

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 08182-15

AGENCY DKT. NO. 05502

**NEW JERSEY MOTOR VEHICLE
COMMISSION,**

Petitioner,

v

JOHN E. BURWELL,

Respondent

Anthony J. Apicelli, Jr., Esq., for petitioner

Albert P. Mollo, Esq., for respondent (Mollo Law Firm, attorneys)

Record Closed. January 28, 2016

Decided: March 14, 2016

BEFORE JOHN S. KENNEDY, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

John E Burwell (Burwell) appeals from the decision of the Motor Vehicle Commission (Commission) to suspend his license for a period of 480 days (sixteen months) due to his involvement in an accident resulting in the death of an individual. By letter of December 22, 2014, the Commission notified Burwell of its action to suspend his license pursuant to N.J.S.A. 39 5-30, and he appealed that decision. On May 22,

2015, the matter was transmitted to the Office of Administrative Law (OAL), for a hearing as a contested case. The hearing was held at the offices of the OAL in Mercerville, New Jersey, on November 18, 2015, and January 28, 2016. The record closed on January 28, 2016.

FACTUAL DISCUSSION

Many of the material facts in this case are undisputed. The accident that led to the fatality in this matter took place on July 22, 2014, at approximately 9.16 a.m., on a clear day. Respondent was driving his vehicle southbound in the left lane of the Garden State Parkway local lanes in Tinton Falls, Monmouth County. The Garden State Parkway in that area consists of three local lanes and two express lanes. The local lanes and express lanes are separated by a grass median embankment. At milepost 107.9 Burwell swerved to the left into the grass median to avoid another vehicle (vehicle two) that was parked on the left shoulder, partially in the left lane and impeding the flow of traffic. Three pedestrians were standing outside of vehicle two on the grass median toward the front driver's side. A third vehicle (vehicle three), not involved in the accident, was parked on the right shoulder of the express lanes parallel to vehicle two. Vehicle three had a flat tire and two of the three pedestrians standing in the grass median were occupants of vehicle three. The occupants of vehicles two and three were employed by the same company. Vehicle three had contacted vehicle two for assistance and to pick up two children being transported by vehicle three. The children were secured in vehicle two before the accident occurred.

Burwell made an evasive maneuver to the left to avoid a collision with vehicle two. Respondent entered the grass median, sideswiped the driver's side door of vehicle two and struck the three pedestrians. One of the pedestrians, Pedro Guerrero Jr. (Guerrero), died as a result of the collision. According to a State Police Fatal Accident Report of July 22, 2014, Burwell tested negative for both alcohol and drugs, and postmortem toxicology tests for Guerrero also were negative for alcohol or drugs. No motor vehicle summonses were issued to Burwell as a result of the accident.

In support of its case, the Commission presented the testimony of eyewitness, Michael Veling. Mr. Veling was traveling southbound in the right lane of the express side of the Garden State Parkway and noticed vehicle three disabled on the median. He also observed vehicle two which had stopped partially on the roadway of the local lanes. Veling noticed that the occupants of vehicles two and three were transferring students from one vehicle to the other. He does not recall if another vehicle was in front of Burwell. Burwell swerved into the median to avoid hitting vehicle two. If he did not swerve out of the lane in which he was traveling, Burwell would have struck vehicle two. Veling stopped on the shoulder, called 911, and gave a statement to the police when they arrived (P-3).

New Jersey State Police Trooper, Eric Rodriguez, prepared a New Jersey Police Crash Investigation Report and Supplement (P-6 and P-7) and a New Jersey State Police Fact Briefing Sheet (P-5). All of Rodriguez's reports were stipulated into evidence and Rodriguez did not testify at the hearing.

In response to the Commission's case, respondent did not testify and the parties agreed to stipulate to the statements he made in a videotaped interview conducted by the New Jersey State Police on July 22, 2014. In that statement, Burwell explained that he was traveling in the left lane of the local lanes on the Garden State Parkway. There was a vehicle in front of him that swerved into the right lane to avoid hitting vehicle two. Because the vehicle in front of him swerved to the right, Burwell had to swerve to the left, into the grass median to avoid hitting vehicle two. Vehicle two was partially in his lane. He did not observe the pedestrians in the grass median when he swerved to avoid vehicle two.

In reviewing the record therefore, I **FIND** as **FACT** that Burwell swerved into the grass median to avoid striking vehicle two which was parked on the left shoulder, partially obstructing the lane in which Burwell was traveling. I further **FIND** as **FACT** if he did not swerve out of the lane in which he was traveling, Burwell would have struck vehicle two.

LEGAL ANALYSIS AND CONCLUSIONS

The Commission is empowered to suspend a motorist's driving privileges for a violation of any provision of the motor vehicle statutes or for any other "reasonable grounds" N.J.S.A. 39:5-30(a). The Legislature has vested authority in the Commission to impose a driver's license suspension as a preliminary matter prior to a plenary proceeding in a motor vehicle fatality case N.J.S.A. 39:5-30(e)(3). Where the Commission proposes suspension of driving privileges under N.J.S.A. 39:5-30 as an administrative enforcement of the motor vehicle regulations, it bears the burden of proof by the preponderance of the competent and credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962)

The primary object of a suspension or revocation of a driver's license "is to foster safety on the highway and not to impose criminal punishment to vindicate public justice." Id. at 155, see also David v. Strelecki, 51 N.J. 563 (1968). A decision to suspend rests on a finding that "a law of the highway has been violated and that the highway would be a safer place for the public if the violator were removed as a driver for some period of time" Ibid. Suspensions must be imposed only for the purpose of reforming the particular motorist and are not to be imposed administratively for the purpose of deterring others. This matter involves a proposed suspension of respondent's license for a substantial period due to the death of an individual in an accident where it is alleged by the Commission that respondent operated his vehicle in a careless manner N.J.S.A. 39:4-97.

Based on the above, I **CONCLUDE** that the Commission has not met its burden in this matter of proving that Burwell was the cause of this fatality by either operating his vehicle in a careless manner or by failing to stop or yield. While unquestionably a tragic accident, from the record before me, the collision was not the result of his actions.

ORDER

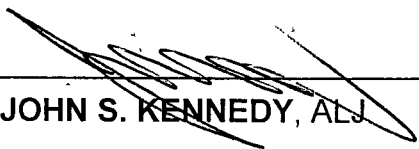
Accordingly, it is **ORDERED** that the Scheduled Suspension Notice issued by the Motor Vehicle Commission under date of December 22, 2014, to respondent John E. Burwell is **REVERSED**.

I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration

This recommended decision may be adopted, modified or rejected by the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Chief Administrator of the Motor Vehicle Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION, 225 East State Street, PO Box 160, Trenton, New Jersey 08666-0160**, marked "Attention: Exceptions". A copy of any exceptions must be sent to the judge and to the other parties.

March 14, 2016
DATE



JOHN S. KENNEDY, ALJ

Date Received at Agency

3/14/16

Date Mailed to Parties:

3/14/16

JSK/vj

WITNESSES

For Petitioner:

Michael Veling

For Respondent:

None

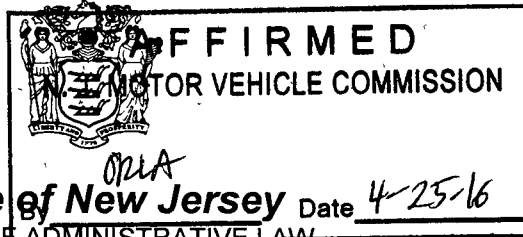
EXHIBITS

For Petitioner:

- P-1 Certified Death Certificate
- P-2 Abstract of Driver History Record
- P-3 Statement of Michael Veling
- P-4 Taped statement of John E. Burwell
- P-5 New Jersey State Place SIMS Fact Briefing Sheet
- P-6 New Jersey Police Crash Investigation Report by Trooper Rodriguez
- P-7 Supplemental New Jersey Police Crash Investigation Report by Trooper Rodriguez
- P-8 Crash Investigation Inspection Report

For Respondent:

None



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. MVH 11275-15

AGENCY DKT. NO. PXXXX-XXXXX-08667

MOTOR VEHICLE COMMISSION

Petitioner,

v.

JUAN C. LEON

Respondent.

Kenneth Vercammen, Esq., appearing on behalf of petitioner, (Kenneth Vercammen & Associates, attorneys)

Joel Seltzer, Esq., appearing on behalf of respondent, (Law Office of Joel C. Seltzer, attorneys)

Record Closed: March 9, 2016

Decided March 11, 2016

BEFORE EVELYN J. MAROSE, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 23, 2015, the New Jersey Motor Vehicle Commission (NJMVC) issued a Scheduled Suspension Notice for twenty-seven months to petitioner, Juan C. Leon, in connection with an accident on November 3, 2014, where two persons lost their lives. The NJMVC asserts that petitioner committed two motor vehicle violations--N.J.S.A.

39:4-97 Careless Driving and N.J.S.A. 39 4-88(b) Unsafe Lane Change at the time of the accident.

The matter was transmitted to the Office of Administrative Law (OAL) on July 24, 2015, for determination as a contested case pursuant to N.J.S.A. 52 14f-1to -13. A hearing was held on November 17, 2015. On the first day of hearing, after the NJMVC rested its case, petitioner made a Motion for Directed Verdict. R. 4 40-1. Decision on the motion was reserved and a fact witness on behalf of petitioner testified. Written submissions were filed and the Motion for Directed Verdict was converted to a Motion for Summary Disposition. The record closed on March 9, 2016.

FINDING OF FACTS

NJMVC Testimony:

Sgt. Frank Pignataro of the Belleville Police Department testified as to the accident investigation. Sgt. Pignataro arrived at the scene of the accident one half hour after its occurrence. The initial report generated that night faulted petitioner for improper passing.

Essex County Prosecutor Detective Dan Cokolet testified regarding the further investigation that was conducted, which included interviews with two witnesses to the accident, Eileen Davis and Ramon Perez. The witnesses stated that a Dodge Dart struck and cut off petitioner's truck. Petitioner managed to evade the actions of the Dodge Dart but in doing so his truck, traveling at or below the posted speed limit, tipped over hitting a guard rail. A Chevrolet Cavalier, containing a driver and passenger, crashed into the rear of the truck and ignited. Both individuals in the vehicle lost their lives. As a result of the full investigation, no criminal charges were filed against petitioner and no moving violations were issued against him. A grand jury also declined to bring an indictment against petitioner. (P-7.)

While some of Detective Cokolet's testimony included hearsay, hearsay is admissible in administrative agency proceedings, subject to the "residuum rule," which

mandates that an administrative decision cannot be predicated on hearsay alone. For a court to sustain an administrative decision, which affects the substantive rights of a party, there must be a residuum of legal and competent evidence in the record. Weston v State, 60 N.J. 36, 51 (1972). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 17:27 5(a). In this case, I **FIND** that the interviews of two eyewitnesses to the accident contained in the final investigation, though hearsay, are consistent with and supported by the competent evidence of Nicole Decaito, a third eyewitness who testified at the hearing

Petitioner's Testimony.

Nicole Decaito was working at a store approximately five hundred feet away from the scene of the accident. Her view of the scene was unobstructed and the weather was clear. She saw a small vehicle speed up behind the truck that petitioner was driving and cut off the truck. The car then sped off. Ms. Decaito observed that petitioner was not speeding and not attempting to change a lane of traffic prior to being cut off by the small vehicle.

The testimony of some witnesses may be so divergent that a careful analysis of the witnesses' credibility is necessary in order to make critical findings of fact. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v Bonnet, 16 N.J. 546 (1954); Gallo v Gallo, 66 N.J. Super. 1 (App Div 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality; internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

Having had the opportunity to observe all three witnesses, compare their testimony for internal consistency and compare their testimony with other evidence to determine if it "hangs together" with other testimony, I **FIND** that all three witnesses' testimony was consistent and credible. All three witnesses answered the questions posed directly and without hesitation. None of the witnesses had any possibility of personally gain from their testimony. In addition, Sgt. Pignataro and Detective Cokolet had experience in accident investigation

Based upon a review of the totality of the evidence, including testimony and documentation, and having had the opportunity to assess the demeanor and credibility of the witnesses who testified, I make the following **FINDINGS of FACT**:

- 1.) No credible evidence was presented that petitioner drove his truck carelessly, without due caution or in a manner that it was likely to endanger a person or property
- 2.) No credible evidence was presented that petitioner intended to move his vehicle into a lane without first ascertaining that such movement could be done safely.
- 3.) Credible evidence was presented that a Dodge Dart struck petitioner's truck causing it to strike a concrete barrier and partially overturn onto the median. Decedents' car then collided with the truck.

ANALYSIS AND CONCLUSIONS OF LAW

The NJMVC is empowered to suspend a motorist's driving privileges for a violation of any provision of the Motor Vehicle statutes or for any "reasonable grounds" N.J.S.A. 39:5-30. In this case, the NJMVC asserts that petitioner violated N.J.S.A. 39:4-97 Careless Driving—which provides that it shall be unlawful for any person to drive or operate a motor vehicle in an unsafe manner likely to endanger a person or brother. The NJMVC also asserts that petitioner violated N.J.S.A. 39:4-88(b) Unsafe Lane Change—which provides that a vehicle shall be driven as nearly as practical entirely

within a single lane and shall not be moved from that lane until the driver has first ascertained that the movement can be made with safety.

While two lives were lost in the accident at issue, I **CONCLUDE** that the NJMVC has not proved by a preponderance of the credible evidence that petitioner violated N.J.S.A. 39.4-97 or N.J.S.A. 39.4-88(b). I **CONCLUDE** that there is no basis to suspend petitioner's license for any period of time.

ORDER

It is hereby **ORDERED** that the scheduled twenty-seven month suspension of the petitioner's driving privileges be **REVERSED**

I hereby **FILE** my initial decision with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION** for consideration

This recommended decision may be adopted, modified or rejected by the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION**, who by law is authorized to make a final decision in this matter. If the Chief Administrator of the Motor Vehicle Commission does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHIEF ADMINISTRATOR OF THE MOTOR VEHICLE COMMISSION, 225 East State Street, PO Box 160, Trenton, New Jersey 08666-0160**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/11/16
DATE

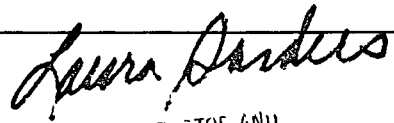

EVELYN J. MAROSE, ALJ

Date Received at Agency.

3/11/16

Date Mailed to Parties

MAR 15 2016


DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

EJM/kep

APPENDIX

WITNESSES

For Petitioner:

Frank Pignataro
Dan Cokolet

For Respondent

Nicole Decaito

EXHIBITS

For Petitioner:

- P-1 New Jersey Police Crash Investigation Report
- P-2 Vehicular Homicide Preliminary Report
- P-3 State of New Jersey Certificate of Death, Terrance Morris
- P-4 State of New Jersey Certificate of Death, Jonathan Marquis Fontenot
- P-5 Abstract of Driver History Record
- P-6 Fatal Accident Investigation Unit Report
- P-7 Crash & Fire Investigation Unit—Continuation Report



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark, NJ 07102
(973) 648-6008

**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the parties
on MAR 15 2016**