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MEMORANDUM OPINION

Court of Appeals of Texas,
Houston (14th Dist.).

TEXAS DEPARTMENT OF
PUBLIC SAFETY, Appellant

v.

Chad Michael HENSON, Appellee.

No. 14-09-00010-CV. | May 11, 2010.

West KeySummary

1 Automobiles

 [Refusal to Take Test](#)

Automobiles

 [Administrative Procedure in General](#)

A trooper's failure to complete a refusal report after a driver refused to submit to an alcohol concentration test did not invalidate the suspension of the driver's license. The driver, a minor, was stopped for a traffic violation. During the stop, the officer observed a strong odor of alcohol and conducted three field sobriety tests. The driver performed poorly on the sobriety tests and after being given the statutorily required warning, refused to submit to an alcohol concentration test. Although the trooper failed to complete a refusal report, the completion of the report was not a prerequisite for suspension. [V.T.C.A., Transportation Code § 724.042.](#)

[Cases that cite this headnote](#)

On Appeal from the County Court at Law No. 2 and Probate Court, Brazoria County, Texas, Trial Court Cause No. CI041015.

Attorneys and Law Firms

[Ronald Lee Foster Jr.](#), [Kevin M. Givens](#), Ketan Natvarlal Patel, for Texas Department of Public Safety.

[Michael Echevarria](#), Joe Patrick Bulanek Jr., for Chad Michael Henson.

Panel consists of Chief Justice [HEDGES](#) and Justices [ANDERSON](#) and [CHRISTOPHER](#).

MEMORANDUM OPINION

[ADELE HEDGES](#), Chief Justice.

*1 This appeal arises from a county court at law's order reinstating appellee's, Chad Michael Henson, driver's license. Henson, a minor, was stopped for traffic violations and arrested for driving while intoxicated. He refused to provide a breath sample. As a result of this refusal, his driver's license was suspended. An administrative law judge ("ALJ") subsequently upheld the suspension. When Henson challenged the ALJ's decision in the county court at law, the court vacated the ALJ's suspension order. Appellant, the Texas Department of Public Safety ("DPS"), now challenges the county court at law's order reversing the ALJ's decision. In three related issues, the DPS contends that the county court at law's order should be reversed because: (1) the DPS complied with [sections 724.032 and 724.042 of the Texas Transportation Code](#)¹ and (2) Henson's refusal to submit a specimen was voluntary. We reverse the county court at law's order and render judgment affirming the order of the ALJ.

I. BACKGROUND

On December 2, 2007, DPS Trooper Ryan Sollock stopped Henson for traffic violations. During the traffic stop, Trooper Sollock observed a strong odor of alcohol on Henson's breath and conducted three field sobriety tests: the horizontal gaze nystagmus test, the walk-and-turn test, and the one-leg-stand test. After Henson performed poorly on the sobriety tests, Trooper Sollock gave Henson his DIC-24 statutory warnings and requested that Henson submit to an alcohol concentration test. Henson refused. Trooper Sollock gave Henson a DIC-25 notice of license suspension for refusing to submit a breath sample. Henson was arrested, and his license was administratively suspended for 180 days.

A. Administrative Hearing

Henson appealed the notice of suspension and requested a hearing under [section 724.041 of the Transportation Code](#).² At the administrative hearing, Henson focused on two arguments: his refusal to submit a specimen was involuntary and Trooper Sollock failed to make a proper written refusal report. Henson contended that his refusal to submit a breath sample was involuntary because his DIC-25 notice of license suspension denominated him an adult, not a minor. Henson further argued that Trooper Sollock was required to make a refusal report containing a statement that Henson had refused to submit a specimen and had refused to sign a refusal statement. According to Henson, Trooper Sollock's omitting this particular refusal statement from his report warranted the reinstatement of Henson's license.

The ALJ ultimately found that Henson was properly asked to submit a specimen of breath or blood and refused. The ALJ further concluded that the DPS proved compliance with the requirements set forth in [section 724.042 of the Transportation Code](#) and sustained the suspension of Henson's license for 180 days.

B. County Court at Law's Judicial Review of ALJ's Order

Henson appealed the ALJ's decision by filing a petition to set aside the administrative order with the county court at law in Brazoria County. In the county court at law, Henson made the same arguments he made before the ALJ: (1) his consent was involuntary because he was improperly admonished as an adult and (2) Trooper Sollock failed to comply with the refusal report requirements prescribed under [section 724.032](#). The county court at law granted Henson's petition and reversed the ALJ's suspension order. The county court at law found: (1) the ALJ's finding that the DPS complied with [section 724.032](#)-the refusal report requirement-was not supported by the evidence; (2) DPS's failure to comply with [section 724.032](#) substantially prejudiced Henson's rights and violated a statutory provision; and (3) Henson's refusal was not voluntary because he was admonished as an adult.

*2 After the DPS's motion for new trial was denied, it filed the instant appeal. The DPS raises three issues on appeal, challenging the county court at law's reinstatement of Henson's license. In the DPS's first issue, it contends that compliance with [section 724.032](#) was not a prerequisite

for suspension; and, in the alternative, Trooper Sollock substantially complied with the refusal report requirements. In its second issue, DPS argues that Henson voluntarily refused to submit to an alcohol concentration test after Trooper Sollock properly admonished him. In its third issue, the DPS argues that it met its burden under [section 724.042 of the Transportation Code](#).

II. STANDARD OF REVIEW

A person whose driver's license is suspended following an administrative hearing is entitled to judicial review of the decision. *See Tex. Transp. Code Ann. § 524.041 (Vernon 2007)*. Judicial review is governed by the substantial evidence rule. *See Tex. Dep't of Pub. Safety v. Alford*, 209 S.W.3d 101, 103 (Tex.2006) (per curiam) (quoting *Mireles v. Tex. Dep't of Pub. Safety*, 9 S.W.3d 128, 131 (Tex.1999)); *Tex. Dep't of Pub. Safety v. Guajardo*, 970 S.W.2d 602, 604 (Tex.App.-Houston [14th Dist.] 1998, no writ). When reviewing an administrative decision under the substantial evidence rule, the reviewing court may “affirm the agency decision in whole or in part.” *Tex. Gov't Code Ann. § 2001.174 (Vernon 2008)*. It must reverse or remand the case if the appellant's substantial rights have been prejudiced because the administrative findings, inferences, conclusions, or decisions are (1) in violation of a constitutional or statutory provision, (2) in excess of the agency's statutory authority, (3) made through an unlawful procedure, (4) affected by other error of law, (5) not reasonably supported by substantial evidence when considering the reliable and probative evidence in the record as a whole, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See id.*; *see also Guajardo*, 970 S.W.2d at 604-05.

Whether substantial evidence supports an administrative order is a question of law. *Alford*, 209 S.W.3d at 103. The dispositive issue for the reviewing court is not whether the ALJ's order was correct, but whether the record demonstrates some reasonable basis for the agency's action. *Mireles*, 9 S.W.3d at 131. We must presume that the agency's decision is supported by substantial evidence. *Tex. Dep't of Pub. Safety v. Walter*, 979 S.W.2d 22, 27 (Tex.App.-Houston [14th Dist.] 1998, no writ). Furthermore, the reviewing court must affirm the ALJ's decision if more than a scintilla of evidence supports it and may affirm “even if the evidence preponderates against it.” *Mireles*, 9 S.W.3d at 131. We may not substitute our judgment for the ALJ's judgment “on the weight of the

evidence on questions committed to agency discretion.” [Tex. Gov’t Code Ann. § 2001.174](#).

III. SUBSTANTIAL EVIDENCE SUPPORTS THE ALJ’S ORDER

*3 In three issues, the DPS contends that the county court at law erred in reversing the order of the ALJ because the ALJ’S findings were supported by substantial evidence. Taken out of order, DPS contends in its second and third issues that it satisfied the requirements outlined under [section 724.042](#), including the voluntariness of Henson’s refusal. In the DPS’s first issue, it contends that compliance with [section 724.032](#)-the refusal report requirement-was not a prerequisite for suspension; and, in the alternative, Trooper Sollock *substantially* complied with the refusal report requirements.

A. [Section 724.042](#) Issues And The Voluntariness Of Henson’s Refusal

To uphold a license suspension, an administrative law judge must find that the DPS proved the following elements by a preponderance of the evidence at an administrative license suspension hearing: (1) a law enforcement officer had reasonable suspicion or probable cause to stop or arrest the driver; (2) the officer had probable cause to believe that the driver was operating a motor vehicle in a public place while intoxicated; (3) the officer arrested the driver and asked him to submit to the taking of a specimen; and (4) the driver refused to submit to the taking of a specimen on request by the officer. [Tex. Transp. Code Ann. §§ 724.042, 724.043](#) (Vernon Supp.2009). The only element relevant to this case is the last: whether Henson refused to submit a specimen on the officer’s request.

Although the record reflects that he refused to submit a specimen, Henson argues-and the county court at law agreed-that his refusal was involuntary because he received erroneous warnings by Trooper Sollock upon his request for a specimen.³ [Section 724.015 of the Transportation Code](#) prescribes what information must be provided by an officer to an individual before requesting a specimen. [Section 724.015](#) provides in relevant part:

Before requesting a person to submit to the taking of a specimen, the officer shall inform the person orally and in writing that:

- (1) if the person refuses to submit to the taking of the specimen, that refusal may be admissible in a subsequent prosecution;
- (2) if the person refuses to submit to the taking of the specimen, the person’s license to operate a motor vehicle will be automatically suspended, whether or not the person is subsequently prosecuted as a result of the arrest, for not less than 180 days;
- (3) if the person is 21 years of age or older and submits to the taking of a specimen designated by the officer and an analysis of the specimen shows the person had an alcohol concentration of a level specified by Chapter 49, Penal Code, the person’s license to operate a motor vehicle will be automatically suspended for not less than 90 days, whether or not the person is subsequently prosecuted as a result of the arrest;
- (4) if the person is younger than 21 years of age and has any detectable amount of alcohol in the person’s system, the person’s license to operate a motor vehicle will be automatically suspended for not less than 60 days even if the person submits to the taking of the specimen, but that if the person submits to the taking of the specimen and an analysis of the specimen shows that the person had an alcohol concentration less than the level specified by Chapter 49, Penal Code, the person may be subject to criminal penalties less severe than those provided under that chapter;

*4 [Tex. Transp. Code Ann. § 724.015\(1\)-\(4\)](#) (Vernon Supp.2009). Trooper Sollock provided the following DIC-24 statutory warnings to Henson upon requesting a specimen:

You are under arrest for an offense arising out of acts alleged to have been committed while you were operating a motor vehicle ... while intoxicated You will be asked to give a specimen of your breath and/or blood. The specimen will be analyzed to determine the alcohol concentration or the presence of a controlled substance, drug, dangerous drug or other substance in your body.

If you refuse to give the specimen, that refusal may be admissible in a subsequent prosecution. Your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 180 days, whether or not you are subsequently prosecuted for this offense.

If you are 21 years of age or older and submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol concentration of 0.08 or more, your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 90 days, whether or not you are subsequently prosecuted for this offense.

If you are younger than 21 years of age and have any detectable amount of alcohol in your system, your license, permit or privilege to operate a motor vehicle will be suspended or denied for not less than 60 days. However, if you submit to the taking of a specimen and an analysis of the specimen shows that you have an alcohol concentration of less than 0.08, you may be subject to criminal penalties less severe than those provided for under Chapter 49, Penal Code.

Trooper Sollock's DIC-24 statutory warnings substantially tracked the statutory language of [section 724.015](#). Accordingly, we find that Sollock's DIC-24 statutory warnings sufficiently provided Henson the information required to be given by an officer before requesting a specimen under [section 724.015](#). Nevertheless, Henson contends that his refusal was involuntary because his DIC-25 notice of suspension described him as an adult, not a minor. The notice of suspension, however, is not part of the warnings required to be provided by the officer before requesting a specimen. *See id.* § 724.015. Rather, the DIC-25 notice of suspension is required to be furnished *after* a person refuses to submit a specimen. *See id.* § 724.032(a) (“If a person refuses to submit ... a specimen, the peace officer shall ... serve notice of licensure suspension ...”). Because Trooper Sollock was not required to give Henson the DIC-25 notice of suspension before requesting a specimen, any irregularity on the notice of suspension did not affect the voluntariness of Henson's refusal to submit a specimen for purposes of [section 724.042](#).

We conclude that substantial evidence supports the ALJ's order: Henson was properly advised of the consequences set forth under [section 724.015](#) and he voluntarily refused to submit a specimen at Trooper Sollock's request. We therefore

sustain the DPS's third issue and the portion of its second issue contending that Henson's refusal was voluntary.

B. Written Refusal Report

*5 In DPS's first issue, it contends that the county court at law erroneously concluded that Trooper Sollock's failure to comply with [section 724.032](#) warranted reversing the ALJ's decision. Section 724 .032(b) includes a refusal report provision, directing an officer to execute a report upon an individual's refusal to submit a specimen. The statute provides in relevant part:

(a) If a person refuses to submit to the taking of a specimen, whether expressly or because of an intentional failure of the person to give the specimen, the peace officer shall:

...

(4) make a written report of the refusal to the director of the department.

(b) The director must approve the form of the refusal report. The report must:

...

(2) contain a copy of:

...

(B) a statement signed by the officer that the person refused to:

(i) submit to the taking of the requested specimen; and

(ii) sign the requested statement under Section 724.031.

[Tex. Transp. Code Ann. § 724.032](#). The county court at law found that Trooper Sollock failed to make a proper refusal report because his report omitted a statement that Henson refused to submit to the taking of the requested specimen and refused to sign a refusal statement. The record is clear that Trooper Sollock failed to indicate in his report that Henson refused to sign the refusal report. This omission, however, did not invalidate the

suspension. The Transportation Code sets forth four prerequisites for suspension: (1) a law enforcement officer had reasonable suspicion or probable cause to stop or arrest the driver; (2) the officer had probable cause to believe the driver was operating a motor vehicle in a public place while intoxicated; (3) the officer arrested the driver and asked him to submit to the taking of a specimen; and (4) the driver refused to submit to the taking of a specimen on request of the officer. *See* [Tex. Transp. Code Ann. § 724.042](#). [Section 724.042](#) does not require any other findings by an administrative judge to uphold the suspension of a driver's license. Accordingly, proof that the officer completed a refusal report as required by [section 724.032](#) is not a prerequisite to sustaining an order suspending a driver's license. *See id.*

We conclude that the ALJ, in upholding the suspension, was not required to find that Trooper Sollock executed a refusal report as specifically required by [section 724.032](#). The county court at law erred in concluding otherwise. Accordingly, we sustain the DPS's first issue.

IV. CONCLUSION

Because we hold that the evidence reasonably supports the administrative decision, we reverse the county court at law's order and render judgment affirming the order of the administrative law judge.

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.

Footnotes

¹ *See* [Tex. Transp. Code Ann. §§ 724.032, 724.042](#) (Vernon Supp.2009).

² *See id.* [§ 724.041](#).

³ The DPS also argues that Henson waived his voluntariness challenge because he did not raise the argument before the ALJ. We disagree. The record clearly reflects that Henson requested the ALJ to reinstate his license because he was improperly admonished as an adult. Accordingly, Henson did not waive his voluntariness argument.