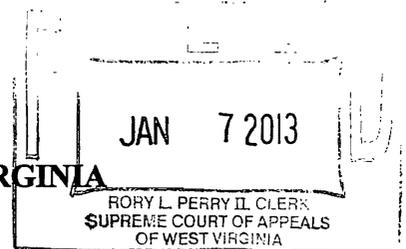


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1273
(Circuit Court Civil Action No. 11-C-218)



**JOE E. MILLER, COMMISSIONER OF
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Respondent below/Petitioner

v.

AMANDA DINGESS;

Petitioner below/Respondent.

FROM THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

BRIEF OF THE DIVISION OF MOTOR VEHICLES

Respectfully submitted,

**JOE E. MILLER, Commissioner,
Division of Motor Vehicles,**

By Counsel,

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MISCELLANEOUS:

I. ASSIGNMENTS OF ERROR

- A. The circuit court erred in finding relevant the fact that the motor vehicle accident, which precipitated the officer's investigation, occurred on private property.**
- B. The circuit court erred in giving weight to the dismissal of the companion criminal DUI charge.**
- C. The circuit court erred in preference to testimonial evidence over documentary evidence.**
- D. In paragraph four (4) of its Final Order, the circuit court erred in excluding the evidence of Petitioner's performance on all of the field sobriety tests even though Respondent's unsupported testimony about her alleged broken toe would not have affected the horizontal gaze nystagmus.**
- E. The circuit court erred in substituting its judgment for that of the hearing examiner on credibility issues.**
- F. The circuit court failed to find how W. Va. Code § 29A-5-4(g) was violated by the Office of Administrative Hearings.**
- G. The circuit court erred in misstating the law in paragraph eight (8) of its Final Order.**
- H. The circuit court erred in paragraph ten (10) in finding that a single answer by the officer was dispositive of a finding of DUI.**

II. STATEMENT OF THE CASE

On August 14, 2010, Deputy C. N. Hess of the Boone County Sheriff's Department responded to a 911 radio message that a vehicle crash had occurred at Tudor's Restaurant in Danville, Boone County, West Virginia. (A. R. Tr. at P. 8-9.) Upon arriving at the scene, Deputy Hess encountered Respondent who was extremely irate; had slurred speech; had the odor of an alcoholic beverage on her breath; and had bloodshot and glassy eyes. (A. R. Tr. at P. 10 and A. R. at P. 60 and P. 61.) Further, while walking to the roadside, Respondent was unsteady and staggered,

and while standing, she was unsteady. (A. R. at P. 60.) Deputy Hess performed three field sobriety tests: the horizontal gaze nystagmus, the walk-and-turn, and the one-leg stand. (A. R. Tr. at P. 1 and A. R. at P. 60-61.) Respondent failed all three field sobriety tests. *Id.*

While at the scene, Respondent informed Deputy Hess that she had been driving but denied hitting another vehicle. (A. R. Tr. at P. 17 and A. R. at P. 60.) Deputy Hess had reasonable grounds to believe that Respondent had been driving while under the influence of alcohol. (A. R. Tr. at P. 10-11 and A. R. at P. 60-61.) Respondent was already under arrest for obstructing, so Deputy Hess placed her in his vehicle and took her to the police station. (A. R. Tr. at P. 11 and P. 18-19.) Respondent refused to submit to the designated secondary chemical test. (A. R. Tr. at P. 14 and A. R. at P. 59 and P. 62.)

On September 8, 2010, Petitioner sent Respondent an Order of Revocation for DUI and for refusing to submit to the secondary chemical test: the revocation was to become effective on October 13, 2010. (A. R. at P. 66.) On October 12, 2010, Petitioner received Respondent's request for an administrative hearing regarding her revocation. (A. R. at P. 67.) On February 17, 2011, the administrative hearing was held before the Office of Administrative Hearings ("OAH.") (A. R. Tr. at P. 1.) The OAH Final Order was entered on October 18, 2011, upholding the DMV's Order of Revocation for DUI yet reversing the DMV's revocation for failure to submit to the secondary chemical test. (A. R. at P. 8.) The revocation date was effective November 1, 2011. *Id.* Respondent filed her "Petition for Review of Administrative Order" with the circuit court on October 28, 2011. (A. R. at P. 17.) The circuit court entered its *Final Order* on September 5, 2012. (A. R. at P. 2.)

Pursuant to W. Va. Code § 29A-5, *et seq*, this case is an appeal from the *Final Order* of the

Circuit Court of Boone County, which reversed the decision of the OAH that affirmed Respondent's order revoking Respondent's driver's license for driving under the influence of alcohol. Petitioner prays the Final Order of the Circuit Court of Boone County be overturned, the decision of the OAH affirmed, and the revocation ordered by the DMV be reinstated.

III. SUMMARY OF ARGUMENT

The Administrative Procedures Act [W. Va. Code § 29A-5-4(g)] makes plain the standard of review for appeals of administrative hearings. The reviewing circuit court may not disturb the decision of the OAH unless it finds that the final order of the administrative agency violates the Respondent's rights for one (or more) of six enumerated reasons. Here, the circuit court restated W. Va. Code § 29A-5-4(g) but failed to address how some of the OAH's findings and/or conclusions violated any of the reasons set forth in the Administrative Procedures Act. Further, the circuit court made relevant the fact that the investigating officer traversed private property to respond to a report of a motor vehicle accident when W. Va. Code § 17C-14-13a and W. Va. Code § 17C-5A-1(a) provide otherwise.

Additionally, in direct violation to this Court's recent decision in *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012), which held that the disposition in the companion criminal matter is inadmissible in the civil administrative proceeding, the circuit court below gave weight to the dismissal of criminal charges. In its Final Order, the circuit court also demonstrated a preference for testimonial evidence over documentary evidence in contravention to this Court's holding in *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010). Next, the circuit court below excluded all evidence obtained through the administration of the field sobriety tests based on Respondent's testimony about an alleged broken toe even though a broken toe would not have

affected her performance on the horizontal gaze nystagmus test. Such a blanket exclusion of evidence is clearly wrong.

Moreover, in contravention to this Court's holding in *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)), the circuit court below, without a demonstrated basis from the record, substituted its judgment for that of the fact finder on credibility determinations. Also, the circuit court entirely misstated this Court's holdings in *Carte v. Cline*, 200 W. Va. 62, 488 S.E.2d 437 (1997) and *Cain v. Miller*, 225 W. Va. 467, 694 S.E.2d 309 (2010). Neither of these cases hold that a police officer must actually see or observe a person move, drive or operate a motor vehicle before a person can be charged with driving under the influence. Finally, the circuit court below ignored all other evidence that Respondent was driving under the influence of alcohol based upon a single answer of the investigating officer on cross examination.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Commissioner requests a Rule 20 argument in this case. There are many errors alleged herein, and Petitioner holds that this matter warrants further inquiry by this Court.

V. ARGUMENT

Judicial review of license revocations is under the Administrative Procedures Act. *Dean v. West Virginia Dep't of Motor Vehicles*, 195 W. Va. 70, 71, 464 S.E.2d 589, 590 (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 order 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. State ex rel. State of West Virginia Human Rts. Comm’n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Findings of fact are reviewed for clear error and conclusions of law are reviewed de novo. *Groves v. Cicchirillo* 694 S.E.2d 639, 643 (W. Va. 2010) (per curiam).

A. The circuit court erred in finding relevant the fact that the motor vehicle accident, which precipitated the officer’s investigation, occurred on private property.

In numbered paragraph three of its Final Order, the circuit court stated that the investigating officer “*responded to an alleged motor vehicle accident in the parking lot of Tudor’s Biscuit World in Danville, Boone County, West Virginia (despite the fact the accident occurred on private property.)*” (A. R. at P. 3.) Pursuant to the Oxford Advanced Learner’s Dictionary, <http://oald8.oxfordlearnersdictionaries.com/dictionary/despite>, despite means “used to show that something happened or is true although something else might have happened to prevent it.” While it is true that the accident occurred on private property, the mere mention of that fact connotes that the hearing examiner should have been affected by that fact. Moreover, where the accident occurred is irrelevant to this matter and should not have been a consideration of the circuit court.

More importantly, such error is in direct contravention to W. Va. Code § 17C-14-13a and W. Va. Code § 17C-5A-1(a).

W. Va. Code § 17C-5A-1(a) states in pertinent part,

Any person who is licensed to operate a motor vehicle in this state and who drives a motor vehicle in this state shall be deemed to have given his or her consent by the operation thereof..to the procedure set forth in this article for the determination of

whether his or her license to operate a motor vehicle in this state should be revoked because he or she did drive a motor vehicle while under the influence of alcohol, controlled substances or drugs, or combined influence of alcohol or controlled substances or drugs...

W. Va. Code § 17C-5-2a(a) specifically defines the phrase “in this state” for purposes of the DUI statutes:

For purposes of this article and article five-a of this chapter, the phrase "in this state" shall mean anywhere within the physical boundaries of this state, including, but not limited to, publicly maintained streets and highways, and subdivision streets or other areas not publicly maintained but nonetheless open to the use of the public for purposes of vehicular travel.

W. Va. Code § 17C-14-13a also addresses right of the officer to investigate Respondent’s accident in the private parking lot.

Notwithstanding any provision of law to the contrary, nothing may prohibit any duly authorized municipal police officers, county deputy sheriffs or members of the department of public safety from entering upon private lands in order to investigate a motor vehicle accident when said private lands are open to the use of the public at-large for any purpose.

Accordingly, the Legislature has granted statutory authority to the investigating officer herein to respond to a call of an alleged motor vehicle accident in the parking lot of Tudor’s Biscuit World in Danville, West Virginia. Further, the Legislature has determined that if Respondent drives her car in this state (and Tudor’s Biscuit World in Danville in certainly within the boundaries of this state), then she has given her consent to be bound by the DUI procedures set forth in statute. By the circuit court’s inclusion of this fact in its *Final Order*, the court suggests that the officer (and therefore the DMV) had no authority to proceed with the administrative license revocation process. Clearly, the circuit court has erred in its speculation.

B. The circuit court erred in giving weight to the dismissal of the companion criminal DUI charge.

Also in numbered paragraph three of its Final Order, the circuit court stated, “After being placed under arrest for obstructing, the defendant was subsequently charged with driving under the influence (which driving under the influence charge was ultimately dismissed by the Boone County Magistrate Court.)” (A. R. at P. 3.) Just like the parenthetical statement of fact discussed in subsection A above, the circuit court’s mention of the dismissal of Respondent’s companion criminal matter is irrelevant here. Moreover, the circuit court’s error is in direct contravention to *Miller v. Epling*, 229 W. Va. 574, 729 S.E.2d 896 (2012).

In syllabus point 4 of *Epling*, this Court held

[w]hen a criminal action for driving while under the influence in violation of West Virginia Code § 17C-5-2 (2008) results in a dismissal or acquittal such dismissal or acquittal has no preclusive effect on a subsequent proceeding to revoke the driver’s license under West Virginia Code § 17C-5A-1 *et seq.* Moreover, in the license revocation proceeding, evidence of the dismissal or acquittal is not admissible to establish the trust of any fact. In so holding, we expressly overrule Syllabus Point 3 of *Choma v. West Virginia Division of Motor Vehicles*, 210 W. Va. 256, 557 S.E.2d 310 (2001).

Since Respondent’s criminal dismissal is inadmissible in the civil, administrative proceeding, the circuit court could not rely on that matter nor even consider its existence. Just “as unsworn oral statements cannot form the basis of a finding of fact,” *Boggs v. Settle*, 150 W. Va. 330, 337, 45 S.E.2d 446, 451 (1965), neither can inadmissible evidence form the basis of a finding of fact. The court below erred in basing its finding on inadmissible evidence.

C. The circuit court erred in giving preference to testimonial evidence over documentary evidence.

On the night of Respondent's arrest, Deputy Hess recorded on the DUI Information Sheet ("DUIIS") that she admitted "I was driving but I didn't hit the truck." (A. R. at P. 60.) The circuit court, however, chose Respondent's self-serving testimony at the administrative hearing (A. R. Tr. at P. 41) over the documentary evidence (DUIIS) completed contemporaneously with the arrest and the testimonial evidence of Deputy Hess. In *Groves v. Cicchirillo*, 225 W. Va. 474, 481, 694 S.E.2d 639, 646 (2010), this Court has previously addressed the issue of a circuit court preferring testimonial evidence over documentary evidence and found that "our law recognizes no such distinction in the context of drivers' license revocation proceedings."

Not only did the court demonstrate bias for testimonial evidence over documentary evidence in contravention to this Court's previous holdings, but it also substituted its judgment for that of the fact finder in contravention to this Court's holding in *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). Here, the hearing examiner made a finding that "the Investigating Officer had reasonable grounds to believe that the Respondent had been **driving** while under the influence of alcohol." [Emphasis added.] (A. R. at P. 10.) However, the circuit court below, did not specifically find that Respondent was not driving, however, based upon the language that it used, in paragraphs 5, 6, and 7 of its Final Order, the Court erroneously assumed, without a demonstrated basis from the record, that Respondent was not driving thus substituting its judgment for that of the fact finder on credibility determinations. Therefore, the circuit court committed reversible error below.

D. In paragraph four (4) of its Final Order, the circuit court erred in excluding the evidence of Petitioner’s performance on all of the field sobriety tests even though Respondent’s unsupported testimony about her alleged broken toe would not have affected the horizontal gaze nystagmus.

Deputy Hess testified at the administrative hearing that he administered three field sobriety tests to Respondent: “the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged [*sic*] stand test, of which she failed all three of them.” (A. R. Tr. at P. 11.) Deputy Hess further testified that he asked Respondent if she had any injuries which would affect her performance on the field sobriety tests, and she advised him that she did not. *Id.* at 30-31. In its Final Order, the OAH found that “[p]rior to the administration of the horizontal gaze nystagmus test, the Investigating Officer performed a medical assessment which showed the Respondent’s eyes had equal pupils, equal tracking and displayed no resting nystagmus.” (A. R. at P. 9.) After discussing Respondent’s performance on the horizontal gaze nystagmus test (“HGN”), the hearing examiner further found that “Respondent failed the horizontal gaze nystagmus test.” *Id.* at 10.

“[A] reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations.” Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000). Because the hearing examiner made factual findings that a medical assessment was properly conducted and did not find fault in the administration of the test, he accepted the officer’s determination of failure as fact. The hearing examiner, however, did not make a factual finding that Respondent’s self-serving testimony regarding a broken toe affected her ability to perform the walk-and-turn test or the one-leg stand test. Therefore, the court below erred in substituting its judgment for that of the fact finder regarding the

results of the field sobriety tests.

Even if this Court were to agree with the circuit court's discounting of the results of the walk-and-turn and one-leg stand tests, the results of the HGN test should not be negated because of an alleged broken toe. The HGN is designed to detect alcohol consumption by checking the driver's eyes and has no correlation to the driver's ability to stand or walk.

Moreover, this Court recently held in *White v. Miller*, 228 W. Va. 797, ---, 724 S.E.2d 768, 777 (2012),

that the horizontal gaze nystagmus test is a field sobriety test, and a driver's performance on the test is admissible as evidence that the driver may have consumed alcohol and may, therefore, be impaired. The results of the horizontal gaze nystagmus test are entitled to no greater weight than other field sobriety tests such as the walk-and-turn test and the one-leg stand test... Finally, this Court holds that a driver's license to operate a motor vehicle in this State cannot be administratively revoked solely and exclusively on the results of the driver's horizontal gaze nystagmus test. Rather, additional evidence in conjunction with the horizontal gaze nystagmus test is required for revocation: for example, the results of other field sobriety tests; the results of a secondary chemical test; whether the vehicle was weaving on the highway; whether the driver admitted consuming an alcoholic beverage; whether the driver exhibited glassy eyes or slurred speech; and/or whether the odor of an alcoholic beverage was detected.

While Petitioner is not asking that the HGN be given more weight than the other field sobriety tests performed by the investigating officer, by the same token, the HGN should not be given less weight. Here, Respondent, as a matter of fact, failed the HGN. That fact, coupled with the fact that Respondent had the odor of an alcoholic beverage emitting from her breath; had glassy and bloodshot eyes; admitted that she had been driving the Dodge Dakota truck but denied striking another vehicle; had slurred speech; staggered while walking; was unsteady while standing (A. R. at P. 9); and had admitted that she had consumed an alcoholic beverage prior to the incident (A. R.

at P. 12), justify the revocation of her driver's license even if the walk-and-turn and one-leg stand tests are ignored. Without question, an alleged broken toe cannot negate all other evidence of intoxication, and the circuit court erred in so finding.

E. The circuit court erred in substituting its judgment for that of the hearing examiner on credibility issues.

This Court has recognized that credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record. *Webb v. West Virginia Bd. of Medicine*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). In other words, an appellate court may only conclude a fact is clearly wrong when it strikes the court as “wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Brown v. Gobble*, 196 W. Va., 559, 563, 474 S.E.2d 489, 493 (1996) (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)). Further,

[s]ince a reviewing court is obligated to give deference to factual findings rendered by an administrative law judge, a circuit court is not permitted to substitute its judgment for that of the hearing examiner with regard to factual determinations. Credibility determinations made by an administrative law judge are similarly entitled to deference. Plenary review is conducted as to the conclusions of law and application of law to the facts, which are reviewed de novo.

Syllabus Point 1, *Cahill v. Mercer County Bd. of Educ.*, 208 W. Va. 177, 539 S.E.2d 437 (2000).

Here, the hearing examiner determined that the

Respondent's cross-examination of the Investigating Officer did not develop any evidence that would serve to compromise the evidence as set forth in the West Virginia DUI Information Sheet nor to discredit the testimony of the Investigating Office offered to support the information conveyed to that document as it relates to the offense of driving under the influence of alcohol.

(A. R. at P. 11.) Clearly, the hearing examiner made a credibility determination about the officer's testimony and the information he completed on the DUIIS. Specifically, Deputy Hess testified that "In the parking lot she did tell me that she was driving, but she said that she did not hit the truck."

(A. R. Tr. at P. 11.) This statement was also included on the DUIIS under the section entitled admissions or statements: "I was driving but I didn't hit the truck." (A. R. at P. 60.)

Such a credibility determination is the hearing examiner's to make and was not shown to be wrong by the circuit court below. All that the *Final Order* mentions regarding this credibility issue is that "Deputy Hess testified, in relevant part, at the administrative hearing that the petitioner admitted to driving on the night of the incident, however, the petitioner denied driving." (A. R. at P. 4.) It is true that Deputy Hess testified one way, and the Respondent's testimony was conflicting. That is the nature of these contested hearings. However, such conflict in testimony became the burden of the hearing examiner to weigh and determine which version is credible. In this instance, the hearing examiner listened to the testimony of both witnesses, observed their demeanor, and made a credibility determination. Without showing that the hearing examiner's conclusion was wrong with the force of a five-week-old, unrefrigerated dead fish, the circuit court erred in substituting its judgment for that of the hearing examiner.

Next, the circuit court substituted its judgment for that of the hearing examiner when it gave significant weight that "the petitioner testified, in relevant part at the administrative hearing that she was not under the influence of alcohol at the time of the incident." (A. R. at P. 4.) Of course, the investigating officer provided conflicting testimony when he testified that it was his opinion that Respondent operated a motor vehicle while under the influence. (A. R. Tr. at P. 4.) Again, it is the duty of the fact finder to make a credibility determination when there are such conflicts. Here, the

hearing examiner addressed the conflict in testimony: “the Respondent offered no credible rebuttal testimony regarding the indicia of physical symptoms of intoxication observed by the Investigating Officer and recorded on the West Virginia DUI Information Sheet.” (A. R. at P. 12.) Once more the circuit court substituted its judgment for that of the fact finder regarding the most relevant credibility determination in a DUI revocation matter yet did not show how the fact finder’s determination stunk like a dead fish. Clearly, the circuit court erred.

F. The circuit court failed to find how W. Va. Code § 29A-5-4(g) was violated by the Office of Administrative Hearings.

While the circuit court restated the standard of review in W. Va. Code § 29A-5-4(g) [the Administrative Procedures Act], when it overruled the findings or conclusions of the OA H, it did not outline each time how the administrative tribunal violated the statutory standards. West Virginia Code § 29A-5-4(g) states,

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 order 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.

In numbered paragraph two of the Final Order, the circuit court found that Deputy Hess “responded to an alleged motor vehicle accident in the parking lot of Tudor’s Biscuit World in Danville, Boone County, West Virginia (despite the fact the accident occurred on private property.)” (A. R. at P. 3.) The court below, however, did not explain how the administrative hearing examiner was wrong, arbitrary, or capricious in finding that the deputy responded to a “traffic accident.” (A.

R. at P. 9.)

In numbered paragraph four of the Final Order, the circuit court found that “no evidence or testimony was adduced at the administrative hearing to rebut the petitioner’s claim that she had a broken toe.” (A. R. at P. 4.) The administrative hearing examiner, however, rejected Respondent’s argument about her broken toe stating that “she did not produce any evidence or witness testimony to corroborate her claim.” (A. R. at P. 12.) As argued in subsection F above, the hearing examiner made a credibility determination between the officer’s evidence and Respondent’s testimony. The circuit court overruled that credibility determination without any sort of explanation as to how the hearing examiner’s determination violated the Administrative Procedures Act. This too is clear error by the circuit court.

In numbered paragraph eleven of the Final Order, the circuit court concluded “that based upon the evidence herein, the Office of Administrative Hearings erred by ruling there was sufficient evidence to conclude the petitioner operated a motor vehicle while under the influence of alcohol on August 31, 2010.” (A. R. at P. 6.) However, the Final Order does not enumerate the facts which were ignored to reach this conclusion.

G. The circuit court erred in misstating the law in paragraph eight (8) of its Final Order.

In numbered paragraph eight of its Final Order, the circuit court stated,

This Court is well aware that the West Virginia Supreme Court of Appeals has held in *Carte v. Cline*, 200 W. Va. 62, 488 S.E.2d 437 (W. Va. 1997), and it’s [*sic*] progeny, and *Cain v. Miller*, 225 W. Va. 467, 694 S.E.2d 309 (W. Va. 2010) that a police officer actually see or observe a person move, drive or operate a motor vehicle before a person can be charged with driving under the influence so long as the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

(A. R. at P. 5.)

The circuit court misstated Syllabus Point 3 of *Carte v. Cline* which held,

W. Va. Code § 17C-5A-1a(a) (1994) ***does not require*** that a police officer actually see or observe a person move, drive, or operate a motor vehicle while the officer is physically present before the officer can charge that person with DUI under this statute, so long as all the surrounding circumstances indicate the vehicle could not otherwise be located where it is unless it was driven there by that person.

[Emphasis added.]

Not only did the circuit court misstate the law (or at the least it made a typographical error in the critical part of the quotation), but the circuit court also inaccurately distinguished the instant matter from *Carte* and *Cain, supra*. The court below opined that *Carte* is inapplicable here because unlike the *Carte*, Respondent testified below to refute her driving and raised doubt with the officer's testimony because there had been other individuals present on the night of Respondent's arrest, but they did not testify. (A. R. at P. 5.) The court below also opined that *Cain, supra*, is distinguishable because unlike *Cain* who was passed out in front of his car when the investigating officer arrived and thus was the only reasonable suspect who could have driven the car, Respondent's passenger was present and could have driven the car. *Id.* To that end, the officer did testify at the administrative hearing that during his DUI investigation, he spoke with Respondent's passenger who informed him that he had not been driving. (A. R. Tr. at 37.) If Respondent truly had not been driving, she too could have produced the "real" driver to testify as to her innocence.

These conclusions about the applicability of *Carte* and *Cain* clearly relate back to the issue of credibility already addressed in subsection E above. Again, credibility determinations by the finder of fact in an administrative proceeding are binding unless patently without basis in the record.

Webb v. West Virginia Bd. of Medicine, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002) (per curiam) (quoting *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995)). Further, an appellate court may only conclude a fact is clearly wrong when it strikes the court as “wrong with the ‘force of a five-week-old, unrefrigerated dead fish.’” *Brown v. Gobble*, 196 W. Va., 559, 563, 474 S.E.2d 489, 493 (1996) (quoting *United States v. Markling*, 7 F.3d 1309, 1319 (7th Cir.1993)).

H. The circuit court erred in paragraph ten (10) in finding that a single answer by the officer was dispositive of a finding of DUI.

Numbered paragraph ten of the Final Order states:

Deputy Hess was questioned as follows:

Q. And you cannot state as you sit there whether or not she was under the influence at the time she was driving because you don't know. Correct?

A. That's correct.

See Tr. at 35. This testimony is dispositive of the issues herein. Obviously, “she” is referring to Ms. Dingess. Ms. Dingess also testified she did not operate [*sic*] motor vehicle while under the influence of alcohol on this date. Thus, Deputy Hess cannot state whether Ms. Dingess operated a motor vehicle while under the influence of alcohol [*sic*] and Ms. Dingess denies operating a motor vehicle while under the influence of alcohol on this date. It is clearly wrong in wrong [*sic*] in view of the reliable, probative, and substantial evidence of the whole record, pursuant to W. Va. Code § 29A-5-4(g), to ignore this evidence and testimony (which is precisely what occurred at the administrative level).

(A. R. at 6.)

The DUIIS, which was completed shortly after the accident, recorded Respondent’s admission to Deputy Hess on the night of her arrest that “I was driving but I didn’t hit the truck.”

(A. R. at P. 60.) On redirect examination, Deputy Hess testified that he had “no reason to believe that someone other than Ms. Dingess was the driver of the vehicle on that day and at that time” (A. R. Tr. at 36) and that Respondent admitted that “she was driving, but that she didn’t hit the truck.”

Id. at 37. Further, Deputy Hess testified that Respondent's passenger informed the officer that he had not been driving Respondent's vehicle. *Id.* at 38.

Additionally, the DUIIS submitted by Deputy Hess clearly shows that Respondent was staggering; was irate; had the odor of alcoholic beverage on her breath; was unsteady walking to the roadside and while standing; had slurred speech and glassy/bloodshot eyes; admitted "I was driving but I didn't hit the truck"; and failed the horizontal gaze nystagmus test because her eyes lacked smooth pursuit, displayed a distinct and sustained nystagmus at maximum deviation and displayed the onset of nystagmus prior to 45 degrees. (A. R. at P. 59-61.) Deputy Hess' testimony supported the information on the DUIIS regarding Respondent behavior being "extremely irate and acting up; real hard to control, you know, hard to talk to, and wasn't listening to a lot." (A. R. Tr. at P. 10.) His testimony further corroborated the DUIIS regarding Respondent's slurred speech (*Id.*) and her performance on the field sobriety tests. *Id.* at 11.

The totality of the evidence in the record clearly proves that more likely than not, Respondent was DUI on the night of her arrest. Clearly, one statement by the officer under cross-examination at the administrative hearing is **not** dispositive of the statutory requirement in W. Va. Code § 17C-5A-2(e): "the principal question at the [administrative] hearing shall be whether the person did drive a motor vehicle while under the influence of alcohol..." Accordingly, the OAH did not err in concluding that the investigating officer had "reasonable grounds to initiate contact with the Respondent on the date of the stated offence and reasonable suspicion to believe that the Respondent had been driving a motor vehicle in this State while under the influence of alcohol." (A. R. at P. 13.)

In its Final Order, the OAH correctly concluded that

Evidence reflecting that a driver operated a motor vehicle upon the public streets or

highways, exhibited symptoms of intoxication, and had consumed alcoholic beverages, constitutes sufficient proof, under a preponderance of the evidence standard, to warrant the administrative revocation of a driver's license for driving while under the influence of alcohol. *Albrecht v. State*, 314 S.E.2d 859, 865 (W. Va. 984).

(A. R. at P. 14.) As outlined above, Respondent had the odor of an alcoholic beverage emitting from her breath when Deputy Hess encountered her. (A. R. at P. 60.) Further, during Respondent's testimony, she admitted that she had consumed an alcoholic beverage prior to the incident. (A. R. Tr. at P. 43.) Next, although Respondent's self-serving testimony at the administrative hearing (A. R. Tr. at P. 41) contradicts her statement to the officer on the night she was arrested, she admitted to the investigating officer that "I was driving but I didn't hit the truck." (A. R. at P. 60.) That admission along with fact that she was with her vehicle in the parking lot when the investigating officer arrived is sufficient to indicate that she had been driving the subject vehicle on the evening in question. Finally, on the night of her arrest, Respondent exhibited symptoms of intoxication: she was staggering; was irate; had the odor of alcoholic beverage on her breath; was unsteady walking to the roadside and while standing; had slurred speech and glassy/bloodshot eyes; failed the horizontal gaze nystagmus test because her eyes lacked smooth pursuit, displayed a distinct and sustained nystagmus at maximum deviation and displayed the onset of nystagmus prior to 45 degrees (A. R. at 59-61); and was "extremely irate and acting up; real hard to control, you know, hard to talk to, and wasn't listening to a lot." (A. R. Tr. at P. 10.)

It is blatantly apparent that based upon the *Albrecht* test, Respondent was driving under the influence of alcohol on the night of her arrest, and one answer by the investigating officer during cross-examination at the administrative hearing cannot negate the rest of the evidence that he had already gathered and submitted to the DMV. The circuit court erred in so concluding.

VI. CONCLUSION

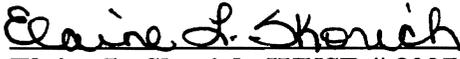
For the above-reasons, the circuit court should be reversed.

Respectfully submitted,

**JOE E. MILLER, Commissioner,
Division of Motor Vehicles,**

By Counsel,

**DARRELL V. McGRAW, JR.
ATTORNEY GENERAL**


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 12-1273
(Circuit Court Civil Action No. 11-C-218)

**JOE E. MILLER, COMMISSIONER OF
WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,**

Respondent below/Petitioner

v.

AMANDA DINGESS,

Petitioner below/Respondent.

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 7th day of January, 2013, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

Matthew M. Hatfield, Esquire
P. O. Box 598
Madison, WV 25130


Elaine L. Skorich