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SEP 21, 2015

Court of Appeals
Division III
State of Washington

NO. 33130-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOSE ANTONIO ALVARADO,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF LICENSING,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal by Jose Alvarado arises under the Uniform Commercial Driver's License Act, chapter 46.25 RCW. The Department of Licensing (Department) disqualified Mr. Alvarado's commercial driver's license when it received a report of a verified positive drug test from a preemployment drug test. The superior court affirmed in a de novo hearing. The superior court's decision should be affirmed because both state and federal law prohibit disclosure of the quantitative laboratory results to the employer and the Department. Federal law allows for disclosure of all records relating to the drug test to the employee. In commercial driver's license disqualification proceedings, the driver may present evidence of a false positive, including laboratory results with quantitative values.

In accordance with RCW 46.25.125(4), the Department established prima facie evidence of Mr. Alvarado's verified positive drug test when it presented "a copy of a positive test result" with a declaration by a medical review officer stating that the laboratory protocols were accurately followed. Mr. Alvarado was provided with an opportunity to present evidence that the result was a false positive, but did not do so. This Court should affirm the superior court's order because the Department properly followed the requirements of RCW 46.25.125(4) and due process.

II. COUNTERSTATEMENT OF ISSUES

1. **Prior to disqualifying a commercial driver's license, is the Department required to provide the license holder with a copy of the laboratory results specifying the quantitative values for a drug even though that practice would conflict with federal regulations and state law?**

2. **Did the Department deprive Mr. Alvarado of due process when it provided him with a copy of the positive drug test result and an opportunity to challenge the validity of the test at an administrative hearing?**

III. STATEMENT OF THE CASE

Jose Alvarado holds a commercial driver's license. CP 10. He applied for employment as a commercial driver with the City of Sunnyside in August 2012. CP 10, 16. The City of Sunnyside is an employer subject to the federal workplace drug and alcohol program. 49 C.F.R. pt. 40; CP 10. As part of the program, Mr. Alvarado submitted to a preemployment drug test. CP 9. The Department received a "Positive/Refused Drug Test Report" from medical review officer Thomas McClure indicating that Mr. Alvarado tested positive for benzoylecgonine (cocaine). CP 9. McClure signed the report under penalty of perjury certifying that the employer, the City of Sunnyside, is a program subject to federal requirements under 49 C.F.R. pt. 40 and that he accurately followed the protocols for testing in accordance with 49 C.F.R. pt. 40 in verifying or confirming the results of the test. CP 9.

The Department sent Mr. Alvarado a notice indicating that his commercial driver's license would be disqualified. CP 8. Mr. Alvarado timely requested a hearing to challenge the proposed disqualification. CP 14. The Request for Hearing form specified that Mr. Alvarado could provide evidence at the administrative hearing that the result was a false positive. CP 14.

At the administrative hearing, the Department offered the Positive/Refused Drug Test Report as an exhibit. CP 4. Mr. Alvarado, through counsel, argued that the matter should be dismissed because RCW 46.25.125(4) requires the Department to provide a copy of the laboratory results with quantitative values to Mr. Alvarado, not a copy of the Positive/Refused Drug Test Report. CP 4. Mr. Alvarado did not testify, present testimony from any witnesses, or submit exhibits to demonstrate that the result was a false positive. CP 4. The hearing officer affirmed the Department's order. CP 6. Mr. Alvarado timely appealed to Yakima Superior Court. At the de novo hearing, Mr. Alvarado, through counsel, made the same arguments and again presented no evidence. CP 20-22. The superior court affirmed the Department's order. CP 22.

IV. STANDARD OF REVIEW

This Court's review of the superior court decision that Mr. Alvarado was not entitled to a copy of the laboratory report with

quantitative values is limited to examining the record to see if substantial evidence supports the trial court's findings and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

This Court reviews de novo questions of law. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Review of statutory interpretation is a question of law. *Id.* at 344. Constitutional challenges are reviewed de novo. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997).

V. ARGUMENT

The Court should affirm the superior court's order disqualifying Mr. Alvarado's commercial driver's license because, consistent with federal and state law requirements, the Department properly provided him with a copy of the positive drug test result. Federal regulations and state law preclude the Department from obtaining the quantitative drug test result. Additionally, the notice of and opportunity to challenge the positive drug test result satisfied due process.

A. Federal and State Law Prohibit the Department from Obtaining Quantitative Drug Test Results

Federal regulations and state law do not require the Department to provide Alvarado with a test result report that includes quantitative analysis. Nothing in the language of the statute suggests such a requirement. To the contrary, state law and federal regulations prohibit reporting the quantitative results to the employer and the Department. Similarly, the Uniform Commercial Driver's License Act, chapter 46.25 RCW, permits only the finding of a verified positive drug test to be released to the Department. The Department properly complied with these laws when it provided the verified positive drug test to Mr. Alvarado and gave him the opportunity to challenge the result at an administrative hearing. The superior court did not commit an error law because it properly interpreted and applied the law when it held that the Department was not required to provide the laboratory report with quantitation. The Court should affirm.

1. Federal law provides protocols to ensure accurate results of preemployment drug tests and does not allow the Department to obtain a copy of the laboratory report with quantitative results.

As part of Congress' plan to protect the public roadways, it required the Secretary of Transportation to establish a program requiring motor carriers to conduct preemployment, reasonable suspicion, random,

and post-accident testing of operators of commercial motor vehicles for the use of controlled substances. 49 U.S.C. § 31306(b)(1)(A); 49 C.F.R. § 40.11(a); 49 U.S.C. § 31306(c). Any employer that employs people who operate commercial motor vehicles must have a drug and alcohol testing program that complies with the testing procedures set forth in 49 C.F.R. pt. 40; 49 C.F.R. § 382.103(a)(1); 49 C.F.R. § 383.3; 49 C.F.R. § 382.105.

Federal regulations establish a comprehensive process for collection of a urine specimen by personnel with special training, 49 C.F.R. §§ 40.31-.37, specimen testing by a laboratory certified by the Department of Health and Human Services, 49 C.F.R. §§ 40.81-.113, and review of test results by a licensed physician—known as the medical review officer—who acts as an "independent and impartial 'gatekeeper' and advocate for the accuracy and integrity of the drug testing process" and provides a "quality assurance review of the drug testing process for the specimens . . ." 49 C.F.R. § 40.123(a), (b).

The federal regulations promulgated by the Secretary of Transportation limit disclosure of the test results by the medical review officer to the employer as either positive or negative, and if the result is positive, the medical review officer may report the type of drug(s). 49 C.F.R. § 40.163(c)(6)-(7), (g).

The medical review officer is required to "contact the employee directly (i.e., actually talk to the employee), on a confidential basis, to determine whether the employee wants to discuss the test result." 49 C.F.R. § 131. The medical review officer "must verify a confirmed positive test result for marijuana, cocaine, amphetamines, and/or PCP unless the employee presents a legitimate medical explanation for the presence of the drug(s)/metabolite(s) in his or her system." 49 C.F.R. § 40.137(a). Once the review process is complete, the medical review officer must report to the employer whether the results are positive or negative. 49 C.F.R. § 40.163(c)(6), .165. The medical review officer may report to the employer the drug(s) that the person tested positive for but "*must not* provide quantitative values" to the employer. 49 C.F.R. § 40.163(g) (emphasis added).[1] The employee may submit a written request to the laboratory to access all records relating to his or her drug test. 49 C.F.R. § 40.329. When an employer receives a copy of a verified positive drug test, federal regulations require the employer to "immediately remove the employee involved from performing safety-sensitive functions." 49 C.F.R. § 40.23(a). A driver may not return to safety-sensitive functions until the driver has met with a substance abuse

[1] The regulation prohibits the medical review officer from providing quantitative values to the "DER," which stands for "designated employer representative," who is the employee designated by the employer to receives the test results. 49 C.F.R. § 40.163(g); 49 C.F.R. § 40.3.

professional, complied with prescribed education/and or treatment and submits to a negative return to duty drug test. 49 C.F.R. § 40.305(b).

Federal regulations authorize employers to comply with state laws that require disclosure of a violation of federal drug testing regulations to the state licensing authority. 49 C.F.R. § 40.331(g).

2. State law permits only the finding of the verified drug test result to be released to the Department.

Washington state law requires the Department to disqualify a CDL when it receives a verified positive drug test. RCW 46.25.125(1). Consistent with the federal regulations, Washington enacted a statute that allows for only the finding of a verified positive result to be disclosed to the Department by the employer. RCW 46.25.123(1). The statute does not provide the Department with authority to obtain the actual laboratory reports with quantitative values. RCW 46.25.123(1). This is consistent with the federal regulation's prohibition on the medical review officer providing the quantitative results to the employer. 49 C.F.R. § 40.163(g).

A medical review officer is required to "report the finding of a commercial motor vehicle driver's verified positive drug test . . . to the department of licensing on a form provided by the department." RCW 46.25.123(1). Upon receiving a verified positive drug test, the Department provides the driver with a Notice of Disqualification and written procedures on how to obtain a hearing. RCW 46.25.125(1). If a

hearing is requested, the issues that may be reviewed at both the administrative hearing and the hearing de novo on appeal to superior court are limited to:

> (a) Whether the driver is the person who is the subject of the report;
>
> (b) whether the motor carrier, employer, or consortium has a program that is subject to the federal requirements under 49 C.F.R. 40; and,
>
> (c) whether the medical review officer or breath alcohol technician making the report accurately followed the protocols established to verify or confirm the results, or if the driver refused a test, whether the circumstances constitute the refusal of a test under 49 C.F.R. 40.

RCW 46.25.125(4).

The Department satisfies its initial burden by producing a copy of the test result received from the medical review officer. RCW 46.25.125(4) provides that "[a] copy of a positive test result with a declaration by the tester or medical review officer or breath alcohol technician stating the accuracy of the laboratory protocols followed to arrive at the test result is prima facie evidence (i) Of a verified positive drug test or positive alcohol confirmation test result ...." RCW 46.25.125(4) (emphasis added). The driver is entitled to present evidence to demonstrate a false positive. RCW 46.25.125(4). The driver may testify, present testimony from witness, and submit exhibits. RCW 46.20.332, .334. As discussed earlier, the driver may submit a

written request to the laboratory to access all records relating to his or her drug test. 49 C.F.R. § 40.329. Here, Mr. Alvarado presented no evidence—only argument—at his administrative and superior court hearings. CP 4; 20-22.

3. The plain language of RCW 46.25.125 does not require the Department to provide a copy of the quantitative test result report.

Mr. Alvarado argues that the Department was required to produce quantitative readings of the level of cocaine present in the specimen he provided. Opening Br. of Appellant at 1, 3-4. However, the statute plainly requires no such thing. "Plain meaning is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 694, 526, 229 P.3d 791 (2010), *republished with modifications* 169 Wn.2d 516, 243 P.3d 1283 (2010). The Court should not add language to an unambiguous statute. "Where the Legislature omits language from a statute, whether intentionally or inadvertently, this court will not read into the statute the language it believes was omitted." *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.2d 1234 (2006).

Here, RCW 46.25.123(1) requires a medical review officer to report a finding of a positive drug test, and RCW 46.25.125(4) establishes

that the same report is prima facie evidence of a verified test report at a requested hearing. In neither section did the Legislature explicitly require proof of the quantitative values of the drug test. Further, this reading harmonizes the drug-testing scheme as whole: federal regulations *prohibit* the medical review officer from providing the quantitative values of a drug test result to the employer. 49 C.F.R. 40.163(g). The quantitative value can only be released to the employee. 49 C.F.R. § 40.329. Under this scheme, the drug test result reported to the Department by the employer necessarily excludes reference to the quantitative value. It would be absurd to read the statute to require the Department to produce evidence that it is prohibited from obtaining, but that the commercial-driver-license holder can obtain on his own. *Cf. Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (holding that court should avoid constructions that yield unlikely, absurd, or strained consequences).

Here, the Legislature intended the Department to rely exclusively on the report received from the medical review officer. The finding of a positive drug test was submitted by the medical review officer to the Department on the Department's form. CP 9, 16. Mr. Alvarado received a copy of the form. CP 3, 9. The Department did not err when it did not produce quantitative laboratory results, not only because the Department never had a copy of those results, but also, more importantly, because the

records from the laboratory are not required by RCW 46.25.125(4). If Mr. Alvarado felt that the quantitative levels were exculpatory, he certainly could have requested the quantitative results from the laboratory and submitted them at a hearing. 49 C.F.R. § 40.329. Although the superior court concluded that the copy of the positive test result was sufficient on the basis that the Uniform Commercial Driver's License Act is to be liberally construed, it is irrelevant because this Court engages in de novo review. CP 20-22.

B. The Department Afforded Mr. Alvarado Adequate Due Process When It Provided Him with A Copy of the Positive Drug Test and an Opportunity to Challenge Its Accuracy

The Fourteenth Amendment to the United States Constitution provides that no "state shall deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. A similar provision is found in the Washington State Constitution, Article 1, §3. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

"It is well settled that driver's licenses are property interests protected by procedural due process." *Amunrud v. Bd. of Appeals*, 158 Wn. 2d 208, 216, 143 P.3d 571 (2006) . However, the government has a compelling interest in "ensuring the sobriety and fitness of operators of

dangerous instrumentalities or equipment." *Int'l Bhd. of Teamsters v. Dep't of Transp.*, 932 F.2d 1292, 1304 (9th Cir. 1991) (upholding random drug testing of commercial truck drivers); *see also Bluestein v. Skinner*, 908 F.2d 451, 457 (9th Cir. 1990) (upholding Federal Aviation Administration regulations requiring random drug testing of flight instructors and dispatchers); *Int'l Bhd. of Elec. Workers, Local 1245 v. Skinner*, 913 F.2d 1454, 1458 (9th Cir. 1990) (upholding random testing of all employees engaged in operations, maintenance, or emergency response functions on gas pipelines).

Under *Mathews*, due process is a flexible standard designed to balance the needs of the public and the individual and arrive at the minimum acceptable process that safeguards the interests of all involved. *Mathews,* 424 U.S. at 334. The procedures required by due process are not rigidly set, but reflect the nature of the proceeding. *Id.* at 334. In order to determine the process due in a given case, the court balances (1) the private interest affected by the government action, (2) the risk of erroneous deprivation of that interest under existing procedural protections, and (3) the countervailing government interest, including the function involved and the fiscal and administrative burdens additional procedures would entail. *Id.* at 335.

In this appeal, the first prong of the *Mathews* test is undisputed because Mr. Alvarado has a property interest in his commercial driver's license. *Amunrud,* 158 Wn.2d at 216.

As to the risk of erroneous deprivation, Mr. Alvarado incorrectly argues that the risk of error is probable under the existing disqualification procedures. Rather, the Department reasonably relies on the report of the medical review officer because the medical review officer is certifying that he or she has followed all of the federal protocols to arrive at the test result. CP 9. The federal regulations provide an extensive framework for the laboratory and medical review officer to comply with before reporting a finding of a positive test result to the employer. *See, generally*, 49 C.F.R. §§ 40.31-.277. Furthermore, the employee may request all of the information related to the test results. 49 C.F.R. § 40.329.

Additionally, to minimize the risk of error in the commercial driver's license disqualification proceeding, once the Department establishes prima facie evidence, the driver may provide evidence to demonstrate that the result is a false positive. RCW 46.25.125(4). The driver is informed of this opportunity in plain language on the Request for Hearing form. CP 14. The driver may present evidence in the form of documentation, such as the laboratory report with quantitative values,

testimony by the driver, or testimony of expert witnesses. *See* RCW 46.20.332, .334.

In *Flory v. Department of Motor Vehicles*, 84 Wn.2d 568, 572, P.2d 1318 (1974) the Washington Supreme Court found that where the Department seeks an order to suspend or revoke a driver's license, due process is satisfied where the licensee is afforded a hearing where he or she is provided the right to confront adverse witnesses, the right to present evidence and oral argument, and the right to representation by counsel. *Flory*, 84 Wn.2d at 572. If the driver presents no evidence, the hearing officer can apply the law to the facts after reviewing the Department's prima facie evidence. *Alforde v. Dep't of Licensing*, 115 Wn. App. 576, 582, 63 P.3d 170 (2003).

Here, the medical review officer signed under penalty of perjury that he followed all of the protocols for testing in accordance with 49 C.F.R. pt. 40 in verifying the results of Mr. Alvarado's test. CP 9, 16. The Department was not entitled to the laboratory report, but Mr. Alvarado could have obtained the report and presented it at the administrative hearing to challenge the validity of the medical review officer's report. Mr. Alvarado's counsel participated in the administrative proceeding, but chose not to call any witnesses or submit exhibits. CP 4-7. The risk of erroneously depriving a driver of his or her license is minimal because of

the medical review officer's certification and the explicit permission in the federal regulations that the employee/driver may obtain his or her own records, and that these records may be presented by the driver at the administrative hearing to prove that the result is a false positive. RCW 46.20.332, .334; RCW 46.25.125.

Finally, as to the government's interest, the state's interest in protecting the public highways from impaired drivers is substantial. The purpose of chapter 46.25 RCW is to be "liberally construed to promote the public health, safety, and welfare." RCW 46.25.005. An integral function of driver's revocation hearings is to swiftly remove intoxicated drivers from the road. *Watkins v. Dep't of Licensing*, 197 Wn. App. 591, 349 P.3d 946, 952 (2015). "When the purpose of legislation is to promote the health, safety and welfare of the public and bears a reasonable and substantial relationship to that purpose, every presumption must be indulged in favor of constitutionality." *State v. Lee*, 135 Wn.2d 369, 390, 957 P.2d 741 (1998). Moreover, the administrative burden on the Department to obtain the laboratory report is tremendous because the Department does not have legal authority to obtain the laboratory report. Agencies only have powers that have been given to them by the legislature. *Kabbae v. Dep't of Social and Health Servs.*, 194 Wn. App. 432, 440, 192 P.3d 903 (2008).

Balancing the *Mathews* factors, the procedures that are in place to appeal a disqualification of a commercial driver's license provide sufficient procedural due process. Mr. Alvarado was given notice and a meaningful opportunity to challenge the Department's actions and demonstrate that the medical review officer erred. Mr. Alvarado has not provided any statutory provisions or case law that support that he was entitled to receive the laboratory report with quantitation from the Department.

VI. CONCLUSION

For the reasons stated above, the Department respectfully requests that the Court affirm the January 23, 2015, decision of the trial court disqualifying Mr. Alvarado's commercial driver's license.

RESPECTFULLY SUBMITTED this 21 day of September, 2015.

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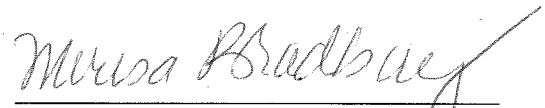

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I served all parties, or their counsel of record, a true and correct copy of this document by United States Mail, postage prepaid, at the following addresses:

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DATED this 21st day of September, 2015, at Spokane, Washington.

Mary C. Miller

MARY C. MILLER
Legal Assistant