



BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

v.

No. 12-0153

DONNA L. MCCORMICK,

Respondent.

PETITIONER'S REPLY BRIEF

Respectfully submitted,

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

By counsel,

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

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Now comes Petitioner, Joe E. Miller, Commissioner of the West Virginia Division of Motor Vehicles (hereinafter, "Division"), by counsel, Janet E. James, Senior Assistant Attorney General, and submits this brief in the above-captioned case pursuant to the Court's *Scheduling Order*.

I. THE CIRCUIT COURT ERRED IN FINDING THAT THE FIELD SOBRIETY TESTS WERE IMPROPERLY RELIED ON.

In *Appellee's Response to Brief of Appellant*, Respondent challenges the legitimacy of the field sobriety tests administered on the night in question. The *Respondent's Motion to Supplement Appendix* contains a portion of an outdated, 1984 National Highway Traffic Safety Administration ("NHTSA") Manual. The appropriate NHTSA standards are those contained in *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012), which were discussed at 724 S.E.2d 777.

In her *Response*, Respondent mis-states the standard to be applied in determining the weight to be given to the horizontal gaze nystagmus ("HGN"), walk-and-turn, and one-leg-stand tests. Respondent relies on *State v. Barker*, 17 W. Va. 194 (1988) and *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E. 2d 952 (2000) to argue that "strict compliance" with the training guidelines for field sobriety tests promulgated by the NHTSA is required. This erroneous standard is also contained in

the circuit court's order being appealed. App'x. At 92. As the Commissioner noted in the Amended Final Order, even NHTSA does not require strict compliance with the standards for administration of the tests: "The preface to the NHTSA field sobriety testing manual clearly states that '...Even under less than ideal conditions, [field sobriety] tests will generally serve as valid and useful indicators of impairment...', and that '...variations from the ideal...does not necessarily make the standardized field sobriety tests invalid.'" App'x. At 82.

However, *Homan* was overturned in *State v. Boczar*, 113 Ohio St. 3d 148 (2007) (cited by this Court in *White v. Miller*, 228 W. Va. 797, 724 S.E.2d 768 (2012)), a case in which the Supreme Court of Ohio held that "substantial compliance" with the NHTSA guidelines suffices to allow evidence of the subject's performance on the field sobriety tests. The *Boczar* court concluded:

Therefore, we hold that HGN test results are admissible in Ohio without expert testimony so long as the proper foundation has been shown both as to the administering officer's training and ability to administer the test and as to the actual technique used by the officer in administering the test.

113 Ohio St.3d 153, 863 N.E.2d 160.

This Court reached a similar result in *White, supra*.

In *White*, this Court undertook an analysis of the HGN test and discussed the *Barker* case extensively. The Court found that the HGN 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 Court also placed the following parameters on the results of the HGN test: They are entitled to no greater weight than other field sobriety tests such as the walk-and-turn test and the one-leg stand test; as in *Barker, supra*, the results cannot be used to determine a specific blood

alcohol content; and, upon a challenge by the driver of a motor vehicle to the admission in evidence of the results of the HGN test, the police officer who administered the test, if asked, should be prepared to give testimony concerning whether he or she was properly trained in conducting the test, and assessing the results, in accordance with the protocol sanctioned by the National Highway Traffic Safety Administration and whether, and in what manner, he or she complied with that training in administering the test to the driver.

The evidence in the present case meets the standards for admissibility and weight set forth in *White, supra*. As in *White*, there is evidence in addition to the HGN results to support the finding that Respondent was DUI. The *Petitioner's Brief* fully sets forth the evidence that Trooper Miller was a trained police officer, and that he explained and demonstrated the tests and he explained in detail the manner in which the Respondent failed the tests. Pet.Brf. At 3-4, 8-9. The HGN test was but one of the field sobriety tests which were relied upon, together, to lead Trooper Miller to develop probable cause for the arrest of the Respondent for driving under the influence of alcohol. Finally, the HGN test was not used by Trooper Miller to estimate Respondent's blood alcohol content.

With its wholesale dismissal of the field sobriety test evidence, the circuit court violated the standard of review which requires deference to the trier of fact.

Consequently, in terms of the field sobriety tests, questions of fact concerning whether White drove a motor vehicle while under the influence of alcohol were left to be resolved by the Commissioner.

724 S.E.2d 777.

The circuit court held: "Petitioner was never given the opportunity [sic] take the field sobriety tests as promulgated by the West Virginia State Police Academy and in accordance to the NHTSA

standards.” App’x. At 91. The West Virginia State Police Academy does not promulgate the rules; NHTSA promulgates a training guide which is used by West Virginia police in their training. Respondent was not only given the opportunity to take the tests, she took the properly-administered tests and failed them.

II. THE CIRCUIT COURT ERRED IN FINDING THAT THE INTOXIMETER RESULTS WERE IMPROPERLY RELIED ON.

Respondent’s position with regard to the Intoximeter results amounts to no more than a complaint that the Commissioner did not accept her version of events. As was fully set forth in the *Petitioner’s Brief*, the circuit court erred in ignoring, and certainly not giving deference to, the credibility determinations made by the Commissioner in the Amended Final Order. The Commissioner found that the secondary chemical test was administered in accordance with legislative rule, and that Trooper Miller observed the Respondent for the requisite 20 minutes prior to administration of the test. App’x. At 60. He also found that the “Arresting Officer’s testimony appeared credible and consistent,” and that “Respondent did not appear credible...” App’x. At 64.

A Hearing Examiner is not required to make “explicit credibility findings’ as to each bit of conflicting testimony, so long as his factual findings as a whole show that [the ALJ] ‘implicitly resolve[d]’ such conflicts.” *N.L.R.B. v. Beverly Enterprises-Massachusetts, Inc.*, 174 F.3d 13, 26 (1st Cir. 1999) (quoting *N.L.R.B. v. Berger Transfer & Storage Co.*, 678 F.2d 679, 687 (7th Cir.1982)). *Accord, J.P. ex rel. Peterson v. County Sch. Bd.*, 516 F.3d 254, 261 (4th Cir. 2008) (“While the hearing officer did not explicitly state that he found the School Board’s witnesses more persuasive, our case law does not require an IDEA hearing officer to offer a detailed explanation of his credibility assessments. . . . Moreover, because the hearing officer ultimately determined that J.P.

made more than minimal progress under the 2004 IEP and that the 2005 IEP was adequate (views that were advocated by the School Board's witnesses and disagreed with by the parents' witnesses), it is apparent that the hearing officer in fact found the School Board's evidence more persuasive.”): *N.L.R.B. v. Katz's Delicatessen*, 80 F.3d 755, 765 (2d Cir.1996) (An ALJ may resolve credibility disputes implicitly rather than explicitly where his “treatment of the evidence is supported by the record as a whole.”); see also *Martin v. Randolph County Bd. of Ed.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) (emphasis added) (“The ALJ, who apparently disbelieved the plaintiff's recollection of the circumstances leading up to the continuance, did not exceed permissible bounds in accepting testimony of the defendant's witnesses about this exchange.”).

Here, the Hearing Examiner found that the officer's testimony was more credible, and clearly resolved the issue of the 20-minute observation period by finding that in fact Trooper Miller observed Respondent for the requisite time. The circuit court noted, “Trooper Miller testified that he could have left the building and room where the Intoximeter ECIRII was located, thus prohibiting his [sic] from conducting the necessary 20 minute observation period...” App'x. At 91. The circuit court reiterates this finding at ¶17. (App'x. at 92), before summarily finding that “there was not sufficient evidence to sustain the results of the intoximeter test results.” App'x. At 92. The testimony of the officer was reconciled by the Hearing Examiner, yet the circuit court dismissed the matter outright without stating why it did not accept the credibility determination made by the Hearing Examiner. This Court has held, “[a]n appellate court may not set aside the factfinder's resolution of a swearing match unless one of the witnesses testified to something physically impossible or inconsistent with contemporary documents.” *Martin v. Randolph County Bd. of Ed.*,

195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995). The Hearing Examiner here made exactly that kind of resolution and the circuit court violated that rule. The circuit court should be reversed.

C. THE CIRCUIT COURT'S HOLDING THAT THE FINDINGS AND CONCLUSIONS OF THE PETITIONER IN THE AMENDED FINAL ORDER WERE REACHED IN A BIASED, PREJUDICED AND PRECONCEIVED MANNER IS IN ERROR, AND THE COURT ITSELF DISREGARDED EVIDENCE AND APPLIED THE WRONG STANDARD TO EVALUATION OF THE EVIDENCE.

The Commissioner properly reconciled conflicts in the evidence and weighed the evidence in this matter in the *Amended Final Order*. The documentary evidence was properly admitted into the record pursuant to W. Va. Code § 29A-5-2 and 91 C.S.R. 1-3.9.4; *Crouch v. West Virginia Div. of Motor Vehicles*, 219 W.Va. 70, 631 S.E.2d 628 (2006); *Lowe v. Cicchirillo*, 223 W.Va. 175, 672 S.E.2d 311 (2008) and *Groves v. Cicchirillo*, 694 S.E.2d 639 (2010). The documentary evidence, along with the testimonies of Respondent and Trooper Miller, were weighed and decided upon by the Hearing Examiner.

The statement in the *Amended Final Order* regarding unequal tracking and pupil size (§12, App'x. At 58) is a criterion used by officers who perform the HGN test. It is included on the DUI Information Sheet. App'x. At 3. The facts found by the Hearing Examiner and supported by the DUI Information Sheet are that Respondent did not exhibit any signs which would invalidate the test. She had equal tracking and equal pupils (App'x. at 3). Furthermore, Respondent told Trooper Miller that she had no conditions which would affect her ability to take the field sobriety tests. App'x. At 16-17.

The credibility determinations made were based upon the testimonies of the Respondent and Trooper Miller. There is no evidence that the Hearing Examiner “was attempting to discredit Ms. McCormick,” as Respondent avers in her brief (at 15).

The only true challenge made to the Intoximeter result is the 20-minute observation period, and, as was argued *supra*, the Hearing Examiner took the totality of Trooper Miller’s testimony, and that of the Respondent, into consideration and made the determination that Trooper Miller observed the Respondent for the requisite time.

The Petitioner complied with the *Circuit Court Order on Administrative Appeal* (App’x. at 44) in drafting the *Amended Final Order* (App’x. At 56). The decision of the Commissioner is supported by the record, and his rulings with regard to reconciliation of conflicts in the evidence and credibility of witnesses, is set forth exhaustively. The circuit court’s order must be reversed.

CONCLUSION

WHEREFORE, based upon the foregoing and for such other reasons as may appear to the Court, the Petitioner hereby respectfully requests the *Order* entered by the circuit court of Lincoln County on January 6, 2012 A.D. be reversed by this Court.

Respectfully submitted,

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

By counsel,

**DARRELL V. McGRAW, JR.
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CERTIFICATE OF SERVICE

I, Janet E. James, Senior Assistant Attorney General, do hereby certify that the foregoing "Petitioner's Reply Brief" was served upon the following by depositing a true copy thereof, postage prepaid, in the regular course of the United States mail, this 16th day of July, 2012, addressed as follows:

David O. Moye, Esquire
Post Office Box 1074
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JANET E. JAMES