

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-0214**

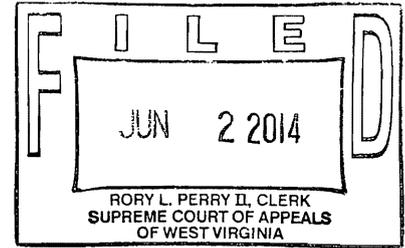
**STEVEN O. DALE, Acting Commissioner,  
Division of Motor Vehicles,**

**Petitioner,**

**v.**

**JASON L. THOMPSON**

**Respondent.**



**BRIEF OF THE DIVISION OF MOTOR VEHICLES**

**Respectfully submitted,**

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COMMISSIONER, DIVISION  
OF MOTOR VEHICLES,**

**By Counsel,**

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## I. ASSIGNMENTS OF ERROR

- A. **The circuit court erred in relying on procedural rules which are inapplicable to the Office of Administrative Hearings.**
- B. **The circuit court erred in substituting its judgment for that of the Office of Administrative Hearings' Chief Hearing Examiner.**
- C. **The circuit court erred in reversing the matter and reinstating Mr. Thompson's driver's license instead of remanding the matter to the Office of Administrative Hearings for another hearing and/or a revised Final Order.**

## II. STATEMENT OF THE CASE

On April 2, 2012, Richard Kern of the Huntington Police Department, the Investigating Officer (“I/O”) in this matter, observed a motor vehicle traveling in an area known for illegal drug activity in Huntington, Cabell County, WV and, as a result, became suspicious. (App.<sup>1</sup> 3, Audio 2<sup>2</sup> at 7:20, 8:15, 8:35.) The I/O did not immediately initiate an investigative stop of the motor vehicle. Instead, the I/O, while parked a distance of approximately 150 feet from the location of Mr. Thompson’s motor vehicle, witnessed Mr. Thompson park the motor vehicle on the roadside, exit the motor vehicle, and begin talking on a cell phone. (Audio 2 at 7:30, 8:50.) The I/O approached the driver and noted that there were no other individuals present in or around the motor vehicle. (Audio 2 at 8:20, 8:35.) The I/O could easily see into the motor vehicle through the back windows because it was a single cab truck with no rear seats. *Id.* The I/O identified the driver as Jason

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<sup>1</sup> App. refers to the Appendix filed contemporaneously with the *Brief of the Division of Motor Vehicles*.

<sup>2</sup> The CD, which Mr. Thompson submitted with his *Memorandum of Law* to the circuit court below, contains audio recordings from two administrative hearings: October 12, 2012 and February 7, 2013. Because the Office of Administrative Hearings did not provide transcripts for these hearings (See App. at P. 48), the DMV shall cite to the recording from the first hearing (October 12, 2012) as Audio 1 and shall cite to the audio of the second hearing (February 7, 2013) as Audio 2.

Thompson. (App. at P. 188.)

Mr. Thompson was licensed and qualified to operate Class A commercial motor vehicles on the date of the stated offense. (App. at P. 193.) Mr. Thompson had the odor of an alcoholic beverage emanating from his breath, glassy eyes, and slurred speech. (App. at P. 188 and Audio 2 at 9:40.) Mr. Thompson advised the I/O that he had consumed six (6) or eight (8) beers on the date of the stated offense. (App. at P. 18 and Audio 2 at 10:02, 10:15.) The I/O observed two beers in a cooler, two open beers in the cab of the truck, as well as an unknown quantity of 12 ounce Bud Light beers in a case also in the truck. (App. at P. 189.) Mr. Thompson was unsteady while exiting the vehicle, while walking to the roadside and while standing. (App. at P. 189 and Audio 2 at 10:30.) The I/O explained, demonstrated, and administered the horizontal gaze nystagmus (“HGN”) test to Mr. Thompson. (App. at P. 189 and Audio 2 at 11:30, 12:38.) During administration of the HGN test, Petitioner’s eyes did not smoothly follow the stimulus used to administer the test, exhibited distinct and sustained nystagmus at maximum deviation, and displayed the onset of nystagmus prior to the angle of forty-five (45) degrees. (App. at P. 198 and Audio 2 at 11:55.) Mr. Thompson refused to submit to the walk-and-turn and one-leg stand field sobriety tests. (App. at P. 190 and Audio 2 at 12:55.)

Pursuant to W. Va. Code § 17C-5A-2(f) (2010), the I/O had reasonable grounds to believe Mr. Thompson had been driving while under the influence of alcohol, controlled substances, or drugs and transported him to the Huntington Police Department for processing and the administration of the designated secondary chemical test (“SCT”) to determine the alcohol concentration level of his blood. (App. at P. 196 and Audio 2 at 13:15, 13:33.) The I/O read and provided Mr. Thompson with a copy of the West Virginia Implied Consent Statement containing the penalties for refusing to

submit to a designated SCT, required by W. Va. Code § 17C-5-4 (2010), and the fifteen-minute time limit for refusal specified in W. Va. Code § 17C-5-7 (2010.) (App. at P. 197 and Audio 2 at 13:40, 14:15, 14:30.)

The SCT designated by the Huntington Police Department is a SCT of the breath. (App. at P. 3 at 14:02.) The I/O was trained to administer the SCT at the WV State Police Academy in September of 2008. (App. at P. 191 and Audio 1 at 7:02 and Audio 2 at 13:55.) Mr. Thompson advised the I/O that he would not submit to a SCT of the breath. (App. at P. 196 and Audio 2 at 13:49, 14:40.) After fifteen minutes, the I/O again asked Mr. Thompson to submit to a SCT of the breath. (App. at P. 196 and Audio 2 at 14:48.) Mr. Thompson again advised the I/O that he would not submit to a SCT of the breath. (App. at P. 196 and Audio 2 at 14:55.)

On May 4, 2012, the West Virginia Division of Motor Vehicles (“DMV”) sent Mr. Thompson an *Order of Revocation* for DUI and for refusing to submit to the SCT and an *Order of Disqualification* for the same. (App. at PP. 198-199.) Mr. Thompson timely appealed the orders to the Office of Administrative Hearings (“OAH.”) (App. at P. 200.) On October 12, 2012, the matter convened for an administrative hearing before the OAH (App. at PP. 201-202), and on February 7, 2013, the matter reconvened for a second administrative hearing (App. at P. 203.) Mr. Thompson was present at the first administrative hearing and testified that his ex-wife was driving the motor vehicle on the night in question. (Audio 1 at 16:06.) He testified that he did not have slurred speech and admitted that he had drunk six or seven Bud Light beers earlier that evening. (Audio 1 at 17:20, 21:40.) Mr. Thompson admitted that he refused to submit to the secondary chemical test to determine the alcohol concentration in this blood. (Audio 1 at 20:06.)

On May 16, 2013, the OAH entered its final order which reversed the DMV’s *Order of*

*Revocation and Order of Revocation.* (App. at PP. 204-212.) Mr. Thompson received said *Order* on June 1, 2013. (App. at P. 237.) On May 25, 2013, the DMV filed an *Amended Motion for Reconsideration* asking the OAH to reconsider its final order and served Mr. Thompson with a copy of the same via regular mail. (App. at PP. 214-216 and 232-235.) On June 28, 2013, the OAH entered its revised final order. (App. at PP. 217-229.) Mr. Thompson received the same on June 29, 2013. (App. at P. 238.) On or about July 25, 2013, Mr. Thompson filed an administrative appeal with the Circuit Court of Wayne County (App. at PP. 12-45), and on January 31, 2014, the circuit court entered its order reversing the order of the OAH and reinstating Mr. Thompson's licenses. (App. at PP. 4-11.)

This case is an appeal from the final order of the circuit court reversing the OAH's *Revised Decision of Hearing Examiner and Final Order of Chief Hearing Examiner* that upheld an *Order of Revocation* which revoked Mr. Thompson's driver's license for driving under the influence ("DUI") of alcohol and for refusing to submit to the secondary chemical test ("SCT") and which upheld an *Order of Disqualification* for his commercial driver's license based upon the same DUI offense.

### **III. SUMMARY OF ARGUMENT**

At the time of Mr. Thompson's administrative hearings, the OAH had no Legislative rules in effect which governed the reconsideration of its decisions, and the circuit court below inappropriately attributed the Legislative rules for administrative hearings conducted by the DMV to the OAH. The circuit court lacked authority to assign the DMV's rules to the OAH. Further, in contravention to this Court's holding in *Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 569 S.E.2d 225 (2002), the circuit court substituted its judgment on a credibility assessment for the judgment

of the OAH hearing examiner. Finally, when the circuit court found that there was a conflict in evidence below, it erred in reversing the matter and reinstating Mr. Thompson's driver's license instead of remanding the matter to the OAH for another hearing and/or a revised final order.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Pursuant to Rule 20 of the Revised Rules of Appellate Procedure (2010), the Commissioner requests oral argument in this case because the interpretation of 91 CSR 1 *et seq.* in relation to the OAH is a matter of first impression, and this matter involves issues of fundamental public importance.

#### **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 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. 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):

**B. The circuit court erred in relying on procedural rules which are inapplicable to the Office of Administrative Hearings.**

In its *Opinion Order*, the Circuit Court of Wayne County concluded:

West Virginia Administrative Procedures Act, *W. Va. Code § 29A-5-4*, West Virginia Code § 17C-5A-2 and the Code of State Rules (CSR) § 91-1-3 do not provide for modification of a Final order of Chief Hearing Examiner by way of a Motion for Reconsideration. However, if it is permissible by means of Rule 59 or Rule 60 of the West Virginia Rules of Civil Procedure, the Constitutional guarantee of a meaningful opportunity to be heard, as well as revised findings and conclusions should be satisfied before a reversal of the Final Order of the Chief Hearing Examiner could be valid. *W. Va. CONST. Art.3 § 10, Miller v. Wood* 229 W. Va. 545, 729 S.E.2d 867, U.S.C.A. CONST. AMEND. XIV.

West Virginia CSR § 91-1-3(3.6.2) requires a Notice of Hearing to state a date, time and place of hearing, as well as a statement of the issues to be addressed and a statement of the consequences for failing to appear.

West Virginia Code § 17C-5A-2 and West Virginia CSR § 91-1-3 requires a recording of the hearing be made and a certified transcript be available for Judicial Review. *W. Va. CSR § 91-1-3; W. Va. Code 17C-5A-2; Rule 4(b) & (c) Rules of Procedure for Administrative Appeals.*

(App. at P. 7.)

Next, the circuit court opined,

Upon Review of the records presented in this case, the Court can find no evidence of a Notice of Hearing upon the Amended Motion for Reconsideration, and no evidence of a transcript of a hearing conducted upon the Amended Notice for Reconsideration, and no proof of service upon the Petitioner, **at his designated change of address**, of a Notice containing a date, time and place for hearing upon the Notice for Reconsideration.

[Emphasis added.] (App. at P. 8.)

Title 91, Series 1, Section 2.1 of the W. Va. Code of State Rules clearly states that “This legislative rule applies to persons contesting any order or decision of the Commissioner of Motor Vehicles pursuant to Chapter 29A of the Code.” Further, Section 3.1.2 defines a DUI hearing as

the administrative procedures conducted *by the Commissioner* pursuant to W. Va. Code §§17C-5A-1 et seq. and 29A-5-1 et seq. as applied to contested cases arising out of the enforcement of administrative revocations and disqualifications imposed under the provisions of W. Va. Code §§17C-5A-2 and 17E-1-13 for driving under the influence of alcohol, controlled substances or drugs, driving while having a blood alcohol concentration above the legal limit or refusing to submit to a chemical test.

[Emphasis added.] W. Va. C.S.R. 91-1-3.1.2 (2005). The instant matter was not heard by the DMV but by the OAH, a “separate operating agency within the Department of Transportation.” W. Va. Code § 17C-5C-1(a) (2010).

On June 10, 2010, the OAH came into existence pursuant to W. Va. Code § 17C-5C-3 (2010). Two years later, the OAH was given rule making authority pursuant to W. Va. Code § 17C-5C-4a (2012): “The Office of Administrative Hearings may propose legislative and procedural rules in accordance with the provisions of article three, chapter twenty-nine-a of this code in order to implement the provisions of this article and to carry out the duties prescribed therein.” The OAH, however, did not promulgate its own Legislative rules until three years after it was created. *See*, W. Va. Code of State Rules § 105-1-1.4 (2013)<sup>3</sup>. The OAH held Mr. Thompson’s administrative hearings on October 12, 2012 and February 7, 2013, which were during the period of time that no Legislative rules governed the OAH administrative hearings. Accordingly, the rules for the DMV’s hearing procedures are inapplicable to hearings conducted by the OAH, and the OAH had no effective Legislative rules at the time of Mr. Thompson’s hearing; therefore, the circuit court erred in relying on W. Va. C. S. R. § 91-1-3 (2005). There simply was no rule in place at the time of Mr. Thompson’s hearing that required the OAH to conduct a hearing on a motion for reconsideration.

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<sup>3</sup> The OAH filed its proposed rule on May 20, 2013, and the DMV was aware of proposed rule “§105-1-18: Motion to Reconsider” at the time that it filed its motion to reconsider on May 25, 2013.

Therefore, the circuit court erred in so holding.

Further, the circuit court was also clearly wrong to conclude that there was no evidence that Mr. Thompson received “at his designated address” notice of the DMV’s request for reconsideration. On May 23, 2012, the OAH (and not the DMV) received a handwritten letter from Mr. Thompson requesting that the DMV send all correspondence to 851 Bronson Court, Huntington, WV 25704 until January 1, 2013. (App. at P. 231.) Pursuant to W. Va. Code § 17B-2-13(a) (1999), the burden was on Mr. Thompson to notify the DMV - not the OAH - of any address change.

Whenever any person after applying for or receiving a driver’s license moves from the address named in the application or in the license issued to the person, or when the name of the licensee is changed by marriage or otherwise, the person **shall** within twenty days thereafter notify the division in writing of the old and new addresses or of the former and new names and of the number of any license then held by the person on the forms prescribed by the division.

[Emphasis added.]

There is no record that Mr. Thompson completed a change of address form with the DMV as is required by W. Va. Code § 17B-2-13(a) (1999); therefore, the DMV was required to use the address on file in its official records. There is also no evidence that Mr. Thompson even notified the DMV that he intended to move temporarily to the Bronson Court address. Mr. Thompson was responsible for timely updating his change of address with the DMV and cannot cry foul because his failure to follow the law had ramifications. This issue is well settled by this Court:

The West Virginia Division of Motor Vehicles satisfies the requirements of due process by mailing a copy of a driver's license revocation or suspension order to an individual whose license to drive is revoked or suspended, addressed to such individual at the last recorded address shown by the Division's records.

Syl. Pt. 8, *State ex rel. Miller v. Reed*, 203 W. Va. 673, 510 S.E.2d 507 (1998).

“The burden is on the licensee to notify the DMV in writing if he changes his address, and

the DMV has no obligation to track him down.” *State ex rel. Mason v. Roberts*, 173 W. Va. 506, 318 S.E.2d 450 (1984). Further, this Court has held that “Pursuant to the provisions of this section, an individual who holds a driver’s license issued by the division of motor vehicles is required to notify the division in writing concerning a change of address within twenty (20) days after a change of residence on the prescribed form.” *Miller v. Reed*.

The *Amended Motion for Reconsideration* asking the OAH to reconsider its *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* (App. at PP. 214-216) was emailed to the OAH and carbon copied by mail to Mr. Thompson’s address of record. (App. at PP. 232-233.) Since Petitioner did not comply with his statutory duty regarding changes of address with the DMV, counsel below mailed the *Motion* to the only address on file with the DMV: Rt. 1, Box 287, Salt Rock, WV 25559. (App. at P. 193.) Miraculously, on June 1, 2013 (App. at P. 237), Petitioner had no trouble receiving the *Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* entered on May 16, 2013. (App. 212.) On June 29, 2013, Mr. Thompson also signed for (App. at P. 238) the *Revised Decision of the Hearing Examiner and Final Order of the Chief Hearing Examiner* entered on June 28, 2013, by the OAH<sup>4</sup> even though he informed the circuit court that he had not received the DMV’s *Amended Motion for Reconsideration* which was sent to the same address on May 24, 2013. (App. at P. 236.)

West Virginia Code § 17A-2-19 (1951) states that

Whenever the department is authorized or required to give any notice under this chapter or other law regulating the operation of vehicles, unless a different method

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<sup>4</sup> To better understand the U. S. Postal Service confirmation page, one must look at the Customer Reference Number at the bottom of the page. “FO” in the middle of string of numbers stands for “Final Order,” and the 347137CDEF refers to the OAH File Number of Mr. Thompson’s case.

of giving such notice is otherwise expressly prescribed, such notice shall be given either by personal delivery thereof to the person to be so notified or by deposit in the United States mail of such notice in an envelope with postage prepaid, addressed to such person at his address as shown by the records of the department. The giving of notice by mail is complete upon the expiration of four days after such deposit of said notice. Proof of the giving of notice in either such manner may be made by the certificate of any officer or employee of the department or affidavit of any person over eighteen years of age, naming the person to whom such notice was given and specifying the time, place, and manner of the giving thereof.

Therefore, even if Petitioner was again living at the Salt Rock address but did not receive a copy of the *Amended Motion*, the DMV's duty was complete four days after counsel below placed a copy in the mail. Accordingly, Mr. Thompson denied himself the opportunity to respond to the *Amended Motion for Reconsideration*, and the circuit court was wrong to conclude that "The Revised Final Order of Chief Hearing Examiner was entered upon unlawful procedures without proper Notice to the Petitioner giving him a meaningful opportunity to be heard." (App. at P. 10.)

**C. The circuit court erred in substituting its judgment for that of the Office of Administrative Hearings' Chief Hearing Examiner.**

Incredibly, the circuit court opined in its *Opinion Order* that

This Court is of the opinion that a Judicial Review is not the appropriate forum to second guess the decision of the Hearing Examiner as to whether or not the Petitioner [Mr. Thompson] committed the offense of Driving Under the Influence. In this case, I am of the opinion that the Petitioner presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on May 16, 2013 that reversed the Commissioner's revocation of Petitioner's license. Likewise, this Court is of the opinion that the investigating officer presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on June 28, 2013 that reinstated the Commissioner's revocation of Petitioner's license. The evidence of the investigating officer and the Petitioner are conflicting, and the Hearing Examiner has broad discretion in making findings of fact. This Court cannot substitute its opinion on the evidence for that of the Hearing Examiner. *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996), *Billings v. Civil Service Commission*, 154 W. Va. 688, 178 S.E.2d 801 (1971).

(App. at P. 5.) Even though the circuit court stated that it cannot substitute its opinion on the

evidence for that of the hearing examiner, that is exactly what happened here.

All documents in the DMV file (including the DUI Information Sheet and the intoximeter ticket) were required to be admitted into evidence, subject to rebuttal. West Virginia Code § 29A-5-2(b) (1998) specifically states:

All evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

*See also, Crouch v. W. Va. Div. of Motor Vehicles*, 219 W. Va. 70, 631 S.E.2d 628 (2006) (holding “Without a doubt, the Legislature enacted W. Va. Code § 29A–5–2(b) with the intent that it would operate to place into evidence in an administrative hearing [a]ll evidence, including papers, records, agency staff memoranda and documents in the possession of the agency, of which it desires to avail itself...” W. Va. Code § 29A–5–2(b) (1998).

Indeed, admission of the type of materials identified in the statute is mandatory. *Lowe v. Cicchirillo*, 223 W. Va. 175, 672 S.E.2d 311 (2008) (holding that admission of hospital record showing motorist's blood alcohol content on night of accident was .33 that was part of DMV's records was mandatory); and *Groves v. Cicchirillo*, 225 W. Va. 474, 694 S.E.2d 639 (2010) (reiterating the holding in *Crouch, supra*, 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.) *See also, Dale v. Odum*, No. 12-1403 (W. Va., Feb. 11, 2014) (per curiam). This Court in *Crouch, supra*, also indicated that “the fact that a document is deemed admissible under the statute does not preclude the contents of the document from being challenged during hearing.

Rather, the admission of such a document into evidence merely creates a rebuttable presumption as to its accuracy.” *Crouch* at 76, 634, FN. 12.

Here, there was more than sufficient un rebutted evidence presented to the OAH to determine by a preponderance of the evidence that Mr. Thompson drove a vehicle in this state while under the influence of alcohol and refused to submit to the designated secondary chemical test. First, it is un rebutted that Mr. Thompson had the odor of alcoholic beverage on his breath; was unsteady while walking to the roadside and while standing; admitted to drinking 6 or 8 beers; had two 12 ounce bottles of Bud Light beer sealed in the cooler, two beers open in the cab of his truck, and an unknown number of beers still in the case; failed the HGN test; and refused to submit to the secondary chemical test. (App. at PP. 189 and 191.)

At the administrative hearing which occurred six months after his arrest for DUI, Mr. Thompson testified that it was not he but his wife who was driving on the night in question. (Audio 1 at 16:06.) Mr. Thompson did not bring his wife to either of the administrative hearings to testify on his behalf even though he knew after the first hearing that the matter was continued in order to secure the officer’s presence at the second hearing. Further, there is nothing on the DUI Information Sheet or in the I/O’s testimony, however, to indicate that Mr. Thompson had told the same story to the I/O on the night of his arrest.

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.

Syl. Pt. 3, *Carte v. Cline*, 200 W. Va. 162, 488 S.E.2d 437 (1997). *See also*, Syl. Pt. 2, *Cain v. W. Va. Div. of Motor Vehicles*, 225 W. Va. 467, 694 S.E.2d 309 (2010); *Reger v. W. Va. Dep’t of*

*Transp., Div. of Motor Vehicles*, 11-1704, 2013 WL 2477269 (W. Va. June 7, 2013). Therefore, the I/O did not need to see Mr. Thompson drive his truck on the night of his arrest if all the surrounding circumstances indicate the truck could not otherwise be located where it was unless it was driven there by Mr. Thompson.

Nevertheless, the I/O testified that he had observed a motor vehicle traveling in an area known for illegal drug activity in Huntington, and, as a result, became suspicious. The I/O did not immediately initiate an investigative stop of the motor vehicle. Instead, the I/O, while parked a distance of approximately 150 feet from the location of Mr. Thompson's motor vehicle, witnessed Mr. Thompson park the motor vehicle on the roadside, exit the motor vehicle, and begin talking on a cell phone. The I/O approached the driver and noted that there were no other individuals present in or around the motor vehicle.

The hearing examiner addressed the discrepancies in Mr. Thompson's and the I/O's versions of the events and found that

[T]he Petitioner's failure to advise the Investigating Officer that his ex-wife had been driving the motor vehicle compromises his testimony offered at the administrative hearing. It is logical to expect that at some point during his interaction with the Investigating Officer and his subsequent arrest for a DUI offense, that the Petitioner would have advised the Investigating Officer that he had not been operating the motor vehicle.

In addition, the Petitioner offered no evidence, aside from his own testimony, to corroborate his contention that he was not operating the motor vehicle. Significantly, the Petitioner was afforded two opportunities to secure his ex-wife as a witness to testify during the administrative hearing that she had been driving the motor vehicle on the date of the stated offense. However, the Petitioner failed to elicit such supporting testimony.

The Hearing Examiner finds that the Investigating Officer's testimony is more credible and sufficiently establishes that the Petitioner was operating the motor vehicle on the date of the alleged offense.

(App at. PP. 224-225.)

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.” *Martin v. Randolph County Bd. of Educ.*, 195 W. Va. 297, 304, 465 S.E.2d 399, 406 (1995). Moreover, we have consistently emphasized that “[a] reviewing court cannot assess witness credibility through a record. The trier of fact is uniquely situated to make such determinations and this Court is not in a position to, and will not, second guess such determinations.” *Michael D.C. v. Wanda L.C.*, 201 W. Va. 381, 388, 497 S.E.2d 531, 538 (1997); *accord Gum v. Dudley*, 202 W. Va. 477, 484, 505 S.E.2d 391, 398 (1997).

*Webb v. W. Va. Bd. of Med.*, 212 W. Va. 149, 156, 569 S.E.2d 225, 232 (2002). Moreover, this Court has held that

the trier of fact is the ultimate judge of credibility and is free to accept or reject any testimony it does not find credible. . . . Where the determinative factor at trial is the credibility of the witnesses, this requires a trial court to specify what witnesses were not credited and why.

*Brown v. Gobble*, 196 W. Va. 559, 569, 474 S.E.2d 489, 499 (1996).

Here, the circuit court noted that the OAH’s revised order makes no additional findings that were not already addressed by the original order except to find that “the investigating officers’ [*sic*] testimony is more credible and sufficiently establishes that the Petitioner was operating the motor vehicle on the date of the alleged offense.” (App. at P. 9.) In the revised order, the OAH hearing examiner clearly demonstrated the reasons why Mr. Thompson’s evidence (or lack thereof) presented six months after the date of his arrest was deemed less credible than the officer’s evidence; therefore, the revised decision should be binding. Consequently, since the OAH demonstrated a basis in the record for its revised order, the reversal of its original order was not “arbitrary and capricious and an abuse of discretion, and a clearly unwarranted exercise of discretion by the Office of Administrative Procedures.” (App. at P. 10.)

**D. The circuit court erred in reversing the matter and reinstating Mr. Thompson’s driver’s license instead of remanding the matter to the Office of Administrative Hearings for another hearing and/or a revised Final Order.**

Again, the circuit court below opined that Mr. Thompson “presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on May 16, 2013 that reversed the Commissioner’s revocation of Petitioner’s license” while at the same time it opined that “the investigating officer presented sufficient evidence to support the finding of the Hearing Examiner reflected in the Order entered on June 28, 2013 that reinstated the Commissioner’s revocation of Petitioner’s license.” (App. at P. 5.) Next, the circuit court determined that the “evidence of the investigating officer and the Petitioner are conflicting, and the Hearing Examiner has broad discretion in making findings of fact.” *Id.*

This Court has previously determined that

[w]here there is a direct conflict in the critical evidence upon which an agency proposes to act, the agency may not elect one version of the evidence over the conflicting version unless the conflict is resolved by a reasoned and articulate decision, weighing and explaining the choices made and rendering its decision capable of review by an appellate court.

Syl. Pt. 6, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518 (1996). In *Muscatell*, this Court reversed and remanded “this cause to the circuit court with directions that the matter be remanded to the Commissioner to determine in the first instance the propriety of the investigatory stop and for other proceedings consistent with this opinion.” 196 W. Va. 598-99, 474 S.E.2d 528-29.

This Court has held that

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. SER, State of W. Va. Human Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Based upon this Court's reasoning in *Muscatell*, if the circuit court below believed that the I/O's testimony was in conflict with Mr. Thompson's testimony and that the OAH had not adequately addressed the conflict, then the proper result would have been for the matter to be remanded to the OAH to address the conflict to the circuit court's satisfaction - not to reverse the DMV's *Order of Revocation* altogether. The circuit court clearly erred in letting a drunk driver escape administrative penalty instead of remanding the matter for clarification.

## VI. CONCLUSION

For the above-reasons, the *Final Order* of the circuit court should be reversed.

Respectfully submitted,

STEVEN O. DALE, ACTING  
COMMISSIONER, DIVISION  
OF MOTOR VEHICLES,

By Counsel,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
No. 14-0214

**STEVEN O. DALE, Acting Commissioner,  
Division of Motor Vehicles,**

**Petitioner,**

**v.**

**JASON L. THOMPSON**

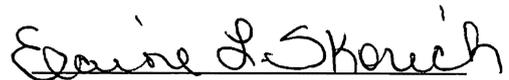
**Respondent.**

**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 2<sup>nd</sup> of June 2014, by depositing it in the United States Mail, first-class postage prepaid addressed to the following, *to wit*:

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