*Date of mailing: August 21, 2020

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: NXXXX XXXXX 04752

IN THE MATTER OF	**:**	**FINAL ADMINISTRATIVE DECISION AND ORDER OF SUSPENSION**
AVROHOM NEWHOUSE	**:**	**(Hearing on the papers)**
		SUSPENSION TERM: 90 DAYS
		EFFECTIVE DATE: 09/11/2020

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Avrohom Newhouse (Newhouse).

This matter arises out of an Interstate Driver License Compact state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Newhouse had been convicted of driving while ability impaired (NYDWAI). Newhouse does not dispute this conviction.

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), N.J.S.A. 39:4-50 (New Jersey's driving while intoxicated law), N.J.S.A. 39:5-30, and N.J.A.C. 13:19-11.1 to -11.2, the Commission issued a Scheduled Suspension Notice informing Newhouse that his New Jersey driving privilege was subject to suspension for a period of 90 days. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-1.

In response to the Scheduled Suspension Notice, Newhouse, through his attorney, wrote to the Commission requesting a hearing. In his hearing request Newhouse argues that his blood alcohol concentration (BAC) was less than .08% and, therefore, there is clear and convincing evidence that the New York conviction was based exclusively on a violation of a proscribed BAC of less than .08%, pursuant to the limited exception set forth

at N.J.S.A. 39:4-50(a)3. Newhouse also included a copy of a Certificate of Conviction, dated December 20, 2018, with his hearing request. According to the Certificate of Conviction, Newhouse pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired"), having been originally charged with violations of N.Y. Veh. & Traf. Law §1192(3) ("driving while intoxicated") and N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated, per se, .08% or more BAC). The Certificate of Conviction, signed by the Chief Court Clerk, describes the driving while ability impaired offense as "Driving While Ability Impaired (Blood Alcohol Content Less Than .08% - Traffic Infraction)."

In addition to the two alcohol-related charges, the Certificate of Conviction lists six other original charges, nonalcohol-related. The six traffic offenses are indicated as covered by the plea to the NYDWAI offense, and the per se offense of N.Y. Veh. & Traf. Law §1192(2) is noted as "Dismissed and Sealed CPL 160.50." A copy of Newhouse's hearing request and Certificate of Conviction are attached hereto collectively as Exhibit R-1.

Subsequently, the Commission issued a letter to Newhouse acknowledging his hearing request, advising Newhouse that he was being afforded an opportunity for a hearing on the papers and that it was his burden to demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%," and noting "This is **not** an opportunity to re-litigate that matter or to collaterally attack the New York conviction in this administrative forum." Newhouse was further instructed to submit documentation supporting an argument that the DWAI conviction was based exclusively on a proscribed BAC of less than .08%:

> a notarized affidavit setting forth all facts in support of your position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with your conviction).

A copy of the Commission's letter is attached hereto as Exhibit P-2.

In response, Newhouse submitted a "Certification of Appellant," in which he argues that the Certificate of Conviction "was entered specifically demonstrating a Blood Alcohol Content of less than 0.08% as mandated by New Jersey law." Newhouse also resubmitted a copy of the December 20, 2018, Certificate of Conviction. A copy of Newhouse's Certification of Appellant is attached hereto as Exhibit R-2. Notably, despite his argument that "the Certificate of Conviction was entered specifically demonstrating a Blood Alcohol Content of less than 0.08% as mandated by New Jersey law," Newhouse did not submit an official plea transcript or a court order signed by the New York judge with the specific judicial findings as to Newhouse's BAC and that that BAC was the sole basis for the conviction resulting from the plea.

Based on the documentary exhibits in the record, I find the following:

1. On June 15, 2018, Newhouse was arrested and charged with several violations, including N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated, per se, requiring a BAC of .08% or more) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated, which may be based solely on "observational" evidence, field tests, or evidence of the driver's behavior). (Exhibit R-1)
2. Newhouse was convicted of N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired") on December 20, 2018, pursuant to a plea agreement for the original charge of N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated).

The charge based on N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated, per se) was dismissed, as were six other non-alcohol related traffic violations. (Exhibit R-1)

3. Newhouse did not submit any evidence of his BAC, such as a report prepared by law enforcement recording the test results.[1]
4. Newhouse did not submit a court transcript showing the factual basis for his plea to NYDWAI, entered as a plea agreement to a reduced charge.
5. Newhouse did not submit any documentation evidencing an adjudication or finding by the New York court concerning a BAC of less than .08% and that that BAC was the exclusive basis for the NYDWAI conviction.
6. The New York statutory provision, N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired"), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

[1] Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer's indications of the various indicia supporting the arrest, which may include admissions, the officer's observations, the results of field testing, and the results of any chemical tests, such as BAC. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a "DWI Bill of Particulars and Supporting Deposition," which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Newhouse is in the best position to have such official documentation and as he bears the burden of proof as to the limited affirmative defense here, his choice in failing to provide documentary support leads to the reasonable inference that the BAC result was not below ,08% when viewed in conjunction with the fact of an original charge of the per se .08% offense. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges, be made available to the defendant upon request. NY CPL §100.25 and 200.95, if not already provided to the defendant.

There is no dispute that Newhouse was convicted of NYDWAI. It is well established by New Jersey case law that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, No. A-0781-17 (App. Div. November 19, 2018), 2018 N.J. Super. Unpub. LEXIS 2542; Markowiec v. NJMVC, No. A-2492-15 (App. Div. February 2, 2018), 2018 N.J. Super. Unpub. LEXIS 257; Ford v. NJMVC, No. A-3117-12 (App. Div. February 14, 2014) (slip op. at 5), 2014 N.J. Super. Unpub. LEXIS 304, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, No. A-2125-12 (App. Div. December 9, 2013), 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, No. A-3008-12 (App. Div. July 12, 2013) (slip op. at 8-9), 2013 N.J. Super. Unpub. LEXIS 1827; New Jersey Motor Veh. Comm'n v. Gethard, No. A-4657-10 (App. Div. February 10, 2012) (slip op. at 5), 2012 N.J. Super. Unpub. LEXIS 287; In re: Alan D. Weissman, No. A-2154-07 (App. Div. May 29, 2009) (slip op. at 2), 2009 N.J. Super. Unpub. LEXIS 1303 (the court specifically notes that "[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction"). See also, State v. McCauley, No. A-4622-04 (App. Div. September 19, 2006), 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley's argument that he fit within the "very limited exception" in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was .06%, since New York's driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), "on its face" is not a "per se" offense and his conviction under that provision "must have been based on other evidence"); and In re: Maxine

Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a "plea bargain" had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%).[2]

As constructed and enacted by the New York legislature, N.Y. Veh. & Traf. Law §1192(1) is specifically, on its face, not a per se type of offense; instead, it is the impairment of a person's ability to operate a motor vehicle that is the critical statutory element established by Newhouse's conviction. Compare, New Jersey Div. of Motor Veh.

[2] For context only, the Commission notes that in its experience handling the many out-of-state New York reported "driving while ability impaired" convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a "plea bargain" to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08 and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

The Commission typically receives approximately 200 such driving while ability impaired reported convictions a year, for which it receives a significant number of hearing requests as to the proposed administrative suspension action. Such hearing requests are among the approximate 8,000 to 9,000 hearing requests the Commission handles for the various proposed administrative suspension actions issued each year, not including those involving the medical and fatal accident type cases. These arise from the enormous volume of both in-state and out-of-state reported convictions that are sent to the Commission on a daily basis, amounting to more than 1 million convictions yearly coming from the in-state court matters alone. The Commission recognizes that each of these DWAI case matters must be assessed on a case-by-case basis in accordance with the particular submissions made by the driver in an effort to meet the clear and convincing evidence standard for fitting within the limited affirmative defense in the New Jersey DWI statute.

v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI offense and the fact that NYDWAI contains the element of impaired driving ability, thus distinguishing it from a statute like the former Utah "alcohol-related reckless driving" statute that was at issue in that case, which Utah statute did not have impaired driving ability as an element of the offense); accord Zeikel, supra, 423 N.J. Super. at 46, 47 (the court "viewed 'impaired driving ability' as the crucial element necessary to apply the statute of another jurisdiction as substantially similar to New Jersey's DWI statute"). Thus, the fact that a person is convicted of NYDWAI does not necessarily mean that the driver's BAC was less than .08%, nor does it mean that there was not sufficient observational evidence to establish impairment of ability to drive. A NYDWAI conviction can be based on other evidence, such as officer observations, field tests, admissions, and/or driver behavior.

Governing New Jersey case law has repeatedly recognized that "observational" evidence is sufficient in New Jersey to support a conviction under New Jersey's unified DWI statute, N.J.S.A. 39:4-50, even without a BAC result. See, e.g., State v. Sorenson, 439 N.J. Super. 471, 479-82 (App. Div. 2015) (noting distinction between the "per se violation" and the "observation violation" both under New Jersey's DWI statute, N.J.S.A. 39:4-50); State v. Campbell, 436 N.J. Super. 264, 267-68 (App. Div.), certif. denied, 220 N.J. 208 (2014) (noting that New Jersey DWI prosecutions under N.J.S.A. 39:4-50(a) may be pursued on "four distinct alternative grounds" one type of which is the "so-called 'observation' cases based on other non-BAC evidence of a defendant's impairment while driving"); State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007) (affirming a defendant's DWI conviction based upon his erratic driving in causing a single-car accident and a police

officer's field observations of his multiple signs of inebriation, despite the inadmissibility of hearsay laboratory reports measuring the BAC level in defendant's blood sample); see also State v. Howard, 383 N.J. Super. 538, 548 (App. Div.) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)), certif. denied, 187 N.J. 80 (2006) (instructing that a violation of N.J.S.A. 39:4-50 can be proven "through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood alcohol level.").

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011), confirms that a conviction of New Jersey's driving while intoxicated statute is sustainable if it is supported by sufficient evidence of "any degree of impairment that affects a person's ability to operate a motor vehicle" while further highlighting that "[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle." See also In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.2d 88 (1990) (New York's highest judicial tribunal construes "impairment" under N.Y. Veh. & Traf. Law §1192(1) as meaning that "the actor by 'voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver'"; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.2d 625 (1979)).

Thus, Newhouse's New Jersey driving privilege is subject to the suspension term mandated by N.J.S.A. 39:4-50[3] unless he can demonstrate, by clear and convincing

[3] The suspension period imposed here is the minimum mandated by New Jersey statute for an alcohol-related offense committed before December 1, 2019.

evidence, that the New York conviction was based exclusively upon a proscribed BAC of less than .08%, pursuant to N.J.S.A. 39:4-50(a)3. See also In re: Maxine Basch, No. A-6009-11 (App. Div. July 16, 2013) (slip op. at 1, 7), 2013 N.J. Super. Unpub. LEXIS 1764, and N.J.S.A. 39:4-50(a)(3) (emphasis added). In the absence of such proof, Newhouse is subject to the mandatory minimum 90-day suspension of his New Jersey driving privilege, pursuant to N.J.S.A. 39:4-50 and N.J.A.C. 13:19-11.1 et seq.

The New Jersey Supreme Court has stated:

> The clear and convincing evidence standard is not a hollow one, as
>
> > [c]lear-and-convincing evidence is that which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.

[New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), quoting In re Seaman, 133 N.J. 67, 74 (1993) (citation, internal quotation and editing marks omitted).]

Newhouse was originally charged with a violation of New York's driving while intoxicated, per se, statute, under N.Y. Veh. & Traf. Law §1192(2), which charge requires, as a basis, a BAC of .08% or more, and New York's driving while intoxicated statute, under N.Y. Veh. & Traf. Law §1192(3), which charge may be based solely on the police officer's observations of the driver, driver admissions, field tests, and driver behavior, and not on BAC. Newhouse pled guilty to a reduced charge of NYDWAI, N.Y. Veh. & Traf. Law §1192(1), from the original charge of N.Y. Veh. & Traf. Law §1192(3) (not requiring a BAC). The charge based on the per se statute, N.Y. Veh. & Traf. Law §1192(2), was dismissed.

Newhouse argues that the NYDWAI conviction was based solely on a BAC of less

than .08%. The very basis of his argument is that his DWAI conviction was based exclusively on a BAC of under .08%, and it is his burden to show the same, by clear and convincing evidence. However, conspicuous by its absence is any official documentation showing his BAC result or documentation of a judicial finding in the form of the plea transcript with factual basis or Order signed by the judge, specifying the BAC that was the sole basis of the NYDWAI conviction.

Newhouse has failed to submit any documentation showing the BAC of less than .08% that he relies on, despite having the right, by law, to the supporting deposition and Bill of Particulars, and he has not presented any documents evidencing a judge's finding as to BAC and that that BAC was the sole basis of the DWAI conviction. The only official document presented by Newhouse is the Certificate of Conviction signed by the court clerk. This document does not prove Newhouse's claim. The Certificate is not an order of the court signed by the judge with particular findings made, that is, a specific finding as to Newhouse's BAC and that that BAC was the exclusive basis for the DWAI conviction. Thus, Newhouse has not even established a BAC result at all, much less a BAC that was the judicial basis for the DWAI conviction.

Despite the requirement noted in the Commission's letter to Newhouse instructing that Newhouse demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration of less than .08%," Newhouse failed to submit any documentation whatsoever confirming the BAC level upon which the NYDWAI conviction was based and failed to show that the NYDWAI conviction was based solely on that BAC. The fact that Newhouse was convicted in New York of driving while ability impaired and not driving

while intoxicated or driving while intoxicated, per se, does not demonstrate, by clear and convincing evidence, that the State of New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%. Nor does the description of the offense on the Certificate of Conviction, "Driving While Ability Impaired (Blood Alcohol Content Less Than .08% - Traffic Infraction)," constitute clear and convincing evidence that the NYDWAI conviction was based exclusively on a BAC of less than .08%. As stated above, the Certificate of Conviction issued by the Chief Court Clerk cannot suffice as the clear and convincing evidence required for the exception at N.J.S.A. 39:4-50(a)3 to apply, and the record is devoid of any other official documentation to support Newhouse's argument such as the official plea transcript or a finding by a judge stating decisively that the NYDWAI conviction was based exclusively on a BAC of under .08%.

In sum, the Certificate of Conviction signed by the Chief Court Clerk does not, in and of itself, rise to the level of clear and convincing evidence that the NYDWAI conviction was based exclusively on a BAC of under .08%. See Basch v. New Jersey Motor Vehicle Comm'n, supra, slip op. at 6-7 (where the appellant had been charged both with driving while intoxicated and driving while intoxicated, per se, and pled guilty to a lesser-included offense of the higher charge of driving while intoxicated, the Appellate Division pointedly stated that a Certificate of Disposition, which had been issued by the court clerk with the notation "NYS VTL 1192-1 [NYDWAI] indicates BAC of .07% or lower" was not, in and of itself, clear and convincing evidence that the appellant's NYDWAI conviction was based exclusively on a BAC of less than .08%). "Clear and convincing evidence" is "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear

conviction, without hesitancy, of the precise facts in issue." New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), supra. Newhouse fails to meet the clear and convincing evidence standard required to meet the very limited exception in New Jersey's DWI statute[4].

It remains undisputed that Newhouse was convicted by the State of New York of N.Y. Veh. & Traf. Law §1192(1), "driving while ability impaired," while holding and presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend Newhouse's New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-4 et seq.) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1). The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New

[4] That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08% conviction, under N.Y. Veh. & Traf. Law §1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08 prior to the effective date of the New Jersey law changing its per se threshold from .10% to .08%; namely between July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08%); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05%, thus specific Utah convictions under its DWI- per se provision would meet this limited exception.) This is not the case for Newhouse's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

Jersey law. See, e.g. Martinez v. NJMVC, No. A-0147-09 (App. Div. March 22, 2010) (slip op. at 4-5), 2010 N.J. Super. Unpub. LEXIS 597; see also, New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to "uniformly impos[e] New Jersey's more stringent penalty instead of being reduced to 'the least common denominator of other States[.]'"); State v. Luzhak, 445 N.J. Super. 241, 248 (App. Div. 2016) (the court again emphasized that New Jersey has a "strong public policy against drunk driving."); and State v. Thompson, No. A-3816-17 (App. Div. April 21, 2020) (slip op. at 5-6), 2020 N.J. Super. Unpub. LEXIS 16 (in which the Appellate Division reiterated the New Jersey Supreme Court's declaration regarding the construction of the DWI laws: "As the Supreme Court held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – '[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,' [id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [id. at 512]. See also [State v. Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains 'one of the chief instrumentalities of human catastrophe')."

Furthermore, it is also well-established by New Jersey case law that it is proper under the doctrine of dual sovereignty, and specifically is not a violation of double jeopardy, for the "home state" which issued the driver license to impose the statutorily mandated suspension after receiving a report of such out-of-state alcohol-related driving conviction under the Interstate Compact. See Pepe, supra, 379 N.J. Super. at 418-419;

In re Johnson, 226 N.J. Super. 1 (App. Div. 1988); and Lawrence, supra, 194 N.J. Super. at 2-3.

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the "suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant's driving privileges within that state." (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis added). The Pepe court further instructed that "under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense." Id. at 418. The Pepe court also considered Pepe's constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension was proper. I specifically conclude that Newhouse's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC below .08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof as described by the New Jersey Supreme Court in New Jersey Div. of Youth & Family Servs., supra. Newhouse's submissions to the Commission fall short of this standard and cannot be said to constitute "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue." Indeed, the nature of the Certificate of Conviction

issued by the court clerk supports the conclusion that the DWAI conviction was entered pursuant to a plea bargain to a lesser offense than the original charge of driving while intoxicated (which offense does not require a BAC), similar to the Basch case.

The effective date of suspension of Newhouse's driving privilege is September 11, 2020. (Suspension term: 90 days).

Also, pursuant to the governing statutory and regulatory requirements under N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2, Newhouse must successfully complete or show satisfactory proof of completion of an alcohol/drug education and highway safety program. It is noted that with respect to any alcohol education classes/program already completed pursuant to the New York conviction, Newhouse may present any official documentation as to such classes/program to the Intoxicated Driver Program ("IDP")/Intoxicated Driver Resource Center ("IDRC"), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission's final decision in this matter.[5] Any appeal from this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief

[5] Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L. Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

Note: Due to the novel coronavirus (COVID-19) emergency, the Superior Court, Appellate Division has provided specific instructions for the filing of papers. Please visit the Judiciary's website at www.njcourts.gov/courts/appellate.html.

If you file an appeal and you are seeking a stay of this Order while your appeal is pending, your request for stay must be in writing and submitted to the NJMVC with proof that a notice of appeal has been filed with the Appellate Division. Your request for stay and proof of filing may be submitted to the NJMVC by fax to (609) 984-1528, or by email to: StayrequestAppDivcase@mvc.nj.gov. Please include a fax number or an email address where the determination as to your stay request will be sent.

B. Sue Fulton
Chair and Chief Administrator

BSF:eha

C: Joseph A. Raia, Esq.

EXHIBIT LIST

*copies redacted of other drivers' personal information

Commission Exhibits

P-1 Copy of Scheduled Suspension Notice dated February 17, 2019 (two pages - front and back)

P-2 Copy of Commission letter to Newhouse advising Newhouse of the opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than .08, dated March 19, 2019 (two pages)

P-3 Copy of New York Department of Motor Vehicles "Report Out-of-State Convictions" dated December 26, 2018 (one page)

Newhouse's Exhibits

R-1 Copy of hearing request dated March 11, 2019 (three pages), with enclosed copy of Certificate of Conviction dated December 20, 2018 (one page)

R-2 Copy of letter to Commission from Joseph A. Raia, Esq., dated April 2, 2019 (one page), with enclosures: Certification of Appellant dated April 2, 2019 (two pages); copy of Certificate of Conviction dated December 20, 2018 (one page)

*Date of mailing: August 26, 2020

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: CXXXX XXXXX 08794

IN THE MATTER OF	**:**	**FINAL ADMINISTRATIVE DECISION AND ORDER OF SUSPENSION**
BRIAN E. CARPENTER	**:**	**(Hearing on the papers)**
		SUSPENSION TERM: 90 DAYS
		EFFECTIVE DATE: 09/16/2020

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Brian E. Carpenter (Carpenter).

This matter arises out of an Interstate Driver License Compact state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Carpenter had been convicted of driving while ability impaired (NYDWAI). Carpenter does not dispute this conviction. (Exhibit P-1, Report, Out-of-State Convictions)

Pursuant to the Interstate Driver License Compact (N.J.S.A. 39:5D-4), N.J.S.A. 39:4-50 (New Jersey's driving while intoxicated law), N.J.S.A. 39:5-30, and N.J.A.C. 13:19-11.1 to -11.2, the Commission issued a Scheduled Suspension Notice informing Carpenter that his New Jersey driving privilege was subject to suspension for a period of 90 days. A copy of the Scheduled Suspension Notice is attached hereto as Exhibit P-2.

In response to the Scheduled Suspension Notice, Carpenter requested a hearing. In his hearing request Carpenter argues that his New Jersey driving privilege should not be suspended because "the New York violation does not rise to the level of New Jersey's discretionary level of .05" and "as such, being that the BAC level was under .05 and well below New Jersey's mandatory .08 BAC standard, it is believed that requisite proofs

could not be established under New Jersey's discretionary level of .05 as there were no breath test/blood analysis nor psycho-physicals offered." Carpenter also argues that New York "disposed of this violation on a conditional discharge which is not compatible with New Jersey statute 39:4-50," and that suspension of his driving privilege would pose an undue hardship. The "Request for Hearing" form filled out by Carpenter provides specifics concerning the significant hardship that he asserts losing his driving privilege would cause due to his work/family/financial obligations. Carpenter also notes that he completed the New York requirements including the "NY IDP" and had received reinstatement of his New York reciprocity driving privilege. A copy of Carpenter's hearing request is attached hereto as Exhibit R-1.

The Commission issued a letter to Carpenter acknowledging his hearing request. The Commission further advised Carpenter that he was being afforded an opportunity for a hearing on the papers, and that it was his burden to demonstrate, "by clear and convincing evidence, that the State of New York conviction was based **exclusively** upon a violation of a proscribed blood alcohol concentration (BAC) of less than .08%," and noting that "This is **not** an opportunity to re-litigate that matter or to collaterally attack the New York conviction in this administrative forum." Carpenter was further advised to submit:

> a notarized affidavit setting forth all facts in support of your position and provide copies of any supporting documents or other evidence (including, but not limited to, the official plea transcript from the State of New York proceeding and/or official court order signed by the New York judge indicating specific findings made in connection with your conviction).

A copy of the Commission's letter is attached hereto as Exhibit P-3.

In response, Carpenter submitted an affidavit in which he states, among other

things, that he was charged with violations of driving with a BAC of .08% or more and driving while intoxicated. (Affidavit of Carpenter, par. 3, Exhibit R-2) Carpenter further states that, when he attended court, "[t]here was no finding of a BAC level at or above a .08% blood level and therefore, the violation bearing Ticket Number 140390Q7KJ [driving while intoxicated, per se, BAC .08% or more] was dismissed" and the driving while intoxicated violation "was disposed of by a conditional discharge of a Driving While Ability Impaired by Alcohol or DWAI alcohol." (Affidavit of Carpenter, par. 4, Exhibit R-2) Carpenter further states that he "did not plead to any offense for a BAC level at or above a .08%. Matter of fact, I did not plead to a BAC level at all." (Affidavit of Carpenter, par. 5, Exhibit R-2)

Carpenter also submitted an affidavit signed by the Hon. David S. Gideon, Town of DeWitt Justice (in the County of Onondaga, New York), stating that the transcript of the hearing at which Carpenter pled guilty to a violation of New York's DWAI statute "is not available due to a recording issue the night of the proceeding." (Affidavit of Hon. David S. Gideon, Town of DeWitt Justice, par. 2, Exhibit R-2). Judge Gideon also reviewed the Court's file "to determine whether Defendant Carpenter's plea involved a Blood Alcohol Content (BAC) of a .08% or above." (Affidavit of Hon. David S. Gideon, Town of DeWitt Justice, par. 3, Exhibit R-2) Judge Gideon concluded the following:

> Based upon the foregoing, Defendant Carpenter's conviction of N.Y. Veh. & Traf. Law §1192(1), based upon the statutory elements of the charge, results from the operation of a motor vehicle while impaired by the consumption of alcohol, with no specificity as to a proscribed blood alcohol content (BAC). N.Y. Veh. & Traf. Law §1195(2)(c) provides, however, that a BAC of less than .08 of one per centum by weight of alcohol in such person's blood shall be prima facie evidence of impairment.[1]

[1] Although not central to the Commission's ultimate determination made herein based on the analysis set forth in the body of this decision, it bears noting for the sake of

[Affidavit of Hon. David S. Gideon, Town of DeWitt Justice, par. 8, Exhibit R-2. Emphasis supplied.]

Attached to the Hon. David S. Gideon's affidavit are a letter advising counsel for Carpenter that the hearing transcript was not available due to technical difficulties, a Certificate of Disposition dated April 18, 2019, and a receipt showing Carpenter's payment of fines and surcharges. According to the Certificate of Disposition, Carpenter pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) ("DWAI alcohol"), having been originally charged with a violation of N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated) and N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated, per se, BAC of .08% or more). The violation of N.Y. Veh. & Traf. Law §1192(2) was noted as "Dism/Satisfaction." (Affidavit of Hon. David S. Gideon, Exhibit B, Exhibit R-2)

In the cover letter accompanying the affidavits of Carpenter and the Hon. David

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completeness, that Judge Gideon's second sentence here is not altogether accurate in its phrasing as to what that New York statute provides concerning "probative value" of "chemical test evidence." Subparagraph (c) of N.Y. Veh. & Traf. Law §1195(2), upon which the Judge's statement focuses, covers the "probative value" for the BAC range of ".07 of one per centum or more but less than .08 of one per centum." However, in subparagraph (b) of N.Y. Veh. & Traf. Law §1195(2), the New York legislature separately provided that the BAC range of more than .05% but less than .07% BAC "shall be relevant evidence, but shall not be given prima facie effect, in determining whether the ability of such person to operate a motor vehicle was impaired by the consumption of alcohol" (emphasis supplied). Significantly, this means that for a BAC result of between .051% to .069% there would necessarily have to be other non-BAC (observational-type) evidence as to the impaired-by-alcohol element to support the NYDWAI conviction (either observational evidence on its own or in combination with BAC evidence). Put simply, BAC results in that range would not be able to be the exclusive basis for a driving-while-impaired (NYDWAI-alcohol) conviction, given this provision in the New York statute. As is seen from careful review of subparagraph (b) of N.Y. Veh. & Traf. Law §1195(2), the Judge's broad reference to "a BAC of less than .08" as being "prima facie evidence of impairment" mistakenly states what N.Y. Veh. & Traf. Law Section §1195(2) actually provides in its entirety.

S. Gideon, counsel for Carpenter argues that because there was no BAC specified in connection with Carpenter's plea to DWAI, the proposed suspension of Carpenter's driving privilege should be rescinded. A copy of counsel's cover letter with enclosed affidavits of Carpenter and the Hon. David S. Gideon are attached hereto collectively as Exhibit R-2.

In sum, Carpenter, his attorney, and Judge Gideon all uniformly state that there was no specific finding of a BAC at the time of the NYDWAI conviction, much less a finding that a BAC of under .08% was the sole basis of the conviction.

Based on the documentary exhibits in the record, I find the following:

1. On December 13, 2018, Carpenter was arrested and charged with several violations, including N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated, per se, requiring a BAC of .08% or more) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated, which may be based solely on "observational" evidence, field tests, or evidence of the driver's behavior). (Exhibit R-2)
2. Carpenter was convicted of N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired") on January 8, 2019 (Exhibit R-2)
3. Carpenter did not submit any evidence of his BAC, such as a report prepared by law enforcement recording the test results.[2]

[2] Typically, in these types of New York cases, there would be documents supporting the original charges. Such documents would include the law enforcement officer's indications of the various indicia supporting the arrest, which may include admissions, the officer's observations, the results of field testing, and the results of any chemical tests, such as BAC. As the Commission has seen in numerous other NYDWAI cases it has reviewed, the document typically used by New York is a "DWI Bill of Particulars and Supporting Deposition," which the officer uses to record information regarding the basis for the charges, including the observations of the driver, performance of field tests, driver admissions, chemical test information, and other evidence. Carpenter is in the best

4. Carpenter did not submit any documentation evidencing an adjudication or finding by the New York court concerning a BAC of less than .08% and that the specific BAC was the exclusive basis for the NYDWAI conviction.
5. It is an undisputed fact that Carpenter's NYDWAI conviction was not based solely on a BAC of less than .08%.
6. The New York statutory provision, N.Y. Veh. & Traf. Law §1192(1) ("driving while ability impaired"), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

There is no dispute that Carpenter was convicted of NYDWAI. It is well established by New Jersey case law that the Commission has the authority to suspend a New Jersey licensee's driving privilege for an out-of-state conviction, pursuant to N.J.S.A. 39:5D-4, and that N.Y. Veh. & Traf. Law §1192(1) is substantially similar to N.J.S.A. 39:4-50. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011); New Jersey Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983). See Mize v. NJMVC, No. A-0781-17 (App. Div. November 19, 2018), 2018 N.J. Super. Unpub. LEXIS 2542; Markowiec v. NJMVC, No. A-2492-15 (App. Div. February 2, 2018), 2018 N.J. Super. Unpub. LEXIS 257 (the driver's argument based on there being no BAC evidence for his NYDWAI conviction was rejected by the Appellate Division and the court affirmed the NJMVC's

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position to have such official documentation and as he bears the burden of proof as to the limited affirmative defense here, his choice in failing to provide documentary support leads to the reasonable inference that the BAC result was not below .08% when viewed in conjunction with the fact of an original charge of the per se .08% offense. New York law requires that the supporting deposition and Bill of Particulars prepared by the state in support of the charges, be made available to the defendant upon request, if not already provided to the defendant. NY CPL §100.25 and 200.95.

suspension of the home state New Jersey driver license); Ford v. NJMVC, No. A-3117-12 (App. Div. February 14, 2014) (slip op. at 5), 2014 N.J. Super. Unpub. LEXIS 304, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, No. A-2125-12 (App. Div. December 9, 2013), 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, No. A-3008-12 (App. Div. July 12, 2013) (slip op. at 8-9), 2013 N.J. Super. Unpub. LEXIS 1827; New Jersey Motor Veh. Comm'n v. Gethard, No. A-4657-10 (App. Div. February 10, 2012) (slip op. at 5), 2012 N.J. Super. Unpub. LEXIS 287; In re: Alan D. Weissman, No. A-2154-07 (App. Div. May 29, 2009) (slip op. at 2), 2009 N.J. Super. Unpub. LEXIS 1303 (the court specifically notes that "[n]either N.Y. Veh. & Traf. Law §1192(1) nor N.J.S.A. 39:4-50(a), require a minimum blood alcohol reading for a conviction"). See also, State v. McCauley, No. A-4622-04 (App. Div. September 19, 2006), 2006 N.J. Super. Unpub. LEXIS 2422 (the court rejected McCauley's argument that he fit within the "very limited exception" in the statute, N.J.S.A. 39:4-50(a)(3), even assuming that his BAC was .06%, since New York's driving while ability impaired statute, N.Y. Veh. & Traf. Law §1192(1), "on its face" is not a "per se" offense and his conviction under that provision "must have been based on other evidence") and In re: Maxine Basch, MVC Chief Administrator Supplemental Final Decision and Final Order on Remand, issued January 8, 2016, found at http://www.nj.gov/mvc/pdf/about/jab_final_decisions16.pdf (suspension imposed for NYDWAI conviction in accord with Appellate Division remand instruction where a "plea bargain" had been entered to the lesser-included offense, also noting other potential evidence of impairment included officer observations, field sobriety tests and/or admissions, as well as a BAC result of .17%).[3]

[3] For context only, the Commission notes that in its experience handling the many out-of-

As constructed and enacted by the New York legislature, N.Y. Veh. & Traf. Law §1192(1) is specifically, on its face, not a per se type of offense; instead, it is the impairment of a person's ability to operate a motor vehicle that is the critical statutory element established by Carpenter's conviction. Compare, New Jersey Div. of Motor Veh. v. Ripley, 364 N.J. Super. 343, 349-50 (App. Div. 2003) (in which the court specifically discusses the NYDWAI offense and the fact that NYDWAI contains the element of impaired driving ability, thus distinguishing it from a statute like the former Utah "alcohol-related reckless driving" statute that was at issue in that case, which Utah statute did not have impaired driving ability as an element of the offense); accord Zeikel, supra, 423 N.J. Super. at 46, 47 (the court "viewed 'impaired driving ability' as the crucial element necessary to apply the statute of another jurisdiction as substantially similar to New Jersey's DWI statute"). Thus, the fact that a person is convicted of NYDWAI does not

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state New York reported "driving while ability impaired" convictions, in those instances where the supporting documents are submitted, it is frequently the case that the NYDWAI conviction was the result of a "plea bargain" to this lesser-included offense and that the police reports and chemical test documents reveal potential evidence of BAC levels of .08 and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

The Commission receives approximately 200 such driving while ability impaired reported convictions a year, for which it receives a significant number of hearing requests as to the proposed administrative suspension action. Such hearing requests are among the approximate 8,000 to 9,000 hearing requests the Commission handles for the various proposed administrative suspension actions issued each year, not including those involving the medical and fatal accident type cases. These arise from the enormous volume of both in-state and out-of-state reported convictions that are sent to the Commission on a daily basis, amounting to more than 1 million convictions yearly coming from the in-state court matters alone. The Commission recognizes that each of these DWAI case matters must be assessed on a case-by-case basis in accordance with the particular submissions made by the driver in an effort to meet the clear and convincing evidence standard for fitting within the limited affirmative defense in the New Jersey DWI statute.

necessarily mean that the driver's BAC was less than .08%, nor does it mean that there was not sufficient observational evidence alone to establish impairment of ability to drive. A NYDWAI conviction can be based on other evidence, such as officer observations, field tests, admissions, and/or driver behavior.

Governing New Jersey case law has repeatedly recognized that "observational" evidence is sufficient in New Jersey to support a conviction under New Jersey's unified DWI statute, N.J.S.A. 39:4-50, even without a BAC result. See, e.g., State v. Sorenson, 439 N.J. Super. 471, 479-82 (App. Div. 2015) (noting distinction between the "per se violation" and the "observation violation" both under New Jersey's DWI statute, N.J.S.A. 39:4-50); State v. Campbell, 436 N.J. Super. 264, 267-68 (App. Div.), certif. denied, 220 N.J. 208 (2014) (noting that New Jersey DWI prosecutions under N.J.S.A. 39:4-50(a) may be pursued on "four distinct alternative grounds" one type of which is the "so-called 'observation' cases based on other non-BAC evidence of a defendant's impairment while driving"); State v. Kent, 391 N.J. Super. 352, 384 (App. Div. 2007) (affirming a defendant's DWI conviction based upon his erratic driving in causing a single-car accident and a police officer's field observations of his multiple signs of inebriation, despite the inadmissibility of hearsay laboratory reports measuring the BAC level in defendant's blood sample); see also State v. Howard, 383 N.J. Super. 538, 548 (App. Div.) (quoting State v. Kashi, 360 N.J. Super. 538, 545 (App. Div. 2003), aff'd, 180 N.J. 45 (2004)), certif. denied, 187 N.J. 80 (2006) (instructing that a violation of N.J.S.A. 39:4-50 can be proven "through either of two alternative evidential methods: proof of a defendant's physical condition or proof of a defendant's blood alcohol level.").

Moreover, the court in Zeikel, supra, 423 N.J. Super. at 48 (App. Div. 2011),

confirmed that a conviction of New Jersey's driving while intoxicated statute is sustainable if it is supported by sufficient evidence of "any degree of impairment that affects a person's ability to operate a motor vehicle" while further highlighting that "[like] New Jersey, New York defines impairment broadly to include any degree of impairment of a person's physical or mental abilities to operate a motor vehicle." See also In re Johnston, 75 N.Y.2d 403, 409-10, 553 N.E.2d 566, 554 N.Y.2d 88 (1990) (New York's highest judicial tribunal construes "impairment" under N.Y. Veh. & Traf. Law §1192(1) as meaning that "the actor by 'voluntarily consuming alcohol . . . has actually impaired, to any extent, the physical and mental abilities which he is expected to possess in order to operate a vehicle as a responsible and prudent driver'"; quoting People v. Cruz, 48 N.Y.2d 419, 427, 399 N.E.2d 513, 423 N.Y.2d 625 (1979)).

Thus, Carpenter's New Jersey driving privilege is subject to the suspension term mandated by N.J.S.A. 39:4-50[4] unless he can demonstrate, by clear and convincing evidence, that the New York conviction was based exclusively upon a proscribed BAC of less than .08%. N.J.S.A. 39:4-50(a)3 (emphasis supplied). See also In re: Maxine Basch, No. A-6009-11 (App. Div. July 16, 2013) (slip op. at 1, 7), 2013 N.J. Super. Unpub. LEXIS 1764. In the absence of such proof, Carpenter is subject to the mandatory minimum 90-day suspension of his New Jersey driving privilege, pursuant to N.J.S.A. 39:4-50 and N.J.A.C. 13:19-11.1 et seq.

The New Jersey Supreme Court has stated:

> The clear and convincing evidence standard is not a hollow one, as
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> [c]lear-and-convincing evidence is that which produces in the mind of the

[4] The suspension period imposed here is the minimum mandated by New Jersey statute for an alcohol-related offense committed before December 1, 2019.

> trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue.

[New Jersey Div. of Youth & Family Servs. v. I.S., 202 N.J. 145, 168 (2010), quoting In re Seaman, 133 N.J. 67, 74 (1993) (citation, internal quotation and editing marks omitted).]

Carpenter was originally charged with two alcohol-related offenses in New York: driving while intoxicated, per se, under N.Y. Veh. & Traf. Law §1192(2), which charge requires, as a basis, a BAC of .08% or more; and driving while intoxicated, under N.Y. Veh. & Traf. Law §1192(3), which charge may be based solely on such evidence as the police officer's observations, field tests, driver admissions, and/or driver behavior, and not on BAC. Carpenter pled to a reduced charge of NYDWAI, N.Y. Veh. & Traf. Law §1192(1), from an original charge of N.Y. Veh. & Traf. Law §1192(3).

As stated above, Carpenter's New Jersey driving privilege is subject to the suspension term mandated by N.J.S.A. 39:4-50 unless he can demonstrate, by clear and convincing evidence, that the New York conviction was based exclusively upon a proscribed BAC of less than .08%, pursuant to N.J.S.A. 39:4-50(a)3, and he was advised of this by the Commission. (Exhibit P-3) Yet, Carpenter's response to the Commission's April 2, 2019 letter contains none of the evidence required to show that the NYDWAI conviction was based exclusively on a BAC of less than .08%. Instead, Carpenter stated that "there was no specified BAC associated with [his] plea…." (Exhibit R-2). This statement was also made by Carpenter himself, in his affidavit, and the New York judge who presided over Carpenter's case, the Hon. David S. Gideon, in his affidavit. (Exhibit R-2). In sum, Carpenter failed to submit any information whatsoever regarding the BAC upon which the NYDWAI conviction was based and failed to show that the NYDWAI

conviction was based solely on that BAC. The fact that Carpenter was convicted in New York of driving while ability impaired and not driving while intoxicated or driving while intoxicated, per se, does not demonstrate, by clear and convincing evidence, that the State of New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than .08%.

Neither the Certificate of Disposition nor Judge Gideon's affidavit rise to the level of clear and convincing evidence that the NYDWAI conviction was based exclusively on a BAC of under .08%. See Basch v. New Jersey Motor Vehicle Comm'n, supra, slip op. at 6-7 (where the appellant had been charged both with driving while intoxicated and driving while intoxicated, per se, and pled guilty to a lesser-included offense of the higher charge of driving while intoxicated, the Appellate Division pointedly stated that a Certificate of Disposition with the notation "NYS VTL 1192-1 [NYDWAI] indicates BAC of .07% or lower" was not, in and of itself, clear and convincing evidence that the appellant's NYDWAI conviction was based exclusively on a BAC of less than .08%). The Certificate of Disposition doesn't include a BAC related to the DWAI conviction, and, as stated above, Judge Gideon affirmatively states, in his affidavit, that the DWAI conviction was not based on a BAC at all. Therefore, Carpenter fails to meet the clear and convincing evidence standard required to meet the very limited exception in New Jersey's DWI statute.[5]

[5] That very limited exception in the New Jersey statute most specifically would apply where there was a conviction under a per se law in another state, for which the other state's per se threshold was lower, at the time of the offense, than the per se prong contained within the New Jersey "unified" DWI statute, N.J.S.A. 39:4-50 (which contains a per se prong as well as an observational prong). An example of this would be a New York DWI- per se .08% conviction, under N.Y. Veh. & Traf. Law §1192(2) ("driving while intoxicated; per se"), that specifically occurred during the timeframe in which the New York per se statutory threshold had been lowered to .08% prior to the effective date of the New Jersey law changing its per se threshold from .10% to .08%; namely between

It remains undisputed that Carpenter was convicted by the State of New York of N.Y. Veh. & Traf. Law §1192(1), "driving while ability impaired," while holding and presenting a New Jersey driver's license. Accordingly, the State of New Jersey is required to suspend his New Jersey driving privilege in accordance with the Interstate Driver License Compact Agreement (N.J.S.A. 39:5D-4 et seq.) and the New Jersey Administrative Code (N.J.A.C. 13:19-11.1). The governing regulation, N.J.A.C. 13:19-11.1(a) and (b), provides that out-of-state convictions shall be given the same effect as if such convictions had occurred in the State of New Jersey. Indeed, N.J.A.C. 13:19-11.1(b) explicitly states that New Jersey driving privileges shall be suspended pursuant to New Jersey law. See, e.g. Martinez v. NJMVC, No. A-0147-09 (App. Div. March 22, 2010) (slip op. at 4-5), 2010 N.J. Super. Unpub. LEXIS 597; see also, New Jersey Div. of Motor Vehicles v. Egan, 103 N.J. 350, 357 (1986) (the New Jersey Supreme Court reviewed and upheld the policy of the Director of the Division of Motor Vehicles to exercise the discretion granted by N.J.S.A. 39:5D-4 to "uniformly impos[e] New Jersey's more stringent penalty instead of being reduced to 'the least common denominator of other States[.]'"); State v. Luzhak, 445 N.J. Super. 241, 248 (App. Div. 2016) (the court again emphasized that New Jersey has a "strong public policy against drunk driving"); and State v. Thompson, No. A-3816-17 (App. Div. April 21, 2020) (slip op. at 5-6), 2020

July 1, 2003 and January 19, 2004. See, New Jersey Div. of Motor Veh. v. Pepe, 379 N.J. Super. 411, 414, footnote 1 (App. Div. 2005) (in which the court points out the different effective dates for New York's and New Jersey's lowering of the statutory BAC per se threshold to .08%); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of .05%, thus specific Utah convictions under its DWI- per se provision would meet this limited exception). This is not the case for Carpenter's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

N.J. Super. Unpub. LEXIS 16 (in which the Appellate Division reiterated the New Jersey Supreme Court's declaration regarding the construction of the DWI laws: "As the Supreme Court held in [State v. Tischio, 107 N.J. 504 (1987)] – and it apparently bears repeating – '[w]e are thus strongly impelled to construe [the statute] flexibly, pragmatically and purposefully to effectuate the legislative goals of the drunk-driving laws,' [id. at 514] which, of course, are to rid our roadways of the scourge of drunk drivers [id. at 512]. See also [State v. Mulcahy, 107 N.J. 467, 479 (1987)] (recognizing, in quoting [State v. Grant, 196 N.J. Super. 470, 476 (App. Div. 1984)], that the drunk driver remains 'one of the chief instrumentalities of human catastrophe')."

Furthermore, it is also well-established by New Jersey case law that it is proper under the doctrine of dual sovereignty, and specifically is not a violation of double jeopardy, for the "home state" which issued the driver license to impose the statutorily mandated suspension after receiving a report of such out-of-state alcohol-related driving conviction under the Interstate Compact. See Pepe, supra, 379 N.J. Super. at 418-419; In re Johnson, 226 N.J. Super. 1 (App. Div. 1988); and Lawrence, supra, 194 N.J. Super. at 2-3.

The court in Pepe, supra, 379 N.J. Super. at 416, specifically held that the "suspension imposed by NJDMV is in accordance with the statute, N.J.S.A. 39:4-50, and not redundant to the penalty imposed in New York, which involved only defendant's driving privileges within that state." (citing Boyd v. Div. of Motor Vehicles, 307 N.J. Super. 356, 360 (App Div.), certif. denied, 154 N.J. 608 (1998), emphasis supplied). The Pepe court further instructed that "under the doctrine of dual sovereignty, the double jeopardy clause does not bar two states from prosecuting a defendant for the same offense." Id. at 418.

The Pepe court also considered Pepe's constitutional equal protection, res judicata/collateral estoppel and laches-type arguments in the context of that Compact case and found those to be without merit.

Finally, as to any contention related to the New York "conditional discharge" aspect of Carpenter's New York sentencing, such argument is rejected. Under New York law for such NYDWAI matters the "conditional discharge" does not indicate that there has been no conviction or that the charges have been or will be dismissed. Rather, it indicates that as part of the sentencing on the NYDWAI conviction Carpenter was given a type of conditional release (from the potential jail term and from a required period of supervised probation) that imposed a set of terms and conditions with which Carpenter was required to comply. See N.Y. CLS Penal §65.05 and 65.10. Indeed, in New York, a violation of any of the listed conditions for the conditional discharge may result in revocation of the sentence and a return to court for resentencing. Thus, conditional discharge in New York is a sentencing option for the judge; nowhere does it provide that the charges will become dismissed. (It is noted that the term "conditional discharge" is used differently by different states, in different contexts.)

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension was proper. I specifically conclude that Carpenter's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC below .08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this

high standard of proof as described by the New Jersey Supreme Court in New Jersey Div. of Youth & Family Servs., supra. Carpenter's submissions to the Commission fall far short of this standard and cannot be said to constitute "evidence so clear, direct and weighty and convincing as to enable the factfinder to come to a clear conviction, without hesitancy, of the precise facts in issue." Indeed, the nature of the Certificate of Disposition issued supports the conclusion that the DWAI conviction was entered pursuant to a plea bargain to a lesser offense than the original charge of driving while intoxicated (which offense does not require a BAC), similar to the Basch case.

The effective date of suspension of Carpenter's driving privilege is September 16, 2020. (Suspension term: 90 days).

Also, pursuant to the governing statutory and regulatory requirements under N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2, Carpenter must successfully complete or show satisfactory proof of completion of an alcohol/drug education and highway safety program. It is noted that with respect to any alcohol education classes/program already completed pursuant to the New York conviction, Carpenter may present any official documentation as to such classes/program to the Intoxicated Driver Program ("IDP")/Intoxicated Driver Resource Center ("IDRC"), which will determine whether these can be accepted in partial or full satisfaction of the IDP alcohol/drug education program required pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.

This constitutes the Commission's final decision in this matter.[6] Any appeal from

[6] Although this matter had been considered among those that were being processed for transmission to the Office of Administrative Law for a plenary hearing, upon further review by the Commission it was noted that there are no factual issues requiring an evidentiary hearing and therefore this final administrative decision and order was issued. See Frank v. Ivy Club, 120 N.J. 73, 98 (1990), cert. denied, 498 U.S. 1073, 111 S. Ct. 799, 112 L.

this decision must be made to the Appellate Division of the Superior Court by filing a Notice of Appeal with the Appellate Division within 45 days from the date of this decision. If an appeal is filed with the court, pursuant to Court Rule, R. 2:5-1(e), service of copies of all papers must be made on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

Note: Due to the novel coronavirus (COVID-19) emergency, the Superior Court, Appellate Division has provided specific instructions for the filing of papers. Please visit the Judiciary's website at www.njcourts.gov/courts/appellate.html.

If you file an appeal and you are seeking a stay of this Order while your appeal is pending, your request for stay must be in writing and submitted to the NJMVC with proof that a notice of appeal has been filed with the Appellate Division. Your request for stay and proof of filing may be submitted to the NJMVC by fax to (609) 984-1528, or by email to: StayrequestAppDivcase@mvc.nj.gov. Please include a fax number or an email address where the determination as to your stay request will be sent.

B. Sue Fulton
Chair and Chief Administrator

BSF:eha

C: Gregory C. Dibsie, Esq.

Ed.2d 860 (1991); Pepe, supra, 379 N.J. Super. 411 (App. Div. 2005).

EXHIBIT LIST*

*copies redacted of drivers' personal identifying information

Commission Exhibits

P-1 Copy of New York Department of Motor Vehicles "Report Out-of-State Convictions" dated January 17, 2019 (one page)

P-2 Copy of Scheduled Suspension Notice dated March 10, 2019 (two pages - front and back)

P-3 Copy of Commission letter to Carpenter advising Carpenter of the opportunity to submit clear and convincing evidence of conviction being exclusively based on a BAC of less than .08%, dated April 12, 2019 (two pages)

Carpenter's Exhibits

R-1 Copy of hearing request letter from Gregory C. Dibsie, Esq., dated March 29, 2019 (one page), with copy of "Request for Hearing" form filled out by Carpenter (one page)

R-2 Copy of letter to Commission from Gregory C. Dibsie, Esq., dated June 4, 2019 (one page), with enclosed: Affidavit of Brian E. Carpenter dated May 20, 2019 (three pages); Affidavit of Hon. David S. Gideon dated May 21, 2019, with attached Exhibit A (letter to Gregory C. Dibsie, Esq., from Hon. David S. Gideon, dated May 3, 2019) and Exhibit B (Certificate of Disposition dated April 18, 2019 and DeWitt Town Court Receipt dated January 8, 2019) (eight pages total)