THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2015-001491

H.H. Vonharten ..... Appellant,

v.

South Carolina Department of Motor Vehicles ..... Respondent.

INITIAL BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE

On December 13, 2013, Paul Mazzeo, MD, a board certified neurologist treating Respondent, submitted a written statement to the Department expressing concern regarding Appellant's ability to safely operate a motor vehicle (ALC ROA. p. 58). The Department issued medical forms to the Appellant to be completed by his physician in order to evaluate his fitness to drive. By letter dated January 17, 2014, the Appellant was also notified that in order to assess his ability to safely operate a motor vehicle he could be required to demonstrate to the Department his knowledge, skills and ability (ALC ROA. p. 54). On February 20, 2014 the Department notified the Appellant that it had not received medical statements from him that it requested and that failure to comply with the request could result in the revocation of privileges on March 22, 2014 (ALC ROA p. 80).

On February 27, 2014, Appellant underwent a Driving Related Skills Assessment at Beaufort Memorial Hospital overseen by Registered and Licensed Occupational Therapist Richard Craner (ALC ROA pp. 69-73, 105-110). As part of that assessment, a questionnaire was completed and signed by the Appellant admitting that he gets more frustrated than he used to, that family members had expressed concerns about his ability to drive (including a handwritten notation of "children and wife" on a page apparently signed at bottom by Appellant). It also contained a handwritten notation stating "wrong lane, back into other lane & cut off motorcyclist & in front of another car" (ALC ROA p. 73, 110).

On April 25, 2014, the Department received medical statements from Appellant. A Department Form DI-7, Medical and Accident History had been sent by Appellant with the assistance of his family doctor, General T. Little (ALC ROA pp. 97-100). In it, Appellant was asked if he had had any reportable motor vehicle accidents to which he checked "yes" and wrote "Bluffton S.C. 1995 approximately" (p. 97). He indicated he took two medications for blood pressure (p. 98). The questionnaire stated that Appellant had been diabetic for 10 -12 years and that he did not follow a prescribed diet (p. 99). It stated that he had had a blackout as recently as 2012 and doctors had been unable to determine the cause (p. 100).

For Summary of Findings and Diagnosis, the response, apparently from Dr. Little, was "[h]ypertension, hyperlipidemia, early dementia, diabetes mellitus, history of syncopal disorder." On the question asked for comments of the guidance of the Medical Advisory Committee the response was "suggest pt be able to demonstrate driving skills." Doctor Little did not respond to the question asking whether he would be willing to ride with the applicant as an operator of a motor vehicle (ALC ROA p. 100).

On May 16, 2014, the Department sent Appellant a letter advising him that his medical statements submitted were incomplete and that they must be completed in their entirety, requesting that he respond within fifteen days of that letter and advising him that he would have to demonstrate driving skills. (ALC ROA p. 81).

The Appellant was required to demonstrate his driving ability by letter dated June 3, 2014 in order to complete the evaluation of his fitness, skills and ability to exercise ordinary and reasonable control in the operation of a motor vehicle (ALC ROA. p. 83). On June 3, 2014, the Appellant successfully completed the knowledge and skills test and his driving privileges were temporarily reinstated (ALC ROA pp. 83-86).

On June 5, 2014, Dr. Mazzeo again wrote the Department reiterating his opinion that Appellant's "dementia precludes him from driving safely" (ALC ROA. p. 104). On June 6, 2014, the Department notified Appellant that his medical records and driver's examination results had been forwarded to the Medical Advisory Board for review (ALC ROA. p. 87). On July 10, 2014, the Department notified the Appellant that his driving privileges had been revoked pursuant to *S.C. Code Ann.* § 56-1-270 based upon the Medical Advisory Board's recommendation that Appellant should be considered physically disqualified from safely operating a motor vehicle (ALC ROA. p. 115).

Appellant requested a hearing which was held on September 24, 2014, before Hearing Officer Brigette B. Autry. The revocation of Appellant's driver's license and driving privilege was sustained in Ms. Autry's Final Order and Decision of December 1, 2014 (ALC ROA pp. 41-48) Thereafter Appellant appealed the Final Order and Decision to the Administrative Law Court. By Order of June 9, 2015, the Honorable Debra Brooks Durden upheld the Department's suspension. The Appellant filed a Motion to Reconsider

Judge Durden's Order on June 16, 2015. Judge Durden on July 7, 2015 issued an Order Denying Appellant's Motion for Reconsideration or for Rehearing. This appeal followed upon Appellant's Notice of Appeal of July 7, 2015.

ARGUMENT

1. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUFFICIENT TO UPHOLD THE HEARING OFFICER'S FINDINGS.

The Department of Motor Vehicles' actions were triggered by correspondence from Dr. Paul Mazzeo, a neurologist treating the Appellant, who advised that Appellant suffered from Alzheimer's dementia, that family members had expressed concern, and that the Doctor believed Appellant's drivers' license should be revoked. As a result of that letter, the Department notified Appellant he would be required to submit medical statements. Reminder letters were sent before completed waivers and medical and vision test (ALC ROA pp. 54, 80). The Neurological Special Questionnaire Confidential portion of the Form 5008, however, was never sent to the Department despite additional reminders (ALC ROA pp. 17, ll. 21-22; 81; 82).

The Appellant also was tested by Beaufort Memorial's Registered and Licensed Occupational Therapist Richard Craner test for physical and mental capacity to drive on February 27, 2014. Craner found a number of physical and cognitive deficits and concluded that "with this presentation of multiple deficits, Mr. Vonharten may have difficulty driving safely and should consider refraining from driving at this time." (ALC ROA pp. 72, 109). Specifically, Craner found that Appellant reported that he had numbness in both feet that occasionally affects his balance (ALC ROA pp. 68, 72, 105, 109). In addition, he found that Appellant failed the trunk cervical rotation in both directions (*Id.*

69, 72, 105, 109). Craner found that on the UB Coordination Minnesota Rate of Manipulation Test Appellant scored in the impaired range for placing and turning (*Id.*), and that the Hooper Visual Organization test had a score of 23/30 indicating mild impairment (ALC ROA pp. 71, 108). He also noted that Appellant failed depth perception and color perception tests (ALC ROA pp.70, 107). He further found that Appellant passed one cognitive trail making test but failed another (test B) that was highly associated with poor driving performance and that Appellant failed the Montreal Cognitive Assessment test with a score of 21/30, a score correlated with Alzheimer's disease (ALC ROA pp. 71, 108).

This constitutes substantial evidence in the record as a whole supporting the decision to revoke Appellant's license. *O'Neal v. S.C. Dep't. of Social Services*, 323 S.C. 233, 437 S.E. 2d 127 (Ct. App. 1993) (where substantial evidence supports the decision of the administrative tribunal, the admission of other evidence, even if improper, does not change the result). Even if the Court ultimately agreed with Appellant that the letters from Dr. Masseo were improper hearsay or that certain notations on Craner's report about the concerns of a family member were also improper hearsay, there would still be substantial evidence supporting the Final Order and Decision of December 1, 2014. Interestingly, Appellant simultaneously objects to references to family members concern about Appellant's driving as hearsay, even though Appellant freely admits to the existence of concerns of family members (ALC ROA pp. 73, 110). Appellant invites this Court to indulge conspiracy theories about "bias of family members" (Appellant's Initial Brief p. 8) despite the lack of a scintilla of evidence in the record that any family members' communications to Dr. Mazzeo were motivated by anything other than concern for Appellant's safety and that of the driving public.

Further, Appellant appears to claim that because the Department's inquiry came about by way of a document he alleges to be hearsay, some sort of infectious invalidity should prohibit the Department from further inquiry unless every fact and document involved is supported by testimony at hearing under oath and subject to cross examination. The Department received correspondence from Appellant's treating neurologist asserting that the Appellant's condition dictated that the Appellant could not drive safely. Appellant's apparent position is that if the Department does not make that doctor available at the OMVH hearing (and ostensibly for the consideration of the Medical Advisory Board as well) the Department should treat the doctor's correspondence as if it had never been received. The law and public safety demand a different result.

2. *THE PRESENCE IN THE RECORD OF LETTERS WRITTEN BY APPELLANT'S TREATING NEUROLOGIST SUGGESTING APPELLANT SHOULD NOT DRIVE AND STATING THAT APPELLANT'S FAMILY MEMBERS HAD EXPRESSED CONCERNS ABOUT APPELLANT'S DRIVING DO NOT CONSTITUTE REVERABLE ERROR.*

There are a myriad reasons Dr. Mazzeo's letters provide no basis for reversal.

First and foremost, it is not reversible because other evidence in the record constitutes substantial evidence to uphold the ruling, as set forth above.

Second, the letters were not offered to prove the matter asserted (that Appellant could not safely drive) but provided a logical progression to explain the actions of the Department and the Medical Advisory Board in determining whether or not Appellant could safely drive.

S. C. Code Ann. § 56-1-221 (C) provides as follows:

> Having cause to believe that a licensed driver or applicant may not be physically or mentally qualified to be licensed, the Department of Motor Vehicles may obtain the advice of the board. The board may formulate its advice from records and reports or may cause an examination and report to be made by one or more members of the board or any other qualified person it may designate. The additional examination is at the expense of the applicant or licensed driver. The licensed driver or applicant may cause a written report to be forwarded to the board by a physician or optometrist of his choice, and it must be given consideration by the board.

S.C. Code Ann. § 56-1-270 provides:

> The Department of Motor Vehicles having good cause to believe that a person holding a South Carolina driver's license is incompetent or otherwise not qualified to be licensed because of physical or mental disability may, upon written notice of at least ten days to the licensee, require him to submit to an examination. Upon the conclusion of such examination the department shall take action as may be appropriate and may suspend or revoke the license of such person or permit him to retain such license or may issue a license subject to restrictions permitted under Section 56-1-170. The license of any person may be suspended or revoked if they refuse or neglect to submit to such an examination.

"Good cause" as stated in these sections does not specify that only sworn testimony subject to cross examination is sufficient. It does not even specify "probable cause." If a treating neurologist tells the Department that his patient is a victim of Alzheimer's dementia and cannot safely drive, public policy dictates that the Department make an inquiry to determine if that is true.

The commencement of an inquiry by the Department was not an indication that it credited or relied on the assertions of third parties referred to in Dr. Mazzeo's letter. It merely meant that upon the written suggestion of a treating physician that Appellant's physical or mental state suggested that he should not drive constituted sufficient cause to

begin an investigation into the allegation, which is exactly what the statute authorizes the Department to do.

In the same way, the Department of Revenue does not sanction a liquor store based on an allegation by a citizen that the store was open at 8:00 p.m., or law enforcement does not arrest a person on a report that the person was seen doing a drug deal at a place known to be a drug hangout. It is sufficient, however, to justify the agencies to make further inquiry. Out-of-court statements are not hearsay if they are offered for the limited purpose of explaining why a government investigation was undertaken. *State v. Brown*, 317 S.C. 55, 63, 451 S.E. 2d 888, 894 (1994); *State v. Rice*, 375 S.C. 302, 324, 652 S.E. 2d 409, 420 (Ct. App. 2007), *rev'd on other grounds*, 392 S.C. 438, 710 S.E 2d 55 (2011).

In fact, the Hearing Officer made clear that she was aware of Respondent's hearsay objections and that she would disregard any hearsay within the letter but treat the portion expressing the doctor's medical opinion as subject to the medical exception (ALC ROA p. 13, l. 25 through p. 14, l. 3). Pursuant to OMVH Rule16 B. and D. (available at http://www.scomvh.net) the record must contain all evidence received and considered, as well as evidence proffered, whether it is ultimately found objectionable or not. Thus, the Hearing Officer would have had to allow the letters into the record if proffered regardless of whether the letters were later found to be competent evidence. Judge Durden correctly pointed out that the Hearing Officer had stated that "anything that would be hearsay within the letter, I'll exclude, but as far as being offered, he does say in that he is reiterating his opinion that . . . [Appellant's] dementia precludes him from driving, I'm going to allow that." The Hearing Officer allowed the letters for the limited purpose of medical diagnosis or treatment under SCRE 803 (4) (ALC Order of June 9, 2015, p. 5). Appellant protests

that the rule applies only to words uttered to a doctor by a patient, not by a doctor to anyone else, citing *State v. Camele*, 293 S.C. 302, 360 S.E. 2d 307 (1987) (Appellant Initial Brief at 6). In that child sex abuse case, the hearsay rule was not solely in issue. At issue was the competence of the testimony of the very young child which the Court ruled the trial court had not properly qualified. The medical professional had testified that the child told her that his father had committed the sex act. The Court found this testimony to be improper because it was not material to the doctor's diagnosis, because the determination of who had or had not committed the act was not an issue in determining whether it had been done at all.

The current case presents a different issue. Modern medical practice gives consideration to the reports of family members, particularly regarding issues of capacity to drive:

> Although, generally speaking, it is true that where an expert does not of his own knowledge know the facts upon which his opinion is based he cannot give his opinion except in response to a hypothetical question, *State v. King,* 158 S.C. 251, 155 S.E. 409 (1930), we think this rule has been limited in situations such as this by *Gentry v. Watkins-Carolina Trucking Co.,* 249 S.C. 316, 154 S.E.2d 112 (1967). In *Gentry,* the Supreme Court held that where a physician is consulted solely as a prospective witness, the physician's testimony as to the patient's statements about his present condition and past symptoms is not admissible as substantive proof of the facts so stated but is admissible as "information upon which he has relied in reaching his professional opinions." 249 S.C. at 324, 154 S.E.2d at 117.
>
> We recognize that *Gentry* dealt with statements made by a patient to a physician; however, we see no practical reason why the logic of *Gentry* cannot be extended to a situation where, as here, an examining psychologist relied in part on information received from the patient and the patient's family.
>
> *Howle v. PYA Monarch, Inc.*, 288 S.C. 586, 595, 344 S.E. 2d 157, 162 (Ct. App. 1986).
>
> It is noteworthy that Dr. Mazzeo was not hired by Appellant strictly for purposes

of litigation. In fact, when Dr. Mazzeo made his allegation, Appellant promptly sought a more favorable opinion from another doctor (ALC ROA p. 26, l. 13-p. 27, l. 3). Dr. Mazzeo was Appellant's attending neurologist who based his determination on his own observations and those of family members who reported to him, conclusions which were "of a type relied on by experts in the particular field in forming opinions or inferences on the subject." *Howle, supra*, at 595, 344 S.E. 2d at 162.

Nevertheless, Appellant has offered no proof that the Hearing Officer gave the letters any specific weight over other evidence nor any weight at all in the face of other evidence clearly showing significant impairment.

In addition, *S.C. Code Ann.* § 1-23-380(A)(6) specifies that an appellate court can only reverse or modify the agency's determination when "substantial rights of the appellant have been *prejudiced* because the administrative findings, inferences, conclusions or decisions are [erroneous or illegal for various stated reasons]." Even if the record contains error, the finding is not reversible unless a party was prejudiced. Appellant was not prejudiced by the letters.

Appellant freely admitted under oath that he had been diagnosed with dementia (ALC ROA, p. 25, l. 14 to p. 26, l. 6). The DI-7 Medical and Accident History report, as part of the Department's form 5008 Request for Medical Statements filed with the assistance of his own chosen family doctor signed by Appellant himself states that that Appellant had a history of blackouts and "doctors are unable to find out why." This portion of the form appears to be filled out in Appellant's own handwritten printing whereas portions filled out by Dr. Little appear quite small and in cursive. In the portion asking for

"Summary of Findings and Diagnosis." Dr. Little listed "early dementia" and "history of syncopal episodes" (ALC ROA p. 63).

Despite the Department's repeated requests, Appellant never sent a DI-6, Neurological Special Questionnaire Confidential portion of the Form 5008 Request for Medical Statements. There was some discussion of a second opinion by a Doctor Shissias (ALC ROA p. 17, l.4 to p. 18, l.3). Appellant testified he may have made or attempted to make an appointment with Dr. Mazzeo in March and said his current doctor was Dr. Shissias, but stated that he could not get Dr. Shissias to fill out the form (ALC ROA p. 26, l. 13 to p. 27, l. 3). Whether the questionnaire requested by the Department to allow it to evaluate Appellant's neurological condition was ever actually prepared by either Dr. Mazzeo or Dr. Shissias, it was never forwarded to the Department. The permissible negative inference is that the results were or would have been unfavorable to Appellant. In any case, the failure or refusal to forward the Confidential Neurological Special Questionnaire in itself authorizes the revocation of the license. *See, S.C. Code Ann.* §56-1-270.

Appellant claims that concerns expressed by the family members were "biased." He freely admitted, however, that these concerns existed (ALC ROA pp. 73, 110). It is noteworthy that on question 10 of the Driving Related Skills Questionnaire asking "Have your family members expressed concerns re: your ability to drive?" The box for the "yes" answer is checked with a handwritten notation "children and wife." The notation is accompanied by the additional handwritten statement "wrong lane, back into other lane & cut off motorcyclist & on front of another car" and Mr. Vonharten signed the page. The statement attributed to Appellant's daughter Tracy on the Occupational Therapy Driving

Skills Assessment of various difficulties while driving (ALC ROA pp. 68, 105) was actually regarded as objectionable by the Hearing Officer (ALC ROA p. 14, l. 9 to p. 15, l. 6). It is not clear form the record, however, whether these concerns were related by Appellant directly, or whether Tracy stated them to Mr. Craner in person in Appellant's presence, or whether the information was related aby a telephone conversation. No evidence appears to show whether he was actually accompanied by Tracy on that visit. If that was not the case, the therapist either questioned Tracy in Appellant's presence without indicating Appellant denied the suggestions, or the therapist contacted Tracy at a later time. In any event, the difference is only a matter of degree. Having admitted that his family had expressed concerns about his driving, he cannot claim to be prejudiced by the mention of that issue in letters by his attending neurologist.

Finally, it is clear that the statutes involved with the Medical Advisory Board are incompatible with the strict enforcement of the hearsay rule that Appellant seeks to impose. In addition to *S C. Code Ann.* §§ 56-1-221 and -270 quoted above, Section 56-1-221 additionally states in pertinent part:

> (A) There is created an advisory board composed of thirteen members. One member must be selected by the Commissioner of the Department of Health and Environmental Control from his staff, ten members must be appointed by the South Carolina Medical Association, and two members must be appointed by the South Carolina Optometric Association. . . . *The identity of physicians and optometrists serving on the board, other than the administrative officer, may not be disclosed except as necessary in proceedings under Sections 56-1-370 or 56-1-410.* The members of the board may receive no compensation.
>
> (B) The board shall advise the executive director of the Department of Motor Vehicles on medical criteria and vision standards relating to the licensing of drivers.
>
> (C) *Having cause to believe that a licensed driver or applicant may not be physically or mentally qualified to be licensed, the Department of*

> *Motor Vehicles may obtain the advice of the board. The board may formulate its advice from records and reports or may cause an examination and report to be made by one or more members of the board or any other qualified person it may designate. The additional examination is at the expense of the applicant or licensed driver.* The licensed driver or applicant may cause a written report to be forwarded to the board by a physician or optometrist of his choice, and it must be given consideration by the board.
> (D) Members of the board and other persons making examinations are not liable for their opinions and recommendations presented pursuant to subsection (C).
>
> (E) *Reports received or made by the board or its members for the purpose of assisting the department in determining whether a person is qualified to be licensed are for the confidential use of the board and the department and may not be divulged to a person or used as evidence in a trial except that the reports may be admitted in proceedings under Sections 56-1-370 and 56-1-410, and a person conducting an examination pursuant to subsection (C) may be compelled to testify concerning his observations and findings in those proceedings.*
>
> (emphasis added)

Thus, the Board is authorized by law to require additional examination, at the expense of the licensed driver, as was done in this matter. The determinations and advice of the Board are intended by the Legislature to be formulated from records and reports, not sworn testimony. In fact, even the identities of the members of the Board other than the administrative officer cannot ordinarily be made public. The additional report required, the Confidential Neurological Special Questionnaire, was repeatedly requested (ALC ROA pp. 54, 80, 81 and 82). Appellant was either unable or unwilling to provide it. Given the additional evidence in the record showing cognitive and physical deficits, the Department's and therefore the OMVH's determination for revocation were fully justified.

3. THE HEARING OFFICER DID NOT ERR IN FAILING TO CONSIDER ALTERNATIVES TO REVOCATION.

The Respondent suggests that the Hearing Officer was in error by failing to consider less restrictive alternatives. While *S.C. Code Ann.* § 56-1-370 authorizes the OMVH to modify suspensions and revocations in certain circumstances, such a modification was not called for in this matter. The Department's position was that Appellant should not drive, and Appellant's position was that there was nothing wrong with him that would justify any modification of his driving privileges, much less revoking them. Thus, Appellant provided no evidence whatsoever that Appellant's driving would be safe during the day as opposed to night, in the neighborhood as opposed to out of town, with assistive devises or without, or the like.

Neither Ms. Ardis nor Appellant's two witnesses were even questioned on what sort of restrictions might make Appellant a safer driver. Trial counsel merely mentioned the possibility of restrictions in final argument (ALC ROA p. 32, ll.11-17) without suggesting which restrictions would be appropriate for Appellant or why. The Hearing Officer, therefore, was given no guidance by Appellant as to how to apply such discretion. Practically, then, the issue for the Hearing Officer's determination was limited to whether the Department's decision to revoke, based on the recommendation of the Medical Advisory Board, was or was not supported by sufficient evidence to sustain it.

Beaufort Memorial Outpatient Rehabilitation, per therapist Richard Craner, OTR/L did a physical and cognitive evaluation on or about February 27, 2014. While not all the results were unfavorable to Respondent, the report noted that Respondent failed the Trail Making Test which is regarded as highly associated with poor driving performance, despite some cuing. He also failed the Montreal Cognitive Assessment at a level associated with

Alzheimer's disease (ALC ROA. p. 71, 108). The report also noted Respondent's difficulty in rotating his trunk and problems with depth perception. Respondent's results on the Hooper VOT score for Deficient Visual Organization was 23/30 indicating mild impairment. As a summary, the report states that while the ultimate decision to allow operation of a vehicle resides with the physician and appropriate government agencies:

> However, Mr. Vonharten has a variety of deficits in physical, visual, and cognitive skills. If he had deficits in only one of these areas, adaptations to his vehicle or approach to driving could be taken to improve his ability to drive safely. However, with the presentation of multiple deficits, Mr. Vonharten may have difficulty driving safely and should consider refraining from driving at this time.
>
> ALC ROA. p. 72.

As a result of the totality of these inputs, the Medical Advisory Board recommended that Respondent's driving privileges be revoked (ALC ROA. p. 56). The Department did this (ALC ROA. p. 90). In addition, the Medical Advisory Board had an opportunity to recommend potential restrictions that might make Respondent's driving safe or at least safer, and it declined to do so (ALC ROA. p. 93). The Department and the OMVH rightly relied on the Board's expertise.

The website referred to in Appellant's Initial Brief at page 9 has no connection with the South Carolina Department of Motor Vehicles. While some of the restrictions mentioned in it are used when actually medically indicated, the website tells readers immediately upon opening the page that it is a private company not affiliated with any government agencies.

4. THERE IS NO EVIDENCE IN THE RECORD THAT SUPPORTS THE ASSERTION THAT THE HEARING OFFICER RELIED ON A TEN YEAR OLD DRIVING CITATION TO CONCLUDE THAT APPELLANT IS NOT ABLE TO OPERATE A VEHICLE SAFELY.

The Hearing Officer briefly mentioned in her findings of fact that on Appellant's Medical and Accident History Form DI-7 Appellant was asked "[h]ave you had any reportable accidents?" to which Appellant responded "yes" approximating 1995 as the time when he had the accident, whereas in fact his record shows he had accidents in 2003 and 2005. This is a perfectly factual statement. She did not mention the issue again in her conclusions of law, or otherwise mention it as a basis for upholding the revocation. The assertion that she "relied" on it and did so erroneously is sheer speculation. Judge Durden correctly pointed out that a careful reading of the Final Order and Decision reveals that the Hearing Officer based her decision on Appellant's medical condition (ALC Order of June 9, 2015, p. 7).

That being said, had the Hearing Officer decided to consider that fact along with other factors, there is no reason she could not have properly considered it. Recent accidents could show some tendency toward the likelihood of unsafe driving, although it would be unusual for an accident by itself to be a reason for revoking a license without more. The question also serves another purpose, however. In most cases, the Department will have access to accurate driving records. The form question calls on the driver to answer that question in in front of a medical doctor who might have special insight into whether any accident might have a medical reason. The question also tests whether the driver has the correct recollection to answer accurately or the willingness to answer truthfully. For whatever reason, Appellant's answer was not correct.

5. THE HEARING OFFICER DID NOT ERR IN UPHOLDING REVOCATION WHERE APPELLANT PERFORMED ADEQUATELY ON VISION, KNOWLEDGE AND SKILLS TESTS, BUT OTHER EVIDENCE SHOWED SUBSTANTIAL IMPAIRMENT.

As stated in Arguments 1. and 2. above, the proper inquiry is whether there is substantial evidence in the record as a whole that supports the conclusions of the tribunal.

In *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E. 2d 304, 307 (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.

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. *Kearse v. State Health and Human Serv. Fin. Comm'n.*, 318 S.C. 198, 200, 456 S.E. 2d 892, 893 (1995). Therefore, the burden is on the Appellant 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, 323, 364 S.E. 2d 455, 456 (1988).

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. *Hamm*

v. South Carolina Public Service Comm'n and Wild Dunes Utilities, Inc., 309 S.C. 295, 298, 422 S.E.2d 118, 119 (1992); *Dorman v. DHEC*, 565 S.E.2d 119, 122, 350 S.C. 159, 165 (Ct. App. 2002). If a Court cannot weigh the evidence or substitute its judgment for that of the agency on matters of fact, it likewise cannot indulge in speculation over whether the administrative tribunal itself weighed one factor over another when there is substantial evidence in the record as a whole supporting the decision.

CONCLUSION

The Record in this case supports the conclusion of the Department, based on the recommendation of the Medical Advisory Board and sustained by the Hearing Officer that Respondent's physical and mental condition precludes him from safely driving. Respondent's attending neurologist, treating Respondent for Alzheimer's dementia, sent the Department a letter stating his medical opinion that Respondent could not safely drive and his driving privileges should be revoked. This started a process to determine Respondent's fitness to drive.

Section 56-1-221 (C) specifically recognizes that the Medical Advisory Board's determination "may be made from records and reports or may cause and examination and report to be made by . . . any other qualified person it may designate." In this case, the Board not only received reports but also affirmatively considered additional reports made after the Department's initial inquiry. Carrying out the intent of this section, the General Assembly must be assumed to have had the knowledge that in personal testimony of doctors, nurses, therapist or other medical professionals before the Department, the Medical Advisory Board and the OMVH would be next to impossible.

The proper inquiry is not whether Respondent can point to some out of court reference in Dr. Mazzeo's letters and speculate without evidence that the whole matter is motivated by certain family members he claims to be biased. It is not even whether a reasonable person could reach a different conclusion based on the evidence, even though there is no other conclusion that could have reasonably been reached in this case. The proper inquiry is whether there is sufficient reliable and probative evidence in the record by which the Department's determination, as recommended by the Medical Advisory Board, can be sustained. There is sufficient evidence in the record to sustain the determination.

Respectfully submitted,

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Blythewood, S.C.
November 17, 2015

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Administrative Law Court

The Honorable Deborah Brooks Durden, Administrative Law Judge

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Appellate Case No. 2015-001491

H.H. Vonharten ..... Appellant,

v.

South Carolina Department of Motor Vehicles ..... Respondent.

PROOF OF SERVICE

PURSUANT TO SCACR, I HEREBY CERTIFY that today, November 17, 2015, I served one (1) copy of the Respondent's Initial Brief and Designation of Matter by depositing with the United States Postal Service, correct postage prepaid, to Counsel for the Appellant at the address indicated below:

James H. Moss, Esquire
Moss, Kuhn & Fleming, P.A.
Post Office Drawer 507
Beaufort, South Carolina 29901-0507

Jeannine Moore

Jeannine (Nina) Moore, Paralegal
Office of General Counsel

November 17, 2015
Blythewood, South Carolina

Nikki R. Haley
Governor

Kevin A. Shwedo
Director

State of South Carolina

Department of Motor Vehicles

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SC Court of Appeals

November 17, 2015

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

RE: ***H.H. Vonharten v. South Carolina Department of Motor Vehicles***
Appellate Case No: 2015-001491

Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. Unbound original and one copy of the Respondent's Initial Brief;
2. Original and one copy of the Respondent'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 Appellant.

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.

Thank you for your cooperation in this matter.

In kind regards,

Jeannine Moore

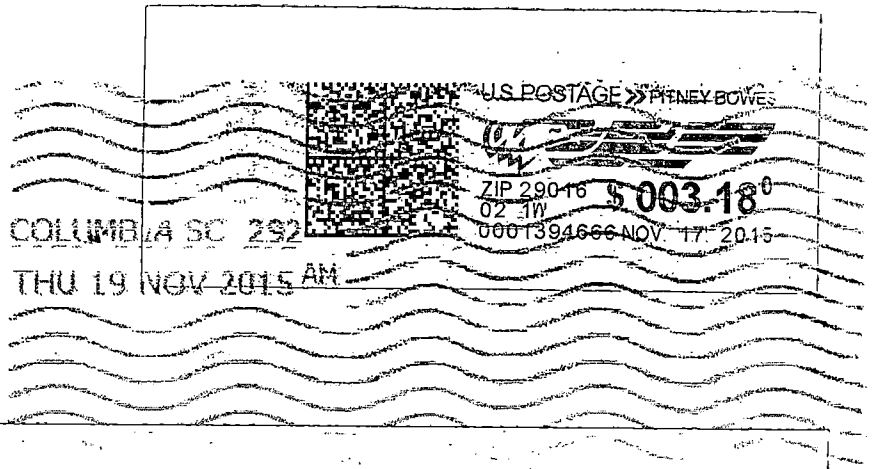
Jeannine (Nina) Moore, Paralegal
Office of General Counsel

Enclosures

cc: James H. Moss, Esquire

South Carolina Department of Motor Vehicles
Post Office Box 1498
Blythewood, South Carolina 29016

MV-17



South Carolina Department of Motor Vehicles
P.O. Box 1498
Blythewood, S.C. 29016

Form 103

Forwarding Service Requested

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