

8-19-2013

Peck v. State Dept. of Trans. Respondent's Brief Dckt. 40808

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

Recommended Citation

"Peck v. State Dept. of Trans. Respondent's Brief Dckt. 40808" (2013). *Idaho Supreme Court Records & Briefs*. 4287.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4287

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.

IN THE SUPREME COURT OF THE STATE OF IDAHO

RAYMOND SCOTT PECK,

Appellant,

vs.

STATE OF IDAHO, DEPARTMENT
OF TRANSPORTATION,

Respondent.

DOCKET NO. 40808

BONNER COUNTY CASE
NO. CV-2012-0964

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 JEFF BRUDIE
District Court Judge

Attorney for Appellant

JOHN A. FINNEY
Finney & Finney PA
120 East Lake Street St 317
Sandpoint, ID 83864

Attorney for Respondent

SUSAN K. SERVICK
Special Deputy Attorney General
618 North 4th Street
Coeur d'Alene, ID 83814

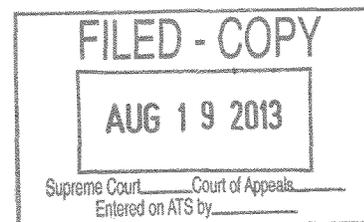


TABLE OF CONTENTS

I.	STATEMENT OF THE CASE	1
	A. Nature of the Case	1
	B. Course of Proceedings	1
II.	STATEMENT OF THE FACTS	1
III.	ISSUES ON APPEAL	2
IV.	ARGUMENT	4
	A. Legal Standard	4
	B. Argument	4
	1. Did the Notice of Suspension violate Peck’s right to procedural due process because it did not inform Peck of the requirements of Idaho Code Section 49-335(2)?	
	2. Did the disqualification of a Commercial Driver’s License violate Peck’s right to substantive due process because he was not operating a commercial vehicle at the time of his arrest?	
	3. Is Peck entitled to attorney fees on appeal?	
V.	CONCLUSION	16

TABLE OF AUTHORITIES

Case Law

<i>Buell v. Idaho Department of Transportation</i> , 151 Idaho 257 (Ct. App. 2011).	8, 9, 15
<i>Canal/Norcrest/Columbus Action Comm. v. City of Boise</i> , 136 Idaho 666, 671, 39 P.3d 606, 611 (2001)	16
<i>Escarcega v. Wyoming Department of Transportation</i> , 153 P.3d 264 (Wyo 2007)	12, 13
<i>In re Suspension of Driver's License of Gibbar</i> , 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2006).	5
<i>Peck v. ITD</i> , 153 Idaho 37, 278 P.3d 439 (Ct. App. 2012)	8, 11
<i>Price v. Payette County Bd. of County Comm'rs</i> , 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).	5
<i>State v. Cooper</i> , 136 Idaho 697 (Ct.App. 2001),	13,
<i>Urrutia v. Blaine County, ex rel. Bd. of Comm's</i> , 134 Idaho 353, 357, 2 P.3d 738, 742 (2000);	5
<i>Williams v. Idaho Department of Transportation</i> , 151 Idaho 257, 254 P.3d 1253 (Ct. App. 2012).	9, 10, 14, 15

Statutes

Idaho Code § 49-335

6, 7, 8, 9, 10, 11, 13, 15

Idaho Code § 18-8002A	6
Idaho Code § 67-5279	3, 4, 5
49 CFR . § 383.51	7

I.
STATEMENT OF THE CASE

A. Nature of the Case

Raymond Scott Peck (herein after Peck) appeals from the District Court's decision upon judicial review affirming the order of the Idaho Transportation Department (hereinafter ITD) which disqualified Peck's commercial driver's license endorsement.

B. Course of Proceedings

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

II.
FACTS OF THE FACTS

On December 2, 2009, Peck was arrested for Driving Under the Influence Bonner County, Idaho. *R. p 14*. Because the BAC results showed a violation of Idaho Code Section 18-8004 the officer issued Peck a notice of suspension of his driver's license and a temporary non-commercial driving permit. See *Peck v. ITD*, 153 Idaho 37, 278 P.3d 439 (Idaho App 2012). Peck challenged the administrative license suspension (ALS) to the Idaho Court of Appeals. *Id.* The Idaho Court of Appeals issued its decision upholding the administrative license suspension on April 30, 2012. *Id.*

On December 15, 2009, the Department mailed Peck a Notice of Disqualification (Notice) because the Department's records show that Peck had failed an evidentiary test for driving under the influence. *Clerk's Record, page 1*. The Notice stated, in part, that the Department was "withdrawing your driving privileges to operate a commercial vehicle for 365 days..." The Notice also invited Peck to request an administrative hearing to contest the action by the Department. *Id.*

On December 30, 2009, Peck, through his attorney requested a hearing on the CDL disqualification. *R., p.2*. On March 1, 2012 Peck also filed a Petition for Stay in Re: CDL Disqualification and proposed Order for a stay in the CDL disqualification. .

The administrative hearing on the CDL disqualification was held May 15, 2012 before hearing officer Michael Howell. At the hearing, the petitioner testified that he was not advised of the consequences to his CDL if he took and failed a BAC test. See *T., p. 4-6*. Peck argued that the CDL disqualification was not proper because the petitioner was not advised of the potential consequences to his CDL if he took and failed the BAC testing. *Id., p. 6-16*. On May 18, 2012 the hearing officer issued his decision, in which he upheld the CDL disqualification for one year. In his decision, the hearing officer correctly wrote and held, in part:

III.

Idaho Code Section 18-8002A provides for the penalties associated with the failure of a blood test but is not intended to be all inclusive of all consequences that may result from an arrest for driving under the influence or for the failure of a blood alcohol test. The Idaho Code and the regulations of the Department of Transportation contain other civil consequences for such action.

VI.

The disqualification of the driver's commercial driving privileges is a consequence unique to commercial drivers that resulted from his failure of the breath test and is in addition to any consequences contained in Idaho Code Section 18-8002A.

VII

The Administrative License Suspension proceedings as set forth in Idaho Code, Section 49-8002A¹ are separated and distinct from and not relevant to the disqualification of commercial driving privileges except the result form the basis of the disqualification in this matter.

VIII

The requirement of notice and the procedure set forth in Idaho Code Section 18-8002A are not affected by or modified by Idaho Code, Section 49-335(2), and there is no additional notice requirement to the statutory notices set forth in

¹ This is an obvious typographical error and should be cited as 18-8002A.

Section 18-8002A as a result of the additional consequences for commercial drivers in Section 49-335(2).

IX.

Idaho Code, Section 49-335 was modified by the state legislature to subject a commercial driver to a disqualification for any conviction of driving under the influence, whether driving a commercial vehicle or not, effective July 1, 2005.

X.

The modification of Idaho Code, Section 49-335 was effective prior to the driver's arrest for driving under the influence, giving him statutory notice of the additional possible consequence prior to his actions which resulted in his conviction and prior to this actual conviction.

XI

The driver argued that the disqualification of his commercial driving privileges pursuant to I.C. Section 49-335(1)(a) is unconstitutional. The very issue of the notice the driver claimed was lacking and a violation of his constitutional rights was specifically addressed by the Court of Appeals in Mr. Peck's appeal to the court. The court stated:

Neither section 18-8002A nor due process requires an officer to inform a person subject to license suspension of the consequences regarding a separate disqualification under section 49-335(2). The notice of consequences contained in section 18-8002A (and reflected in the advisory form) is not deficient simply because it did not inform Peck of consequences under a different statute. *See Buell v. Idaho Dep't of Transp.*, 151 Idaho 257, 264, 254 P.3d 1253, 1260 (Ct.App.2011) (holding a person with a CDL is presumed to have knowledge of the laws governing CDLs, and therefore, Buell " was presumed to know that the disqualification of his CDL was in addition to any suspensions he received under [Title 18]"); *Thompson v. State*, 138 Idaho 512, 516, 65 P.3d 534, 538 (Ct.App.2003) (rejecting an argument that the police officer was obligated to give a driver advice regarding all consequences of taking a breath test, not just those delineated in section 18-8002A). Therefore, Peck's due process rights were not violated. *Peck v. State of Idaho, Department of Transportation, Court of Appeal 2012 Opinion No. 25*, at p. 6.

R., p. 16-19. On June 5, 2012 Peck filed a Petition for Judicial Review. The appeal was heard by the Honorable Jeff Brudie. On February 4, 2013, Judge Brudie correctly upheld the action of ITD and affirmed the decision of the hearing officer. *R.* p. 117.

III. CHARACTERIZATION OF THE ISSUES

The issues on appeal are stated as follows:

1. Did the Notice of Suspension violate Peck's right to procedural due process because it did not inform Peck of the requirements of Idaho Code Section 49-335(2)?
2. Did the disqualification of a Commercial Driver's License violate Peck's right to substantive due process because he was not operating a commercial vehicle at the time of his arrest?
3. Is Peck entitled to attorney fees on appeal?

IV. ARGUMENT

A. STANDARD OF REVIEW ON THE PETITION FOR REVIEW

In this appeal the burden of proof is on Peck. In order to vacate or remand the decision of the hearing officer, Peck must establish that the decision of the hearing officer was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion.

Generally, in a Petition for Judicial Review, the court reviews the agency's underlying decision. The scope of review is such that "[t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." Idaho Code Section 67-5279. The scope of review is such that this Court must uphold the hearing officer's conclusions of law unless those conclusions of law fall within the enumerated violations set forth in Idaho Code Section 67-5379 (3) (a-e).

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270 and *In re Suspension of Driver's License of Gibbar*, 143 Idaho 937, 155 P.3d 1176 (Ct. App. 2006). In an appeal from the decision of the district court acting in its appellate capacity under IDAPA, this Court reviews the agency record independently of the district court's decision. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App.2002). This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 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's*, 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). 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).

B. IDAHO LAW AND FEDERAL LAW

Generally, Idaho Code § 18-8002A prescribes the penalties governing all aspects of a motorist's driving privileges in the event that the motorist submits to, but fails, evidentiary testing. I.C. § 18-8002A(4)(a). The suspension is imposed by ITD and the statute provides for administrative review of the suspension. I.C. § 18-8002A(4), (7). This is commonly referred to as an Administrative License Suspension (ALS).

Idaho's motor vehicle code prescribes additional consequences which result from a motorist's refusal to submit to evidentiary testing or failing such testing. On July 1, 2007 Idaho Code Section 49-335 was modified to subject a driver with a CDL to disqualification if the driver fails a test for alcohol whether the person is operating a commercial vehicle or not. These additional consequences solely relate to the ability to operate commercial vehicles pursuant to Idaho Code § 49-335(2). This is commonly known as a CDL disqualification.

The disqualification of Peck's CDL was pursuant to Idaho Code § 49-335. Idaho Code § 49-335 provides in pertinent part as follows:

- (1) Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if convicted in the form of a judgment or withheld judgment of a first violation under any state or federal law of:
 - (a) Operating a motor vehicle while under the influence of alcohol or a controlled substance;

* * *

(2) Any person who operates a commercial motor vehicle or who holds a class A, B or C driver's license is disqualified from operating a commercial motor vehicle for a period of not less than one (1) year if the person refuses to submit to or submits to and fails a test to determine the driver's alcohol, drug or other intoxicating substances concentration while operating a motor vehicle.

* * *

(4) A person is disqualified for the period of time specified in 49 CFR part 383 if found to have committed two (2) or more of any of the offenses specified in subsection (1) or (2) of this section, or any combination of those offenses, arising from two (2) or more separate incidents. [emphasis added].

In 1999, Congress passed the Federal Motor Carrier Safety Improvement Act, which included provisions requiring that the holder of a CDL be prohibited from driving a commercial motor vehicle if he or she has been convicted of certain violations of a state's motor vehicle laws. 49 C.F.R. § 383.51 identifies the offenses that "disqualify" the holder of a CDL from driving a commercial motor vehicle. A state that fails to comply with this federal mandate risks losing federal highway funds. Pursuant to 49 CFR 383.51 of the Federal Motor Carrier Safety Administration a first incident required that the holder of CDL must be disqualified from operating a commercial motor vehicle for one year. A copy of 49 CRF 383.51 is attached as Exhibit 1. Therefore, the disqualification of Peck's CDL is required by both Idaho State Law and Federal Regulation.

C. SUSTANTIVE AND PROCEDURAL DUE PROCESS

Peck argues that his right to procedure and/or substantive due process was violated by the CDL disqualification at issue in this matter.² Petitioner's argument is without legal or factual basis.

In the prior ALS appeal, Peck argued that due process was violated due to defects in the notice given to Peck prior to the evidentiary testing. *Peck v. ITD*, 153 Idaho 37, 278 P.3d 439 (Ct. App. 2012) footnote 2. In that case, the Court of Appeals explained the difference between substantive due process and procedural due process. *Id.* Substantive due process means that the reason for depriving the driver's license cannot be arbitrary. *Id.* A challenge to the license suspension procedure and advisory is a procedural due process claim. *Id.*

1. PROCEDURAL DUE PROCESS:

THE PROCEDURE AND THE ADVISORY ARE LAWFUL

Peck argued that the advisory given to him failed to adequately advise him of all his rights, and it therefore constitutionally defective. As discussed below, this argument lacks merit.

Issues regarding the constitutionality of a CDL disqualification were brought to the Idaho Court of Appeals recently in *Buell v. Idaho Department of Transportation*, 151 Idaho 257 (Ct. App. 2011). Buell first argued that the CDL disqualification violated the principles of double jeopardy. This argument was rejected by the Court of Appeals. Buell then argued that his due process rights were violated because I.C. §§ 18-8002, 18-8002A, and 49-335 are ambiguous and did not adequately notify him of when his

² Peck does not distinguish whether he argues a violation of the Due Process Clause of the United States Constitution or Idaho Constitution; however, the due process guarantees in each are substantially the same. See *Peck v ITD*, 153 Idaho 37, 278 P.3d 439 (Ct. App. 2012) at footnote 2.

CDL disqualification would begin. The Court of Appeals also rejected this argument, stating:

Idaho Code Sections 18-8002 and 18-8002A are part of the criminal code. Idaho Code Section 18-8002 provides for suspension of a noncommercial driver's license when a driver has refused to submit to an evidentiary BAC test. Idaho Code Section 18-8002A provides for the suspension of a driver's license when a driver has failed an evidentiary BAC test. The motor vehicle code prescribes additional consequences that result from a motorist's refusal to submit to evidentiary testing or for failing such testing. I.C. § 49-335. Idaho Code Section 49-335(1)(a) provides that a CDL holder will be disqualified from operating a commercial vehicle for one year if convicted of driving under the influence. Idaho Code Section 49-335(2) provides that a CDL holder will be disqualified from operating a commercial vehicle for one year if the person refuses to submit to or fails a BAC evidentiary test. A disqualification under I.C. § 49-335 is in addition to a suspension under I.C. §§ 18-8002 or 18-8002A and relates solely to the driver's CDL. A holder of a CDL is presumed to have knowledge of the laws governing CDLs. *See Wilson v. State*, 133 Idaho 874, 880, 993 P.2d 1205, 1211 (Ct.App.2000). Therefore, Buell was presumed to know that the disqualification of his CDL was in addition to any suspensions he received under either I.C. §§ 18-8002 or 18-8002A.

Id. Likewise, in this case, CDL drivers, like the petitioner, are presumed to know that the disqualification of his CDL was an additional penalty to him for failing a BAC test.

Additional issues regarding the constitutionality of Idaho CDL disqualification were brought before the Idaho Court Appeals in *Williams v. Idaho Department of Transportation*, 151 Idaho 257, 254 P.3d 1253 (Ct. App. 2012). In *Williams*, the petitioner was contesting a hearing officer's decision to disqualify Williams for life from holding a CDL because of a second conviction for driving under the influence. Williams raised several constitutional arguments against the action by ITD. Williams argued that his due process rights were violated because he was not notified that his CDL would be suspended if took and failed the BAC test. The Court of Appeals rejected this argument. The Court first outlined the burden of proof and stated:

Where the constitutionality of a statute is challenged, we review the lower court's determination de novo. *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003); *State v. Martin*, 148 Idaho 31, 34 218 P.3d 10, 13 (Ct. App. 2009). The party attacking a statute on constitutional grounds must overcome a strong presumption of validity. *Korsen*, 138 Idaho at 711, 69 P.3d at 131; *Martin*, 148 Idaho at 34, 218 P.3d at 13. Appellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality. *Korsen*, 138 Idaho at 711, 69 P.3d at 131; *Martin*, 148 Idaho at 34, 218 P.3d at 13.

The Court of Appeals continued, addressing the petitioner's argument:

A statute may be challenged as unconstitutionally vague on its face or as applied to a complainant's conduct. *Korsen*, 138 Idaho at 712, 69 P.3d at 132; *Martin*, 148 Idaho at 35, 218 P.3d at 14. Here, Williams does not make a facial challenge, but contends only that the statute is impermissibly vague as applied to him. To succeed on an "as applied" vagueness challenge, a complainant must show that the statute failed to provide fair notice that the complainant's specific conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to charge the complainant. *Martin*, 148 Idaho at 35, 218 P.3d at 14.

Williams argues that he was not adequately notified of the consequences of submitting to the tests as required by I.C. § 18-8002. In denying Williams' claim that the statute was void for vagueness, the district court stated:

This issue was recently addressed, in part, by the Idaho Supreme Court in *Wanner v. ITD*, 150 Idaho 164, 244 P.3d 1250 (2011), wherein the Idaho Supreme Court held that a § 18-8002A suspension governs driving privileges in toto, while an I.C. § 49-335 suspension applies to a particular subset of driving privileges, i.e. the right to operate a commercial vehicle. Further the Idaho Court of Appeals addressed a similar argument in *Buell*, supra. There, *Buell* argued that his due process rights were violated because I.C. §§ 18-8002, 18-8002A, and 49-335 are ambiguous and did not adequately notify him of when his CDL disqualification would begin. The Idaho Court of Appeals held that I.C. §§ 18-8002 and 18-8002A are criminal statutes and address suspension of non-commercial licenses. Further, I.C. § 49-335 prescribes additional consequences that result from a motorist's refusal to take or the failure of an evidentiary test. The *Buell* court held that a disqualification under I.C. § 49-335 is in addition to a suspension under I.C. §§ 8002 and 8002A.

A holder of a CDL is presumed to have knowledge of the laws governing CDLs. *Wilson v. State*, 133 Idaho 874, 880, 993 P.2d 1205, 1211 (Ct. App. 2000). Williams argues that at no time was he informed that his CDL would be suspended for his lifetime if he failed the breath testing. The

record shows that Williams was provided the required notifications as required by I.C. § 18-8002A.

Williams was presumed to know that the disqualification of his CDL was in addition to any suspensions he received under I.C. §§ 18-8002 or 18-8002A. Williams was also presumed to know the consequences if he was convicted of any of the offenses listed in I.C. § 49-335(1) or refused to submit to or failed an evidentiary test pursuant to I.C. § 49-335(2). He was also presumed to know that his CDL would be suspended for life for two or more major events as specified in I.C. § 49-335(1) or (2).

This Court finds that I.C. §§ 18-8002, 18-8002A and 49-335 are not void for vagueness. There is no legal requirement that an arresting officer provide notice of all the collateral effects that a breath test failure will have on one's CDL endorsement. As a holder of a CDL, Williams was presumed to have such knowledge.

In this case, there was no violation of Peck's right to procedural due process. Peck argues that the Notice of Suspension was not adequate because it failed to inform him of the provisions and consequences of Idaho Code § 49-335(2). Peck does not argue that he did not receive the admonitions required by Idaho Code §§ 18-8002 and 18-8002A. Instead, he invites this Court to add language to those code sections by including other consequences to the Suspension Advisory form. This Court should decline the invitation. Idaho law does not require that a driver be informed of every single consequence of the failure of an evidentiary test. Specifically, Idaho Code §§ 18-8002 and 18-8002A do not require law enforcement officers to inform drivers of every potential consequence of failing the evidentiary test. In fact, in *Peck v. ITD*, the Idaho Court of Appeals held:

In regards to whether Peck was afforded procedural due process relating to his license *suspension* by the notice actually given, Peck does not argue the notice of suspension advisory form was ambiguous or did not completely advise him of his rights and duties under section 18-8002A. In fact, the advisory form specifically provided all information required by section 18-8002A and gave him notice of the license suspension and the procedures afforded to him to challenge it. Neither

section 18-8002A nor due process requires an officer to inform a person subject to license suspension of the consequences regarding a separate disqualification under section 49-335(2). The notice of consequences contained in section 18-8002A (and reflected in the advisory form) is not deficient simply because it did not inform Peck of consequences under a different statute. *See Buell v. Idaho Dep't of Transp.*, 151 Idaho 257, 264, 254 P.3d 1253, 1260 (Ct.App.2011) (holding a person with a CDL is presumed to have knowledge of the laws governing CDLs, and therefore, Buell " was presumed to know that the disqualification of his CDL was in addition to any suspensions he received under [Title 18]"); *Thompson v. State*, 138 Idaho 512, 516, 65 P.3d 534, 538 (Ct.App.2003) (rejecting an argument that the police officer was obligated to give a driver advice regarding all consequences of taking a breath test, not just those delineated in section 18-8002A). Therefore, Peck's due process rights were not violated.

Id., page 445.

In its decision, the District Court also cited a case from the state of Wyoming, noting the similarities of the DUI laws. In *Escarcega v. Wyoming Department of Transportation*, 153 P.3d 264 (Wyo 2007) stated:

It would be impractical to require that an arresting officer convey all the information in both statutory schemes to an arrestee before requesting a specimen for chemical testing. The implied consent and various driver's license statutes contain multiple interrelated provisions for penalties that may be heightened or vary according to the circumstances of each violation. To require a detailed recitation of all statutory penalties involved in a traffic stop would be a misuse of law enforcement resources and would not serve the purpose of the implied consent statutes. The implied consent law was intended as a complement to the DWUI statute and was designed to facilitate tests for intoxication, not to inhibit the ability of the state to keep drunk drivers off the road. *Chastain*, 594 P.2d at 461.

Implied consent is, by nature, implied in law. Merely by choosing to drive a motor vehicle on the roads of this state, a driver agrees to submit to chemical testing in the event of his arrest for DWUI. The consequences for refusing a chemical test are published law, of which every citizen is presumed to have knowledge. *See Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991). The Legislature has created a few limited exceptions to that rule by requiring that specific warnings be given to drivers in certain situations before penalties can be imposed. Appellant here was given the precise warning required by the applicable statutes for a driver stopped in a non-commercial vehicle. He was entitled to no more and no less

Id., at page 270. In the Peck Decision, the District Court then explained:

The DUI statutory scheme enacted by Idaho's legislature, like that of Wyoming's, contains "multiple interrelated provision for penalties that may be heightened or way according to the circumstances of each violation." Idaho Code Section 49-335, which provides for disqualification and penalties relative to commercial driver's licenses, is referenced with I.C. § 18-8005 of Idaho's DUI scheme. However, the legislature chose not to reference I.C. § 49-335 within the mandatory notice provision provided in I.C. § 18-8002A(2). Idaho legislature set forth in I.C. § 18-8002A(2) the specific consequences a driver must e informed about prior to a law enforcement officer's request that a driver perform evidentiary testing subject to a DUI arrest. While the notification may not cover all potential consequences of refusing to submit to evidentiary testing or of failing evidentiary testing, it is all that Idaho's legislature has required, no more and no less.

R., p.123.

Peck also argued "implied consent" and that "implied consent required notice of one' rights and the consequences". Petitioner's brief page 8. This is a misstatement of the doctrine of "implied consent." The concept of implied consent in Idaho is explained in *State v. Cooper*, 136 Idaho 697 (Ct.App. 2001), where the court stated:

Consent is a well-recognized exception to the Fourth Amendment's warrant requirement. *State v. Rodriguez*, 128 Idaho 521, 523, 915 P.2d 1379, 1381 (Ct.App.1996). Idaho's driver licensing scheme provides, as a condition of possessing a valid license, that a driver of a motor vehicle is deemed to have consented to an evidentiary test for blood alcohol concentration where there are reasonable grounds to believe that the person has been driving or in actual physical control of a motor vehicle in violation of the DUI laws. Idaho Code § 18-8002(1); *McNeely v. State*, 119 Idaho 182, 187, 804 P.2d 911, 916 (Ct.App.1990); see also *South Dakota v. Neville*, 459 U.S. 553, 559, 103 S.Ct. 916, 920, 74 L.Ed.2d 748, 755-56 (1983).

Id., page 699.

In support of his arguments, Peck cited in *Matter of Virgil*, 126 Idaho 946, 947, 895 P.2d 183 (Ct. App. 1995). That case is distinguishable to the facts and law of this case. In the *Virgil* case, the defendant successfully argued that an administrative license suspension imposed by a magistrate pursuant to Idaho Code Section 18-8002 must be set

aside because the Twin Falls Police Department's advisory form was defective and did not comply with the statutory language of Idaho Code Section 18-8002(3).³

Here, the Court of Appeals has already held that the Advisory Notice given to Peck at the time of his arrest "specifically provided him notice of the license suspension and the procedures afforded to him to challenge it." Therefore, unlike the Virgil case, the Notice given to Peck was not defective.

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 is not necessary and the Notice of Suspension given to Peck complied with Idaho law.

2. SUBSTANTIVE DUE PROCESS: CDL DISQUALIFICATION IS NOT ARBITRARY

Peck also argues that his substantive due process rights were violated because the CDL disqualification was arbitrary in that "the underlying conduct has no relation to the disqualified conduct of operating a commercial motor vehicle." This argument is also without merit.

In *Williams v. ITD*, 151 Idaho 257, 254 P.3d 1253 (Ct. App. 2012), the Court of Appeals addressed a similar argument. In *Williams*, the petitioner argued that the CDL disqualification violated principles of Double Jeopardy. In addressing this argument, the Court dealt with the question as to whether the disqualification was excessive. The Court stated the following:

³ Idaho Code Section 18-8002(3) has been amended since the Virgil case. The Notice provisions are now contained 18-8002A.

Sixth, we must consider whether there is a purpose, other than punishment, that could be assigned to the lifetime CDL disqualification and whether the disqualification is excessive in relation to the alternative purpose assigned to it. As noted above, the purpose of I.C. § 49-335 is to remove problem drivers from the road through disqualification. Statement of Purpose, SB 1001 (1989). The right of a citizen to operate a motor vehicle is substantial, but it is also subject to reasonable regulation by the State in the exercise of its police powers. Talavera, 127 Idaho at 705, 905 P.2d at 638. When a person is approved for a CDL, he or she agrees to abide by certain conditions and regulations. *Id.* The commercial driving industry is highly regulated because of the size and weight of commercial vehicles and the heightened danger they pose to the public should they be misused. Impaired commercial drivers pose a unique danger to the public because of the type of vehicles they operate. Therefore, disqualification of a CDL indicates only that the holder has failed to comply with the agreed conditions, not that he or she is being punished for a particular act. *Id.*

The *Williams* Court went on to hold that “the lifetime disqualification from driving a commercial vehicle is not disproportionate to the statute's legitimate remedial goal of keeping problem drivers with multiple alcohol violations off the roadways.”

The holding in *Williams* is consistent the Court of Appeal holding in *Buell* where the Court held a one-year disqualification from driving a commercial vehicle was not disproportionate to the statute's legitimate remedial goal of keeping problem drivers off the roadways. *Buell*, page 1260.

The District Court reviewed this issue and correctly found that:

Peck failed to demonstrate that I.C. Section 49-335 is arbitrary or that it bear no rational relationship to any legitimate legislative objective. Therefore, Petitioner’s assertion that his substantive due process rights were violated is without merit.

Clerk's Record, page 124.

In this case, there was no violation of Peck’s right to substantive due process because the action by ITD is not arbitrary. Because of the size and weight of vehicles operated by a CDL driver, the industry is highly regulated. As the Idaho Court of Appeals has held, persons who hold a CDL endorsement agree to abide by certain

conditions and regulations to obtain and keep the endorsement. The additional regulation on CDL drivers is directly related to the unique danger to the public because of the types of vehicles they operate. Thus, CDL drivers are also subject to reasonable regulation by the State including a one year disqualification for an alcohol violation in a non-commercial vehicle.

V.

NO ATTORNEY FEES

Peck has also requested an award of attorney fees on this appeal. This argument is also without merit. To award attorney fees, 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.

VI.

CONCLUSION

ITD respectfully requests that the court uphold the decision of the District Court and of the hearing officer which sustained CDL disqualification. ITD also requested the court remand the matter to the District Court to vacate the stay of the CDL disqualification.

Dated August 13, 2013.


Susan K. Servick
Special Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the BRIEF was transmitted, August 13, 2013 by the following method, to:

JOHN A. FINNEY
Attorney at Law
120 East Lake Street, Suite 317
Sandpoint, ID 83864
Fax: 208 263-8211

Fax
 US Mail


Susan K. Servick