

**CHAPTER 77. EQUIPMENT AND TRAINING REQUIRED FOR ADMINISTERING CHEMICAL TESTS; TEST PROCEDURES AND ACCURACY CERTIFICATION FOR BREATH TEST DEVICES**

<b>Subchap.</b>		<b>Sec.</b>
<b>A.</b>	<b>[Reserved]</b> .....	<b>77.1</b>
<b>B.</b>	<b>PERMANENT REGULATIONS</b> .....	<b>77.21</b>

**Authority**

The provisions of this Chapter 77 issued under the Vehicle Code, 75 Pa.C.S. §§ 1547(c)(1) and 6103, unless otherwise noted.

**Source**

The provisions of this Chapter 77 amended through December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599, unless otherwise noted. The Department of Health also adopted the amendments to this Chapter 77 at 14 Pa.B. 4599. Immediately preceding text appears at serial pages (91780) to (91782) and (80029) to (80032).

**Cross References**

This chapter cited in 58 Pa. Code § 51.51 (relating to chemical tests); and 58 Pa. Code § 131.5 (relating to chemical tests).

**Subchapter A. [Reserved]**

**§ 77.1. [Reserved].**

**Source**

The provisions of this § 77.1 adopted October 7, 1977, effective October 8, 1977, 7 Pa.B. 2900; amended January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; amended December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial pages (120351) to (120352).

**§ 77.2. [Reserved].**

**Source**

The provisions of this § 77.2 adopted October 7, 1977, effective October 8, 1977, 7 Pa.B. 2900; amended September 14, 1979, effective September 15, 1979, 9 Pa.B. 3197; amended August 7, 1981, effective August 8, 1981, 11 Pa.B. 2775; amended December 25, 1981, effective December 26, 1981, 11 Pa.B. 4453; amended December 23, 1982, effective December 25, 1982, 12 Pa.B. 4341; amended January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; reserved August 31, 1984, effective September 1, 1984, 14 Pa.B. 3156. Immediately preceding text appears at serial pages (85968) and (80027).

**Notes of Decisions**

The modification of a testing device which appears on the list of approved testing devices does not automatically render the test result inadmissible, but rather means only that the Commonwealth would be required to establish an alternate foundation by showing that the test actually administered was sufficiently reliable to permit the results to have probative value. *Commonwealth v. McGinnis*, 486 A.2d 428 (Pa. Super. 1984).

**§ 77.3. [Reserved].****Source**

The provisions of this § 77.3 adopted October 7, 1977, effective October 8, 1977, 7 Pa.B. 2900; amended September 14, 1979, effective September 15, 1979, 9 Pa.B. 3197; amended January 12, 1983, effective January 14, 1983, 13 Pa.B. 449; amended March 10, 1983, effective March 10, 1983, 13 Pa.B. 1066; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial pages (120352) to (120353).

**§ 77.4. [Reserved].****Source**

The provisions of this § 77.4 adopted January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial pages (120353) to (120355).

**§ 77.5. [Reserved].****Source**

The provisions of this § 77.5 adopted January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial page (120355).

**§ 77.6. [Reserved].****Source**

The provisions of this § 77.6 adopted January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; amended March 10, 1983, effective March 10, 1983, 13 Pa.B. 1066; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial pages (120355) to (120357).

**§ 77.7. [Reserved].****Source**

The provisions of this § 77.7 adopted January 12, 1983, effective January 14, 1983, 13 Pa.B. 499; sunset January 15, 1988, 19 Pa.B. 2760. Immediately preceding text appears at serial page (120357).

**Subchapter B. PERMANENT REGULATIONS**

Sec.	
77.21.	Purpose.
77.22.	Definitions.
77.23.	Training requirements for administering chemical tests.
77.24.	Breath test procedures.
77.25.	Accuracy inspection tests for Type A equipment.
77.26.	Periodic calibration of Type A breath test equipment.
77.27.	Type B equipment.

**Source**

The provisions of this Subchapter B adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599, unless otherwise noted.

**§ 77.21. Purpose.**

This subchapter applies to equipment and operator training, test procedures and accuracy certification requirements for evidentiary breath test equipment used to determine the alcoholic content of the blood of persons suspected of operating a motor vehicle while under the influence of alcohol as provided in 75 Pa.C.S. § 1547 (relating to chemical testing to determine amount of alcohol or controlled substance) and 30 Pa.C.S. § 5125(c) (relating to chemical testing to determine amount of alcohol or controlled substance) on or after December 22, 1984.

**Source**

The provisions of this § 77.21 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial page (140059).

**Notes of Decisions**

Certificates of calibration and accuracy were not presumptive evidence of accuracy of breath test results but were only presumptive evidence of completion of proper testing for accuracy of breath test equipment. *Commonwealth v. Sloan*, 607 A.2d 285 (Pa. Super. 1992).

**§ 77.22. Definitions.**

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

*Accuracy inspection test*—A series of five simulator tests using a simulator solution designed to give a reading of .10% conducted by a certified breath test operator on Type A alcohol breath test equipment within 30 days prior to using the breath test equipment to perform an actual alcohol breath test.

*Alcohol breath test*—Chemical testing of a sample of a person's expired breath, using breath test equipment designed for this purpose, in order to determine the concentration of alcohol in the person's blood.

*Calibrate*—The term includes both of the following:

(i) Performance of a series of five simulator tests at each of three separate readings on Type A alcohol breath test equipment.

(ii) Adjustment of the equipment when necessary upon the failure of the equipment in the simulator tests.

*Certified breath test operator*—A person certified to administer alcohol breath tests with and to perform various tests to calibrate or ascertain the accuracy of a particular item of breath test equipment following completion of a course of instruction approved by the Department of Health and the Department.

*Chemical test or testing*—Analysis performed on a biological material, including but not limited to breath, blood or urine, to determine the identity, concentration, or both, of particular constituents such as alcohol or controlled substances. Test procedures may rely on one or more physical or chemical properties of the constituent and utilize instrumental or chemical analysis techniques to accomplish the determination.

*Department*—The Department of Transportation of the Commonwealth.

*Simulator solution*—An aqueous standard ethanol solution which, when equilibrated with air in a breath simulator device, produces an air-alcohol mixture of a predetermined concentration that is designed to give a specific reading on breath test equipment and can be used to calibrate and verify the accuracy of Type A alcohol breath test equipment.

*Simulator test*—Use of simulator solution in a breath simulator device to verify the accuracy of or calibrate Type A alcohol breath test equipment.

*Type A alcohol breath test equipment*—Equipment approved by the Department of Health for determining the alcohol content of the blood by analysis of a person's breath.

*Type B alcohol breath test equipment*—Equipment approved by the Department of Health for taking a sample of a person's breath for subsequent laboratory analysis to determine the alcohol content of the person's blood.

#### Source

The provisions of this § 77.22 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial page (140060).

### § 77.23. Training requirements for administering chemical tests.

(a) *Course A contents.* A course of training in the use of Type A alcohol breath test equipment shall consist of at least 30 hours of instruction, including the following:

- (1) A screening examination for law enforcement officers, when required by the teaching facility, for example, mathematics or reading ability.
- (2) Pharmacology and physiological effects of alcohol.
- (3) Interpretation of chemical findings.

- (4) Legal aspects of chemical testing.
  - (5) Demonstration of appropriate equipment.
  - (6) Utilization of Type A alcohol breath test equipment on drinking subjects or on equipment designed to simulate drinking subjects.
  - (7) Explanatory review of testing and recordkeeping requirements specified in this subchapter.
  - (8) Review of 75 Pa.C.S. § 1547 (relating to chemical testing to determine amount of alcohol or controlled substance).
  - (9) Preparation of testimony.
  - (10) Courtroom demonstrations.
  - (11) Related observations by arresting officer supplementing intoxication report.
  - (12) Other materials considered necessary by the teaching facility which are approved by the Department and the Department of Health.
- (b) *Instructors and curricula for Course A.* Instruction shall be given by an instructor approved jointly by the Department of Health and the Department using a curriculum in compliance with Course A requirements.
- (c) *Certificates for Course A.*
- (1) Persons successfully completing Course A shall be issued certificates as certified breath test operators qualified to operate only Type A alcohol breath test equipment on which they actually received instruction during the course of training.
  - (2) Persons successfully completing Course A may subsequently qualify to operate another model of Type A alcohol breath test equipment manufactured by the same or a different alcohol breath test company upon successful completion of a course of at least 8 hours of instruction in its operation and interpretation of chemical findings.
- (d) *Course B contents.* A course of training in the use of Type B alcohol breath test equipment shall consist of a minimum of 6 hours of instruction, including the following:
- (1) Explanatory review of testing and recordkeeping requirements specified in this subchapter.
  - (2) Related observations by arresting officer supplementing intoxication report.
  - (3) Review of 75 Pa.C.S. § 1547 (relating to chemical testing to determine amount of alcohol or controlled substance).
  - (4) Demonstration of appropriate equipment.
  - (5) Utilization of chemical test equipment on drinking subjects or on equipment designed to simulate drinking subjects.
  - (6) Other materials considered necessary which are approved by the Department of Health and the Department.

(e) *Instructions and curricula for Course B.* Instruction shall be given by an instructor approved jointly by the Department of Health and the Department using a curriculum in compliance with Course B requirements.

(f) *Certificates for Course B.* Persons successfully completing Course B shall be issued certificates as certified breath test operators qualified to operate only Type B alcohol breath test equipment on which they actually received instruction during the course of training.

(g) *Exemption from instruction.*

(1) A person certified to administer alcohol breath tests with a particular item of breath test equipment during the period between September 29, 1968, and September 26, 1970, under the approved course of instruction certified by the Secretary of the Department of Revenue, may continue to administer alcohol breath tests with the equipment without undergoing further instruction and shall be considered a certified breath test operator under this subchapter.

(2) A person certified to administer alcohol breath tests with a particular item of breath test equipment on November 5, 1977, under Equipment and Instructions for Administering Chemical Tests and Making Chemical Analysis for Alcoholic Content of Blood, 1 Pa.B. 288 (September 26, 1970) may continue to administer alcohol breath tests with the equipment without undergoing further instruction and shall be considered a certified breath test operator under this subchapter.

(3) A person certified by the Department or the State Police on December 22, 1984 to administer alcohol breath tests, conduct accuracy verifications or inspections with a particular item of breath test equipment may continue to perform the duties with the equipment without undergoing further instruction and will be considered a certified breath test operator under this subchapter.

#### Source

The provisions of this § 77.23 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial pages (140060) to (140062).

### § 77.24. Breath test procedures.

(a) *Observation.* The person to be tested with breath test equipment shall be kept under observation by a police officer or certified breath test operator for at least 20 consecutive minutes immediately prior to administration of the first alcohol breath test given to the person, during which time the person may not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten or smoked. Custody of the person may be transferred to another officer or certified breath test operator during the 20 consecutive minutes or longer period as long as the person to be tested is under observation for at least 20 consecutive minutes prior to initial administration of the alcohol breath test.

(b) *Procedures.* Alcohol breath tests shall be conducted by a certified breath test operator. Accuracy inspection tests and calibrations conducted using breath test equipment shall be performed by a certified breath test operator, the manufacturer or its authorized representative or a person who has received comparable training or instruction. Alcohol breath tests, accuracy inspection tests and calibrations conducted using breath test equipment shall be performed in accordance with accepted standard procedures for operation specified by the manufacturer of the equipment or comparable procedures. The procedures for alcohol breath testing shall include, at a minimum:

(1) Two consecutive actual breath tests, without a required waiting period between the two tests.

(2) One simulator test using a simulator solution designed to give a reading of .10%, to be conducted immediately after the second actual alcohol breath test has been completed. The lower of the two actual breath test results will be the result used for prosecution. The test results will be disregarded, and the breath test device will be removed from service under § 77.25(b)(4) (relating to accuracy inspection tests for Type A equipment) if one of the following occurs:

(i) If the difference between the results of the two actual alcohol breath tests is .02 or more, for machines read to the second decimal place, or .020 or more for machines read to the third decimal place.

(ii) If the simulator test yields a result less than .09% or greater than .10% when the breath test device is read to the second decimal place, or if the simulator test yields a result less than .090% or greater than .109% when the breath test device can be read to the third decimal place.

(c) *Procedures for adjustment.* Breath test equipment which fails the testing under § 77.25(b) or subsection (b) shall be placed out of service and shall be serviced, repaired and adjusted, as necessary, by the manufacturer or its authorized representative or a person who has received comparable training or instruction prior to being placed back into service. In addition, the breath test device shall be tested under subsection (b) prior to being placed back into service.

(d) *Simulator solution certification.* The manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices. This certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer.

(e) *Ampoule certification.* The manufacturer of ampoules utilized in Type A breath testing devices shall certify to the user that its ampoules will produce the intended results when used for actual breath tests, accuracy inspection tests or for calibrating breath test devices. The certification shall be based on laboratory testing conducted by a laboratory independent of the manufacturer. The laboratory testing shall employ generally accepted scientific methods sufficient to insure that the ampoules conform to manufacturer specification.

#### Source

The provisions of this § 77.24 adopted December 21, 1984, effective December 22, 1984, except § 77.24(d)—(f) which shall take effect January 7, 1985, 14 Pa.B. 4599; amended February 22, 1985, effective February 23, 1985, except § 77.24 (d) and (e) which shall take effect June 1, 1985, 15 Pa.B. 681; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial pages (140062) to (140064).

#### Notes of Decisions

##### *Appeals*

Appellant waived the issue of whether a warning as to the consequences of failure to consent to a breath test was given when appellant did not raise the issue in the petition or at the hearing. *Ostrander v. Department of Transportation*, 541 A.2d 441 (Pa. Cmwlth. 1988).

##### *Approval of Equipment*

When the Intoxilyzer 500 has been approved as a testing device, and when the appellant's only evidence that the device is not accurate was the bald, unsupported claim that it has a 50% error rate, the appellant failed to establish that the trial court erred in admitting into evidence the appellant's blood alcohol content. *Commonwealth v. Snell*, 811 A.2d 581 (Pa. Super. 2002); appeal denied 820 A.2d 162 (Pa. 2003).

##### *Blood Test*

Licensee appealed the Department of Transportation's suspension of driver's license following an alleged refusal to take a chemical test, the appeal was continued, and 2 years later the licensee filed a Motion to Dismiss which was denied thereby sustaining the Department's suspension of the driver's license. The Department, as the nonmoving party, was not responsible for moving the appeal forward. *Koller v. Department of Transportation*, 682 A.2d 82 (Pa. Cmwlth. 1996).

Although the driver never verbally refused to submit to the blood test, by declining to fully extend their arm for the attending physician the driver prevented blood from being drawn. These acts were substantially short of an unequivocal assent to the officer's request, and although the procedure for drawing blood was initiated, the driver obviously failed to complete the test. Thus, the driver did not make an honest effort to take the test and these actions constituted a refusal qualifying the driver's license suspension. *Department of Transportation v. Leaver*, 23 D & C 4th 380 (Pa. Com. Pl. 1995).

##### *Conviction in Another State*

A conviction in New York for the offense denominated "driving while ability impaired" is a conviction for an offense essentially similar to one of the offenses under the Pennsylvania Vehicle Code which carried a mandatory license suspension; thus, the Department of Motor Vehicles acted according to law in suspending the driver's operating privileges. *Olmstead v. Department of Transportation*, 27 D.&C. 4th 6 (1995); affirmed 707 A.2d 1144 (Pa. 1998).

##### *Double Jeopardy*

The mandatory suspension of a licensee's operating privileges following a conviction for driving under the influence of alcohol is a remedial sanction that is civil in nature. The suspension of a licensee's operating privileges under these circumstances serves not so much as punishment, but rather serves the remedial goal of protecting the public against the licensee's unsafe driving habits. Because the suspension following a conviction for driving under the influence of alcohol serves this remedial goal, it does not constitute punishment for purposes of a double jeopardy analysis. *Ponce v. Department of Transportation*, 685 A.2d 607 (Pa. Cmwlth. 1996); appeal denied 694 A.2d 625 (Pa. 1997).

##### *Equipment Maintenance*

The failure of the Intoxilyzer 500 in the pretest did not constitute a malfunction of the machine, where "malfunctioning" means failing to perform on accuracy and calibration tests or during an actual breath test, and not otherwise; simply stated, a 0.90 percent BAC or above in a pretest is not a malfunction. *Commonwealth v. Hoopes*, 722 A.2d 172 (Pa. Super. 1998); appeal denied 737 A.2d 1224 (Pa. 1999).

Trial court properly refused to suppress breath test results where the breathalyzer technician failed to examine the internal components of the machine prior to checking the machine's accuracy; only those machines which have failed accuracy and calibrations testing under subsection (b) of this sec-



tion, or § 77.25(b) must be serviced, repaired or adjusted as needed, and then retested for accuracy and calibrations. *Commonwealth v. Demor*, 691 A.2d 958 (1997); appeal denied 704 A.2d 1380 (Pa. 1997).

Only those machines which have failed accuracy and calibrations testing under (b) of this section must be serviced, repaired or adjusted as needed, and then re-tested for accuracy and calibrations; to interpret 75 Pa.C.S. § 1547(c) as requiring service, repair or adjustment of the machine before determining that the machine is malfunctioning defies common sense. *Commonwealth v. Demor*, 691 A.2d 958 (Pa. Super. 1997).

There was no dispute that the breath testing device was tested and found accurate prior to being placed back into service; thus, the court refused to suppress the test results on the basis of the adjustment of the machine. *Commonwealth v. Grosskettler*, 27 D.&C. 4th 283 (Pa. Com. Pl. 1994).

Regulatory requirement that simulator solution be produced and tested for accuracy by independent laboratories was not satisfied when manufacturer and laboratory were included in two separate divisions of county's department of laboratories. *Commonwealth v. Thill*, 612 A.2d 1043 (Pa. Super. 1992); appeal denied 626 A.2d 1157 (Pa. 1993).

The Commonwealth properly conceded that regardless of the merits of the underlying suppression issue that it sought to appeal, the test results were nonetheless inadmissible because the county department of laboratories had both manufactured and tested the simulator solution used in the breathalyzer in violation of this regulation. *Commonwealth v. Malinowski*, 671 A.2d 674 (Pa. 1996).

The suppression court correctly found that the intoxilyzer used to test the defendant malfunctioned due to differing test entries and should have been removed from service and calibrated between its last calibration and the defendant's test. *Commonwealth v. Mobrey*, 594 A.2d 700 (Pa. Super. 1991).

The mere fact that the parties in *Department of Transportation, Bureau of Driver Licensing v. Lohner*, 624 A.2d 792 (1993), stipulated to the proper calibration of the breathalyzer does not mean that where the parties do not so stipulate that the Department of Transportation must produce documentary evidence regarding calibration. *Pappas v. Department of Transportation*, 669 A.2d 504 (Pa. Cmwlth. 1996).

#### *Evidence*

Competent medical testimony is required to prove that a knowing and conscious refusal could not be made. *Hatalski v. Department of Transportation*, 666 A.2d 386 (Pa. Cmwlth. 1995).

Defendant convicted of driving under the influence was entitled to new trial based on after-discovered evidence questioning accuracy of breath testing machines. *Commonwealth v. Brosnick*, 607 A.2d 725 (Pa. 1992).

The licensee failed to introduce any medical testimony that an alleged sinus condition prevented proper performance of the breathalyzer test after two attempts; therefore, the burden shifted to the licensee to prove by competent medical evidence a physical inability to take the test. *Mueller v. Department of Transportation*, 657 A.2d 90 (Pa. Cmwlth. 1995), appeal denied, 665 A.2d 471 (Pa. 1995).

The Court did not err in admitting into evidence the results of the Intoxilyzer 5000 breath test where the Commonwealth presented competent evidence that the manufacturer of the solution certified the solution in compliance with this regulation and that a second certification was completed independently of the manufacturer. The Commonwealth does not have to produce the manufacturer of the simulator solution. *Commonwealth v. Shade*, 24 Pa. D. & C. 4th 146 (1995).

#### *General Comment*

The breathalyzer regulations at 67 Pa. Code §§ 77.24—77.26 are reasonable, comport with State law and ensure valid test results. *Baldinger v. Commonwealth*, 509 A.2d 912 (Pa. Cmwlth. 1986).

*Informing Drivers*

It was not necessary for a police officer to advise the defendant when the officer warned the defendant after the first breath test that failure to submit to the second test would result in a 12 month suspension of driver's license. *Department of Transportation v. Viglione*, 537 A.2d 375 (Pa. Cmwlth. 1988).

*Insufficient Breath Samples*

A licensee's failure to provide breath samples sufficient to complete a breathalyzer test constituted a refusal. *Mueller v. Department of Transportation*, 657 A.2d 90 (Pa. Cmwlth. 1995), appeal denied, 665 A.2d 471 (Pa. 1995).

A failure to supply breath sufficient to actuate the alcohol breath test shifted the burden to the licensee to prove by competent medical evidence that the licensee was physically unable to take the test. Where the licensee failed to establish physical incapacity to perform the test and failed to inform the officers of any medical problems, the licensee's failure to provide sufficient breath samples constituted a refusal and the driver's license suspension was appropriate. *Mueller v. Department of Transportation*, 657 A.2d 90 (Pa. Cmwlth. 1995), appeal denied, 665 A.2d 471 (Pa. 1995).

If a properly calibrated breathalyzer machine registers a deficient sample without medical proof that licensee was unable to supply sufficient air, the deficient sample constituted a per se refusal to take the test which was grounds for suspension. *Department of Transportation v. Lohner*, 624 A.2d 792 (Pa. Cmwlth. 1993).

*License Suspension Inappropriate*

One-year suspension of driving privileges was proper when driver, after passing second set of sobriety tests, refused to submit to a second chemical test. *Department of Transportation v. Harbaugh*, 595 A.2d 715 (Pa. Cmwlth. 1991).

Initial refusal by defendant to submit to a second alcohol breath test and subsequent consent after machine purged itself was still a refusal and warranted the suspension of driver's license. *Flickinger v. Department of Transportation*, 547 A.2d 476 (Pa. Cmwlth. 1988).

It was improper to suspend a driver's license based on a refusal to submit to a blood test after licensee had submitted to two breath tests, where police officer did not establish reasonable ground for requesting second test since only purpose was to substantiate the accuracy of the initial test. *Department of Transportation v. Penich*, 535 A.2d 296 (Pa. Cmwlth. 1988).

*Medical Conditions*

Where a licensee suffers from a medical condition whose existence, 1) affects the licensee's ability to perform the test and 2) is not obvious, the licensee is required to inform the officer of the condition so an alternative chemical test that the licensee could perform can be administered. If the officer was not so notified, the licensee is precluded from relying upon any such condition or inability as an affirmative defense to a suspension as a consequence of a test refusal. The licensee has the burden of proving that he or she was so overwrought at the time of the testing that he or she could not notify the testing officer of his or her physical incapability. *Hatalski v. Department of Transportation*, 666 A.2d 386 (Pa. Cmwlth. 1995).

Driver failed to introduce any medical testimony showing that the alleged respiratory condition prevented the driver from properly performing the breathing test; thus, the driver's license was appropriately suspended. *Pappas v. Department of Transportation*, 669 A.2d 504 (Pa. Cmwlth. 1996)

*Notice*

Where the Pennsylvania Department of Transportation did not mail the additional notice of suspension until appellant applied for a Pennsylvania driver's permit almost 3 years after arrest for driving under the influence and where the Department clearly had appellant's address of record in Delaware,

the Department could not now deny appellant a Pennsylvania driver's permit. *Department of Transportation v. Tyler*, 23 D&C 4th 422 (Pa. Com. Pl. 1995).

#### *Observation*

General observation of a suspect during the requisite time period, during which the suspect was never out of the officer's observation for any significant period of time prior to the breathalyzer test, satisfied the observation requirement. *Commonwealth v. Snell*, 811 A.2d 581 (Pa. Super. 2002).

Failure to comply with the requirement of observation of a DUI suspect for the requisite 20 minute pretest period renders the test results inadmissible; however, although regulations require a 20 minute pretest observation, that observation does not mean "eyes on [the] mouth 100% of the time." General observation of a suspect during the requisite time period, in which the suspect was in the presence of the arresting officers the entire time, satisfied the observation requirement. *Commonwealth v. Barlow*, 776 A.2d 273 (Pa. Super. 2001).

#### *Reasonable Requests*

It was reasonable for a police officer to request a breathalyzer and blood test when the officer had reason to suspect that the licensee was under the influence of both alcohol and a controlled substance. *Department of Transportation v. Jackson*, 536 A.2d 880 (Pa. Cmwlt. 1988).

#### *Refusal*

Where the testimony of the administering officer alone is sufficient to support a finding that the licensee did not provide an adequate breath sample, without reliance on indices from the breathalyzer machine itself, the Department need not show compliance with the observation requirements of § 77.24(a) to establish a refusal. *Spera v. Department of Transportation*, 817 A.2d 1236 (Pa. Cmwlt. 2003); appeal denied 841 A.2d 534 (Pa. 2003).

The trial court's finding that the licensee intentionally did not supply two complete breath samples will not be disturbed, and that act is deemed a refusal to submit to the test. *McGee v. Commonwealth*, 803 A.2d 255 (Pa. Cmwlt. 2002).

Appellant's refusal to submit to a second breathalyzer until 45 minutes had passed constituted a refusal to submit to a breath test under this section. *Ostrander v. Department of Transportation*, 541 A.2d 441 (Pa. Cmwlt. 1988).

Driver did not refuse to submit to chemical testing within meaning of law in effect at time of occurrence, since driver had submitted to one test, and this section requiring two blood alcohol tests was not promulgated until after the occurrence. *Department of Transportation v. Fellmeth*, 528 A.2d 1090 (Pa. Cmwlt. 1987).

A driver must submit to further testing when either element of a breath test was missing or else his lack of consent may be inferred as an unqualified refusal. *Bonise v. Department of Transportation*, 517 A.2d 219 (Pa. Cmwlt. 1986).

#### *Simulator Solution*

On appeal from a judgment of sentence imposed following a driver's third conviction for driving while under the influence, the court held that the Commonwealth was not required to produce certification by an independent laboratory that tested the concentration of the simulator solution, because the driver had introduced no evidence to suggest that the laboratory's product was defective. *Commonwealth v. Hoopes*, 722 A.2d 172 (Pa. Super. 1998).

In a prosecution for driving under the influence of alcohol, the trial court did not abuse its discretion in admitting the results of the chemical testing of the motorist's breath even though the Commonwealth did not admit into evidence a manufacturer's certification of the simulator solution used in conjunction with the device, where, absent some suggestion that the products were in fact defec-

tive, the Commonwealth was under no burden to show certification of the manufacturer's product. *Commonwealth v. Starr*, 739 A.2d 191 (Pa. Super. 1999).

#### *Two Consecutive Tests*

The trial court did not err in suppressing breath test results, where the two breath tests produced printout slips that did not reflect the same pertinent information (one test printout showed that an "air blank" test was performed with the breath test and the other showed that the "air blank" test was performed with the breath test), and the sergeant who performed the breathalyzer testing testified that he had no idea why the test results differed. *Commonwealth v. Stoops*, 723 A.2d 184 (Pa. Super. 1998); appeal denied 747 A.2d 368 (Pa. 1999).

Motorist, who gave valid breath test failed to provide sufficient breath test at second test, gave valid test at third attempt, and then failed the fourth did not provide two consecutive actual tests within the meaning of this section. *Department of Transportation v. Schraf*, 581 A.2d 249 (Pa. Cmwlth. 1990); appeal denied 593 A.2d 425 (Pa. 1991).

A request for a second breath test under this section was per se reasonable under the Supreme Court's decision in *Department of Transportation v. McFarren*, 514 Pa. 411, 525 A.2d 1185 (1987), and failure to submit to the two tests must result in a 1 year suspension of operating privileges. *Department of Transportation v. Bittner*, 538 A.2d 94 (Pa. Cmwlth. 1988).

A request for a second breath test under this section is, per se reasonable and a refusal to submit to the second test was grounds for a license suspension. *Bush v. Commonwealth*, 535 A.2d 754 (Pa. Cmwlth. 1988).

Since this section requiring the administration of two blood alcohol tests was promulgated subsequent to the occurrences in the case at bar, it was inapplicable; however, it was unreasonable to request a second test solely to substantiate the accuracy of a first test. *Department of Transportation v. McFarren*, 525 A.2d 1185 (Pa. 1987).

A breath test under this section requires two consecutive breath tests without a required waiting period between the tests and a reading where the results of the difference between the tests was less than .02. *Bonise v. Department of Transportation*, 517 A.2d 219 (Pa. Cmwlth. 1986).

#### *Verbal Assent*

Any alleged confusion which the licensee may have demonstrated was vitiated by the licensee's subsequent verbal assent to take the test. *Hatalski v. Department of Transportation*, 666 A.2d 386 (Pa. Cmwlth. 1995).

### **§ 77.25. Accuracy inspection tests for Type A equipment.**

(a) *Frequency*. An accuracy inspection test shall be conducted on Type A alcohol breath test equipment within 30 days prior to using the breath test equipment to perform an actual alcohol breath test.

(b) *Procedures*. Procedures shall be as follows:

(1) An average deviation test shall be conducted to determine the accuracy of the instrument in the following manner:

(i) A total of five simulator tests shall be conducted using a simulator solution which is designed to give a reading of .10%.

(ii) The results of all five simulator tests shall be recorded on an appropriate test record.

(iii) Test results shall be recorded to the third decimal place, if the third decimal place is available.

(2) The Type A alcohol breath test equipment does not pass the accuracy inspection test and shall be removed from service if one of the following occurs:

(i) In the event of a breath test device which can only be read to the second decimal place, one or more of the five tests yields a result less than .09% or greater than .10%.

(ii) In the event of a breath test device which can only be read to the third decimal place, one or more of the five tests yields a result less than .090% or greater than .109% or the average deviation, derived by adding the absolute value of the differences between the results of the five tests and a constant value of .100 and dividing the total of these absolute values by 5, exceeds .005.

(3) An example of an average deviation calculation for a breath testing device capable of being read to the third decimal place is as follows:

<i>Constant Value</i>	<i>Reading</i>	<i>Difference (absolute value)</i>
.100	.099	.001
.100	.104	.004
.100	.098	.002
.100	.101	.001
.100	.102	.002
		$\frac{.010}{5} = .002$

Average deviation = .002 and .002 does not exceed .005.

(4) Breath test equipment which has malfunctioned or which fails an accuracy inspection test shall be placed out of service and shall be serviced or repaired, as necessary, by the manufacturer or its authorized representative or a person who has received comparable training or instruction and shall be tested under § 77.26(b) (relating to periodic calibration of Type A breath test equipment) prior to being placed back into service.

(c) *Certificate of accuracy.* Upon satisfactory completion of the accuracy inspection procedure, the test record shall be recorded on a certificate of accuracy of a type provided or approved by the Department. The certificate of accuracy shall be signed and dated by the individual who performed the accuracy inspection test and shall be retained for a period of 3 years from the date of the accuracy inspection test. The certificate of accuracy shall be the presumptive evidence of accuracy referred to in 75 Pa.C.S. § 1547 (relating to chemical testing to determine amount of alcohol or controlled substance).

**Source**

The provisions of this § 77.25 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial pages (140065) to (140067).

**Notes of Decisions***Approval of Equipment*

When the Intoxilyzer 500 has been approved as a testing device, and when the appellant's only evidence that the device is not accurate was the bald, unsupported claim that it has a 50% error rate, the appellant failed to establish that the trial court erred in admitting into evidence the appellant's blood alcohol content. *Commonwealth v. Snell*, 811 A.2d 581 (Pa. Super. 2002); appeal denied 820 A.2d 162 (Pa. 2003).

*Malfunction*

The failure of an Intoxilyzer 500 in the pretest did not constitute a malfunction, where "malfunctioning" means failing to perform on accuracy and calibration tests or during an actual breath test, and not otherwise; simply stated, a .090 percent BAC or above in a pretest is not a malfunction. *Commonwealth v. Hoopes*, 722 A.2d 172 (Pa. Super. 1998); appeal denied 737 A.2d 1224 (Pa. 1999).

Accurate, for the purposes of equipment of this type, is a relative term; equipment is accurate if the average deviation does not exceed .005. *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

In order to comply with regulation regarding inspections for accuracy of breathalyzer equipment, breath test equipment must be tested within 30 days prior to use. *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

Counsel may not use formula to arrive at average deviation other than that formula set forth in this chapter specifically for testing the accuracy of breath test equipment. *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

A certificate showing that breath test equipment has been inspected for accuracy, and is accurate, shall be the presumptive evidence of accuracy required by 75 Pa.C.S. § 1547(c)(i), and, with the certificate of calibration, will be considered sufficient to support a reliable test result. *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

The breathalyzer regulations at 67 Pa. Code §§ 77.24—77.26 are reasonable, comport with State law and ensure valid test results. *Baldinger v. Commonwealth*, 509 A.2d 912 (Pa. Cmwlth. 1986).

#### Cross References

This section cited in 67 Pa. Code § 77.24 (relating to breath test procedures); and 67 Pa. Code § 77.26 (relating to periodic calibration of Type A breath test equipment).

### § 77.26. Periodic calibration of Type A breath test equipment.

(a) *Frequency.* Type A alcohol breath test equipment shall be calibrated annually within 1 year of using the breath test equipment to perform an actual alcohol breath test.

(b) *Procedures for calibration testing.*

(1) Calibration testing a breath test device shall consist of conducting three separate series of five simulator tests. One of the series of tests shall use simulator solution designed to give a reading of .10%. One of the series of tests shall use simulator solution designed to give a reading of .05%. The last series of tests shall use simulator solution designed to give a reading above .10% which is a multiple of .05%.

(2) The results of the three separate series of tests shall be recorded on an appropriate test record.

(3) Test results shall be recorded to the third decimal place if the third decimal place is available.

(4) The breath test equipment does not pass the calibration procedure and shall be removed from service if one of the following occur:

(i) In the case of a device which can only be read to two digits, one or more of the five simulator tests in any one of the three separate series of tests yields a result which is one of the following:

(A) More than .01 below the reading that the simulator solution is designed to give.

(B) Greater than the reading that the simulator solution is designed to give.

(ii) In the case of a device which can be read to three digits, if, in any one of the three separate series of five simulator tests one of the following occurs:

(A) The average deviation derived by adding the absolute value of the differences between the results of the five tests and the constant value of the reading that the simulator solution is designed to give, and dividing the total of these absolute values by 5, exceeds .005.

(B) One or more of the five tests yields a reading which is more than .010 below the reading that the simulator solution is designed to give, or which is more than .009 above the reading that the simulator solution is designed to give.

(5) An example of a calibration testing procedure for a breath test device capable of being read to the third decimal place is as follows:

	<i>Constant value</i>	<i>Reading</i>	<i>Difference (absolute value)</i>
<i>First Series</i>	.10	.103	.003
	.10	.104	.004
	.10	.097	.003
	.10	.104	.004
	.10	.099	.001
		$\frac{.015}{5} = .003$	
<i>Second Series</i>	.05	.049	.001
	.05	.054	.004
	.05	.048	.002
	.05	.051	.001
	.05	.052	.002
		$\frac{.010}{5} = .002$	
<i>Third Series</i>	.15	.149	.001
	.15	.151	.001
	.15	.148	.002
	.15	.151	.001
	.15	.160	.010
		$\frac{.015}{5} = .003$	

First series—Average deviation = .003 and .003 does not exceed .005

Second series—Average deviation = .002 and .002 does not exceed .005

Third series—Average deviation = .003 and .003 does not exceed .005 but the fifth test of the series yields a result which is more than .009 above the constant value so the device fails the calibration testing.

(c) *Procedures for adjustment.* Breath test equipment which fails the testing under § 77.25(b) (relating to accuracy inspection tests for Type A equipment) or subsection (b) shall be placed out of service and shall be serviced, repaired and adjusted, as necessary, by the manufacturer or its authorized representative or a person who has received comparable training or instruction prior to being placed back into service. In addition, the breath test device shall be tested under subsection (b) prior to being placed back into service.

(d) *Certificate of calibration.* Upon satisfactory completion of the calibration procedure, the test record shall be recorded on a certificate of calibration of a type provided or approved by the Department. The certificate of calibration shall be signed and dated by the individual who performed the calibration procedure and shall be retained for a period of 3 years from the date of the calibration procedure.



**Source**

The provisions of this § 77.26 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial pages (140067) to (140069).

**Notes of Decisions***Approval of Equipment*

When the Intoxilyzer 500 has been approved as a testing device, and when the appellant's only evidence that the device is not accurate was the bald, unsupported claim that it has a 50% error rate, the appellant failed to establish that the trial court erred in admitting into evidence the appellant's blood alcohol content. *Commonwealth v. Snell*, 811 A.2d 581 (Pa. Super. 2002); appeal denied 820 A.2d 162 (Pa. 2003).

A certificate of calibration, when offered into evidence with a certificate of accuracy, shall be presumptive evidence of the accuracy of breath test equipment. A reading acquired from such certified equipment must be considered a reliable test result for purposes of determining blood alcohol content, and for proving guilt beyond a reasonable doubt of a violation of law regulating driving under the influence of alcohol. *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

Intoxilyzer test results were admissible even though the intoxilyzer was not calibrated before the test, since this section, requires only that the calibration be performed within 1 year following breath test. *Commonwealth v. Williamson*, 514 A.2d 917 (Pa. Super. 1986).

The breathalyzer regulations at 67 Pa. Code §§ 77.24—77.26 are reasonable, comport with State law and ensure valid test results. *Baldinger v. Commonwealth*, 509 A.2d 912 (Pa. Cmwlth. 1986).

**Cross References**

This section cited in 67 Pa. Code § 77.25 (relating to accuracy inspection tests for Type A equipment).

**§ 77.27. Type B equipment.**

Only equipment and methods approved by the Department of Health may be used for the laboratory analysis of breath samples collected with Type B alcohol breath testing equipment. Laboratories performing the analyses shall be licensed and specifically approved for blood alcohol analysis under Department of Health standards.

**Source**

The provisions of this § 77.27 adopted December 21, 1984, effective December 22, 1984, 14 Pa.B. 4599; readopted January 12, 1990, effective immediately and apply retroactively to December 22, 1989, 20 Pa.B. 211. Immediately preceding text appears at serial page (140069).

[Next page is 79-1.]

77-16

(337698) No. 408 Nov. 08

*Copyright © 2008 Commonwealth of Pennsylvania*