

**IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT, IN AND  
FOR ORANGE COUNTY, FLORIDA**

**CAITLIN CLARK,**

Petitioner,

v.

CASE NO.: 2009-CA-19417-O  
WRIT NO.: 09-19

**STATE OF FLORIDA, DEPARTMENT  
OF HIGHWAY SAFETY AND MOTOR  
VEHICLES, DIVISION OF DRIVER  
LICENSES**

Respondent.

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Petition for Writ of Certiorari  
From the Florida Department of  
Highway Safety and Motor Vehicles,  
Mary Varnadore, Hearing Officer.

William R. Ponall, Esquire,  
for Petitioner.

James Fisher, Esquire,  
for Respondent.

Before M. SMITH, GRINCEWICZ, and O’KANE, J.J.

PER CURIAM.

**FINAL ORDER GRANTING PETITION FOR WRIT OF CERTIORARI**

Petitioner Caitlin Clark (“Clark”) timely filed this petition seeking certiorari review of the Florida Department of Highway Safety and Motor Vehicles’ (the “Department”) “Findings of Fact, Conclusions of Law and Decision,” sustaining the suspension of her driver’s license pursuant to section 322.2615, Florida Statutes, for driving a motor vehicle with an unlawful breath-alcohol level. This Court has jurisdiction pursuant to section 322.2615(13), Florida

Statutes, and Florida Rule of Appellate Procedure 9.030(c). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320.

### **Facts and Procedural History**

On March 1, 2009, Officer Holt, of the University of Central Florida Police Department, arrested Clark for DUI and transported her to the Orange County DUI Testing Center. Breath Test Operator Brown (“BTO Brown”) conducted the twenty-minute observation of Clark, and Officer Holt read implied consent warnings to Clark. Clark submitted to a breath-alcohol test, which resulted in breath-alcohol levels of .158 and .155. Therefore, the Department suspended her driving privilege.

Pursuant to section 322.2615, Florida Statutes, Clark requested a formal review of her license suspension. The hearing was scheduled, and subpoenas were issued and served for five witnesses, including BTO Brown and Florida Department of Law Enforcement (“FDLE”) Inspectors Roger Skipper (“Inspector Skipper”) and Kelly Melville (“Inspector Melville”). Prior to the hearing, the FDLE filed a Motion to Quash Administrative Subpoena for Inspector Skipper. Clark responded in opposition to the motion, and she filed a Motion for Attorney’s Fees, alleging that the FDLE’s motion was frivolous and not filed in good faith. Hearing Officer Mary Varnadore denied the motion to quash and the motion for attorney’s fees, stating that she lacked authority to grant the motion for attorney’s fees.

On April 1, 2009, Hearing Officer Mary Varnadore held a formal review at which Clark did not appear but was represented by counsel. At the hearing, Clark’s counsel examined Inspector Skipper, asking him whether he knew what version of micron bands were used on the Intoxilyzer instrument used to test Clark’s breath-alcohol level. Inspector Skipper refused to answer the question, and the hearing officer requested that Clark’s counsel proffer the relevance

of the question. Clark's counsel explained that the question is relevant to determining whether the Intoxilyzer instrument complied with Florida Administrative Code Rule 11D-8.003, FDLE/ATP Form 34, and the U.S. Department of Transportation Conforming Products List of Evidential Breath Measurement Devices (the "CPL"). He further demonstrated that substantial compliance with the administrative regulations would be necessary to establish the validity of the breath test results and admit them into evidence. The hearing officer determined that the question was outside of the scope of the hearing, and she prevented Clark's counsel from asking questions regarding micron bands and the Intoxilyzer's inclusion on the CPL.

Clark objected to the hearing officer's limiting of her cross-examination of Inspector Skipper. Furthermore, she moved to invalidate her license suspension on five grounds: 1) Inspector Melville failed to appear at the hearing; 2) BTO Brown failed to appear at the hearing; 3) Clark was not lawfully stopped and detained; 4) the breath test did not comply with the administrative rules; and 5) Clark was denied due process when the hearing officer limited her cross-examination of Inspector Skipper. The hearing officer overruled Clark's objection, and she reserved ruling on Clark's motions.

On May 8, 2009, Hearing Officer Mary Varnadore held a continuance formal review at which Clark did not appear but was represented by counsel. BTO Brown appeared at this hearing, but Inspector Melville again failed to appear. Therefore, Clark moved to invalidate her license suspension on two grounds: 1) Inspector Melville failed to appear at the hearing for a second time, and 2) Clark was deprived of her right to a meaningful formal review hearing within 30 days of her request. The hearing officer reserved ruling on both motions. On May 19, 2009, the hearing officer entered an order denying all of Clark's motions and sustaining the suspension of Clark's driver's license.

## Discussion of Law

The Court's review of an administrative agency decision is governed by a three-part standard of review: 1) whether procedural due process was accorded; 2) whether the essential requirements of the law were observed; and 3) whether the decision was supported by competent substantial evidence. Broward County v. G.B.V. Int'l, Ltd., 787 So. 2d 838, 843 (Fla. 2001) (citing City of Deerfield Beach v. Vaillant, 419 So. 2d 624, 626 (Fla. 1982)). "It is neither the function nor the prerogative of a circuit judge to reweigh evidence and make findings [of fact] when [undertaking] a review of a decision of an administrative forum." Dep't of Highway Safety & Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th DCA 1989).

In a case where the individual's license is suspended for driving with an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher, "the hearing officer shall determine by a preponderance of the evidence whether sufficient cause exists to sustain, amend, or invalidate the suspension." § 322.2615(7), Fla. Stat. (2008). The hearing officer's scope of review is limited to the following issues:

1. Whether the law enforcement officer had probable cause to believe that the person whose license was suspended was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages or chemical or controlled substances.
2. Whether the person whose license was suspended had an unlawful blood-alcohol level or breath-alcohol level of 0.08 or higher as provided in [section] 316.193.

§ 322.2615(7)(a), Fla. Stat. (2008).

In her petition, Clark argues that the hearing officer's decision is not supported by competent substantial evidence that Clark was lawfully seized and detained for purposes of a DUI investigation. She further argues that the hearing officer's decision is not supported by competent substantial evidence that the breath test was conducted in substantial compliance with

applicable administrative rules. Clark also argues that she was denied procedural due process because the hearing officer improperly limited her cross-examination of Inspector Skipper. Finally, Clark asserts that the hearing officer departed from the essential requirements of the law by denying her motion for attorney's fees against the FDLE.

*Attorney's Fees*

Clark fails to cite to any rule, statute, or opinion that establishes a hearing officer's authority to assess attorney's fees against a non-party. The FDLE is not a party to this litigation. Therefore, we find that the hearing officer did not depart from the essential requirements of the law by denying Clark's motion for attorney's fees. See Pevsner v. Frederick, 656 So. 2d 262 (Fla. 4th DCA 1995).

*Limiting Cross-Examination of Inspector Skipper*

"For the results of a . . . breath test to be admissible, the State must establish that the test was made in substantial conformity with the applicable administrative rules and statutes." Dep't of Highway Safety & Motor Vehicles v. Russell, 793 So. 2d 1073, 1075 (Fla. 5th DCA 2001) (citing State v. Donaldson, 579 So. 2d 728 (Fla. 1991)). Once the State submits affidavits claiming that the breath-alcohol test substantially conformed to applicable administrative standards, the affidavits constitute presumptive proof of conformity, and the burden is upon the licensee to present evidence to rebut this presumption. See Meinken v. State, Dep't of Highway Safety & Motor Vehicles, Div. of Driver Licenses, 17 Fla. L. Weekly Supp. 154a (Fla. 9th Cir. Ct. Oct. 29, 2009) (citing Dep't of Highway Safety & Motor Vehicles v. Mowry, 794 So. 2d 657, 659 (Fla. 5th DCA 2001)). Once a licensee presents evidence to rebut the presumption of conformity, the burden shifts to the Department to demonstrate substantial compliance with the applicable administrative rules. See Id. (citing Dep't of Highway Safety & Motor Vehicles v.

Farley, 633 So. 2d 69, 71 (Fla. 5th DCA 1994)).

Florida Administrative Code Rule 11D-8.003 approves the CMI, Inc. Intoxilyzer 8000 for evidentiary use, provided the instrument is evaluated in accordance with FDLE/ATP Form 34. Subsection 1 of Form 34 provides that breath test instruments used in Florida must be listed on the CPL. When the Intoxilyzer 8000 was added to the CPL, it was described as a “non-dispersive infrared device which uses the 3.4 micron and the 9 micron band for measurement of alcohol.” 67 Fed. Reg. 62091 (Oct. 3, 2002). “If the Intoxilyzer 8000 in use in Florida uses any micron bands other than the 3.4 and 9.0 micron band, it is not on the [CPL].” State v. Atkins, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008) (en banc).

In the present case, the State submitted affidavits claiming that the Intoxilyzer 8000 instrument and the methods used to test Clark’s breath-alcohol level complied with Florida Administrative Code Rule 11D-8. These affidavits constituted presumptive proof of compliance. Clark’s counsel attempted to rebut this presumption by questioning Inspector Skipper concerning the micron bands used in the Intoxilyzer instrument. This question was relevant to determine whether this Intoxilyzer instrument was listed on the CPL, thus complying with FDLE/ATP Form 34 and Florida Administrative Code Rule 11D-8.003. When the hearing officer failed to require Inspector Skipper to answer the question and prevented Clark’s counsel from further asking such questions, she prevented Clark from presenting evidence to rebut the presumption of compliance. Clark had the right to present evidence relevant to the issues, cross-examine opposing witnesses, and rebut the evidence presented against her. Fla. Admin. Code R. 15A-6.013(5). Therefore, we find that Clark was denied procedural due process. In light of this conclusion, we find it unnecessary to address the additional arguments made by Clark and the Department.

When an evidentiary error is made at an administrative hearing, such as limiting a licensee's right to cross-examine a witness, the proper remedy is to remand for further proceedings. Lillyman v. Dep't of Highway Safety & Motor Vehicles, 645 So. 2d 113, 114 (Fla. 5th DCA 1994). In this scenario, the licensee is not entitled to a dismissal of the license suspension proceeding. Id. Therefore, the proper remedy in the present case is to remand.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the "Petition for Writ of Certiorari" is **GRANTED**; the hearing officer's "Findings of Fact, Conclusions of Law and Decision" is **QUASHED**; and the case is **REMANDED** for further proceedings consistent with this opinion.

**DONE AND ORDERED** in Chambers, at Orlando, Orange County, Florida on this the \_\_\_\_15th\_\_\_\_ day of \_\_\_\_June\_\_\_\_\_, 2010.

\_\_\_\_\_/S/\_\_\_\_\_  
**MAURA T. SMITH**  
Circuit Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**DONALD E. GRINCEWICZ**  
Circuit Judge

\_\_\_\_\_/S/\_\_\_\_\_  
**JULIE H. O'KANE**  
Circuit Judge

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Order has been furnished via U.S. mail to: **William R. Ponall, Esq., Kirkconnell, Lindsey, Snure and Yates, P.A.**, Post Office Box 2728, Winter Park, Florida 32790 and **James Fisher, Esq., Department of Highway Safety and Motor Vehicles**, 133 South Semoran Boulevard, Suite A, Orlando, Florida 32807 on the \_\_\_\_16th\_\_\_\_ day of \_\_\_\_June\_\_\_\_\_, 2010.

\_\_\_\_\_/S/\_\_\_\_\_  
Judicial Assistant