

container in the center console that was three quarters full and that appeared to be fresh. He also observed Appellant was wearing an orange wristband like those distributed at a local bar, and that Appellant's eyes were bloodshot, her speech was slurred, and there was a strong odor of alcohol coming from the vehicle. Trooper Horton asked Appellant to step out of the vehicle at which time he could smell alcohol emanating from her person; Appellant admitted that she was consuming alcohol at a bar as well as at a friend's house. Trooper Horton proceeded with the standardized field sobriety tests and, based upon his observations of Appellant and other indications of intoxication, arrested Appellant for driving under the influence (DUI).

Appellant was transported to the Spartanburg County Detention Center where she was placed in a breath analysis room. Trooper Horton initiated and advised Appellant that a video recording system was activated. Trooper Horton orally advised Appellant of her implied consent rights, with a written copy also provided. Appellant agreed to submit to a breath test using the DataMaster machine. Trooper Horton instructed Appellant on how to provide an adequate breath sample, advising Appellant to take a long deep breath and breathe into the machine's mouthpiece until told to stop. He further advised Appellant that an intermittent tone was indication that an adequate breath sample was not being provided whereas "a long steady tone is what we're listening for, and that [Appellant] [] would be able to hear that tone if she was blowing properly." (R. 28:8-14). Appellant acknowledged her understanding. Trooper Horton acknowledged that Appellant did not delay the start of the test nor interfere with his advisement of her rights and warnings. (R. 40:3-18). Following the required twenty-minute observation period, Trooper Horton passed the DataMaster to Appellant to begin the test.

During the hearing, Trooper Horton indicated that during the two-minute testing period Appellant "bl[e]w in, at times she would stop, at times she would breathe in and exhale again and again." (R. 28:17-20). He further opined that Appellant attempted to delay the administration of the breath test because most people are able to complete the test in less than two minutes. (R. 39:3-9, 16-18). Accordingly, Trooper Horton indicated to the machine that Appellant refused the test. He confirmed that after explaining to Appellant that a refusal had been recorded, Appellant challenged him, stating several times that **she did take the test and she did not refuse to take the test.** (Emphasis added).

ISSUE ON APPEAL

Did the OMVH Hearing Officer correctly sustain the suspension of Appellant's driving privileges upon finding that Appellant constructively refused a breath test as provided for by S.C. Code Ann. §56-5-2950.

STANDARD OF REVIEW

The OMVH is authorized by law to determine contested cases arising from the Department. S.C. Code Ann. § 1-23-600 (2005 & Supp. 2022). The OMVH is regarded as an "agency" under the Administrative Procedures Act (APA), thus providing the ALC jurisdiction over appeals of OMVH decisions. S.C. Code Ann. §§ 1-23-310(2) and -660(D) (2005 & Supp. 2022); *S.C. Dep't of Motor Vehicles v. Holtzclaw*, 382 S.C. 344, 341, 675 S.E.2d 756, 758 (Ct. App. 2009) ("[t]he DMVH [subsequently renamed OMVH] is an agency under the [APA].").

When acting in its appellate capacity, the Court's review is generally limited to the Record on Appeal. S.C. Code Ann. §§ 1-23-310(2) and 1-23-380; *see also, Byerly Hosp. v. South Carolina State Health & Human Services Finance Com'n*, 319 S.C. 225, 229, 460 S.E.2d 383, 385 (1995). Subsection 1-23-380(5) of the South Carolina Code (Supp. 2022) provides the standard of review to be utilized by appellate bodies when reviewing agency decisions. *See* § 1-23-600(E) (directing administrative law judges to conduct appellate review in the same manner prescribed in section 1-23-380). Pursuant to this standard:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

§ 1-23-380(5).

An appeal from an action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 212, 394 S.E.2d

842 (1990). A decision is supported by "substantial evidence" when the record as a whole allows reasonable minds to reach the same conclusion as the agency. *Friends of the Earth v. Public Service Com'n of South Carolina*, 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010); *Bilton v. Best Western Royal Motor Lodge*, 282 S.C. 634, 641, 321 S.E.2d 63, 68 (Ct. App. 1984). In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996) (citing *Kearse v. State Health & Human Services Fin. Com'n*, 318 S.C. 198, 200, 456 S.E.2d 892, 893 (1995)). The fact that the record presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Waters v. S.C. Land Resources Conservation Com'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996); *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995); *Bilton*, 282 S.C. at 641, 321 S.E.2d at 68 (citing *Lark v. Bi-Lo*, 276 S.C. 130, 276 S.E.2d 304 (1981)). "A reviewing court will not overturn a finding of fact by an administrative agency 'unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 603-04, 550 S.E.2d 287, 292 (2001) (quoting *Lark*, 276 S.C. at 136, 276 S.E.2d at 307 (1981)). The party challenging an agency action has the burden of proving convincingly that the agency's decision is unsupported by substantial evidence. *Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

DISCUSSION

In reaching the conclusion that Appellant "constructively refused" to submit to a breath test, the OMVH Hearing Officer reasoned that the unacceptable breath test was rendered by Appellant's failure to comply with Trooper Horton's instructions. The OMVH Hearing Officer noted that, unlike the driver in *Chisolm v. S.C. Dep't of Motor Vehicles*, Appellant did not produce a steady tone on the DataMaster, demonstrated a lack of effort to "try any harder to take deep breaths as instructed, nor make an affirmative request to retake the test. 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). Substantial evidence does not support the OMVH Hearing Officer's determination, thus, the agency decision must be reversed. See *Pines Ass'n for Prot. Of Wildlife Inc., supra*.

Section 56-5-2950(A) (2018) provides:

A person who drives a motor vehicle in this State is **considered to have given consent** to chemical tests of the person's breath, blood, or urine for the purpose of determining the presence of alcohol, drugs, or the combination of alcohol and drugs, if arrested for an offense arising out of acts alleged to have been committed while the person was driving a motor vehicle while under the influence of alcohol, drugs, or a combination of alcohol and drugs. A breath test must be administered at the direction of a law enforcement officer who has arrested a person for driving a motor vehicle in this State while under the influence of alcohol, drugs, or a combination of alcohol and drugs. At the direction of the arresting officer, the person first must be offered a breath test to determine the person's alcohol concentration. ... The breath test must be administered by a person trained and certified by the South Carolina Criminal Justice Academy, pursuant to SLED policies.

(Emphasis added); *cf. Town of Mount Pleasant v Shaw*, 315 S.C. 111, 432 S.E.2d 450 (1993) (purpose of breathalyzer advisory is to inform driver of serious consequences of refusal).

Subsection 56-5-2950(B)(1) goes on to provide that:

No tests may be administered or samples obtained unless, upon activation of the video recording equipment and prior to the commencement of the testing procedure, the person has been given a written copy of and verbally informed that:

- (1) the person does not have to take the test or give the samples, but that the person's privilege to drive must be suspended or denied for at least six months with the option of ending the suspension if the person enrolls in the Ignition Interlock Device Program, if the person refuses to submit to the test, and that the person's refusal may be used against the person in court; ...

While not required, a driver's refusal to submit to a breath test will result in suspension of a driver's license *See* § 56-5-2951. Refusal is not defined by statute, but rather must be determined by the facts and circumstances of each case. SLED Policy 8.12.5(F)(4) informs, however, that a refusal can occur when:

- a. The subject expresses a refusal to take the test after being advised of his/her implied consent rights.
- b. The subject refuses to cooperate or interferes with the administration of the test.

c. The subject acts unruly while the test is being administered. This includes the entire process from the time the subject encounters the operator until the test is complete.

d. The subject delays the administration of the test. The test operator is not required to wait until an attorney or other individual arrives at the test site.

e. The subject does not cooperate in the checking of his/her mouth. This includes, but is not limited to, failure to open mouth, failure to accurately answer questions about foreign material and/or dental work, and failure to remove foreign material and/or removable dental work.

f. The subject ingests prohibited substances during the observation period. This prohibition includes smoking during the observation period.

g. The subject intentionally regurgitates or refuses to rinse out his/her mouth after unintentional regurgitation.

h. The subject refuses to answer or incorrectly answers biographical information required by the operator. The operator, may at his/her discretion, test a subject without complete biographical information, as long as the operator has sufficient information to identify the subject.

i. The subject does not attempt to blow, pretends to blow, or does not blow an adequate sample, as determined by the instrument. Any subject will be able to provide an adequate sample, as determined by the instrument.

j. The subject intentionally causes the instrument to have an error or failure.

SLED Policy 8.12.5(L); *see also*, *Chisolm*, 402 S.C. at 598, 741 S.E.2d at 45. (SLED authorized to make policies and provisions to effectuate the implied consent statute). SLED Policy further provides:

If an acceptable breath sample is not provided in two minutes, the instrument will display "Did the subject refuse?" When question is prompted, press the touch-screen icon, "Yes" or "No." If "Yes" is answered, the instrument will print "REFUSED" by "SUBJECT SAMPLE", after the final steps of the operational protocol are completed. This is considered a completed test and signature lines

will be printed on the Breath Alcohol Analysis Test Report/Evidence Ticket. If "No" is answered, the test will abort and the instrument will print "INCOMPLETE SUBJECT TEST" on the Breath Alcohol Analysis Test Report/Evidence Ticket. An "INCOMPLETE SUBJECT TEST" reading, by itself, is not a refusal situation. (A "NO" should only be entered if the subject failed to provide an acceptable breath sample through no fault of his/her own.) In the event of an "INCOMPLETE SUBJECT TEST", the breath test sequence may be repeated, except the advisement process is not required to be repeated. This is not a completed test and no signature lines will be printed.

(Emphasis added). The OMVH carries the burden of proof to show that the driver refused to take the breath test. *Chisolm, supra; S.C. Dep't of Motor Vehicles v. McCarson*, 391 S.C. at 149, 705 S.E.2d at 431.

When, as is the case here, a driver submits to a breath test but produces an unacceptable breath sample, the inquiry shifts to whether the driver was at fault for the unacceptable test; thus amounting to constructive refusal. Here, substantial evidence does not support that Appellant constructively refused the breath test. The testimony unequivocally reveals that Appellant not only submitted to the breath test but actively blew into the DataMaster in an effort to produce an adequate breath sample. There is no evidence that Appellant acted unruly, no evidence that she delayed the administration of the test, no indication that she did not cooperate in the checking of her mouth, no evidence of her having ingested prohibited substances during the observation period nor intentionally regurgitated, no evidence that Appellant refused to answer or incorrectly answer biographical information, nor evidence of Appellant intentionally causing the instrument to have an error or failure. In fact, Trooper Horton acknowledged that Appellant willfully submitted to the test without having delayed its administration.¹ And while the inadequate sample may have been a result of Appellant's intermitted breathing there is no evidence that she acted willful to thwart the administration of the breath test. On direct. Appellant reiterated that it was her intention to give a breath sample. She stated that she kept "blowing, kept blowing, kept blowing, tried to get a little like harder or stronger. ... [[Trooper Horton] didn't tell me I was doing it, like, wrong

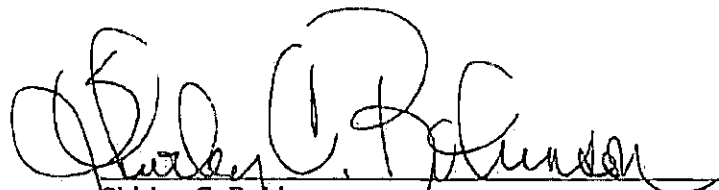
¹ The Court notes that Trooper Horton's testimony suggests that the sole basis for his recording of a refusal was that notwithstanding her attempt, most people are able to complete the breath test in less than two minutes. Trooper Horton's opinion is certainly unreasonable as what would otherwise be the logic of allotting two minutes for the administration of the test. Moreover, SLED policies are subservient to subsection 56-5-2951(A). As such, without other evidence suggesting a refusal, the amount of time it takes a driver to complete a breath test is not determinative as to whether a constructive refusal has occurred.

... I thought I was doing it correctly the whole time." (R. 55:25-56:7). Appellant's testimony is further corroborated by the video recording which shows that during the two-minute administration of the breath test, Appellant produced nine steady tones, ranging in length from two to thirteen seconds. Trooper Horton did not instruct Appellant how long the steady tone must last but rather only that a steady tone was indication that she was properly completing the test correctly. *Id.* at 606, 741 S.E.2d at 50. Moreover, similar to Chisolm's request to take a second breath test, Appellant's immediate challenge to Trooper Horton's advisement that a refusal was recorded, provides further evidence that Appellant did not refuse the test. *Id.*

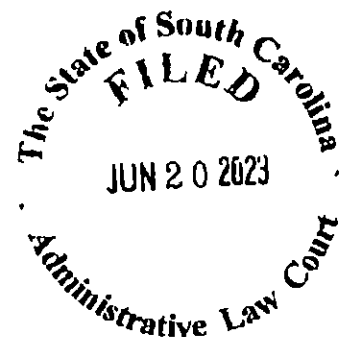
ORDER

IT IS HEREBY ORDERED that the Order and Decision of the Office of Motor Vehicle's Hearing Officer sustaining the Department of Motor Vehicles' suspension of the Appellant's driver's license and privileges is **REVERSED**.

AND IT IS SO ORDERED.



Shirley C. Robinson
Administrative Law Judge

June 20, 2023
Columbia, South Carolina



CERTIFICATE OF SERVICE

I, Shanice Hagood, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



Shanice Hagood
Judicial Law Clerk

June 20, 2023
Columbia, South Carolina

