

Office of the Attorney General  
State of North Dakota

Opinion No. 83-48

Date Issued: December 23, 1983

Requested by: Vince H. Ficek  
Dickinson City Attorney

--QUESTION PRESENTED--

I.

Whether the driver is responsible for paying the costs of subpoena service and witness fees of the state toxicologist for appearances at hearings held before the State Highway Commissioner or a hearing officer under Section 39-20-05 of the North Dakota Century Code.

--ATTORNEY GENERAL'S OPINION--

I.

It is my opinion that the driver is responsible for paying the costs of subpoena service and the witness fees of the state toxicologist for appearances at hearings held before the State Highway Commissioner or a hearing officer under Section 39-20-05, N.D.C.C., when the subpoena is issued at the driver's request.

--ANALYSIS--

Section 39-20-07(9), N.D.C.C., provides as follows:

9. Notwithstanding any statute or rule to the contrary, the defendant may subpoena, without cost to the defendant, the person who conducted the chemical analysis referred to in this section to testify at the trial on the issue of the amount of alcohol, drugs, or a combination thereof in the defendant's blood, breath, saliva, or urine at the time of the alleged act.

That subsection first appeared in our law pursuant to 1975 N.D. Sess. Laws 359, where it stated as follows:

Notwithstanding any statute or rule to the contrary, the defendant may subpoena the state toxicologist or any employee thereof to testify at the trial of the issue at no cost to the defendant.

Shortly before the convening of the 1975 Legislative Assembly, the North Dakota Supreme Court issued several decisions in criminal cases relating to foundational matters for the introduction of results of breath testing devices approved by the state toxicologist. 1975 N.D. Sess. Laws 359 was apparently an effort to meet the objection the Supreme Court had concerning the use of breathalyzers and also to provide for copies of documents from the state toxicologist, certified as correct, to be introduced into evidence to show that the chemical testing equipment is approved for use in North Dakota. Certified copies were made admissible in evidence both as to breath testing and to direct blood testing. The certified copy of the analytical report of a blood analysis signed by the state toxicologist was made admissible as prima facie evidence of the results of that analysis.

Because Section 39-20-37(9), N.D.C.C., and its predecessors, is written in terms of a 'defendant' and a 'defendant's' blood alcohol content, and testifying at a 'trial,' it is apparent, using these words in their ordinary sense ( Section 1-02-02, N.D.C.C.) and considering the history of the law, that defendants in criminal cases were the intended beneficiaries of the provisions in question. This intention is made clear by the legislative history of 1975 N.D. Session Laws 359, where testimony before the House Judiciary Committee shows that criminal cases were under consideration.

Section 39-20-05, N.D.C.C., relates to administrative hearings before the State Highway Commissioner or the Commissioner's hearing officer. These administrative hearings are requested by the driver after receiving notice of potential adverse action against the driver's motor vehicle operator's license. At these hearings, requested by the driver, there is no 'defendant' and no trial in the sense of criminal court proceedings. Rather, the parties to the action are the driver and the law enforcement officers involved in the incident. The issues to be determined are the limited statutory issues of either Section 39-20-05(2) or (3), N.D.C.C., with a decision rendered by the hearings officer. Criminal liability of the driver is not determined at these administrative hearings. Only the exercise of the state's police power to control driving privileges is in issue.

The North Dakota Supreme Court in the case of *Asbridge vs. State Highway Commissioner*, 291 N.W.2d 739 (N.D. 1980), held that Section 28-32-19, N.D.C.C., applied to review of these administrative agency decisions. Unless inconsistent with other specific statutes, other portions of Chapter 28-32, N.D.C.C., would also apply to these administrative proceedings as well, including Section 28-32-09, N.D.C.C., relating to the subpoena and attendance of witnesses at administrative hearings. In relevant part, that section provides:

28-32-09. SUBPOENA AND ATTENDANCE OF WITNESSES. Any officer, examiner, chairman, or acting chairman of any administrative agency, upon request of any part to a hearing conducted by it, or upon his own motion on behalf of the agency, shall require by subpoena the attendance and testimony of witnesses and the production of the documents and other objects described in such subpoena at such hearing or proceeding, and the

cost of serving such subpoena shall be paid by the person or agency requesting it. . . . Any witness who is subpoenaed under the provisions of this section and who appears at the hearing, or whose deposition is taken, shall receive the same fees and mileage as a witness in a civil case in the district court, and such fees shall be paid by the party or agency at whose instance the witness appears or his deposition is taken.

Therefore, because the proceedings in question are before an administrative agency, and are not criminal in nature, the provisions of Section 28-32-09, N.D.C.C. apply, and if it is the driver who requests the subpoena, the driver bears the expense of serving the subpoena and paying the fees and mileage of the witness.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the action of public officials until such time as the question presented is decided by the courts.

Robert O. Wefald  
Attorney General

Prepared by: Robert E. Lane  
Assistant Attorney General