

42-2-126. Revocation of license based on administrative determination.

(1) Legislative declaration. The purposes of this section are:

(a) To provide safety for all persons using the highways of this state by quickly revoking the driver's license of any person who has shown himself or herself to be a safety hazard by driving with an excessive amount of alcohol in his or her body and any person who has refused to submit to an analysis as required by section 42-4-1301.1;

(b) To guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for a full hearing; and

(c) Following the revocation period, to prevent the relicensing of a person until the department is satisfied that the person's alcohol problem is under control and that the person no longer constitutes a safety hazard to other highway users.

(2) Definitions. As used in this section, unless the context otherwise requires:

(a) "Excess BAC" means that a person had a BAC level sufficient to subject the person to a license revocation for excess BAC 0.08, excess BAC underage, excess BAC CDL, or excess BAC underage CDL.

(b) "Excess BAC 0.08" means that a person drove a vehicle in this state when the person's BAC was 0.08 or more at the time of driving or within two hours after driving.

(c) "Excess BAC CDL" means that a person drove a commercial motor vehicle in this state when the person's BAC was 0.04 or more at the time of driving or at any time thereafter.

(d) "Excess BAC underage" means that a person was under the age of twenty-one years and the person drove a vehicle in this state when the person's BAC was in excess of 0.02 but less than 0.08 at the time of driving or within two hours after driving.

(e) "Excess BAC underage CDL" means that a person was under the age of twenty-one years and the person drove a commercial motor vehicle in this state when the person's BAC was in excess of 0.02 but less than 0.04 at the time of driving or at any time thereafter.

(f) "Hearing officer" means the executive director of the department or an authorized representative designated by the executive director.

(g) "License" includes driving privilege.

(h) "Refusal" means refusing to take or complete, or to cooperate in the completing of, a test of the person's blood, breath, saliva, or urine as required by section 18-3-106 (4) or 18-3-205 (4), C.R.S., or section 42-4-1301.1 (2).

(i) "Respondent" means a person who is the subject of a hearing under this section.

(3) Revocation of license. (a) Excess BAC 0.08. (I) The department shall revoke the license of a person for excess BAC 0.08 for three months for a first violation and for one year for a second or subsequent violation.

(II) (A) Notwithstanding the provisions of subparagraph (I) of this paragraph (a), a person twenty-one years of age or older at the time of the violation whose

license is revoked for a first offense under subparagraph (I) of this paragraph (a) may request that, in lieu of the three-month revocation, the person's license be revoked for a period of not less than thirty days, to be followed by a suspension period of such length that the total period of revocation and suspension equals six months. If the hearing officer approves the request, the hearing officer may grant the person a probationary license that may be used only for the reasons provided in section 42-2-127 (14) (a). If the person is a persistent drunk driver, as defined in section 42-1-102 (68.5), the probationary license shall be conditioned on the use of an approved ignition interlock device, as defined in section 42-2-132.5 (7) (a). The time served under a probationary license shall not be credited against any mandatory interlock restriction imposed pursuant to section 42-2-132.5.

(B) The hearing to consider a request under this subparagraph (II) may be held at the same time as the hearing held under subsection (8) of this section; except that a probationary license may not become effective until at least thirty days have elapsed since the beginning of the revocation period.

Editor's note: This version of paragraph (a) is effective until January 1, 2009.

(a) Excess BAC 0.08. (I) The department shall revoke the license of a person for excess BAC 0.08 for:

(A) Nine months for a first violation committed on or after January 1, 2009; except that such a person may apply for a restricted license pursuant to the provisions of section 42-2-132.5;

(B) One year for a second violation; and (C) Two years for a third or subsequent violation occurring on or after January 1, 2009, regardless of when the prior violations occurred; except that such a person may apply for a restricted license pursuant to the provisions of section 42-2-132.5.

(II) (Deleted by amendment, L. 2008, p. 833, § 3, effective January 1, 2009.)

Editor's note: This version of paragraph (a) is effective January 1, 2009.

(b) Excess BAC underage. (I) The department shall revoke the license of a person for excess BAC underage for three months for a first violation, for six months for a second violation, and for one year for a third or subsequent violation.

(II) (A) Notwithstanding the provisions of subparagraph (I) of this paragraph (b), a person whose license is revoked for a first offense under subparagraph (I) of this paragraph (b) and whose BAC was not more than 0.05 may request that, in lieu of the three-month revocation, the person's license be revoked for a period of not less than thirty days, to be followed by a suspension period of such length that the total period of revocation and suspension equals three months. If the hearing officer approves the request, the hearing officer may grant the person a probationary license that may be used only for the reasons provided in section 42-2-127 (14) (a).

(B) The hearing to consider a request under this subparagraph (II) may be held at the same time as the hearing held under subsection (8) of this section; except that a probationary license may not become effective until at least thirty days have elapsed since the beginning of the revocation period.

(c) Refusal. The department shall revoke the license of a person for refusal for one year for a first violation, two years for a second violation, and three years for a third or subsequent violation; except that the period of revocation shall be at least three years if the person was driving a commercial motor vehicle that was transporting hazardous materials as defined in section 42-2-402 (7).

Editor's note: This version of paragraph (c) is effective until January 1, 2009.

(c) Refusal. (I) The department shall revoke the license of a person for refusal for one year for a first violation, two years for a second violation, and three years for a third or subsequent violation; except that the period of revocation shall be at least three years if the person was driving a commercial motor vehicle that was transporting hazardous materials as defined in section 42-2-402 (7).

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (c), such a person whose license has been revoked for two years for a second violation or for three years for a third or subsequent violation may apply for a restricted license pursuant to the provisions of section 42-2-132.5.

Editor's note: This version of paragraph (c) is effective January 1, 2009.

(d) Excess BAC CDL. The department shall revoke for the disqualification period provided in 49 CFR 383.51 the commercial driving privilege of a person who was the holder of a commercial driver's license or was driving a commercial motor vehicle for a violation of excess BAC 0.08, excess BAC CDL, or refusal.

(e) Excess BAC underage CDL. The department shall revoke the commercial driving privilege of a person for excess BAC underage CDL for three months for a first violation, six months for a second violation, and one year for a third or subsequent violation.

(4) Multiple restraints and conditions on driving privileges. (a) (I)

Except as otherwise provided in this paragraph (a), a revocation imposed pursuant to this section shall run consecutively and not concurrently with any other revocation imposed pursuant to this section.

(II) If a license is revoked for excess BAC and the person is also convicted on criminal charges arising out of the same occurrence for DUI, DUI per se, DWAI, or UDD, both the revocation under this section and any suspension, revocation, cancellation, or denial that results from the conviction shall be imposed, but the periods shall run concurrently, and the total period of revocation, suspension, cancellation, or denial shall not exceed the longer of the two periods.

(III) If a license is revoked for refusal, the revocation shall not run concurrently, in whole or in part, with any previous or subsequent suspensions, revocations, or denials that may be provided for by law, including but not limited to any suspension, revocation, or denial that results from a conviction of criminal charges arising out of the same occurrence for a violation of section 42-4-1301. Any revocation for refusal shall not preclude other action that the department is required to take in the administration of this title.

(IV) The revocation of the commercial driving privilege under excess BAC CDL may run concurrently with another revocation pursuant to this section arising out of the same incident.

(b) (I) The periods of revocation specified in subsection (3) of this section are intended to be minimum periods of revocation for the described conduct. A license shall not be restored under any circumstances, and a probationary license shall not be issued, during the revocation period.

(II) Notwithstanding the provisions of subparagraph (I) of this paragraph (b), a person whose privilege to drive a commercial motor vehicle has been revoked because of excess BAC CDL and who was twenty-one years of age or older at the time of the offense may apply for a driver's license of another class or type as long as there is no other statutory reason to deny the person a license. The department may not issue the person a probationary license that would authorize the person to operate a commercial motor vehicle.

(c) Upon the expiration of the period of revocation under this section, if a person's license is still suspended on other grounds, the person may seek a probationary license as authorized by section 42-2-127 (14) subject to the requirements of paragraph (d) of this subsection (4).

(d) (I) Following a license revocation, the department shall not issue a new license or otherwise restore the driving privilege unless the department is satisfied, after an investigation of the character, habits, and driving ability of the person, that it will be safe to grant the privilege of driving a motor vehicle on the highways to the person; except that the department may not require a person to undergo skills or knowledge testing prior to issuance of a new license or restoration of the person's driving privilege if the person's license was revoked for a first violation of excess BAC 0.08 or excess BAC underage.

(II) (A) If a person was determined to be driving with excess BAC and the person had a BAC that was 0.17 or more or if the person's driving record otherwise indicates a designation as a persistent drunk driver as defined in section 42-1-102 (68.5), the department shall require the person to complete a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301.3 as a condition to restoring driving privileges to the person and, upon the restoration of driving privileges, shall require the person to hold a restricted license requiring the use of an ignition interlock device pursuant to section 42-2-132.5 (1) (b.5).

(B) If a person seeking reinstatement is required to complete, but has not yet completed, a level II alcohol and drug education and treatment program, the person shall file with the department proof of current enrollment in a level II alcohol and drug education and treatment program certified by the division of alcohol and drug abuse pursuant to section 42-4-1301.3, on a form approved by the department.

(5) Actions of law enforcement officer. (a) If a law enforcement officer has probable cause to believe that a person should be subject to license revocation for excess BAC or refusal, the law enforcement officer shall forward to the department an affidavit containing information relevant to the legal issues and

facts that shall be considered by the department to determine whether the person's license should be revoked as provided in subsection (3) of this section. The executive director of the department shall specify to law enforcement agencies the form of the affidavit to be used under this paragraph (a) and the types of information needed in the affidavit and may specify any additional documents or copies of documents needed by the department to make its determination in addition to the affidavit. The affidavit shall be dated, signed, and sworn to by the law enforcement officer under penalty of perjury, but need not be notarized or sworn to before any other person.

(b) (I) A law enforcement officer, on behalf of the department, shall personally serve a notice of revocation on a person who is still available to the law enforcement officer if the law enforcement officer determines that, based on a refusal or on test results available to the law enforcement officer, the person's license is subject to revocation for excess BAC or refusal.

(II) When a law enforcement officer serves a notice of revocation, the law enforcement officer shall take possession of any driver's license issued by this state or any other state that the person holds. When the law enforcement officer takes possession of a valid driver's license issued by this state or any other state, the law enforcement officer, acting on behalf of the department, shall issue a temporary permit that is valid for seven days after the date of issuance.

(III) A copy of the completed notice of revocation form, a copy of any completed temporary permit form, and any driver's, minor driver's, or temporary driver's license or any instruction permit taken into possession under this section shall be forwarded to the department by the law enforcement officer along with an affidavit as described in paragraph (a) of this subsection (5) and any additional documents or copies of documents as described in said paragraph (a).

(IV) The department shall provide to law enforcement agencies forms for notice of revocation and for temporary permits. The law enforcement agencies shall use the forms for the notice of revocation and for temporary permits and shall follow the form and provide the information for affidavits as provided by the department pursuant to paragraph (a) of this subsection (5).

(V) A law enforcement officer shall not issue a temporary permit to a person who is already driving with a temporary permit issued pursuant to subparagraph (II) of this paragraph (b).

(6) Initial determination and notice of revocation. (a) Upon receipt of an affidavit of a law enforcement officer and the relevant documents required by paragraph (a) of subsection (5) of this section, the department shall determine whether the person's license should be revoked under subsection (3) of this section. The determination shall be based upon the information contained in the affidavit and the relevant documents submitted to the department, and the determination shall be final unless a hearing is requested and held as provided in subsection (8) of this section. The determination of these facts by the department is independent of the determination of a court of the same or

similar facts in the adjudication of any criminal charges arising out of the same occurrence. The disposition of the criminal charges shall not affect any revocation under this section.

(b) (I) If the department determines that the person is subject to license revocation, the department shall issue a notice of revocation if a notice has not already been served upon the person by the law enforcement officer as provided in paragraph (b) of subsection (5) of this section. A notice of revocation shall clearly specify the reason and statutory grounds for the revocation, the effective date of the revocation, the right of the person to request a hearing, the procedure for requesting a hearing, and the date by which a request for a hearing must be made.

(II) In sending a notice of revocation, the department shall mail the notice in accordance with the provisions of section 42-2-119 (2) to the person at the last-known address shown on the department's records, if any, and to any address provided in the law enforcement officer's affidavit if that address differs from the address of record. The notice shall be deemed received three days after mailing.

(c) If the department determines that the person is not subject to license revocation, the department shall notify the person of its determination and shall rescind any order of revocation served upon the person by the law enforcement officer.

(d) A license revocation shall become effective seven days after the person has received the notice of revocation as provided in subsection (5) of this section or is deemed to have received the notice of revocation by mail as provided in paragraph (b) of this subsection (6). If the department receives a written request for a hearing pursuant to subsection (7) of this section within that same seven-day period and the department issues a temporary permit pursuant to paragraph (d) of subsection (7) of this section, the effective date of the revocation shall be stayed until a final order is issued following the hearing; except that any delay in the hearing that is caused or requested by the person or counsel representing the person shall not result in a stay of the revocation during the period of delay.

(7) Request for hearing. (a) A person who has received a notice of revocation may make a written request for a review of the department's determination at a hearing. The request may be made on a form available at each office of the department.

(b) A person must request a hearing in writing within seven days after the day the person receives the notice of revocation as provided in subsection (5) of this section or is deemed to have received the notice by mail as provided in paragraph (b) of subsection (6) of this section. If the department does not receive the written request for a hearing within the seven-day period, the right to a hearing is waived, and the determination of the department that is based on the documents and affidavit required by subsection (5) of this section becomes final.

(c) If a person submits a written request for a hearing after expiration of the seven-day period and if the request is accompanied by the person's verified

statement explaining the failure to make a timely request for a hearing, the department shall receive and consider the request. If the department finds that the person was unable to make a timely request due to lack of actual notice of the revocation or due to factors of physical incapacity such as hospitalization or incarceration, the department shall waive the period of limitation, reopen the matter, and grant the hearing request. In such a case, the department shall not grant a stay of the revocation pending issuance of the final order following the hearing.

(d) At the time a person requests a hearing pursuant to this subsection (7), if it appears from the record that the person is the holder of a valid driver's or minor driver's license or of an instruction permit or of a temporary permit issued pursuant to paragraph (b) of subsection (5) of this section and that the license or permit has been surrendered, the department shall stay the effective date of the revocation and issue a temporary permit that shall be valid until the scheduled date for the hearing. If necessary, the department may later extend the temporary permit or issue an additional temporary permit in order to stay the effective date of the revocation until the final order is issued following the hearing, as required by subsection (8) of this section. If the person notifies the department in writing at the time that the hearing is requested that the person desires the law enforcement officer's presence at the hearing, the department shall issue a written notice for the law enforcement officer to appear at the hearing. A law enforcement officer who is required to appear at a hearing may, at the discretion of the hearing officer, appear in real time by telephone or other electronic means in accordance with section 42-1-218.5.

(e) At the time that a person requests a hearing, the department shall provide to the person written notice advising the person: (I) Of the right to subpoena the law enforcement officer for the hearing and that the subpoena must be served upon the law enforcement officer at least five calendar days prior to the hearing;

(II) Of the person's right at that time to notify the department in writing that the person desires the law enforcement officer's presence at the hearing and that, upon receiving the notification, the department shall issue a written notice for the law enforcement officer to appear at the hearing;

(III) That, if the law enforcement officer is not required to appear at the hearing, documents and an affidavit prepared and submitted by the law enforcement officer will be used at the hearing; and

(IV) That the affidavit and documents submitted by the law enforcement officer may be reviewed by the person prior to the hearing.

(f) Any subpoena served upon a law enforcement officer for attendance at a hearing conducted pursuant to this section shall be served at least five calendar days before the day of the hearing.

(8) Hearing. (a) (I) The hearing shall be scheduled to be held as quickly as practicable but not more than sixty days after the date the department receives the request for a hearing; except that, if a hearing is rescheduled because of the unavailability of a law enforcement officer or the hearing

officer in accordance with subparagraph (III) or (IV) of this paragraph (a), the hearing may be rescheduled more than sixty days after the date the department receives the request for the hearing, and the department shall continue any temporary driving privileges held by the person until the date to which the hearing is rescheduled. At least ten days prior to the scheduled or rescheduled hearing, the department shall provide in the manner specified in section 42-2-119 (2) a written notice of the time and place of the hearing to the respondent unless the parties agree to waive this requirement.

Notwithstanding the provisions of section 42-2-119, the last-known address of the respondent for purposes of notice for any hearing pursuant to this section shall be the address stated on the hearing request form.

(II) A law enforcement officer who submits the documents and affidavit required by subsection (5) of this section need not be present at the hearing unless the hearing officer requires that the law enforcement officer be present and the hearing officer issues a written notice for the law enforcement officer's appearance or unless the respondent or the respondent's attorney determines that the law enforcement officer should be present and serves a timely subpoena upon the law enforcement officer in accordance with paragraph (f) of subsection (7) of this section. (III) If a law enforcement officer, after receiving a notice or subpoena to appear from either the department or the respondent, is unable to appear at the original or rescheduled hearing date due to a reasonable conflict, including but not limited to training, vacation, or personal leave time, the law enforcement officer or the law enforcement officer's supervisor shall contact the department not less than forty-eight hours prior to the hearing and reschedule the hearing to a time when the law enforcement officer will be available. If the law enforcement officer cannot appear at the original or rescheduled hearing because of medical reasons, a law enforcement emergency, another court or administrative hearing, or any other legitimate, just cause as determined by the department, and the law enforcement officer or the law enforcement officer's supervisor gives notice of the law enforcement officer's inability to appear to the department prior to the dismissal of the revocation proceeding, the department shall reschedule the hearing following consultation with the law enforcement officer or the law enforcement officer's supervisor at the earliest possible time when the law enforcement officer and the hearing officer will be available.

(IV) If a hearing officer cannot appear at an original or rescheduled hearing because of medical reasons, a law enforcement emergency, another court or administrative hearing, or any other legitimate, just cause, the hearing officer or the department may reschedule the hearing at the earliest possible time when the law enforcement officer and the hearing officer will be available.

(b) The hearing shall be held in the district office nearest to where the violation occurred, unless the parties agree to a different location; except that, at the discretion of the department, all or part of the hearing may be conducted in real time, by telephone or other electronic means in accordance with section 42-1-218.5.

(c) The department shall consider all relevant evidence at the hearing, including the testimony of any law enforcement officer and the reports of any law enforcement officer that are submitted to the department. The report of a law enforcement officer shall not be required to be made under oath, but the report shall identify the law enforcement officer making the report. The department may consider evidence contained in affidavits from persons other than the respondent, so long as the affidavits include the affiant's home or work address and phone number and are dated, signed, and sworn to by the affiant under penalty of perjury. The affidavit need not be notarized or sworn to before any other person.

(d) The hearing officer shall have authority to:

(I) Administer oaths and affirmations;

(II) Compel witnesses to testify or produce books, records, or other evidence;

(III) Examine witnesses and take testimony;

(IV) Receive and consider any relevant evidence necessary to properly perform the hearing officer's duties as required by this section;

(V) Take judicial notice as defined by rule 201 of article II of the Colorado rules of evidence, subject to the provisions of section 24-4-105 (8), C.R.S., which shall include:

(A) Judicial notice of general, technical, or scientific facts within the hearing officer's knowledge;

(B) Judicial notice of appropriate and reliable scientific and medical information contained in studies, articles, books, and treatises; and

(C) Judicial notice of charts prepared by the department of public health and environment pertaining to the maximum BAC levels that people can obtain through the consumption of alcohol when the charts are based upon the maximum absorption levels possible of determined amounts of alcohol consumed in relationship to the weight and gender of the person consuming the alcohol;

(VI) Issue subpoenas duces tecum to produce books, documents, records, or other evidence;

(VII) Issue subpoenas for the attendance of witnesses;

(VIII) Take depositions or cause depositions or interrogatories to be taken;

(IX) Regulate the course and conduct of the hearing; and

(X) Make a final ruling on the issues.

(e) When an analysis of the respondent's BAC is considered at a hearing:

(I) If the respondent establishes, by a preponderance of the evidence, that the respondent consumed alcohol between the time that the respondent stopped driving and the time of testing, the preponderance of the evidence must also establish that the minimum required BAC was reached as a result of alcohol consumed before the respondent stopped driving; and

(II) If the evidence offered by the respondent shows a disparity between the results of the analysis done on behalf of the law enforcement agency and the results of an analysis done on behalf of the respondent, and a preponderance of the evidence establishes that the blood analysis conducted on behalf of the law enforcement agency was properly conducted by a qualified person

associated with a laboratory certified by the department of public health and environment using properly working testing devices, there shall be a presumption favoring the accuracy of the analysis done on behalf of the law enforcement agency if the analysis showed the BAC to be 0.096 or more. If the respondent offers evidence of blood analysis, the respondent shall be required to state under oath the number of analyses done in addition to the one offered as evidence and the names of the laboratories that performed the analyses and the results of all analyses.

(f) The hearing shall be recorded. The hearing officer shall render a decision in writing, and the department shall provide a copy of the decision to the respondent.

(g) If the respondent fails to appear without just cause, the right to a hearing shall be waived, and the determination of the department which is based upon the documents and affidavit required in subsection (5) of this section shall become final.

(9) Appeal. (a) Within thirty days after the department issues its final determination under this section, a person aggrieved by the determination shall have the right to file a petition for judicial review in the district court in the county of the person's residence.

(b) Judicial review of the department's determination shall be on the record without taking additional testimony. If the court finds that the department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination that is unsupported by the evidence in the record, the court may reverse the department's determination.

(c) A filing of a petition for judicial review shall not result in an automatic stay of the revocation order. The court may grant a stay of the order only upon a motion and hearing and upon a finding that there is a reasonable probability that the person will prevail upon the merits and that the person will suffer irreparable harm if the order is not stayed.

(10) Notice to vehicle owner. If the department revokes a person's license pursuant to paragraph (a), (c), or (d) of subsection (3) of this section, the department shall mail a notice to the owner of the motor vehicle used in the violation informing the owner that:

(a) The motor vehicle was driven in an alcohol-related driving violation; and

(b) Additional alcohol-related violations involving the motor vehicle by the same driver may result in a requirement that the owner file proof of financial responsibility under the provisions of section 42-7-406 (1.5).

(11) Applicability of "State Administrative Procedure Act". The "State Administrative Procedure Act", article 4 of title 24, C.R.S., shall apply to this section to the extent it is consistent with subsections (7), (8), and (9) of this section relating to administrative hearings and judicial review.