

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM ADMINISTRATIVE LAW COURT **SC Court of Appeals**

The Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 22-ALJ-21-0333-AP

Breyonna Jeter Respondent,

v.

South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

INITIAL BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1) DID THE ADMINISTRATIVE LAW COURT ERRONEOUSLY ENGAGE IN A REWEIGING OF THE EVIDENCE IN THIS CASE IN VIOLATION OF S.C. CODE §1-23-380?

STATEMENT OF THE CASE

This matter comes before the Court of Appeals pursuant to the appeal of the South Carolina Department of Motor Vehicles (hereinafter, “SCDMV” or “DMV”), who seeks review of the June 20, 2023, Order from the Administrative Law Court (hereinafter, “ALC”) which reversed the Office of Motor Vehicle Hearings (OMVH) Final Order. The Appellant, SCDMV seeks to have the ALC’s Final Order overturned and the OMVH *Final Order and Decision* issued August 17, 2022, reinstated in full.

On May 8, 2022, at approximately 4:18 a.m., Trooper Horton of the South Carolina Department of Public Safety (hereinafter “SCDPS”) was on routine patrol and was sitting stationary on US 176. ALC R. p. 9, lines 19-22. Trooper Horton observed a vehicle speeding on US176 which had a 35 miles per hour posted speed limit. ALC R. p. 10, lines 3-10. Trooper Horton estimated a speed of approximately 75 miles per hour. ALC R. p. 10, lines 10-11. Trooper Horton utilized his speed measurement device and confirmed the vehicle was traveling at a speed of 76 miles per hour in a 35 mile per hour posted speed limit zone. ALC R. p. 10, lines 11-22. Trooper Horton initiated a traffic stop and noticed the vehicle continue to speed. ALC R. p. 11, lines 11-14. The vehicle abruptly changed lanes and traveled a slight distance before stopping at a gas station. ALC R. p. 11, lines 17-21.

There were two occupants in the vehicle and the Respondent was the driver. ALC R. p. 11, line 25; ALC R. p. 12, lines 1-8. Upon making contact with Respondent,

Trooper Horton observed a 40-ounce beer in the center console that was three quarters full, fresh, and cold. ALC R. p. 13, lines 10-15. Trooper Horton also observed Respondent wearing an orange wristband consistent with those distributed at a local bar. ALC R. p. 13, lines 17-25. Trooper Horton further observed that Respondent's eyes were bloodshot, glassy, glossy, and watery, observed that Respondent's speech was slurred and slow, was slow to respond or reply, if at all. ALC R. p. 14, lines 1-7. Trooper Horton noticed a very strong odor of alcohol coming from the vehicle and asked Respondent to step out of the vehicle. ALC R. p. 14, lines 7-11. Once Respondent was out of the vehicle, Trooper Horton could smell alcohol on Respondent's person. ALC R. p. 15, lines 7-11. Respondent admitted consuming alcohol at the bar, drinking at a friend's house, and that she was on her way to her aunt's house. ALC R. p. 15, lines 14-19.

Trooper Horton asked Respondent to participate in standardized field sobriety tests ("SFSTs"), which Respondent agreed. ALC R. p. 15, lines 21-24. Based on his observations of Respondent's driving, behavior once stopped, and other indicators of intoxication, Trooper Horton arrested Respondent for Driving Under the Influence. ALC R. p. 22, lines 11-14.

Following her arrest, Respondent was transported to the Spartanburg County Detention Center for a DataMaster DMT test (hereinafter "DataMaster"). ALC R. p. 24, lines 11-12. Trooper Horton provided a printed copy of the Advisement of Implied Consent Rights to Respondent and read those rights out loud to Respondent. ALC R. p. 25, lines 11-22 and ALC R. p. 97. The reading of the Advisement of Implied Consent Rights was captured on video recording in the breath testing room as well as all other events that occurred. ALC R. p. 25, lines 5-10. Trooper Horton instructed the Respondent

that a long steady tone by the DataMaster machine is what is needed to indicate a proper sample and that there would be an intermittent beep that would break up if the sample was not sufficient. ALC R. p. 28, lines 8-16.

When it was time for a breath sample to be provided, Respondent acted as if she was actively blowing into the machine. However, at times she would appear blow in, at times she would stop, at times she would breathe in and exhale again, but failed to ever produce a steady tone, which would indicate that breath was being blown into the machine. ALC R. p. 28, lines 5-20. This sequence of events can be clearly seen on the video recording of the breath testing room. The DataMaster machine timed out and asked on the display if Respondent had refused the test which Trooper Horton indicated "Yes." ALC R. p. 28, lines 21-24. Based on the behavior of the Respondent, Trooper Horton determined that Respondent had officially refused to submit to the breath test. ALC R. p. 29, lines 9-12. Trooper Horton presented Respondent with a copy of the test results to sign and advised her that she officially refused the test. ALC R. p. 29, lines 18-23. Respondent then refused to sign the test results. ALC R. p. 30, lines 8-10.

Upon refusing to submit to a breath sample, Respondent was found to be in violation of S.C. Code Ann. § 56-5-2950, and Trooper Horton issued a Notice of Suspension form pursuant to S.C. Code Ann. § 56-5-2951. ALC R. p. 31, lines 18-24. Respondent timely requested a contested case hearing which was held with the OMVH, after notice to the parties, on August 15, 2022. ALC R. p. 6-72. After reviewing the record and considering all the evidence, the OMVH Hearing Officer issued an order affirming the suspension of the Respondent's driving license or driving privileges. ALC R. p. 74-79. The OMVH Hearing Officer ruled that Trooper Horton gave detailed

instructions to the Respondent regarding giving a breath sample, however Respondent did not follow those instructions. ALC R. p. 90. Based on Respondent's actions, the OMVH Hearing Officer concluded that the Respondent was uncooperative and constructively refused the breath sample. ALC R. p. 92.

The Respondent filed an appeal to the ALC. ALC R. p. 40-59. The ALC determined that the Respondent's actions did not constitute a constructive refusal of the breath test and reversed the suspension. ALC Order p. 7-8.

SCDMV then timely appealed to the Court of Appeals.

STANDARD OF REVIEW

The scope of judicial review in cases such as this is limited by the Administrative Procedures Act, S.C. Code §1-23-380(A)(6).

(A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

(6) The court shall not substitute its judgment for that 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.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981), our Supreme Court set out the standard of evidentiary review under the South Carolina Administrative Procedure Act:

[Section 1-23-380(g)(5)] specifically states: "The Court shall not substitute its judgment for that of the agency as to the weight of evidence on questions of fact." In addition, the statute states the decision under appeal must be "clearly erroneous" in view of the substantial evidence on the whole record.

We, therefore, caution the Bench and Bar as to the limitations upon the application of the "substantial evidence" rules in reviewing the decision of administrative agencies. As stated in *Dickinson-Tidewater, Inc. v. Supervisor of Assess.*, 273 Md. 245, 329 A.2d 18, 25, the substantial evidence test "need not and must not be either judicial fact-finding or substitution of judicial judgment for agency judgment"; and a judgment upon which reasonable men might differ will not be set aside.

The Court further noted that:

The substantial evidence rule... means that we 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." (Citation omitted.)

See also *Schudel v. South Carolina Alcoholic Beverage Control Commission*, 276 S.C. 138, 276 S.E.2d 308 (1981); *Fast Stops, Inc. v. Ingram*, 276 S.C. 593, 281 S.E.2d 18 (1981).

An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co.*, 302 S.C. 211, 394 S.E.2d 842 (1990); *Lark v. Bi Lo, Inc.*, *supra*. In *Lark*, our Supreme Court quoted *Consolo v. Federal Maritime Commission*, 383 U.S. 611, 16 L.Ed.2d 131, 86 S.Ct. 1118 (1966), to define substantial evidence:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."... "It

must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury..." This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark, 276 S.C. at 136, 276 S.E.2d at 311. *See, also, Dorman v. DHEC*, 565 S.E.2d 119, 350 S.C. 159 (Ct. App. 2002); *Hamm v. South Carolina Public Service Commission and Wild Dunes Utilities, Inc.*, 311 S.C. 295, 422 S.E.2d 118 (1992).

A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC, supra*; *Hamm v. American Telephone & Telegraph Co., supra*; *Chemical Leaman Tank Lines v. South Carolina Public Service Commission*, 258 S.C. 518, 189 S.E.2d 296 (1972). The limited substantial evidence standard of review is intended only to assure that the agency's action is properly supported and that, therefore, no abuse of delegated authority occurred. *See Fowler v. Lewis*, 260 S.C. 54, 194 S.E.2d 191 (1973).

On review of the acts or orders of administrative agencies, the courts will presume, among other things, that the agency action is regular and correct, and that the orders and decisions of the agency are valid and reasonable. 73A C.J.S. *Public Administrative Law and Procedure* Section 220(a) (1983). Therefore, the burden is on the Petitioner to show convincingly that the order of the agency is without evidentiary support or is arbitrary or capricious as a matter of law. *Hamm v. South Carolina Public Service Commission*, 294 S.C. 320, 364 S.E.2d 455 (1988).

ARGUMENT

1) THE ADMINISTRATIVE LAW COURT DID ERRONEOUSLY ENGAGE IN A REWEIGING OF THE EVIDENCE IN THIS CASE IN VIOLATION OF S.C. CODE §1-23-380.

a. The OMVH Determinations Regarding a Constructive Refusal

The Respondent argued to the OMVH Hearing Officer that the facts and circumstances in this case were similar to that of *Chisolm v. S.C. Dept. of Motor Vehicles*, 402 S.C. 593, 741 S.E.2d 42 (Ct. App. 2013). In the *Chisolm* case, the court discussed the DataMaster and how the machine makes a steady tone when a person is blowing into the machine properly. *Chisolm*, 402 S.C. at 595 and at 601. Further, the DataMaster machine beeps during intermittent breathing or when a person is not breathing into the machine properly. *Chisolm*, 402, S.C. at 601 (citing *Quick v. Comm., Dep't of Transp., Bureau of Driver Licensing*, 915 A.2d 1268, 1270 (Pa.Comm.w.Ct.2007)). The *Chisolm* Court noted that other jurisdictions have upheld the suspension of a driver's license based on the subject's refusal to submit to a breath test when the driver failed to produce a steady tone into the breath instrument. *Chisolm*, 402 S.C. at 601. In the *Chisolm* case, a review of the breath testing room video showed that Chisolm produced a steady tone, indicating that Chisolm was blowing into the machine, for approximately 1 minute and 53 seconds of the two-minute time period in which she could provide a breath sample. *Chisolm*, 402 S.C. at 595 and 606. Further, there was no evidence submitted in the *Chisolm* case that indicated Chisolm tried to fake or thwart the test. *Id.* Additionally, the officer offered to allow Chisolm another opportunity to take the test, Chisolm agreed, however the officer indicated that the machine would not allow another test to be performed. *Id.*

In this case, Trooper Horton instructed the Respondent that a long steady tone by the DataMaster machine is what is needed to indicate a proper sample and that there would be an intermittent beep that would break up if the sample was not sufficient. ALC R. p. 28, lines 8-16. Trooper Horton testified in reference to the Respondent giving a sample that “at times she would blow in, at times she would stop, at times she would breathe in and exhale again and again.” ALC R. p. 28, lines 18-20. After listening to the testimony of Trooper Horton and watching video evidence submitted during the hearing, the OMVH Hearing Officer made the following factual determinations in the *Final Order and Decision*:

“During the two minutes given for the test, Respondent breathed into the machine intermittently and took breaths in, but she did not provide an adequate breath sample and the machine timed out. Respondent began blowing into the machine at approximately 31:10 on the video (Respondent’s Exhibit 1) and produced a steady tone until approximately 31:14. The machine then resumed beeping for approximately fifteen seconds (until 31:29). Respondent then produced another steady tone for approximately five seconds (until 31:37). There was then beeping for the next approximately thirteen seconds (until 31:50). There was then a steady tone for approximately twelve seconds (until 32:02). The beep lasted one second, and then a steady tone resumed for approximately thirteen seconds (until 32:16). A beep then lasted one second, and then a steady tone resumed for approximately six seconds (until 32:32). Beeping then resumed for approximately ten seconds (until 32:42). A steady tone then resumed for approximately two seconds (until 32:44). A steady tone then resumed for another approximately two seconds after a second of beeping (until 32:47). The machine then beeped for the remainder of the test which was approximately fourteen seconds (until 33:01). Respondent did not appear to ever take a deep breath into the machine as instructed and did not produce a sufficient sample.” ALC R. p. 83-84.

The OMVH Hearing Officer compared the facts of this case to those in *Chisolm* and found this case to be distinguishable in upholding the suspension and SCDMV agrees with this determination. ALC R. p. 89-90. The OMVH Hearing Officer made the following determinations (ALC R. p. 90):

1. "Respondent proceeded to breathe into the DataMaster multiple times over approximately one minute and fifty-one seconds (from the time she first breathed into the machine until the test ended), and several of the attempts produced a steady tone; but the longest tones lasted only thirteen and fourteen seconds, respectively, and they were all too weak in terms of the volume of breath to register a result."
2. "Respondent did not appear to take deep breaths and stopped in between attempts, even though Trooper Horton had instructed her prior to the test that she need to take a long breath in and a long breath out and to 'take a deep breath, as big as you can and exhale into this mouthpiece'"
3. "He also instructed Respondent that she would hear beeping if she stopped breathing because that would mean she was not providing a sample, so Respondent should have been aware that she was not providing an adequate sample when she heard the beeping."
4. "Respondent also discontinued breathing into the machine during the final fourteen seconds of the test, even though Trooper Horton had instructed her that once she started the test, to breathe out until he told her to stop."
5. "Despite Trooper Horton's instructions as to how Respondent should breathe, Respondent did not appear to try any harder to take deep breaths as instructed, and she continued to blow on intermittently into

the machine. As a result, Respondent did not blow enough air to produce a recordable sample.”

6. “[D]etailed instructions were plainly stated to the driver just before the test, confirmation of the driver’s understanding of those instructions was obtained from the driver, and the driver had no questions about how to take the test following the instructions.”
7. “Respondent did not provide a continuous tone but instead provided only intermittent tones.”

Unlike *Chisolm*, there is substantial evidence in this record that demonstrates Respondent did not ever take a deep breath and make a sufficient effort to blow in the machine. Thus, a refusal was properly entered per SLED Policy guidelines. It appears that the Respondent never produced a steady tone, indicating a proper sample, for more than 12 seconds. This is significantly distinguishable from the *Chisolm* case in which there was a steady tone for 1 minute and 53 seconds of the two-minute waiting period. Also, the court in *Chisolm* found that the officer being willing to administer another test, even though eventually unsuccessful in doing so, to be a large factor in deciding the officer abused his discretion since it appears the officer believed there was a sufficient sample given the first time even though not read by the DataMaster. However, in this case, Trooper Horton immediately indicated that the test would be counted as a refusal in accordance with SLED Policy. ALC R. p. 84-85. In accordance with SLED Policy, Trooper Horton had discretion as to whether to enter a “Yes” or “No” to the question “Did the subject refuse?” based on the actions of the Respondent during the two-minute

test period. As noted by the OMVH Hearing Officer, SLED Policy 8.12.5(L)(2)(f)(vii) 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 Respondent failed to ever produce a sufficiently long enough steady tone from the DataMaster. ALC. R. p. 84-85. Trooper Horton followed SLED policy by selecting "YES" when the DataMaster machine asked him "Did the subject refuse?" In fact, given the sequence of events in this case, a selection of "NO" to this inquiry would have violated SLED policy because Trooper Horton did in fact believe that an improper sample had been given. Thus, there is no evidence Trooper Horton abused his discretion in choosing "Yes" to answer that the question "Did the subject refuse." The OMVH agreed with Trooper Horton's assessment after reviewing all evidence including the actual video recording of the entire test procedure and made findings accordingly.

b. The ALC's Reweighing of the Evidence

The scope of the ALC's judicial review is limited by the Administrative Procedures Act. However, the ALC exceed its statutory authority on this appeal. According to S.C. Code §1-23-380(A)(6):

(A) A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review....

(6) **The court shall not substitute its judgment for that 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:

- c. In violation of constitutional or statutory provisions;
- d. In excess of the statutory authority of the agency;
- e. Made upon unlawful procedure;
- f. Affected by other error of law;
- g. Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- h. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(emphasis added) A court cannot weigh the evidence and substitute its judgment for that of the agency upon a question as to which there is room for a difference of intelligent opinion. *Dorman v. DHEC, supra; Hamm v. American Telephone & Telegraph Co., supra; Chemical Leaman Tank Lines v. South Carolina Public Service Commission, supra.* An appeal from action of an administrative agency must be sustained if supported by substantial evidence. *Hamm v. American Telephone & Telegraph Co., supra; Lark v. Bi Lo, Inc., supra.* "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach a conclusion that the administrative agency reach." *Murphy v. South Carolina Employment Sec. Com'n* 492 S.E.2d 625, 627, 328 S.C. 542, 544 (1997) quoting *Merck v. South Carolina Employment Sec. Comm'n*, 290 S.C. 459, 351 S.E.2d 338 (1986).

The ALC begins its discussion by outlining the evidentiary findings of the OMVH Hearing Officer:

“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 instruction nor make an affirmative request to retake the test.”

ALC Order, p. 4. Regardless of the findings of the OMVH Hearing Officer, the ALC ruled that “(s)ubstantial evidence does not support the OMVH Hearing Officer’s determination, thus the agency decision must be reversed. ALC Order p. 4. In contradiction to the OMVH Hearing Officer evidentiary findings, the ALC reweighed the evidence and made the following findings (ALC Order p. 7-8):

1. “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.”
2. “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.
3. “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.”
4. “Trooper Horton acknowledged that Appellant willfully submitted to the test without having delayed its administration,”
5. “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”

The ALC found that the testimony “unequivocally” reveals that Respondent “actively blew into the DataMaster in an effort to produce an adequate breath sample.” ALC Order p.7. The sequence of events during the time that Respondent acted as though she was giving a breath sample was well documented and thoroughly examined by the OMVH Hearing Officer after watching the video. Those events were outlined by the OMVH Hearing Officer as follows, indicated by the approximate time of the video that is in evidence (ALC R. p. 83-84):

- “Respondent began blowing into the machine at approximately 31:10 on the video (Respondent’s Exhibit 1) and produced a steady tone until approximately 31:14.”
- “The machine then resumed beeping for approximately fifteen seconds (until 31:29).”
- “Respondent then produced another steady tone for approximately five seconds (until 31:37).”
- “There was then beeping for the next approximately thirteen seconds (until 31:50).”
- There was then a steady tone for approximately twelve seconds (until 32:02).”
- “The beep lasted one second, and then a steady tone resumed for approximately thirteen seconds (until 32:16).”
- “A beep then lasted one second, and then a steady tone resumed for approximately six seconds (until 32:32).”
- “Beeping then resumed for approximately ten seconds (until 32:42).”
- “A steady tone then resumed for approximately two seconds (until 32:44).”

- “A steady tone then resumed for another approximately two seconds after a second of beeping (until 32:47).”
- “The machine then beeped for the remainder of the test which was approximately fourteen seconds (until 33:01).”

In accordance with this outlined sequence of events, the OMVH Hearing Officer found that the evidence showed that Respondent “did not provide a continuous tone” and the breaths were “all too weak in terms of the volume of breath to register a result.” ALC R. p. 90. Additionally, the OMVH Hearing Officer indicates that the Respondent “did not appear to take deep breaths and stopped in between attempts.” ALC R. p. 90. The OMVH Hearing Officer clearly believed this evidence showed that the Respondent did not actively blow into the machine to attempt to produce an adequate sample. After a thorough examination of all evidence, the OMVH Hearing Officer decided that the Respondent did not make a sufficient attempt to give an appropriate breath sample after clear instructions by Trooper Horton. However, upon reweighing the same evidence, the ALC says “unequivocally” that the Respondent did actively blow into the machine. ALC Order p.7.

The ALC found that there is “no evidence” that the Respondent acted willful to thwart the administration of the breath test. ALC Order p. 7. However, upon reviewing all the evidence, the OMVH Hearing Officer indicated that the Respondent “did not appear to try any harder to take deep breaths as instructed, and she continued to blow only intermittently into the machine.” ALC R. p. 90. “Respondent did not appear to ever take a deep breath into the machine as instructed and did not produce a sufficient sample.” ALC R. p. 83-84. According to the Hearing Officer, this defiance of Trooper Horton’s instructions led to Respondent not blowing “enough air to produce a recordable sample.”

ALC R. p. 90. Again, the OMVH Hearing Officer clearly examined this evidence and intercepted it as thwarting the administration of the test. However, upon reweighing the same evidence, the ALC found she was not willful in her attempt to thwart the administration of the breath test. ALC Order p.7.

The ALC found that Trooper Horton “did not instruct Appellant how long the steady tone must last.” ALC Order p. 8. However, the OMVH Hearing Officer indicated in the *Final Order and Decision*, that “detailed instructions were plainly stated to the driver just before the test, confirmation of the driver’s understanding of those instructions was obtained from the driver, and the driver had no questions about how to take the test following the instructions.” ALC R. p. 90. These instructions included that Trooper Horton “had instructed her prior to the test that she need to take a long breath in and a long breath out.” ALC R. p. 90. Additionally the OMVH Hearing Officer found that Trooper Horton instructed that “she would hear beeping if she stopped” and that would mean “she was not providing an adequate sample when she heard the beeping.” ALC R. p. 90. Also, the OMVH Hearing Officer indicated that Trooper Horton “had instructed her that once she started the test, to breath out until he told her to stop” and again “(d)espite Trooper Horton’s instructions as to how Respondent should breath” the Respondent did not give an appropriate breath sample. ALC R. p. 90. There clearly was beeping when the Respondent failed to give an adequate sample and Trooper Horton did not tell the Respondent to stop at any time. However, upon reweighing the same evidence the ALC indicated that Trooper Horton “did not instruct Appellant how long the steady tone must last.” ALC Order p. 8.

The ALC found that Trooper Horton “acknowledged” that the Respondent “willfully submitted to the test without having delayed its administration.” ALC Order p. 7. However, upon reviewing all the evidence, the OMVH Hearing Officer found that “Trooper Horton argued that he thoroughly gave Respondent instructions as to how to take the breath test, and Respondent stated she understood.” ALC R. p. 88. As well as finding that Trooper Horton “argued that there are various forms of intent in these cases but Respondent did not follow instructions during the breath test, just as she did not during the SFST’s.” ALC R. p. 88. The Respondent was also found to be “uncooperative by failing to follow trooper Horton’s instructions (which she had indicated she understood just before taking the test) to take long, deep breaths and to breach long deep breaths into the machine.” ALC R. p. 92 Again, the OMVH Hearing Officer clearly examined this evidence and interpreted the Respondent “failing to follow trooper Horton’s instructions” as being “uncooperative. ALC R. p. 92. The OMVH Hearing officer interpreted Trooper Horton’s testimony as indicating that the refusal was intentional. ALC R. p. 88. However, he ALC reweighed the evidence to find that Trooper Horton “acknowledged” that the Respondent “willfully submitted to the test without having delayed its administration.” ALC Order p. 7.

Additionally, the ALC indicated 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.” ALC Order p. 7. Footnote 1. Also, stating that “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 construction refusal has occurred.” ALC Order p. 7. Footnote 1. The OMVH Hearing

Officer examined the evidence and found that the Respondent had a “discontinued blowing pattern” and that was the basis of the refusal. ALC R. p. 91. The OMVH Hearing Officer also indicated that “[d]espite Trooper Horton’s instructions as to how Respondent should breathe, Respondent did not appear to try any harder to take deep breaths as instructed, and she continued to blow on intermittently into the machine.” ALC R. p. 90. “Respondent also discontinued breathing into the machine during the final fourteen seconds of the test, even though Trooper Horton had instructed her that once she started the test, to breath out until he told her to stop.” ALC R. p. 90. However, upon reweighing the same evidence, the ALC found that the only reason for recording a refusal was that “most people are able to complete the breath test in less than two minutes.” ALC Order p. 7. Footnote 1.

Based on the forgoing, it is clear that there was substantial evidence presented at the OMVH hearing of a constructive refusal and this was extensively outlined the in the Order of the OMVH Hearing Officer. However, the ALC reweighed the evidence in contradiction to S.C. Code §1-23-380(A)(6). Therefore, the Order of the ALC should be overturned and the OMVH *Final Order and Decision* issued August 17, 2022, affirmed.

CONCLUSION

For the reasons set forth above, the Order of the ALC should be overturned and the OMVH *Final Order and Decision* issued August 17, 2022, affirmed.

[SIGNATURE ON THE FOLLOWING PAGE]

Respectfully submitted,



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Attorneys for the Appellant

August 11, 2023
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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AUG 14 2023

APPEAL FROM ADMINISTRATIVE LAW COURT SC Court of Appeals

The Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 22-ALJ-21-0333-AP

Breyonna Jeter Respondent,

v.

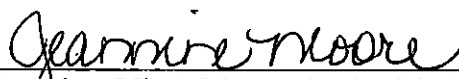
South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Appellants.

Of Whom the South Carolina Department of Motor Vehicles is Appellant.

CERTIFICATE OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, August 11, 2023, I served one (1) copy of the Appellant's Initial Brief and Designation of Matter by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Respondent at the address indicated below:

Trent N. Pruett, Esquire
202 North Petty Street,
Gaffney, SC 29340


Jeannine (Nina) Moore, Senior Lit. Paralegal
Office of General Counsel

August 11, 2023
Blythewood, South Carolina

Henry McMaster
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

August 11, 2023

The Honorable Jenny Abbott Kitchings
Clerk, The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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AUG 14 2023
SC Court of Appeals

RE: *Breyonna Jeter v. South Carolina Department of Motor Vehicles and South Carolina Department of Public Safety*
Case No: 2023-001148

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. Unbound original and two (2) copies of the Appellant's Initial Brief;
2. Original and two (2) copies of the Appellant's Designation of Matter To Be Included In the Record on Appeal with Certificate of Counsel of SCACR, Rule 209(c) compliance; and
3. Certificate of Service of these documents on counsel for the Respondent.

Please file the original and copies necessary for SCACR compliance and return the extra copies to me with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Sincerely,

A handwritten signature in cursive that reads "Jeanine Moore".

Jeanine (Nina) Moore, Senior Lit. Paralegal
Office of General Counsel

Enclosures

cc: Trent N. Pruett, Esquire



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