

**STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE #: CXXXX XXXXX 11762**

IN THE MATTER OF : **FINAL ADMINISTRATIVE DECISION
AND ORDER OF SUSPENSION**
HOOK K. CHOK : **(Hearing on the papers)**
SUSPENSION TERM: 90 DAYS
EFFECTIVE DATE: 10/04/22

This is the Motor Vehicle Commission's (Commission) Final Administrative Decision in the matter of Hook K. Chok (Chok).

This matter arises out of an Interstate Driver License Compact (N.J.S.A. 39:5D-1 to 5D-14) state notification sent by the New York Department of Motor Vehicles to the Commission, reporting that Chok was arrested on September 29, 2019, and convicted on January 14, 2020, of driving while ability impaired (NYDWAI). Chok does not dispute this conviction. A copy of the Out-of-State Conviction report is attached hereto as Exhibit P-1 (reporting conviction under AAMVA "ACD CODE: A25"; which signifies "driving while impaired"¹).

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

¹ "ACD" is the AAMVA (American Association of Motor Vehicle Administrators) Code Dictionary which states use to translate traffic offense convictions and withdrawals into a uniform format, for transmitting under the National Driver Register/Problem Driver Pointer System (NDR/PDPS) and also the Commercial Driver License Information System (CDLIS). See generally, 49 U.S.C.S. §30304; 23 C.F.R. Ch. III, Pt. 1327 and App. A.

In response to the Scheduled Suspension Notice, Chok (represented by Peter Y. Lee, Esq.) requested a hearing, arguing, among other things, that the Commission does not have the legal authority to suspend Chok's New Jersey driving privileges as a result of the NYDWAI conviction because a New Jersey driving while intoxicated conviction requires a blood alcohol content (BAC) result of 0.08% or more. Chok represented that he would provide the Commission with the "complete record of [the] proceedings in Mamakating Town Court, New York," and, further, that the January 14, 2020 transcript would confirm a "no-blood-alcohol-content conviction under New York law." Finally, Chok argued that the Commission's imposition of a suspension and associated consequences for the NYDWAI conviction is unconstitutional in that they are "excessive." Due to delays caused by the pandemic, Chok also requested additional time to obtain the court documents, and further requested the Commission's assistance in obtaining the documents. A copy of Chok's hearing request dated March 7, 2020, is attached hereto as Exhibit R-1.

On March 30, 2020, Chok again requested additional time within which to obtain the required documentation supporting his position that his New Jersey driving privileges should not be suspended for the NYDWAI, citing the pandemic-related closures of the courts and Chok counsel's offices, and other effects of the pandemic. A copy of Chok's March 30, 2020, letter is attached hereto as Exhibit R-2.

The Commission issued a letter to Chok acknowledging the hearing request, further advising Chok 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 0.08%." The Commission further stated that this was not "an opportunity to re-litigate [the New York] matter or to collaterally

attack the New York court conviction in this administrative forum.” The Commission also instructed Chok to “provide a notarized affidavit setting forth all facts in support of [his] 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 [his] conviction).” A copy of the Commission’s letter is attached hereto as Exhibit P-3.

On May 27, 2020, Chok responded to the Commission’s May 4, 2020 letter, stating that he needed additional time to obtain the necessary documents due to pandemic-related court closure, and submitting additional legal argument based on the representation that the NYDWAI was based “exclusively on a B.A.C. of less than 0.08%,” and that the 90-day proposed suspension was excessive, unconstitutional, and a violation of the Driver License Compact, N.J.S.A. 39:5D-1, et seq. Included with Chok’s letter was a certification signed by Chok, wherein Chok states that he and counsel had been attempting to obtain the January 14, 2020, transcript from the Mamakating Town Court but had not been able to do so. Chok also stated that on January 14, 2020, he and the prosecutor agreed, on the record in court, that “the DWAI conviction arises from a blood alcohol content level of less than 0.08 percent.” (See Exhibit R-3, with enclosure: Certification (first) of Hook Chok).

On June 8, 2020, the Commission granted Chok’s request for additional time. Attached hereto as Exhibit P-4 is the Commission’s June 8, 2020 letter granting an extension until July 8, 2020.

On July 7, 2020, Chok provided a second certification, in which Chok argued that he had not had enough time to obtain the January 14, 2020, transcript and that the New York prosecutor “acknowledged that the DWAI conviction results exclusively from a

blood alcohol content level of less than 0.08 percent” and that this statement was placed on the record in court. A copy of Chok’s July 7, 2020, submission is attached hereto as Exhibit R-4. As a result of Chok’s representations in his July 7, 2020, submission, the Commission extended the time within which to obtain court documents, to February 1, 2021. The Commission also instructed Chok to submit an additional request for an extension, to the Commission, should the court remain closed. A copy of the Commission’s letter granting an extension is attached hereto as Exhibit P-5.

On January 29, 2021, Chok wrote to the Commission, requesting a decision “on the merits,” though failing to provide the January 14, 2020 transcript of proceedings, nor did Chok provide any additional documentary evidence in support of his arguments. A copy of Chok’s January 29, 2021, letter is attached hereto as Exhibit R-5.

Due to the unique circumstances and delays related to the pandemic, resulting in Chok’s inability to secure the January 14, 2020, transcript, in addition to Chok’s claims of due process violations, the Commission contacted the Mamakating Town Court in an effort to expedite release of the transcript and related documentation. After a prolonged process and several unsuccessful attempts, including being given a blank audio disk by the Mamakating Town Court, resubmitting its request for the audio recording, and having to obtain and pay for the services of a New Jersey court reporting firm, Renzi Legal Resources, to transcribe the recording, the Commission was able to obtain the sound recording and the transcript of the January 14, 2020, proceedings. According to the January 14, 2020, transcript, Chok pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI). The transcript does not contain any statements of the parties, or court findings that a BAC of less than 0.08% was the exclusive basis of Chok’s conviction.²

² Noting that it was because Chok had raised the issue of his BAC level in his hearing request and included statements that the New York conviction was based on a BAC of less

The Commission forwarded the transcript, along with other documents it was able to obtain, to Chok, as follows: Certificate of Disposition issued by the Mamakating Town Court; the New York State Police Breath Alcohol Analysis Record, showing a reported BAC of 0.12% on September 29, 2019; and the September 29, 2019, Supporting Deposition and Bill of Particulars served on Chok by the New York State Police, documenting the officer's observations and field sobriety test results, specifying a BAC of 0.12%, and stating that Chok had been charged with operating a vehicle "in an intoxicated condition and/or having a 0.12% blood alcohol content," pursuant to N.Y. Veh. & Traf. Law §1192(2) (BAC 0.08% or greater). The Supporting Deposition and Bill of Particulars specified the N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC 0.08% or greater) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated) charges. Chok was advised that these documents obtained by the Commission were considered part of the record, and he was instructed to provide any additional documentation or argument he wished the Commission to consider. Copies of the transcript and documents the Commission obtained and supplied to Chok are attached hereto collectively as Exhibit P-6.

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

1. On September 29, 2019, Chok was charged with violations of N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC 0.08% or greater) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated), and N.Y. Veh. & Traf. Law §1180(b) (speeding in excess of 55 mph; 84 mph in a 55 mph zone).
2. The New York State Police Breath Alcohol Analysis Record obtained by the

than 0.08%, that the Commission had afforded Chok this opportunity to come forward with evidentiary proof to try to support such potential argument concerning an exclusive basis for his NYDWAI conviction as this is set out in the New Jersey DWI statute.

Commission shows a reported BAC of 0.12% on September 29, 2019.

3. The Supporting Deposition and Bill of Particulars documents the officer's observations and field sobriety test results, includes the reported BAC of 0.12%, and specifies the violations of N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC 0.08% or greater) and N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated).
4. On January 14, 2020, Chok pled guilty to a violation of N.Y. Veh. & Traf. Law §1192(1) (NYDWAI), in response to the original charge of N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated). The violations of N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC 0.08% or greater) and N.Y. Veh. & Traf. Law §1180(b)(speeding) were dismissed.
5. Chok has not submitted any court findings supporting his argument that the New York conviction was based exclusively upon a violation of a proscribed BAC of less than 0.08%.³
6. The New York DWAI statute, N.Y. Veh. & Traf. Law §1192(1), is not a per se offense as constructed and enacted by the New York legislature.

Analysis

There is no dispute that Chok pled guilty to and was convicted of NYDWAI. Thus, the sole issue to be determined here is whether Chok has met his burden to prove, with clear and convincing evidence, that his New York conviction was for an offense “based **exclusively** upon a violation of a proscribed BAC of less than 0.08%.” In re: Maxine Basch, (unreported) (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764 at 1, 6-7, and N.J.S.A. 39:4-50(a)(3). In the absence of such proof, Chok is

subject to the mandatory minimum 90-day suspension of his New Jersey driving privileges, pursuant to N.J.S.A. 39:4-50⁴, New Jersey's driving while intoxicated (DWI) statute and N.J.A.C. 13:19-11.1 et seq.

Despite the requirement noted in the Commission's response to Chok's hearing request that Chok 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 0.08%," Chok failed to submit any proof whatsoever regarding a BAC, much less proof of an official court finding on the record as to any BAC being the exclusive basis for entry of the DWAI conviction. Indeed, it is noted that the Commission was able to obtain the documentation from the court's files in the case indicating that there had been a recorded BAC test result of 0.12% reflecting that this was part of the potential evidence which provided the support for the initial charge of violating N.Y. Veh. & Traf. Law §1192(2) (driving while intoxicated; per se, BAC 0.08% or greater). In addition, the "Supporting Deposition and Bill of Particulars" form documents the arresting officer's observations and field sobriety test results, which provided support for the charge of violating N.Y. Veh. & Traf. Law §1192(3) (driving while intoxicated). It is acknowledged that this documentation reflects the "potential" per se evidence and observational-type evidence from the case, which evidence did not become subject to adjudication, given that Chok chose to enter the guilty plea to the statutory NYDWAI offense – which statutory offense contains the specific element of "impaired ability to drive" but does not contain a per se amount element.

Chok's assertion in his Certifications for this administrative matter (Exhibits R-3 and R-4) that there was an agreement with the New York assistant district attorney named

⁴ The version of N.J.S.A. 39:4-50 that was in effect on the date of the offense, September 29, 2019.

“Brian” that his plea would be entered into the official court record as based exclusively on a BAC level less than 0.08% is not supported by the plea transcript of the official court proceeding. There is nothing presented by Chok to corroborate in any way this claim which is, in this context, “self-serving”.

The plea proceeding bears no indication, much less clear and convincing evidence, that Chok’s NYDWAI conviction by guilty plea was based exclusively on a BAC of less than 0.08%. The plea colloquy contains Chok’s acceptance of the NYDWAI, N.Y. Veh. & Traf. Law §1192(1), statutory offense – which offense in its elements provides that there was impairment of his ability to drive when he drove in New York on that offense date. The simple fact that Chok was convicted in New York of driving while ability impaired and not driving while intoxicated does not demonstrate, by clear and convincing evidence, that the New York conviction for driving while ability impaired was based exclusively upon a violation of a proscribed BAC of less than 0.08%. The impairment of driving ability can be shown by observational evidence alone or by observational evidence in combination with (or despite having) a BAC level that was below 0.08%.

The New Jersey legislature specifically provided in the New Jersey DWI statute, N.J.S.A. 39:4-50(a)(3), that it is the driver’s burden to show that the out-of-state conviction was “based exclusively” on the BAC level below 0.08%, explicitly providing that: “unless the defendant [driver] can demonstrate [that exclusive basis]” (emphasis added), that out-of-state conviction will be considered as would a substantially similar offense to New Jersey’s DWI statutory provision. That there is the “impairment of driving ability” element in the particular New York statutory provision Chok explicitly accepted on the record and there is an absence, in the proofs presented, of any specific BAC level admitted or acknowledged as the sole basis establishing that impairment, means Chok cannot meet the “clear and convincing evidence” standard required under this burden.

The controlling New Jersey case law has well established 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, (unreported) (App. Div. 2018), Dkt. No. A-0781-17T1, 2018 N.J. Super. Unpub. LEXIS 2542; Markowicz v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 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 suspension of the home state New Jersey driver license); Ford v. NJMVC, (unreported) (App. Div. 2014), Dkt. No. A-3117-12T1, 2014 N.J. Super. Unpub. LEXIS 304, at 5, certif. denied, 217 N.J. 587 (2014); Xheraj v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-2125-12T1, 2013 N.J. Super. Unpub. LEXIS 2893; Wayne v. NJMVC, (unreported) (App. Div. 2013), Dkt. No. A-3008-12T1, 2013 N.J. Super. Unpub. LEXIS 1827, at 8-9; New Jersey Motor Veh. Comm'n v. Gethard, (unreported) (App. Div. 2012), Dkt. No. A-4657-10T3, 2012 N.J. Super. Unpub. LEXIS 287, at 5; In re: Alan D. Weissman, (unreported) (App. Div. 2009), Dkt. No. A-2154-07T3, 2009 N.J. Super. Unpub. LEXIS 1303, at 2 (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, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 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 0.06%, 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 0.17%)⁵.

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 Chok’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

⁵ 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 0.08% and above as well as observational-type evidence including field sobriety tests, officer observations, driving behavior, and/or driver admissions.

In a typical year, the Commission receives approximately 200 such driving while ability impaired reported convictions, 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.

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.”).

In Zeikel, supra, the court determined that a conviction under New York’s DWAI statute was “substantially similar” to a conviction under New Jersey’s DWI statute to qualify as a prior conviction for sentencing purposes under N.J.S.A. 39:4-50(a)(3). Zeikel, supra, 423 N.J. Super. at 45-49. The court rejected the defendant’s argument that New Jersey sets a higher threshold than New York by requiring a finding of “intoxication,” reasoning that “[i]ntoxication not only includes obvious manifestations of drunkenness but any degree of impairment that affects a person’s ability to operate a motor vehicle”. Id. at 48. See also, State v. Aziz, (unreported) (App. Div. 2020), Dkt. No. A-1268-18T4, 2020 N.J. Super. Unpub. LEXIS 757, in which the Appellate Division affirmed the lower court’s holding that the appellant’s prior conviction for New York DWAI constituted a prior conviction under New Jersey law. In relying on Zeikel, the court stated: “[In Zeikel,] We held that absent proof that a New York DWAI conviction was based exclusively on a blood alcohol reading of less than 0.08, a DWAI conviction is ‘substantially similar [in] nature’ to driving under the influence under New Jersey law, and shall be treated as a prior conviction for sentencing enhancement purposes.” Aziz, supra, at 2, quoting Zeikel, supra, at 48. The Aziz court further noted that, “[f]irst, a New York defendant conceivably may be prosecuted for DWAI, instead of DWI, simply because there is no BAC evidence at all” and “[s]econdly, a DWAI offender with less than 0.08 B.A.C. still commits an offense substantially similar in nature to a New Jersey DUI under N.J.S.A. 39:4-50(a), so

long as the less-than-0.08 reading is not the exclusive basis for the New York conviction.” Id. at 2-3. With the Aziz court further explaining that the totality of the circumstances in that case, if proved, concerning the field sobriety tests, the officer’s observations and the defendant’s driving behavior, as well as the driver’s refusal to submit to a “binding” chemical test, would be sufficient to “establish an observational DUI violation under [New Jersey] law.” Id. at 3-4.

Governing New Jersey case law repeatedly recognizes that “observational” evidence is by itself 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.S.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.S.2d 625 (1979)).

Absent clear and convincing evidence presented by Chok that a BAC of less than 0.08% was made the exclusive basis of the NYDWAI conviction, Chok's New Jersey driving privilege is subject to suspension. See, e.g., Markowiec v. NJMVC, (unreported) (App. Div. 2018), Dkt. No. A-2492-15T1, 2018 N.J. Super. Unpub. LEXIS 257 (affirming the Commission's final decision and order suspending Markowiec's driving privilege based on a NYDWAI where Markowiec argued that there was no chemical test performed and that his BAC was under 0.08%, but there was no clear and convincing evidence, such as a plea transcript or court order showing that the conviction was based exclusively on a BAC of less than 0.08%. The court also emphasized that the finding of substantial similarity between a NYDWAI and a New Jersey DWI did not turn on evidence of a BAC level). A conviction for driving while ability impaired need not be based on BAC at all, or it may be based on a BAC below .008% in combination with other observational

evidence supporting the element of impaired driving ability.⁶

Given these factors, Chok has failed to show, by clear and convincing evidence, that his NYDWAI conviction was based exclusively on a BAC of less than 0.08%, as is required to meet the very limited exception in New Jersey's DWI statute.⁷

It remains undisputed that Chok 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

⁶ Indeed, it is noted that under the New York DUI statute's "Probative value" section as to "Chemical test evidence", N.Y. Veh. & Traf. Law § 1195(2)(b), evidence of a BAC of 0.051% to 0.069%, is considered "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." Therefore, for a conviction of NYDWAI to be entered with this BAC amount there must have been other sufficient observational evidence to support the "impairment of ability to operate a motor vehicle" statutory element, as the NYDWAI provision is specifically not a per se offense. Similarly, if the BAC test result evidence was 0.05% or below, that range is considered "prima facie evidence that the ability of such person to operate a motor vehicle was not impaired by the consumption of alcohol", and thus again, this means that with this lower level BAC amount there must have been sufficient other observational evidence despite that BAC result to establish beyond a reasonable doubt the element of "impairment of ability to operate a motor vehicle" for such NYDWAI conviction. N.Y. Veh. & Traf. Law § 1195(2)(a).

⁷ 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 0.08 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 0.08 prior to the effective date of the New Jersey law changing its per se threshold from 0.10 to 0.08; 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 0.08); also, it is noted that currently the State of Utah has lowered its statutory per se threshold to a BAC of 0.05, thus specific Utah convictions under its DWI-per se provision would meet this limited exception.) This is not the case for Chok's conviction under the NYDWAI statutory provision, N.Y. Veh. & Traf. Law §1192(1).

License Compact Agreement (N.J.S.A. 39:5D-1 to -14) 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, (unreported) (App. Div. 2010), Dkt. No. A-0147-09T3, 2010 N.J. Super. Unpub. LEXIS 597 at 4-5; 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[.]’”); DiGioia v. NJMVC, (unreported) (App. Div. 2021), Dkt. No. A-3587-19, 2021 N.J. Super. Unpub. LEXIS 533 (the court declared, in affirming the Commission’s imposition of suspension of the New Jersey home state license for a New York conviction, that “the Compact simply requires that New Jersey consider appellant’s New York conviction as if the offense occurred in New Jersey, which the Commission indisputably did”); 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, 462 N.J. Super. 370, 375 (App. Div. 2020) (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.

It remains undisputed, and I therefore find, that Chok was convicted of an alcohol-related driving offense that occurred on September 29, 2019, in the State of New York (for which he was convicted on January 14, 2020). As such, pursuant to N.J.S.A. 39:5D-4, 39:5-30, 39:4-50 and N.J.A.C. 13:19-11.1 et seq., I order his New Jersey driving privilege to be suspended for 90 days. The suspension period imposed here is the

minimum mandated by New Jersey statute for this alcohol-related driving offense, which was committed before December 1, 2019⁸; there is no discretion to impose a reduced suspension term.

Conclusion and Final Order

Based on the foregoing, I conclude that the Commission's proposed suspension is proper. I specifically conclude that Chok's submissions to the Commission are insufficient to meet his affirmative burden to show, by clear and convincing evidence, that his NYDWA conviction was based exclusively on a BAC below 0.08%. The New Jersey legislature, in N.J.S.A. 39:4-50, explicitly required that the submitted evidence meet this high standard of proof. 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).]

Chok'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."

The effective date of suspension of Chok's driving privilege is October 4, 2022. (Suspension term: 90 days).

⁸ The New Jersey DWI statutory penalties were amended effective December 1, 2019, for offenses committed on or after that date. Thus, the amended penalties do not apply here. State v. Scudieri, 469 N.J. Super. 507 (App. Div. 2021).

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, Chok 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, Chok 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.⁹ 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 Administrator, as well as the Attorney General. The Appellate Division may be contacted by calling (609) 815-2950.

Note: 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 with the court and you are seeking a stay of this

⁹ 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).

Order while your appeal is pending, your request for stay, made pursuant to New Jersey Court Rule 2:9-7, 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 should be submitted to the Office of Legal and Regulatory Affairs, NJMVC (attention: STAY REQUEST/ APP. DIV. PROOF OF FILING) either 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.

Further Note: A stay of this Order is not automatically granted upon filing a Notice of Appeal with the Appellate Division. In requesting that a stay be granted in conjunction with the filing of your appeal, you have the burden to show that your case meets each of the factors set out in New Jersey case law to warrant the issuance of that type of injunctive relief. See, Garden State Equality v. Dow, 216 N.J. 314, 320 (2013).



Latrecia Littles-Floyd
Acting Chair and Chief Administrator

LLF:ea/kw

c: Peter Y. Lee, Esq., at two addresses:

P.O. Box 52, Edgewater, NJ 07020

and

733 Third Avenue, 16th Floor, New York, NY 10017

EXHIBIT LIST

*Copies redacted of other drivers' personal identifying information

Commission Exhibits

- P-1 Copy of NYDMV Out-of-State Conviction report dated January 30, 2020, received by the Commission on February 13, 2020 (1 page, redacted) *
- P-2 Copy of New Jersey Motor Vehicle Commission, Scheduled Suspension Notice, (front and back), date prepared February 16, 2020 (2 pages)
- P-3 Copy of Commission letter to Chok advising him of the opportunity to submit clear and convincing evidence of the conviction being exclusively based on a BAC of less than 0.08% (affording a hearing on the papers), dated May 4, 2020 (1 page)
- P-4 Copy of Commission letter to Chok advising of extension, dated June 8, 2020 (1 page)
- P-5 Copy of Commission letter to Chok advising of extension, dated December 1, 2020 (2 pages), with enclosure: (see Exhibit P-1: NYDMV Conviction Report)
- P-6 Copy of Commission letter to Chok (3 pages), dated August 5, 2021, with enclosures: New York State Police Breath Alcohol Analysis Record, dated September 29, 2019 (1 page); Supporting Deposition and Bill of Particulars, dated September 29, 2019 (2 pages); transcript of audio recording of Mamakating Town Court, Disposition, dated January 14, 2020, prepared by Renzi Legal Resources (10 pages), dated July 14, 2021; Certificate of Disposition, dated March 31, 2021 (1 page); and *previously provided Exhibit P-1: NYDMV Conviction Report, redacted

Chok's Exhibits

- R-1 Copy of hearing request (4 pages) from Peter Y. Lee, dated March 7, 2020 , with enclosure: (see Exhibit P-2, Scheduled Suspension notice).
- R-2 Copy of letter to the Commission from Peter Y. Lee, dated March 30, 2020 (2 pages)
- R-3 Copy of letter to the Commission from Peter Y. Lee, dated May 27, 2020 (4 pages) with enclosure: Certification (first) of Hook Chok (2 pages)
- R-4 Copy of letter to the Commission from Peter Y. Lee, dated July 7, 2020 (1 page), with enclosure: Certification (second) of Hook Chok (2 pages)
- R-5 Copy of letter to the Commission from Peter Y. Lee, dated January 29, 2021 (2 pages), with enclosure: see Exhibit P-4