

FILED
IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WEST VIRGINIA OFFICE OF MINERS'
HEALTH, SAFETY AND TRAINING,**

2020 NOV 10 PM 3:46

KANAWHA COUNTY CIRCUIT COURT

Appellant/Petitioner below,

v.

Circuit Court No.: 20-AA-62
Judge Tod J. Kaufman

BOBBY BEAVERS,

Appellee/Respondent below.

FINAL ORDER

ON THIS DAY came the Appellant/Petitioner, the West Virginia Office of Miners' Health, Safety, and Training ("OMHST"), and Appellee/Respondent, Bobby Beavers, through counsel Lonnie Simmons, wherein the Petitioner appealed a June 8, 2020 Decision issued by the Coal Mine Safety Board of Appeals ("Board") granting Appellee/Respondent's appeal and reinstating his mining certifications, allowing him to return to work. After receipt of the briefing and written submissions by the parties, together with a full record of the proceedings held before the Board, this matter is now ripe for review. Accordingly, upon due and deliberate consideration of all evidence, applicable law, and argument(s) of the parties, the Court hereby **DENIES** Appellant/Petitioner's appeal and **AFFIRMS** the Decision issued on June 8, 2020.

I. FINDINGS OF FACT

1. In this administrative appeal from the Coal Mine Safety Board of Appeals, Appellee Beavers could not afford to retain counsel, so he represented himself *pro se*.
2. Appellee Beavers is a coal miner employed by Onxy Energy, LLC, who lives in Bluefield, West Virginia with his wife and two young children, with one more child on the way at the time of the hearing began on April 16, 2020, and was continued to April 23, 2020. (AR 15, 198).
2. As a coal miner, Appellee Beavers was subject to random drug

screening, under W.Va.Code §22A-1A-1.

3. Several years ago, Appellee Beavers was prescribed pain medication, which resulted in an addiction to opioids. Recognizing that he needed to address this medical issue, particularly since he and his wife wanted to start a family, he voluntarily began participating in a drug rehabilitation and counseling program offered by S. W.Va. Recovery, Inc. As a part of this program, Appellee Beavers is prescribed Suboxone. (AR 96, 148, 153).
4. In this program, Appellee Beavers participates in group therapy and regularly is tested for drugs every two weeks. (AR 100-02).
5. Appellee Beavers has participated in this drug rehabilitation program for six years and continues to receive treatment, counseling, and drug testing. (AR 103).
6. During the entire time he has been in this program, Appellee Beavers has never failed a drug test, except for the one that triggered this case. (AR 104).
7. Appellee Beavers testified that he has never smoked marijuana in his life. (AR 20).
8. On February 9, 2020, in connection with his rehabilitation program, Appellee Beavers submitted to drug testing and the results were negative, except a positive result for his prescribed Buprenorphine. (AR 80, 149).
9. On February 10, 2020, Appellee Beavers spoke with Harold T. Wells, who is the registered pharmacist at BlueWells Family Pharmacy in Bluefield, West Virginia. When he met with Mr. Wells, they discussed Appellee Beavers trying a CBD product to help him sleep. He specifically asked Mr. Wells if the use of CBD would have any impact on his drug screens and he was assured that the CBD would not cause him to fail a drug screen. "I asked plainly, I said, now, this won't mess with my treatment or drug screens or anything,

- because I have to take one every month, and he said, no, he said, you won't have no issues out of it." (AR 80-81, 90, 146).
10. His bank statement corroborated his testimony by showing that Appellee Beavers made a purchase at this pharmacy on February 10, 2020, which was the CBD product. (AR 82, 147).
 11. On February 11, 2020, the day after Appellee Beavers used CBD for the first time, he went to work and was asked to provide a urine sample and submit to random drug testing, which he did. (AR 199).
 12. Dana Carasig, M.D, who is a certified medical review officer, verified that Appellee Beavers tested positive for Carboxy-THC. (AR 200).
 13. In a letter to Appellee Beavers dated February 19, 2020, from Appellant West Virginia Office of Miners' Health, Safety & Training, he was informed that his Surface Apprentice Miner Certification and his Surface Coal Miner Certification were temporarily suspended based upon this positive test and he was prohibited temporarily from performing any job on mine property. (AR 199).
 14. On February 26, 2020, Appellee Beavers filed a letter with Appellant requesting a hearing, which was held on April 16 and 23, 2020. (AR 196).
 15. The only witness presented at the hearing by Appellant was Dr. Carasig, who is employed by Doctors Review Service, which is a medical review organization. (AR 49).
 16. Dr. Carasig has been a certified medical review officer for almost six years. (AR 49).
 17. In her role as a certified medical review officer, Dr. Carasig reviews positive drug test results, ensures the chain of custody presents no problems, and otherwise looks for any correctable flaws. Once she has completed that review, she calls the donor to determine if there could be a medical explanation for the positive result. (AR 50).
 18. After determining that the chain of custody was established, she spoke

- by telephone with Appellee Beavers, who informed her that he had quit taking CBD. (AR 54).
19. Dr. Carasig explained she did not have the authority to overturn the positive result based upon the donor's explanation that he had used CBD. (AR 54).
 20. Dr. Carasig admitted that the testing conducted cannot distinguish whether the THC metabolite detected was from smoking marijuana or from consuming a tainted CBD product. (AR 57).
 21. She was asked whether a sample tested by a GCMS machine and then using TFAA as a derivative could test positive for THC when the actual substance is CBD, Dr. Carasig stated she guessed that was true, but further stated she was not a certified scientist and she does not conduct any testing herself. (AR 60-61).
 22. Dr. Carasig assumes the particular laboratory involved in this case did use a GCMS machine because that is standard practice. (AR 61).
 23. Dr. Carasig was not sure whether or not there now exists a testing apparatus that can distinguish between THC and CBD. (AR 61).
 24. Based upon the documents she had, Dr. Carasig could not testify that the testing process used could distinguish between THC and CBD. (AR 62).
 25. As far as Dr. Carasig knew, the laboratory that conducted the testing does not test for CBD products. (AR 65).
 26. She also testified that in those states where the use of medical marijuana has been legalized, if a donor using marijuana pursuant to a legal prescription tested positive for THC, that would be reported as a positive result and would not be excused because on the federal level, marijuana still is treated as an illegal drug. (AR 67-68).
 27. Appellee Beavers included in the record a letter from his pharmacist, discussing his purchase of CBD, drug screens taken at S. W.Va. Recovery that were clean on February 22, March 8 and 22, 2020,

- except for his prescribed medication. (AR 150-52).
28. When he purchased the Optivida Hemp Extract 540, Appellee Beavers did not have a prescription, but the pharmacist kept this product locked behind the counter. (AR 90-91).
 29. Appellee Beavers testified that when he received the telephone call from Dr. Carasig saying that he had tested positive for THC, he began crying because he had worked so hard and he was never around marijuana. When Dr. Carasig asked him if he had used any CBD product, Appellee Beavers said he had just used CBD the day before the testing to help him sleep, but that he had stopped taking it. (AR 91-92).
 30. In the final order entered June 8, 2020, the Coal Mine Safety Board of Appeals, by a 2 to 1 vote, made the following specific findings of fact:
 1. The Board finds that Respondent consumed a cannabidiol ("CBD") product.
 2. The Board finds that CBD is not a controlled substance and is lawfully sold as an over-the-counter product in West Virginia.
 3. The Board finds that Respondent consulted with a pharmacist prior to consuming a CBD product and was assured by the pharmacist that the CBD product would not result in a positive drug test for THC.
 4. The Board finds that the Medical Review Officer was not able to testify that the testing mechanism or methodology used by the testing laboratory could distinguish between THC and CBD. (AR 3-4).
 31. Based upon these findings of fact, the Board granted Appellee

Beavers' appeal, which permitted him to return to working as a coal miner.

II. CONCLUSIONS OF LAW

When the final decision of an administrative agency is appealed, the standard of judicial review applied is a deferential one. In Syllabus Point 1 of *Modi v. West Virginia Board of Medicine*, 195 W.Va. 230, 465 S.E.2d 230 (1995), the West Virginia Supreme Court explains the circumstances that must be present before an agency's final ruling may be reversed:

"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." ' Syllabus point 2, *Shepherdstown Volunteer Fire Department v. West Virginia Human Rights Commission*, 172 W.Va. 627, 309 S.E.2d 342 (1983)." Syllabus, *Berlow v. West Virginia Board of Medicine*, 193 W.Va. 666, 458 S.E.2d 469 (1995).

In *Modi*, 195 W.Va. at 239, 465 S.E.2d at 239, the West Virginia Supreme Court further explained that findings of fact made by an agency supported by substantial evidence should not be disturbed on appeal:

We have previously concluded that findings of fact made by an administrative agency will not be disturbed on appeal unless such findings are contrary to the evidence or based on a mistake of law. In other words,

the findings must be clearly wrong to warrant judicial interference. *Billings v. Civil Service Commission*, 154 W.Va. 688, 178 S.E.2d 801 (1971). **Accordingly, absent a mistake of law, findings of fact by an administrative agency supported by substantial evidence should not be disturbed on appeal.** *West Virginia Human Rights Commission v. United Transportation Union*, 167 W.Va. 282, 280 S.E.2d 653 (1981); *Bloss & Dillard, Inc. v. West Virginia Human Rights Commission*, 183 W.Va. 702, 398 S.E.2d 528 (1990). (Emphasis added).

In Syllabus Points 3 and 4 of *In re: Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996), the West Virginia Supreme Court provided the following explanation for a court to apply when reviewing a contested case:

3. 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.
4. “Substantial evidence” requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency’s factual finding is supported by substantial evidence, it is conclusive.

In this case, Appellant was seeking to suspend Appellee Beavers’ coal miner certifications for six months from the date of the positive drug test result, under W.Va.Code §22A-1A-2(c). Thus, in the administrative proceeding held below, Appellant had the burden of establishing that Appellee Beavers had “a positive drug or alcohol test as determined pursuant to the provisions of this article.”

In applying the foregoing standards to the appeal filed in this case, the Court concludes the final decision by the Coal Mine Safety Board of Appeals must be affirmed. There is substantial evidence supporting each of the findings of fact made by the Board. Appellee Beavers testified that he had consumed a CBD product on February 10, 2020, and his pharmacist had informed him that the CBD would not impact any of his drug screens. Because Appellee Beavers has been and continues to be treated for opioid addiction for about six years and was regularly drug tested, he

wanted some assurances that the use of the CBD product would not cause him to fail a drug screen. The fact that Appellee Beavers has not failed any drug screen during the six years he has participated in this rehabilitation program demonstrates he was taking this process very seriously and he was very diligent about avoiding any substance that might impact his drug screens.

The most critical finding made by the Board, which is supported by substantial evidence, is that Dr. Dana Carasig testified several times that the testing conducted in this case cannot distinguish between CBD, which is a legal over-the-counter product, and THC, which is found in marijuana, an illegal product. Thus, a test result that is positive for THC may actually mean CBD was detected, but due to the limitations of the testing system, this distinction cannot be made. A coal miner who consumes a legal product containing CBD should not lose his or her job simply because the drug testing performed is incapable of distinguishing between CBD and THC. The Board found this to be a fundamental flaw in the testing conducted and, consequently, found Appellant had failed to meet its burden of proving that Appellee Beavers' coal miner certifications should be suspended based upon the evidence presented.

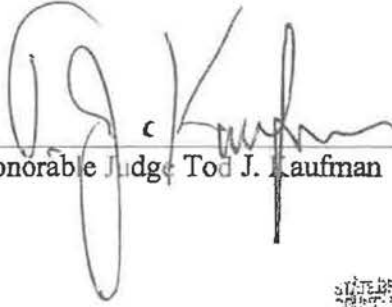
The Board's findings of fact and conclusions of law are supported by the evidence developed in this case and are consistent with the applicable law. Therefore, the Court hereby **ADJUDGES, ORDERS, and DECREES** that the June 8, 2020 final order issued by the Coal Mine Safety Board of Appeals hereby is **AFFIRMED** and the appeal filed by Appellant West Virginia Office of Miners' Health, Safety & Training is denied. The objection and exception of Appellant are noted.

The Clerk is ordered to mail a certified copy of this **ORDER** to all counsel of record.

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ENTERED this 10th day of NOVEMBER, 2020.


Honorable Judge Tod J. Kaufman

STATE OF WEST VIRGINIA
CLERK OF CIRCUIT COURT OF SAID COUNTY
HEREBY CERTIFY THAT THE FOREGOING
RECORDS OF SAID COURT.
DATE November 20, 2020
CLERK <
M. S. [Signature]