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BERDON, J., dissenting. I would affirm the judgment of the trial court ordering the reinstatement of the plaintiff's motor vehicle operator's license. Accordingly, I dissent.

The plaintiff, Justin M. Alvord, sought an administrative hearing, in accordance with General Statutes § 14-227b (g), in order to obtain the return of his license. Pursuant to § 14-227b (g), the hearing “shall be limited to a determination of the following issues: (1) Did the police officer have probable cause to arrest the person for operating a motor vehicle while under the influence of intoxicating liquor or drug or both; (2) was such person placed under arrest; (3) did such person refuse to submit to such test or analysis or did such person submit to such test or analysis, commenced within two hours of the time of operation, and the results of such test or analysis indicated that such person had an elevated blood alcohol content; and (4) was such person operating a motor vehicle.” General Statutes § 14-227a (a) defines “elevated blood alcohol content” as the “ratio of alcohol in the blood of such person that is *eight-hundredths of one per cent* or more of alcohol, by weight.” (Emphasis added.)

“If, after such hearing, the [defendant commissioner of motor vehicles] finds on any one of the said issues in the negative, the commissioner *shall* reinstate such license or operating privilege. . . .” (Emphasis added.) General Statutes § 14-227b (h).

The statutes are crystal clear. Unless the defendant finds that the operator's blood alcohol content (BAC) was eight-hundredths of 1 percent or more, the defendant shall reinstate the operator's license. The defendant's only finding with respect to the plaintiff's BAC in this case was “0.07 [percent] or more.” Because the defendant failed to find that the plaintiff's BAC was 0.08 percent or more, the defendant, according to § 14-227b (h), must reinstate the plaintiff's license.

The majority excuses the defendant's failure to find that the plaintiff had a BAC of 0.08 percent or more because there is “substantial evidence [in the record] to support the defendant's conclusion that the plaintiff operated a motor vehicle while he had an elevated blood alcohol content.” Nevertheless, the majority's reliance on the evidence in the record cannot control the outcome of this case for several reasons.

First, as previously pointed out, § 14-227b (h) mandates that the plaintiff's license be reinstated on the defendant's failure to find any one of the issues required under § 14-227b (g). A finding that an operator's BAC is “0.07 [percent] or more” does not satisfy a finding that the operator had an elevated blood alcohol content,

as statutorily required. The legislature recently enacted Public Acts 2003, No. 03-154, which directs the court, including this appellate court, to give effect to the plain and unambiguous words of a statute. “The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.” Public Acts 2003, No. 03-154.

“We cannot ignore the plain wording of the statute.” *State v. Lemoine*, 256 Conn. 193, 207, 770 A.2d 491 (2001). “It is plain error for the trial court [and this appellate court] to fail to apply an applicable statute.” *Connecticut National Bank v. Giacomi*, 242 Conn. 17, 39, 699 A.2d 101 (1997). “If courts were free to pick and choose what part of a statute . . . to rely on and what part to ignore, then the courts . . . would, in effect, draft the law as well as construe its meaning.” *Florez v. Callahan*, 156 F.3d 438, 443 (2d Cir. 1998). Indeed, by disregarding the mandate of § 14-227b (g), the plaintiff’s due process rights are implicated. See *Otero v. New York City Housing Authority*, 484 F.2d 1122, 1135 (2d Cir. 1973).

Second, the majority looks for support in the results of two Breathalyzer tests performed on the plaintiff. The first test indicated that the plaintiff had a BAC of 0.152 percent. The second test, administered approximately thirty-one minutes later, indicated that the plaintiff had a BAC of 0.126 percent. Although the defendant found that the Breathalyzer test results “indicated a BAC of 0.07 [percent] or more,” the defendant’s subordinate findings make no mention of the Breathalyzer tests. “[J]udicial review of the commissioner’s action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes §§ 4-166 through 4-189], and the scope of that review is very restricted. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency’s findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this [appellate] court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact.” (Citation omitted; internal quotation marks omitted.) *Murphy v. Commissioner of Motor Vehicles*, 254 Conn. 333, 343, 757 A.2d 561 (2000). In other words, it is not for this court to determine the facts.

Finally, whether the plaintiff was operating his vehicle erratically, smelt of alcohol or allegedly failed a sobriety test does not support a finding that the plaintiff

had a BAC of 0.08 percent or more, as required by § 14-227a (a). Indeed, contrary to the majority's "finding," the record in this case reveals that the plaintiff passed physical tests such as the walk and turn test.¹

Accordingly, as a result of the failure of the defendant to find that the plaintiff had a BAC of 0.08 percent or more, I believe that the judgment of the trial court should be affirmed and that the defendant should be ordered to reinstate the plaintiff's license.

I also disagree with the rescript in the majority opinion. Fairness would dictate that, on remand, the trial court should determine whether the defendant incorrectly denied the plaintiff's motion to reconsider his decision on the basis of a report from James E. O'Brien, Ph.D., M.D., in which O'Brien opined that in this case, the BAC could not be determined with reasonable scientific certainty.²

I dissent.

¹ The defendant in his brief concedes that "the plaintiff successfully completed" some of the field sobriety tests.

² In the report that the plaintiff wanted the defendant to consider, O'Brien states in relevant part: "In regards to your inquiry as to whether or not [the plaintiff's] blood alcohol level was indeed at or above 0.08% w/w cannot be answered with reasonable scientific certainty. This is based on the fact that [the plaintiff's] blood alcohol decreased 0.026% in the 31 minutes between the two tests. This value is equivalent to a decline of 0.050% per hour. The normal decline in the alcohol level for 31 minutes would be 0.009% (0.018% per hour). A decrease of this magnitude (0.050% per hour) is almost three times the normal decline of 0.018% per hour and is most rare, if not medically impossible, to metabolize sufficient alcohol to result in such a large decline. This marked decrease can only be explained by either one or both of the tests being incorrect. In view of this, the tests must be considered invalid and [the plaintiff's] blood alcohol level cannot be established."

The dissent does not rely on O'Brien's letter, as claimed by the majority in its footnote 7. The dissent refers to O'Brien's letter to point out that although the majority reverses the judgment of the trial court on the basis of the majority's conclusion that a BAC finding of 0.07 percent or more satisfies the statutory requirement of 0.08 percent or more, there was another issue before the trial court.

The second issue was whether the defendant abused his discretion by refusing to grant the plaintiff's petition for reconsideration, which was predicated on O'Brien's report. The trial court never reached that issue because it logically concluded that a BAC of 0.07 percent or more does not equal a BAC of 0.08 percent or more. Accordingly, even if the majority is correct, the rescript in this case should be that the matter is remanded to the trial court to consider whether the defendant abused his discretion by failing to grant the plaintiff's motion for reconsideration. The decision of the trial court foreclosed any consideration of the motion to reconsider. Certainly, the plaintiff had no reason to raise the issue after the trial court orally ruled in his favor.