that the officer left the room or that the officer left Peck unattended during the 15 minute observation period. On the contrary, Peck admits that the officer was present in the room when Peck allegedly belched. *Transcript, page 6, lines 24-25.*

Furthermore in *Bennett,* the only evidence regarding compliance by the officer with the testing procedures was a computer-generated affidavit which contained a paragraph above the officer's signature line that read: "The test(s) was/were performed in compliance with Section 18-8003 & 18-8004(4) Idaho Code and the standards and methods adopted by the Department of Law Enforcement." Here, Officer Crossley's Affidavit contained specific statements about compliance with two fifteen minute observation periods.

In *Bennett* case, the hearing officer was presented with unrefuted testimony that the officer left the room during the 15 minute observation period. Here, the hearing officer's was presented with *conflicting evidence*. Therefore, his role was to weigh conflicting evidence. Evaluating disputed evidence, the hearing officer made a factual determination that Peck's testimony was **not credible** and discounted Peck's testimony regarding the alleged belch. This finding is based upon substantial and competent

evidence and is therefore binding on the reviewing court.[2] Judge Verby addressed this issue and held:

> Although the affidavit is contradictory and there was conflicting evidence regarding the belch, the hearing officer weighed the evidence and found the officer's testimony to be more credible. The hearing officer's evaluation of the parties' credibility, and his conclusion that Mr. Peck's testimony concerning the belch should not be accepted, could have been based in part on the similarly of the breath test result. It would be inappropriate for a reviewing court to second guess the hearing officer's findings of fact of these circumstances. The agency's findings must be upheld as they are not clearly erroneous and are supported by substantial evidence in the record.

R., p.74-75.

6. ATTORNEY FEES AGAINST ITD ARE NOT JUSTIFIED.

Petitioner is also requesting an award of attorney fees on this appeal. This argument is also without merit. Idaho Code Section 12-117(1) provides for an award of attorney fees only if certain conditions are met. The statute provides:

> (1) Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

Therefore, to award attorney fees under this section, the Court must rule in favor of Peck and also find that the Department acted without a reasonable basis in fact or law. See, *Canal/Norcrest/Columbus Action Comm. v. City of Boise,* 136 Idaho 666, 671, 39 P.3d 606, 611 (2001).

In this matter, as discussed above, there was a reasonable basis in law and in the facts upon which the hearing officer made his decision. Therefore, since neither requirement of the statute has been met, the court must decline to award attorney fees.

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[2]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. *Bennett v. State, Dept. of Transp.*, 147 Idaho 141, 206 P.3d 505 (Idaho App. 2009).

V.

CONCLUSION

For the reasons stated above, ITD respectfully requests this Court to affirm the decision of the hearing officer and the District Court, vacate the driver's license stay and uphold the suspension of Peck's driver's license.

Dated this 6 day of September 2011.

Susan K. Servick
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the **RESPONDENT'S BRIEF** were transmitted on September 6 2011 by the following method, to:

JOHN A. FINNEY
Attorney at Law
120 East Lake Street, Suite 317
Sandpoint, ID 83864
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___ Fax
✓ US Mail

Susan K. Servick