*Date of mailing: January 8, 2016

STATE OF NEW JERSEY
MOTOR VEHICLE COMMISSION
CASE FILE NUMBER: BXXXX XXXXX 61892

IN THE MATTER OF	**:**	**SUPPLEMENTAL FINAL DECISION AND FINAL ORDER ON REMAND**
MAXINE L. BASCH	**:**	

This is the Motor Vehicle Commission's (Commission) "Supplemental Final Decision on Remand" in the matter of Maxine L. Basch (Basch). On July 16, 2013, the Superior Court of New Jersey, Appellate Division, reversed and remanded the Commission's June 22, 2012, Denial of Hearing Request/Final Decision in this matter which arose from Basch's undisputed February 28, 2012, conviction under N.Y. Veh. & Traf. Law §1192(1) (driving while ability impaired, DWAI). See, Basch v. New Jersey Motor Vehicle Commission, (unreported), (App. Div. 2013), Dkt. No. A-6009-11T1, 2013 N.J. Super. Unpub. LEXIS 1764.

In the Denial of Hearing Request/Final Decision, the Commission had taken administrative action to suspend Basch's New Jersey driving privilege for 90 days pursuant to the Interstate Driver License Compact (IDLC or Compact), N.J.S.A. 39:5D-4, as well as N.J.S.A. 39:5-30 and N.J.A.C. 13:19-11.1 to -11.2. The corresponding mandatory statutory surcharges were also imposed pursuant to N.J.S.A. 17:29A-35(b)(2)(b). At the time of issuance of the court's July 16, 2013 unpublished opinion, Basch had already fully served the 90-day suspension and her New Jersey driving privilege had already been restored as of October 16, 2012. As of the date of this

decision, it is also noted that Basch has fully paid the statutory surcharges that had been imposed as a result of her DWAI conviction.

In determining that this matter should be remanded to the Commission, the court specifically noted its particular concern that the record submitted on appeal did not definitively establish whether Basch's New York DWAI conviction was by means of a trial or a guilty plea. Id. at 2. Most significant in the court's discussion of this aspect of the record is that, in the circumstance where it can be determined that the New York case was in fact resolved by entry of a guilty plea, the court pointedly and definitively declared that: "[i]n [the court's] view, a plea bargain by which a defendant agrees to plead guilty to a lesser-included offense of DWI is not a conviction 'based exclusively' on a BAC of less than .08%"; thus necessarily meaning that such defendant cannot meet his/her burden of proof for the affirmative defense found in N.J.S.A. 39:4-50(a)(3), which affirmative defense Basch is attempting to meet in this appeal.

With respect to the possibility that Basch's case may have been a plea bargain entered to the lesser-included offense, the court noted in that circumstance, "[i]t may be that evidence of a BAC level of .08% or more was available, but the prosecution in New York offered a favorable plea bargain to avoid a trial." Id. at 7. The court referenced that "[s]uch plea bargains are not permitted in New Jersey for DWI cases," citing Pressler & Verniero, Current N.J. Court Rules, Appx. to Part VII, Guideline 4 (2013) ("No plea agreements whatsoever will be allowed in drunken driving . . . offenses.") Ibid. The court pinpointed the nature of its concern, by stating, "[w]e do not know on this record whether they [plea bargains] are permitted in New York." Thus, it is readily apparent from this discussion by the court what the court was specifically focused on in

requiring the Commission to conduct a remand either in the form of "a hearing" or "other proceedings consistent with this decision." Id. at 8.

The court instructed that, for this remand, the Commission must give Basch either "a hearing" or "otherwise an adequate opportunity" to meet her burden to prove, under N.J.S.A. 39:4-50(a)(3), by the standard of "clear and convincing evidence", that her February 28, 2012, conviction under N.Y. Veh. & Traf. Law §1192(1) "was based exclusively on a violation of a proscribed blood alcohol concentration of less than 0.08%." Id. at 7. Moreover, the court straightforwardly declared that "[i]n the absence of such evidence, the MVC did not err in imposing the license suspension or the surcharge." Ibid.

Statement of the Sole Issue on Remand

The Appellate Division directed that the sole issue to be determined on the remand is whether Basch has met her burden to prove, with "clear and convincing evidence", that "her New York conviction was for an offense 'based exclusively upon a violation of a proscribed blood alcohol concentration of less than 0.08%.' In the absence of such proof, the suspension and surcharge may be re-imposed." Basch, supra, 2013 N.J. Super. Unpub. LEXIS 1764, at 1, 7; and N.J.S.A. 39:4-50(a)(3).

Nature of the Remand Proceedings

The Commission conducted this remand in the form of a "hearing on the papers", allowing Basch to submit into the record for consideration of the issue on remand any documentary evidence (whether in the form of official court documents, sworn affidavits and/or certifications) as well as any legal arguments to support her proofs in trying to

meet her burden of establishing by "clear and convincing evidence" that her New York DWAI conviction was "based exclusively" on a violation of a proscribed BAC below .08%, as required by the limited exception contained in the New Jersey statute at N.J.S.A. 39:4-50(a)(3).

As more fully explained in the Commission's letter to Basch, dated April 23, 2015,

> "[i]n accordance with the court's instructions, the Commission is providing for a full opportunity to present your clear and convincing evidence by means of a 'hearing on the papers' in which documentary evidence and arguments are submitted in written form. Furthermore, in order to afford you a full and fair opportunity to present such evidence, the "Final Administrative Decision on Remand (subject to Supplemental Final Decision)" was issued to present you with the court documents and supporting evidence from the New York proceedings that the New York court provided to the Commission, as well as a "preliminary" indication of the rationale supporting the validity of the imposition of the previously served suspension and surcharges. In the absence of submissions on your behalf to overcome these New York court documents, this represents the Commission's position, however, it is specifically subject to consideration of any documentary evidence (in the form of official court documents or sworn affidavits/certifications which would rebut such evidence that is in the record) that you choose to submit. Such "hearing on the papers" fully complies with the court's instructions in a matter such as this, where there has already been a court conviction entered as to the underlying matter, thus requiring the Commission in this New Jersey administrative proceeding to not allow for a collateral attack or re-litigation of a matter that has already been fully and finally disposed of in a court of competent jurisdiction (the New York court).

Furthermore, the Commission afforded Basch an additional thirty days (beyond the original 45 days for submissions) from the date of this explanatory letter in the event there had been any confusion as to the conduct of these remand proceedings in the

form of a “hearing on the papers”, for Basch to submit any additional documentation for consideration as part of the record. Basch was specifically advised that the record for this “hearing on the papers” would be considered closed as of that later date and a Supplemental Final Administrative Decision on Remand would be issued based on all submissions made to that date, including the submission made dated April 17, 2015 (as well as the earlier submissions received from Basch on February 26, 2015).

Thus, the record on this remand contains the documentary materials and arguments made by Basch (through her representative, Mr. Maxim Basch) in each of the three submissions dated February 26, 2015; April 17, 2015; and May 20, 2015; which are each listed in the Exhibit List to this Supplementary Final Decision on Remand. Also contained in this record on remand (and listed in the Exhibit List) are each of the New York court documents provided by the Justice Court of the Village of Nyack concerning the guilty plea entered by Basch on February 28, 2012. Copies of all such New York court documents were provided to Basch as part of the “Final Administrative Decision on Remand (made specifically subject to Supplemental Final Decision upon further submissions received from Basch)[1]” dated March 9, 2015, to allow her to present any documentary evidence which might rebut those New York documents.

Contrary to Basch’s arguments made in her submissions, the court did not require that an in-person, trial-type hearing be conducted for purposes of determining

[1] The “Final Administrative Decision on Remand” (made specifically subject to issuance of a Supplemental Final Administrative Decision in its first paragraph and first footnote and in the “Additional Submissions” section on pages 11-12 if additional material was submitted on behalf of Basch) did not become the Final Administrative Determination on Remand upon receipt of submissions by Basch.

the issue on remand. The court's specific language in its opinion plainly contradicts such contention. The court stated, on page 7 of its decision, that MVC is "to give appellant a hearing or otherwise adequate opportunity, to present clear and convincing evidence that the New York charges did not support a conviction for an offense involving .08% or more BAC." (emphasis added). The court further stated, on page 8 of its decision, that the matter was reversed and remanded to the MVC "for a hearing or other proceedings consistent with this decision." (emphasis added). Thus, the court did not restrict the Commission to conducting an in-person hearing to allow for Basch to present her evidence and arguments to meet her burden of proof on the remand issue.

Indeed, the nature of this matter, which arises from an undisputed conviction[2] in the New York court for DWAI (a conviction that is final and cannot be re-litigated here),

[2] Basch, in her arguments, repeatedly misconstrues and mischaracterizes this New Jersey administrative suspension action as being a New Jersey "conviction" by the Commission and mistakenly requests that the "conviction in the State of New Jersey be overturned." In this matter, there is only a conviction in New York (reported to NJMVC pursuant to the Interstate Compact), for which Basch would need to have appealed in the New York courts to have her guilty plea vacated and seek to have the New York court dismiss the conviction. Basch has failed to present any evidence of having done this. Thus, the New York DWAI conviction stands as the final disposition by the court of competent jurisdiction which cannot be collaterally attacked in this New Jersey administrative proceeding. Basch further misunderstands and mischaracterizes the Certificate of Disposition provided by the New York court clerk, as being a court order, which it is not. Also, Basch at various points implies, suggests and makes assertions as if a trial was held by the New York court in which findings were made; this is flatly contradicted by the official New York court documents which in all pertinent places denote that the DWAI conviction was by entry of a guilty plea, not a trial. Basch remarkably fails to acknowledge or even mention that she entered a plea of guilty in this matter. Moreover, perhaps not so surprisingly, Basch also fails to address that the New York documents confirm that this was a "plea bargain" to the lesser-included offense of DWI (as postulated by the Appellate Division in its opinion) as there had been potential evidence (in the form of a BAC result of .17% as well as officer observations, field sobriety tests, and admissions) which would have served to support the original charges in the event of there not having been a plea entered to end the case. This is precisely what the Appellate Division opinion indicated needed to be addressed on remand.

and even more particularly the narrow scope of the identified remand issue, makes a "hearing on the papers" in which documentary evidence and argument is submitted the most appropriate method for addressing this remand. In this way, Basch was permitted to submit any evidence which Basch had from the New York court proceedings and could also have submitted sworn affidavits or certifications as to any testimony she wished to offer for consideration on this issue. There is no need to have live witness testimony on a matter that was already fully resolved in the New York court; thus it is the Commission's position that a "hearing on the papers" fully comports with the court's instruction and due process principles. There can be no reasonable assertion of prejudice to Basch in completing the remand in this manner; Basch was given a full and fair opportunity to present any relevant evidence she wished to have considered.

Record as to the Sole Issue on Remand / Documentary Exhibits

Submissions that were made by Maxim F. Basch, as representative for Maxine L. Basch, dated February 26, 2015; April 17, 2015; and May 20, 2015; and the New York court documents provided concerning the guilty plea entered on February 28, 2012 are each listed in the Exhibit List at the end of this determination.

Statement and Finding of Facts on the Remand Issue

On December 4, 2011, Basch was arrested and charged with five violations of New York law, two of the violations involving alcohol-related offenses: N.Y. Veh. & Traf. Law § 1192(2) (driving while intoxicated, per se, with a blood alcohol concentration of .08 or more) and 1192(3) (driving while intoxicated; Basch's blood alcohol concentration is listed on the Simplified Information/Certificate Concerning Violation of Law Relating to Vehicles as "17%"). Copies of the five traffic summonses are attached hereto

collectively as Exhibit R-1 (with the court disposition information indicated on the Simplified Information/Certificate designated as "HQA2003CMM" with a certification by the Court Clerk that "Defendant entered a plea of guilty in writing pursuant to Section 1805 of the Vehicle and Traffic Law" to "VTL 1192-1 DWAI" and the "DWI Test Results" indicated as "17%", where the original charge listed had been violation of N.Y. Veh. & Traf. Law § 1192(3), Driving While Intoxicated (misdemeanor).)

According to the "DWI Bill of Particulars" provided by the Justice Court of the Village of Nyack, probable cause for arrest was based on the arresting officer's observations of Basch's driving, odor of alcoholic beverage, glassy eyes, impaired speech, impaired motor coordination, and performance of field test(s) (failed horizontal gaze nystagmus, walk and turn, and one leg stand), as well as oral admissions made by the defendant that she had been drinking. The arresting officer also noted, based on the chemical test performed, that Basch had a blood alcohol concentration (BAC) of 0.17%. A copy of the Bill of Particulars is attached hereto as Exhibit R-2.

A blood alcohol concentration of 0.17% is also indicated on the signed "Certification of Breath Test Result" dated December 4, 2011, completed by the breath test operator, Sgt. A. Brunner. A copy of the Certification of Breath Test Result is attached hereto as Exhibit R-3, and also includes a copy of the "Subject Test" printout, signed and certified by the breath test operator, indicating a result of "0.17". A copy of the cover letter from the Justice Court of the Village of Nyack is attached hereto as Exhibit R-4.

On February 28, 2012, Basch pleaded guilty to a violation of N.Y. Veh. & Traf. Law §1192(1), driving while ability impaired. Attached hereto as Exhibit R-5 is a copy of

the Certificate of Disposition dated August 2, 2013, provided by the Justice Court of the Village of Nyack. Notably, a copy of the Certificate of Disposition was also submitted to the Commission by Basch, dated February 29, 2012, which copy included a notation not found on the copy submitted to the Commission by the State of New York. The notation on the copy submitted by Basch states: "NYS VTL 1192-1 INDICATES BAC OF .07% OR LOWER" and is inserted below the list of Dispositions of the original charges. A copy of this Certificate of Disposition is attached hereto as Exhibit A-1.

On April 17, 2012, the Commission issued a Scheduled Suspension Notice, informing Basch that her New Jersey driver's license was subject to suspension for a period of 90 days, effective May 11, 2012, pursuant to N.J.S.A. 39:4-50 and N.J.S.A. 39:5D-4, the Interstate Driver License Compact. Basch served the suspension and her driving privileges were restored October 16, 2012. Basch has also paid all of the statutory surcharges.

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

1. On December 4, 2011, Basch was charged with violations of New York law N.Y. Veh. & Traf. Law § 1192(2) (driving while intoxicated, per se, with a blood alcohol concentration of .08 or more) and 1192(3) (driving while intoxicated), along with other traffic offenses. (Exhibit R-1).
2. Probable cause for the arrest was based on a police officer's observations of Basch's behavior, admissions by Basch, and a positive breath screening test (Exhibit R-2).

3. The observational characteristics indicated by the arresting police officer on his official report were: Basch's driving behavior, odor of alcoholic beverage, glassy eyes, impaired speech, impaired motor coordination, and performance of field test(s) (failed horizontal gaze nystagmus, walk and turn, and one leg stand), as well as admissions of drinking made by Basch to the officer (Exhibit R-2).

4. The Certification of Breath Test Result, as well as the court disposition information entered on the Simplified Information/Certificate Concerning Violation of Law Relating to Vehicles, designated as "HQA2003CMM", as certified and signed by the Court Clerk, both listed a blood alcohol concentration of 0.17% (Exhibit R-1 and R-3).

5. On February 28, 2012, Basch entered a plea of guilty to a violation of N.Y. Veh. & Traf. Law §1192(1), driving while ability impaired (Exhibits R-1, R-4 and R-5).

6. While it is specifically noted that the potential observational evidence indicated in findings #2 and #3 above and the potential BAC test results evidence indicated in finding #4 above were not adjudicated findings as the matter was resolved by entry of a guilty plea and no trial was held, it is found that the prosecution did have such potential evidence which would support the original charges noted in finding #1 above (and also support the lesser-included conviction for having driven while driving ability was impaired by alcohol). This finding is made specifically to address the Appellate Division's identified inquiry as to whether a "plea bargain" had been entered. Among the potential evidence supporting the charges was the BAC test result of .17%; this confirms that the DWAI conviction by way of guilty plea was a plea bargain to the lesser-included offense of DWI.

7. The New York statute, N.Y. Veh. & Traf. Law §1192(1), in its entirety, reads:

> Driving while ability impaired. No person shall operate a motor vehicle while the person's ability to operate such motor vehicle is impaired by the consumption of alcohol.

8. The New York statute, N.Y. Veh. & Traf. Law §1192(1), under which Basch was convicted, contains as a necessary element that Basch's ability to operate a motor vehicle was impaired by the consumption of alcohol.

9. The New York statute, N.Y. Veh. & Traf. Law §1192(1), (driving while ability is impaired) is not a per se offense as constructed and enacted by the New York legislature.

10. The Certificate of Disposition from the New York court clerk with the inserted notation as submitted by Basch (Exhibit A-1) is not a court order. As it is not a court order signed by the Judge, the inserted notation cannot be accepted as establishing any sort of finding made by the court as to an established BAC result for Basch. Additionally, the language of the inserted notation: "NYS VTL 1192-1 INDICATES BAC OF .07% OR LOWER" does not state that Basch's conviction under that statutory provision was based exclusively on a BAC result of .07% or lower, nor even that Basch had a BAC result of .07% or lower.

11. By entering a guilty plea to the New York statute, N.Y. Veh. & Traf. Law §1192(1), (driving while ability is impaired), the elements contained in that statute, namely that Basch drove while her ability to operate a motor vehicle was impaired by the consumption of alcohol, have been established. Basch has

submitted no evidence that refutes that she was convicted on the basis that she drove while her driving ability was impaired by alcohol.

Analysis

The Appellate Division ordered the remand to give Basch the opportunity to prove that the New York conviction was "based exclusively" on a blood alcohol concentration of less than 0.08%. That proof must consist of clear and convincing evidence. Basch, supra, 2013 N.J. Super. Unpub. LEXIS 1764, at 1, 7. Absent such proof, the Commission's order of suspension and assessment of statutory surcharges remains valid. Ibid.

Thus, the only issue to be decided on remand is whether Basch has met her burden to prove, with clear and convincing evidence, that "her New York conviction was for an offense 'based exclusively upon a violation of a proscribed blood alcohol concentration of less than 0.08%.' In the absence of such proof, the suspension and surcharge may be re-imposed." Ibid.

It remains undisputed that Basch was convicted of a violation of N.Y. Veh. & Traf. Law §1192(1), driving while ability impaired. Unless Basch can show that the conviction was based exclusively on a blood alcohol concentration of less than 0.08%, the Commission's suspension of her driving privilege and imposition of surcharges was valid.

The only documentation pertaining to this issue that Basch has submitted in making her three submissions for the record on this remand is the copy of the February 29, 2012, Certificate of Disposition with the notation that states: "NYS VTL 1192-1 INDICATES BAC OF .07% OR LOWER." However, the mere fact that Basch was

convicted of a violation of N.Y. Veh. & Traf. Law §1192(1) is not clear and convincing evidence that her conviction was based exclusively on a blood alcohol concentration of less than 0.08%. Indeed, the official New York court documents show that the potential evidence supporting the New York charges included the Certification of Breath Test Result indicating that Basch's blood alcohol concentration was 0.17%. Basch has submitted no documentation showing otherwise. As noted above, the arresting officer also made several observations of Basch's behavior that formed the basis for determining that there was probable cause for Basch's arrest and also serve as evidence of her driving ability having been impaired by the consumption of alcohol. Thus, the documentation in the record shows that not only was there potential evidence of a BAC of .08% or greater, there was also additional potential evidence that serves to establish impairment to drive even in the absence of a BAC reading or in combination with a BAC reading of .05% to .079% if that is all the BAC result showed (which was not the case here), and thus support a conviction under N.Y. Veh. & Traf. Law §1192(1) (DWAI).

Most significantly for determining this remand, the Appellate Division has already stated that the Certificate of Disposition with the notation is insufficient to show by clear and convincing evidence that the conviction was based exclusively on a blood alcohol concentration of less than 0.08%:

> Appellant urges that the certificate and the quoted notation prove she was convicted of an offense based on BAC of less than .08%.
>
> While it is true as far as stated, the affirmative defense provided by N.J.S.A. 39:4-50(a)(3) requires "clear and convincing evidence" that the New York conviction "was based exclusively" on a BAC of less than .08%. In our view,

> a plea bargain by which a defendant agrees to plead guilty to a lesser-included offense of DWI is not a conviction "based exclusively" on a BAC of less than .08%.
> Basch, supra, 2013 N.J. Super. Unpub. LEXIS 1764, at 6-7.

On this remand record, Basch has presented nothing more than the Certificate of Disposition with the notation on it, which the Appellate Division already rejected as being insufficient to meet her burden of proof; Basch has not provided any documentation showing that the conviction was based exclusively on a blood alcohol concentration of less than .08%. In fact, all of the available New York court documentation shows that the potential evidence to support the New York charges included a BAC of .17% and also shows ample observational evidence to support the ultimate DWAI conviction even in the absence of a BAC result or in combination with a BAC of less than .08% because such observational evidence can be found sufficient by itself to support a finding that the driver's ability to operate was impaired by the consumption of alcohol.

In fact, the governing New Jersey case law repeatedly recognizes that "observational" evidence is also 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. 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. 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. 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). Moreover, the court in State v. Zeikel, 423 N.J. Super. 34, 48 (App. Div. 2011), confirms that a conviction of New Jersey's DWI 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)).

In State v. McCauley, (unreported) (App. Div. 2006), Dkt. No. A-4622-04T2, 2006 N.J. Super. Unpub. LEXIS 2422, the defendant, McCauley, argued that a prior DWAI conviction in New York State should not have been counted as a prior conviction in New Jersey because, according to his own testimony, his blood alcohol concentration at the time of arrest was .06%. McCauley had been charged in New York with violations of N.Y. Veh. & Traf. Law § 1192(1) (driving while ability impaired), N.Y. Veh. & Traf. Law § 1192(2) (driving while intoxicated per se (under the then standard of .10%)), and N.Y.

Veh. & Traf. Law § 1192(3) (driving while intoxicated). McCauley was convicted under N.Y. Veh. & Traf. Law § 1192(1) (DWAI). In rejecting McCauley's argument, the Appellate Division stated:

> [N.J.S.A. 39:4-50(a)(3)] provides a very limited exception[3] to the definition of "prior conviction" for purposes of determining a repeat offender. That exception applies only to a "per se" conviction in a foreign jurisdiction where a blood alcohol concentration (BAC) of less than .08% established the offense and where no other finding supported the conviction. McCauley, supra, 2006 N.J. Super. Unpub. LEXIS 2422 at 4.

The only evidence offered by McCauley was his own testimony that his blood alcohol concentration at the time of arrest was .06%. This, the Appellate Division held, was not enough to show that the conviction was based exclusively on a blood alcohol concentration of less than .08%: "There is no dispute that defendant was convicted under subsection [1] of the New York statute, that is, driving while impaired. On its face, it was not a per se offense. Thus even assuming defendant's BAC was .06, his New York conviction for 'driving while impaired' must have been based upon other evidence." McCauley, supra, 2006 N.J. Super. Unpub. LEXIS 2422 at 7.

It is well-established that the Commission has the authority to suspend a New Jersey resident'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, supra, 423 N.J. Super. at 44-49 (App. Div. 2011); New Jersey

[3] That "very limited exception" in the New Jersey statute most specifically will 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). This is not the case for Basch's conviction under the NYDWAI statutory provision.

Div. of Motor Veh. v. Lawrence, 194 N.J. Super. 1, 2-3 (App. Div. 1983); 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; N.J. Motor Vehicle 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"). The only exception to this clearly established tenet is a conviction based exclusively on a blood alcohol concentration of less than .08%. State v. Zeikel, 423 N.J. Super. 34, 44-49 (App. Div. 2011). Basch has failed to present clear and convincing evidence that the New York conviction was based exclusively on a blood alcohol concentration of less than 0.08%. Therefore, the Commission's suspension of her driving privilege and imposition of the corresponding surcharge were proper.

In short, the uncertainty on the record presented to the Appellate Division at that earlier point about whether Basch's conviction was a result of a guilty plea, and in particular a "plea bargain", or whether it was the result of a trial, has been clarified by the official New York documents in the record on this remand. Basch has not presented any documentation to establish that her DWAI conviction for having driven while her driving ability was impaired by the consumption of alcohol was based exclusively on a BAC result. Basch plead guilty to the New York DWAI statutory provision which

provision does not contain a per se BAC level; rather it contains as a necessary element that the defendant drove a vehicle while her ability to operate was impaired by alcohol. This is a substantially similar violation to that contained in the New Jersey unified DWI statute (as New Jersey's DWI statute, N.J.S.A. 39:4-50, contains both an observational[4] prong as well as a per se prong) and as such, the suspension imposed pursuant to the Interstate Compact was valid, and indeed required.

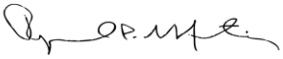
Conclusion and Final Order on Remand

Based on the foregoing, I conclude that the Commission's April 17, 2012, Order of Suspension and corresponding imposition of statutory surcharges were proper. As previously noted, Basch has already served the 90-day suspension and her New Jersey driving privilege was restored as of October 16, 2012. Additionally, she has fully paid the statutory surcharges and has already complied with the Intoxicated Driver Resource program, pursuant to N.J.S.A. 39:4-50(b) and N.J.A.C. 13:19-11.2.[5]

[4] It is noted that Basch's arguments (as first made in her original brief) reflect a common misconception often held by lay persons, as well as some attorneys, that it is "perfectly legal to drive" or "you cannot be convicted" in New Jersey if your BAC result is below the per se threshold of .08% -- this is not an accurate statement, as the governing New Jersey case law confirms. The New Jersey statute contains the "observational" prong, which means that the necessary "impaired driving ability" for a DWI offense can be proven by other observational evidence (officer observations, field sobriety tests, and/or admissions by the driver) either alone or in combination with a BAC result. Your driving ability can be impaired even if your BAC result is below .08% and this can be established by the strength of other observational evidence; it is such impairment of the ability to drive that makes it illegal to drive.

[5] As with any out-of-state alcohol-related conviction for which the IDRC/IDP program is required, the driver may seek to show, if he/she is able, that the driver has completed an equivalent program in the State of conviction (here, New York). Any determination as to whether another State's program is sufficient to satisfy or partially satisfy this New Jersey statutory requirement is made by the IDRC. It is not known whether Basch completed any potentially equivalent program in New York, nonetheless, Basch chose to attend the IDRC/IDP program and successfully completed the requirements as of

This "Supplemental Final Decision and Final Order" constitutes the Commission's Final Decision on Remand in this matter. 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. Please note that, should you choose to file an appeal with the court, you must serve copies of all papers on both the New Jersey Motor Vehicle Commission, Chief Administrator, as well as the Attorney General (who will represent the Commission), pursuant to Court Rule, R. 2:5-1(e). You may contact the Appellate Division by calling (609) 292-4822.



Raymond P. Martinez
Chairman and Chief Administrator

RPM:kw

c: Maxim F. Basch, representative (via Fax and mail)

April 23, 2015 (which program satisfaction is noted on that date in her Driver History Record).

EXHIBIT LIST

R-1 Copies of five (5) traffic summonses, "New York State- Department of Motor Vehicles, Simplified Information/Certificate Concerning Violation of Law Relating to Vehicles", HQA2003CMM, HQA2003BMM, HQA20038MM, HQA20039MM, and HQA2003DMM, Defendant: Maxine L. Basch, date of offenses: 12/04/2011 (five pages)

R-2 Copy of DWI Bill of Particulars (two pages)

R-3 Copy of Certification of Breath Test Result, with "Subject Test" printout (two pages)

R-4 Cover Letter from Justice Court of the Village of Nyack, Stephen Mulvaney, Court Clerk (one page)

R-5 Copy of Certificate of Disposition, with official seal and signature of Court Clerk, Stephen T. Mulvaney, Disposition date: 02/28/2012 (one page)

R-6 Copy of Commission's letter to Maxine L. Basch, dated February 26, 2015 (one page)

R-7 Copy of Commission's letter to Maxim F. Basch (representative)/Maxine L. Basch, dated April 23, 2015 (two pages)

Appellant's Exhibits

Submissions made dated February 26, 2015:

A-1 Copy of Certificate of Disposition, submitted on behalf of Maxine L. Basch, Disposition date: 02/28/2012 (with notation "NYS VTL 1192-1 INDICATES BAC OF .07% OR LOWER"), with signature of Court Clerk, Stephen T. Mulvaney (one page)

A-2 Copy of Letter from Maxim F. Basch to Felix Garcia, Jr., Department of Health Services, dated November 25, 2014 (one page)

A-3 Copy of Letter from Maxim F. Basch to New Jersey Motor Vehicles Commission, Raymond P. Martinez, dated February 20, 2015 (one page)

A-4 Copy of Affidavit of Maxine L. Basch, stating that she appoints Maxim F. Basch "to represent me on all legal matters", dated August 11, 2014 (one page)

A-5 Copy of Letter from Felix Garcia, Jr., Bergen County, Department of Health Services, IDRC, to Maxine L. Basch, dated "November" (one page)

A-6 Copy of Appellate Division, unpublished decision, in Basch v. NJMVC, Dkt. No. A-6009-11T1 (decided July 16, 2013) (eight pages; not attached; LEXIS citation provided in decision)

Submissions made dated April 17, 2015:

A-7 Letter responding to "Final Administrative Decision on Remand" (subject to issuance of Supplemental Final Decision on Remand), dated April 17, 2015 (two pages)

A-8 "Re-Scheduling Notice" from County of Bergen, Department of Health Services, Intoxicated Driver Resource Center" to Maxine L. Basch, dated March 16, 2015 (one page)

A-9 "Motion to Compel Order on Appeal From: Order of Suspension – Driving Privileges" (one page); including Certification of Service indicating service on the NJ Motor Vehicle Commission (one page); "Legal Brief" (four pages); and attachment of Appellate Division unpublished decision in App. Dkt. No. A-6009-11T1, dated July 16, 2013 (eight pages)

Submissions made dated May 20, 2015:

A-10 Letter responding to "Final Administrative Decision on Remand" (subject to issuance of Supplemental Final Decision on Remand), dated May 20, 2015 (two pages); with "Legal Brief" (two pages)