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Elias-Cruz v. Idaho Dept of Transportation Respondent's Brief Dckt. 39425

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IN THE SUPREME COURT OF THE STATE OF IDAHO

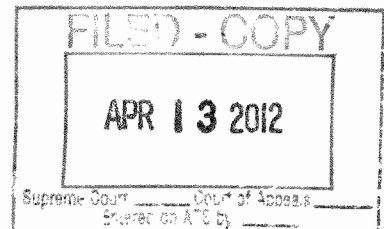
IN THE MATTER OF THE DRIVING)	39425-2011
LICENSE PRIVILEGES OF ALMA)	
ELIAS-CRUZ)	
_____)	
ALMA A. ELIAS-CRUZ,)	
)	
<i>Petitioner-Respondent,</i>)	
)	RESPONDENT’S BRIEF
v.)	
)	
IDAHO TRANSPORTATION)	
DEPARTMENT,)	
)	
<i>Respondent-Appellant.</i>)	
_____)	

APPEAL FROM THE SECOND JUDICIAL DISTRICT, LATAH COUNTY

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I. TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES.....iii

STATEMENT OF THE CASE..... 1

ISSUES PRESENTED ON APPEAL.....3

STANDARD OF REVIEW.....4

ARGUMENT.....4

I. The District Court correctly determined that the Hearing Officer’s decision was not supported by substantial and competent evidence because it disregarded the margin of error inherent in the Lifeloc FC20, which could cause up to a 25% inaccuracy in the BrAC results.....4

II. The District Court correctly held that the Hearing Officer denied Ms. Elias-Cruz’s due process rights when he suspended her driving privileges without considering the inherent margin of error present in the Lifeloc FC20.....7

A. Ms. Elias-Cruz’s due process rights were denied when the Hearing Officer disregarded the uncontradicted expert testimony concerning the margin of error in the Lifeloc FC20.....9

B. The District Court properly concluded the Hearing Officer’s decision deprived Ms. Elias-Cruz of procedural due process.....12

III. The decision of the Hearing Officer was not supported by substantial competent evidence because the Lifeloc FC20 had not been properly calibrated.....13

A. The BrAC results should have been excluded because the Lifeloc FC20 had not been calibrated for more than one year prior to the breath sample being taken.....13

B. The BrAC results should have been excluded because the Idaho State Police Standard Operating Procedures requires two verification samples, but only one was performed after taking Ms. Elias-Cruz’s breath sample.....17

C. The BrAC results should have been excluded because the performance verification solution does not account for a .020 blood alcohol standard, which affects the validity of the test and distorts the performance verification solution target value of +/- 10%.....18

CONCLUSION.....19

II. TABLE OF CASES AND AUTHORITIES

Cases:

<i>Abrams v. Jones</i> , 35 Idaho 532, 207 P. 724 (1922).....	8
<i>Adams v. City of Pocatello</i> , 91 Idaho 99, 416 P.2d 46 (1966).....	8, 12
<i>Castaneda v. Brighton Corp.</i> , 130 Idaho 923, 950 P.3d 1262 (1998).....	4
<i>In re Schroeder</i> , 147 Idaho 476, 210 P.3d 584 (Idaho Ct. App. 2009).....	15, 17
<i>In re Suspension of Driver’s License of Gibbar</i> , 143 Idaho 937, 155 P.3d 1176 (Idaho Ct. App. 2006).....	9
<i>Marshall v. Dep’t of Transp.</i> , 137 Idaho 337, 48 P.3d 666 (Idaho Ct. App. 2002).....	4, 5, 19
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).....	8
<i>McDaniel v. State, Dep’t of Transp.</i> , 149 Idaho 643, 239 P.3d 36 (Idaho Ct. App. 2010).....	<i>passim</i>
<i>Nazerian v. Gourley</i> , 2005 WL 1576246 (Cal. Ct. App.).....	6
<i>Nugent v. Iowa Dep’t of Transp.</i> , 390 N.W.2d 125 (Iowa 1986).....	7
<i>Ruble v. Kansas Dep’t of Rev.</i> , 26 Kan.App.2d 1, 973 P.2d 213 (Kansas Ct. App. 1999).....	7
<i>State v. Frickey</i> , 332 Mont. 255, 136 P.3d 558 (Mont. 2006).....	15
<i>Wieseler v Prins</i> , 167 Ariz. 223, 805 P.2d 1044 (Ariz. Ct. App. 1990).....	7

Statutes:

Idaho Code § 18-8002.....	2, 4
Idaho Code § 18-8002A.....	1, 2, 10, 12
Idaho Code § 18-8002A(7)(d).....	9
Idaho Code § 18-8004(1)(a).....	3, 11
Idaho Code § 18-8004(1)(d).....	<i>passim</i>
Idaho Code § 18-8004(4).....	9

Idaho Code § 67-5270 et seq.....	1
Idaho Code § 67-5279.....	4, 5, 19
Idaho Code § 5279(3).....	4
IDAHO CONST. art. I, § 13.....	8, 12
U.S. CONST. amend. XIV, § 1.....	8, 12
MISS. CODE ANN. § 63-11-19.....	16
N.M. ADMIN. CODE 7.33.2.11.1-7.33.2.11.9.....	16

Other Authorities:

6.0 Idaho Breath Alcohol Standard Operating Procedures, Revision 2, Effective 11/10/10.....	5, 7, 17, 18
Alco-Sensor Manual.....	13, 14
BLACK’S LAW DICTIONARY (9 th ed. 2009).....	10
IDAPA 11.03.01-11.13.03.....	15
Lifeloc FC20 ISP Manual.....	14
MONT. ADMIN. R. 23.4.214.....	16

III. STATEMENT OF THE CASE

Procedural History

This is an Administrative License Suspension (“ALS”) proceeding pursuant to Idaho Code § 18-8002A. The Idaho Department of Transportation (“ITD”) issued a Notice of Suspension (“the Notice”), dated October 21, 2010. (R. pp. 028-029). The Notice stated that the specific basis for the suspension of Ms. Elias-Cruz’s Idaho driver’s license was “upon test results received by the Idaho Transportation Department...for failing evidentiary testing.” (R. p. 029). The matter was set for a telephonic ALS hearing on December 9, 2010. At the ALS hearing, Ms. Elias-Cruz appeared through counsel. ITD did not appear at the ALS hearing.

Following the ALS hearing, the ITD Hearing Officer, David J. Baumann, issued Findings of Fact and Conclusions of Law and Order and sustained the ALS license suspension. (R. pp. 072-082). Subsequently, Ms. Elias-Cruz filed a Petition for Judicial Review and Request for Stay on January 25, 2011. (R. pp. 085-088). An Order for Stay of License Suspension was entered on February 16, 2011, pending the outcome of the judicial review proceeding. (R. pp. 066-067). The matter was brought before the Honorable Judge John R. Stegner in the District Court on August 24, 2011, pursuant to Idaho Code § 67-5270 et seq. Judge Stegner issued a Memorandum Opinion ruling in favor of Ms. Elias-Cruz. (R. pp. 146-155). ITD appealed, and the matter is now before this Court.

Statement of Facts

The Respondent, Ms. Elias-Cruz, is a licensed Idaho driver who resides in Moscow, Idaho, and was under the age of 21 and attending the University of Idaho at the time that this case arose. On October 21, 2010 at 9:09 p.m., Trooper Jacob Schwecke (“Schwecke”) of the

Idaho State Police stopped Ms. Elias-Cruz at approximately milepost 361.5 on U.S. Highway 95 in Latah County, Idaho. Ms. Elias-Cruz was stopped for exceeding the posted speed limit.

Schwecke approached the vehicle and identified himself. He told Ms. Elias-Cruz that he stopped her for exceeding the speed limit. Schwecke smelled an alcoholic odor coming from inside the vehicle, and Ms. Elias-Cruz admitted to consuming alcohol prior to driving.

Schwecke had Ms. Elias-Cruz exit the vehicle and perform field sobriety tests. (R. p. 033). Ms. Elias-Cruz did not meet any decision points on the field sobriety tests. (R. p. 035).

After Schwecke had Ms. Elias-Cruz perform the field sobriety tests, he requested that she take a Breath Alcohol Content (BrAC) test. He informed her of the consequences she would face under Idaho Code §§ 18-8002 and 18-8002A if she refused to take the BrAC test. Ms. Elias-Cruz agreed to give a breath sample to Schwecke. Schwecke then used the Lifeloc FC20, a breath alcohol-testing device, to take two breath samples from Ms. Elias-Cruz. The breath samples resulted in readings of .020 and .021 respectively. (R. p. 033). Based upon those readings and the fact that Ms. Elias-Cruz was under the age of 21 years, Schwecke placed Ms. Elias-Cruz under arrest for driving under the influence of alcohol pursuant to Idaho Code § 18-8004(1)(d) and transported her to the Latah County jail. (R. pp. 032-033).

The Idaho Department of Transportation issued Ms. Elias-Cruz a *Notice of Administrative License Suspension* at the time of her arrest on October 21, 2010. (R. p. 028). Ms. Elias-Cruz requested an ALS hearing in a letter written on October 25, 2010. (R. p. 042). Ms. Elias-Cruz attended the ALS hearing through counsel on December 9, 2010, where counsel for Ms. Elias-Cruz put on evidence of the inherent margin of error on the Lifeloc FC20, which the manufacturer recognizes as .005. Second, counsel showed that this inherent margin of error increases the potential rate of error up to +/- 25% on the lower BrAC test (.020). Finally,

counsel put on evidence that the Lifeloc FC20 used in Ms. Elias-Cruz's BrAC sampling had not been calibrated as the manufacturer's operations manual and the Idaho State Police manual require in order to operate correctly.

Counsel for Ms. Elias-Cruz, together with the testimony from Loring Beals, argued that this evidence would make it just as likely that Ms. Elias-Cruz's BrAC was actually .015 or .016, which is below the statutory requirement for a license suspension under I.C. § 18-8004(1)(d). (R. pp. 074-075). Additionally, counsel for Ms. Elias-Cruz argued that *McDaniel v. State* should not apply in this case because *McDaniel* involved a different Idaho statute, I.C. § 18-8004(1)(a). *McDaniel v. State, Dep't of Transp.*, 149 Idaho 643, 239 P.3d 36 (Idaho Ct. App. 2010).

In his Findings of Fact and Conclusions of Law, the ALS Hearing Officer sustained the suspension. Ms. Elias-Cruz then appealed to the District Court for the Second Judicial District of Idaho. The District Court held, in its Memorandum Opinion, that the ALS Hearing Officer denied Ms. Elias-Cruz's right to due process by not taking the inherent margin of error into consideration in deciding whether to sustain the license suspension. ITD then filed a timely Notice of Appeal with this Court.

IV. ISSUES PRESENTED ON APPEAL

Issue 1: Whether the Hearing Officer's decision to sustain Ms. Elias-Cruz's license suspension was based on substantial and competent evidence when he disregarded the inherent margin of error in the evidentiary test results produced by the Lifeloc FC20, which could cause up to 25% inaccuracy in the BrAC results.

Issue 2: Whether the Hearing Officer effectively denied Ms. Elias-Cruz's due process rights when he suspended her driving privileges without considering the inherent margin of error present in the Lifeloc FC20.

Issue 3: Whether the Hearing Officer erred in relying upon the results of the Lifeloc FC20 breath sample when it had not been calibrated for over a year before the breath sample from Ms. Elias-Cruz was taken and was not calibrated with a pair of verification solutions at the same statutory BrAC level for which Ms. Elias-Cruz was tested.

V. STANDARD OF REVIEW

Idaho Code § 67-5279(3) provides that a Hearing Officer's decision may be overturned upon review where the Hearing Officer's findings:

- (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.

IDAHO CODE § 67-5279(3) (2004).

In an appeal from an agency decision, the appellate court defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.3d 1262, 1265 (1998). Appellate review of a driver's license suspension under I.C. § 18-8002 presents a mixed question of law and fact. *McDaniel*, 149 Idaho at 645, 239 P.3d at 38. The appellate court "will defer to findings of fact supported by substantial evidence but will freely review conclusions of law and their application to the findings of fact." *Id.*

VII. ARGUMENT

I. The District Court correctly determined that the Hearing Officer's decision was not supported by substantial and competent evidence because it disregarded the margin of error inherent in the Lifeloc FC20, which could cause up to a 25% inaccuracy in the BrAC results.

The Idaho Administrative Procedures Act provides for reversal of an agency decision if it was not supported by substantial, competent evidence. In reviewing administrative decisions, courts defer to the agency's finding of fact unless they are clearly erroneous or not supported by

sufficient evidence. IDAHO CODE § 67-5279 (2004). *Marshall v. Dep't of Transp.*, 137 Idaho 337, 48 P.3d 666 (Idaho Ct. App. 2002). By disregarding the margin of error inherent in the Lifeloc and basing his decision solely upon the potentially flawed Lifeloc test results, the Hearing Officer's conclusion that Elias-Cruz failed an evidentiary test was not supported by substantial and competent evidence. For every Breath Alcohol Concentration (BrAC) test, the device used to test the BrAC generates results, which have an inherent margin of error. That margin of error should be taken into account in determining a license suspension pursuant to a BrAC result of .020 for a violation of Idaho Code § 18-8004(1)(d) for two reasons: 1) in contrast to a person with a BrAC of .080 or more, a person with a BrAC level of .020 percent shows no external signs of intoxication and, thus, the only evidence against her is the BrAC results; and 2) the inherent margin of error has a much greater impact on the accuracy of the BrAC results at a .020 level than it has at a .080 level.

The breath test analyzer used by the Idaho State Police (ISP) in the testing of Elias-Cruz's BrAC has a known margin of error. That device, the Lifeloc FC20 Breath Test Analyzer (the Lifeloc), has a margin of error of .005 that is recognized by the manufacturer and applies to any BrAC result given by the device. (R. p. 052). The Idaho Breath Alcohol Standard Operating Procedures ("SOPs") §5.1.5 also recognizes that an instrument that has a margin of error that is greater than +/- 10% when measured against a verification solution does not meet testing standards. 6.0 Idaho Breath Alcohol Standard Operating Procedures, Revision 2 Effective 11/01/2010, p. 11. The manufacturer of Lifeloc recognizes that the FC20 has a .005 margin of error on any given BrAC result and therefore the result would not meet the requirements of being within +/- 10% when measured against a .020 verification solution. The FC20 would have a 25% margin of error at the .020 BrAC level.

In order to violate I.C. §18-8004(1)(d), an individual must have at least .020 or greater BrAC and be under the age of twenty-one (21). At the .020 level of intoxication, there are no external indicators of intoxication. (ALS Hrg. Tr., pp. 10-11). In fact, Ms. Elias-Cruz did not fail any field sobriety tests and exhibited no external signs of intoxication. (R. p. 033). Furthermore, there are no effects on a person's ability to operate a vehicle at the .020 statutory threshold. (R. p. 074).

Given that no external indicators of intoxication corroborate a driver's intoxication at the .020 level and that an individual's ability to operate a vehicle is not affected at .020 level, the BrAC result is the only evidence that can be used to determine a violation of the statute. When the BrAC results are near the .020 level threshold, the Department should consider the inherent margin of error in deciding whether to suspend a driver's license.

Although no Idaho appellate court has ruled on this specific issue, a California Court of Appeals, in an unpublished decision, determined that when the BrAC level is so close to the threshold, the results alone are not enough for a reasonable trier of fact to determine that the driver violated the low tolerance law. *Nazerian v. Gourley*, 2005 WL 1576246 (Cal. Ct. App.). The court in *Nazerian* noted that "[t]he fact that law enforcement may use the device does not relieve the DMV of its burden of showing that the driver was in fact driving with a BAC of 0.01 percent or greater." *Id.* at *6.

There is an inverse ratio between the Lifeloc margin of error and the level of BAC being tested. The margin of error of the Lifeloc increases as the level of the BrAC being tested decreases. At the .080 level of intoxication, the .005 margin of error of the Lifeloc results in a potential 6.25% error in the BrAC results. (ALS Hrg. Tr., pp. 7-9). At the .020 level of intoxication required by I.C. § 18-8004(1)(d), the .005 margin of error of the Lifeloc results in a

potential 25% error in the accuracy of the BrAC results. When applied to Elias-Cruz's case, her .020 and .021 BrAC results could potentially be as low as .015 and .016 or as high as .025 and .026 respectively. *Id* at 11. These margin of error values are outside of the SOPs requirement that values be within +/- 10% of the solution against which they are tested. 6.0 Idaho Breath Alcohol Standard Operating Procedures, Revision 2 Effective 11/01/2010, §§ 5.1.5 and 5.1.8, p. 11. The potential 25% inaccuracy in the BrAC results at the .020 level should carry significant weight when considering whether a driver meets the .020 threshold of the statute. As a result of the significant increase in the impact of the margin of error when testing at the lower BrAC level of .020, test results should be based on the actual alcohol content in the body rather than a printout from a device that is subject to a 25% rate of error.

No Idaho cases address a margin of error for a violation of I.C. § 18-8004(1)(d), which has a threshold of .020 for defendants under the age of 21. All of the states, including Idaho, that hold the margin of error does not need to be considered by the hearing officer, only address results that are at .080 percent or higher. *See McDaniel*, 149 Idaho 643, 239 P.3d 36; *Ruble v. Kansas Dep't of Revenue*, 26 Kan.App2d. 1, 973 P.2d 213 (1999) (a test of .087); *Wieseler v. Prins*, 167 Ariz. 223, (Ariz. Ct. App. 1990) (a test of .102); *Nugent v. Iowa Dep't of Transp.*, 390 N.W.2d 125, (Iowa 1986) (a test of .102). These cases that address a .080 percent or higher do not apply in this case because this case involves a statutory level of .020, and the inherent margin of error has a greater impact on the reliability of the results at a .020 level.

II. The District Court correctly held that the Hearing Officer denied Ms. Elias-Cruz's due process rights when he suspended her driving privileges without considering the inherent margin of error present in the Lifeloc FC20.

By disregarding the inherent margin of error in the Lifeloc, the Hearing Officer deprived Ms. Elias-Cruz of the ability to challenge the only piece of evidence against her, which deprived

her of her ability to meet her burden of proof and obtain a fair and impartial hearing based on all of the evidence. The right to drive is a constitutionally protected liberty interest, and an Idaho driver being deprived of her right to drive is entitled to due process according to the Fourteenth Amendment to the U.S. Constitution as well as Article I, Section 13 of the Idaho Constitution.

This Court has held that the right to drive “is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions.” *Adams v. City of Pocatello*, 91 Idaho 99, 101, 416 P.2d 46, 48 (1966). This Court has also held that “[w]here the state confers a license upon an individual...such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.” *Abrams v. Jones*, 35 Idaho 532, 546, 207 P. 724, 726 (1922). Thus, the right to drive is a constitutionally protected right, the deprivation of which triggers certain due process protections.

The Court must address three factors in considering a challenge to procedural due process. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

These three factors include:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. In Ms. Elias-Cruz’s case, the Hearing Officer erroneously deprived her of due process by disregarding the expert testimony of Loring Beals concerning the inherent margin of error in the Lifeloc.

A. Ms. Elias-Cruz's due process rights were denied when the Hearing Officer disregarded the uncontradicted expert testimony concerning the margin of error in the Lifeloc FC20.

By allowing Ms. Elias-Cruz to put on expert testimony concerning the margin of error inherent in the Lifeloc but then disregarding that undisputed expert testimony, the Hearing Officer denied Ms. Elias-Cruz her due process right to a fair and impartial hearing. The Idaho Code allows ALS petitioners to challenge the results of their BrAC test by showing that “[t]he tests for alcohol concentration...administered at the direction of the peace officer were not conducted in accordance with the requirements of [I.C. §] 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered....” IDAHO CODE § 18-8002A(7)(d) (2004); *see also In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 947, 155 P.3d 1176, 1186 (Idaho Ct. App. 2006). In this case, the Hearing Officer denied Ms. Elias-Cruz's due process when he disregarded the expert witness's uncontradicted testimony.

The current controlling case in Idaho on the issue of whether to consider the margin of error in breathalyzer results is *McDaniel v. State*. In that case, the Idaho Court of Appeals concluded that a license should be suspended merely upon test results indicating that a person's blood alcohol level is in excess of the statute. 149 Idaho at 646, 239 P.3d at 39. The *McDaniel* decision should be overruled because it fails to take the due process implications into consideration.

It would be fundamentally unfair to hold a driver strictly liable for a violation of I.C. § 18-8004(1)(d) based on the results of the BrAC test without allowing the driver to challenge the evidence against her by showing that the breath testing machine was not working properly. When the statutory minimum is so low that the margin of error would have a significantly greater impact on the reliability of the BrAC test results, as in the case of Ms. Elias-Cruz, it is especially

unfair to hold a driver strictly liable based upon the BrAC test results. Because there are no external signs of intoxication with a BrAC level of .020 percent unlike the case when a person has a BrAC of .08 percent or more, it is even more unfair to hold a driver strictly liable based only upon the BrAC test results.

Although the Hearing Officer allowed Ms. Elias-Cruz to put on testimony from an expert witness about the inherent margin of error, that did not provide Ms. Elias-Cruz with her due process right to a fair and impartial hearing because the expert's testimony concerning the margin of error was completely disregarded. In Ms. Elias-Cruz's case, the Hearing Officer did not merely "reject" the expert's opinion, as ITD claims. (Appellant's Brief p. 18.) Rather, the Hearing Officer, after considering the *McDaniel* case, concluded that "any inherent margin of error in the test results is disregarded." (R. p. 78, emphasis in original). The definition of "disregard" is "[t]he action of ignoring or treating without proper respect or consideration." BLACK'S LAW DICTIONARY 540 (9th ed. 2009). In disregarding the expert testimony on the inherent margin of error, the Hearing Officer denied Ms. Elias-Cruz the opportunity to meet her burden of proof, which violated her due process right to a fair and impartial hearing.

As the District Court noted, "[a] strict application of *McDaniel* would mean that even if a license holder could prove the breath alcohol machine malfunctioned she would still forfeit her driver's license." (R. p. 152). The *McDaniel* court "focused only on the statutory interpretation without considering whether *McDaniel*'s constitutional rights to due process were violated by that analysis." (R. p. 152). Thus, the *McDaniel* decision should be overruled, and the Hearing Officer should consider the inherent margin of error in a breathalyzer before sustaining a driver's license suspension under I.C. § 18-8002A.

Alternatively, even if this Court chooses not to overrule the decision in *McDaniel*, the holding in that case should not apply in Ms. Elias-Cruz's situation. *McDaniel* is distinguishable from this case in a number of ways. First, Ms. Elias-Cruz's license was suspended for violating I.C. § 18-8004(1)(d), whereas the *McDaniel* suspension was for a violation of I.C. § 18-8004(1)(a). Subsection (1)(d) has a threshold of .020 and applies to defendants who are under the age of 21, while subsection (1)(a) has a threshold of .08 and applies to those over the age of 21. These Idaho Code sections apply to different situations and are intended to combat different social ills. The first is a policy directed at keeping underage people from drinking. The second is intended to keep dangerous vehicles off of public roadways and is directed at the safety of the general public and the hazards that intoxicated drivers pose.

Ms. Elias-Cruz's case is further distinguishable from *McDaniel* because the inherent margin of error results in a significantly greater impact on the accuracy of the BrAC result in Ms. Elias-Cruz's case than it would have in the *McDaniel* case. A .005 margin of error for a breath sample of .080 could produce results that are 6.25% higher or lower than the actual value versus a breath sample of .020 that could produce results that are 25% higher or lower than the actual value. Under I.C. § 18-8004(1)(a), which requires a BrAC of .080, the margin of error inherent in the Lifeloc results in only a 6.25% rate of inaccuracy. In contrast, under the .020 BrAC result required under I.C. § 18-8004(1)(d), for which Elias-Cruz was arrested, the margin of error inherent in the Lifeloc results in a 25% rate of inaccuracy, which is much more substantial and has a significantly greater impact upon the validity of the BrAC results. Therefore, the Hearing Officer erred in applying the *McDaniel* decision to Ms. Elias-Cruz's case because the difference between offenses and BrAC requirements of the two statutes involved, coupled with the impact

of the margin of error on the accuracy of the Lifeloc BrAC result, distinguishes Ms. Elias-Cruz's case from that of McDaniel.

B. The District Court properly concluded the Hearing Officer's decision deprived Ms. Elias-Cruz of procedural due process.

The District Court concluded that “the Hearing Officer erred by concluding that I.C. § 18-8002A does not allow for the consideration of the breath-testing machine's margin of error and violated Elias-Cruz[‘s] due process right to a fair and impartial hearing by refusing to consider such evidence.” (R. p. 152). ITD's argument that the due process claim was not properly before the district court is without merit.

Ms. Elias-Cruz argued that the State deprived her of her right to drive without adequate process. Both the Fourteenth Amendment to the U.S. Constitution and Article I, § 13 of the Idaho Constitution preclude the State from depriving a person “of life, liberty or property without due process of law.” U.S. CONST. amend. XIV, § 1; IDAHO CONST. art. I, § 13. The right to drive “is a right or liberty, the enjoyment of which is protected by the guarantees of the federal and state constitutions.” *Adams*, 91 Idaho at 101, 416 P.2d at 48. When an Idaho driver is being deprived of any liberty interest guaranteed under the U.S. Constitution or under the Idaho Constitution, procedural due process rights automatically apply.

In this case, Ms. Elias-Cruz argued that the Hearing Officer deprived her of her right to drive when he failed to take into account the inherent margin of error in the Lifeloc (*See* Petitioner's Brief to the District Court, R. p. 117 (argument that the BrAC results are “the singular evidence of a driver's having any alcohol in her system that could be used in determining whether the driver is in violation of the statute”); *see also* ALS Hrg. Tr. p. 23 Ll. 3-5 (argument that “the margin of error should be something that is considered when something like

your license is being taken away”). The District Court properly relied upon denial of Ms. Elias-Cruz’ procedural due process rights as a basis for its decision.

III. The decision of the Hearing Officer was not supported by substantial competent evidence because the Lifeloc FC20 had not been properly calibrated.

Even if this Court does not agree with the reasons given in the District Court’s opinion, this Court should still affirm the District Court’s decision for the additional independent reason that the Lifeloc was not properly calibrated. The BrAC results should have been excluded. The Hearing Officer’s decision to sustain Ms. Elias-Cruz’s license suspension was not supported by substantial competent evidence because there was no evidence at the administrative hearing that the Lifeloc had been properly calibrated. In fact, the evidence was that there were at least three errors in the calibration of the Lifeloc. First, the Lifeloc had not been calibrated for more than a year prior to taking Ms. Elias-Cruz’s breath sample. Second, there was only one performance verification solution test processed on the Lifeloc when the Idaho State Police SOPs specifically require a *pair* of performance verification solutions. Third, the breath testing machine should have been calibrated with a .020 performance verification solution, as opposed to a .080 or .200 verification solution, to ensure the validity of the BrAC test results.

- A. The BrAC results should have been excluded because the Lifeloc FC20 had not been calibrated for more than one year prior to the breath sample being taken.

First, it is important to distinguish an accuracy check from the actual calibration. Although the device used in this case was the Lifeloc FC20, a comparable breath testing device, the Alco-Sensor, provides insight into the difference between a calibration/accuracy check and the actual calibration. As the Alco-Sensor manual states, “In an Accuracy Check procedure, the operator performs a test on a known alcohol concentration...and compares the test result to determine how closely the Alco-Sensor reads the correct alcohol concentration. In a Calibration

Adjustment, the operator uses a known alcohol concentration...and follows a procedure to adjust the Alco-Sensor to read more accurately.” Alco-Sensor Manual, *available at* <http://www.alcopro.com/calibration.asp>. The “Accuracy Check” procedure that the manual describes is the same as the calibration check procedure on the Lifeloc FC20. The “Calibration Adjustment” procedure that the manual describes is the same as the actual calibration procedure on the Lifeloc FC20.

In this case the Lifeloc FC20 ISP manual differentiates between calibration checks and the calibration of the machine. The ISP manual states that “actual recalibration of the instrument is done in the ISP labs and is password-protected.” ISP Manual p. 9, *available at* <http://www.isp.idaho.gov/forensic/certificates.html>. The fact that the ISP differentiates between calibration checks and actual calibration is persuasive evidence that both procedures achieve separate ends. The State preformed a calibration check within twenty-four (24) hours of the breath test with a .080 verification solution rather than a .020 verification solution. (R. p. 031). That check merely validated the defendant’s blows against the test blow. It does not independently verify that the machine was working within the statutorily acceptable margin of error.

This license suspension rests solely on the results of the Lifeloc FC20 breath sample test. Therefore, it is imperative that the test results be accurate. The manufacturer of the Lifeloc FC20 recommends that the machine be both calibrated on an annual basis and have a calibration check done within 24 hours of a breath sample being taken. (R. p. 054). In this case, the calibration check was done within 21 hours after Elias Cruz’s breath sample was taken. However, the actual calibration had been done on August 18, 2009, 14 months before her breath test was taken. (R. p. 031). Furthermore, when the actual calibration was done 14 months before Ms. Elias-Cruz’s

breath sample was taken, it showed that the Lifeloc was reading high at a .206 when calibrated to a .200 solution. (R. p. 031).

In a Montana Supreme Court case, the court held that test results from a breathalyzer machine were inadmissible when the machine had not been calibrated for 13 months and administrative rules required that the machine be calibrated on an annual basis. *State v. Frickey*, 332 Mont. 255, 136 P.3d 558 (2006). Here, Idaho's administrative rules are silent as to the time frame for the actual calibration of the Lifeloc FC20, but the manufacturer recommends that the machine be calibrated every 12 months. *See* Lifeloc FC20 Frequently Asked Technical Questions, R. p. 054. Idaho's standards for approved BrAC testing machines "shall be issued in the form of policy statements and training manuals," (IDAPA 11.03.01 through 11.13.03). "Failure to abide by the regulations set forth in the standard operating procedures and training manuals for administration of breath tests renders the test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results." *In re Schroeder*, 210 P.3d 584 (Idaho Ct. App. 2009).

Because the Idaho Code states that the standards shall come from policy statements and training manuals, the Court can assume that the legislature intended for the Standard Operating Procedures to be supplemental rather than exclusive. Finding otherwise would have the effect of making all manufacturer guidelines and recommendations useless and essentially put the ISP in the role of re-writing all equipment user manuals. Therefore, the Court should look at both the ISP guidelines and the user manual to analyze whether the Lifeloc FC20 machine was calibrated with sufficient accuracy to have the results be considered sufficient evidence for the Department to suspend Elias-Cruz's license.

Both the manufacturer and many other states have issued guidelines that the machine be calibrated at least every 12 months. The ISP user manual for the Lifeloc FC20 manual states on page 4 that a warning will show when the calibration is expiring, which is set for every 6 months. This is actually a shorter period than the Lifeloc recommends to users on its website. (R. p. 054, stating the machine should be calibrated every 12 months). Other states that have statutes calling for calibration at least every 12 months include Mississippi, New Mexico, and Montana. *See, e.g.,* MISS. CODE. ANN. § 63-11-19 (West current through 2011), requiring calibration checks be performed at least quarterly; N.M. ADMIN. CODE 7.33.2.11.1 to 7.33.2.11.9 (West current through 2011), requiring certification of the machine at least annually with weekly calibration checks; and MONT. ADMIN. R. 23.4.214 (current through Sept. 11, 2011), requiring annual calibration certification to be performed by a laboratory. In Idaho, there is no statute or administrative rule that specifies how often a breathalyzer must be calibrated.

The SOPs are silent on the desired period of calibration for the Lifeloc. Although the SOPs do not expressly state that the Lifeloc should be calibrated at least annually, it would be reasonable to require that the Lifeloc be calibrated annually to ensure the accuracy and validity of test results that could potentially deprive a driver of her constitutionally protected liberty interest in driving. Furthermore, the Lifeloc manufacturer recommends at least annual calibration, and in the absence of a specific guideline or SOP stating how often the Lifeloc should be calibrated, the Idaho State Police should default to what the manufacturer recommends in order to ensure the validity and accuracy of the Lifeloc test results. Because the Lifeloc was not calibrated for over a year before taking Ms. Elias-Cruz's breath sample, the test results from the Lifeloc are not reliable, and the Hearing Officer's decision to sustain Ms. Elias-Cruz's

license suspension based on those unreliable results was not supported by substantial competent evidence.

B. The BrAC results should have been excluded because the Idaho State Police Standard Operating Procedures requires two verification samples, but only one was performed after taking Ms. Elias-Cruz's breath sample.

The breath samples taken from Ms. Elias-Cruz should have been inadmissible against her since the Lifeloc was not properly checked for calibration with two verification samples, as required by the SOPs, after taking Ms. Elias-Cruz's breath sample. This Court has held that “[f]ailure to abide by the regulations set forth in the standard operating procedures and training manuals renders the test inadmissible as evidence absent expert testimony that the improperly administered test nevertheless produced reliable results.” *Schroeder*, 147 Idaho at 478, 210 P.3d at 586. Section 5.1.5 of the SOPs states that, “[a]cceptable 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.” 6.0 Idaho Breath Alcohol Standard Operating Procedures, Revision 2 Effective 11/01/2010, p. 11 (emphasis added). The word “pair” implies that there should be two samples tested during the performance verification.

In this case, only one sample was taken during the performance verification. (R. p. 32). The word “pair” in the SOPs must have a purpose. The purpose of requiring a “pair” of samples is to check the results of the performance verification and to make sure that the Lifeloc is properly calibrated. The SOPs required Trooper Schwecke to perform a pair of performance verification samples, but he only performed one sample. Thus, even if the Court does not agree that the BrAC results are inadmissible for failure to calibrate the Lifeloc annually, Trooper Schwecke's failure to follow the SOPs makes the breath samples taken from Ms. Elias-Cruz inadmissible.

- C. The BrAC results should have been excluded because the performance verification solution does not account for a .020 blood alcohol standard, which affects the validity of the test and distorts the performance verification solution target value of +/- 10%.

In cases involving a violation of I.C. § 18-8004(1)(d), the breath alcohol testing machine should be calibrated according to a .020 performance verification solution to ensure the accuracy of the machine and the validity of the results and to establish that the machine falls within the verification solution target range of +/- 10%. Section 5.1.5 of the SOPs requires that a pair of performance verification solutions of either .080 or .200 be performed on the breath testing machine to calibrate and check the machine for accuracy. 6.0 Idaho Breath Alcohol Standard Operating Procedures, Revision 2 Effective 11/01/2010, p. 11. According to the SOPs, both solutions must have a result that falls within a range of +/- 10% of the known verification solution value (.080 or .200) in order for the machine to be considered accurate enough. *Id.* However, when testing for a BrAC of .020, allowing a machine to be .008 or .020 off (10% of .080 and .200, respectively) would not ensure that the breath alcohol testing machine is within the +/- 10% range of a .020 standard level.

For example, if the machine were tested with a performance verification solution of .080 and produced results of .083 and .084, this would mean that the machine tested high by about .003 and .004, which would be about 3.7% and 5%, respectively, and well within the +/- 10% range for a .080 standard. However, if that same machine is used to then test a BrAC of .020, testing high by .003 or .004 would cause the machine to be off by 15% and 20%, respectively. Since a BrAC of .020 percent is such a minute level, the Lifeloc should have been calibrated with a performance verification solution of .020 in order to establish the accuracy of the Lifeloc and to ensure that the Lifeloc was working properly in accordance with the +/- 10% standard in the SOPs.

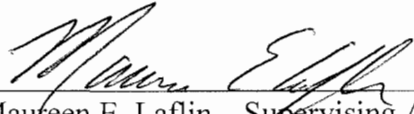
In reviewing administrative decisions, courts defer to the agency's finding of fact unless they are clearly erroneous or not supported by sufficient evidence. I.C. § 67-5279. *Marshall*, 48 P.3d at 666. Here, there is no evidence to support the conclusion that the Lifeloc FC20 was properly calibrated and reporting accurately. Rather, there is only evidence that: 1) the machine had not been calibrated in over a year; 2) Schwecke failed to perform two verification samples; and 3) the verification solution did not account for a .020 statutory level. Accordingly, the Hearing Officer erred in relying on the BrAC results and his decision to sustain Ms. Elias-Cruz's license suspension should be reversed.

VIII. CONCLUSION

Ms. Elias-Cruz respectfully asks this Court to affirm the decision of the District Court in vacating the Hearing Officer's decision and remanding the case.

Alternatively, because the Lifeloc was not properly calibrated before taking Ms. Elias-Cruz's breath sample, the Lifeloc results are not reliable, and the Lifeloc results should be excluded. Since the Lifeloc results are the only evidence that Ms. Elias-Cruz was in violation of I.C. 18-8004(1)(d), the case against Ms. Elias-Cruz should be dismissed.

Respectfully submitted this 9th day of April, 2012.



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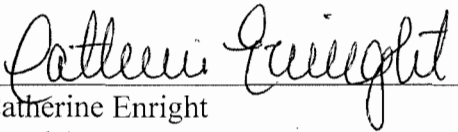
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On this 9th day of April, 2012.



Catherine Enright
Legal Intern