

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

JARROD R. M. HOLZHEU,)
)
Appellant,)
)
vs.)
)
STATE OF IDAHO, DEPARTMENT OF)
TRANSPORTATION,)
)
)
Respondent.)

Case No. **CV 2008 10161**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. INTRODUCTION AND BACKGROUND.

Appellant Jarrod R.M. Holzheu (Holzheu) appeals the respondent Idaho Transportation Department's (ITD) Findings of Fact and Conclusions of Law and Preliminary Order, dated November 29, 2008, suspending his commercial driver's license (CDL). Holzheu is a self-employed long-haul trucker.

In 2007, Holzheu received a Driver Disqualified citation in Oregon, based on a previous 2005 citation and conviction for his vehicle being over length in Colorado. He was convicted of this charge on October 8, 2007. R. p. 13. In 2008, Holzheu received a citation for exceeding the posted speed limit in Wyoming by fifteen (15) or more miles per hour. He was convicted of this charge on October 6, 2008. R. p. 15. Based on these two convictions, ITD sought to suspend Holzheu's commercial driving privileges for sixty (60) days pursuant to Idaho Code § 49-335(6). On October 30, 2008, Holzheu sought an administrative hearing and a stay of disqualification pending the hearing. ITD

granted the stay and the hearing was held on November 18, 2008. On November 29, 2008, hearing examiner Michael B. Howell issued his Findings of Fact and Conclusions of Law and Preliminary Order, which upheld ITD's decision to disqualify Holzheu's commercial driving privileges. The Hearing Examiner held: "Idaho Code Section 49-120 adopts the definition of 49 CFR part 383 which identify driving a commercial vehicle without a valid CDL in possession...as a serious traffic violation." Fact and Conclusions of Law and Preliminary Order, p. 2, ¶ II.

On December 22, 2008, Holzheu filed his Petition for Judicial Review with this Court. Holzheu sought a stay of the November 29, 2008, Findings of Fact and Conclusions of Law and Preliminary Order, and on December 23, 2008, the Honorable Charles Hosack ordered Holzheu's commercial driving privileges not be disqualified during the pendency of judicial review.

The issues raised by Holzheu are:

1. Whether the Hearing Officer's Findings of Fact were correct.
2. Whether the Hearing officer's Conclusions of Law were correct.
3. Whether Petitioner's 2007 Driver Disqualified Citation qualifies as a serious traffic offense under 49 C.F.R. 383.5.
4. Whether Petitioner is entitled to Attorney Fees.

Memorandum in Support of Petition for Judicial Review. The dispositive issue for this Court is whether a disqualified driver citation is a serious traffic offense under Idaho Code § 49-335(6), as defined in § 49-120(11) and as defined under 49 CFR § 383.5 (g) or (h). Idaho Code § 49-335(6) reads:

(6) A person is disqualified from operating a commercial motor vehicle for a period of not less than sixty (60) days if convicted of two (2) serious traffic violations, or one hundred twenty (120) days if convicted of three (3) or more serious traffic violations, committed in a commercial motor vehicle

arising from separate incidents occurring within a three (3) year period. Serious traffic violation is specifically defined under Idaho Code § 49-120(11), which in turn reads: “serious traffic violation’ means conviction of an offense specified in 49 CFR part 383 and including any subsequent amendments thereto, while operating a commercial motor vehicle, and shall include driving a commercial motor vehicle.” This Court finds Holzheu did not commit a serious traffic violation under 49 CFR § 383.5 (g) or (h). This Court may overturn the agency’s decision where that agency’s findings or conclusions in that decision violate statutory provisions. Idaho Code § 67-5279(3).

The Court further finds that a disqualified driver citation likely violates Idaho Code § 49-335(11), which reads:

(11) A person is additionally disqualified from operating a commercial motor vehicle in accordance with 49 CFR part 383 if convicted of operating a commercial motor vehicle during a time when such person’s class A, B or C driving privileges were revoked, suspended, or canceled or during a time when such person was disqualified from operating a commercial motor vehicle.

However, Holzheu was not charged with violating Idaho Code § 49-335(11). Holzheu was clearly notified that he violated pursuant to Idaho Code § 49-335(6), not subsection (11). The Notice of Disqualification, sent to Holzheu on December 12, 2008, reads:

NOTICE OF DISQUALIFICATION

THE RECORDS OF THE IDAHO TRANSPORTATION DEPARTMENT INDICATE THAT YOU HAVE BEEN CONVICTED OF 2 SERIOUS TRAFFIC OFFENSES OCCURRING WITHIN A 3-YEAR PERIOD WHILE OPERATING A COMMERCIAL MOTOR VEHICLE.

BY STATUTE, THE DEPARTMENT IS WITHDRAWING YOUR DRIVING PRIVILEGES TO OPERATE A COMMERCIAL MOTOR VEHICLE FOR 60 DAYS EFFECTIVE DECEMBER 31, 2009 THROUGH MARCH 01, 2009, IDAHO CODE 49-335(6).

R. p. 22. Equally clear is the fact that the Hearing Examiner only considered Idaho Code § 49-335(6), when he found as a fact that “The period between the incidents set

forth above is less than three (3) years”, and made the conclusion of law that “Idaho Code, Section 49-335(6), provides that a person is disqualified from operating a commercial motor vehicle for a period of sixty (60) days if convicted of two (2) serious traffic violations within a three (3) year period.” Fact and Conclusions of Law and Preliminary Order, pp. 1-2, Findings of Fact ¶ II, Conclusions of Law ¶ I.

II. STANDARD OF REVIEW.

Review of decisions to deny, cancel, suspend, disqualify, revoke, or restrict driver’s licenses is governed by the Idaho Administrative Procedures Act (IDAPA). See I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Reviewing Courts review the agency record on appeal independently. *Marshall v. Idaho Dep’t of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). However, reviewing courts do not substitute their judgment for that of the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. An agency’s findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency’s factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency’s decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency’s statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must

demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

III. ANALYSIS.

A. The Hearing Officer's Findings of Fact Are Erroneous, but not "Clearly Erroneous" so as to Warrant Reversal Based on Factual Findings.

Holzheu argues the Hearing Examiner's finding that "respondent received a conviction for operating a commercial vehicle without a valid CDL in possession on October 8, 2007" (Fact and Conclusions of Law and Preliminary Order, p. 1, Findings of Fact ¶ I), is incorrect because Holzheu's Oregon citation was not for EXP/NOCDL/IP, but was instead for Driver Disqualified. Memorandum in Support of Petition for Judicial Review, pp. 2-3. The gist of Holzheu's entire argument is that a Driver Disqualified citation and conviction is not a serious traffic offense and does not give rise to a suspension under I.C. § 49-335(6). Memorandum in Support of Petition for Judicial Review, pp. 3-6.

ITD notes for this Court that the agency record contains Holzheu's Driver License Record which shows a citation and conviction for "EXP/NOCDL/IP" (R. p. 4), which ITD argues stands for "driving a commercial vehicle with an expired CDL; driving a commercial vehicle with no CDL; or driving a commercial vehicle without a valid CDL in the driver's possession." Respondent's Brief, p. 7. ITD argues the Oregon citation does not appear in the administrative record and "it is important to note that Holzheu failed to produce as evidence at the administrative review hearing or in this appeal, any evidence related to the conviction which resulted from this citation." *Id.*, pp. 6-7.

Although Holzheu states he submitted an affidavit and attached a copy of the actual citation he received in Oregon to the Hearing Examiner before the administrative

review hearing, such submissions cannot be found in the Administrative Record for Judicial review. On January 23, 2009, Holzheu filed a “Notice of Filing Additional Documents” which has attached to that pleading Holzheu’s Administrative Hearing Memorandum submitted before the Hearing Examiner, the Affidavit of Holzheu, attached to which is a copy of the Oregon citation. This Notice of Filing Additional Documents was made, appropriately pursuant to I.A.R. 28(c), but subject to objection or at least a motion to delete under I.A.R. 30. On January 28, 2009, ITD objected to the Notice of Filing by filing its “Objection to Notice of Filing.” However, ITD did not notice up its objection. Oddly, ITD in its Objection to Notice of Filing stated “Respondent hereby requests this Court schedule a hearing for this objection.” That is not the way matters are noticed for hearing. Idaho Rule of Civil Procedure 7(b)(3)(A). The Court on its own *may* notice for hearing any motion, trial or proceeding pending before it. I.R.C.P. 6(e)(2). However, the Court cannot exercise that discretion if it is not aware of a party’s desire to have oral argument because that request is tucked away in a motion. In the ordinary course, the filing of this Objection to Notice of Filing without a proposed order would not cause any Deputy Clerk of Court to bring the file to the Court’s attention unless a hearing was requested by a party and noticed up. This Court had not seen that Objection to Notice of Filing until the Court reviewed the entire file on the date this case was set for oral argument on appeal, May 13, 2009. Since ITD failed to state “with particularity the grounds therefore including the number of the applicable civil rule, if any, under which it is filed”, and failed to notice its objection, this Court will not consider the Objection to Notice of Filing. I.R.C.P. 7(b)(1). At oral argument, counsel for ITD withdrew its objection. Accordingly, the material submitted in the Notice of Filing will be considered by this Court on appeal.

Given the evidence before the Hearing Examiner, his findings of fact were not clearly erroneous. Specifically, his finding that “Records of the Department, which records were introduced and received in evidence, demonstrate that while driving a commercial motor vehicle, respondent received a conviction for operating a commercial vehicle without a valid CDL in possession on October 8, 2007, State of Oregon arising out of an incident which occurred on July 7, 2007...” (Fact and Conclusions of Law and Preliminary Order, p. 1, Findings of Fact ¶ I), is erroneous, but not to the level of being clearly erroneous. As noted above, an agency’s findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). Nor, is the ITD’s interpretation of the Hearing Examiner’s factual finding unreasonable for attorney fee purposes, as is discussed at the end of this opinion. The Hearing Examiner looked at the “Records of the Department” (Fact and Conclusions of Law and Preliminary Order, p. 1, Findings of Fact ¶ I), and apparently concluded that Holzheu’s Driver License Record which shows a citation and conviction for “EXP/NOCDL/IP” (R. p. 4), meant Holzheu had an invalid CDL. That fact, while erroneous in this Court’s opinion, is not clearly erroneous.

However, this Court finds that whether Holzheu “received a conviction for operating a commercial vehicle without a valid CDL in possession on October 8, 2007”, or, instead received a Driver Disqualified citation in Oregon, is not determinative on this appeal. Neither driving without a valid CDL in possession nor a driver disqualified citation are covered under Idaho Code § 49-335(6), as further defined by Idaho Code § 49-120(11), as defined under 49 CFR § 383.5 (f), (g) or (h).

B. The Hearing Examiner Made an Erroneous Conclusion of Law in Determining a Driver Disqualified Conviction is a Serious Traffic Offense.

Holzheu argues the Hearing Examiner erred in concluding that “driving a commercial vehicle without a valid CDL in possession” was a serious traffic offense as such language is not used in the Idaho Code or applicable C.F.R. Memorandum in Support of Petition for Judicial Review, pp. 3-6. ITD argues Holzheu’s Oregon conviction for driving a commercial motor vehicle while disqualified from holding a CDL is a serious traffic offense of the type referenced in I.C. § 49-335(6). ITD argues:

Obviously when Holzheu was stopped while driving a commercial vehicle while disqualified he was therefore driving a commercial vehicle without obtaining a commercial driver’s license (in this case obtaining one would require resolving the citation and conviction and re-qualifying for his CDL).

Respondent’s Brief, p. 9. Idaho Code § 49-335(6) reads:

A person is disqualified from operating a commercial motor vehicle for a period of not less than sixty (60) days if convicted of two (2) serious traffic violations... committed in a commercial motor vehicle arising from separate incidents occurring within a three (3) year period.

A serious traffic violation, in turn, is defined as:

Conviction of an offense specified in 49 C.F.R. 383 and including any subsequent amendments thereto, while operating a commercial motor vehicle, and shall include driving a commercial motor vehicle:

- a) Without obtaining a commercial driver’s license; or
- b) Without having a commercial driver’s license in the driver’s possession; or
- c) Without the proper license class of commercial driver’s license or endorsements for the specific vehicle group being operated or for the passengers or cargo being transported.

I.C. § 49-120(11). Finally, 49 C.F.R. 383.5 defines serious traffic violations as:

- a) Excessive speeding, involving any single offense for any speed of 15 miles per hour or more above the posted speed limit;
- b) Reckless driving, as defined by State or local law or regulation, including but not limited to offenses of driving a CMV (commercial motor vehicle) in willful or wanton disregard for the safety of persons or property;
- c) Improper or erratic traffic lane changes;
- d) Following the vehicle ahead too closely;
- e) A violation, arising in connection with a fatal accident, of State or local law relating to motor vehicle traffic control;

- f) Driving a CMV without obtaining a CDL;
- g) Driving a CMV without a CDL in the driver's possession. Any individual who provides proof to the enforcement authority that issued the citation, by the date the individual must appear in court or pay any fine for such a citation, that the individual held a valid CDL on the date the citation was issued, shall not be guilty of this offense; or
- h) Driving a CMV without the proper class of CDL and/or endorsements for the specific vehicle group operated or for the passengers or type of cargo being transported.

Only the 2007 citation and conviction in Oregon are at issue on appeal, because Holzheu makes no argument that the hearing officer's considering his 2008 citation and conviction for exceeding the speed limit by 15 mph or more in Wyoming was improper in any way. Regarding the 2007 Oregon citation and conviction, Holzheu argues that he was driving a CMV with a CDL, he had the CDL in his possession at the time the Oregon citation was issued, and he had a proper CDL for the CMV operated. Memorandum in Support of Petition for Judicial review, p. 5. Holzheu also argues that Driver Disqualified is not listed as one of the serious traffic violations which give rise to disqualification under I.C. § 49-335(6). *Id.*, p. 4. The statute disqualifying CMV drivers for driving a commercial motor vehicle while disqualified is I.C. § 49-335(11), but Holzheu argues because ITD opted to pursue this matter under I.C. § 49-335(6), whether disqualification under subsection (11) could be maintained is not before this Court. *Id.*, pp. 5-6.

ITD replies the disqualification violation falls within the definition of a serious traffic violation as such a violation amounts to: (1) driving a commercial motor vehicle without obtaining a CDL (which would require resolving the citation and conviction in Oregon in order to obtain a CDL) and, (2) driving a commercial motor vehicle without a CDL in his possession ("because the license he had was invalid and therefore did not constitute a commercial driver's license"). Respondent's Brief, pp. 9-10. This Court would agree if the applicable statutory scheme instead listed: (1) driving a commercial motor vehicle

without obtaining a **valid** CDL and, (2) driving a commercial motor vehicle without a **valid** CDL in his possession.

This Court disagrees, and finds ITD's interpretations are not supported by the actual language in the statutory scheme. Again, Idaho Code § 49-335(6) reads:

(6) A person is disqualified from operating a commercial motor vehicle for a period of not less than sixty (60) days if convicted of two (2) serious traffic violations, or one hundred twenty (120) days if convicted of three (3) or more serious traffic violations, committed in a commercial motor vehicle arising from separate incidents occurring within a three (3) year period.

Serious traffic violation is specifically defined under Idaho Code § 49-120(11), which in turn reads: "serious traffic violation' means conviction of an offense specified in 49 CFR part 383 and including any subsequent amendments thereto, while operating a commercial motor vehicle, and shall include driving a commercial motor vehicle." The only applicable portions of 49 CFR § 383, set forth above in its entirety, are subsections:

- f) Driving a CMV without obtaining a CDL;
- g) Driving a CMV without a CDL in the driver's possession. Any individual who provides proof to the enforcement authority that issued the citation, by the date the individual must appear in court or pay any fine for such a citation, that the individual held a valid CDL on the date the citation was issued, shall not be guilty of this offense; or
- h) Driving a CMV without the proper class of CDL and/or endorsements for the specific vehicle group operated or for the passengers or type of cargo being transported.

It is undisputed that the Oregon citation and conviction were for driving a commercial motor vehicle while disqualified in the State of Colorado. This Court does not find the language of I.C. §§ 49-335(6), I.C. § 49-120 or 49 C.F.R. 383 to be ambiguous. There is no need to engage in statutory interpretation. The issue before the Court is whether Holzheu's 2007 driving while disqualified conviction in Oregon fits within the serious traffic violations enumerated in I.C. § 49-120(11) and 49 C.F.R. 383.

Driving a commercial motor vehicle without a “valid” CDL in the possession of the driver is not listed as a serious traffic offense under the Idaho statute and the applicable federal regulations. The Hearing Examiner’s findings and conclusions used the word “valid”, which Holzheu argues is incorrect as that word is not found in the statute or the federal regulation. The argument could be made that the word “valid” is necessarily implied in the requirement that a driver of a commercial motor vehicle have a “valid” CDL in his possession, but that situation is specifically covered by Idaho Code § 49-335(11), which states:

(11) A person is additionally disqualified from operating a commercial motor vehicle in accordance with 49 CRF part 383 if convicted of operating a commercial motor vehicle during a time when such person’s class A, B or C driving privileges were revoked, suspended, or canceled or during a time when such person was disqualified from operating a commercial motor vehicle.

Holzheu was simply charged by the ITD with the wrong Idaho Code section in the December 12, 2008, Notice of Disqualification.

Simply put, Idaho Code § 49-335(6), via Idaho Code § 49-120(11) and 49 CRF § 383 (f), (g) and (h) make it a serious traffic violation to be: f) Driving a CMV without obtaining a CDL (ie., not even having a CDL anywhere on the planet), g) Driving a CMV without a CDL in the driver’s possession (ie., having a CDL somewhere on the planet, but not with you in your truck when you are stopped), and h) Driving a CMV without the proper class of CDL and/or endorsements for the specific vehicle group operated or for the passengers or type of cargo being transported (just what it says). Holzheu did not commit any of these serious traffic violations. Satisfying each, he f) had a CDL, g) he had a CDL in his possession when stopped, and h) that CDL had the proper endorsements for what he was driving.

Holzheu's CDL was disqualified. However, the pertinent statute is Idaho Code § 49-325(11), which again reads:

(11) A person is additionally disqualified from operating a commercial motor vehicle in accordance with 49 C.F.R. 383 if such a person is convicted of operating a commercial motor vehicle during a time when such person's class A, B or C driving privileges were revoked, suspended or canceled or during a time when such a person was disqualified from operating a commercial motor vehicle.

I.C. § 49-335(11). The plain language of the subsection indicates that disqualification for driving while disqualified from operating a commercial motor vehicle is in addition to the disqualifications that are found in subsections (1) to (10). Thus, at ITD's election, it could have also sought disqualification on this ground, but did not. ITD gave Holzheu notice that it was proceeding under Idaho Code § 49-335(6), not subsection (11).

Ironically, if he had been correctly charged by ITD with a violation of Idaho Code § 49-335(11), the 2008 Wyoming citation for speeding by fifteen miles per hour or more (R. p. 15) is irrelevant as Idaho Code § 49-335(11) does not require two violations.

It appears Holzheu has all but abandoned the argument he set forth at the administrative review hearing, that he had no **knowledge** of the disqualification arising out of his driving in Colorado at the time he was cited in Oregon, as he now makes this argument only in passing on appeal to this Court. Memorandum in Support of Petition for Judicial Review, p. 5. As correctly argued by ITD, knowledge of disqualification is not required for I.C. § 49-335 to be applicable. Respondent's Brief, pp. 10-11. All that is required are two convictions for serious traffic offenses arising out of different incidents within three years. Here, Holzheu did in fact have knowledge of the disqualification. Holzheu had been sent a Serious Violation Warning Letter dated January 15, 2008, advising him of one serious traffic violation, the 2007 Oregon Driver Disqualified Citation. R. p. 14. Following receipt of this letter, Holzheu did not take action to resolve the

Oregon citation and conviction and subsequently committed another serious traffic violation in Wyoming in August 2008.

However, the fact remains that he was *charged* by ITD with a violation of Idaho Code § 49-335(6) in the December 12, 2008, Notice of Disqualification. That statute was discussed, appropriately, given the Notice of Disqualification, by the Hearing Examiner. The correct statute, Idaho Code § 49-335(11), was never charged, and as a result, the correct statute was never discussed by the Hearing Examiner.

C. Attorney Fees.

Holzheu seeks an award of attorney fees pursuant to I.C. § 12-117 (or in the alternative, I.C. §§ 12-120, 12-121), arguing ITD acted without a reasonable basis in fact or law as the evidence before the Hearing Examiner was that his 2007 conviction was for Driver Disqualified, which is not listed as an enumerated offense in 49 C.F.R. 383.5. Memorandum in Support of Petition for Judicial Review, p. 6. ITD notes Holzheu must first be determined the prevailing party (which this Court finds he is), and Holzheu must then prove ITD acted unreasonably in order to receive an award for attorney fees. Respondent's Brief, p. 13.

As discussed above, this Court finds ITD's interpretation of the Hearing Examiner's pertinent factual finding is erroneous, but not clearly erroneous. Likewise, this Court Finds ITD's interpretation of the relevant statutory and regulatory language is reasonable, although incorrect. Thus, there has been no showing by Holzheu that ITD acted unreasonably in relying on the record before the Hearing Examiner (which arguably did not contain the copy of the 2007 Oregon citation). This Court cannot find this appeal was defended unreasonably. Holzheu's request for attorney fees is denied.

IV. CONCLUSION AND ORDER.

IT IS HEREBY ORDERED the conclusions of law of the Hearing Examiner are REVERSED. The license suspension is REVERSED. Holzheu's request for attorney fees is DENIED.

Entered this 13th day of May, 2009.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of May, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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