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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Shirley C. Robinson, Administrative Law Judge

Case No. 2023-001148

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.

APPELLANT'S PETITION FOR REHEARING

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STATEMENT OF THE ISSUES ON PETITION FOR REHEARING

WAS THE OMVH HEARING OFFICER'S FINDING THAT RESPONDENT REFUSED THE BREATH TEST FOLLOWING RESPONDENT'S ARREST FOR DRIVING UNDER THE INFLUENCE SUPPORTED BY SUBSTANTIAL EVIDENCE?

DID THE ADMINISTRATIVE LAW COURT ERRONEOUSLY ENGAGE IN A REWEIGING OF THE EVIDENCE AND SUSTITUTE ITS JUDGMENT AS TO THE WEIGHT OF THE EVIDENCE?

DOES THE COURT OF APPEALS OPINION CITE TO ANY EVIDENCE IN THE RECORD SUPPORTING THE PER CURIAM RULING AFFIRMING THE ADMINISTRATIVE LAW COURTS ORDER?

DID THE RESPONDENT FAIL TO BLOW AN ADEQUATE SAMPLE AS DETERMINED BY THE DATAMASTER INSTRUMENT?

FACTS RELIED ON FROM THE RECORD ON APPEAL

The Appellant highlights those facts in the record on appeal in this petition for rehearing relating solely to Respondent's refusal to submit an adequate breath sample for testing.

Following her arrest for Driving Under the Influence, Respondent was transported to the Spartanburg County Detention Center for a DataMaster DMT test (hereinafter "DataMaster"). R. p. 0071, 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. 0072, lines 11-22 and R. p. 0144. 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. R. p. 0072, 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. R. p. 0075, 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 to 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. R. p. 0075, 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.” R. p. 0075, lines 21-24. Based on the behavior of the Respondent, Trooper Horton determined that Respondent had officially refused to submit to the breath test. R. p. 0076, 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. R. p. 0076, lines 18-23. Respondent then refused to sign the test results. R. p. 0077, 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. R. p. 0078, 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. R. p. 0053-0119. 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. R. p. 0127-0139. 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. R. p. 0137. Based on Respondent’s actions, the OMVH

Hearing Officer concluded that the Respondent was uncooperative and constructively refused the breath sample. R. p. 0139.

The Respondent provided intermittent breath samples during the entire period for her to submit a breath sample. Respondent's intermittent breath samples ranged from two (2) seconds to thirteen (13) seconds. R. p. 0130 line 26 and R. p. 0131 line 2. The Hearing Officer found that "she did not provide an adequate breath sample and the machine timed out." R. p. 0130 lines, 18-19. The Hearing Officer also found that "Respondent did not appear to ever take a deep breath into the machine as instructed and did not produce a sufficient sample." R. p. 0131 lines, 4-5. The video evidence of Respondent's refusal and failure to provide an adequate sample for testing was admitted without objection. R. p. 0130, footnote 1.

The Hearing Officer also found that the evidence showed that "the machine was working properly before, during, and after the test." R. p. 0131, lines 29-30. The Hearing Officer found that "there is no evidence that Respondent expressed a desire to take the breath test again." R. p. 0138, lines 26-27. The Hearing Officer concluded "that Respondent constructively refused to provide an adequate breath sample." R. p. 0139, lines 9-10.

STANDARD OF REVIEW

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

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).

ARGUMENT

THE OMVH HEARING OFFICER'S FINDING THAT RESPONDENT CONSTRUCTIVELY REFUSED THE BREATH TEST FOLLOWING RESPONDENT'S ARREST FOR DRIVING UNDER THE INFLUENCE IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The record on appeal overwhelmingly supports the finding that the OMVH Hearing Officer findings were supported by substantial evidence. The evidence summarized below in the record is undisputed and without objection:

1. Respondent was properly advised on how to submit a breath sample. “Trooper Horton explained at length how to take the breath test.” R. p. 0130, lines 4-5. Including to “take a deep breath, as big as you can and exhale into this mouthpiece.” R. p. 0137, lines 12-13.
2. Respondent failed to follow the instructions which she stated she understood. R. p. 0139, line 7. Specifically, “Respondent did not appear to try any harder to take deep breaths as instructed, and she continued to blow only intermittently into the machine.” R. p. 0137, lines 19-20.
3. Respondent failed to supply an adequate breath sample for testing. Specifically, “Respondent did not blow enough air to produce a recordable sample.” R. p. 0137, lines 20-21.
4. Video evidence showed that Trooper Horton properly followed SLED policy in finding that Respondent failed to provide an acceptable breath sample. Trooper Horton properly treated the Respondent’s failure to submit an adequate breath sample as being due to her failure to follow the instructions.

Respondent did not ever take a deep breath and make a sufficient effort to blow in the machine. The refusal was properly entered per SLED Policy guidelines. Respondent never produced a steady tone, indicating a proper sample, for more than 13 seconds.

Substantial evidence exists in the record supporting the determination of the Hearing Officer. Respondent was properly instructed how to submit a breath sample, Respondent failed to follow the instructions, Respondent failed to submit an adequate breath sample and Trooper Horton followed SLED policy in treating this as a refusal versus an incomplete subject test.

**THE ADMINISTRATIVE LAW COURT REWEIGED THE EVIDENCE AND
SUSTITUTED ITS JUDGMENT AS TO THE WEIGHT OF THE EVIDENCE
AND IMPROPERLY ADDED A SUBJECTIVE STANDARD**

The only way possible for the Administrative Law Court (hereinafter, “ALC”) to reach its conclusion was to ignore the unobjected evidence supporting the OMVH Hearing Officer's order and reinterpret evidence to support an alternative finding. This is classic reweighing of the evidence.

The Court of Appeals’ current opinion fails to address how the underlying evidence and factual determinations made by the OMVH Hearing Officer were in error. The Court of Appeals opinion finds that substantial evidence shows Jeter did not constructively refuse to provide a breath sample. This flips the script and fails to answer the question of whether substantial evidence existed to support the OMVH Hearing Officer’s ruling. Keeping in mind that “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 v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 311 (1981).

The ALC reweighed the evidence and added a subjective intent standard that does not exist in the Implied Consent Law (S.C. Code §56-5-2950) or SLED Policy (Implied Consent Operations Manual). The ALC added the willfulness of the subject in failing to provide an adequate breath sample as an element of analysis. The ALC order finds “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.” R. p. 0008. A subject’s willfulness regarding providing an adequate breath sample for testing is not provided in law or regulation and it is improper for the ALC to create an additional element as that is the prerogative of the South Carolina Legislature not the ALC.

There is no evidence that either the South Carolina Legislature in the Implied Consent Law or SLED in the implementing regulations provides for the subjective intent of the subject to submit a breath sample as a factor in determining whether an adequate breath sample has been submitted.

THE COURT OF APPEALS OPINION FAILS TO CITE ANY EVIDENCE IN THE RECORD SUPPORTING THE PER CURIAM RULING AFFIRMING THE ADMINISTRATIVE LAW COURTS ORDER?

The current opinion from the Court of Appeals places the Appellant at a disadvantage in that there is no citation as to what evidence supported the ALC opinion and how that evidence was not properly considered by the OMVH Hearing Officer. The nature of a per curiam opinion is that it does not provide Appellant with the ability to determine what evidence in the record the Court of Appeals found convincing and offer an appropriate response to that determination.

The ALC found that the testimony “unequivocally” reveals that Respondent “actively blew into the DataMaster in an effort to produce an adequate breath sample.” R. p. 0008. The fact that the Respondent blew some breath into the DataMaster is not in dispute, however, neither should it be in dispute that the Respondent failed to supply an adequate breath sample and the detailed findings of fact by the OMVH Hearing Officer supports this conclusion.

Those events were outlined by the OMVH Hearing Officer as follows, indicated by the approximate time of the video that is in evidence (R. p. 0130-0131):

- “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).”

The result of Respondent’s intermittent breath submission was that the DataMaster machine noted that Respondent failed to submit an adequate breath sample. The failure to do so was solely due to Respondent not following the instructions. The Respondent was properly instructed how to submit a breath sample, the Respondent indicated that she understood the instructions. Respondent failed to submit an adequate breath sample due to her fault, not the fault of Trooper Horton’s instructions, not the fault of the Implied Consent Law, not the fault of SLED Policy, not the fault of the DataMaster, and not because she subjectively wanted to take the test,

but because she objectively failed to submit an amount of her breath into the DataMaster to allow for a blood alcohol content determination to be made. That is a constructive refusal.

THE RESPONDENT FAILED TO BLOW AN ADEQUATE SAMPLE AS DETERMINED BY THE DATAMASTER INSTRUMENT.

The OMVH Hearing Officer found that Respondent failed to submit an adequate breath sample as determined by the DataMaster. R. p. 0131-0132. Appellant does not dispute that an adequate sample was not submitted.

SLED Policy provides that if an acceptable breath sample is not provided in two minutes, then the test operator must determine if the subject has refused to submit an adequate breath sample. An incomplete subject test is not treated as a refusal only when “the subject failed to provide an acceptable breath sample through no fault of his/her own.” See, SLED Policy 8.12.5(L)(2)(f)(vii). Trooper Horton treated Respondents failure to submit an adequate breath a sample as a refusal. R. 0132, line 1. As stated earlier, substantial evidence exists in the record and more importantly substantial evidence was found to exist and cited in the order of the OMVH Hearing Officer to support the conclusion that Respondent constructively refused the breath test by failing to follow the instructions and not submitting an adequate breath sample.

CONCLUSION

For the reasons set forth above and the reasons set forth in Appellant's brief, the Court should grant Appellant's Petition for Rehearing and the Order of the ALC should be overturned and the OMVH *Final Order and Decision* issued August 17, 2022, affirmed.

Respectfully submitted,



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This 26th day of August, 2026
Blythewood, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Shirley C. Robinson, Administrative Law Judge

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Breyonna Shaquelle Jeter Respondent,

v.

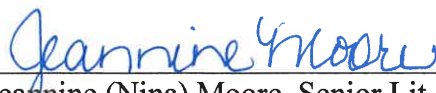
South Carolina Department of Motor Vehicles and
South Carolina Department of Public Safety Appellants.

PROOF OF SERVICE

I HEREBY CERTIFY that I have served the Appellant's Petition for Rehearing by email to the Clerk of Court and Respondent's attorney along with mailing same via the United States Mail, postage prepaid, on August 26, 2026, addressed to the Respondent's attorney and the court as indicated as follows:

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

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


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

August 26, 2026
Blythewood, South Carolina

Henry McMaster
Governor



Kevin A. Shwedo
Director

State of South Carolina
Department of Motor Vehicles

August 26, 2026

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

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

Dear Ms. Kitchings:

Enclosed for filing please find an original and two (2) copies of the Appellant South Carolina Department of Motor Vehicles' Petition for Rehearing and Proof of Service in the above-referenced matter. Please file the original and return the extra copy to us with an affixed clerk's date of filing in the enclosed self-addressed stamped envelope.

Thank you for your cooperation in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Jeannine Moore".

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

Enclosures

cc: Trent N. Pruett, Esquire