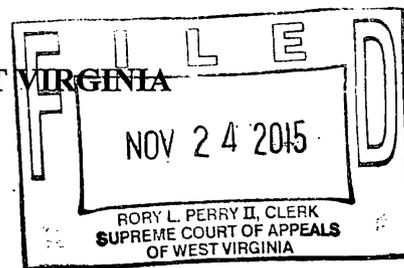


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0865

(Circuit Court Civil Action No. 14-P-14)



**PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Petitioner,

v.

TAMMY L. ROBBINS,

Respondent.

FROM THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

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I. ASSIGNMENT OF ERROR

1. **The circuit court was factually wrong regarding which tribunal heard the matter below, and therefore, ignored the authority of the Office of Administrative Hearings' Chief Hearing Examiner to review the hearing examiner's proposed final order and to overrule the same.**
2. **The circuit court ignored the clear evidence of Respondent's driving while under the influence of alcohol, controlled substances, or drugs.**

II. STATEMENT OF THE CASE

On May 20, 2012, around 4:00 a.m., Trooper R. Jones of the West Virginia State Police was on official duty and was at the emergency room in Davis Memorial Hospital in Elkins, in Randolph County, West Virginia. (App.¹ at P. 160 and A. Tr.² at PP. 9-11.) At that time, Trooper Jones was informed that a patient walked in for treatment of injuries sustained in a possible DUI accident. *Id.*

While speaking with Tammy L. Robbins, Respondent herein, Trooper Jones detected the odor of an alcoholic beverage emanating from her breath. (A. Tr. at PP. 11 and 30.) Trooper Jones saw abrasions on Ms. Robbins' forehead and mud on her legs. (A. Tr. at PP. 11.) He obtained a voluntary statement from Ms. Robbins wherein she admitted that she wrecked her car and had been drinking alcohol at a party prior to driving: specifically she admitted to drinking "two glasses of wine - one in the car." (App. at P. 165 and A. Tr. at P. 12.) Trooper Jones understood Ms. Robbins' statement to mean two glasses of wine plus the one that she had in the car. (A. Tr. at P. 18.) Ms. Robbins also admitted to not reporting the accident to the police. (App. at P. 165 and A. Tr. at PP. 12 and 15.) Per her signed statement, Ms. Robbins swerved to miss a deer and went into a roadside ditch. (App. at P. 165 and A. Tr. at PP. 14-15.)

¹App. refers to the Appendix filed contemporaneously with the Petitioner's brief.

²A. Tr. refers to the Administrative Transcript located at the end of the Appendix. Pursuant to Rule 7(b) of the Revised Rules of Appellate Procedure, the original page numbers of the transcript are used.

Trooper Jones called State Police communication in Elkins which then contacted Trooper J. Kopec, the Investigating Officer (“I/O”) in this matter, who was stationed in Tucker County where the accident occurred, and advised him of the situation and from there, the I/O took over the DUI investigation. (A. Tr. at P. 12.) Based upon his training and experience, Trooper Jones considered Ms. Robbins’ speech and the smell of alcoholic beverages on her breath as indicators that she was under the influence of alcohol. (A. Tr. at PP. 40-41.) Since Trooper Jones had already made contact with Ms. Robbins and had taken her statement, the I/O first went to investigate the automobile crash. (A. Tr. at PP. 51-52.)

The I/O had difficulty finding Ms. Robbins’ vehicle because it had been towed from the accident scene without law enforcement’s permission. (A. Tr. at P. 52.) The I/O found the ditch where the vehicle had wrecked and compared the orange mud from the scene with the orange mud found in the grill of Ms. Robbins’ vehicle. (A. Tr. at P. 91.) Ms. Robbins’ vehicle was totaled, and there was a head imprint on the windshield with some hair in the imprint. (A. Tr. at PP. 53-54.)

The I/O then went to the hospital and made initial contact with Ms. Robbins. (App. at PP. 158-162.) Ms. Robbins had some type of scarring and redness on her forehead and the odor of an alcoholic beverage emanating from her person. (A. Tr. at P. 59.) She also had redness and a “goose egg” on her forehead. (A. Tr. at P. 102.) At first, Ms. Robbins was cooperative with the I/O, and then her cooperation quickly became argumentative, refusing to sign anything for him. (App. at PP. 161-162 and A. Tr. at P. 60.) Further, Ms. Robbins had slurred speech and bloodshot and glassy eyes. *Id.* Neither of the troopers nor Ms. Robbins asked for a blood test, but a blood sample was taken at 5:41 a.m. (App. at PP. 161, 168-169 and A. Tr. at P. 64.) Trooper Jones asked that a non-alcoholic swab

be used in conjunction with the blood draw which was requested by the hospital. (A. Tr. at P. 18 and 19-20.)

On August 16, 2012, the DMV sent Ms. Robbins an *Order of Revocation* for DUI. (App. at P. 82.) On September 13, 2012, the OAH received Ms. Robbins *Written Objections and Hearing Request Form*. (App. at PP. 84-85.) On October 4, 2013, the OAH conducted an administrative hearing. (A. Tr. at P. 1.)

The results of the blood draw conducted by Davis Memorial Hospital were accepted by the Hearing Examiner without a final determination of admissibility. (A. Tr. at P. 25.) Ms. Robbins' counsel objected to the report's admission without any supporting testimony by the preparer of the report. (A. Tr. at PP. 22 and 24.) The report was submitted with a notarized statement certifying that it was a true copy of Ms. Robbins' original medical records pertaining to her care and treatment on May 20, 2012. (App. at P. 167.) The report was signed by Rebecca J. Hammer of Davis Memorial Hospital and showed a blood test result of ALCOHOL, MG/DL 189. *Id.* After completing the proper conversion from a blood test to a breath test per the W. Va. Code, the I/O handwrote on the report the numbers ".162." (A. Tr. at PP. 69-73.)

At the administrative hearing, Ms. Robbins' friend and former roommate, Angie Shockley, testified that after the accident, Ms. Robbins went to Ms. Shockley's house. (A. Tr. at P. 112 and 117.) Per Ms. Shockley, while Ms. Robbins' was at her house, Ms. Robbins consumed a few ounces of vodka. (A. Tr. at PP. 112-113 and 125.) Ms. Shockley also testified that Ms. Robbins drank one third of a bottle of Gray Goose vodka and that she drove Ms. Robbins to the hospital and waited for her there. (A. Tr. at PP. 113-115.) Ms. Shockley further testified that she had Ms. Robbins at the

hospital within an hour of her arrival at her house. (A. Tr. at P. 125.) Ms. Shockley also testified that Ms. Robbins did not disclose that she had been in a car wreck. *Id.*

The interview section of the DUI Information Sheet (“DUIIS”) states that Ms. Robbins denied drinking before the crash but admitted to drinking ½ glass of wine since the crash. (App. at P. 162 and A. Tr. at P. 79.) Per the I/O, Ms. Robbins, herself, filled out the answers on the report starting from the question about drinking after the accident. (A. Tr. at PP. 76 and 81.) Ms. Robbins failed to testify at the very hearing she requested (A. Tr. at P. 3); therefore, the officers’ testimony remains unrebutted.

On June 18, 2014, the OAH entered its *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner*. (App. at PP. 142-151.) On July 17, 2014, Ms. Robbins filed a *Petition for Administrative Appeal* in this matter. (App. at PP. 5-22.) Ms. Robbins served the DMV at an address which has not been used since 2009 and failed to serve the OAH with a copy of the petition in contravention to Rule 2(e) of the Rules of Procedure for Administrative Appeals (“RPAA.”) *Id.* Ms. Robbins also failed to designate the record with the OAH as required by Rule 4 of the Rules of Procedure for Administrative Appeals.

On or about December 22, 2014, irrespective of the neglected *Designation of the Record*, the OAH filed the administrative record with the circuit court. (App. at PP. 77-170 and A. Tr. at PP. 1-133.) Ms. Robbins failed to do anything further with her case, including asking for a briefing schedule or filing a brief, until June 5, 2015, when, without serving notice of hearing on the DMV, she appeared before the circuit court and obtained an *ex parte* order granting a stay of her license revocation. (App. at PP. 23-30.) On June 15, 2015, the DMV filed a motion to vacate the *ex parte* stay, and on June 18, 2015, this Court granted that motion and vacated the stay of license revocation.

(App. at PP. 32-57.) Ms. Robbins failed to file a brief in support of her *Petition for Administrative Appeal* (App. at P. 1), yet the DMV filed its brief on June 25, 2015. (App. at PP. 58-76.) On August 3, 2015, the circuit court entered its *Order* reversing the *Decision of Hearing Examiner and Final Order of Chief Hearing Examiner* of the OAH. (App. at PP. 2-4.)

III. SUMMARY OF ARGUMENT

The Circuit Court of Tucker County conflated the DMV, a party below, and the OAH, the tribunal below, thus erroneously and arbitrarily relying on past arguments of the DMV to determine that the OAH Chief Hearing Examiner could not modify the decision of the OAH Hearing Examiner. The circuit court further ignored the overwhelming evidence of Ms. Robbins' driving while under the influence of alcohol.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to W. Va. Rev. R. App. Pro. 19 (2010), the Commissioner requests oral argument in this case because this matter involves assignments of error in the application of settled law and a result against the weight of the evidence.

V. ARGUMENT

A. Standard of Review

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. W. Va. Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995) (per curiam).

Upon judicial review of a contested case under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 4(g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions, or orders are: "(1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory

authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Syl. Pt. 2, *Shepherdstown Volunteer Fire Dep't v. SER, State of W. Va. Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are accorded deference unless the reviewing court believes the findings to be clearly wrong, and conclusions of law are reviewed *de novo*. *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (per curiam).

“The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). Likewise, “deference...is the hallmark of abuse-of-discretion review.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). Additionally, this Court is sitting here as an appellate court, *Noble v. West Virginia DMV*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009) (per curiam) (quoting *West Virginia Bd. of Med. v. Shafer*, 207 W. Va. 636, 639, 535 S.E.2d 480,483 (2000) (Davis, J., dissenting)) (“In administrative proceedings such as the one at bar, the circuit court is sitting in the capacity of an appellate court”), and the Supreme Court of Appeals has “made plain that an appellate court is not the appropriate forum for a resolution of the persuasive quality of evidence.” *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996).

A court can only interfere with a hearing examiner’s findings of fact when such findings are clearly wrong. *Modi v. W. Va. Bd. of Med.*, 195 W. Va. 230, 239, 465 S.E.2d 230, 239 (1995). “This rule is of appreciable importance to the parties because clear-error review ordinarily heralds a rocky road for an appellant. Under this standard, appellate courts cannot presume to decide factual issues

anew. Our precedent ordains that deference be paid to the trier's assessment of the evidence." *FOP v. Fairmont*, 196 W. Va. 97, 101 n.4, 468 S.E.2d 712, 716 n.4 (1996). "[T]he clearly erroneous rule loses none of its rigor 'when the [lower] court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.'" *Id.*, 468 S.E.2d at 716 n.4 (quoting *Anderson v. Bessemer*, 470 U.S. 564, 574 (1985)). "[T]his standard precludes a reviewing court from reversing a finding of the trier of fact simply because the reviewing court would have decided the case differently[.]" *Brown v. Gobble*, 196 W. Va. 559, 565, 474 S.E.2d 489, 495 (1996), an "ALJ's findings may not be disregarded on the basis that other inferences might have been more reasonable." *Newport News Shipbuilding and Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

B. The circuit court was factually wrong regarding which tribunal heard the matter below, and therefore, ignored the authority of the Office of Administrative Hearings' Chief Hearing Examiner to review the hearing examiner's proposed final order and to overrule the same.

In its Order, the circuit court opined that the "unusual question in this case is that DMV's [*sic*] Hearing Examiner found that there was not sufficient evidence against this driver. However, the Chief Hearing Examiner reviewed the same evidence and came to the conclusion that Ms. Robbins' license should be suspended." (App. at P. 2.) After recognizing that the "Chief Hearing Examiner has the authority to make the final call for DMV [*sic*]," the circuit court next editorialized that "for years DMV's attorneys have been stressing that the Hearing Examiner was there and heard the testimony and great deference should be afforded his determinations. In this instance, DMV is asking the Court to virtually ignore the determination of its own [*sic*] Hearing Examiner." (App. at P. 3.) Clearly, the circuit court conflated the DMV with the OAH throughout its *Order*. The DMV

was not the agency that presided over the administrative hearing nor is it the agency which issued the final order.

On June 10, 2010, the OAH was created as a “*separate operating agency* within the Department of Transportation.” [Emphasis added.] W. Va. Code § 17C-5C-1(a) (2010). Pursuant to W. Va. Code § 17C-5C-3 (2010),

The Office of Administrative Hearings jurisdiction to hear and determine all:

(1) Appeals from an order of the Commissioner of the Division of Motor Vehicles suspending a license pursuant to section eight, article two-B, chapter seventeen-B of this code;

(2) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles suspending or revoking a license pursuant to sections three-c, six and twelve, article three, chapter seventeen-B of this code;

(3) Appeals from orders of the Commissioner of the Division of Motor Vehicles pursuant to section two, article five-A, of this chapter, revoking or suspending a license under the provisions of section one of this article or section seven, article five of chapter;

(4) Appeals from decisions or orders of the Commissioner of the Division of Motor Vehicles denying, suspending, revoking, refusing to renew any license or imposing any civil money penalty for violating the provisions of any licensing law contained in chapters seventeen-B and seventeen-c that are administered by the Commissioner of the Division of Motor Vehicles; and

(5) Other matters which may be conferred on the office by statute or legislatively approved rules.

The DMV retained jurisdiction over cases with arrests dates prior to June 10, 2010. The OAH has jurisdiction of arrests which occurred after June 10, 2010. *See, Miller v. Epling*, 229 W. Va. 574, 584, 729 S.E.2d 896, 906 (2012). Ms. Robbins was arrested on May 20, 2012; therefore, the OAH had jurisdiction over the administrative matter. It was the OAH Hearing Examiner who issued his decision reversing Ms. Robbins’ license revocation, and it was the OAH Chief Hearing

Examiner who reviewed the same upheld the revocation. The DMV was a party below but was not involved in the Hearing Examiner's or the Chief Hearing Examiner's decision making. Accordingly, the circuit court's reliance on DMV's past arguments has no basis in the record and is arbitrary and capricious.

This Court has held that an administrative agency may not exercise authority which is not given to it expressly or impliedly in statute.

Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. *They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.*

Syl. Pt. 2 *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973) (emphasis added). *See also State ex rel. Hoover v. Berger*, 199 W. Va. 12, 19, 483 S.E.2d 12, 19 (1996) ("An administrative agency ... has no greater authority than conferred under the governing statutes.").

Reed v. Thompson, 235 W. Va. 211, 772 S.E.2d 617, 620 (2015). Here, the Chief Hearing Examiner had authority to review and modify the Hearing Examiner's proposed final order.

Pursuant to W. Va. C. S. R. § 105-1-17.3 (2014), the OAH Chief Hearing Examiner must review the decision of the Hearing Examiner as to "legal accuracy and clarity and other requirements." Further, the OAH Chief Hearing Examiner has authority to modify the Hearing Examiner's findings of fact and conclusions of law. *Id.* Further, in "case of conflict between the final decision of the hearing examiner and the final order of the Chief Hearing Examiner, the final order of the Chief Hearing Examiner shall control." *Id.*

In the instant matter, the Hearing Examiner determined that the blood test results were inadmissible then failed to address the other evidence of DUI which the DMV presented to prove

its case. (App. at P. 148.) The OAH Chief Hearing Examiner reviewed the legal accuracy of the Hearing Examiner's proposed order and found that while the Hearing Examiner correctly pointed out that the blood test results do not provide "good evidence" that Ms. Robbins' driving was impaired, "the law does not require that a secondary chemical test be performed to sustain an order of revocation entered by DMV. *See Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984)." (App. at P. 149.) Next, the OAH Chief Hearing Examiner reviewed the evidence of DUI which the Hearing Examiner had ignored. The OAH Chief Hearing Examiner correctly performed his required duties per Legislative Rule, and circuit court erroneously and capriciously applied past arguments of the DMV to the instant matter. Regardless of the DMV's past arguments or the decision of the OAH Chief Hearing Examiner, the circuit court ignored the evidence of DUI and the applicable law.

C. The circuit court ignored the clear evidence of Respondent's driving while under the influence of alcohol, controlled substances, or drugs.

The circuit court found that the "Chief Hearing Examiner chose to put more weight upon the fact that Ms. Robbins did not report the accident and did not complete the DUI Information Sheet." (App. at P. 3.) Unlike the circuit court's order, which fails to address or analyze the evidence presented at the administrative hearing, the OAH Chief Hearing Examiner completed such analysis of the evidence in his final order. (App. at PP. 149-150.)

The circuit court focused its analysis on the fact that the Chief Hearing Examiner modified the Hearing Examiner's findings. The actions of the Chief are not an improper hijacking of the Hearing Examiner's decision: it was a correction of the substantive flaws in the Hearing Examiner's analysis. The Chief did not overturn any critical credibility determinations; he observed that the Hearing Examiner's analysis stopped after a finding that the blood test results were not probative.

That is not the standard: a licensee will be revoked on evidence of DUI *or* evidence from a secondary chemical test. The Hearing Examiner stopped short in her analysis, and the Chief carried out his duty to perform the analysis correctly.

The Final Order of the chief Hearing Examiner is reviewable by the circuit court. Absent viable complaints about the revisions made by the Chief, the circuit court's duty is to find whether there is sufficient evidence to uphold the Final Order. Instead, the circuit court below focused on the revisions made to the Hearing Examiner's order and, like the Hearing Examiner, ignored the evidence. The circuit court completely violated the proper standard of review for administrative matters.

Moreover, the OAH Chief Hearing Examiner correctly pointed out this Court's prior holding in *Dean v. West Virginia Dept. of Motor Vehicles*, 195 W. Va. 70, 314 S.E.2d 859 (1995), that the absence of a chemical test does not foreclose of intoxication proof by other means as a ground for license revocation. (App. at P. 149.) "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syl. Pt. 2, *Albrecht v. State*, 173 W. Va. 268, 314 S.E.2d 859 (1984); Syl. Pt. 1, *Boley v. Cline*, 193 W. Va. 311, 456 S.E.2d 38 (1995); Syl. Pt. 1, *Dean v. W. Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 464 S.E.2d 589 (1995); Syl. Pt. 2, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997); *Coll v. Cline*, 202 W. Va. 599, 605, 505 S.E.2d 662, 668 (1998); Syl. Pt. 4, *Montgomery v. State Police*, 215 W. Va. 511, 600 S.E.2d 223 (2004); Syl. Pt. 4, *Lilly v. Stump*, 217 W. Va. 313, 617 S.E.2d 860 (2005); *Carpenter v. Cicchirillo*, 222 W. Va. 66, 68, 662 S.E.2d 508,

510 (2008); Syl. Pt. 4, *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008); Syl. Pt. 3, *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010); FN. 11, *Ullom v. Miller*, 227 W. Va. 1, 14, 705 S.E.2d 111, 124 (2010); *White v. Miller*, 228 W. Va. 797, 802, 724 S.E.2d 768, 773 (2012); Syl. Pt. 4, *Dale v. McCormick*, 231 W. Va. 628, 749 S.E.2d 227 (2013); Syl. Pt. 6, *Dale v. Dingess*, 232 W. Va. 13, 750 S.E.2d 128 (2013); Syl. Pt. 8, *Dale v. Ciccone*, 233 W. Va. 652, 760 S.E.2d 466 (2014).

Further, the OAH Chief Hearing Examiner reviewed the evidence presented by the DMV and determined that the Hearing Examiner afforded the same too little weight. *Id.* Specifically, the OAH Chief Hearing Examiner considered Ms. Robbins' admission to drinking two (2) glasses of wine prior to the accident, one of which was consumed in her car; the one vehicle accident which Ms. Robbins failed to report; the change in Ms. Robbins' story about how much she drank when she wrote in the answers on the DUIIS herself; and the fact that drinking after the accident does not negate her admission to drinking before the accident as well. (App. at PP. 149-150.)

In *Dean, supra*, this Court relied on *Albrecht, supra*, in upholding a revocation for DUI with the result of only one standardized field sobriety test, the odor of alcoholic beverage, and the driver crossing the center line and crashing his vehicle. Similarly, in *Boley, supra*, this Court upheld a revocation for DUI with only one failed field sobriety test and the odor of alcoholic beverage on the Boley's breath.

This Court has addressed the significance of drunk drivers causing one vehicle crashes:

This Court in *Reilley v. Byard*, 146 W. Va. 292, 301, 119 S.E.2d 650, 655 (1961), commenting on the actions of a motorist who left the highway and collided with a telephone pole, stated: "Rational men do not purposely operate motor vehicles in such manner. Not only traffic regulations, but also prudence and fundamental human instincts of self-preservation dictate otherwise."

FN 4, *Albrecht, supra*.

Further, all evidence in the Commissioner's file, including the blood test results, was required to be admitted at the administrative hearing as a matter of statute in accordance with W. Va. Code §29A-5-2(b)(1964); *Crouch v. W. Va. Division of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006), *Comm'r of W. Va. Div. of Motor Vehicles v. Brewer*, 13-0501, 2014 WL 1272540 (W. Va., Mar. 28, 2014)(memorandum decision), *Dale v. Odum*, 233 W. Va. 601, 760 S.E.2d 415 (2014) (per curiam), *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010), *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010)(per curiam), *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008)(per curiam), *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va., Apr. 10, 2014)(memorandum decision), *Dale v. Reynolds*, 13-0266, 2014 WL 1407375 (W. Va., Apr. 10, 2014)(memorandum decision), *Davis v. Miller*, 11-1189, 2012 WL 6097655 (W. Va., Dec. 7, 2012)(memorandum decision), and *Miller v. Chenoweth*, 229 W. Va. 114, 727 S.E.2d 658 (2012)(per curiam).

In *Crouch, supra*, this Court noted that the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during the hearing. Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy. 219 W. Va. at 76, n.12, 631 S.E.2d at 634, n.12. Here, Ms. Robbins failed to testify at the very hearing which she requested; therefore, both the evidence on the DUIIS and the blood test results remain wholly un rebutted. The OAH Hearing Examiner and the circuit both erred in ignoring the blood test results when that evidence was required by the Administrative Procedures Act to be admitted into evidence at the hearing subject to rebuttal, and the same was not rebutted.

Previously this Court has looked askance at drivers who ostensibly challenge the evidence in the case against them, yet do not make any actual attempt to rebut the evidence. “In the present case, no effort was made to rebut the accuracy of any of the records, including the DUI Information Sheet, Implied Consent Statement or Intoximeter printout which were authenticated by the deputy and admitted into the record at the DMV hearing.” *Groves v. Cicchirillo*, 225 W. Va. 474, 479, 694 S.E.2d 639, 644 (2010); “Ms. Reed did not testify, nor was there any other affirmative evidence, that she was not given a written implied consent statement to contradict the DUI Information Sheet.” *Dale v. Reed*, 13-0429, 2014 WL 1407353 (W. Va. Apr. 10, 2014); “The deficiency in Mr. Veltri’s argument regarding the concept of retrograde extrapolation is that he failed to present any evidence at trial of the retrograde extrapolation in his individual circumstance.” *Dale v. Veltri*, 230 W. Va. 598, 602, 741 S.E.2d 823, 827 (2013); “In fact, the only evidence of record on this issue was Deputy Lilly’s testimony which clearly demonstrated that the officer gave the Implied Consent form to the appellee. As there was no testimony in conflict with the officer, we see no reason to contradict his testimony.” *Lilly v. Stump*, 217 W. Va. 313, 319, 617 S.E.2d 860, 866 (2005); “To the extent that Ms. McCormick believed Trooper Miller did not perform the test in accordance with the law, she was required to question Trooper Miller in this area.” *Dale v. McCormick*, 231 W. Va. 628, 633, 749 S.E.2d 227, 232 (2013); “Pursuant to this Court’s decision in *McCormick*, if Mr. Oakland had a serious inquiry or challenge to the quality or quantity of Officer Wilhelm’s response about his credentials, the onus was on Mr. Oakland to inquire further.” *Dale v. Oakland*, 13-0761, 2014 WL 2561375 (W. Va. June 6, 2014); “[W]hile Mr. Doyle objected to the admission of the statement of the arresting officer, he did not come forward with any evidence challenging the content of that document. Consequently, there was un rebutted evidence admitted during the administrative hearing

that established a valid stop of Mr. Doyle's vehicle, and the hearing examiner's finding to the contrary was clearly wrong." *Dale v. Odum*, 760 S.E.2d 415 (W. Va. 2014).

The OAH Chief Hearing Examiner considered all of the evidence of DUI and the applicable case law to make his conclusion. Clearly, under the *Albrecht* test, the OAH was correct to uphold the Commissioner's *Order of Revocation*, and the circuit court ignored the overwhelming evidence of DUI.

VI. CONCLUSION

For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

PATRICIA S. REED,
COMMISSIONER, DIVISION OF
MOTOR VEHICLES,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PATRICIA S. REED, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

NO. 15-0865

TAMMY L. ROBBINS,

Respondent.

VII. CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, does certify that I served a true and correct copy of the forgoing **BRIEF OF THE DIVISION OF MOTOR VEHICLES** on this 24th day of November, 2015 by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Christopher W. Cooper, Esquire
Blackwater Law, PLLC
333 2nd Street, Suite 1
Parsons, WV 26287


Elaine L. Skorich

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0865

(Circuit Court Civil Action No. 14-P-14)

PATRICIA S. REED, COMMISSIONER,
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Petitioner,

v.

TAMMY L. ROBBINS,

Respondent.

CERTIFICATE OF SERVICE

I, Elaine L. Skorich, Assistant Attorney General, do hereby certify that the foregoing *Brief of the Division of Motor Vehicles* was served upon the opposing party by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 24th day of November, 2015, addressed as follows:

Christopher W. Cooper, Esquire
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ELAINE L. SKORICH