

4-25-2012

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

Follow this and additional works at: https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs

Recommended Citation

"Elias-Cruz v. Idaho Dept of Transportation Appellant's Reply Brief Dckt. 39425" (2012). *Idaho Supreme Court Records & Briefs*. 3419.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/3419

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

Lawrence G. Wasden
Attorney General

Edwin L. Litteneker
Special Deputy Attorney General
Idaho Transportation Department
PO Box 321
Lewiston, Idaho 83501
Telephone: (208) 746-0344
ISB No. 2297

Attorney for Respondent-Appellant

IN THE SUPREME COURT OF THE
STATE OF IDAHO

IN THE MATTER OF THE DRIVING)
LICENSE PRIVILEGES OF ALMA)
ELIAS-CRUZ)

Supreme Court No. 39425-2011

ALMA A. ELIAS-CRUZ,)

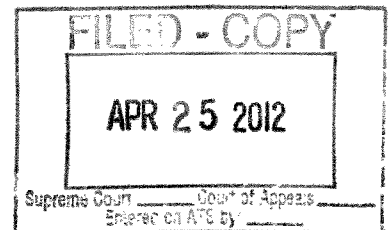
Petitioner-Respondent,)

APPELLANT'S REPLY BRIEF

v.)

IDAHO DEPARTMENT OF)
TRANSPORTATION,)

Respondent-Appellant.)



APPEAL FROM SECOND JUDICIAL DISTRICT, LATAH COUNTY

THE HONORABLE JOHN R. STEGNER, PRESIDING

Edwin L. Litteneker
Special Deputy Attorney General
P.O. Box 321
Lewiston, ID 83501
Attorney for Appellant

Patrick D. Costello-Supervising Attorney
Maureen E. Laflin-Supervising Attorney
Catherine Enright-Legal Intern
Aaron J. Tibble-Legal Intern
P.O. Box 442322
Moscow, Idaho 83844-2322
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... ii

STATUES..... iii

OTHER AUTHORITY.....iii

I. STATEMENT OF THE CASE.....1

 a. Introduction.....1

 b. Characterization of the Issues1

IV. ARGUMENT.....1

 1. The Hearing Official did not err by finding that there is not an inherent margin of error in the test result produced by the Lifeloc FC 20.....1

 2. The Hearing Official properly determined that the Lifeloc FC 20 had been calibrated in accordance with the Standard Operating Procedures of the Idaho State Patrol.....6

 3. The Hearing Official’s failure to acknowledge the Lifeloc FC 20’s margin of error did not deny Ms. Elias-Cruz her ability to meet her burden or obtain a fair and impartial hearing.....8

V. CONCLUSION.....13

TABLE OF AUTHORITIES

CASES	PAGE(S)
<i>Archer v. State Department of Transportation, 145 Idaho 617, 181 P.3d 543 (2008)</i>	7
<i>Bell v. Idaho Transp. Dept. 151 Idaho 659, 262 P.3d 1030 (2011)</i>	8
<i>In re Suspension of Driver’s License of Gibbar, 143 Idaho 937, 155 P.3d 1176 (Ct.App.2006)</i>	12
<i>In the Matter of the Suspension of the Driver’s License of Linda Lee Hubbard, Docket No, 38969, Idaho Supreme Court, April 10, 2012</i>	7, 12
<i>In re Mahurin, 140 Idaho 656, 99 P.3d 125 (Ct. App. 2004)</i>	4, 6, 7
<i>Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976)</i> ..	9, 10
<i>McDaniel v. State, Dept. of Transp., 149 Idaho 643, 239 P.3d 36, 39 (Idaho Ct. App. 2010)</i>	4, 5, 6, 9, 10, 11, 12, 13
<i>Reisenauer v. State, Dept. of Transp. 145 Idaho 948, 188 P.3d 890 (2008)</i>	2
<i>State v. Daniel, 132 Idaho 701 @703, 979 P.2d 103 (1998)</i>	4
<i>State v. Hartwig, 112 Idaho 370, 732 P.2d 339 (Ct.App. 1987)</i>	12
<i>State v. Ward, 135 Idaho 400, 403-05, 17 P.3d 901, 904-06 (Ct. App. 2001)</i>	12
<i>Viveros v. State Dept. of Health and Welfare, 126 Idaho 714, 716, 889 P.2d 1104, 1106 (1996)</i>	8

STATUES

Idaho Code § 18-8002A.....2, 3, 4, 6, 7, 8, 9, 10, 11, 14, 18, 19, 20
Idaho Code § 18-8004.....2, 5, 13
Idaho Code § 67-5277.....11
Idaho Code § 67-5279(3).....7, 9, 11

OTHER AUTHORITIES

Idaho Breath Alcohol, Standard Operating Procedures,
Revision 2, Effective 11/10/10.....3

I. STATEMENT OF THE CASE

a. Introduction.

This is the Reply Brief of the Idaho Transportation Department (the Department). The Department seeks review of the District Court's decision setting aside an Administrative License Suspension entered by The Department's Hearing Official.

b. Characterization of the Issues.

The Department has characterized the issues as follows:

1. The Hearing Official did not err by finding that there is not an inherent margin of error in the test result produced by the Lifeloc FC 20.
2. The Hearing Official properly determined that the Lifeloc FC 20 had been calibrated in accordance with the Standard Operating Procedures of the Idaho State Patrol.
3. The Hearing Official's failure to acknowledge the Lifeloc FC 20's margin of error did not deny Ms. Elias-Cruz her ability to meet her burden or obtain a fair and impartial hearing.

The Respondent re-characterizes the issues in responding to the issues set out by the Department. The reply argument that follows maintains the organization of the issues as initially set out by the Department and addresses the arguments of Ms. Elias-Cruz in the context of the issues characterized by the Department.

II. Argument.

1.

The Hearing Official did not err by finding that there is not an inherent margin of error in the test result produced by the Lifeloc FC 20.

Ms. Elias-Cruz argues that the Department's Hearing Official's decision to sustain the license suspension was not based on substantial and competent evidence when he disregarded testimony that the breath testing equipment, the Lifeloc FC 20 suffers from an inherent margin of error.

Ms. Elias-Cruz's argument is nothing more than a policy argument offered to change the present state of Idaho Law. Ms. Elias-Cruz suggests that the margin of error "should be taken into account" (emphasis added) (Respondent's Brief, p. 5).

Ms. Elias-Cruz argues generally that since a person with a .02 blood alcohol content shows no external signs of intoxication, something more than a failed breath alcohol result should be the basis of an Administrative License Suspension. However, a failed evidentiary test is precisely what I.C. §§ 18-8002A(4) and 18-8004 contemplate as the basis of an Administrative License Suspension.

The need to demonstrate the existence of external evidence of intoxication is clearly rejected in the Administrative License Suspension context, *Reisenauer v. State, Dept. of Transp.*, 145 Idaho 948, 188 P.3d 890 (2008).

Ms. Elias-Cruz suggests that there is no external evidence of intoxication. However, that argument is not based on the Record in this matter. The record indicates that Trooper Schwecke observes the smell of an alcoholic beverage and notes an admission by Ms. Elias-Cruz to the consumption of alcohol (ALS R. p. 006).

Next Ms. Elias-Cruz argues that the existence of an inherent margin of error has a greater impact on the accuracy of test results at a .02 level than at a .08 level. The Legislature determined at what level a test failure would result in a suspension, be it at .02 for a driver under the age of 21 or .08 for an adult (or a .20 for an aggravated DUI).

A margin of error of plus or minus 10% or a margin of error of .005 means that a driver with a .08 blood alcohol could “actually have a blood alcohol content” below .08 (.075) just as a driver under the age of 21 with a .02 blood alcohol could have an actual blood alcohol content of .015. The fairness of that result is not before the Court on judicial review and was not before the Hearing Official originally. (I.C. § 67-5279)

Ms. Elias-Cruz’s argument that the Standard Operating Procedures recognize a margin for error in the performance verification standards, (Idaho Breath Alcohol Standard Operating Procedure § 5.1.5) is not the basis for an argument that the test results should recognize a margin of error for purposes of demonstrating a driver’s breath alcohol content.¹

What Elias-Cruz suggests is that the Hearing Official must consider that there is a potential margin of error which is then compared against a performance verification standard. Such an argument is not among the matters to be shown by Ms. Elias-Cruz pursuant to I.C. § 18-8002A(7). The conclusion of Ms. Elias-Cruz’s argument also creates a standard which is not now part of the Idaho State Police’s Standard Operating Procedures.

Nor is there any evidence in the Record suggesting that a range of satisfactory results in a performance verification means there is a margin of error in the reported

¹ The Hearing Official made Findings based on the Record created by Ms. Elias-Cruz:

- 3.8 The Idaho State Police Standard Operating Procedure and the Operator Training Manuals do not require nor indicate that the actual test performed on a properly calibrated instrument be adjusted due to the margin of error of the simulator solution or testing instrument.
- 3.9 Additionally, I.C. §18-8002A does not provide nor allow for the margin of error to be taken into consideration with respect to the breath test results.
- 3.10 In considering this argument, such reasoning would have the effect of making the legal limit a moving target depending on which evidentiary testing instrument was used in a particular case.

Findings of Fact and Conclusions of Law and Order, p. 7, ALS R. p. 051.

blood alcohol content results. Ms. Elias-Cruz must do more to meet her burden. *In re Mahurin*, 140 Idaho 656, 99 P.3d 125 (Ct. App. 2004).

Whether the manufacturer recognizes a margin of error is not dispositive nor controlling on the Idaho State Police (ALS R. p. 027).

Further, Ms. Elias-Cruz does not challenge the existence of cause for Trooper Schwecke's belief that she was operating a motor vehicle while under the influence of alcohol resulting in his request that she perform evidentiary breath alcohol testing (I.C. § 18-8002A(7)(b)).

The only authority for Ms. Elias-Cruz's argument is an unpublished California decision, not an analysis of the Idaho Court of Appeals decision in *McDaniel v. State, Dept. of Transp.*, 149 Idaho 643, 239 P.3d 36 (2010).

The Court of Appeals had no difficulty in *McDaniel*, rejecting the application of a potential margin of error on breath alcohol testing results. The showing of the "actual" blood alcohol level is not required in the Administrative License Suspension setting, I.C. §§ 18-8002A(7)(c) and I8-8004.

Ms. Elias-Cruz has the burden of showing that she did not fail an evidentiary test demonstrating a breath alcohol content of at least .02. The .02 breath alcohol test result here is as much a failed evidentiary test as the .083 evidentiary test result in *McDaniel*. The exercise of mathematically calculating a potential range for blood alcohol content considering an inherent margin of error is certainly not contemplated either by the Legislature or by the Court in *McDaniel*.²

² Such an analysis is reminiscent of retrograde extrapolation, a notion also rejected by the Idaho Court, *State v. Daniel*, 132 Idaho 701 @703, 979 P.2d 103 (1998).

There is no basis in this Record to suggest that the *McDaniel* Court was incorrect in its analysis other than arguing for a different policy result. Neither the District Court nor Ms. Elias-Cruz offers an analysis of the Court of Appeals decision in *McDaniel* or indicate why the Hearing Official was incorrect in his interpretation of I.C. § 18-8002A(7) and I.C. § 18-8004.³

Ms. Elias-Cruz does not argue that the administration of the breath alcohol testing did not meet the Standard Operating Procedures only that the Standard Operating Procedures should provide something different.

In this very narrow context of the Administrative License Suspension for the failure of an evidentiary test, the Hearing Official's analysis of the application of *McDaniel* to these facts is clearly appropriate and indicates that there was substantial evidence in the Record supporting the conclusion that Ms. Elias-Cruz had not met her burden to show that the breath alcohol test was not administered consistent with the standards of I.C. § 18-8004.

³ *McDaniel's* statutory interpretation is applicable here:

The conclusion of these courts has primarily hinged on whether the license suspension statute is interpreted to require a driver's license to be suspended upon test results indicating a blood alcohol level in excess of the statutory limit, or alternatively, upon an actual level of alcohol in excess of the statutory limit....The plain meaning of the statutory language is that a driver's license will be suspended upon test results indicating a BAC of 0.08 or more, not 0.08 plus or minus any margin of error....Nowhere does I.C. § 18-8002A contain language that requires the Hearing Official to take into account any inherent error within the breath test machine before a license can be suspended, it simply requires that the test results indicate a BAC in excess of the legal limit, which is 0.08. See I.C. §§18-8002A(4)(a), 18-8004. Therefore, any inherent margin of error in the test results is disregarded....McDaniels failed to establish that the Hearing Official was required to consider any inherent margin of error in the Intoxilyzer 5000 before suspending his driver's license.

McDaniel v. State, Dept. of Transp. 149 Idaho 643, 239 P.3d 36 (Ct. App. 2010).

2.

The Hearing Official properly determined that the Lifeloc FC 20 had been calibrated in accordance with the Standard Operating Procedures of the Idaho State Patrol.

The Hearing Official determined that the Lifeloc FC 20 was properly calibrated.⁴

Ms. Elias-Cruz's responds to this issue by offering argument which was not made to the Hearing Official (Respondent's Brief p. 13). The Hearing Official was asked to consider the effect of what Ms. Elias-Cruz's actual blood alcohol content may have been, that *McDaniel* was wrongly decided and that Ms. Elias-Cruz's case is distinguishable from the *McDaniel* decision (Tr. p. 14 LL. 5-13). The Hearing Official was not asked to set aside the suspension based on an annual calibration requirement, the existence of only one performance verification sample or a calibration with a .02 solution.

There is no requirement that the Lifeloc FC 20 be annually calibrated (ALS R. p. 027). In fact the only calibration information the Hearing Official has before him are reported calibrations on 08/18/2009 and 10/22/2010 (ALS R. p. 004). There is no testimony as to what it would mean if the Lifeloc FC 20 was not calibrated annually. The failure to offer such evidence indicates a failure of Ms. Elias-Cruz to meet her burden (I.C. § 18-8002A(7), *In re Mahurin*, 140 Idaho 656, 99 P.3d 125 (2004)).

4

5.

Was the Evidentiary Testing Instrument Properly Calibrated and Approved for use Pursuant to ISP Standard Operating Procedure, and Was the Instrument Functioning Accurately at the Time of Breath-Testing.

1. Alma Elias-Cruz submitted to an evidential breath test October 21, 2010, at 2139 hours.
4. The acceptable performance verification check conducted October 22, 2010, at 1930 hours, with performance verification results of .081, approved the breath testing instrument for evidentiary use in accordance with the ISP Standard Operating Procedure.
5. The breath testing instrument was properly calibrated and approved for evidentiary testing of alcohol concentration, and the testing instrument was functioning accurately at the time of breath-testing.

Findings of Fact, Conclusions of Law and Order, p. 9, ALS R. 053.

Ms. Elias-Cruz simply asks the Court to come to a conclusion different than the Hearing Official. There is no evidence in this Record that the Lifeloc FC 20 was not properly calibrated at the time it was used to test Ms. Elias-Cruz's breath alcohol content. There are only policy arguments offered as to what other states might have done or what might be reasonable to require under other situations. Such arguments are not appropriate in judicial review of a Hearing Official's decision to suspend Ms. Elias-Cruz's driving privileges as a result of failing an evidentiary test by being under age of 21 and having .02 breath alcohol content (I.C. § 67-5279) .

Ms. Elias-Cruz argues that she has met her burden by demonstrating that two verification samples were not employed. The Record does not consist of any information as to the circumstances of the performance verification by the police officer administering the breath alcohol testing. The only evidence in the Record has to do with the calibration of the instrument not its performance verification.⁵

The lack of that information in the Record is Ms. Elias-Cruz's responsibility not the State's responsibility.⁶ Ms. Elias-Cruz fails to meet her burden by not demonstrating whether there was a deficiency in the implementation of the Standard Operating Procedures, *In re Mahurin*, 140 Idaho 656, 99 P.3d 125 (2004).

Ms. Elias-Cruz also argues that there should be a .02 performance verification.

⁵ The Court of Appeals recently considered what evidence was in the record to review the circumstances of an adequate performance validation pursuant to the Standard Operating Procedures, *In the Matter of the Suspension of the Driver's License of Linda Lee Hubbard*, Idaho Supreme Court , Docket No. 38969 (April 12, 2012).

⁶ Consider the following:

Archer presented no evidence demonstrating that a calibration check had not been performed or that the machine was not operating correctly. Archer bore the burden of proof at the ALS hearing and, because he produced no evidence regarding the lack of a calibration check or the reliability of the Alco-Sensor III, he failed to meet his burden of proof. *Archer v. State Department of Transportation*, 145 Idaho 617, 181 P.3d 543 (2008).

There is nothing in the Standard Operating Procedures indicating a .02 performance verification requirement.

There is no evidence that the Lifeloc FC 20 was not properly calibrated or that the Lifeloc FC 20 was not properly operating. Ms. Elias-Cruz called a forensic toxicologist to testify as to the operation of the Lifeloc equipment. Mr. Beals does not testify that the Lifeloc FC 20 was not operating properly at the time that the breath tests were performed. In fact the entirety of Ms. Elias-Cruz's argument is based on the fact that the Lifeloc FC 20 breath testing equipment was properly operating.

Finally, the performance verification arguments were not made to the Hearing Official or to the Court on Judicial Review and should not become the basis to set aside the Hearing Official's decision, *Bell v. Idaho Transp. Dept.* 151 Idaho 659, 262 P.3d 1030 (2011).

3.

The Hearing Official's failure to acknowledge the Lifeloc FC 20's margin of error did not deny Ms. Elias-Cruz her ability to meet her burden or obtain a fair and impartial hearing.

The due process argument was never argued to the Hearing Official (Tr. p. 14 LL. 5-13). The due process argument was also not argued to the District Court. The failure to preserve this argument precludes the Court's review, *Bell*.⁷

7

.....because this constitutional issue was not raised to the Hearing Official we will not resolve it on appeal. See, *Viveros v. State Dept. of Health and Welfare*, 126 Idaho 714, 889 P.2d 1104 (1995). *Bell v. Idaho Transp. Dept.* 151 Idaho 659, 262 P.3d 1030 (2011).

Ms. Elias-Cruz clearly received a constitutionally sufficient opportunity to present her case to the Department's Hearing Official in an effort to meet her burden of proof.⁸

Should the Court consider the due process argument appropriately before it, the characterization of the issue by Ms. Elias-Cruz means that the "official action" is not the process of suspending Ms. Elias-Cruz's driving privileges but instead the official action is the decision making process of the Hearing Official. There is no due process violation when a Hearing Official does not adopt the conclusions argued as a result of expert testimony, particularly when the Hearing Official appropriately applies the *McDaniel* decision.

The *Mathews* factors requires a consideration of Ms. Elias-Cruz's private interest in her driving privileges affected by the Department's official action to suspend her driving privileges. However, the District Court characterized the denial of due process as the Department's Hearing Official's failure to "accept" the testimony of toxicologist, Loring Beals.

⁸ The analysis of a claim that the procedure provided was deficient requires an analysis of the *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976):

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.

Neither the District Court or Ms. Elias-Cruz analyze the *Mathews* factors.

Ms. Elias-Cruz argues that the Hearing Official should not follow the law of the State of Idaho. The Hearing Official's decision making does not rise to the level of a due process violation simply by applying Idaho law.⁹

Applying the second *Mathews* factor, there is no risk of an erroneous deprivation of Ms. Elias-Cruz's driving privileges based on the procedure utilized. The Hearing Official didn't disregard the testimony of Loring Beals. That testimony was part of the Record and Ms. Elias-Cruz was permitted to make the Record that she thought appropriate. The Hearing Official analyzed Loring Beals testimony and Ms. Elias-Cruz's argument and clearly explained why it was he was going to follow the *McDaniel* decision and not recognize an inherent margin of error (ALS R. p. 051, Finding 3.12).¹⁰

The Hearing Official does not violate Ms. Elias-Cruz's due process rights when he rules against Ms. Elias-Cruz indicating why he did so. Ms. Elias-Cruz does not suggest that she has a constitutional right to a Hearing Official that would disregard existing Idaho law and decide contrary to the that law. The Hearing Official here simply does not make the conclusion that Ms. Elias-Cruz advocates should be made from that testimony, particularly considering that there was no testimony or argument that the breath testing equipment was not operating properly.

⁹ The Hearing Official quotes from *McDaniel* in his order. (R. p. 051, Finding 3.12) The underlined portion of the Hearing Official's decision "...any inherent margin of error in the test result is disregarded" is a correct citation and recitation of the Court of Appeals language in *McDaniel*. *McDaniel v. State, Dept. of Transp.* 149 Idaho 643, 239 P.3d 36 (Ct. App. 2010).

¹⁰

In *State of Idaho v. Bryan Lee McDaniel, Court of Appeals of the State of Idaho, 2010 Opinion No. 58*, the court held that the plain meaning of the statutory language is that a driver's license will be suspended upon test results indicating a BAC of 0.08 or more, not 0.08 plus or minus any margin of error...Nowhere does I.C. § 18-8002A contain language that requires the Hearing Official to take into account any inherent error within the breath test machine before a license can be suspended, it simply requires that the test results indicate a BAC in excess of the legal limit, which is 0.08. Therefore, any inherent margin of error in the test results is disregarded.

Findings of Fact and Conclusion of Law and Order, p. ALS R. p. 051.

Clearly, the Hearing Official weighed the evidence, considered the *McDaniel* decision and came to a reasonable conclusion explaining how he weighed the evidence. There is no argument that the Hearing Official was arbitrary and capricious in weighing the evidence as he did. The District Court and now Ms. Elias-Cruz do not indicate which department procedures were problematic only that the Hearing Official's weighing of the evidence consistent with Idaho law was problematic.

There is no evidence as to what additional or substitute procedures should have been employed by the Hearing Official, instead Ms. Elias-Cruz argues for a result different than the clear application of Idaho law and advocates for a change in Idaho law based upon arguments which were not made to the Hearing Official or to the District Court. The conclusion of Ms. Elias-Cruz's argument is that it is just unfair to hold a driver under the age of 21 to a .02 breath alcohol content standard. It is just as unfair to hold an adult to a .08 breath alcohol content standard.

The inquiry required by I.C. § 67-5279(3)(a) as to whether the decision of the Hearing Official would "violate due process" does not require an analysis of how evidence is weighed and considered by the Hearing Official.¹¹

¹¹ Such an inquiry is contrary to "judicial review" of issues of fact, I.C. § 67-5277 and the deference due the Hearing Official as to the weight of evidence on questions of fact, I.C. § 67-5279(1).

A Strict application of *McDaniel* does not mean that Ms. Elias-Cruz or any other driver with a .02 could not prove a malfunction of the breath testing instrument. The Court of Appeals has specifically rejected such an analysis, *In the Matter of the Suspension of the Driver's License of Linda Lee Hubbard, Docket No, 38969, Idaho Supreme Court, April 10, 2012.*¹²

There was no proof offered of a malfunction of the breath testing equipment either to the Hearing Official or to the District Court. The .02 standard in and of itself does nothing more than create an evidentiary standard to determine whether someone's conduct subjects them to the statutory requirement that a driver demonstrate the variety of factors set out in I.C. § 18-8002A to avoid a driver's license suspension. Ms. Elias-Cruz could have solicited testimony from Loring Beals as to the circumstances of the operation or malfunction of the Lifeloc FC 20 at the time the test was performed by Ms. Elias-Cruz but did not.

Due process does not require the showing of "actual" blood alcohol content. It is

¹²

Compliance with the ISP's standards for operation of the instrument is not a guarantee that it was operating correctly. Inadequate or incomplete operating standards and procedures could fail to disclose when a testing instrument is not functioning correctly. In *Gibbar*, we interpreted Idaho Code § 18-8002A(7)(c) and (d) "as permitting [administrative license suspension] petitioners to challenge the results of their BAC test by proving that the testing equipment was inaccurate or was not functioning properly because the State has adopted procedures that do not ensure accuracy and proper functioning." *Gibbar*, 143 Idaho 947, 155 P.3d at 1186. Similarly, in *State v. Hartwig*, 112 Idaho 370, 732 P.2d 339 (Ct. App. 1987), we held that although breath test results were properly admitted into evidence at a criminal trial because the State showed that the designated state agency had approved the machine for use and that the machine was operated in compliance with approved standards, the reliability and performance of the machine is still subject to challenge. We stated: "If there is evidence that any particular machine has malfunctioned or was designed or operated so as to produce unreliable results, such evidence would be relevant to both the admissibility and weight of the test results." *Id.* at 375, 732 P.2d at 344. See also *State v. Ward*, 135 Idaho 400, 403-05, 17 P.3d 901, 904-06 (Ct. App. 2001). Thus, compliance with standards approved by the ISP does not preclude a challenge under Idaho Code § 18-8002A(7)(d) that the testing equipment was not functioning properly when the test was administered. Of course, the burden to prove malfunction rests upon the petitioner, as noted above.

Hubbard v. Dept. of Transportation, Idaho Ct. App. April 10, 2012.

clearly within the province of the Legislature to determine whether breath alcohol content demonstrated by the failure of an evidentiary test subjects a driver to an Administrative License Suspension, *McDaniel v. State, Dept. of Transp.* 149 Idaho 643, 239 P.3d 36 (Ct. App. 2010).

V. CONCLUSION

Ms. Elias-Cruz failed to meet her burden pursuant to I.C. § 18-8002A(7) to show that the breath alcohol testing was not performed in conformity with I.C. § 18-8004(4) and the Standard Operating Procedures of the Idaho State Police.

Due process was not argued to the Hearing Official and is not implicated by the hearing process provided to Ms. Elias-Cruz.

The Hearing Official's decision should be affirmed and Ms. Elias-Cruz's driving privileges should be suspended for 90 days.

DATED this 23rd day of April 2012.



Edwin L. Litteneker
Special Deputy Attorney General

I DO HEREBY CERTIFY that a true
And correct copy of the foregoing
Document was:

Mailed by regular first class mail,
And deposited in the United States
Post Office

Sent by facsimile and mailed by
Regular first class mail, and
Deposited in the United States
Post Office

Sent by Federal Express, overnight
Delivery

Hand delivered

To: Patrick D. Costello – Supervising Attorney
Maureen E. Laflin – Supervising Attorney
Catherine Enright – Legal Intern
Aaron J. Tribble – Legal Intern
Legal Aid Clinic
University of Idaho College of Law
P.O. Box 442322
Moscow, Idaho 83844-2322

On this 23 day of April 2012.



Edwin L. Litteneker